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File: 166-34-32661

Citation: 2004 PSSRB 167

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

BRIAN LUNDIN

Grievor

and

CANADA CUSTOMS AND REVENUE AGENCY

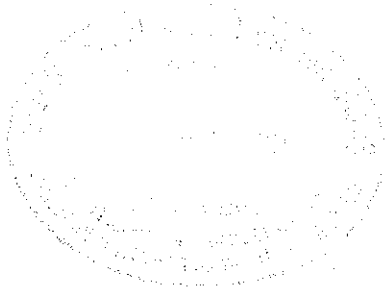
Employer

Before: Ian R. Mackenzie, Board Member

For the Grievor: Himself

For the Employer: Jennifer Champagne, Counsel

Heard at Ottawa, Ontario,
August 9 and 10, 2004.



[1] On September 23, 2002, Brian Lundin was rejected on probation from his position as a Systems Analyst (CS-02) with the Canada Customs and Revenue Agency (CCRA), as it was then called. Mr. Lundin grieved the rejection on probation, alleging that it was "disguised discipline". His grievance was referred to adjudication on August 13, 2003.

[2] Mr. Lundin also filed a complaint with the Canadian Human Rights Commission (CHRC) against his rejection on probation. During the course of the hearing before me, counsel for the employer, Jennifer Champagne, advised that the CHRC had deferred to the jurisdiction of the Public Service Staff Relations Board (PSSRB). By letter dated January 15, 2004, the CHRC decided, pursuant to paragraph 41(1)(b) of the *Canadian Human Rights Act* (*CHRA*), not to deal with the complaint "at this time" because:

> *... the complaint could more appropriately be dealt with according to a procedure provided for under another Act of Parliament. At the termination of this procedure, or if it proves not to be reasonably available, the Commission may exercise its discretion to deal with the complaint at the complainant's request.*

[3] At the commencement of the hearing, I outlined the hearing procedure for the parties, as well as the burden of proof in a case involving a rejection on probation.

[4] Counsel for the employer raised three objections to the PSSRB's jurisdiction to hear this grievance: (1) the timeliness of the grievance; (2) the ability of Mr. Lundin to file a grievance pursuant to section 91 of the *Public Service Staff Relations Act (PSSRA)*; and (3) the ability to refer a grievance against rejection on probation pursuant to section 92 of the *PSSRA*.

[5] The rejection on probation letter was issued on September 3, 2002, and the grievance is dated March 21, 2003. The final level grievance response notes that the grievance was untimely and rejects the grievance on that basis (as well as on other grounds, discussed below). I advised Mr. Lundin of his right to seek an extension of time pursuant to section 63 of the *PSSRB Regulations and Rules of Procedure, 1993*, and he made the application at this hearing. I reserved on the determination of whether the grievance was timely, as well as reserving on the application for an extension.

[6] Counsel for the employer also objected to the jurisdiction of the PSSRB on the basis of subsection 91(1) of the *PSSRA*. In the final-level response to the grievance, D.G.J. Tucker, the Assistant Commissioner, Human Resources Branch, stated:

> [...]
>
> *Pursuant to section 91 of the* Public Service Staff Relations Act *and clause 34.04(a) of your Collective Agreement, an employee may present a grievance in respect of which no administrative procedure for redress is provided in or under an Act of Parliament. Employees of the Canada Customs and Revenue Agency who are rejected on probation have an administrative procedure for redress under section 8.1 of Canada Customs and Revenue Agency's Staffing Program in the form of Individual Feedback followed by Decision Review. I understand that you were afforded the applicable recourse for a rejection on probation in accordance with section 8.1 of the Staffing Program. Therefore, a rejection on probation is not subject to the grievance process. I am unable to intervene in this matter on the basis that another procedure for redress exists to address your issues.*
>
> [...]

[7] Ms. Champagne submitted that section 54 of the *Canada Customs and Revenue Agency Act* (*CCRA Act)* provided for the other "administrative procedure for redress":

> ***54.****(1) The Agency must develop a program governing staffing, including the appointment of, and recourse for, employees.*

[8] Mr. Lundin argued that the decision in *Archambault v. Canada Customs and Revenue Agency*, 2003 PSSRB 28, applied and that an adjudicator did have jurisdiction.

[9] I noted that counsel for the employer's argument under section 91 of the *PSSRA* was not raised in *Archambault* (*supra*). I further noted that I could not rule on this objection to jurisdiction without evidence. I therefore reserved on this objection, as well.

[10] Ms. Champagne also relied on subsection 92(3) of the *PSSRA* as an analogy to argue that I was without jurisdiction:

> *(3) Nothing in subsection (1) shall be construed or applied as permitting the referral to adjudication of a grievance with respect to any termination of employment under the* Public Service Employment Act.

[11] It was common ground that the *Public Service Employment Act* (*PSEA*) does not apply to the CCRA. Mr. Lundin brought *Archambault* (*supra*) to my attention. I reserved on this objection, as well.

[12] I ruled that I would first determine whether I had jurisdiction to hear the merits of the grievance. If I determined that I did have jurisdiction, dates would be set to hear evidence on the merits.

[13] During the course of the hearing, Mr. Lundin objected to parts of an exhibit (Exhibit E-6) that allegedly contained the notes of Andrew Howieson, Mr. Lundin's supervisor, relating to Mr. Lundin's performance. He noted that Mr. Howieson was not present to be questioned on the notes or to prove that they were, in fact, his notes. One entry contained the notes of John Feiner, Project Manager, who did testify, and another entry related to a meeting attended by Messrs. Lundin and Feiner. The only portions of the exhibit that are admissible are the portions identified by Mr. Feiner as his own notes and those notes of the meeting that Mr. Feiner attended. Consequently, I have not considered the other portions of the notes.

[14] Two witnesses testified on behalf of the employer, and Mr. Lundin testified on his own behalf.

Evidence

[15] Mr. Lundin received a letter of offer from the CCRA on August 10, 2001, for an indeterminate position as a Systems Analyst with the Ottawa/Hull Information Technology (IT) Branch (Exhibit E-1). The position was classified at the CS-02 group and level (Computer Systems Administration). Mr. Lundin was living in Winnipeg when he received the letter of offer. His appointment was effective September 17, 2001. An attachment to the letter sets out the terms and conditions of employment, including notification of a 12-month probationary period.

[16] Mr. Lundin testified that he had 25 years of computer statistics analysis experience and a Master's degree in the science of statistics and computers.

[17] John Feiner is the Project Manager in the IT Branch and testified on behalf of the employer. He is the supervisor of Mr. Howieson, a Project Leader, who was Mr. Lundin's supervisor. Mr. Feiner testified that he was not aware of Mr. Lundin's prior work experience and did not contact Mr. Lundin's references. He testified that he

relied on others in the CCRA to conduct the hiring process. He testified that it was his expectation that an experienced IT person was being hired.

[18] The main duties of the position revolved around the development and maintenance of a workload management system for the "Other Levies" section of the CCRA. Mr. Feiner testified that Mr. Lundin's role was to understand the client's business requirements, convert those business requirements to system specifications and to work with the programmers to develop improvements and "bring it to implementation".

[19] An "Employee Performance Management Report" (Exhibit G-8) was signed by Mr. Lundin on November 14, 2001. The goals for the upcoming review period were identified as follows:

> *One of the main goals of this directorate is to foster a team environment. To achieve this goal, you are expected to function as a team member and demonstrate appropriate inter-personal skills, as well as being able to work independently when required.*
>
> 1. *Analyze, proposed computer applications and requests for systems change/development to determine the scope, impact, and cost of implementation. Develop and maintain applications computer systems by developing, implementing and testing solutions to computer systems requirements.*
>
> 2. *Client service Oriented. Give the best service possible.*
>
> 3. *Supporting CCRA Values.*

[20] Mr. Feiner testified that he first became aware of problems with Mr. Lundin's performance early in the spring of 2002, when an employee approached him to raise concerns about inappropriate comments made by Mr. Lundin in the workplace. Mr. Feiner followed up with Mr. Howieson. It was after that meeting with Mr. Howieson that he became aware of performance issues. The concerns related to the time it took the grievor to get work done, his understanding of the basic fundamentals and his productivity. After the initial meeting with Mr. Howieson, the Human Resources Section of the CCRA was approached for guidance.

[21] Mr. Howieson prepared a document to address performance concerns called "CCRA's Action Plan for Developing Performance for Employees Who Do Not Meet Performance Expectations" (the "Action Plan") (Exhibit E-3). Mr. Lundin testified that this document was placed on his desk sometime around April 23, 2002.

[22] The review period for the Action Plan was for April 23 to May 24, 2002, and was signed by Mr. Howieson on May 2, 2004. There were two required "performance improvements" identified: "Improving his performance in regard to interaction with the CIP team" and "Knowledge of the Case Management Software". The "Corrective Action(s)" column of the form stated that Mr. Lundin would review material provided on the "Code of Ethics and Conduct" and "Preventing and Resolving Harassment". It stated that, based on comments made to him during a meeting on April 23, 2002, and this material, he would "take the necessary steps to establish good working relationships with his fellow team members." This performance factor would be "re-evaluated based largely on feedback from his teammates".

[23] Under the second area for improvement identified ("Knowledge of the Case Management Software"), Mr. Howieson set out the following corrective actions (Exhibit E-3):

> *Brian will review the OLAS Business Requirements and determine how they map to Case solutions. He will then work with the experienced OLP analysts to translate these requirements into BP Mapping changes. These changes are expected to be completed by the end of iteration 7.*
>
> *Brian will be evaluated on how quickly and efficiently these updates are made and how much of the work he was able to accomplish on his own. The expectation being that he will need some help initially but as his understanding progresses he should be able to work independently. Also it is expected that he will research issues related to this work and propose solutions to the other OLP analysts for their input.*

[24] Mr. Lundin refused to sign the Action Plan for the period April 23 to May 24, 2002, because of statements about harassment and the "Code of Ethics and Conduct". Mr. Feiner met with Mr. Lundin on May 6, 2002. Mr. Lundin told him that he "wanted things to improve" but did not want to sign the Action Plan. Mr. Feiner assured him that signing only meant that he had met with Mr. Howieson and had discussed the document. Mr. Lundin still did not want to sign it, and Mr. Feiner indicated that this was fine and annotated the form as follows:

> *I discussed this form (and the overall situation) with Brian. He is uncomfortable in signing the form because of the references to Code of Conduct and Harassment. I told him that I am o.k. with him not signing as long as he understands the situation. He said he does.*

[25] Mr. Lundin testified that he asked that the CCRA's Dispute Resolution System (Exhibit G-1) be used to address the concerns raised in the Action Plan about his interaction with the work team. He further testified that his managers never responded to this request.

[26] Mr. Feiner testified that the assumption in hiring at the CS-02 group and level was that the employee had a background in IT and that training was only required on the workload management system. All employees received a handbook and documentation, as well as an interactive training system. Mr. Lundin was also assigned a mentor, an experienced analyst with previous success in mentoring. Mr. Lundin testified that he worked unpaid overtime to get up to speed on the CCRA system.

[27] A second Action Plan was prepared for the period of June 4 to 28, 2002, (Exhibit E-3). The first identified area for improvement was "Continue to improve his performance in regard to interaction with the CIP team." The corrective action required was to attend an interpersonal skills workshop. The second area identified for improvement was the same as in the first action plan: "Knowledge of the Case Management Software." The corrective action was a number of tasks and concluded that Mr. Lundin would be evaluated on "how quickly and efficiently these updates are made and how much of the work he is able to accomplish on his own." Mr. Lundin signed the Action Plan.

[28] Messrs. Feiner and Howieson met with Mr. Lundin on August 1, 2002, to discuss his performance as it related to the second Action Plan. At this meeting, Mr. Lundin was advised that there had been significant improvement in his relations with colleagues. However, concerns were expressed about his productivity. Mr. Feiner testified that Mr. Lundin was told that if a decision were to be made that day, it would be to reject him on probation. Mr. Feiner also testified that Mr. Lundin was asked if there was "anything outside of his work that might be affecting his performance." He testified that Mr. Lundin only mentioned his "sore knee". Mr. Feiner stated that Mr. Lundin was also advised of the Employee Assistance Program (EAP) if there was anything he needed to discuss. Mr. Feiner also testified that Mr. Lundin was advised

that assignments over the next review period (August 1 to 29, 2002) would be at the level that he was expected to be working at after 10 months on the job. Mr. Lundin was warned that his performance would be reviewed on August 28, 2002, and if expectations were not being met, he would be rejected on probation. Mr. Feiner stated that he did not recall that Mr. Lundin challenged or refuted the observations on his performance.

[29] The third Action Plan covered the period August 1 to 29, 2002 (Exhibit E-3). The same two areas for improvement were listed: "Continue to improve his performance in regard to interaction with the CIP team" and "Knowledge of the Case Management Software". The corrective actions for interaction with the CIP team were listed as follows:

> *Work independently. Do not rely on other team members to make simple decisions or to verify information that is readily available.*
>
> *Follow up on issues in a timely fashion.*
>
> *Clearly communicate his ideas in both a verbal and written format.*
>
> *Be adaptable - demonstrate flexibility in priorities and assignments.*
>
> *This will be re-evaluated based upon personal observation and feedback from his teammates.*

[30] The corrective actions under "Knowledge of the Case Management Software" were as follows:

> *Brian will continue to work on the OLAS BP Mapping changes.*
>
> *There are also a number of minor issues that he has been asked to complete which need to be actioned. It is expected that progress will be made on these along with his other assignments and new work is also actioned in a timely fashion. It is expected that during this review period there will also be several small assignments which will be given and which Brian is expected to complete on his own in a timely fashion. These may include impacting and/or implementing change requests, actioning problems reports as a result of testing etc.*
>
> *Be able to apply basic Case concepts.*

> *Brian will be evaluated on how quickly and efficiently these updates are made and how much of the work he is able to accomplish on his own.*

[31] All three of the Action Plans (Exhibit E-3) included the following comment: "Failure to comply with these expectations could result in rejecting Brian on probation."

[32] On August 8, 2002, Mr. Lundin sent an e-mail to Mr. Feiner (Exhibit E-4) requesting an evaluation by Health Canada of his fitness to work. He also wrote that he would attempt to get information on his present state of health from his family doctor. Mr. Feiner replied on the same day, as follows:

> *As we just discussed, all of the previous conversations that Andrew and I have had with you over the past several months concerning your performance while on probation gave you ample opportunity to bring up health issues as a factor that could be contributing to your slower than expected progress. In fact, several times you were asked by us if there were any factors that we may not be aware of that could be hampering your progress and in each instance, you said there was not.*
>
> *At the present time, we do not believe it is necessary to refer you for a Health Canada assessment and we have not observed any physical or psychological evidence that compels us to initiate a referral. Nonetheless, if you obtain a letter from your family doctor indicating that a health condition is in fact contributing to your slower than expected progress, we will then provide any reasonable accommodation that may be necessary to assist you with the safe and effective performance of your duties.*
>
> *If your doctor does identify that a health condition is hampering your progress, I would like to underscore the fact that you are not obliged to share any information with management specifically related to your condition as this is your personal information. On the other hand, if your family doctor identifies any limitation(s) that require special accommodation, management may at that time revisit the issue of referring you for a Health Canada assessment.*

[33] Mr. Feiner testified that this was the first time that Mr. Lundin raised any health issues. Mr. Lundin testified that he had spoken to his supervisor, Mr. Howieson, about his health issues on a number of prior occasions. Mr. Feiner testified that the employer initiates an assessment of fitness to work by Health Canada only if it is felt that a health problem is affecting work. After many requests to Mr. Lundin to advise

them if his health was affecting his work and being told "no", there was no reason to believe that health was a factor in the performance of his job.

[34] On or about August 20, 2002, Mr. Lundin started to use a wheelchair at work. He had started to use a cane at work around April 2002.

[35] On August 26, 2002, Mr. Lundin sent an e-mail to Kathy McDougall (Director, Client Identification Division) and to Messrs. Feiner and Howieson (Exhibit E-5) setting out "some issues related [to] work and health". In this e-mail, he provided the names of his doctors for blood-related issues (including anaemia) and neurological issues. He stated that a blood transfusion was required every month to alleviate his anaemia and related issues. The blood transfusions were having a "beneficial affect" [sic]. He stated that neurological tests were being conducted. Prior to starting work at the CCRA, he stated that there had been no health issues related to blood or coordination. He also stated that the wheelchair had improved both his lifestyle and work ability. He repeated his request for a Health Canada evaluation of fitness to work. He also requested the appropriate forms for a long-term disability application.

[36] Mr. Feiner replied on the same day, as follows (Exhibit E-5):

> *Brian,*
>
> *As for #4 in the attached email, I have already answered your question about a Health Canada Assessment in an email I sent to you on August 8th. If you did not receive a copy, please let me know.*
>
> *As for #5, I will get a copy of the Long Term Disability application form for you tomorrow.*

[37] Phred Hughes, Director-General, Revenue Accounting Systems Directorate, IT Branch, signed the letter rejecting Mr. Lundin on probation dated September 3, 2002 (Exhibit E-2). The letter provided that his employment would terminate at the close of business on September 23, 2002. Mr. Feiner met with Mr. Lundin to give him the letter. Mr. Lundin did not meet with Mr. Hughes until the individual feedback process (see below). The letter gave the following reasons for the rejection on probation:

> [...]
>
> *A review of your performance over the last eleven months indicates that you are unable to meet the required levels for this position. Reviews were conducted by your Project*

> *Leader, Andrew Howieson, in April, June and August. In each instance, your performance expectations and your performance were discussed with you in detail and you were advised that you were not meeting those expectations. You were also asked to identify any extenuating circumstances that were affecting your performance. You told us there were none. Every effort was made to ensure that you had the proper coaching, mentoring and training however in spite of all of this, there have not been any significant improvements in your performance.*
>
> [...]

[38] The letter also stated that recourse consisted of individual feedback "and, if requested by the employee, decision review", as provided for in the CCRA Staffing Program Directive (Exhibit E-8) on "Recourse for Staffing". The Staffing Program provides for a 12-month probationary period and for rejection on probation "where justifiable" with two weeks' notice. The Staffing Program states, at paragraph 8.1-7, that employees rejected on probation "have access to Individual Feedback followed by Decision Review, in accordance with the CCRA Directive on Recourse for Staffing" (Exhibit E-8, Annex "L"). Both individual feedback and decision review allow an employee to be "accompanied" but do not provide for a right to be represented.

[39] Mr. Lundin was advised in the letter that he had seven calendar days following receipt of the letter to request individual feedback. On September 9, 2002, Mr. Lundin filed a request for individual feedback (Exhibit E-9). He set out the following three reasons for seeking feedback:

> 1. *Disagree with managers' assessment of my performance, at no time during my probation period did management indicate spec*[ific] *issue with the quality of my work.*
>
> 2. *This is a possible disciplinary action because of an alleged complaint of "harassment" against me.*
>
> 3. *This may have issues related to disability and disability insurance.*

[40] The directive on Recourse for Staffing requires a response to a request for individual feedback within 20 days (Exhibit E-8). Mr. Hughes testified that he reviewed documentation that he received from Mr. Feiner and then met with Mr. Lundin. Mr. Hughes responded to the request for individual feedback on October 21, 2002, (Exhibit E-10) and concluded that no corrective action would be taken. He stated that he was satisfied that Mr. Howieson had frequently informed Mr. Lundin of the

inadequacy of his performance and had taken steps to help him improve. Apart from the first Action Plan (Exhibit E-3), he stated that he found no other explicit reference to harassment. In response to the allegation relating to disability, Mr. Hughes stated that Mr. Lundin had indicated that there was nothing interfering with his performance when he was asked on August 1, 2002.

[41] Mr. Lundin requested a decision review on September 27, 2002, prior to receiving the response to the request for individual feedback. The directive on Recourse for Staffing requires a response within 20 days of receipt of the request. Mr. Lundin received a response from Susan Brown, Deputy Assistant Commissioner, on February 28, 2003 (Exhibit E-12). She concluded that his situation was "fully investigated and that you were unable to meet your performance expectations in spite of the guidance, counselling and training provided to you by our managers". She concluded that there was no evidence of disguised disciplinary action. She also concluded that his disability did not have any impact on the decision to reject him on probation. She concluded:

> *...as I do not find that the decision to reject you on probation was done in an inconsistent manner, that the process leading up to the rejection was applied incorrectly or unfairly, or that it was a disguised disciplinary action, no corrective action will be taken as a result of Decision Review.*

[42] Mr. Lundin filed his grievance against the rejection on probation on March 21, 2003 (Exhibit E-7). He testified that his union representative, Martin Ranger, advised him that he could file a grievance after the decision review process had been completed.

[43] Mr. Lundin's application for disability insurance was approved on September 3, 2003, retroactive to December 21, 2002.

Arguments

For the Employer

[44] Counsel for the employer submitted that Mr. Lundin's rejection on probation was not disciplinary and therefore not within the jurisdiction of an adjudicator. Mr. Lundin was rejected because of reasons related to his unsuitability and unsatisfactory performance. The letter rejecting Mr. Lundin on probation (Exhibit E-2) refers to his unsatisfactory performance as the reason for the rejection. Mr. Lundin

was asked prior to his rejection on probation to identify extenuating circumstances affecting his performance, and none were identified. Mr. Lundin received proper coaching during his probationary period. His shortcomings were identified in the Action Plans (Exhibit E-3) and apart from comments relating to harassment, were not disputed by Mr. Lundin in his testimony. Mr. Lundin was told on many occasions what was expected of him, as well as receiving feedback on his performance. He was offered and given resources that would be helpful in improving his performance. Mr. Feiner testified that Mr. Lundin was hired as an experienced employee and basic training was not offered. However, training on the system used within the CCRA was provided and mentoring was offered. Mr. Feiner testified that an "adjustment period" was expected of all employees but that the expectation was that all employees would be fully effective within six to nine months. It was quite apparent by August 2002 that, without a miracle, Mr. Lundin would not be fully efficient. Throughout the series of Action Plans, Mr. Lundin was made aware of his shortcomings and the consequence of not meeting those expectations.

[45] Ms. Champagne noted that Mr. Lundin's arguments against his rejection on probation revolve around harassment. There was never a formal complaint of harassment against Mr. Lundin. Mr. Feiner testified that comments had been brought to management's attention. In order to avoid problems in the future and in order to meet the employer's obligation to provide a harassment-free workplace, Mr. Lundin was informed of the existing policies against harassment. In no way did this action by the employer imply that Mr. Lundin was guilty of harassment. Soon after he received the warning, improvements in his behaviour were noted and this was no longer an issue. The last time that this was discussed was on May 6, 2002. The employer did not consider this in coming to its decision to reject Mr. Lundin on probation. There was no evidence to support the contention of Mr. Lundin in his grievance that this was why he was released.

[46] Ms. Champagne referred me to *Canada (Attorney General) v. Leonarduzzi*, [2001] F.C.J. No. 802 (QL), *Canada (Attorney General) v. Penner*, [1989] 3 F.C. 429 (QL) and *Archambault* (*supra*). She submitted that once the employer has demonstrated an employment-related reason for rejection on probation, the burden of proof shifts to the employee to demonstrate that the rejection on probation was disguised discipline or a "sham". Mr. Lundin has not met his burden of proof. He did not demonstrate that he was rejected on probation because of alleged harassment complaints or for any

other reasons other than those set out in the letter rejecting him on probation. Ms. Champagne also referred me to *Owens v. Treasury Board (Royal Canadian Mounted Police)*, 2003 PSSRB 33.

[47] Ms. Champagne also argued that the grievance mechanism was not available to Mr. Lundin under section 91 of the *PSSRA*. The *CCRA Act* gave exclusive authority to the CCRA to oversee staffing and staffing recourse (section 54). Mr. Lundin used both levels of recourse that were available to him under the CCRA staffing directives. Accordingly, it is not open to him to seek parallel recourse. The CCRA did not provide for grievances to be open to individuals rejected on probation; the sole recourse is set out in the Staffing Program (Exhibit E-8). If an employee is dissatisfied with the results of the CCRA recourse, then the appropriate action is judicial review, not filing a grievance. Ms. Champagne referred me to *Dhudwal and Others v. Canada Customs and Revenue Agency*, 2003 PSSRB 116, and *Anderson v. Canada (Customs and Revenue Agency)*, 2003 FCT 667; affirmed 2004 FCA 126.

[48] Ms. Champagne also submitted that the grievance was untimely. Mr. Lundin was not grieving the Decision Review memorandum. He was grieving his rejection on probation. He should have filed his grievance within 25 days of September 3, 2002, the date on which he received the letter rejecting him on probation. She submitted that a bargaining agent representative had assisted Mr. Lundin and he was able to seek assistance in the proper understanding of the collective agreement. There were no extraordinary factors that would justify an extension of time to file a grievance of more than five months. She submitted that I should deny the application for an extension of time.

[49] With regard to Mr. Lundin's health-related problems, Ms. Champagne submitted that Mr. Lundin had not been forthcoming to the employer with information on any health issues that might have affected his performance. It was incumbent on him to provide any information. Mr. Lundin was asked numerous times if anything was impeding his performance and he said there was nothing, other than a "sore knee".

[50] The CHRC's decision to defer to adjudication does not change the fact that the question that remains is whether Mr. Lundin was rejected on probation for reasons relating to employment. The referral of the CHRC does not change the nature of the question before an adjudicator, and the test remains the same.

[51] There was no evidence that he was rejected for any reasons other than those set out in the Action Plan (Exhibit E-3). The e-mail dated August 26, 2002 (Exhibit E-5) was the first piece of information on anything pertaining to his health. He had persistently refused to share information previously. The employer is under no obligation to probe if an employee does not want to be forthcoming; the employee is the only one to blame for the lack of communication.

For the Grievor

[52] Mr. Lundin submitted that the letter rejecting him on probation required him to use the internal process first, followed by the grievance process. It was for this reason that he filed his grievance when he did. Accordingly, he submitted that his grievance was timely.

[53] Mr. Lundin submitted that it was necessary to look at the foundation of the rejection on probation to understand the good faith or bad faith of the overall process. He submitted that the bad faith started on April 23, 2002, when the employer alleged that he was guilty of harassment (Exhibit E-3). He noted that this allegation was still on his overall evaluation. Mr. Lundin disputed that the meeting on April 23, 2002, ever took place and that he made those comments. The allegations in the Action Plan were never investigated, and Mr. Lundin submitted that he still did not know what the alleged comments referred to in the document were. Mr. Lundin submitted that once it is shown that the first action of the employer was in bad faith, anything that comes after is also in bad faith, even though it might look legitimate. The bad faith of the employer started on April 23, 2002, and continued right through to the rejection on probation. Mr. Lundin submitted that he was being harassed by the employer's actions in not giving him access to recourse for the allegations of harassment. He was provided with no mechanism for rebuttal of the allegations in the Action Plans. Also, his managers were talking to his colleagues and he did not know what was being said about him. Mr. Lundin argued that the managers had "dirtied the water" and once the water is dirty, what can you do with it?

[54] Mr. Lundin submitted that he signed subsequent Action Plans because there was no point in refusing; he had made his objections and had also requested the CCRA's Dispute Resolution System to deal with the allegations of harassment.

[55] Mr. Lundin also submitted that the employer did not follow the applicable employer guidelines on managing performance (Exhibits G-5 and G-6). The obligations set out in the guidelines are summarized in Exhibit G-6:

> [...]
>
> 2. *At the minimum, the manager must be able to demonstrate the following responsibilities have been fully met:*
>
> - *the duty to act in good faith;*
> - *the duty to inform the employee fully of the requirements of the position;*
> - *the duty to inform the employee that the employee is not meeting the requirements of the position, to inform the employee of the nature of the shortfall, and of the consequences if the employee continues failing to meet the requirements of the position;*
> - *the duty to provide the employee with the opportunity to make the necessary adjustments to meet requirements;*
> - *the duty to assist the employee in making these adjustments; and*
> - *the duty to explore alternative solutions before demoting or releasing the employee.*
>
> [...]

[56] Mr. Lundin submitted that there was no effective review of his performance and he was not permitted to provide comments on the Action Plans. The documents were always written prior to any discussion. He argued that the individual feedback process accepted the Action Plan documents at face value and perpetuated the bad faith, as did the decision review.

[57] Mr. Lundin submitted that on at least one occasion he had told his manager, Mr. Howieson, that he had "really serious health issues". In August of 2002, he told Messrs. Feiner and Howieson about his medical condition and requested an evaluation of his fitness to work. Mr. Lundin stated that he told everyone who asked that he had "problems". He noted that, initially, he felt that he did not need any assistance with his medical condition but by August, he felt that a Health Canada evaluation would alleviate his problems and provide a good basis for a layoff or leave until the problems "resolved themselves".

[58] Mr. Lundin submitted that there was enough evidence to put the good faith of the employer in doubt. In the letter rejecting him on probation (Exhibit E-2), the employer stated that there were no "extenuating circumstances". Mr. Lundin submitted that he had identified the two extenuating circumstances for the employer: the false allegations of harassment and health issues.

Reply Argument

[59] Ms. Champagne submitted that an allegation of bad faith is not an allegation that can be made lightly. It is not enough to describe everything as "bad faith"; you must also demonstrate that there was bad faith. Mr. Lundin can disagree with the process, but this does not mean that it was done in bad faith.

Additional Arguments

[60] I drew the parties' attention to *Dhaliwal v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2004 PSSRB 109, a decision issued on the day of the hearing, and gave both parties an opportunity to comment on it.

For the Employer

[61] Ms. Champagne submitted that the facts in *Dhaliwal* (*supra*) were quite different from the facts in this case. There were no performance problems in *Dhaliwal* (*supra*), only an issue around the use of leave. The decision reiterates the test in *Leonarduzzi* (*supra*). In Mr. Lundin's case, the employer has met its obligation to inform the employee of the deficiencies in his performance and the consequences of not addressing those deficiencies. The employer also meets its obligation to enquire into the reasons for the deficiencies in performance. The employee also has a duty to collaborate in this regard and inform the employer of any reasons for the lack of performance.

For the Grievor

[62] Mr. Lundin referred me to paragraph 76 of *Dhaliwal* (*supra*):

> *[76] ...When the employer decides that an employee is unsuitable for the position to which he or she was appointed to, it has an obligation to lead evidence regarding how it came to its decision to reject the employee on probation: Leonarduzzi (supra). In other words, although the onus is on the employee to prove bad faith, the employer must demonstrate what rationale, what building blocks were used*

> *to reach such a decision. The employer must lead evidence regarding the building blocks that led to such a decision. If it does so, the issue of good faith will be dealt with, as the evidence will demonstrate that the decision was made in good faith.*

[63] Mr. Lundin submitted that in the decision to reject on probation in this case, some of the "building blocks" were flawed.

[64] Mr. Lundin also referred me to paragraph 83 of the decision, and in particular the following:

> *[83] ...In my view, if a decision is not made in good faith using the guidelines in the Treasury Board's own policy, the result is a decision made in bad faith.*

[65] Mr. Lundin submitted that he had not been given access to processes for addressing the allegations of harassment.

Reasons for Decision

[66] This reference to adjudication raises three jurisdictional issues:

1. Is this a matter that can be grieved under section 91 of the *PSSRA*? In other words, is there another "administrative procedure for redress in or under an Act of Parliament"?

2. If it is a matter that can be grieved under section 91 of the *PSSRA*, is the grievance timely? If the grievance is untimely, is it appropriate to extend the time limits for the filing of a grievance?

3. If a grievance can be filed and if the grievance is timely (or, if an extension is granted), was the rejection on probation disguised discipline?

[67] For the reasons set out below, I have concluded that rejection on probation is a matter that can be grieved in accordance with section 91 of the *PSSRA*, as there is no other administrative procedure for redress in or under an Act of Parliament.

[68] I have also concluded that the grievance is not timely but that it is appropriate in the circumstances to grant an extension.

[69] I have concluded that Mr. Lundin's rejection on probation was not disciplinary. Accordingly, I have concluded that I am without jurisdiction under section 92 of the *PSSRA*.

[70] I will deal with each issue in turn.

Section 91 of the *PSSRA*: Is There Another Administrative Procedure For Redress?

[71] Section 91 of the *PSSRA* states that an employee is entitled to present a grievance at all levels, including the final level, unless an "administrative procedure for redress is provided in or under an Act of Parliament." The threshold question to determine is whether the CCRA Staffing Recourse mechanism is such an administrative procedure. More specifically, the question is whether a rejection on probation at the CCRA is subject to an administrative procedure other than a grievance.

[72] The Supreme Court of Canada (in *Regina Police Association Inc. v. Regina (City) Board of Police Commissioners,* 2000 SCC 14) at paragraph 39, has stressed the importance of deciding jurisdictional issues in a "manner that is consistent with the statutory schemes governing the parties":

> *The key question...is whether the essential character of a dispute, in its factual context, arises either expressly or inferentially from a statutory scheme. In determining this question, a liberal interpretation of the legislation is required to ensure that a scheme is not offended by the conferral of jurisdiction on a forum not intended by the legislature.*

[73] The *CCRA Act* provides the employer with the authority (and obligation) to develop a "program governing staffing, including the appointment of, and recourse for, employees" (subsection 54(1)). The employer has developed a staffing program and staffing recourse process (Exhibit E-8).

[74] The *CCRA Act* (under paragraph 51(1)(g)) also gives the authority to the employer to terminate employment for reasons other than discipline, identical to the power given to the Treasury Board under the *Financial Administration Act*:

> *(g) provide for the termination of employment, or the demotion to a position at a lower maximum rate of pay, for reasons other than breaches of discipline or misconduct, of persons employed by the Agency, and establish the circumstances and manner in which and the authority by which or by whom those measures may be taken or may be varied or rescinded in whole or in part;*

[75] As clearly set out in the letter of rejection on probation (Exhibit E-2), Mr. Lundin was rejected on probation under paragraph 51(1)(g) of the *CCRA Act*. The provisions for establishing a recourse mechanism under the *Act* (subsection 54(1)) appear after

the specific provisions for termination and refer directly to the appointment of employees. There is no recourse mechanism established under paragraph 51(1)(g). This does not mean that the employer cannot include rejection on probation in a staffing recourse mechanism, or that employees cannot use it to address concerns about their rejection on probation. "Individual feedback" under the policy is characterized in the directives as serving a dual purpose of recourse and career development and it may, in some cases, serve a useful purpose for both the former employee and the employer. However, the fact remains that the recourse mechanism was not created under the section of the *CCRA Act* that governs rejection on probation, and the inclusion of rejection on probation under this staffing recourse mechanism does not prevent the filing of a grievance.

[76] In *Dhudwal* (*supra*) (which held that the staffing recourse under the staffing program was "an administrative procedure for redress"), the issue was a staffing complaint that is clearly within the scope of section 54 of the *CCRA Act.* Counsel for the employer also relied on the decision of the Federal Court in *Anderson* (*supra*). As in *Dhudwal* (*supra*), the matter at issue was a staffing complaint and not a rejection on probation. Furthermore, the question being answered by the Court was whether the individual feedback session met the requirements of the *CCRA Act* and the principles of procedural fairness. This is not the question before me. However, the Trial Division judge makes an observation that serves to highlight a significant difference between recourse for staffing and recourse for rejection on probation. Justice Dawson stated:

> *However, a decision as to whether one meets the pre-requisites for a position does not impact upon a person to the same extent as a decision where the right to continue in employment is at stake...*

[77] The CCRA staffing program (Exhibit E-8) sets out the employer's policy on probation (at section P8.0) and states that employees rejected on probation have access to individual feedback followed by decision review, in accordance with the CCRA directive on Recourse for Staffing. The policy statement on probation does not state that an employee cannot file a grievance against a rejection on probation; it merely states that employees rejected on probation "have access to" individual feedback followed by decision review. If the right to grieve were intended to be removed, the policy would have made this explicit.

[78] The directive on Recourse for Staffing (Annex "L" to Exhibit E-8) reinforces the conclusion that the recourse mechanism is not intended to displace access to the grievance process. The introductory section ("Program Statements") refers to "staffing" concerns and "staffing activities". The examples given of the application of individual feedback and decision review all refer to staffing and appointment-related matters. The chart outlining the types of recourse available does not mention rejection on probation. Furthermore, the policy states that the type of recourse available (individual feedback, decision review or independent third party review) is "commensurate with the nature and significance of the staffing decision". Independent third party review is available for the placement stage of the selection process and permanent promotions without a selection process but is not available for what is arguably the much more significant decision to reject on probation. The staffing program policy and directives therefore support the conclusion that the recourse mechanism was not designed to displace the grievance process for rejection on probation.

[79] If I am wrong, and the recourse for staffing is "an administrative procedure under an Act of Parliament", an analysis of the staffing recourse mechanism shows that it does not meet the requirements as set out in the jurisprudence. In *Canada (Attorney General) v. Boutilier*, [2000] 3 F.C. 27, the Court of Appeal concluded:

> *If another administrative procedure for redress is available to a grievor, that process must be used, as long as it is a "real" remedy. It need not be an equivalent or better remedy as long as it deals "meaningfully and effectively with the substance of the employee's grievance" (Chopra v. Canada (Treasury Board), [1995] 3 F.C. 445 (T.D)).*

[80] In *Byers Transport Ltd. v. Kosanovich*, [1995] 3 F.C. 354, the Court of Appeal concluded that the "complaint (i.e., the factual situation complained of) must be essentially the same" in the other procedure for redress. It also concluded that the procedure must be capable of resulting in "some real redress which could be of personal benefit" to the grievor. Mr. Lundin is alleging that the rejection on probation was disguised discipline. The staffing recourse mechanism does not assess whether a rejection on probation is disciplinary and, hence, is not "essentially the same" as a grievance, nor does it deal with the substance of the grievance.

[81] The grounds for recourse according to the Staffing Program Directive are "whether the employee exercising recourse was treated in an arbitrary way." "Arbitrary" is defined in the Directive as:

> *In an unreasonable manner, done capriciously; not done or acting according to reason or judgment; not based on rationale, on established policy; not the result of reasoning applied to relevant considerations; discriminatory (i.e., difference of treatment or denial of normal privileges to persons because of their race, age, sex, nationality, religion, or union affiliation.)*

[82] In the Decision Review response (Exhibit E-12), Ms. Brown stated that her role is "to ensure that employees are not treated in an arbitrary way by ensuring that the rules, guidelines and procedures were applied consistently and reasonably to all candidates." This is not the analysis required when assessing whether the rejection on probation was disciplinary or not.

[83] I also note, in passing, that the description in the policy of the grounds for recourse does not include discrimination on the basis of disability. This may be an editorial error, as the list of grounds uses "i.e.", indicating that the list is exhaustive. If the list was not intended to be exhaustive, it is more appropriate to use "e.g.". However, I have not relied on this omission in coming to my decision.

[84] Although the Federal Court has determined that the remedies do not need to be identical in both administrative procedures for redress, it has concluded that it must be a real remedy and one that deals "meaningfully and effectively" with the substance of the employee's grievance (*Boutilier* (*supra*)). Mr. Hughes testified that he could have rescinded the rejection on probation as corrective action in the Individual Feedback. I accept this evidence, on the assumption that a delegated authority to reject on probation includes the implied delegated authority to rescind the rejection on probation. However, the Directive (Exhibit E-8) is not so clear on the range of corrective measures available. It only specifies a "range of possible corrective measures" that includes:

> *⇒ order correction of the error in the process;*
>
> *⇒ recommend revocation of appointed employee, if required;*
>
> *⇒ recommend having another manager involved in the decision.*

[85] It is clear that the examples of corrective measures are focused on staffing processes, such as competitions, and not rejections on probation. It is not clear to me that this Directive includes the possibility of reinstatement after a rejection on probation, unless reinstatement can be viewed as a "correction of the error in the process". Correcting "the error in the process" does not necessarily result in a change in the result. This is separate from Mr. Hughes' authority to reverse his delegated decision to reject on probation. This authority is not provided for in this "administrative procedure for redress" but exists outside of the procedure.

[86] The lack of access to an independent third party process for employees rejected on probation is in marked contrast to the jurisprudence relied on by the employer. In all the Federal Court decisions cited by the employer, the "other administrative process for redress" is an independent third party (CHRC or Public Service Commission (PSC)). In *Boutilier* (*supra*), the Court concluded that the intent of Parliament in referring to "other administrative procedures for redress" was as follows:

> *This result gives primacy in dispute resolution to the human rights administration, as well as other expert administrative schemes, where expertise and consistency is plainly favoured by Parliament, rather than decisions by ad hoc adjudicators.*

[87] The Court has not yet faced an argument that an internal recourse process, without access to an independent third party, precludes access to the grievance process (and ultimately adjudication). However, an internal recourse process without access to an independent third party does not reflect an intent to give primacy to an "expert administrative scheme".

[88] In conclusion, I find that a rejection on probation can be grieved.

Timeliness of the Grievance and Application for Extension of Time

[89] I must first determine if Mr. Lundin's grievance was timely and, if not, whether I should exercise my discretion and grant the application for an extension of time. Mr. Lundin is grieving his rejection on probation, which he was aware of on September 3, 2002. His grievance was not filed until March 2003. His grievance was clearly untimely. If time limits in a collective agreement are to be suspended during an internal process outside of the grievance process, either the parties need to mutually agree to such a suspension or the employer consents to the delay through its acquiescence. In this case there was no agreement, and the employer was clear in the

grievance responses that it was not acquiescing. I therefore find that the grievance was untimely.

[90] I must now examine whether it is appropriate, in the circumstances of this case, to exercise my discretion under the *PSSRB Regulations and Rules of Procedure, 1993,* to extend the time limits. The PSSRB's jurisprudence has set out five basic criteria for granting an extension: (1) clear, cogent and compelling reasons for the delay; (2) the length of the delay; (3) the due diligence of the grievor; (4) balancing the injustice to the employee against the prejudice to the employer in granting an extension; and (5) the chance of success of the grievance. (See *Schenkman v. Treasury Board (Public Works and Government Services Canada)*, 2004 PSSRB 1.)

[91] It was Mr. Lundin's uncontradicted testimony that his bargaining agent representative advised him that he could file a grievance after the internal CCRA process had been completed. Mr. Lundin's actions in first proceeding through the individual feedback and decision review process were therefore reasonable. The letter of rejection on probation specified this process as the appropriate process for contesting management's decision. He was not advised in this letter of his right to file a grievance if he felt the decision was a disguised disciplinary action. In good faith, Mr. Lundin used the suggested process and found it wanting. He then promptly filed a grievance. There is a certain logic to the approach he took: start out by using the internal "feedback" process and then raise it to the grievance level. As noted earlier, the CCRA staffing recourse process is a hybrid of career management and recourse. This "career management" aspect, coupled with the explicit prohibition of representation, conveys the impression that this is an informal process where managers and employees can share information and resolve their differences. It was reasonable for Mr. Lundin to wait until the process was completed before filing a grievance. I therefore conclude that Mr. Lundin had a clear, cogent and compelling reason for the delay in filing his grievance.

[92] The length of the delay in filing his grievance was not extensive. He filed his grievance promptly after the issuance of the decision review memorandum from Mr. Hughes. I note that if the employer had met the deadlines for response at both the individual feedback and decision review levels, the grievance would have been filed sooner.

[93] Mr. Lundin was diligent in filing his grievance and in consulting his bargaining agent.

[94] The injustice to Mr. Lundin in not granting an extension outweighs any prejudice the employer will suffer as a result of granting it. The loss of employment is universally recognized as a serious matter. It would be a grave injustice if Mr. Lundin were prevented from challenging his employer's decision to reject him on probation. Given that the length of time is not extensive, there is no evidence of any prejudice that the employer will suffer as a result of the granting of the extension.

[95] For the above reasons, I grant the application for an extension of time pursuant to section 63 of the *PSSRB Regulations and Rules of Procedure, 1993.*

Section 92: Is the Rejection on Probation "Disguised Discipline?"

[96] The jurisdiction of an adjudicator under the *PSSRA* is set out in section 92 as follows:

> *92. (1) Where an employee has presented a grievance, up to and including the final level in the grievance process, with respect to*
>
> *(a) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award,*
>
> *(b) in the case of an employee in a department or other portion of the public service of Canada specified in Part I of Schedule I or designated pursuant to subsection (4),*
>
> *(i) disciplinary action resulting in suspension or a financial penalty, or*
>
> *(ii) termination of employment or demotion pursuant to paragraph 11(2)(f) or (g) of the Financial Administration Act, or*
>
> *(c) in the case of an employee not described in paragraph (b), disciplinary action resulting in termination of employment, suspension or a financial penalty,*
>
> *and the grievance has not been dealt with to the satisfaction of the employee, the employee may, subject to subsection (2), refer the grievance to adjudication.*
>
> [...]

> *(3) Nothing in subsection (1) shall be construed or applied as permitting the referral to adjudication of a grievance with respect to any termination of employment under the Public Service Employment Act.*
>
> *(4) The Governor in Council may, by order, designate for the purposes of paragraph (1)(b) any portion of the public service of Canada specified in Part II of Schedule I.*

[97] It is not disputed that the grievance does not involve the interpretation of a collective agreement (paragraph 92(1)(a) of the *PSSRA*). The CCRA is a separate employer and does not fall under paragraph 92(1)(b) of the *PSSRA*. The Governor-in-Council has not designated the CCRA as falling under paragraph 92(1)(b) of the *PSSRA*. The reference in subsection 92(3) of the *PSSRA* to rejection on probation under the *PSEA* does not apply, as the CCRA is exempt from the *PSEA*.

[98] There is no specific reference to "rejection on probation" in the *CCRA Act*, as there is under the *PSEA*. As noted earlier (and as recognized by the employer in its letter of rejection on probation), the authority of the CCRA to set probationary periods and to reject on probation comes from section 51:

> ***51.*** *(1) Notwithstanding subsections 11(2) and (3) and section 12 of the* Financial Administration Act, *the Agency may, in the exercise of its responsibilities in relation to personnel management,*
>
> [...]
>
> *(g) provide for the termination of employment or the demotion to a position at a lower maximum rate of pay, for reasons other than breaches of discipline or misconduct, of persons employed by the Agency and establish the circumstances and manner in which and the authority by which or by whom those measures may be taken or may be varied or rescinded in whole or in part; ...*

[99] By comparison, the authority of an employer subject to the *PSEA* to reject on probation is more specific:

> *28(2) The deputy head may, at any time during the probationary period of an employee, give notice to the employee that the deputy head intends to reject the employee for cause at the end of such notice period as the Commission may establish for that employee or any class of employees of which that employee is a member, and the employee ceases to be an employee at the end of that period.*

[100] What flows from the interplay between the *CCRA Act* and the *PSSRA* is that an adjudicator has jurisdiction if the rejection on probation is "disciplinary action". If the rejection on probation is "for reasons other than breaches of discipline or misconduct", an adjudicator is without jurisdiction. The jurisprudence cited by the employer on rejection on probation (e.g., *Penner* (*supra*) and *Leonarduzzi (supra)*) is not applicable to the CCRA, because that jurisprudence involves the interpretation of the rejection on probation provision contained in section 28 of the *PSEA*. As noted, there is no such provision applicable to the CCRA. The test for determining whether a termination is "disciplinary" or "non-disciplinary" is different from the test set out in decisions involving rejection on probation pursuant to the *PSEA*. The main difference is that in a rejection on probation under the *PSEA*, the adjudicator can remain without jurisdiction even if there has been misconduct on the part of the employee that could attract discipline (*Penner* (*supra*)). When, as here, the analysis focuses on whether an action is disciplinary or non-disciplinary, reliance by the employer on the misconduct of the employee to justify a termination for non-disciplinary reasons will result in an adjudicator taking jurisdiction. In the end, the grievor still has to demonstrate that the rejection on probation was disguised discipline (as in *Archambault* (*supra*)).

[101] The employer's characterization of a termination as non-disciplinary does not determine an adjudicator's jurisdiction. Rather, the adjudicator must examine the substance of the employer's actions to determine if the termination was, in fact, non-disciplinary. The Federal Court in *Canada (Attorney General) v. Horn*, [1994] 1 F.C. 453, has succinctly summarized the analysis as follows:

> *Where the adjudicator has before her or him a grievance that alleges that termination of employment is in reality a discharge for reasons of discipline, the adjudicator must determine whether that allegation reflects reality or whether the termination... is made for other reasons as prescribed by statute. In a case such as this, it is not sufficient for the adjudicator to consider whether the statutory conditions for a declaration of abandonment appear to have been met, and if that is the case, to desist from further inquiry. It is incumbent upon her or him to consider whether that appearance accords with reality by assessing the basis upon which the action was taken, considering the evidence that is adduced.*

[102] When there is an allegation of disguised discipline, the onus is on the grievor to present evidence to support the allegation of disciplinary action: *Valadares v. Canada (Treasury Board)*, [1994] F.C.J. No. 1296 (QL).

[103] The considerations that differentiate "disciplinary action" from "non-disciplinary action" revolve around the distinction between voluntary and involuntary action on the part of the employee (*Robertson v. Treasury Board (Department of National Revenue)*, PSSRB File No. 166-2-454 (1971), cited in *Smith v. Treasury Board (External Affairs Canada)*, PSSRB File No. 166-2-19902 (1991) (QL). In *Smith* (*supra*), the adjudicator stated that discipline can only arise out of "voluntary, wilful acts of malfeasance":

> *Discipline could not be justified for innocent or involuntary acts or for lack of ability or capacity to perform to certain standards. That did not mean that the employer could not deal with such issues through other means, simply that it could not support the discipline of an employee for such shortcomings. If it was improper for an employer to exert discipline for an innocent lack of ability, it was just as impossible for an employee to turn an otherwise administrative action relating to inability into a case of disguised discipline without first establishing a proper base upon which the employer could discipline.*

[104] Mr. Lundin has maintained that his rejection on probation was as a result of unsubstantiated harassment allegations made against him. Although concerns about his interaction with colleagues were raised early in the process, the evidence shows that by the time that the decision to reject him on probation was made, these issues had been adequately resolved and were not considered by the employer in coming to its decision. I note, however, that interaction with colleagues can be a performance-related concern and are not necessarily disciplinary in nature. In the end, it was solely Mr. Lundin's performance of his duties that was used to justify the rejection on probation. The evidence shows that the rejection on probation was based on performance-related and, therefore, non-disciplinary reasons. The evidence also shows that Mr. Lundin was advised of performance-related concerns formally in successive Actions Plans, as well as being notified of the consequences of his failure to improve his performance. I therefore conclude that Mr. Lundin has not demonstrated that his rejection on probation was disguised discipline.

[105] It is not necessary to address the good faith of the employer in its decision to reject on probation (or, in other words, to assess whether the decision to reject on probation was made in bad faith). This is different from the analysis in *Dhaliwal* (*supra*) and other rejection on probation cases in those parts of the public service covered under the *PSEA*. In those cases, once an employment-related reason for