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Citation: 2009 PSLRB 90



*Public Service  
Labour Relations Act*

Before an adjudicator

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BETWEEN

**PATRICIA ZAKAIB**

Grievor

and

**DEPUTY HEAD  
(Canadian International Development Agency)**

Respondent

Indexed as  
*Zakaib v. Deputy Head (Canadian International Development Agency)*

In the matter of individual grievances referred to adjudication

**REASONS FOR DECISION**

***Before:*** [Georges Nadeau, adjudicator](#)

***For the Grievor:*** [Herself](#)

***For the Respondent:*** [Adrian Bieniasiewicz, counsel](#)

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Heard at Ottawa, Ontario,  
February 9 to 12, 2009.

## REASONS FOR DECISION

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### **I. Individual grievances referred to adjudication**

[1] On March 3, 2008, Patricia Zakaib (“the grievor”), under paragraphs 209 (1)(b) and (c) of the *Public Service Labour Relations Act (PSLRA)*, referred two grievances to adjudication that she had filed on August 14, 2007, against the Canadian International Development Agency (“the respondent” or “the employer” or CIDA). The grievances read as follows:

First grievance:

*I am writing to inform you that I wish to grieve, under Section 208 of the Public Service Labour Relations Act, the decision taken in accordance with the Directive on Executive Compensation, Appendix B, Section 3.2. The decision, causing financial penalty, was conveyed to me in a letter dated August 8, 2007 received at my home on August 10, 2007.*

Second grievance:

*I am writing to inform you that I wish to grieve, under Section 208 of the Public Service Labour Relations Act, the results of my on-going commitments in my Performance Management Agreement for the period 2006-07. The results are causing financial penalty.*

*I received the results of the PMA, via Canada Post on July 13, 2007. I subsequently wrote to Johanne Marquis requesting information on CIDA's formal appeal system. In an e-mail on August 2, 2007 Johanne informed me that such a process did not exist.*

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### **II. Preliminary objections to jurisdiction**

[2] On June 6, 2008, the employer advised the Public Service Labour Relations Board (“the Board”) that it believed that no adjudicator had jurisdiction to hear the grievances (Exhibit E-1) because “. . . the performance review of Ms. Zakaib for the period in question and the decision not to grant her a performance in-range increase or a bonus did not constitute a disciplinary measure or a financial penalty as per Section 209 (1)(b) of the *PSLRA*.”

[3] At the beginning of these proceedings, counsel for the employer made two objections to my jurisdiction to hear these grievances. The first was about the performance appraisal and stated that the denials of salary revision and bonus were

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administrative and not disciplinary. The second was that, even if the matter were disciplinary, the grievor had not raised the issue of a disguised disciplinary action either in the grievances or at the hearing. The grievor should not be allowed to argue that she was subjected to disguised discipline at this stage of the proceedings. Counsel for the employer submitted four decisions, *Burchill v. Attorney General of Canada*, [1981] 1 F.C. No. 109 (C.A.), *Garcia Marin v. Treasury Board (Department of Public Works and Government Services Canada)*, 2006 PSLRB 16, *Shneidman v. Attorney General of Canada*, 2007 FCA 192, and *Bahniuk v. Canada Revenue Agency*, 2005 PSLRB 177, in support of his arguments. Counsel for the employer asked the Board to dismiss the grievances for lack of jurisdiction.

[4] Ms. Zakaib responded that, as an executive, she had used reason, fairness and good faith as guides to solving problems and that she believes strongly that the matters should have been resolved through mediation. She deplored the fact that the employer refused to participate in mediation. She submitted that, in her letter dated June 24, 2008, responding to the employer's written objection (Exhibit G-5), she indicated that the employer used the performance management agreement as a disciplinary tool and as a blame-shifting and punitive measure and, as such that it had acted in extreme bad faith. She maintained that, as noted in *Bahniuk*, an adjudicator has jurisdiction to review a performance appraisal for the limited purpose of determining whether the performance guidelines were applied in good faith or in a disciplinary fashion.

[5] Ms. Zakaib indicated that discipline was mentioned during the grievance process at the very first meeting in the presence of her supervisor, Lillian Chatterjee, and in a meeting held with Senior Vice-President Hau Sing Tse.

[6] Counsel for the employer disputed that the issues of discipline and bad faith had been raised and maintained that the evidence would show that those issues had not been raised during the grievance process. Counsel for the employer pointed to the letter replying to the grievances (Exhibit G-3) and indicated that the first time that the employer heard allegations from the grievor that she had been subjected to discipline was in her reply to the employer's objection to jurisdiction. Counsel for the employer noted that in *Garcia Marin* the adjudicator had applied the principle that the onus was on the grievor to establish that discipline was involved if the grievor alleged that a performance evaluation was disciplinary. Counsel for the employer also noted that, in

*Bratrud v. Office of the Superintendent of Financial Institutions Canada*, 2004 PSSRB 10, the jurisprudence was consistent and that, although there may be financial consequences associated with a performance appraisal, those consequences do not constitute a disciplinary sanction under the *PSLRA*. She also referred to *Veilleux v. Treasury Board (Public Service Commission)*, PSSRB File No. 166-02-11370 (19820729), where it is mentioned that an adjudicator should not decide in the employer's stead on an employee's performance rating since that is the employer's right.

[7] I reserved my decision on the objections and heard the following testimonies.

### **III. Testimonies**

#### **A. Ms. Zakaib**

[8] Ms. Zakaib was employed as the director of the Youth Action Division within the employer's Canadian Partnership Branch. She accepted that position in January 2003, after a career in politics. She had gone through the Public Service Commission boards and written its tests, both of which are required to become a public servant. She had worked in the Minister's office and had a long history of interest in development and human rights. At the time of the events leading to the grievances, she reported to Ms. Chatterjee, Director General, Agency Services and the Canadian Relations Directorate, who in turn reported to Jennifer Benimadhu, Vice-President, Canadian Partnership Branch. Both had begun in their positions in July 2003, after Ms. Zakaib had been appointed to her position. Ms. Zakaib was a member of the Executive Group.

[9] In her testimony, Ms. Zakaib described the challenging situations that she had faced on a number of fronts during the 2006-2007 performance evaluation year. The organization went through a period of turmoil.

[10] In March 2006, the President of the CIDA announced (Exhibit G-6) the transfer of the Youth Program Staff from the Communications Branch to Ms. Zakaib's division (Youth Action). It was the first phase of a restructuring that would see the youth programs moved, in October 2006, to the Canada Corps in what would become a Youth Secretariat.

[11] Ms. Zakaib indicated that, at that time, Ms. Benimadhu told her not to do any work on the Youth Secretariat, which was to become part of the Canada Corps, until the transfer to the Canada Corps was completed.

[12] Despite six employees moving under her responsibility, no additional program or project funds were allocated to her division. Ms. Zakaib indicated that Ms. Chatterjee told her that she would have to figure it out for herself. She found the money in her own budget and was able to “cash manage” the situation.

[13] A number of the employees that had been transferred from the Communications Branch did not want to work in the Youth Action Division, which resulted in a number of departures. Ms. Zakaib was not given permission to add staff even though the amount of work did not decrease.

[14] In September 2006, Ms. Chatterjee advised Ms. Zakaib that the branch had no operating money and that all disbursements had to be approved by the Branch Management Team. That caused problems in the administration of programs such as the Youth Internship Program. Ms. Zakaib described the situation as very chaotic with the lack of resources making the situation untenable.

[15] On October 6, 2006, it was announced that the planned move of the youth programs to the Canada Corps was cancelled (Exhibit G-7). The programs would remain under the direction of the Canadian Partnership Branch. Ms. Zakaib testified that Ms. Benimadhu expressed her disappointment to her that no work had been done on the Youth Secretariat. She appeared to have forgotten her earlier directive and now wanted the entire plan for the Youth Secretariat.

[16] The Executive Group is subject to a performance evaluation plan. The plan produces a performance management agreement that is prepared at the beginning of the fiscal year and that outlines the ongoing commitments and the performance measures. At the end of the fiscal year, achieved results are noted. The establishment of the ongoing commitments for an employee in the Executive Group are finalized only after the commitments of that employee’s supervisor are finalized.

[17] Ms. Zakaib testified that, although she had worked on several iterations of her ongoing commitments, she was not able to complete them as she did not see her supervisor’s commitments until August 2006. In October 2006, the agreement on the ongoing commitments had not yet been signed when Ms. Zakaib alleges that Ms. Chatterjee informed her that Ms. Benimadhu had asked her to start documenting Ms. Zakaib in order to justify a performance rating of “did not meet,” relative to her objectives. In April 2007, the “results achieved” column of Ms. Zakaib’s performance

report was finalized, and Ms. Zakaib signed as having received the document on April 28, 2007 (Exhibit G-9).

[18] Once the performance management agreement was completed, Ms. Zakaib's immediate supervisor, Ms. Chatterjee, prepared a document entitled "Narrative Assessment, Summary of Executive's Achievement" (Exhibit G-10) ("the narrative assessment"). Ms. Zakaib was presented with the final assessment on July 9, 2007, which rated her overall ongoing commitments as "did not meet" and her key commitments as "met most." This had the result of denying her the economic increase to her remuneration and the bonus otherwise paid to members of the Executive Group.

[19] Ms. Zakaib indicated that she attended two meetings during the grievance process. The first was on October 3, 2007 with Ms. Chatterjee, who was accompanied by Serge Viens, a labour relations advisor at the CIDA. During the meeting, she went over the points outlined in a document entitled "Performance Management Agreement Rebuttal" (Exhibit G-11). At the end of the meeting, the lawyer who accompanied her, Ella Forbes-Chilibek, submitted that Ms. Zakaib had suffered a loss of revenue and that a financial penalty was associated with the employer's action.

[20] The second grievance meeting occurred on December 10, 2007 with Mr. Tse. Ms. Zakaib was accompanied by her new counsel, Adrian Ishak. Ms. Zakaib indicated that she did all the talking. She went through the performance management agreement (Exhibit G-9) and the narrative assessment (Exhibit G-10). She spoke about the issues raised in the assessment.

[21] With respect to the budget oversight, Ms. Zakaib testified that she would likely have said that being held accountable for the management of a budget to which she did not have access was ridiculous.

[22] With respect to the uneven management of staff, she did not believe that the comment was supportable given that there was so much confusion about the amalgamation of the Youth Division with the Communications Branch, the lack of funds and the specific order from Ms. Benimadhu not to work on the amalgamation of the two teams. The physical amalgamation as well as the plans for a new group did not provide for funding. She was not given the tools that would have enabled her to provide information to her staff. During the meeting, Ms. Zakaib indicated that requests for information from staff were relatively simple, such as: "When can we

move down?” referring to their physical locations. The Communications Branch staff was being evicted from its offices. Ms. Zakaib had been told by Ms. Benimadhu that it was too bad but that there was no space for them. The atmosphere of the branch and the response from Ms. Benimadhu were not supportive, and the staff felt very much lost at sea. The information that the staff sought was about the transition, and that information was not forthcoming from senior management.

[23] With respect to the employees not having received the mandatory training, Ms. Zakaib said that, in general, her staff had taken the mandatory courses and that, at the time the narrative assessment was written, two of the new staff members had not been able to attend the mandatory training because of scheduling problems.

[24] After the announcement that the Youth Division was to remain in the Partnership Branch, Ms. Zakaib asked Ms. Chatterjee for a meeting with a facilitator. The meeting was held on March 14, 2007.

[25] On the question of coaching, Ms. Zakaib noted that the last point mentioned in the grievance reply had not been part of the assessment. She indicated that she had tried to obtain permission for coaching for many months. Finally, she was told that the request was approved in principle but that she would have to wait because of monetary issues. In January 2007, her mother became ill, and when she was told to take the coaching, she did not feel able to balance her family obligations and her work. She felt that the coaching should be taken at a more appropriate time.

[26] Ms. Zakaib indicated that there were no discussions with Mr. Tse on the allegation of disciplinary action resulting in a financial penalty.

[27] Ms. Zakaib indicated that she went on sick leave in June 2007 and that she did not return to work until she retired on October 8, 2008. She alleged that, when she was on sick leave, she was subjected to discriminatory treatment by the CIDA's management, that she was denied access to her annual leave and that she was told that there was no grievance process. It was only after she obtained legal counsel that the CIDA acknowledged that a grievance process existed.

[28] In support of her case, Ms. Zakaib submitted a course list (Exhibit G-12), a list of courses attended (Exhibit G-13), a survey (Exhibit G-14) and several budget documents (Exhibit G-15). With respect to the survey, she testified that the comments had much to

do with the transfer and that the complete document demonstrated a balanced approach of how to work with a large group. She noted that Ms. Chatterjee had been present and that the meeting with the facilitator had been a positive exercise. The budget documents (Exhibit G-15) showed that a Branch meeting was called to explain the budget freeze and to give direction to staff on the budget problems. They also demonstrated the requirement to obtain authorizations for expenditures as small as \$14.28 and showed that she had only three employees left from the original staff.

[29] In cross-examination, Ms. Zakaib indicated that the number of employees under her responsibility had peaked at 13 and that now there were 7. As the director of the Youth Action Division, her main responsibilities were the Francophone Scholarship Program, the International Youth Internship Program and other non-governmental organization programs focused on youth. Her staff responsibilities included providing clear job descriptions, creating cohesive management and planning the group's activities. With the merging of staff from the Communications Branch, persons involved in school outreach were being brought in to work with persons more involved in administering programs.

[30] Ms. Zakaib acknowledged that it was her responsibility to keep her employees informed. She indicated that this was done through staff meetings and added that it was possible as long as the information was passed on to her from higher management. Employees are also informed through the Intranet. She maintained that her staff was sufficiently briefed and that meetings were held regularly. She disagreed with the assertion that staff had complained to Ms. Chatterjee that they were not sufficiently briefed and stated that she had not been made aware of that assertion.

[31] Ms. Zakaib was asked if it were true that Ms. Chatterjee had raised on several occasions that staff members were complaining that they were not receiving sufficient direction on their work. She responded that the first time she was made aware of such comments was at the end of fiscal year 2006-2007 when it became apparent that employees were not completing contribution agreements correctly. The contribution agreements had to be rewritten. This was the first time that she had heard of lack of direction. She acknowledged that Ms. Chatterjee raised the issue with her.

[32] Ms. Zakaib agreed that it was her responsibility to guide staff as far as the work was concerned. Her door was always open, and she was available. She acknowledged



that, as she was not working full time for the whole period, some staff members may have gone to Ms. Chatterjee.

[33] Ms. Zakaib recognized that she had signed the 2005-2006 performance appraisal (Exhibit E-2). She refused to sign the 2004-2005 appraisal summary as she found that the narrative assessment was not fair.

[34] Questioned on the issue of coaching, Ms. Zakaib indicated that she had initially asked for coaching in late 2005 or early 2006. After May 2006, she was working only three days a week. The matter was delayed when a budget freeze occurred. By the time the Vice-President approved the coaching, she may have told Ms. Chatterjee that with the expected transfer to the Canada Corps, she would no longer have to be concerned with it (Exhibit E-4).

[35] With respect to the 2006-2007 performance appraisal, Ms. Zakaib reiterated that she had been told that Ms. Benimadhu had told Ms. Chatterjee to monitor her performance. Ms. Zakaib was told that Ms. Chatterjee recommended a “met most” rating for Ms. Zakaib on both the overall ongoing commitments and the overall key commitments. She was told that Ms. Benimadhu had also recommended a rating of “met most.”

[36] In re-examination, Ms. Zakaib presented additional documents on human resource management at the CIDA (Exhibits G-16 and G-17), on the management accountability framework (Exhibit G-18), on the Performance Management Program (Exhibit G-19) and on notes that she had taken on different occasions (Exhibit G-20). She also presented a letter she had asked a lawyer to write about the denial of annual leave (Exhibit G-21), emails on the question of coaching (Exhibit G-22), a letter confirming that she was not eligible for the salary revision because of her “did not meet” rating, an extract from the directive on executive compensation (Exhibits G-23A and G-23B), notes from the staff retreat meeting (Exhibit G-24), notes from the first-level grievance hearing (Exhibit G-25), correspondence on the issues that she raised with her superiors (Exhibit G-26), emails to Ms. Benimadhu on budgetary problems (Exhibit G-27), emails on cash management (Exhibit G-28), letters of support from her employees (Exhibit G-29), and a note signed by Deborah Vickers (Exhibit G-30), a former employee, on her perception of the situation facing Ms. Zakaib and what she had been told.

**B. Ms. Vickers**

[37] Ms. Vickers joined the CIDA in January 2004 after a career as a ministerial “aide.” She held the position of Communications Advisor for the Youth Outreach Program, which, at that time, was located in the Communications Branch. Since January 2007, she has been a senior project officer at Agriculture and Agri-Food Canada.

[38] Ms. Vickers testified that, after returning from language training in January 2006, she learned that the Youth Outreach Program would be moving to the Canada Corps under the direction of Claire Dansereau, along with the Youth Action Division. In spring 2006, the President announced that the Youth Outreach Program would temporarily be housed within the Partnership Branch en route to the Canada Corps as the Youth Outreach Program and the Youth Action Division would be brought together under Ms. Zakaib. Two or three months later, the move to Canada Corps was abandoned; the situation then became more difficult.

[39] Ms. Vickers testified that the two groups were on separate floors. The Youth Outreach Program had project commitments and deadlines coming up quickly but no budget. The issue was brought up very often at divisional meetings. The response was “. . . we are happy to have you here but you did not come with money. . .”, which made for an uncomfortable situation. After much pushing, Ms. Zakaib was allowed to use her Youth Action Division budget to cash-manage the Youth Outreach Program until funds were dedicated to the latter program.

[40] Ms. Vickers stated that Ms. Zakaib had an open-door policy, that she was approachable and that staff were regularly in and out of her office. The deadlines and the lack of budget created concerns among the staff as well as the move, and the cancellation of the move to Canada Corps. With 3000 submissions and trips to be planned, frustration was mounting.

[41] Ms. Vickers indicated that all staff members had been given work plans and that Ms. Zakaib had put a lot of effort into bringing the groups together. A session was organized with a consultant to talk about the frustrations with the change and transition. Everyone was in the same place, and all were trying to figure out where each person fit. It was a bonding and connecting exercise.

[42] Ms. Vickers indicated that, during staff meetings, discussions took place on the information made available to employees on-line. She indicated that the work situation became more difficult after two employees left the program. To her knowledge, no complaints were made about the availability of information; the budget was the main concern.

[43] Ms. Vickers acknowledged a note that she had prepared (Exhibit G-30). She had been asked to put in writing what she had heard from Ms. Chatterjee. She testified that, at a meeting with Ms. Chatterjee, Ms. Chatterjee indicated that she believed that Ms. Zakaib had not been treated properly when she was hired. Ms. Chatterjee told her that the Vice-President at the time was not pleased with having Ms. Zakaib in the position but that the appointment had been "forced upon her." This resulted in different treatment for Ms. Zakaib such as having less authority to staff positions. Ms. Chatterjee indicated that, in hindsight, she should have provided more support to Ms. Zakaib.

[44] In cross-examination, Ms. Vickers indicated that she could not recall any staff members complaining about Ms. Zakaib. She acknowledged that a survey had been distributed before the session with the consultant and that complaints were voiced during the session. However, she indicated that she never felt that the complaints were directed at Ms. Zakaib. They arose from the change in direction and the frustration over the budget. Ms. Zakaib was perceived as powerless, and both the Director General and the Vice-President were seen as not very supportive. Ms. Vickers was not aware that the staff complained that they did not have clear goals and objectives.

[45] As for meetings, Ms. Vickers indicated that she did not know why the staff wanted to start having regular meetings. She indicated that the Youth Outreach Program staff were younger and needed more support, and she assumed that the request had come from them.

[46] Ms. Vickers also indicated that it was difficult to be creative with no approved budget. The feeling amongst the staff was that they could not see a future without a budget.

**C. Mr. Viens**

[47] Mr. Viens has been a labour relations advisor at the CIDA since October 2006. His role is to guide, prepare and assist management on labour relations issues, specifically during the grievance process.

[48] Mr. Viens testified that he met Ms. Zakaib on the following three occasions: at the first-level grievance hearing, at the final-level grievance hearing and on the Friday after the final-level hearing when she brought him some documents.

[49] Mr. Viens indicated that, at the first-level grievance hearing before Ms. Chatterjee, Ms. Zakaib was accompanied by Ms. Forbes-Chilibeck, a lawyer from the law firm of Nelligan O'Brien Payne. Ms. Zakaib presented her arguments on her two grievances. Overall, her arguments covered certain elements of the performance evaluation. During the meeting, she did not raise the issue that the performance evaluation was a disciplinary measure. Ms. Zakaib raised issues with four elements of the performance evaluation. Mr. Viens recalled that she questioned the allegations that she managed her staff unevenly; she indicated that, if her employees had not taken the mandatory training, it was not because of elements that she controlled. She explained why she had refused the assistance of a coach. She provided explanations related to her being present only three to four days per week. Ms. Zakaib indicated that the problems within the division were a shared responsibility. Ms. Forbes-Chilibeck spoke very little and did not raise the issue that the evaluation was a disciplinary measure. Neither Ms. Zakaib nor her lawyer raised the issue of bad faith.

[50] Mr. Viens indicated that the final-level hearing took place before Mr. Tse. At that hearing, Ms. Zakaib was accompanied by Mr. Ishak, a lawyer from the same law firm as Ms. Forbes-Chilibeck. Ms. Zakaib and her lawyer did not raise the issue of a disciplinary measure or bad faith. The same issues that had been raised at the first-level meeting were raised at the second-level meeting. Mr. Viens recalled three of the four issues raised as follows: mandatory training, coaching and uneven management. Ms. Zakaib submitted a number of documents in support of her arguments, such as copies of emails and reports about her work.

[51] Mr. Viens also indicated that, at each level of the grievance process, Ms. Zakaib submitted a document entitled "Performance Management Agreement Rebuttal"

(Exhibit G-25). Nowhere in the document is there any mention of a disciplinary measure or bad faith.

[52] In cross-examination, Mr. Viens acknowledged that nowhere in the rebuttal document is there a mention of coaching. He indicated that, during the first-level meeting, it was raised orally. Asked if he recalled if Ms. Forbes-Chilibeck had raised the issue of a financial penalty, Mr. Viens indicated that the grievance hearing was over when the matter was raised. He noted that the issue of a financial penalty resulting from the performance appraisal was mentioned in the grievances.

[53] Mr. Viens recalled that, at the final-level meeting, coaching was mentioned, although that issue was not part of the ongoing commitments. He indicated that documents were submitted for consideration. According to his testimony, the only four issues that were discussed during the grievance hearing appear in the grievance response (Exhibit G-3). Mr. Ishak spoke very little and did not make any allegations. Ms. Zakaib led the discussion throughout the presentation of her arguments.

#### **D. Ms. Chatterjee**

[54] Ms. Chatterjee is currently Director General, Communications Branch, CIDA. From July 2003 to September 2007, she was Director General of Agency Services and the Canadian Relations Directorate in the Canadian Partnership Branch. Between September 2007 and January 2008, Agency Services was folded into the Volunteer Sector Program, which Ms. Chatterjee was also asked to manage. She reported to Ms. Benimadhu.

[55] As Director General of Agency Services and the Canadian Relations Directorate, Ms. Chatterjee was responsible for the Youth Action Division, the Voluntary Cooperation and Public Engagement Unit, the Conference Secretariat Unit, and the CIDA's regional offices.

[56] Ms. Chatterjee testified that Ms. Zakaib reported to her from the time Ms. Chatterjee arrived at the Partnership Branch until she left in January 2008. When Ms. Chatterjee left, Ms. Zakaib was on leave. Ms. Chatterjee added that Ms. Zakaib had been on leave from February 2006 to April 2006 and that from the end of April 2006 until March 2007 Ms. Zakaib worked three to four days per week.

[57] Ms. Chatterjee explained how the performance assessment worked. She indicated that it is a top-down exercise starting with the Clerk of the Privy Council, who sets the commitments for the public service. Then the CIDA president will establish his or her commitments, which are in line with those of the Clerk. The persons that report to the president will then prepare their commitments based on the president's commitments, and so on.

[58] Ms. Chatterjee indicated that executives, such as Ms. Zakaib, prepare their ongoing and key commitments. An executive must demonstrably meet those commitments to be entitled to a bonus and an economic increase. Key commitments are over and above regular commitments, and they change every year.

[59] Ms. Chatterjee testified that Ms. Zakaib would have likely prepared her commitments some time after her return from leave at the end of April 2006. They appear in the first two columns of the performance management agreement (Exhibit G-9). The employee completes the last column, which identifies the results achieved. Ms. Chatterjee looked at what Ms. Zakaib achieved and how it was achieved and prepared the narrative assessment (Exhibit G-10). After completing the narrative assessments for the other executives, she submitted the performance management agreements and the narrative assessments to her supervisor, Ms. Benimadhu. She met with Ms. Benimadhu to discuss the narrative assessments. Ms. Benimadhu asked her for recommendations for overall ratings for ongoing commitments and overall key commitments. Ms. Chatterjee indicated that her recommendation was "met most" in both cases. Ms. Benimadhu indicated that she agreed with the assessment. Ms. Benimadhu must submit the performance management agreements and the narrative assessments of her branch executives to the Executive Committee to ensure that executives are rated consistently throughout the organization. Following the collective decision made by the Executive Committee, Ms. Chatterjee was informed by Ms. Benimadhu of her rating and those of her employees. Ms. Chatterjee contacted Ms. Zakaib, who was on sick leave at the time, since Ms. Zakaib had asked to be informed of the results by phone. Ms. Zakaib, over the phone, indicated that she was upset. She did not agree with the rating and stated that she was going to fight it. Ms. Zakaib felt that her reputation was affected. Ms. Chatterjee also sent a letter to Ms. Zakaib after the phone conversation confirming the ratings.

[60] Ms. Chatterjee testified that she had prepared narrative assessments for the years 2003-2004 (Exhibit E-5), 2004-2005 (Exhibit E-3A), 2005-2006 (Exhibit E-2) and 2006-2007 (Exhibit G-10). Ms. Chatterjee indicated that Ms. Zakaib had refused to sign her narrative assessments for 2003-2004, 2004-2005 and 2006-2007.

[61] Ms. Chatterjee indicated that when Ms. Benimadhu came back from the Executive Committee she informed her that Ms. Zakaib's rating for overall ongoing commitments had been assessed as "did not meet." Ms. Benimadhu told her that the President had noted that Ms. Zakaib had received, year after year, the rating "met most" and that, since there had been no signs of improvement and she had declined repeated offers of coaching, the President recommended a "did not meet."

[62] Ms. Chatterjee reviewed her comments in the narrative assessment. She indicated that budget oversight was a shared responsibility and that the uneven management of staff meant that it was not all great and not all bad. Managing staff had been an ongoing issue, made more acute by the arrival of new staff. Ms. Chatterjee noted that staff members came to see her indicating that they did not know what was going on; they complained of not receiving enough direction. The manager that replaced Ms. Zakaib during her absences also reported receiving similar comments.

[63] Ms. Chatterjee testified that she had requested that an exercise take place with the Centre for Workplace Efficiency and Well-Being because the addition of staff was a major challenge. She wanted to make sure that the division was functioning well; both Ms. Zakaib and the staff wanted it. An organizational specialist, D. Campeau, met individually with all the staff in Youth Action Division, including Ms. Zakaib and Ms. Chatterjee. A one-day meeting was held in March 2007. Mr. Campeau also met with Ms. Zakaib and Ms. Chatterjee together.

[64] Ms. Chatterjee had indicated that the dissatisfaction with Ms. Zakaib's staff management resulted from a combination of things. At times, Ms. Chatterjee would receive drafts that were not well prepared because the staff lacked basic information. For instance, Ms. Zakaib's staff would not know how to fill in a routing slip. It was Ms. Zakaib's responsibility to inform staff on how to do the work. She reported that Ms. Zakaib had not given her staff the proper instructions about how to prepare a response to an independent assessment of the Francophone Scholarship Program. That resulted in Ms. Chatterjee meeting with the staff and explaining page-by-page what

was needed. Ms. Chatterjee indicated that she would receive comments from staff on the lack of direction on a weekly basis.

[65] Ms. Chatterjee had weekly bilateral meetings with Ms. Zakaib. She felt that Ms. Zakaib was at times frustrated with some of the staff and their complaints. Ms. Chatterjee recalled that at times Ms. Zakaib would not adequately debrief her staff. She noted that information that she had passed to Ms. Zakaib had not reached her staff.

[66] Ms. Chatterjee indicated that a new policy had been implemented requiring new staff to take mandatory training. It was evident that some of Ms. Zakaib's staff did not understand that the training was mandatory. It was Ms. Zakaib's responsibility to ensure that they understood this requirement.

[67] Ms. Chatterjee reviewed some of Mr. Campeau's comments on the one-day retreat mentioned in the report (Exhibit G-14B). She also pointed out the answers from the survey that Mr. Campeau had created for the retreat (Exhibit G-14A). She noted the following comments reported under the heading "Control and Procedure": ". . . lack of regular meetings . . .", ". . . lack of information sharing . . ." and "lack of work plans." She indicated that these matters were the manager's responsibility. Ms. Zakaib was willing to engage in finding solutions, but it was the end of the assessment period. Ms. Chatterjee indicated that she took that into account when assessing Ms. Zakaib.

[68] Ms. Chatterjee reiterated that staff appeared unaware of the requirement to follow the mandatory training. When she told Ms. Zakaib of the problem, Ms. Zakaib indicated that she had informed the staff.

[69] Ms. Chatterjee indicated that the staff told her that they were appreciative that she had spent the day at the retreat explaining how they fit in. It was apparent that they were not aware of branch matters and of what was happening at the branch level. She acknowledged that it was an uncertain period for all of them.

[70] On coaching, Ms. Chatterjee indicated that, over the years, on two previous occasions, attempts were made to assist Ms. Zakaib. The first time was when Ms. Zakaib requested a 360-degree evaluation. The project fell through when the person doing the evaluation was not prepared to share the results with the supervisor but only with Ms. Zakaib. The second time was at the end of fiscal year 2005-2006. In May 2006, when Ms. Zakaib returned to work, she declined coaching. This situation was



mentioned in emails (Exhibit E-4). Ms. Zakaib indicated to Ms. Chatterjee that she would not need a coach because she was being transferred to the Canada Corps. By the time of a budget freeze in September 2006, Ms. Zakaib had already made it clear that she would not take the coaching.

[71] Ms. Chatterjee testified that she did not prepare the assessment to discipline Ms. Zakaib. She was required to prepare an assessment of how Ms. Zakaib had met her commitments, and in her view, Ms. Zakaib had met most of her commitments. There was no bad faith.

[72] Ms. Chatterjee indicated that the letter informing Ms. Zakaib of the consequences of her assessment was prepared by a member of Human Resources (Exhibit G-23A). She explained the apparent contradiction between the letter and the directive on executive compensation (Exhibit G-23B) by indicating that the rating is done after the assessment period is over and the consequences are applied to the following year.

[73] Ms. Chatterjee testified that she did not tell Ms. Zakaib that she had been instructed by Ms. Benimadhu to start documenting her nor did she tell her that Ms. Benimadhu wanted to give her a rating of “did not meet.” Ms. Chatterjee added that Ms. Benimadhu supported her recommendation that Ms. Zakaib be given a “met most” rating. She did not tell Ms. Vickers that Ms. Zakaib had been treated with less respect and discriminated against because of her political background. Ms. Chatterjee asserted that she did not treat Ms. Zakaib differently.

[74] Ms. Chatterjee indicated that she was present during the first-level hearing of the grievance, along with Mr. Viens, Ms. Zakaib and Ms. Zakaib’s lawyer. Ms. Chatterjee’s role during the hearing was to listen, and she would respond to the grievance after the hearing. Ms. Chatterjee indicated that Ms. Zakaib raised the issue that the decision imposed a financial penalty on her. The arguments that she recalled Ms. Zakaib raising were that she felt blamed for the staff that came over with no budget and for the budget oversight. Ms. Zakaib did not argue that the assessment was a disciplinary measure or that the assessment had been prepared in bad faith.

[75] Ms. Chatterjee indicated that the financial consequences of the rating for Ms. Zakaib were that she would not receive the percentage increase in pay or the

performance bonus. To earn the performance pay, an executive must obtain a rating of “met most” for his or her ongoing commitments.

[76] Ms. Chatterjee indicated that she was shocked when she saw Ms. Zakaib’s comments on her rating (Exhibit G-20) which comments attributed to her a statement to the effect she had been told to document Ms. Zakaib’s performance. Ms. Benimadhu never gave her that direction, and if she had, Ms. Chatterjee would not have mentioned it to Ms. Zakaib. As a manager, Ms. Chatterjee is responsible for monitoring performance, and throughout the year, she raised issues with Ms. Zakaib. She may have said that Ms. Zakaib had to meet the commitments or she would get rated as “did not meet.” She also recalled a meeting where Ms. Zakaib told her that she was documenting everything. Ms. Chatterjee responded that she also documented everything. Ms. Chatterjee did not say that she was doing it because of a direction from Ms. Benimadhu. She also indicated that the statement attributed to her to the effect that Ms. Benimadhu was out to get the grievor, also mentioned in Ms. Zakaib’s notes (Exhibit G-20), was not true. Ms. Zakaib never raised the possibility of meeting with a conciliator, and she is not the only executive who is not part of the Executive Committee.

[77] Ms. Chatterjee recalled the circumstances that led to a meeting on November 15, 2006. An employee had complained in writing about feeling intimidated and abused by Ms. Zakaib. The letter surprised Ms. Chatterjee as the employee had not made such a complaint to her. The initial recommendation from Ms. Benimadhu was to remove Ms. Zakaib from her manager position, but after reconsidering that approach it was decided that Ms. Zakaib would keep her role and that the employee would be directed to report to Ms. Chatterjee. Once Ms. Zakaib returned from her vacation, she was advised of the situation.

[78] Referring to the letter prepared by Ms. Vickers (Exhibit G-30), Ms. Chatterjee indicated that when she arrived in her position a PM-06 was reporting to Ms. Zakaib. The PM-06 had been part of a group of PM-06s that had been assigned to each directorate as a result of a reorganization. When the PM-06 left, Ms. Zakaib was not authorized by Ms. Benimadhu to fill the vacancy because no salary budget had been set aside for the position. Ms. Chatterjee indicated that in retrospect she should have fought to fill the position. The position was eventually filled two years later.

[79] In cross-examination, Ms. Chatterjee confirmed that she had no prior experience in the public service when she accepted the position at the CIDA in July 2003. She was not aware of any minutes of the Executive Committee meeting dealing with the ratings. She was not aware of any written documents confirming the recommendation from Ms. Benimadhu and herself that Ms. Zakaib's rating be set to "met most."

[80] Ms. Chatterjee was aware of a perception that there was a quota on the number of executives that should receive pay increments and bonuses. However, that was not the case, and as a participant to the last Executive Committee meeting that dealt with ratings, she indicated that no direction was given as to the number of individuals that were to receive a specific rating.

[81] Ms. Chatterjee indicated that she did not know who had made comments at the Executive Committee meeting about Ms. Zakaib's rating. Ms. Benimadhu did not tell her.

[82] Ms. Chatterjee reiterated that she met several times with Ms. Zakaib to discuss her work performance. The first two columns of the performance management agreement were signed on October 26, 2006. Between October 26, 2006 and April 28, 2007, the performance issues were discussed at bilateral meetings. No other formal performance documents were created during that time.

[83] As for coaching, Ms. Chatterjee confirmed that the stumbling block was the consultant's refusal to share his evaluation with any person other than Ms. Zakaib. She confirmed that Ms. Benimadhu had cost issues about the first proposal for a coach. Ms. Benimadhu would authorize the expense only if Ms. Chatterjee met with the coach. She did not recall that Ms. Zakaib told her that her mother's sickness was the reason to delay the coaching. She was aware that Ms. Zakaib's mother was sick and that she had been sick for many years. She reiterated that Ms. Zakaib had told her face-to-face that she would not fill the coaching form and that she did not need coaching.

[84] With respect to the mandatory courses, Ms. Chatterjee indicated that some employees had no idea that they had to take them. She confirmed that Ms. Zakaib told her that she had advised the employees of the requirement. She confirmed that February and March were the most intense period in the year but indicated that should not necessarily be the case. She recalled that in February and March 2007, the Youth Action Program received an additional \$3 million dollars at Ms. Zakaib's request. Ms.

Chatterjee acknowledged that this created additional work and added that it was all the more reason for the employees to take the required training. She maintained that it was Ms. Zakaib's responsibility to ensure that staff were aware of the basics of their jobs.

**E. Ms. Benimadhu**

[85] Ms. Benimadhu is Vice-President of the Canadian Partnership Branch. The branch is responsible for programs with Canadian non-government organizations wishing to contribute to international development overseas to reduce poverty and to work towards sustainable development. She reports to the CIDA President, and six directors general report to her, one of whom is the Director of the Voluntary Sector Program. Robert Greenhill was the President at the time of the performance appraisal.

[86] Ms. Benimadhu testified that the Performance Management Program is common across all government departments and that it is managed by the Treasury Board Secretariat of Canada (the "Treasury Board"). It is a process for managing the executive group of the public service in a transparent and equitable manner based on common competencies for all. It was established by the Treasury Board to ensure that the behaviour of executive management demonstrates that it always acts in the best interests of the public. Public interest is paramount over private or personal interest. Each executive is responsible for meeting his or her ongoing and key commitments. The ongoing commitments are linked to the day-to-day management of resources, while key commitments are above and beyond daily activities. The assessments are done on a fiscal-year basis and are conducted by the individual's direct report. Recommended ratings are proposed.

[87] Ms. Benimadhu indicated that she assessed the employees directly reporting to her while they assessed those employees reporting to them. In this case, Ms. Chatterjee evaluated Ms. Zakaib and provided a recommended rating. The copies of the documents for all employees being assessed are sent to Human Resources, which prepares a binder for the Executive Committee. The Executive Committee consists of all executives directly reporting to the president. Employees from Human Resources attend, and their roles are to take notes and to provide information at the president's request. The executives are assessed by level to ensure equality between executives at the same level within the CIDA. Executives at the EX-01 level are the first group assessed, and they are the most important group, numbering between 85 and 90

employees. Each branch head makes a presentation on each executive employee. The presentation gives a brief description of the executive's strengths, his or her activities, the areas that need improvement and a recommended rating. The president then asks for comments from other members of the Executive Committee based on their experiences working with the person in question. The comments are not to be attributed to anyone. Ms. Benimadhu indicated that both she and Human Resources people take notes so that comments may be shared. Based on the presentation and the comments, the President makes a decision on whether to change the rating. The ratings that are questioned are initially set aside and are reviewed at the end of the meeting. In extraordinary circumstances, the President may wait before issuing a decision. The President's decision is the final one made.

[88] Ms. Benimadhu testified that Ms. Chatterjee had drafted the evaluation that was forwarded to her with a "met most" rating on both ongoing and key commitments. Ms. Benimadhu indicated that she agreed with that rating and that it was the rating she recommended to the President. She recalled that the President asked for background information from Human Resources. They informed the President that the recommended rating, "met most," would be the third time in a row that Ms. Zakaib received that rating. Ms. Benimadhu recalled comments from other members of the Executive Committee that Ms. Zakaib's interpersonal relationships with other branches were not good and that she did not always collaborate well with other branches. The President observed that the level of performance had not improved and with declining the services of a coach and two comments from other members of the Executive Committee, he was of the view that Ms. Zakaib's performance was insufficient for an EX-01. The President proposed a "did not meet" rating for the ongoing commitments and a "met most" for the key commitments.

[89] Ms. Benimadhu indicated that the executive making the presentation is not permitted to defend or rebut the comments because it is understood that the presentation represents the speaker's perceptions. Whether she agreed with the speaker making the comment is beside the point. Ms. Zakaib's rating was set aside to be reviewed once again at the end of the meeting with the other assessments for which the ratings were to be changed.

[90] Following the meeting, Ms. Benimadhu would normally arrange for a meeting to provide feedback to both Ms. Chatterjee and Ms. Zakaib, since Ms. Chatterjee had

written the assessment. However, Ms. Zakaib was on sick leave at that time, and she shared the results only with Ms. Chatterjee. It was her understanding that Ms. Chatterjee called Ms. Zakaib. Ms. Benimadhu sent a letter to Ms. Zakaib (Exhibit G-9) confirming the rating, as she did to all executives under her supervision.

[91] Ms. Benimadhu denied asking Ms. Chatterjee to document Ms. Zakaib's performance so that she would receive a "did not meet" rating. She reiterated that both Ms. Chatterjee and herself recommended a "met most" rating.

[92] In cross-examination, Ms. Benimadhu indicated that it was not the first time that a recommendation of an employee's rating that she put to the Executive Committee was overturned. She indicated that there were always a good number of ratings that were set aside in the first step of the review by the Executive Committee. There is no quota; it is based on individual merit. There are no attempts to keep ratings below a financial level. The bonus must be earned through the employee's activities.

[93] With respect to the comments formulated by other Executive Committee members, Ms. Benimadhu indicated that, when a rating is reconsidered, there is an opportunity for the director to comment on the performance, but she indicated that ". . . we don't defend, we don't fight back!" There is no opportunity to put the comments in context. The view is that the comments are the results of experiences of the member making the comments and the employee. She could not say if the comments resulted from Ms. Zakaib's attempts to resolve the budget problem.

#### **IV. Summary of the arguments**

##### **A. For the grievor**

[94] Ms. Zakaib deplored the fact that the employer had refused to engage in mediation to resolve these grievances. She indicated that it was clear in *Bahniuk* and that it was reiterated in *Ball v. Canada Revenue Agency*, 2007 PSLRB 12, that the Board had jurisdiction to determine if the employer had acted in bad faith. The jurisdiction may be limited, but it clearly covers the core grounds of bad faith that lie at the heart of her grievances.

[95] She noted that both Ms. Chatterjee and Ms. Benimadhu had testified under oath that they had submitted a "met most" rating on Ms. Zakaib's performance appraisal. The President changed that rating to "did not meet" on scant or no evidence and as a

means to discipline her. It was based on the incorrect information that she had refused coaching and mentoring.

[96] Ms. Zakaib further argued that *Stevenson v. Canada Revenue Agency*, 2007 PSLRB 43, in which the adjudicator cited *Canada (Attorney General) v. Grover*, 2007 FC 28, indicated that adjudicators are required to examine the substance of an employer's alleged disciplinary action, not its form, to determine whether they have jurisdiction. When examining an action that, on its face, is administrative, the adjudicator must examine all the surrounding facts and circumstances to determine whether that action was, in reality, disguised discipline.

[97] Ms. Zakaib also noted that, according to *Tucci v. Canada (Attorney General)*, Federal Court File No. T-623-96 (19970211), unlimited discretion cannot exist and that the courts have continuously asserted their rights to review a delegate's exercise of discretion for a wide range of abuses. Abuse arises when the delegate acts on inadequate material, including cases where there is no evidence, or without considering relevant matters.

[98] Ms. Zakaib argued that the President, responsible for both Ms. Chatterjee and Ms. Benimadhu, acted to discipline her based on an almost complete lack of credible and documented evidence.

[99] Ms. Zakaib noted that, contrary to what had occurred in *Marin*, she had not changed her tune during the process. She had argued all along that this was an abuse of authority and process and that the performance management agreement was made in bad faith, without evidence, and that it was used to discipline her for prior behaviour, real or imagined by senior management.

[100] Ms. Zakaib added that the testimonies of Ms. Chatterjee and Ms. Benimadhu confirm that the process at the Executive Committee was inadequate both in the evidence that it considered and in the evidence that it did not consider, such as the organizational confusion, the budget freeze and the transfer of employees.

[101] Ms. Zakaib noted the complete lack of concrete evidence from Ms. Chatterjee and Ms. Benimadhu, who claimed that they documented their events or meetings thoroughly. She also noted that their recollections were selective.

[102] Ms. Zakaib argued that the Youth Action Directorate, during the year in question, despite the lack of control over its fate, the lack of funds and fewer staff was able to deliver on all its commitments.

[103] Ms. Zakaib indicated that it was unfortunate that the President had not testified because he could have directly shown why the rating was changed.

[104] Ms. Zakaib argued that there was no documentary evidence to support Ms. Chatterjee's assertion that she had announced that she did not need to take coaching as she was moving to Canada Corps. A number of emails adduced in evidence demonstrated Ms. Zakaib's willingness to enter into an agreement with a coach. Similarly, Ms. Zakaib argued that the issue of training staff was put forward by the employer as a distraction because the evidence showed that she had constantly reminded staff of the mandatory training.

[105] Ms. Zakaib argued that it is not clear from the survey results (Exhibit G-14) who the target was of the negative comments. In her testimony, Ms. Chatterjee stated that in certain cases she, the Vice-Presidents and Ms. Zakaib were responsible. Ms. Zakaib also noted the apparent contradiction in the survey between the high leadership rating and the lack of direction.

[106] Ms. Zakaib argued that she had testified that there were regular meetings with staff in the Youth Action Directorate. The meetings may not have been structured, but they were conducted with a lot of energy and passion. Following the retreat, more detailed agendas were prepared and a greater focus was placed on lessons learned.

[107] Ms. Zakaib argued that, if Ms. Chatterjee had held all the meetings that she claimed to have held with the staff, there would have been no misunderstandings about roles and responsibilities.

[108] Ms. Zakaib argued that the appraisal was undertaken in a climate of near-chaos in the organization and poor human resource management and that senior management in her branch sought to blame others (and her) for their own mistakes and shortcomings. The rationale in the appraisal itself does not, in any reasonable way, substantiate the rating, and it is the latest manifestation of an attitude of discrimination against her, seemingly because of her work experience before joining the public service.



[109] Ms. Zakaib argued that the appraisal process could not be judged to have been performed in good faith. In fact, she was assigned challenging goals at a time of significant organizational upheaval and then constrained from obtaining or managing the resources necessary to achieve those goals. One cannot hold a manager accountable when he or she is not given the necessary resources to achieve the goals.

[110] Ms. Zakaib contends that the Performance Management Program was manipulated to shift blame for the mismanagement at more senior levels to make her a scapegoat and, in effect, to discipline her. The employer did not exhibit good faith when applying the directive of the Performance Management Program for executives. It did not demonstrate adherence to the values and ethics code of the public service, which requires fairness and respect in dealing with other public servants and that is a prerequisite of the Performance Management Program.

[111] Ms. Zakaib indicated that she suffered financially. She lost the performance pay for the period and the executive compensation revision of April 1, 2007, which had effectively reduced her pension. Pursuing her rights has cost her emotionally, psychologically, physically and financially. She added that between all the cases and jurisdictional questions there lay a matter of justice and fairness.

[112] Ms. Zakaib indicated that she forced the entire staff of the Youth Action Division, even though the staff did not like it, to attend quarterly briefings conducted by Ms. Benimadhu. The staff also attended CIDA-wide briefing sessions that were held on occasion.

[113] Ms. Zakaib added that she spent her entire working life in the service of the public. For 25 years, she worked in politics where she met many dedicated and motivated public servants. That motivated her to join the public service. She went to the Public Service Commission and did everything that was required. She passed all the tests and did not obtain a position through connections. The performance appraisal had a horrible impact on her career and devastated her. She was not able to defend herself.

#### **B. For the employer**

[114] Counsel for the employer asked me to examine the grievances to determine if I had jurisdiction to deal with them. He noted that one grievance dealt with the results

of the ongoing commitments and the second with the financial consequences flowing from the performance appraisal.

[115] Counsel for the employer argued that what Ms. Zakaib was really challenging was the rating she had been given and that the adjudicator has no jurisdiction to review performance appraisals. He added that the reason the adjudicator lacks jurisdiction can be found in section 209 of the *PSLRA*. The Board and its adjudicators are statutory creatures who do not have any inherent powers. Section 209 clearly specifies the types of grievances that can be referred to adjudication, and only a grievance that has been properly presented may be referred to adjudication. Counsel for the employer argued that the case law was clear. The grievor cannot present a new grievance or modify a grievance once he or she is at adjudication. Ms. Zakaib's grievances must be dismissed as they were not referable to adjudication under section 209.

[116] Counsel for the employer recognized that an adjudicator may accept jurisdiction when a grievor can show that a performance appraisal was, in fact, a disciplinary measure or disguised discipline, as in *Bahniuk*. However, counsel for the employer noted that neither bad faith nor disguised discipline were raised in the grievances themselves or during the grievance process. Both Mr. Viens, who was present during both of the meetings, and Ms. Chatterjee said that the grievor never raised the issues that the performance appraisal was done in bad faith or that it was a disguised disciplinary measure. Counsel for the employer also noted that Ms. Zakaib was assisted with legal counsel at both of the meetings and that neither counsel raised the issue of discipline or bad faith. Counsel for the employer relied on *Burchill* and *Shneidman* and asked that the grievances be dismissed for lack of jurisdiction.

[117] Counsel for the employer also argued that, even if the grievor had raised the issue of bad faith or disguised discipline, the evidence did not establish that the appraisal was done in bad faith or that it was of a disciplinary nature. The grievor failed to meet the onus placed on her by the jurisprudence. Counsel quoted *Marin*, *Bratrud* and *Veilleux* and also quoted from Brown and Beatty, *Canadian Labour Arbitration*. 4th ed., at para 7:4210, on the nature of disciplinary action.

[118] Counsel for the employer argued that refusing coaching was not misbehaviour, that the grievor had not been singled out and that there was no mention of discipline during the Executive Committee meeting when they reviewed the grievor's

performance appraisal. Counsel for the employer noted that Ms. Benimadhu had explained the rating. All the reasons mentioned were performance related. What was taken into account were the grievor's past performance and comments made by executives. It was for those reasons that the grievor was given a "did not meet" rating on her ongoing commitments. There is not the slightest evidence that the President or any member of the Executive Committee wanted to punish the grievor. To prove disguised discipline, the grievor must establish on a balance of probabilities that misbehaviour was the source of the employer's action and that the misbehaviour was punished by the employer.

[119] Counsel for the employer noted that, even if Ms. Zakaib had been able to prove that it was disguised discipline, the grievor would also have to prove that it resulted in a financial penalty. Counsel for the employer argued that the case law is clear that a financial consequence resulting from a performance appraisal does not constitute a financial penalty within the meaning of section 209 of the *PSLRA*. He quoted from *Bratrud*.

[120] Counsel for the employer questioned how the grievor could argue that the performance appraisal was a disguised disciplinary measure when both Ms. Chatterjee and Ms. Benimadhu had recommended that the rating be "met most."

[121] Counsel for the employer concluded by asking that both grievances be dismissed.

### **C. Grievor's rebuttal**

[122] Ms. Zakaib indicated that Mr. Viens had acknowledged that, at the end of the meeting with Ms. Chatterjee, her lawyer, Ms. Forbes-Chilibeck, had raised various issues not part of the presentation. Ms. Zakaib also argued that there was no evidence that the performance appraisal was done in good faith. The case had been the same from the beginning, and she was not, as alleged by the employer, changing her case.

### **V. Reasons**

[123] I have carefully reviewed the evidence put forward by the parties, and I have come to the conclusion that I do not have jurisdiction to hear these grievances. Both the wording of the grievances as well as the evidence on the presentations made during the grievance process do not convince me that the allegations that the

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performance appraisal was done in bad faith or that it was a disguised disciplinary measure were ever presented or discussed during the grievance process.

[124] Although in the presentation of her case Ms. Zakaib alleged that discipline was mentioned, in her testimony under oath, the only reference she made to the matter was to say that the lawyer who accompanied her raised the issue of a financial penalty. Notes from the grievor's meeting with her lawyers (Exhibit G-11), the rebuttal document prepared before the meeting with Ms. Chatterjee, the handwritten notes added to the rebuttal document and the grievance replies do not in any fashion support the grievor's contention that the issues of bad faith or disguised discipline were raised by either her or her counsel. The fact that the financial consequences or penalty, as the grievor put it, of the appraisal were raised in the grievance and at the end of a grievance hearing does not in itself transform the grievances into allegations that the appraisal was a disciplinary measure resulting in a financial penalty or that it was done in bad faith. A disciplinary measure is a measure taken by the employer to correct a voluntary malfeasance by an employee, not an administrative measure to improve performance. Furthermore, in this case, the grievor made no allegation of any incident that ever could have resulted in her being the target of punishment by the employer.

[125] The Court decisions in *Burchill* and *Shneidman* are clear; for an adjudicator to have jurisdiction to hear a grievance, the issues must have been dealt with during the grievance process. Since the grievances and the grievance process did not deal with the issue of disciplinary action, the objection to jurisdiction is maintained.

[126] However, I would like to comment in obiter that the process to review recommendations on performance ratings is, to say the least, troubling. The evidence revealed that the recommendations from the grievor's immediate superiors were that she had "met most" of her commitments. These recommendations were not accepted by the President at an Executive Committee meeting set to review the performance appraisals of all executives within the CIDA. Ms. Benimadhu, the Vice-President, testified that the recommendations were not accepted for three reasons. The first was that it was the third year in a row that Ms. Zakaib was to receive a "met most", the second was that negative comments had been made about Ms. Zakaib's relationships with other services within the CIDA from two executives and, finally, the third was that Ms. Zakaib had refused coaching. Of those three reasons, only one pertains to her

actual performance during the year, and it is the one relating to comments from other executives. The evidence from Ms. Benimadhu was that the comments were not subject to debate. In essence, taken at face value, they are more akin to gratuitous comments if not innuendos than to anything else. The other two reasons invoked, the previous years' ratings and the so-called refusal of coaching, had nothing to do with the rating of the actual performance of the grievor during the year that was being assessed. Both Ms. Chatterjee and Ms. Benimadhu maintained before me that their recommendations were that Ms. Zakaib had met most of her commitments. None of the reasons invoked by the employer bear any relationship with an exercise to ensure CIDA-wide consistency in the evaluation of executives, which was the object of the Executive Committee meeting dealing with ratings. In light of the reasons invoked, the President's decision to overturn the recommendations of the supervisors appears to me to have been made for reasons other than her performance during the period in question, though not in bad faith. I hope that the employer will take a close look at its procedure and that it will take the necessary steps to allow for the debate of comments if the comments are to be the basis of a change to a recommendation on an executive's rating. In light of these observations, I also hope that the employer will reconsider Ms. Zakaib's final rating and reinstate the "met most" rating with its normal consequences.

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

*(The Order appears on the next page)*

**VI. Order**

[128] The employer's objection to jurisdiction is maintained and the grievances are dismissed.

July 17, 2009.

**Georges Nadeau,  
adjudicator**