Date: 20130919

Files: 566-02-7448 to 7450

Citation: 2013 PSLRB 112

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

GORDON TETI

Grievor

and

DEPUTY HEAD
(Department of Human Resources and Skills Development)

Respondent

Indexed as
Teti v. Treasury Board (Department of Human Resources and Skills Development)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Augustus Richardson, adjudicator

For the Grievor: James Cameron, counsel

For the Respondent: Pierre Marc Champagne, counsel

Heard at Toronto, Ontario,
July 9 to 12, 2013.

I. Individual grievance referred to adjudication

[1] The Treasury Board (Program and Administrative Services) ("the employer") and the Public Service Alliance of Canada ("the union") are parties to a collective agreement with an expiry date of June 20, 2014 ("the collective agreement"). In early 2012, the grievor, Gordon Teti, was working under a series of short-term acting appointments as a Program Officer (PM-02) at the Department of Human Resources and Skills Development Canada (Citizen Services) in its Toronto office. This series of appointments had commenced on April 1, 2011 (Exhibit E-13). The appointments had been renewed six times. The last renewal came on February 28, 2012. The employer extended his appointment from the previous end date of March 30, 2012 to April 30, 2012 (Exhibit E-19). However, on March 29, 2012, the grievor:

a. was placed on leave with pay;

b. was escorted from the employer's offices and told not to come back without advance notice and permission from the employer; and

c. was told that his employment with the employer would cease and not be extended at the close of business on April 30, 2012 (Exhibit U-1, Tab 18).

[2] The events leading up to the employer's actions on March 29, 2012 ground the three grievances before me.

[3] The first, dated March 23, 2012, grieved "a sustained, constant and persistent policy of harassment and discrimination by [the grievor's] team leader, Carmen Varao-Phillips (Management) at [his workplace] contrary to the Values and Ethics Code of the Public Service [the "Ethics Code"]" (Exhibit U-1, Tab 1 (PSLRB file 566-02-7450)). The grievor is Black, and had emigrated some years earlier from Kenya. No particular remedy was specified in the grievance.

[4] The second grievance, dated March 27, 2012, grieved that he had been "disciplined unfairly contrary to the collective agreement as a whole and any related policy" (Exhibit U-1, Tab 2 (PSLRB file 566-02-7449)). It sought as a remedy the removal of a disciplinary letter dated March 26, 2012 from the grievor's personnel file as well as any other action required to make him whole.

[5] The third, dated April 2, 2012, grieved that he had been "terminated unjustly contrary to the collective agreement and the Canadian Human Rights Act" (Exhibit U-1, Tab 3 (PSLRB file 566-02-7448)). It sought as a remedy the following:

> *a. The employer remove the letters of March 29th disciplining me and terminating my employment from my file;*
>
> *b. That my record be made whole;*
>
> *c. That I be offered the extension of my term employment commensurate with my qualifications and the extensions offered to my co-workers;*
>
> *d. Damages in accordance with my rights under the Canadian Human Rights Code; and*
>
> *e. Any other remedy that the adjudicator thinks just under these circumstances.*

[6] Notice of the grievor's complaint of discrimination for the grievance alleging discrimination and harassment (PSLRB file 566-02-7450) was also given to the Canadian Human Rights Commission on or about August 16, 2012. The notice stated that the prohibited ground of discrimination involved the employer, who, it was alleged, ". . . discriminated against Mr. Teti by treating him in an adverse differential manner because of his race and national origin contrary to the Canadian Human Rights Act." By way of corrective action the grievor sought the following:

> a. to revoke the decision of non-renewal of term and to make the complainant whole;
>
> b. to offer the same extension of term employment that was offered to Mr. Teti's co-workers;
>
> c. to remove the disciplinary letters from Mr. Teti's file;
>
> d. to provide Mr. Teti with punitive damages; and
>
> e. to carry out any other corrective actions as deemed appropriate under the circumstances.

II. Preliminary issues

[7] At the commencement of the hearing, the employer's representative made two objections, one procedural and the other substantive.

[8] I deal first with the procedural objection. It arises out of a request made by the employer on June 13, 2013 for a postponement of the hearing that was scheduled for July 9 to 12, 2013. The request was made because counsel for the employer had ". . . just recently identified a key witness whose testimony [was] required at the hearing." The request added that ". . . there was an error in communication resulting in this particular witness only being identified a few days ago." The witness (who was never identified) was going to be ". . . out of the country during the dates reserved for the hearing."

[9] I pause here to note that the hearing had been tentatively scheduled for those dates in December 2012. Both parties were given the opportunity to advise whether the dates were suitable. Neither party objected and the dates were finalized in January 2013. On May 28, 2013, the Public Service Labour Relations Board ("the Board") delivered a formal notice of the hearing to the parties. Against this backdrop, I further note that the request from the employer did not identify the witness who was unavailable. It did not explain why or how it had only been "a few days" before June 13 that he or she had been identified as necessary, why the witness's testimony was "key," why the employer had not earlier realized the importance of the witness's testimony, or why it was impossible for it to subpoena the witness to attend.

[10] The request was objected to by the grievor's representative. Given that the grievances involved an alleged termination, and given the employer's failure to provide the information outlined above, I determined on June 19, 2013 that the request should be denied, and the parties were advised accordingly.

[11] At the commencement of the hearing, counsel for the employer advised that, while he respected the decision that had been made, he nevertheless wished that the request and denial be put on the record. I have done so accordingly.

[12] The second objection went to my jurisdiction. An adjudicator's jurisdiction with respect to individual grievances referred to adjudication is restricted by paragraph 209(1)(*b*) of the *Public Service Labour Relations Act* ("the *Act*") to ". . . a disciplinary action resulting in termination, demotion, suspension or financial penalty." Counsel for the employer submitted what had happened to the grievor was simply the non-renewal of a term contract. The term contract had expired according to its terms. It was not a "termination" of employment. That being the case, I had no jurisdiction to hear the matter.

[13] Having made that submission, counsel also recognized that there was jurisprudence to the effect that an adjudicator may have jurisdiction to review or consider the *bona fides* of the employer's decision not to renew a term contract, and that such an analysis could not be conducted without at least some evidence. That being the case, he accepted that the hearing could proceed, subject to the renewal of his objection to jurisdiction once all of the evidence was introduced.

III. The hearing

[14] The grievor presented his case first. On his behalf, I heard the testimony of the following:

a. the grievor himself;

b. Ian Thompson, who was at the material time a union representative and the one who acted for the grievor immediately prior to and after March 29, 2012; and

c. Avry Carty, a PM-02 Program Officer (testifying under subpoena) who worked in the same office and near the grievor, and who was also a union representative in the fall of 2011.

[15] On behalf of the employer, I heard the testimony of the following:

a. Carmen Varao-Phillips, who at various material times was either the grievor's team leader or an acting manager;

b. Nora Hibberd, who was at all material times one of four managers of the grievor's unit, to whom Ms. Varao-Phillips reported;

c. Nicole Gowan, who was at all material times a labour relations consultant giving advice to management with respect to the grievor; and

d. Bill Woods, who in March 2012 was a senior executive director with Service Canada in Ontario, responsible for the Temporary Foreign Worker program there.

[16] The parties each also introduced a number of documents as exhibits.

[17] The facts in this case were relatively straightforward and were not seriously contested by either side. What was in issue (particularly with respect to the allegation of harassment and discrimination) was the characterization of those facts, the inferences to be drawn from them and the legal issues arising out of them. That being

the case, I do not see the need to provide an exhaustive summary of each witness's testimony. I propose simply to set out my findings of fact, except where it is necessary to explain a particular fact or resolve a material conflict in the evidence.

IV. The facts

[18] The grievor is from Kenya. After attending university there, he came to Canada to study at the University of Manitoba and the University of Winnipeg in the mid-2000s. During that time, he also worked part- or full-time as, among other things, a security officer in Manitoba (Exhibit U-3). He also worked from time to time in Kenya. In 2009, he left Manitoba and his family (he had a wife and three daughters) and moved to Toronto to take up a position as a Citizen Services Officer (PM-01) working in the Live-In Caregiver Program division of the Temporary Foreign Worker (TFW) unit of Service Canada (HRSDC) (Exhibit U-3). It was a term position running from August 20, 2009 to May 2010. The grievor's term appointment was subsequently extended several other times. In November 2010 he received a new term appointment, effective December 1, 2010 as a PO at the PM-02 level: Ex. E-14. That term appointment was subsequently extended five times, the last extension being from March 30, 2012 to April 30, 2012: Ex. E-14, E-15, E-16, E-17, E-18 and E-19. During that period of time he worked at a call centre, answering questions about the Live-In Caregiver program from prospective employers.

[19] Insofar as is relevant to these proceedings, the TFW unit dealt with two separate though related programs: the Live-In Caregiver Program (LCP), and the TFW program proper. The first dealt with applications by employers to permit the entry into Canada of a specific subset of temporary foreign workers, namely those who came to work in Canada as live-in caregivers. This program was, according to Ms. Varao-Phillips, relatively simple. The TFW program, as the name suggests, was more complex. It dealt with applications by employers in a variety of businesses and industries to permit the entry into Canada of temporary foreign workers to work for those employers. Since the program applied to a large number of different types of industries, the rules, regulations and guidelines surrounding the program were more complicated, or at least more detailed.

[20] The grievor testified that in November 2010, he was told that there was an opening in the TFW unit. He accepted the position. The appointment was initially for December 2010, working out of the Toronto office, with an end date of

December 31, 2010 (Exhibit E-14). Four other employees were appointed under the same terms at the same time. They all received training in the program. Their team leader was Ms. Varao-Phillips.

[21] Ms. Varao-Phillips testified about the employer's training program. Program officers (POs) would initially receive several days' training in the particular program to which they were assigned. After that initial training, they would be assigned a few files. Their work on every file assigned to them would be monitored by a Business Expertise Advisor (BEA). During the monitoring period, a PO handles files and can make recommendations, but cannot make independent decisions without the approval of the monitor assigned to him or her. This continues until the monitor is satisfied that the PO is able to work independently. At that point, the PO is said to be "released," and is able to handle his or her files without further monitoring. She explained that the length of this training period varied with the program. The Live-In Caregiver program was relatively simple and straightforward, while the TFW was a bit more complicated. She thought that, in general, the average period of training would cover four to six weeks, following which the PO was released to work on his or her own files independently.

[22] Ms. Varao-Phillips testified that, following his appointment to the TFW unit in December 2010, the grievor worked exclusively on the LCP.

[23] At some point very early in his training period, the grievor noticed that there was an overtime opportunity available to POs in the program. He applied for overtime, but was told by Ms. Varao-Phillips that new hires who were still being trained could not get overtime work. The grievor testified that he found this odd, because (according to him) two or three of the other new hires had put in for, and had been approved for, overtime. He did not mention to Ms. Varao-Philips his understanding that the other new hires had been permitted to work overtime, nor did he grieve the denial. In any event, he testified that in February 2011 he again applied for overtime and this time, according to him, "the response was positive." He was allowed to work some overtime, and did so in May 2011 (Exhibit E-11). This sequence of events was consistent with Ms. Varao-Phillips's explanation at the hearing, which was that trainees could not be given overtime until they were released and able to work on their own.

[24] The grievor was released some time in the early part of 2011. He worked independently on the temporary Live-In Caregiver program. He testified that one of the

BEAs, Bill Shena, gave him advice regarding the low income cut-off ("LICO") criteria to be applied in evaluating an employer's application. The LICO was discussed at a staff meeting on August 15, 2011. The advice being given at the meeting was, he thought, contrary to the advice he had received from Mr. Shena. He asked a question seeking clarification on the point. Following that question, Ms. Varao-Phillips decided to appoint a mentor to provide further guidance and advice to the grievor with respect to the Live-In Caregiver program ". . . to help [him] in processing the LCP files, and ensure that [he was on] the right track" (Exhibit E-10), email dated August 23, 2011). Mr. Shena was the BEA assigned to review his work.

[25] The grievor's response to Ms. Varao-Phillips at the time was positive. He stated, "[I am] grateful to be accorded an opportunity to learn more and even become a better worker than I am today." He added that any extra "source of knowledge is critical and deeply appreciated" (Exhibit E-10). The grievor testified that at the time he had thought that he would be receiving new information, but that instead the information and additional training and advice he received was the same that had been provided to him when he first started. He testified that he found this odd.

[26] On September 1, 2011, the grievor's manager, Nora Hibberd approved the extension of the grievor's term contract from September 30, 2011 to December 30, 2011 (Exhibit E-16).

[27] The grievor also testified that, on September 7, 2011, Mr. Shena came to his cubicle and questioned his work in a loud voice. Mr. Shena quieted down after discussing the file with the grievor and left smiling. However, about 20 minutes later, he returned with another file that the grievor had worked on, again questioning his work in a loud voice. The grievor testified that he could see other nearby employees looking up from their cubicles to determine the source of the disturbance. He testified that he told Mr. Shena he felt humiliated before his co-workers and that Mr. Shena's conduct was not right. Mr. Shena left and returned to his own office. The grievor testified that his co-workers then "came to [him] saying that the way Bill treated [him] was wrong." Ms. Carty witnessed the incident, and later reported that she considered Mr. Shena's conduct to be "unacceptable and unprofessional in [their] place of work" (Exhibit U-1, Tab 7). The grievor testified that he told them he felt like quitting but that they urged him to reconsider. He left work and saw his family doctor, who later advised that the grievor "[had] been experiencing increasing workplace stress over the

past 3 weeks." His doctor reported that it would be reasonable for the grievor to stay off work until September 12, 2011 (Exhibit U-1, Tab 6).

[28] The grievor returned to work and, on September 13, 2011, he met with Ms. Varao-Phillips, Ms. Hibberd, Ms. Carty and some others (Exhibit U-1, Tab 7). It was common ground that at the meeting the grievor questioned the earlier decision to provide further training and monitoring to him after the August 15 meeting, since up until that point there had been no question or complaint regarding the quality of his work. He also questioned the manner in which he had been treated by Mr. Shena on September 7. Ms. Varao-Phillips explained why the decision had been made by management, but agreed that in the future such decisions ought to be discussed with the PO in question ". . . to ensure that everyone is in agreement with any plan that is put in place in regards to any development or training required for the PO's role." She also agreed that feedback to a PO should be provided in private (Exhibit U-1, Tab 7, email dated October 11, 2011). Both the grievor and Ms. Carty took this to be an apology on Ms. Varao-Phillips' part for the way the training issue had been handled.

[29] The grievor testified that, following the meeting, he and Ms. Carty expected to receive minutes of the meeting and what had been decided from Ms. Varao-Phillips. When none arrived, the grievor emailed her on October 3, 2011 to request "the details of the issues discussed and the resolutions reached during [the] meeting" (Exhibit U-1, Tab 7). Ms. Varao-Phillips responded on October 11, 2011 setting out "to the best of [her] recollection, the main discussion, and outcome of the meeting that [he] requested" (Exhibit U-1, Tab 7). The grievor responded on October 12, 2011 saying: "what you have provided is not a detailed summary of our deliberations" (Exhibit U-1, Tab 7). He asked Ms. Carty, in her capacity as union representative, "to come up with a detailed verbatim report of the proceedings and resolutions of the meeting" (Exhibit U-1, Tab 7).

[30] Ms. Carty then sent a two-page email to Ms. Varao-Phillips on October 12, 2011. The email recounted the August 15, 2011 meeting and the subsequent (and she alleged related) decision of management to place the grievor in "refresher" training and to assign a BEA to mentor his work "without adequate explanation" (Exhibit U-1, Tab 7). Ms. Carty stated that there was "no concrete evidence" to support either the training or the monitor, especially given that up until that point there had been no comments or concerns expressed about the grievor's work. She went on to recount the

September 7, 2011 incident with Mr. Shena and stated that it was inappropriate conduct on his part. She wrote that in the future "joint consultation must be made with the PO, BEA and team leader if a need arises for training and/or monitoring," adding that "feedback must be administered in a respectful manner by all involved parties and in privacy" (Exhibit U-1, Tab 7). She concluded by saying that further clarification as to why the grievor had been placed under monitoring and given retraining "would be appreciated" (Exhibit U-1, Tab 7).

[31] In cross-examination at the hearing, Ms. Carty stated that she saw or heard nothing during the meeting of September 13, 2011 that would suggest that the decision to have the grievor undergo further training or supervision was based on discrimination because of race or national origin. She acknowledged that there was a large number of employees who were of different racial and national origins. All she could say was that the grievor was the only African Black male; all the other racially Black employees were either born in Canada or from the Caribbean.

[32] Ms. Varao-Phillips, who at the time was acting manager, did not respond to Ms. Carty's email. She explained that she did not respond because, by the time she had processed the memo, Ms. Carty was no longer a union representative. She did not provide a response to the person who replaced Ms. Carty because, as manager, she did not consider it appropriate. It was the responsibility of Tina Cutler, who at that time was the grievor's team manager.

[33] The grievor testified about two subsequent events involving Jason Rainville, who at the time was the acting team leader while Ms. Varao-Phillips was acting manager, that he alleged also, supported his allegations of discrimination.

[34] The first incident occurred on or around November 11, 2011. The grievor was dealing with a client who, according to the grievor, was extremely irritated with the lack of progress with respect to one of her applications under the TFW program. The grievor testified that he checked with the system and discovered the source of the delay (which apparently lay with the person at the call centre who was handling the file). He knew that the normal procedure was to tell the client to call the call centre for details with respect to the application. However, because she was so angry, he volunteered to contact the person at the call centre directly on her behalf. He then sent an email to one Padmavathi Iyer, the person handling the client's file, asking that she respond to the client's concerns (Exhibit U-1, Tab 8, email dated November 3, 2011).

Ms. Iyer then sent an email to her team leader, Duncan Jamieson, to ask how she was to deal with the grievor's request (Exhibit U-1, Tab 8, email dated November 3, 2011). Mr. Jamieson then emailed the grievor, copying Mr. Rainville at the same time, to advise that such inquiries should be directed up the chain of command to the grievor's team leader, who would then take the appropriate action (Exhibit U-1, Tab 8).

[35] The grievor testified that he was content with this message and replied with a simple "thank you." However, Mr. Rainville came to him later that day to tell him that he "was not authorized to give anyone instruction and that I should not instruct anyone about how to handle a file." The grievor characterized Mr. Rainville's conduct as "hostile." He testified that Mr. Rainville then left without giving him "the chance to explain why [he] did what [he] did," and that because of that he sent him an email to explain. He copied Ms. Carty, Carla Benvenuto (who was a union representative) and Ms. Iyer, among others, on his email.

[36] I pause here to note that the grievor's testimony concerning this incident elided much of the detail of what appears to have actually happened. For example, the email he sent to Mr. Rainville to explain what had happened actually said the following:

> *Following our meeting a while ago, I think it is imperative that I meet with you and Duncan to make some clarifications. What I did was in good faith and in the best interest of the employer and the department. I am disturbed and uncomfortable when you told me that I should not tell other staff what to do. I treat this matter very seriously since you came to me shortly after I thought the issue had been dealt with and concluded by Duncan. . . .*
>
> [Exhibit U-1, Tab 8]

[37] Mr. Jamieson responded by saying that he would be happy to have a meeting, and wanted to know what issues the grievor wanted to discuss. He also asked whether Ms. Carty would be attending (since she had been copied on the grievor's email) and, if so, as union representative. Ms. Benvenuto intervened by email, saying that she saw what had happened as "a simple miscommunication that [she had] made plenty of times" (Exhibit U-1, Tab 8). She added that she had been told in the past that in such cases she should speak first to her team leader and that she had become accustomed to doing that. She concluded by saying that she thought it was "reasonable to expect direction from the TL [team leader] [she reports] to, but that [was just her] opinion" (Exhibit U-1, Tab 8, email dated November 3).

[38] The grievor responded to Ms. Benvenuto, saying:

> *I respect your thoughts on this matter. However, it was premature for you to offer your opinion at this stage since this compromises on your role as an arbiter. Moreso, I doubt if you have facts at your disposal at this time. Having said that, please indeed I have made the choice that a meeting should be held to deliberate on this matter and the presence and participation of a union representative is a prerequisite. I am looking forward to have a constructive engagement with Duncan and Jason at a time of their own choosing. . . .* [Exhibit U-1, Tab 8]

[39] Mr. Jamieson responded to this email, pointing out that a union representative was required only in cases of disciplinary matters, and he did not consider the meeting to be disciplinary in nature. However, he saw no harm in the grievor's having a union representative attend if that was what he wanted (Exhibit U-1, Tab 8). The grievor replied, confirming that Ken Horsford, the union local's acting president, should attend. He also suggested that Ms. Iyer could "attend the meeting to put forward her position since she is a central focus on the matter" (Exhibit U-1, Tab 8). The meeting eventually took place on November 7. The grievor did not testify as to what happened at that meeting.

[40] The second incident involving Mr. Rainville involved a request by the grievor to take his vacation time in November and December. The grievor testified that he had put in his request earlier to his team leader (who was not Mr. Rainville at the time). Mr. Rainville then took over the position, and when he did, he told his team members that those who had not put in their vacation requests should do so. The grievor told him that his vacation should be in November and December, but Mr. Rainville told him he was "too late" to ask for those dates. The grievor testified that he replied that he "was just reminding [him], because [he] had already submitted [his] request to [his] previous supervisor." Mr. Rainville "was adamant that the answer should be 'no,' but Ms. Hibberd [the team's manager] intervened, and [his] application was approved."

[41] The next incident offered by the grievor as an example of discriminatory conduct involved Ms. Hibberd. On November 1, 2011, the Unit's office building was evacuated. Ms. Hibberd testified that these evacuations were randomly generated, and that she had no knowledge at the time the evacuation was ordered as to whether it was a drill or a real emergency. On this occasion, the grievor happened to be outside the building on a lunch break. Because of that, he did not appear at the mandated

assembly point outside the building where all employees were supposed to congregate after an evacuation to permit a head count. The grievor met an employee who told him about the evacuation. He returned to the building and spoke to Ms. Hibberd (whose responsibility included taking the head count). He testified that she initially shouted at him and threatened discipline. The grievor was shocked and concerned. However, when he went back to Ms. Hibberd at the end of the day to speak to her again, "to [his] happiness, she apologized to [him], saying to [him] that she was like a parent in that situation, and that is why [she] acted the way [she] did."

[42] The grievor next testified about an incident that happened on November 11. He testified that he was working on a file. The application had been faxed and was, he said, illegible. He emailed the employer to ask for a better copy. He followed up with a phone call to the client. It was, he said, a pleasant conversation. The client said that he would get back to the grievor. Instead, the grievor received a phone call from the client's lawyer, accusing him of incompetence. He said that he was new to the program and that he was not happy with the grievor's request for a new copy of the application because "he knew the application was legible so any problem must be due to [his] incompetence." The lawyer then sent the grievor an email, saying that he had spoken to the grievor's supervisor

> *. . . about your telling my client that we'd sent an illegible copy. (Our copy was legible but your fax machine may not have printed properly). I also talked to her about your question whether the foreign worker had work experience in the same field (which is not a criterion under the program). Your temporary supervisor Jason may call me. As you can see, we did in fact send the fax as requested by you. . . .*
>
> [Exhibit U-1, Tab 9]

[43] The grievor testified that he was shocked that Ms. Varao-Phillips, then acting manager, would talk to the lawyer and say what the lawyer suggested had been said. However, "based on the temporary nature of my employment, I smiled, but said to myself that I wanted to confirm that there was a reason to ask." He testified that he took the file and discussed it with her. He did not discuss with her what the lawyer had said, but he did show her the application in order to demonstrate why he had asked for the better copy. He testified that he was "embarrassed and humiliated" that his manager had discussed his handling of the file with the lawyer. At this point in his testimony, he broke down in tears. The hearing was adjourned at that point to permit

him to compose himself, and when it resumed, we moved on his reasons for filing the three grievances.

[44] I note here that Ms. Varao-Phillips testified that she vaguely recalled a discussion about an illegible fax. There was nothing wrong in her view with a PO requesting a better copy. And as far as the lawyer's call was concerned, she explained that she often received calls from clients and their representatives, either to compliment or criticize the work of the POs in her office. There was nothing unusual about this call.

[45] Returning to the chronology, on November 29, 2011, Ms. Hibberd approved an extension of the grievor's appointment from December 30, 2011 to January 31, 2012, (Exhibit E-17). On December 19, 2011, Ms. Hibberd approved the extension of the grievor's appointment from January 31, 2012 to March 30, 2012 (Exhibit E-18).

[46] In late January 2012, the grievor came to process an application that had been put in on behalf of Sears Canada. On January 20, he emailed the lawyer for Sears Canada to say that the application had been placed on hold pending confirmation of the application with the employer (Exhibit U-1, Tab 19). At the same time, he copied his email to one Ismat Mirza, Senior Vice-President, Business Capability and HR, at Sears Canada. He testified that he then discussed the matter with the lawyer and made a decision to approve the application. On January 23, 2012, he emailed Ms. Mirza as follows:

> *. . . I hope you did get my voice mail of this morning. I called you earlier and left a message advising that I was going to contact your lawyers. I did manage to talk to Keven [the lawyer for Sears] and everything is OK. I will be sending a copy of the LMO [Labour Market Opinion] to Kevin by fax shortly.*
>
> *Please, when you get a minute give me a call at [telephone number redacted]. . .* [Exhibit U-1, Tab 19]

[47] The grievor testified that, at the time he sent that email, he had already approved the application. His decision had been made and communicated to the lawyer. He asked Ms. Mirza to call "as a courtesy . . . because that is normal practice."

[48] Ms. Mirza then called the grievor. He testified that she asked him where he was from (this, according to him, being a common question because of his accent). He told

her he was from Kenya and had come to Canada with assistance from the federal government as a student. She then "took over" and told him her own story as an immigrant, coming to Canada from Afghanistan, getting a job at Sears as a receptionist and working her way up to vice-president. She told him she had three children. He told her he had three children, including a teenage daughter in Winnipeg who was looking for work. The grievor asked Ms. Mirza how he could get in touch with Sears' Human Resources in Winnipeg and she, according to him, told him he could send his daughter's resume to her. She then said she had enjoyed the conversation but had to go to a meeting. The grievor testified that, because he had not had a chance to tell her his own story of being an immigrant to Canada, he told her that he would send her a link to his own website.

[49] The grievor did not put into evidence a copy of the link that he sent. Nor did he provide a copy of the website to which the link would have directed Ms. Mirza had she clicked on it. What he did provide was a copy of a "GCWCC [Government of Canada Workplace Charitable Campaign] Success Story," which he had submitted in October 2011 to the employer's intranet. This was apparently done in response to an internal charitable campaign that had been organized by the employer, part of which called for personal success stories of its employees. The grievor's submission (Exhibit U-7) was comprised of three long paragraphs that detailed his upbringing in Kenya and his mother's encouragement to better himself through education. Towards the end of the last paragraph the following appears:

> *Gordon attributes his academic success to his mother whom he believes instilled in him the knowledge and wisdom that education empowers. Consequently, LCF-Kenya was founded to honour the legacy of Mama Lorna who passed away too young before enjoying the fruits of her labour. With the support and collaboration from our partners LCF-Kenya's vision is to empower the youth through education.*

[50] The grievor explained that LCF-Kenya was a charitable foundation he had set up in his mother's honour. He testified that, in sending Ms. Mirza the link to his personal website (which, according to him, was the same textually as Exhibit U-7), he was not soliciting—and did not solicit—any donation to the charitable organization that was mentioned on the same page "because there is no way that [he] could solicit, because this charity is not registered in Canada, so [he] would never solicit for this foundation." When asked why he sent the link, he said, "[because] I'm proud of this story . . . because Ms. Mizra had told me her story so now it was for me to tell her my

story." He also denied that he had asked for a job for his daughter. He said: "all I asked was how I could communicate with their Winnipeg office and she offered to do it for me." Later that day, after leaving work, he did send Ms. Mirza his daughter's resume from his personal email account.

[51] The next day, on January 24, 2012, Ms. Varao-Phillips received a call from the corporate counsel for Sears Canada. Ms. Mizra had expressed some concern about her conversation with the grievor to corporate counsel. Ms. Varao-Phillips subsequently spoke on that day to both Ms. Mizra and the corporate counsel. She summarized her conversations in an email dated January 24, 2012 to Ms. Hibberd (with a copy to Nicole Gowan) (Exhibit E-12). The contents of the email contain hearsay, and perhaps, double hearsay (given that she spoke to both Ms. Mizra and the corporate counsel). Much was made by the grievor of the errors of fact contained in the notes. And there were indeed such errors. However, the errors were identified and corrected in the subsequent investigation, during which Ms. Mizra corrected or denied some of the statements that had been attributed to her in Ms. Varao-Phillips' notes-for example, a suggestion that the grievor had asked her if she would consider "adopting" his daughter, or whether she could help him find future employment. Suffice it to say, however, that there were certain basic facts in those notes about which there was no misunderstanding:

a. the grievor had spoken to Ms. Mizra;

b. the conversation had taken place within the context of an application filed under the TFW program that was being handled by the grievor;

c. the grievor had sent Ms. Mizra a link to a website that mentioned the charity he had set up on behalf of his late mother;

d. there was a discussion about the grievor's daughter's search for work and about whether Sears might be hiring; and

e. the grievor did send Ms. Mizra his daughter's resume.

[52] Ms. Varao-Phillips also wrote that she recalled that the grievor had submitted a potential "conflict of interest" document the previous year, which she believed had been determined to not constitute a conflict of interest (Exhibit E-12). This was a reference to the fact that, sometime in the spring of 2011, the grievor had raised the issue of his foundation with his manager, and, in particular, whether it might place

him in conflict with the Ethics Code. While the grievor again did not put into evidence what he had submitted to his manager for review, he did introduce a letter dated May 5, 2011 from the Director General, Human Resources Branch (Exhibit U-1, Tab 12). In that letter, he was advised that his work with the foundation did not constitute a conflict of interest. However, he was also told that a conflict of interest:

> *. . . could occur if you were to assist persons in their dealings with the government which includes the sharing of information or procedures which are generally not available to the public at large. You should also avoid activities or discussions which could lead to the perception that you are using your position, title, contacts or authority with HRSDC (including Service Canada and Labour) to obtain benefits or employment for persons associated with you. . . .*
>
> [Exhibit U-1, Tab 12]

[53] Ms. Varao-Phillips concluded by asking for advice as to what to do. She was then advised by Ms. Gowan that the incident would be investigated, and that in the meantime she should not speak to the grievor about it (Exhibit E-12).

[54] On February 7, 2012, the grievor was advised that an administrative investigation would be conducted "in relation to violations of the Values and Ethics Code for the Public Service" (Exhibit U-1, Tab 11). At that time, he met with Ms. Gowan and others to discuss the incident: see Ms. Gowan's notes at Exhibit U-1, Tab 14. Regardless of whether the notes were verbatim or not, it is clear from the evidence of Ms. Gowan and the grievor that he was made aware of management's concern that his conversation with Ms. Mizra might constitute a violation of the Ethics Code.

[55] On February 28, 2012, Ms. Hibberd approved an extension of the grievor's appointment from March 30, 2012 to April 30, 2012 (Exhibit E-19).

[56] The grievor was subsequently interviewed by the investigator appointed to look into the matter. The investigator also spoke to Ms. Mizra, among others. The investigator prepared a draft report that was reviewed by Ms. Gowan. Ms. Gowan testified that she had reviewed the draft and only made grammatical or stylistic suggestions. However, on cross-examination, it became clear that what actually happened was that she pressed the investigator to eliminate what she called "grey areas." Instead, he was to prepare a black and white report with definite findings.

[57] Meanwhile, the union was conducting an election campaign for the officers of its local. The election was held on March 20. On March 21, the grievor wrote an email to the newly elected officials. He congratulated them on their victory. He suggested that the former officials had been working hand in glove with management, adding that he was "extremely happy that Ken Horsford did not present himself for re-election for his leadership was a disgrace" (Exhibit U-6). The email was sent on the employer's internal email system, not that of the union. It was also copied to a number of people, both union members (including Mr. Horsford) and non-union members, such as Ms. Gowan.

[58] Mr. Horsford was upset by the email, and complained about it to management. Mr. Thompson, who came to be the grievor's union representative, acknowledged that use of the employer's email system for union business was not permitted or wanted by the employer, and it was certainly not wanted by the union. It was not uncommon, however, for union discussions to sometimes end up on the employer's email system. When it happened, the union's practice was to direct the employees not to do it. That too, according to Mr. Thompson (over the objection of the employer's counsel), was the response of management to such unauthorized use of the employer's system. "Normally," he said, "that ends it . . . but in this case they [management] decided to discipline Mr. Teti [see below for reasons]."

[59] The final report on the Sears Canada incident was presented to the grievor on March 22, 2012. It was put into evidence by the grievor, although he did not include the various appendices that had been attached to the report (Exhibit U-1, Tab 15). The report concluded that the grievor had breached the Ethics Code in that he had used his position to contact a Sears Canada vice-president for personal reasons,

> *a. by reason of his forwarding his daughter's resume; and*
>
> *b. by reason of forwarding a link to a website for his personal charity.*
>
> [Exhibit U-1, Tab 15]

[60] The grievor was offered a chance to respond. On March 26, Mr. Thompson, his union representative, provided a response on behalf of the grievor (Exhibit U-1, Tab 16). Mr. Thompson complained that the report and investigation contained misinformation that he attributed to Ms. Varao-Phillips. He also emphasized the fact that there had been no request for a donation to the charity, nor any request that

Ms. Mizra obtain or offer a job to his daughter. He also referred to the fact (which appears clear on the exhibits that were submitted) that "Sears Canada . . . [made] it very clear that they were calling out of an abundance of caution as opposed to any real concerns they had about Mr. Teti's service. They wanted the record to be clear" (Exhibit U-1, Tab 16).

[61] On the same day, the grievor also received a disciplinary letter from the Director, Mr. Azouz, with respect to the March 21 email the grievor had sent regarding the results of the union elections. The letter, drafted by Ms. Gowan, notes: "it was confirmed that you sent an offensive and disparaging message to another employee, while copying additional employees and union representatives on your communication" (Exhibit U-1, Tab 17). This behaviour was considered inappropriate, and grounds for discipline by way of a letter of reprimand that was to be placed in his file for two years.

[62] Bill Woods was the senior executive director with Service Canada in Ontario responsible for the TFW program. He testified that in early 2012 Mr. Azouz, who was the director of the branch, reported to him. He was made aware of the concerns regarding the grievor's discussions with Ms. Mizra, and was briefed as the investigation continued. He testified that he understood that Sears Canada had contacted management to express concerns regarding that discussion, and that Sears Canada was concerned that it not be accused of any wrongdoing because of it. He was disturbed because, if it was true that the grievor had discussed potential employment of his daughter or had passed on information regarding his charitable organization, then "it was clearly outside the bounds of any business discussion that ought to take place between a Program Officer and an employer . . . a Program Officer occupies a position of authority over the employer, because they [sic] determine the labour market opinion which can have an impact on the employer's business."

[63] After the investigation was completed, Mr. Woods reviewed the report with Mr. Azouz and the Assistant Deputy Minister. Ms. Gowan recommended "the termination of employment . . . and that was [his] conclusion as well." He testified that in his opinion the investigators had found that the allegations of conflict of interest had been established. He also took into account the fact that the grievor knew, at least as of May 2011, of the importance of the need to avoid any suggestion of a benefit to

his family members or his charity. He concluded that "non-renewal" of the grievor's employment was appropriate.

[64] In cross-examination, Mr. Wood acknowledged that he assumed the investigator's report had been objective and independent, and that he had not seen the earlier draft report. He agreed that he relied on the report in coming to his decision.

[65] This meeting resulted in two conclusions: first, that the grievor's employment contract would not be renewed upon its expiry on April 30, 2012; and second, that the grievor would be told to leave the office on March 29 and not return.

[66] Ms. Hibberd testified that at this time there were roughly 20 term employees, including the grievor, in the office. Of those, the contracts of all but that of the grievor were renewed as of May 1, 2012. That too was the grievor's evidence. As well, he testified that when he left the office on March 29, "there was tremendous work load, and shortly before [he] was fired there were more employees that were brought in because of the amount of work in the department, which is why there was overtime as well being done on Saturdays and Sundays." This testimony was not contradicted by any of the employer's witnesses.

[67] As already noted, the grievor filed three grievances. He was asked about the first grievance, the one he filed on March 23, 2012 alleging harassment. He testified that he filed it:

> *. . . because at this point given all the incidents that had accumulated . . . that had happened . . . that I had gone through, starting from the denial of overtime, the verbal harassment by a colleague [Bill Shena] and the fact that nothing was done to him . . . so I decided that it was now time to ask for some kind of redress . . . I had brought the issues to management and yet nothing happened ... the trend just continued so I thought that it was time . . . it was an action of last resort, because, as I say, being a term employee on contract this was a last resort . . .*

[68] When asked why he had singled out his team leader, Ms. Varao-Phillips, he said that it was because:

> *. . . the first incident, about overtime, was directly within her powers . . . she denied me overtime while the rest of the employees got overtime . . . the second incident was when I was taken for retraining, that happened because she wanted*

> *me to go for retraining . . . and then there was the incident between me and Bill Shena, she chaired the meeting and yet took no action whatsoever . . . so with all this inaction to these incidents, she in my view was directly responsible.*

[69] With respect to his second grievance, relating to the letter of reprimand for his email of March 21 (Exhibit U-6), he testified that he had sent the email because he had not been happy with the representation he had been receiving from the previous shop stewards. He stated that he was "shocked that [he] could be disciplined for sending an email to union members regarding the union representatives that [he had] voted for." He did not explain, however, why he copied his email to former officers of the union (Mr. Horsford) and people not in the union at all (Ms. Gowan).

[70] He was also asked about the allegations of discrimination based on race and national origin that he had made in his third grievance. He testified as follows to explain why he made those allegations: ". . . because we are supposed to be treated the same . . . I was treated inhumanely, I was discriminated against, I was singled out because I'm different . . . the colour of my skin, my origin, my accent."

V. <u>Submissions on behalf of the grievor</u>

[71] Counsel for the grievor agreed that there was a long line of authority to the effect that the expiration of a term contract did not in and of itself amount to a termination. There was no obligation on an employer to renew a term contract. An employer's refusal to renew such a contract did not amount to a termination of that contract: *Dansereau v. National Film Board,* [1979] 1 F.C. 100; *Chouinard v. Deputy Head (Department of National Defence),* 2010 PSLRB 133 at paras 46 and 47.

[72] Counsel also agreed that an adjudicator lacked jurisdiction under the collective agreement or under the *PSLRA* to order the employer to offer a new contract to a term employee whose contract had expired. The power to appoint a person—to hire a person—for a position in the public service lay solely with the Public Service Commission: *Chouinard* at paras 46 and 47. That being the case, he also agreed that I lacked jurisdiction to order the remedy of requiring the employer to extend the grievor's "term employment commensurate with [his] qualifications and the extensions offered to [his] co-workers," as sought in the termination grievance.

[73] However, counsel submitted that the situation was different if the employer's decision not to renew a term contract, or to terminate it before the expiration of its

term, was the result of discrimination based on a ground prohibited under the *Canadian Human Rights Act* and the anti-discrimination provisions of the collective agreement. While an adjudicator in such a case still could not order the employer to rehire the employee, he or she could order damages in lieu of such an order. The power to order damages flowed from the remedial powers vested in an adjudicator by reason of the *CHRA* and article 19 (No Discrimination) of the collective agreement. Such remedial powers were not limited to those that could be exercised under the *PSLRA*. They were broader: see, for example, *Stringer v. Treasury Board (Department of National Defence),* 2011 PSLRB 110 at paras 42, 43, 47 and 48; *Gibson v. Treasury Board (Department of Health),* 2008 PSLRB 68 at paras 11 to 14. Counsel submitted that they were broad enough to permit an adjudicator to order damages in lieu of reinstatement.

[74] Counsel submitted that it was open to me to make the following findings of fact on the evidence:

> a. that the grievor's employment ceased not because his term had expired but because he was terminated; and
>
> b. that such termination was the result of discrimination based on race or national origin, both of which were prohibited grounds under the *CHRA* and the collective agreement.

[75] Counsel then submitted that, having made such findings, I had the jurisdiction to make an order that, in effect, provided the employer with the following options:

> a. it could pay the grievor damages in lieu of offering him a new term position similar to that of his peers, or
>
> b. it could elect to offer him a new term position, in which case there would be no damages because they would have been fully mitigated by the offer of a new term contract.

[76] Counsel submitted that such an order would respect the employer's power of appointment. It would not force the employer to hire the grievor; it would not deny it the power of appointment. The order would simply give the employer the right to elect which of two possible consequences it should face by reason of its discriminatory conduct: damages or rehiring.

[77] Counsel then turned to two questions:

a. Was the grievor terminated?

b. If so, was the termination grounded in discrimination based on a prohibited ground?

A. Was there a termination?

[78] Counsel for the grievor submitted that there could be no question that the grievor was terminated on March 29, 2012. On that day he was told that his term contract would not be renewed after April 30, 2012. He was placed on leave until April 30, escorted from the employer's building, and prohibited from returning to the office. The fact that he was also told in the second letter signed by Mr. Azouz on March 29 that he "[would] cease to be an employee at the cessation of [his] period of employment [i.e., April 30]" did not alter the fact that to all intents and purposes he had ceased to be an employee on March 29. Counsel pointed out that Mr. Woods' testimony was to the effect that management had decided that the appropriate discipline was "a non-renewal of his contract and termination of employment." The fact that the grievor continued to be paid for the period March 29 to April 30 did not mean that he was still an employee. The employer's decision to strip the grievor of all the normal accoutrements of employment as of March 29 meant that it also stripped him of his status as an employee as of that date. The fact that the employer may have paid the grievor for the balance of the term that remained after March 29 did not convert the termination into something else.

B. Was the termination based on discrimination?

[79] Counsel for the grievor submitted that one had to distinguish between what the grievor did and what he was said to have done. What he did was send his daughter's resume, as well as a link to his personal website, to Ms. Mizra. He did not ask for a job for his daughter. He did not solicit a donation for the foundation he had set up in his mother's name. Nor did Ms. Mizra object at the time; indeed, she said that she would pass it on to the Winnipeg office. Counsel acknowledged that the grievor's action in sending the resume was "not the smartest thing to do," but that it was at best a "fairly minor" breach of the Ethics Code. It may have been deserving of some discipline but it could not support a decision to terminate.

[80] Supporting that conclusion was the fact that the decision was based on a report that was fatally flawed. Mr. Woods had testified that he wanted an objective report of what had happened. What he had, however, was not a neutral report based on an independent and objective investigation into the facts. It had been produced only after Ms. Gowan had required the investigator to rewrite his draft report to remove "grey" uncertainties. Her comments were not simply confined to questions of style or grammar. They were rather provided from a "labour relations standpoint" with the intent of obtaining a "black and white" final report. As a result, the report took the side of management. It was not designed to find out what happened. Rather, it was designed to support management's position that what had happened was a violation of the Ethics Code.

[81] With respect to discrimination, counsel submitted that he did not have to produce examples of direct, overt discrimination in order to justify a conclusion that the grievor had been the victim of discrimination. In the human relations context, there is rarely any such smoking gun. What there may be, however, is a pattern of differential treatment that can only be explained by conscious or unconscious discrimination based on a prohibited ground. So, for example, if one employee is treated differently from all other employees, and that employee is a member of a racial minority, one may be justified in suspecting that the differential treatment is the result of discrimination based on race.

[82] Counsel pointed to the following as being examples of what he said was the differential treatment of the grievor:

a. the initial decision in early 2011 to deny the grievor the opportunity to have overtime, but granting it to the other three or four trainees;

b. the decision to impose retraining on him in August 2011 after his question at the meeting, even though there had been no quality issues up until that point;

c. the decision to re-impose monitoring on him after that August meeting, even though up until that point he had been working (and making decisions) on his own;

d. Mr. Shena's conduct in speaking to the grievor in public in such a loud and aggressive tone that other employees heard him and became concerned;

e. Mr. Rainville's brusque manner of dealing with the grievor over the mix-up of vacation schedules;

f. Ms. Hibberd's angry and disrespectful conduct at the evacuation drill;

g. the fact that his supervisor spoke to outside counsel, passing on the opinion that the grievor was not experienced;

h. the written reprimand for sending non-business email on the employer's system, when other employees who had committed similar offences had received only a verbal warning; and

i. the decision to terminate the grievor's position for what was, at best, a minor and innocent violation of the Ethics Code.

[83] Counsel submitted that these actions constituted a pattern of behaviour on the employer's part wherein it repeatedly treated the grievor differently (and more harshly) than it did its other employees. Such a pattern of differential treatment could only be explained by discrimination based on race or national or ethnic origin.

[84] Turning to remedy, counsel submitted that, had the discrimination not existed, the grievor would have been reappointed to a further term position. That had repeatedly happened in the past. There was no issue of lack of work at the office. All of his co-workers had had their terms extended. While the grievor in this case could not obtain a renewal of his term contract, he was, as a victim of discrimination under the *CHRA* and the collective agreement, entitled to be made whole to the extent legally possible: *Sangha v. Mackenzie Valley Land and Water Board,* [2007] F.C.J. No. 1136 at para 28; *Chopra v. Health Canada,* [2004] C.H.R.D. No. 23; *McAvinn v. Strait Crossing Bridge Ltd,* [2001] C.H.R.D. No. 36. In addition, it could not be the case that the payment of his wages and benefits from the date of his termination to the end of his term was sufficient to make him whole. In setting an appropriate award of damages to compensate the grievor, counsel urged me to consider the following: the loss of the grievor's opportunity to pursue his career as a federal public servant; the financial duress and pressure he had undergone as a result of the employer's conduct; and the fact that, had he not been discriminated against, he would have continued, at the very least, as a term employee and, possibly, some day have moved over to indeterminate status.

VI. Submissions on behalf of the employer

[85] Counsel for the employer commenced his submissions by emphasizing that there were in fact three separate grievances before me: one for the letter of reprimand, one for the decision not to renew the grievor's term contract, and one for discrimination. He submitted that it was important to keep them separate and distinct rather than to blend them together.

A. The letter of reprimand

[86] Counsel for the employer submitted that it was clear that an adjudicator had no authority to consider or deal with a letter of reprimand. The only jurisdiction an adjudicator had under paragraph 209(1)(*b*) of the *Act* was to deal with "a disciplinary action resulting in termination, demotion, suspension or financial penalty." [Emphasis added] In the case before me, the letter of reprimand had not resulted in a termination, demotion, suspension or financial penalty. Hence, I had no jurisdiction to deal with the grievance, and it ought to be dismissed.

[87] I should note here that counsel for the grievor agreed with this submission, as far as it went. His submission, however, was that I could consider the letter of reprimand as evidence to support the discrimination grievance. But on that point, counsel for the employer replied that the evidence, such as it was, did not support such a submission. The reprimand came in response to the grievor's use of the employer's email system for non-official, personal use. The evidence was clear that both the employer and the union agreed that the employer's email system was to be used only for work activities. Furthermore, the email could not be justified as somehow related to union business or activities, since it contained a personal attack on the conduct and character of a former union official who had been and remained an employee. Notwithstanding that discipline for personal use of the employer's system might generally only attract a verbal rather than a written reprimand, it remained the case that it was an unauthorized use. It accordingly warranted discipline. The letter of reprimand was nothing more than the exercise of normal management control of the workplace. There was no evidence that it was anything more than that and, in particular, that it was motivated or influenced in any way by discrimination.

B. The refusal to renew the term contract

[88] Counsel for the employer submitted that in essence what had happened was this: prior to the end of his term contract, the grievor was told that his contract would not be renewed; he was told at that point to leave and not come back; and he was paid his wages and benefits for the remainder of the term of his contract. The grievor's situation was thus no different than what it would have been had the employer simply told him on March 29 that his contract would not be renewed after April 30.

[89] Counsel for the employer renewed his submission that on these facts an adjudicator had no jurisdiction to consider a grievance with respect to a decision not to renew a term contract. The failure to renew a contract is not a "termination" of employment within the meaning of paragraph 209(1)(*b*). No action is required of the employer to end the contract; it has simply expired according to its terms: see, for example, *Pieters v. Treasury Board (Federal Court of Canada),* 2001 PSSRB 100 at paras 45 to 46; *Monteiro v. Treasury Board (Canadian Space Agency),* 2005 PSSRB 27 at para 12; *Chouinard v. Deputy Head (Department of National Defence),* 2010 PSLRB 133 at para 47. That being the case, the employer's motivation for refusing to renew a term contract is irrelevant: *Pieters*, at para 46.

[90] Counsel acknowledged that there was jurisprudence for the proposition that an adjudicator did have limited jurisdiction to inquire into a non-renewal case for the purpose of determining whether the decision had been made in bad faith: *Re Laird and Treasury Board (Employment & Immigration),* [1990] CPSSRB No. 213. However, he submitted that the weight of authority supported the proposition that the issue of bad faith (that is, the employer's motivation) was relevant only where an employer prematurely terminated a term contract: *Chouinard* at para 48. Even then, the only remedy available to an adjudicator would be to award any pay that would otherwise have been paid to the term employee had he or she not been prematurely terminated: *Laird*; *Foreman v. Treasury Board (Indian and Northern Affairs Canada),* 2003 PSSRB 73 at para 27. In the case before me, however, the grievor had been paid out to the end of his term contract. Hence, there was no remedy available to the grievor even if the employer's actions on March 29 constituted a premature termination of his term contract.

[91] Counsel for the employer submitted strenuously that what happened on March 29 was not the premature termination of a term contract, but rather a decision

not to renew a term contract. The decision was based on reasonable grounds. The evidence was clear that the grievor had breached the Ethics Code. The fact that the investigation report might be flawed (though he did not concede that it was) did not mean that the decision not to renew the contract could not be supported. I was entitled to consider the matter *de novo*, and there was other evidence before me that pointed to the decision being justified. The grievor had earlier received a letter warning him of what he could and could not do under the Ethics Code. Mr. Woods had testified that he considered the basic facts himself independent of the report and was concerned by them. The grievor's own testimony supported a conclusion that what he had done was a violation of the Ethics Code.

[92] Counsel accordingly submitted that I should dismiss the non-renewal grievance, either because:

a. I had no jurisdiction to consider a grievance respecting the non-renewal of a term contract, or

b. even if I had jurisdiction by reason of a premature termination of the term contract, there was no remedy that I could award that had not already been paid by the employer by way of salary and benefits to the end of the term.

C. <u>The discrimination grievance</u>

[93] Counsel for the employer submitted that the grievor needed to establish two things:

a. differential treatment of him on the part of the employer, and

b. that that treatment was caused or contributed to by reason of his race or ethnic origin.

[94] Counsel for the employer submitted that none of the incidents offered by the grievor could be linked to differential treatment caused by or linked to racial or ethnic discrimination. The letter of reprimand and the decision not to renew has been dealt with already. With respect to the issue of overtime, counsel pointed out that an alternate explanation for the initial refusal—based on his lack of release—had been offered by Ms. Varao-Phillips. Moreover, the suggestion that the denial of overtime was discriminatory was further refuted by the fact that the grievor was later offered, and

accepted, overtime. With respect to the loud discussion between the grievor and Mr. Shena in September, or Ms. Hibberd's irritable response at the time of the evacuation drill, or the issue of whether the grievor could take the vacation days he had put in for, the worst that could be said was that they were examples of "a bad day" for the managers in question. They were not examples of discrimination. With respect to the retraining and rementoring that took place in the summer or early fall of 2011, the grievor's own evidence was that he was, at least initially, happy to be given more training. Moreover, there was evidence from the employer as to why it required him to undergo the additional training. The fact that the training might have been ultimately unsatisfying to the grievor did not mean that it was discriminatory. The onus lay on the grievor to establish a link between such conduct and a prohibited ground under the *CHRA* or the collective agreement—mere allegations are not enough. See, for example, *Shaw v. Cox,* 2012 H.R.T.O. 1949 (CanLII) at paras 15 and 16; *Mukonkole v. Hi-Ball Services and another (No. 2),* 2012 BCHRT 18 (CanLII) at paras 70 and 71.

[95] For these reasons, counsel submitted that I ought to dismiss this grievance as well.

[96] Turning to the question of damages, counsel submitted that, in the event that I found that there was discrimination, the evidence of loss—or of mitigation—was "pretty thin." The job applications that the grievor had put into evidence as Exhibit U-20 were limited in time and scope. There were only eight between April and December 2012. There were only four between January and May 2013, and all of them were for the same position of being an election observer in Kenya (albeit for four different parties). Therefore, at most, there were only a total of nine distinct applications. The grievor was receiving EI during much of that time, and his problems with rent arose only in the past few months when his Employment Insurance (EI) ceased and he began receiving social assistance. As a result, any award of damages should be small, if anything.

VII. Reply on behalf of the grievor

[97] Counsel advised that there was nothing by way of reply.

VIII. Analysis and award

[98] I will deal with the three grievances separately, without ignoring the submission on behalf of the grievor that the facts of one may support another as well.

A. The letter of reprimand – PSLRB No. 566-02-7449

[99] The letter of March 26, 2012 reprimanding the grievor for what the employer said was inappropriate use of its email system was clearly disciplinary in nature. However, it did not result in termination, demotion, suspension or financial penalty. It was simply placed in his file for two years. That being the case, I have no jurisdiction under paragraph 209(1)(*b*) of the *Act* to consider the grievance. I accordingly order that the file be closed.

[100] This does not mean that the facts leading up to the disciplinary action, or the action itself, cannot be considered with respect to the other grievances. It means simply that a grievance with respect to the letter itself is outside the scope of an adjudicator's jurisdiction.

B. The harassment and discrimination grievance – PSLRB No. 566-02-7450

[101] In this grievance the grievor alleged "a sustained, constant and persistent policy of harassment and discrimination by [his] team leader, Carmen Varao-Phillips (Management) [at his workplace] contrary to the Values and Ethics Code of the Public Service" (Exhibit U-1, Tab 1).

[102] Without getting into the minutiae of the arguments, I am prepared to assume that I have jurisdiction to consider this grievance because it involves the application of article 19 of the collective agreement. But even assuming I have jurisdiction, it is clear on the evidence and the facts that the grievor has failed to establish his allegations against Ms. Varao-Phillips.

[103] To recapitulate, the grievor complained about the following in respect of the following incidents:

a. the initial denial of overtime opportunities when he first started in the Live-In Caregiver program;

b. the decision in August 2011 to require the grievor to undergo additional training and mentoring;

c. the alleged failure to respond to the grievor's concerns arising out of the incident in September 2011 involving Mr. Shena;

d. the alleged comments to a client's lawyer in November 2011 respecting the grievor's competence;

e. Ms. Hibberd's alleged misrepresentation or distortion of statements made to her by Ms. Mizra concerning the grievor's actions on January 23, 2012;

f. Ms. Hibberd's conduct at the evacuation drill;

g. Mr. Rainville's alleged brusque manner of dealing with the grievor over the mix-up of vacation schedules;

h. the written reprimand for sending non-business email on the employer's system;

i. the decision to terminate the grievor's position for what was, at best, a minor and innocent violation of the Ethics Code; and

j. the termination of the grievor.

[104] With respect to the overtime issue, the basic point is that no new employees received overtime until they had been released. Up until that point, they required oversight by BEAs. Hence, to permit trainees to work overtime would mean that BEAs would also have to be available. I accept that evidence. It is logical and makes operational sense. Moreover, it is supported by the fact (not denied by the grievor) that he was later provided with overtime, at least by May 2011. The fact that it was in May and not earlier is consistent with the grievor having been released to work on his own by that time.

[105] The grievor's evidence that several of his co-workers were provided with overtime does not in and of itself establish any impropriety on the part of Ms. Varao-Phillips. Accepting that it is correct, there was no independent evidence as to the state of their training, or whether they might have been released before the grievor was. And if Ms. Varao-Phillips' initial decision was based on improper motives, one is left to wonder why she changed her mind and allowed the grievor overtime the second time.

[106] With respect to the issue of retraining, the grievor's own evidence was that he initially welcomed the opportunity to receive additional training. His subsequent

complaint with the substance of that training—that it was simply a repeat of what he had been told before—may or may not be accurate, but it is beside the point. Ms. Varao-Phillips was entitled to make a decision as to whether any employees for whom she was responsible might benefit from additional training or support. The fact that the training or support that was provided (by someone other than her) might not have been what the grievor expected does not establish any intent on her part to harass the grievor. At worst, it might support no more than a conclusion that the people she had entrusted to provide the training and support had misunderstood what they were to do, or had failed to do it properly.

[107] With respect to the incident involving Mr. Shena, the evidence was clear that Ms. Varao-Phillips did respond to the concerns raised by the grievor. She did agree that a better explanation of the need for additional training should and would be provided in the future. She also agreed that (negative) feedback should be provided in private. It is not clear what more could be expected of her in the circumstances. The fact that she chose not to discipline Mr. Shena (assuming she was even in the position to do that) does not mean that she discounted or ignored the grievor's complaint about his conduct. It means at best that she made a decision that nothing more could be gained by keeping the incident alive. That was a managerial decision she was entitled to make. The fact that the grievor did not agree with that decision does not convert it into one based on discrimination against him.

[108] With respect to the grievor's discussion with the lawyer in November 2011, I agree that the email sent by the lawyer to the grievor was inappropriate. It was supercilious in its treatment of an employee who was only doing his job. I believe I can take notice of the fact that faxes, especially those of completed forms, are often hard to read, if not entirely illegible. To respond as the lawyer did to the grievor's request for a better copy was inappropriate, arrogant and unfortunate. It is not, however, evidence of any improper conduct on the part of Ms. Varao-Phillips. The lawyer's comments to the grievor about his discussion with her were obviously hearsay, and given the context, hardly to be credited. And even if they were, Ms. Varao-Phillips can hardly be faulted because someone called to complain—rightly or wrongly—about the grievor's work on a file. Moreover, she stated that she saw nothing wrong with asking for another copy of an application. I can take from that that Ms. Varao-Phillips did not criticize or fault the grievor as a result of the call to her by the lawyer.

[109] The other point of course is that the grievor's accusation that Ms. Varao-Phillips had discussed his competence with the lawyer was based on what the lawyer told him, not what she told him. I have already noted that the lawyer appears to have conducted himself in a rather arrogant, aggressive way. His comments were hearsay. The grievor may have been shocked by what the lawyer said, but it was unfair of him to credit those comments without asking Ms. Varao-Philips whether she had said what the lawyer said she had said. There was no evidence to suggest that she had in fact said it.

[110] With respect to Mr. Rainville's brusque manner, there was no evidence that he was more polite with others, or that he usually dealt with misunderstandings arising from crossed lines of communication in a better fashion. And the point remains that when Mr. Teti pursued the issue it was his position, not that of Mr. Rainville, which prevailed.

[111] With respect to the written reprimand for sending non-business email, the suggestion that it evidenced differential treatment based on race or national origin was not persuasive. In the first place, it was based on the impressionistic–and hearsay–evidence of Mr. Thompson. I note that the employer's counsel objected to it on those grounds. In the second place, non-business emails on the employer's system no doubt include a wide range of "offending" content, ranging from pictures or jokes about cats to gossip to sexual innuendos to personal attacks on fellow employees or managers. To suggest that all such email would attract only verbal warnings or reprimands strikes me as unlikely. It is more likely that unauthorized use of the email system is going to attract different penalties depending at least in part on the email's content. So, for example, I expect that any employer would consider responding to an unauthorized email that attacked a fellow employee in a different way than one advertising a bike for sale. The fact that the employee whose reputation had been attacked by the grievor's email complained about it highlights the distinction. A written reprimand in respect of such an email is evidence in itself of no more than that the employer discriminated on the basis of content, not on the basis of race or national origin.

[112] With respect to Ms. Varao-Phillips' initial involvement in the Sears Canada affair, the fact that the notes she took after her conversations with the Sears Canada lawyer and Ms. Mizra may have contained inaccuracies does not establish an intent to deceive or misrepresent on her part. She spoke to two people, one of whom (the corporate

lawyer) was relaying hearsay information from the other person (Ms. Mizra). In such a case, her notes could just as easily reflect the inaccurate understanding of the corporate counsel as it might of Ms. Varao-Phillips, rather than an intentional misrepresentation of what Ms. Mizra told her.

[113] Moreover, the basic facts set out in her notes were correct and uncontested by the grievor. The grievor did speak to Ms. Mizra from his place of employment. He did request information regarding how his daughter might be able to secure work at Sears Canada by submitting a resume. He did send the resume to Ms. Mizra. He did send Ms. Mizra a link to his charitable foundation. These were the same fundamental facts that were confirmed in the investigator's report and which formed the basis of the decision not to renew the grievor's term appointment.

[114] Finally, with respect to the decision to terminate the grievor's position (that is, to refuse to renew his term appointment) that was a decision made by people other than Ms. Varao-Philips. I will deal with the circumstances surrounding the decision later.

[115] I am accordingly satisfied that none of these facts, either alone or in combination, go any way towards establishing the serious allegation contained in the grievance. The grievor's allegation that Ms. Varao-Phillips discriminated against him was and is wholly unsubstantiated by the evidence. In coming to this conclusion, I note as well that the grievor's allegation is made of a team leader with many years of experience who worked in an office that had a large complement of people of colour and a variety of ethnic and national origins. Given such a context, the grievor would need more than simply the fact that he was from Kenya or was racially black to establish that Ms. Varao-Phillips, when exercising her responsibilities as a manager, was acting in a discriminatory fashion toward him.

[116] The grievance fails and must be dismissed.

C. <u>The termination grievance – PSLRB No. 566-02-7448</u>

[117] To repeat, this grievance alleges that the grievor was "terminated unjustly contrary to the collective agreement and the Canadian Human Rights Act." The remedy initially sought was as follows:

> *a. The employer remove the letters of March 29th*

> *disciplining me and terminating my employment from my file;*
>
> *b. That my record be made whole;*
>
> *c. That I be offered extension of my term employment commensurate with my qualifications and the extensions offered to my co-workers;*
>
> *d. Damages in accordance with my rights under the Canadian Human Rights Code;*
>
> *e. Any other remedy that the adjudicator thinks just under these circumstances.*

[118] In considering this grievance, I must return to the question of whether I have jurisdiction to consider the grievance at all. The employer says that I do not. It says that it did not terminate the grievor. It simply decided not to renew his term contract. It says it was under no obligation to renew his contract, and that an adjudicator has no power to order the employer to offer a new term contract to a term employee whose term contract of employment has expired. Counsel for the grievor, on the other hand, said that the employer did terminate the grievor, and that that termination gives me jurisdiction with respect to the grievance. He also said that since, as the grievor alleges, the termination was linked to discrimination contrary to the *CHRA* and the collective agreement, I have jurisdiction to grant damages in lieu of reinstatement—unless of course the employer chooses to offer him a new term contract instead.

[119] To understand these submissions, it is necessary first to understand that there are two types of cessation of a term contract of employment. In one, the cessation happens before the agreed-upon expiry date of the contract; in the second, the cessation happens on the expiry date.

1. <u>Where the cessation happens before the end of the term</u>

[120] I think it is clear that the cessation of employment prior to the end of a term contract would in normal course constitute a termination of that contract. That being the case, an adjudicator clearly has jurisdiction under paragraph 209(1)(*b*) to hear a grievance with respect to that cessation of employment.

[121] The more difficult question concerns what remedies are open to an adjudicator in such a case. I accept that he or she cannot order the employer to rehire the former employee or to offer him or her a new term contract. But are the damages that might

be awarded in the event that the termination was found to be without just cause limited to the wages payable during the balance of the term, as was suggested in *Laird*? I am not certain that they are, for reasons discussed below.

2. <u>Where the cessation happens at the end of the term contract</u>

[122] The employer's argument here is twofold. First, there is a long line of cases that have held that, where a term contract expires pursuant to its terms, it cannot be said to have been terminated. The employer does nothing. It does no more and no less than what it agreed to do: hire the employee for a fixed term, at the end of which the employee would cease to be an employee. Accordingly, since there has been no termination, an adjudicator cannot have jurisdiction.

[123] Second, an adjudicator has no power and no jurisdiction to order the employer to hire or rehire anyone. That power lies solely with the Public Service Commission. But since an adjudicator cannot order the employer to rehire an employee, he or she cannot order damages in lieu of any such rehiring. To do that would be to do indirectly what cannot be done directly: see, for example, *Foreman v. Treasury Board (Indian and Northern Affairs Canada),* 2003 PSSRB 73 at paras 26 and 27. This is so even when the employer, acting in bad faith, lays a term employee off prior to the elapse of his or her term: *Laird v. Treasury Board (Employment & Immigration),* [1990] CPSSRB No. 213 at page 16.

[124] But if an adjudicator has no power to order a term employee to be rehired, and if he or she cannot order damages in lieu of any such rehiring, then an adjudicator ought to conclude that he or she has no jurisdiction to hear a grievance where, as here, the term employee was paid the balance for the balance of his term pending the elapse of his term contract.

[125] I have several difficulties with this line of argument.

[126] First, it is I think without question that an adjudicator can decide whether or not he or she has jurisdiction to hear a grievance. But the question of whether a particular cessation of employment is or is not a "termination" within the meaning of paragraph 209(1)(*b*) of the *Act* is a question of law that must be based on findings of fact—that is, on evidence. What this means in turn is that there must be at least some evidence before the adjudicator to enable him or her to make such a determination.

The amount of evidence necessary will vary with the case. In some cases, little evidence may be needed by the adjudicator—so little that he or she may be able to entertain the employer's objection at the outset of the hearing. Other cases with more complex facts or issues may require the adjudicator to hear all of the evidence before ruling on the objection as to his or her jurisdiction.

[127] Second, it strikes me as overly formalistic to say that, in every cases the cessation of a term contract pursuant to its terms is not a termination. To say so is to elevate form over substance. Every case depends upon its facts. More importantly, to say so is to conflate two types of cases in which the cessation of a term appointment may occur.

[128] In the first type of case, the employee has been employed to perform a specific task (for example, a particular work project) or to fill a time-limited gap in the employer's work force (for example, to replace an employee who is on maternity leave). The employer has a specific need for someone to fulfill a specific task for a specific period of time, and that need is satisfied by appointing someone to do that task, or replace that employee, for the necessary period of time. In such a case, one may say that the cessation of employment was not the result of an act on the part of the employer. It was simply the ending of an appointment at the time and date agreed upon by the parties. This indeed is the type of case that led to the decision in *Dansereau*.

[129] There is, however, a second type of case where, as here, the employer has a long-term, ongoing need for employees to fulfill not just a specific job, but a regular and ongoing service or operation. The evidence may support a conclusion—as it could in the case before me—that term appointments were routinely renewed as a matter of course. In such a context, it may indeed take a definite act on the employer's part to displace or alter the organizational inertia or necessity (or both) that would otherwise have seen the renewal of a particular term appointment. Such an act, if taken in bad faith, or if based on prohibited grounds of discrimination, could, depending on the facts, amount to a "termination" within the meaning of paragraph 209(1)(*b*). This is the type of case that led to the decision in *Laird*.

[130] If the cessation in such a case does amount to a "termination" within the meaning of paragraph 209(1)(*b*), then I am not convinced that an adjudicator's remedial power is as limited as suggested by the employer's representative.

[131] I appreciate that the adjudicator in *Laird* did come to the conclusion that an adjudicator had no authority to award damages by way of lost income that would have been earned had the term appointment been renewed because "this would be tantamount to making an appointment and, thus, beyond my jurisdiction" (page 16). I also appreciate that he came to this conclusion notwithstanding his finding that the grievor in that case was, through bad faith on the part of the employer, laid off before the expiry of her term; and notwithstanding a finding that, were it not for the bad faith layoff, "there is every reason to believe" that her appointment would have been renewed for at least another year if not more (see page 16). However, and with the greatest respect for the adjudicator (and those who since then have relied on his reasoning), it is my view that his reasoning on this point went too far.

[132] In coming to the conclusion that he did, it is clear that the adjudicator was relying on his reading of the decision of the Federal Court of Appeal in *Dansereau v. National Film Board,* [1979] F.C. 100, and in particular, the following passage he quoted from the decision:

> *An employee hired for a specific term is not laid off when this term expires, since the termination of his employment at that time is not due to lack of work but to the terms of the contract under which the employee was hired.*

[133] A close analysis of the facts and decisions in *Dansereau* does not, in my opinion, support the conclusion that an adjudicator could never award damages in excess of what was due under the term appointment.

[134] The Federal Court of Appeal decision has its origins in the decision below of adjudicator Lachapelle in *Dansereau v. National Film Board*, PSSRB No. 166-8-3058 (19780112). Ms. Dansereau initially worked for the National Film Board under various freelance contracts as a writer, editor, director and producer. She was then hired under a one-year term contract to work as a director for a particular film. Through her appointment, she became a regular, albeit temporary, employee and was governed by the collective agreement. In contrast, freelancers were not governed by the collective agreement.

[135] The film Ms. Dansereau was hired to work on was not completed in the time contemplated. Her appointment was extended for one month. At the end of that month she left her job. The evidence was that at the time of her departure the employer had a

number of freelancers working for it on various specific tasks, and that others were hired after she left, again to perform specific tasks. It was also clear that Ms. Dansereau's skills and expertise were such that she could have performed the types of tasks that the freelancers were performing.

[136] The collective agreement contained three relevant provisions. Under the first, clause 13.03, laid-off employees were entitled to priority for reinstatement for 18 months following their layoff. Under the second, "layoff" was defined as "termination of employment because of lack of work." The third provided as follows:

> *40.01 The Employer maintains the principle and the practice of obtaining the services of regular employees and freelancers. It is agreed that services of freelancers shall not be obtained to circumvent the provisions of this agreement or to terminate employment of regular employees.*

[137] Ms. Dansereau grieved the cessation of her employment, and sought compensation for the loss of salary sustained after the end of her term appointment. Her counsel argued that the employer had used freelancers to replace Ms. Dansereau and had accordingly violated clause 40.01. He argued that Ms. Dansereau had been laid off and that she was accordingly entitled, pursuant to clause 13.03, to priority for reinstatement. As such, she should have been rehired before any more freelancers were taken on.

[138] After setting out this background, and the submissions of the parties, the adjudicator stated at page 12 that "[t]he only question here is therefore whether the termination of Mrs. Dansereau's employment . . . following the expiry of the term which had been set for her employment . . . contravenes clause 40.01 . . . in the circumstances revealed by the evidence." He noted that clause 40.01 did not prohibit the hiring of freelancers. All it prohibited was "the hiring of freelancers for the purpose of accomplishing a set purpose, that of circumventing the provisions of the collective agreement or of terminating the employment of regular employees" (pages 12 and 13). He went on to comment as follows at page 13:

> *[T]he evidence reveals no casual relationship between the hiring of the free lancers and the termination of Mrs. Dansereau's employment which might have indicated that the employer had intended, by hiring free lancers, to terminate Mrs. Dansereau's employment.*
>
> [*Sic* throughout]

[139] The freelancers in question were hired to work on projects different from the one Ms. Dansereau was working on. They were not hired to do or to complete the work she had been hired to do. They did not replace her. That being the case, he concluded at page 14 that the freelancers had not been hired to terminate Ms. Dansereau's employment. Her employment ended simply because her term had expired, not because freelancers were hired. "The expiry of the term did not serve to disguise a termination of employment caused by the hiring of freelancers" (page 14). Therefore, on these facts it could not be said that clause 40.01 had been violated. Nor could it be said that the cessation of her employment constituted a "layoff," as that term was defined in the collective agreement, because "it is not the result of lack of work but rather the result of the normal expiry of the term of employment" (page 15). Ms. Dansereau could not accordingly rely upon clause 13.03 because she had not been "laid off" (page 15).

[140] It is important to emphasize here that the decision in *Dansereau* did not represent a general statement of the law. Rather, it was a decision based on the wording of particular provisions in a particular collective agreement and on the particular facts before him. Nor was it a statement that the expiry of a term appointment could never be considered a termination. Indeed, the decision appeared to proceed on the basis that the grievor might have succeeded in her claim for lost wages after the expiry date of her contract had she been able to establish a causal connection between the cessation of her employment and the hiring of the freelancers. That in any event was one of the remedies claimed, and there was no suggestion in the decision that such could never as a matter of law be awarded.

[141] The union then applied to the Federal Court of Appeal for judicial review of the decision. Two arguments were advanced.

[142] First, the union argued that the term contract itself must have been contrary to the collective agreement, and in particular to clause 13.03. If employees under term contracts could simply be let go at the end of their term, then their rights under clause 13.03 to priority in the event of layoff would be violated.

[143] In response, the court stated that this argument "[was] not valid." Immediately after that statement, it made the oft-cited statement that an employee "hired for a specific term is not laid off when his term expires, since the termination of his

employment at that time is not due to lack of work but to the term of the contract under which the employee was hired."

[144] In other words, the rights provided to laid-off employees under clause 13.03 were not violated in this case because the grievor had not been laid off within the meaning of the collective agreement.

[145] The second argument advanced by the grievor was that, while clause 40.01 permitted the hiring of freelancers, it could not be used to contravene other rights under the collective agreement or to justify termination of employees. Justice Pratt noted at p. 102 that the adjudicator had found as a fact that there had been no causal relationship between the hiring of the freelancer and the termination of Ms. Dansereau's employment, "which might have indicated that the employer had intended, in hiring the freelancer, to terminate Ms. Dansereau's employment." His Honour went on to say that that finding of fact was supported on the record before the Court.

[146] Then on its face the decision in *Dansereau* was not, with respect, a statement that a term employee could never be awarded damages in lieu of reinstatement. What it rather said was that under the terms of the particular collective agreement in that case:

> a. a term employee whose employment came to an end pursuant to the terms of the contract had not experienced "termination of employment because of lack of work" within the meaning of the collective agreement; and
>
> b. on the facts of that case there was no causal connection between the end of the term employee's employment and the employer's decision to hire a freelancer.

[147] The decision did not—at least as I read it—say anything about what should happen if there had been a causal connection between the two events. Nor did it say that the expiry of a term contract according to its terms could never amount to a "termination" within the meaning of paragraph 209(1)(*b*) (or its former equivalent). Indeed, had Justice Pratt intended to say that one would have expected him to reject the grievor's second argument on legal principles rather than on the facts.

[148] I am accordingly not prepared to hold that an adjudicator would never have jurisdiction to inquire into a grievance involving an employee whose term contract has ended on its expiry date. In my opinion, an adjudicator does have jurisdiction to inquire into the circumstances of a cessation of a term contract where there is an allegation that bad faith or some other wrongful conduct on the part of the employer resulted in the non-renewal of that contract, when in ordinary course the contract would have been renewed. Nor is it settled law that an adjudicator in such a case could never award damages or other compensation beyond the cessation date of a term employee's contract of employment. That being the case, the mere fact that, as was the case here, a term employee is paid to the end of his term does not deny jurisdiction to an adjudicator under paragraph 209(1)(*b*). An adjudicator is still entitled to consider whether, on the facts before him or her, the cessation of employment at the end of a term contract was in fact a "termination" within the meaning of paragraph 209(1)(*b*), and if it was, consider the possibility of awarding lost income beyond the cessation date.

[149] I turn now to the grievance before me.

[150] The first question here is whether the grievor was terminated on March 29 when he was told to leave and not come back. In my opinion, he was not. He remained an employee until the end of his term contract. He continued to be paid his regular salary and benefits until the end of his term. What happened on March 29 was somewhat akin to a suspension with pay that occurs when an indeterminate employee is suspended pending an investigation into alleged wrongdoing. That employee remains an employee during the investigation, notwithstanding that he or she is told to leave the work site.

[151] The next question is whether the grievor was "terminated" within the meaning of paragraph 209(1)(*b*) of the *Act*. The answer to that question depends upon whether the grievor can establish that the employer was acting in bad faith when it decided—for decide it did—not to renew the grievor's term contract because of what it considered to be a breach of its Ethics Code. And in my opinion, the grievor has failed to establish that the employer was acting in bad faith when it decided not to renew his term appointment.

[152] The employer had reasonable grounds for its conclusion that the grievor had breached its Ethics Code by conducting himself in such a way as to give rise to an appearance, if not an actual, conflict of interest. Contrary to what the grievor submits,

it is also arguable that the grievor's lapse was not minor in the least. The grievor's opinion could determine the success or failure of the application that had been put in on behalf of Sears Canada.. The fact that, according to him, he had made the decision to approve the application prior to his conversation with Ms. Mizra does not explain why he specifically asked her to call him. They were not friends. There was no evidence that there had been any contact between them up until his request that she call him. That being the case, if he had in fact made the decision he says he made, there was no reason to ask her to call. The fact that he did ask her to call, and then proceeded to discuss his daughter's possible employment with Sears Canada in the context of what could only have appeared to her to be a call about the application, could easily be interpreted as a request for a *quid pro quo*. The fact that the grievor did not expressly ask for employment for his daughter, or expressly solicit a donation to his charity, does not mean that the person speaking to him might not think that such requests were implied. Indeed, the fact that Ms. Mizra spoke to corporate counsel after the call, and the fact that a call was then made to the grievor's team leader, simply underlines the fact that the phone call at the very least had "the appearance" of being a conflict.

[153] There is also the fact that the grievor sent a link to his charitable website to Ms. Mizra. His justification—that he simply wanted to tell her his own life story—did not strike me as credible. First, there really was no need to carry on the "discussion" between them once the call ended. Second, it would have been a simple matter to cut and paste his own life story without the link into a reply email to Ms. Mizra. That is not what he did.

[154] These facts, not denied by the grievor, satisfy me that the employer's decision not to renew his contract was made in good faith. It was based on a reasoned conclusion that he had violated its Ethics Code by way of an apparent, if not actual, conflict of interest. Such conduct would in normal course have warranted discipline of some sort, a fact that is enough in my opinion to establish the employer's good faith. It does not matter that the decision not to renew the term contract, may have been severe. The decision not to renew the grievor is completely consistent with the employer's concerns around the grievor's judgment and, as I have discussed earlier in my reasons and will summarize below, while discrimination and harassment could constitute bad faith, there is no evidence of discrimination or harassment here. The evidence did not establish a *prima facie* case, let alone one on a balance of probabilities, that the employer's decision was based in any way on a ground of

discrimination under the *CHRA*. Nor does it matter that, had the grievor been an indeterminate employee, an adjudicator might conclude that termination would have been too harsh a penalty. This is not a case of discipline. The issue is simply whether the employer was acting in good faith, not whether an adjudicator agrees with the decision made in good faith.

[155] I also do not accept the grievor's argument that the decision not to renew the term appointment based on the ethics breach was in any way a veiled act of discrimination. I think it is important to note that the grievor failed to establish even a hint of discrimination based on race or national origin. The differential treatment that the grievor offered up as circumstantial evidence of such discrimination was in my opinion all treatment that was tied to his conduct, not to his race or national origin. He did receive overtime once his training was complete and he was released. He was given more training when a question he asked at a meeting suggested he needed it. When he complained about the lack of consultation, his team leader agreed that she would do better the next time. The fact that a mentor shouted at him for his work establishes, at best, that the mentor was not suited for his task. It says nothing about whether he was unfair in his assessment of the grievor's work on the file. The fact that Ms. Hibberd shouted at him after the evacuation was because he was absent from an assembly point, not because he was Kenyan or Black. Moreover, she later apologized to him with the perfectly reasonable explanation (and one I accept) that her initial reaction had been based on stress associated with concern for her employees (I note too that this supposedly biased manager nevertheless renewed his term appointment after the concerns about the Sears Canada incident arose). These and the other examples offered by the grievor are in my view emblematic of the grievor's tendency to deflect any personal responsibility for his actions onto others. The incident involving Ms. Iyer, as detailed above, was only one example of this tendency. The grievor acknowledged that he knew what the normal procedure was in such situations, but failed to follow it. When reminded of the proper procedure by his managers, he insisted on escalating the incident into a quasi-disciplinary one, indeed attempting to drag Ms. Iyer into it when she had only done what was expected of her. Although not determinative of this issue, I would also note that the employer's workforce, on the evidence, was a complex mix of racial types and national origins, and given all the evidence before me, that fact makes the allegation somewhat difficult to credit.

[156] For all these reasons, I am satisfied that:

a. I have jurisdiction to consider the allegation that the grievor's term contract was not renewed because of bad faith or discrimination that would make the non-renewal in law a "termination" within the meaning of paragraph 209(1)(*b*) of the *Act*,

b. the grievor has failed to establish the existence of any such bad faith or discrimination, pursuant either to the collective agreement or the *CHRA*, and that accordingly

c. the non-renewal of his term contract was not a "termination" within the meaning of paragraph 209(1)(*b*) of the *Act*, or discrimination within the meaning of the *CHRA*.

[157] As a result of these determinations, my jurisdiction ceases. The file must be ordered closed.

[158] For all of the above reasons, I make the following orders:

(The Order appears on the next page)

IX. Order

[159] I am without jurisdiction to hear the Letter of Reprimand grievance (PSRLB File No. 566-02-7449) and I order the file closed.

[160] The harassment grievance (PSLRB File No. 566-02-7450) is dismissed.

[161] While I have jurisdiction to hear the termination grievance (PSLRB File No. 566-02-7448), on the evidence the cessation of the grievor's term employment was not a termination within the meaning of paragraph 209(1)(*b*) of the *Act* and I accordingly have no jurisdiction, I order the file closed.

September 19, 2013.

Augustus Richardson,
adjudicator