Date: 20091005

File: 566-02-1260

Citation: 2009 PSLRB 122

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

DOMINIQUE TURMEL

Grievor

and

TREASURY BOARD
(Correctional Service of Canada)

Employer

Indexed as
Turmel v. Treasury Board (Correctional Service of Canada)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Roger Beaulieu, adjudicator

For the Grievor: Ariane Pelletier, Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN

For the Employer: Patricia Gravel, counsel

Heard at Quebec, Quebec,
November 19 and 20, 2008, and January 6, 2009.
(PSLRB Translation)

I. Individual grievance referred to adjudication

[1] At the time of the events giving rise to her grievance, Dominique Turmel, the grievor, held a correctional officer position at Donnacona Institution in Quebec with the Correctional Service of Canada (CSC).

[2] Donnacona Institution is a maximum-security penitentiary housing the most dangerous offenders, all of whom have been sentenced for the most serious crimes under the *Criminal Code of Canada*.

[3] Ms. Turmel was pregnant when she filed her grievance in February 2007. She contests the employer's violation of article 45 and subsequent articles of the collective agreement, alleges that her medical certificate was not respected, and claims all wage losses caused by a violation of the collective agreement in force.

[4] The financial stake in this case is approximately 10 weeks' pay, plus benefits applicable to the period in question, from January 30, 2007 (the date on which Ms. Turmel was declared to be on leave without pay) to April 12, 2007 (the date of the birth).

[5] Another matter at issue is the examination and application of the provisions of section 132 of the *Canada Labour Code* (*CLC*).

[6] I also note that, in order to fully identify all aspects of this case, Ms. Turmel filed a claim with the Commission de la santé et de la sécurité du travail du Québec (CSST) on November 28, 2006 alleging psychological harassment by her manager, Chantale Fortier. The employer adduced the claim in evidence during Ms. Turmel's cross-examination (Exhibit E-1).

[7] At the time of the grievance hearing, the final decision on the harassment complaint before the CSST was not known because it was still before the Commission des lésions professionnelles.

[8] Moreover, neither party mentioned the harassment complaint in argument at the hearing. Therefore, I will not consider it in my decision.

II. Summary of the evidence

A. For Ms. Turmel

[9] Article 45 of the collective agreement reads as follows:

> ***ARTICLE 45***
> ***MATERNITY-RELATED REASSIGNMENT OR LEAVE***
>
> ***45.01*** *An employee who is pregnant or nursing may, during the period from the beginning of pregnancy to the end of the twenty-fourth (24th) week following the birth, request the Employer to modify her job functions or reassign her to another job if, by reason of the pregnancy or nursing, continuing any of her current functions may pose a risk to her health or that of the foetus or child.*
>
> ***45.02*** *An employee's request under clause 45.01 must be accompanied or followed as soon as possible by a medical certificate indicating the expected duration of the potential risk and the activities or conditions to avoid in order to eliminate the risk. Dependent upon the particular circumstances of the request, the Employer may obtain an independent medical opinion.*
>
> ***45.03*** *An employee who has made a request under clause 45.01 is entitled to continue in her current job while the Employer examines her request, but, if the risk posed by continuing any of her job functions so requires, she is entitled to be immediately assigned alternative duties until such time as the Employer:*
>
> *(a) modifies her job functions or reassigns her,*
>
> *or*
>
> *(b) informs her in writing that it is not reasonably practicable to modify her job functions or reassign her.*
>
> ***45.04*** *Where reasonably practicable, the Employer shall modify the employee's job functions or reassign her.*
>
> ***45.05*** *Where the Employer concludes that a modification of job functions or a reassignment that would avoid the activities or conditions indicated in the medical certificate is not reasonably practicable, the Employer shall so inform the employee in writing and shall grant leave of absence without pay to the employee for the duration of the risk as indicated in the medical certificate. However, such leave shall end no later than twenty-four (24) weeks after the birth.*
>
> ***45.06*** *An employee whose job functions have been modified, who has been reassigned or who is on leave of absence shall*

> *give at least two (2) weeks notice in writing to the Employer of any change in duration of the risk or the inability as indicated in the medical certificate, unless there is a valid reason why that notice cannot be given. Such notice must be accompanied by a new medical certificate.*
>
> ***45.07*** *Notwithstanding 45.05, for an officer working in an institution where she is in direct and regular contact with offenders, if the Employer concludes that a modification of job functions or a reassignment that would avoid the activities or conditions indicated in the medical certificate is not reasonably practicable, the Employer shall so inform the officer in writing and shall grant leave of absence with pay to the officer for the duration of the risk as indicated in the medical certificate. However, such leave shall end no later than at the time the officer proceeds on Maternity Leave Without Pay or the termination date of the pregnancy, whichever comes first.*
>
> ***45.08*** *An employee who returns to work at the end of her maternity leave parental leave* [sic] *may ask for a reduced work week ending no later than twelve (12) months after the end of the maternity leave or the parental leave without pay set out in paragraphs 30.03 and 30.06.*
>
> *For the duration of this period, the employees* [sic] *benefits are governed by Article 35 – Part-Time Employees.*
>
> *In order for an employee to have a reduced work week, the Employer, the employee and the Union must conclude an agreement in writing to this effect. The employee may terminate the agreement at any time on thirty (30) days' notice. When the agreement expires, the employee shall return to her position or to a position equivalent to the substantive position she occupied before the leave.*

[10] Section 132 of the *CLC* reads as follows:

> *PREGNANT AND NURSING EMPLOYEES*
>
> *Cease to perform job*
>
> ***132.****(1) In addition to the rights conferred by section 128 and subject to this section, an employee who is pregnant or nursing may cease to perform her job if she believes that, by reason of the pregnancy or nursing, continuing any of her current job functions may pose a risk to her health or to that of the foetus or child. On being informed of the cessation, the employer, with the consent of the employee, shall notify the work place committee or the health and safety representative.*

> *Consult medical practitioner*
>
> *(2) The employee must consult with a qualified medical practitioner, as defined in section 166, of her choice as soon as possible to establish whether continuing any of her current job functions poses a risk to her health or to that of the foetus or child.*
>
> *Provision no longer applicable*
>
> *(3) Without prejudice to any other right conferred by this Act, by a collective agreement or other agreement or by any terms and conditions of employment, once the medical practitioner has established whether there is a risk as described in subsection (1), the employee may no longer cease to perform her job under subsection (1).*
>
> *Employer may reassign*
>
> *(4) For the period during which the employee does not perform her job under subsection (1), the employer may, in consultation with the employee, reassign her to another job that would not pose a risk to her health or to that of the foetus or child.*
>
> *Status of employee*
>
> *(5) The employee, whether or not she has been reassigned to another job, is deemed to continue to hold the job that she held at the time she ceased to perform her job functions and shall continue to receive the wages and benefits that are attached to that job for the period during which she does not perform the job.*
>
> *R.S., 1985, c. L-2, s. 132; R.S., 1985, c. 9 (1st Supp.), s. 4; 2000, c. 20, s. 10.*

[11] On August 19, 2006, as soon as her pregnancy was confirmed, Ms. Turmel informed the employer's representatives, in accordance with the normal procedure at Donnacona.

[12] Providing the employer with the pregnancy notice also provided an opportunity for a discussion with Josée Tremblay, Director of Labour Relations, who was responsible for reassignments at Donnacona.

[13] As soon as Ms. Tremblay learned of Ms. Turmel's pregnancy, she had preliminary discussions with her and indicated the different possibilities for reassignment, including to the administration area on the second floor and a second option in preventive security administration.

[14] Ultimately, her reassignment to administration on the second floor with the possibility of also being assigned to the preventive security section in the same area but on another floor was confirmed around October 10, 2006.

[15] In administration on the second floor, Ms. Turmel worked under the direction of Ms. Fortier, while in preventive security administration, she worked under the direction of Mr. Chicoine, Coordinator of Correctional Operations.

[16] In the meantime, Ms. Turmel visited her attending physician, Dr. Jean-Marie Auger, who was also her attending physician during her first pregnancy and who was familiar not only with his patient but also with the CSC maximum-security institution at Donnacona.

[17] Dr. Auger, from the Donnacona medical centre, reconfirmed Ms. Turmel's pregnancy on October 13, 2006 and recommended in his certificate that she be reassigned as of October 16, 2006 to a position meeting specific conditions. The list of those conditions was adduced in evidence (Exhibit U-2). The medical certificate reads as follows:

> [Translation]
>
> . . .
>
> *Ms. Turmel is 11 weeks pregnant with a due date of April 30, 2007.*
>
> *Based on my medical evaluation, I recommend that, as of October 16, 2006, she be reassigned to work in a position that meets the following conditions:*
>
> - *No contact with inmates;*
> - *No contact with visitors and their children;*
> - *The possibility of changing positions as required without limitations;*
> - *The possibility of leaving her office at all times;*
> - *No repetitive lifting of loads and, if done occasionally, no lifting over 10 kg any one time;*
> - *No repetitive flexing, extension or rotation of the trunk;*
> - *No imposed and rapid pace of work;*

- *No handling of firearms or tear gas;*
- *No visual contact with scenes of violence;*
- *Maximum of 8 hours per day (day or night);*
- *Maximum of 5 consecutive days of work;*
- *Minimum of 2 days of rest after 5 days of work;*
- *Minimum of 30 minutes for meals;*
- *A break of at least 15 minutes per half-day of work.*

I am available as needed for all requests for information or to provide desired clarifications.

Sincerely,

. . .

[18] Ms. Fortier also repeated to Ms. Turmel the instructions (see paragraph 21 of this decision) that she was to follow, and Ms. Turmel began her reassignment to the preventive security section on October 17, 2006.

[19] Ms. Turmel began her reassignment without a job description. Therefore, she asked her bargaining agent representative, Annie Perreault, to check into and to resolve the deficiency. Ms. Perreault was a correctional officer and held the position of Status of Women Representative for pregnant women at Donnacona Institution. She discussed with the employer pregnant employees' terms and conditions of work.

[20] Ms. Tremblay informed Ms. Turmel and Ms. Fortier reiterated that the only inmates able to access Ms. Turmel's two work sites were the inmate-cleaners, who worked on a precise schedule that was known and posted (Exhibit U-3). Ms. Turmel received a copy of the inmate-cleaners' schedule on October 23, 2006. It reads as follows:

[Translation]

. . .

Please note the schedules of the administration inmate-cleaners,

Inmate P.['s] *. . . schedule:*

08:30 to 09:30 every morning (break from 09:30 to 09:45 - authorized to go outside)

09:45: return to cell

13:00 to 14:00 every afternoon (break from 14:00 to 14:15 - authorized to go outside

14:15: return to cell

Inmate C.['s] *. . . schedule:*

- *Arrival in a.m.* *08 :30*
- ***Break in a.m.*** ***09:30 to 09 :45***
  authorized to go outside
- *Return to cell:* *10:45*
- *Arrival hour in p.m.* *13:00*
- ***Break in p.m.*** ***14:00 to 14:15***
  authorized to go outside
- *Return to cell:* *14:30 (security inmate)*

It is essential to follow the schedule because of the presence of a pregnant person in our area. Due to that restriction, Inmate C is not authorized to enter administration without permission from the operations office or control B.

Should you find that this schedule is not being followed, please intervene with the inmates and contact me at extension 2126 or inform Chantal Fournier CAMM at extension 2120.

. . .

[The names of the inmate-cleaners have been changed for confidentiality reasons.]

[Emphasis in the original]

[21] The instructions given to Ms. Turmel, which Ms. Tremblay and Ms. Fortier also explained to her verbally, were that, while the inmate-cleaner was working at the scheduled times, Ms. Turmel was to remain in her office with the door closed. If she wished to or needed to leave the office for any reason, she was to inform Ms. Girard, who was in charge of the inmate-cleaner, by phone to temporarily remove the inmate-cleaner from the work area so that Ms. Turmel could go where she needed to, if necessary. The objective was to avoid all contact with the inmate-cleaner.

[22] The first contact (contrary to the medical certificate, see paragraph 17 of this

decision) between Ms. Turmel and an inmate-cleaner occurred on October 19, 2006, two days after she began her reassignment. Between October 19 and November 23, 2006, a total of six incidents of that type occurred.

[23] I will analyze each contact later in this decision.

[24] According to Ms. Turmel's testimony, she spoke with Ms. Fortier after her first contact with the inmate-cleaner. Ms. Fortier allegedly asked her if she was afraid of the inmates, and Ms. Turmel apparently replied as follows: "[translation] It should not happen because there is not supposed to be any contact."

[25] Also according to her testimony, after the first incident, Ms. Girard reminded the grievor that she should not assume that the inmate-cleaner had left his work site at the specified time and that she should call Ms. Girard before leaving her office when she was aware from the schedule that the inmate-cleaner had already begun working in her section.

[26] Furthermore, Ms. Turmel testified that, after the first incident or contact, she informed Ms. Perreault of its circumstances.

[27] As for the second incident or contact, on October 24, 2006, contact was made with Ms. Turmel for the first time in the administration area on the second floor after, according to the schedule, the inmate-cleaner was supposed to have left the hallway between Ms. Turmel's office and the washrooms. Ms. Girard, the person in charge of the inmate in that location, witnessed the contact.

[28] Ms. Girard's reaction to the contact with Ms. Turmel was "[translation] that she must not assume that the inmate has left Ms. Turmel's work area but must call Ms. Girard before leaving her office after the inmate has begun work at 08:30."

[29] According to the bargaining agent, at the time of Ms. Turmel's first pregnancy, the practice at Donnacona had been for the supervisor to escort the inmate-cleaner clear of the pregnant woman's work area once the inmate's shift was complete, which was not the case at the time of her second pregnancy.

[30] The third contact occurred on October 26, 2006 in the computer room. The bargaining agent's argument is that, despite the instructions to Ms. Turmel to work in a closed office, the door to the computer room was not closed because several

employees needed to access the area.

[31] The fourth contact was on October 27, 2006 in the general administration office on the second floor in the presence of Ms. Girard and Ms. Fortier, her supervisor. This time, inmate P entered the general office without knocking. On that day, Ms. Turmel had been loaned to the general-office sector to replace the absent telephone operator. Ms. Girard asked inmate-cleaner P to leave the general office. The same day, toward the end of the afternoon, Ms. Turmel discussed with Ms. Fortier her feelings about the contact that day. Ms. Fortier then repeated the instructions and told her the following: "[translation] It is up to you to take responsibility for yourself and to manage your stress with inmates. You're too inflexible."

[32] Following one of the contacts between Ms. Turmel and an inmate-cleaner, which Ms. Fortier witnessed, Ms. Fortier's commented as follows, according to Ms. Turmel's testimony: "[translation] It is up to you to take responsibility for yourself and to manage your stress with inmates. You are too inflexible."

[33] On November 13, 2006, Ms. Turmel met Ms. Tremblay by chance during a shopping trip and briefly told her about the discomfort and distress that she had felt each time she had encountered an inmate-cleaner and that she did not feel safe at work. Ms. Turmel also mentioned that she had spoken about it with her boss, Ms. Fortier, and that the Ms. Fortier did not want to do anything to change the situation. Also during the encounter in the store, Ms. Turmel allegedly told Ms. Tremblay that the contacts contravened the conditions set out in her medical certificate.

[34] The fifth contact occurred on November 14, 2006, once again in the preventive security area. According to the bargaining agent, it was further proof that the employer had not made Ms. Turmel's work site sufficiently safe and that there was a lack of effective communication and coordination by the employer between the different areas to which Ms. Turmel had been reassigned.

[35] Ms. Turmel and Ms. Fortier had other discussions during the week of November 20, 2006 about contact with inmate-cleaners, but Ms. Fortier maintained her position, and Ms. Turmel told her that each contact upset her.

[36] On November 22, 2006, Ms. Turmel, along with Ms. Perreault, met with

Ms. Fortier. The purpose of the meeting was to ask the employer to respect Ms. Turmel's medical certificate at work.

[37] At the November 22, 2006 meeting, Ms. Turmel explained the numerous contacts that had occurred with inmate-cleaners and reiterated that she had been profoundly upset each time. Ms. Fortier reiterated to Ms. Turmel that she needed to control her emotions and her fear.

[38] The outcome of the November 22, 2006 meeting was as follows:

- Ms. Tremblay was no longer in charge of Ms. Turmel, and Ms. Fortier was her only supervisor.
- Ms. Turmel's only work station would be in administration on the second floor.
- Ms. Turmel needed to make a phone call if she wished to leave her office when the inmate-cleaner was in her area.
- According to the employer, a written agreement for the procedure to be followed was not necessary even though the bargaining agent insisted that everything be recorded or put in writing.

[39] The next day, November 23, 2006, Ms. Turmel encountered an inmate for the sixth time, this time at the institution's entrance when she arrived for work. Following the incident, Ms. Turmel requested another meeting with Ms. Fortier, which took place the same day.

[40] At the meeting, Ms. Fortier indicated to Ms. Turmel that she was not pleased to have to discuss the matter again and that it was a heavy burden for her.

[41] On November 24, 2006, Ms. Turmel informed Ms. Fortier that she had gone to the hospital in Quebec because she was bleeding and was afraid for her baby. She met Dr. C. Godin, who gave her a medical certificate and told her to stop working from November 24 to December 2, 2006, stating that she should see her attending physician before returning to work. This information was adduced as Exhibit U-4(a).

[42] Dr. Godin's diagnosis, as contained in Exhibit U-4(a), states the following: "[translation] . . . difficulty with pregnancy (premature contractions, uterine loss,

exhaustion) caused by problems encountered at work. Work stoppage for one week, to be re-evaluated on December 2, 2006 by attending M.D."

[43] On November 28, 2006, Ms. Turmel filed a claim with the CSST claiming psychological harassment by the manager Ms. Fortier in the context of Ms. Turmel's reassignment due to her pregnancy. Ms. Turmel also immediately contacted the employer to take advantage of the employee assistance program for psychological care.

[44] On January 29, 2007, a final meeting was held to discuss Ms. Turmel's reassignment. Ms. Turmel was present along with Ms. Perreault, Ms. Tremblay (newly promoted to the position of Assistant Director, Security and Management (ADSM)), Lynn Lachance of administrative services, and Yves Caron from the employee assistance program.

[45] The employer proposed the following two positions to Ms. Turmel: the same position in administration on the second floor, but with a new supervisor, Ms. Lachance, or the same position but with evening hours.

[46] Ms. Turmel proposed telework from her home or in other CSC offices in the region, where there would be no contact with inmates.

[47] The employer rejected both of Ms. Turmel's proposed solutions.

[48] Ms. Turmel responded by asking to have an office set up, if possible, in the store on the institution's grounds at Donnacona, located a few hundred feet from the main buildings. The employer also rejected that option.

[49] The employer then informed Ms. Turmel that she would be placed on leave without pay beginning on January 30, 2007.

[50] The leave without pay continued until Ms. Turmel gave birth on April 12, 2007.

[51] The leave without pay imposed on Ms. Turmel is the central element of this case.

[52] During cross-examination, Ms. Turmel indicated that, during her first pregnancy, she had been reassigned to the vault section at Donnacona and that she would have agreed to return there the second time, but that solution had not been

offered.

[53] It was revealed in cross-examination that Ms. Turmel's spouse was also a correctional officer at Donnacona, which was one of the reasons for refusing the work-from-home request (grounds of confidentiality of inmate information).

[54] Still with Ms. Turmel's evidence, it was shown that the witness, Ms. Perreault, in addition to being a correctional officer, was also a part of the bargaining agent's executive, the status-of-women representative and the resource person for pregnant women at Donnacona Institution. She was also a spokesperson for pregnant women with the employer, but her main focus with respect to pregnant women was knowing the conditions indicated in each pregnant woman's medical certificate and ensuring that the employer respected those conditions during reassignments.

[55] Because of her different responsibilities, Ms. Perreault was familiar with all the possible reassignment locations at Donnacona. When she learned that one of the positions offered to Ms. Turmel was in the preventive security area, she was skeptical because of possible contacts with inmate-cleaners.

[56] Ms. Perreault was the only employee at Donnacona with specific responsibility for pregnant women. She was also aware of the risks associated with violent offenders in maximum-security facilities and the high number of inmates known to have drug problems or medical problems associated with HIV or different forms of hepatitis.

[57] Following Ms. Turmel's first contact with an inmate-cleaner during the first week of the reassignment, Ms. Perreault had a discussion with Mr. Chicoine, the person in charge of the preventive security section. Mr. Chicoine did not wish to change the way anything was done because he wanted to maintain unrestricted movement within his area and he trusted his inmate-cleaner, as mentioned in the document that Ms. Perreault sent to him (Exhibit U-6). Ms. Perreault testified that she never received a reply to her email (Exhibit U-6).

[58] The crucial point for Ms. Perreault was for Ms. Turmel to never have contact with an inmate at work, in keeping with the medical certificate from her physician.

B. For the employer

[59] Ms. Tremblay was the only witness for the employer. She began her career with the CSC in 1992 as a correctional officer and moved up the ranks to the position of Acting Area Director in the Trois-Rivières and Lanaudière sector. She is responsible for labour relations and inmates at Donnacona and has 125 employees under her authority. She knows Ms. Turmel and has been her supervisor since 2006. She was informed of Ms. Turmel's second pregnancy from the start.

[60] Ms. Tremblay testified that, following a discussion with Ms. Turmel, she wanted to find her an assignment at Donnacona Institution that would be as interesting and as stimulating as possible on an intellectual level.

[61] Thus, in seeking the best possible position for a pregnant woman, Ms. Tremblay turned down a possible reassignment to the store because of CO_2 vapours, which could have been harmful to Ms. Turmel's health. Similarly, an assignment to the vault section was rejected because it was not stimulating enough.

[62] Ms. Tremblay settled on the administration section on the second floor because it is a very busy place in the fall and the work is more varied.

[63] Another possible sector was preventive security, which was on the first floor of the administration section. That position would have been on an as-needed basis because the demand was not steady.

[64] Before taking sick leave for about a month from mid-October to mid-November 2006, Ms. Tremblay made sure that the work instructions and the person responsible for Ms. Turmel, Ms. Fortier, as well as the people in charge of the inmate-cleaners, were familiar with Ms. Turmel's case.

[65] It was clear that Ms. Girard was in charge of the inmate-cleaner on the second floor (in administration), that Mr. Chicoine was in charge of the inmate-cleaner in the preventive security area and that, in both cases, the schedule for the inmate-cleaners was to be sent in writing to all persons concerned, which ultimately happened. The schedule was posted on October 21, 2006 in preventive security. According to the evidence, Ms. Fortier did not send the schedule for the inmate-cleaner in administration on the second floor to Ms. Turmel until October 23, 2006.

[66] Ms. Tremblay explained Ms. Turmel's work instructions to her before she left on sick leave. Ms. Fortier also explained them on Ms. Turmel's first day of work in administration on the second floor.

[67] Ms. Turmel's instructions were simple. She was to ensure that, while the inmate-cleaner was in the workplace, she remained in her office (her workstation) with the door closed during the time her area was being cleaned. If Ms. Turmel needed, for example, to go the washroom or leave her office urgently during the inmate-cleaner's shift, she was to use her office telephone to call Ms. Girard or some other person to avoid any contact with the inmate-cleaner, in accordance with her medical certificate.

[68] Not only were the instructions simple and easy to follow, but I also felt during Ms. Tremblay's testimony a genuine interest in Ms. Turmel's well-being.

[69] That impression is reflected in Ms. Tremblay's testimony that the CSC is trying to improve the work environment for pregnant women. She explained that, just a few years ago, pregnant women at the CSC were even working in sections of the prison where they had to carry weapons, but that practice has since been stopped.

[70] When she returned to work from sick leave on November 14, 2006, Ms. Tremblay was not aware of the several contacts that had taken place with inmate-cleaners, except for a brief conversation with Ms. Turmel in a store on November 13.

[71] Following a series of contacts (six in total), Ms. Turmel went on sick leave with a medical certificate from November 24, 2006 to January 24, 2007.

[72] On January 29, Ms. Tremblay met with Ms. Turmel one last time to offer her the two options for reassignment mentioned in paragraph 45 of this decision. Ms. Turmel rejected the options because, in her opinion, neither respected the provisions of article 45 of the collective agreement in force nor met the conditions set by her attending physician.

[73] Finally, during her testimony under cross-examination, Ms. Tremblay stated that the only two positions that could have been offered to Ms. Turmel on reassignment were, in fact, the same position, during either the day shift or the night shift, because the only options for reassignment were locations with productive work or vacant positions.

[74] To wrap up, Ms. Tremblay stated that the inmate-cleaners had undergone risk assessments. I will return to that point in my reasons for decision.

[75] Counsel for the employer concluded by stating that I must consider Ms. Turmel's testimony as not credible because she read part of her testimony from handwritten notes.

III. Summary of the arguments

A. For Ms. Turmel

[76] After briefly summarizing the facts already related earlier in this decision, Ms. Turmel alleged that no meeting was held before the reassignment began. That meeting was supposed to have ensured a proper understanding of the reassignment conditions.

[77] According to the bargaining agent, that oversight led to a lack of monitoring of the inmate-cleaners by the employer when they were working in the locations to which Ms. Turmel had been reassigned.

[78] The bargaining agent claimed that the employer's lack of monitoring the inmate-cleaners demonstrated a lack of commitment to control the movements of those inmates and that it amounted to negligence after six contacts occurred.

[79] After the first incident or contact on October 19 in preventive security on the first floor, Ms. Turmel spoke to Ms. Fortier even though Ms. Fortier was not in charge of that section.

[80] Ms. Fortier's response was that Ms. Turmel was too inflexible and that she needed to manage her stress.

[81] In light of the contacts that occurred on October 19, 24, 26 and 27, 2006, the bargaining agent claimed that the supervision of the inmate-cleaners was inadequate otherwise the contacts would not have happened.

[82] The bargaining agent reiterated that there should not have been any contact between Ms. Turmel and inmate-cleaners or other inmates because it was contrary to the medical certificate. After the contact, Ms. Turmel asked that the instructions be put in writing, which was refused.

[83] According to the bargaining agent, even after five contacts, Ms. Turmel still wanted to continue working despite the deficiencies with respect to her safety and despite the non-compliance with her medical certificate.

[84] When Ms. Fortier called her to a meeting on November 22, 2006, Ms. Turmel arrived with her bargaining agent representative, Ms. Perreault. Ms. Tremblay was also present at the meeting. According to the bargaining agent, unfortunately Mr. Chicoine, from preventive security, did not attend despite two of the five contacts taking place in his sector.

[85] With respect to that last fact, the bargaining agent again claimed that there was no effective communication at the employer's facility between the different sectors to which Ms. Turmel was reassigned.

[86] Finally, the bargaining agent concluded that, at the November 22 meeting, the employer did not take any corrective action with respect to either the safety and health of Ms. Turmel and that of her fetus or the failure to comply with her medical certificate.

[87] The next morning, November 23, 2006, the sixth contact occurred at the main entrance to the institution. This time, it was contact with an escorted inmate.

[88] The last important meeting was held on January 29, 2007 when the employer offered Ms. Turmel the two options for reassignment that have already been mentioned in this decision that she rejected. Following her refusal, Ms. Turmel was placed on leave without pay as of January 30, 2007.

[89] Ms. Turmel's arguments also raised the following points, which I will examine in the reasons for my decision:

- Inmate-cleaners "in protection": Although the two inmate-cleaners underwent an internal risk assessment, they were still inmates sentenced for serious offences and, at the time of the hearing, the natures of their offences and their chances of reoffending were not known. Nor was anything else known about them, for example their states of health, such as whether they were carriers of a disease (for example, hepatitis or some other contagious disease).

- Clause 45.02 of the collective agreement: The employer did not obtain an

independent medical opinion. Consequently, the employer may not change, through its non-medical managers, the conditions set by Ms. Turmel's attending physician. Since it did not obtain an independent medical opinion, the employer, in the bargaining agent's opinion, must comply, to the letter, with the medical certificate in this case.

- In accordance with clause 45.03(b) of the collective agreement, after six contacts, the employer should have advised Ms. Turmel (meaning that it should have informed her in writing) that it was not reasonably practicable to reassign her and still comply with her medical certificate.

[90] According to the bargaining agent, the employer did not offer safe conditions and was unable to comply with Ms. Turmel's medical certificate. Therefore, she should have benefited from the provisions of clause 45.07 of the collective agreement and received 10 weeks' pay and adjustments to the benefits applicable to those 10 weeks.

[91] The bargaining agent further argued that managers telling Ms. Turmel "[translation] to manage [her] stress" and "[translation] not to be inflexible" amounts to them substituting for Ms. Turmel's physician. The employer should have asked for an independent medical opinion but did not.

[92] Moreover, based on the accommodation argument presented in Exhibit U-7, if the employer was unable to offer an acceptable reassignment, it was obliged to place Ms. Turmel on leave with pay under clause 45.07 of the collective agreement.

[93] Finally, the bargaining agent's arguments referred me to section 132 of the *CLC* and cited case law, which I will analyze in the reasons for decision.

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

[94] The employer began by requesting that I examine the legislative and contractual context. According to the employer, clause 45.07 of the collective agreement applies only if I conclude that the employer's reassignment of Ms. Turmel was not reasonably practicable.

[95] The employer also claimed that the provisions of the *CLC* governing pregnant or nursing employees, and specifically subsections 132(1), (2), (3), (4) and (5), cover only the period before a pregnant woman obtains a medical certificate. In other words, if a

pregnant woman obtains the medical certificate mentioned in subsection 132(2) on the first day of her pregnancy, then the entirety of the provisions of section 132 no longer apply to her. Similarly, if a pregnant woman obtains the medical certificate mentioned in subsection 132(2) only on the day before the birth, the entirety of the provisions of section 132 apply throughout the entire time of her pregnancy until the birth, according to the employer.

[96] The employer argued that, in this case, it put in place what it believed reasonable for Ms. Turmel. In short, the employer stated that, if the reassignment was not "reasonably practicable," it was not because of the employer but because of Ms. Turmel.

[97] The employer stated further that the evidence shows that, by her behaviour, Ms. Turmel made her reassignment difficult and that she deliberately refused to apply the "very simple" measures that it had set out.

[98] With respect to the contacts with inmates, there is no definition of contact in the collective agreement in force, the *CLC*, or any case law or theory cited to me.

[99] The employer argued that, had Ms. Turmel followed the measures that it had proposed, then "[translation] most of the contacts would not have occurred. [emphasis added]"

[100] The employer suggested in its arguments that the evidence be examined from the following three perspectives:

1) the medical evidence;

2) the reassignment; and

3) the accommodation and its principles.

1. The medical evidence

[101] The only medical evidence in the file is Ms. Turmel's medical certificate signed by her attending physician on October 13, 2006 and given to the employer on October 16, 2006 (Exhibit U-2).

[102] The employer admitted that it did not seek an independent medical opinion.

[103] According to the employer, the restrictions set out in the medical certificate (Exhibit U-2) are normal. The employer does not contest them because they are easy to comply with and to manage.

[104] The measures proposed by the employer show that it wanted to keep Ms. Turmel at work while complying with her medical certificate.

[105] The certificate does not mention any specific health issue, and what it does specify is normal.

[106] The employer stated that Ms. Turmel's physician is the same one who treated her during her first pregnancy, and the employer acknowledges that he is very familiar with his patient's work environment at the CSC institution at Donnacona.

[107] According to the employer, if the attending physician had been concerned for his patient, he would have suggested medical restrictions or placed her on sick leave.

[108] The employer concluded that part of its arguments by pointing out that, according to Exhibit U-4(d), Ms. Turmel's attending physician sent his patient back to work without any medical restrictions. The employer concluded that this is not a case of non-compliance with the medical certificate (Exhibit U-2) but a work conflict between Ms. Turmel and the manager, Ms. Fortier.

[109] The employer argued that the real problem that occurred in October and November 2006 was not the reassignment but an issue of labour relations with Ms. Fortier and that the intent was to have me conclude that Ms. Turmel was entitled to paid leave.

2. <u>The reassignment</u>

[110] The employer's argument about the reassignment pointed out that Ms. Turmel's testimony is subjective because she read her handwritten notes into evidence. The employer claimed that it undermined her credibility.

[111] It was Ms. Turmel's second pregnancy at Donnacona Institution. She was familiar with the layout, the schedules and the seriousness of the inmates' sentences, as well as how things operate in the institution.

[112] Everywhere she was reassigned, except in general administration, she had a

closed office with a telephone and a lock on the door. Despite those facts, she did not follow the instructions given to her. In the employer's opinion, if the reassignment was unsuccessful, it was solely Ms. Turmel's fault.

i. The six contacts between October 19 and November 23, 2006

a. First contact

[113] After obtaining her medical certificate dated October 13, 2006, Ms. Turmel began her reassignment on October 16, 2006 in the preventive security section under Mr. Chicoine's authority. On October 23, 2006 only, she received from Ms. Fortier the schedule of the inmate-cleaners (Exhibit U-3) covering Mr. Chicoine's and Ms. Fortier's sectors. The first contact between Ms. Turmel and an inmate-cleaner occurred on October 19, 2006.

[114] The employer pointed out that Ms. Turmel did not follow the instruction requesting that she close the door to her office and that it was her fault that contact occurred.

b. Second contact

[115] The second contact was on October 24, 2006 in administration on the second floor, after the end of the inmate-cleaner's shift. Ms. Girard, the supervisor, observed the contact in the hallway when Ms. Turmel was heading toward the washrooms.

[116] The employer's argument was that Ms. Turmel did not call the supervisor to verify whether the inmate-cleaner had left. In the employer's opinion, by her behaviour, Ms. Turmel risked contact with the inmate-cleaner because it was a few minutes after 09:30.

c. Third contact

[117] The third contact happened in the computer room on October 26, 2006, since the door was not closed because several employees required access to the room for their work.

[118] In its arguments, the employer stated that Ms. Turmel knew that the inmate-cleaner was on duty in that area and that she had the option of closing the door to avoid any contact. If she felt threatened, she could have acted differently; she

did not. In addition, she acknowledged that the contact happened precisely during the inmate-cleaner's shift. Moreover, according to the employer, Ms. Turmel claimed that several people witnessed the incident but that none came forward to corroborate her statements.

d. Fourth contact

[119] The fourth contact happened on October 27, 2006 in the general administration office, with Ms. Fortier and Ms. Girard present. On this occasion, Ms. Turmel had been loaned to the general administration office to replace the telephone operator, who was absent.

[120] The employer did not contradict the fact that this event occurred, but questions whether it was actually a contact.

[121] With respect to this contact, the employer stated that it acted immediately with speed and efficiency to have the inmate-cleaner escorted out of the room where Mses. Turmel, Fortier and Girard were located.

[122] The employer mentioned that Ms. Turmel said at the time that she was satisfied with the manner in which the inmate-cleaner was escorted out of the room.

e. Fifth contact

[123] The fifth contact occurred on November 14, 2006, once again in the preventive security area under the authority of Mr. Chicoine.

[124] According to the employer, at the time of the contact, Ms. Turmel was at a fax machine when the inmate-cleaner was on the premises. The employer wondered what she was doing there, knowing that she was supposed to keep her office door closed. The employer stated that Ms. Turmel simply did not follow the instruction that she knew existed.

f. Sixth contact

[125] The sixth contact happened on November 23, 2006 at the entrance to the institution with inmates close to an escort van. With respect to this contact, the employer wondered why, after seeing the escort van when she arrived in the parking lot, Ms. Turmel still walked toward the entrance despite knowing that contact would occur with one or more inmates.

[126] The employer stated that what happened on November 23, 2006 was not its fault.

[127] Moreover, the employer stated that Ms. Turmel did not help make her reassignment a success.

[128] The employer claimed that it is not logical to conclude that the reassignment was not reasonably practicable by relying solely on the argument that contacts occurred.

[129] It is necessary to interpret the expression "not reasonably practicable" for all aspects of Ms. Turmel's behaviour and the efforts that she made to avoid contact. Indeed, she did not make any efforts, which undermines her credibility. According to the employer, the probative value of the testimony and her behaviour are in my hands.

[130] The employer further stated that it, employees and the bargaining agent must collaborate if a reasonable accommodation is to be found. In addition, the employer also believes that Ms. Perreault's testimony confirms that Ms. Turmel was not seeking collaboration among the parties. In contrast, Ms. Tremblay's testimony was credible and professional, and it must be given probative value.

3. Accommodation

[131] Article 45 of the collective agreement must be interpreted in the context of accommodation. It must be interpreted in a restrictive manner.

[132] Finally, the employer cited the following three judgments of the Supreme Court of Canada in support of the argument that the bargaining agent and Ms. Turmel have an obligation to collaborate with the employer: *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970; *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4; and *Hydro Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43.

IV. Reasons

[133] An in-depth analysis of the facts, all the evidence and the case law adduced enables me to make the following comments and statements, which are the basis of the rationale for my decision. First, I do not accept the employer's argument in

paragraph 75 questioning Ms. Turmel's credibility. Ms. Turmel answered all the questions put to her spontaneously and without hesitation. She was clear in her explanations, and she does not lack credibility simply because she occasionally consulted her handwritten notes. All her testimony and the balance of the evidence indicate that she was perfectly credible.

[134] To begin, each time contact occurred between an inmate-cleaner and Ms. Turmel, it was necessary to consider Ms. Turmel's medical certificate. One of the purposes of a medical certificate is to maintain a reasonable balance between the possible risks and the health of the pregnant woman and her fetus during her pregnancy when she is at work.

[135] In the employer's opinion, Dr. Auger, who signed Ms. Turmel's medical certificate, is a professional who is quite familiar with Donnacona Institution and who knows his patient, whom he treated during her first pregnancy and whom he monitored during her second pregnancy.

[136] It is important to point out that, in this case, the employer did not obtain an independent medical opinion. Since it did not exercise its right to obtain that opinion, the employer may not, through its managers, substitute itself for the only existing medical evidence.

[137] Moreover, the employer could have verified, according to clause 45.02 of the collective agreement, whether the restriction of no contact with inmates was justified. As mentioned in the previous paragraph, the employer did not obtain an independent medical opinion and, in the absence of such an opinion about Ms. Turmel's health and that of her fetus, there was no reason for the employer not to apply the provisions of clause 45.04. Paragraph 137 of this decision can be reiterated in its entirety with respect to the fourth restriction from Ms. Turmel's physician (see paragraph 17 of this decision), specifically "[t]he possibility of leaving her office at all times." Clause 45.04 reads as follows:

> ***45.04*** *Where reasonably practicable, the Employer shall modify the employee's job functions or reassign her.*

[138] Under article 45 of the collective agreement, the employer has an obligation, where reasonably practicable, to modify the employee's job functions or to reassign her, while respecting the conditions set out in her medical certificate. That obligation

is reinforced by the following:

- First, the employer did not obtain an independent medical opinion under clause 45.02 of the collective agreement to take into consideration Ms. Turmel's particular circumstances, as clearly set out in her medical certificate.

- Second, the employer did not obtain a medical opinion that contradicted Ms. Turmel's medical certificate, which, I repeat, is the only medical certificate in evidence. To counter the medical certificate in evidence, the employer should have obtained a medical opinion that contradicted each of the conditions that were not within the employer's expertise, and specifically, Dr. Auger's first condition, stating the following: "[translation] No contact with inmates," and his fourth condition, stating as follows for Ms. Turmel: "[translation] The possibility of leaving her office at all times." The employer could have and should have obtained such a certificate to be successful, but it did nothing.

- Third, in its arguments, the employer stated that it agreed with Ms. Turmel's medical certificate.

- Fourth, the employer not only acknowledged and accepted Ms. Turmel's medical certificate, it also acknowledged that the physician who prepared it was quite familiar with his patient's workplace.

[139] This is not a case of a certificate of convenience; it is quite the contrary.

[140] In his medical certificate (Exhibit U-2), addressed to the CSC at Donnacona and dated October 13, 2006, Ms. Turmel's treating physician concluded as follows: "[translation] I am available as needed for all requests for information or to provide desired clarifications." I have no evidence and no argument from the employer before me indicating that it tried to obtain additional information or clarifications from Ms. Turmel's physician.

[141] The employer's attitude toward the contacts between Ms. Turmel and the inmate-cleaner in the preventive security section shows that it felt that it was not reasonably practicable to reassign Ms. Turmel to avoid the activities or conditions indicated in the medical certificate.

[142] Thus, the employer simply did not want to modify how things were done to

make the work sites to which Ms. Turmel was reassigned more secure, knowing that accidental contact between the pregnant employee and an inmate-cleaner was likely to happen, in breach of the restrictions specifically indicated on a medical certificate of which the employer was aware.

[143] The frequency of the contacts between Ms. Turmel and the inmate-cleaners met the conditions set out in clause 45.07 of the collective agreement, entitling the employee to paid leave during the risk period mentioned in the medical certificate. That clause reads as follows:

> ***45.07*** *Notwithstanding 45.05, for an officer working in an institution where she is in direct and regular contact with offenders, if the Employer concludes that a modification of job functions or a reassignment that would avoid the activities or conditions indicated in the medical certificate is not reasonably practicable, the Employer shall so inform the officer in writing and shall grant leave of absence with pay to the officer for the duration of the risk as indicated in the medical certificate. However, such leave shall end no later than at the time the officer proceeds on Maternity Leave Without Pay or the termination date of the pregnancy, whichever comes first.*

[144] Things might have been different if, in accordance with the provisions of clause 45.02 of the collective agreement, the employer had obtained an independent medical opinion contradicting the fact that Ms. Turmel's health and that of her fetus warranted the restriction that she have no contact with inmates and also that she have the possibility of leaving her office at all times. (See the medical certificate restrictions at paragraph 17 of this decision.)

[145] It is known that the employer did not obtain an independent medical opinion but that, had it wished to, it would have been necessary to examine the "particular circumstances" of the request for reassignment as provided in clause 45.02 of the collective agreement. A medical opinion sought by the employer must deal with the specific request from a pregnant woman, which is <u>accompanied by a medical certificate setting out the risks and restrictions that apply to her particular situation</u>.

[146] I must point out that, contrary to the employer's claims at paragraph 109 of this decision, the balance of the evidence does not support the position that the problem in October and November 2006 was labour relations between Ms. Turmel and Ms. Fortier. On the contrary, the real problem was Ms. Turmel's reassignment, necessitated by the

nature of her substantive position.

[147] I will continue to examine the reassignment in the specific context of the six contacts between Ms. Turmel and the inmate-cleaners, taking into account the relevant case law from our Board and from the Supreme Court of Canada.

[148] The first contact occurred on October 19, 2006, two days after Ms. Turmel started her reassignment to preventive security and four days before she received, on October 23, 2006, a copy of the inmate-cleaner's schedule from Ms. Fortier, her supervisor, who was not in charge of the preventive security section.

[149] It is true that Ms. Turmel did not follow the instructions to close her office door in that department to avoid contact. Because it was her second day in a new job and because she had yet to receive a copy of the inmate-cleaner's schedule, even though she had been informed of it verbally before her assignment on October 19, she thought that she was protected from contacts given the conditions in that area. Given that it was the first contact, I am giving her the benefit of the doubt. Ms. Turmel is not at fault nor responsible for the contact.

[150] The second contact occurred on October 24, 2006 in the administration area (under Ms. Fortier's responsibility) a few minutes after the end of the inmate-cleaner's shift. Ms. Girard witnessed the contact. It is true that Ms. Turmel should have called the person in charge of the inmate-cleaner before leaving her office, which she did not do. However, she was entitled to expect that the inmate-cleaner would no longer be in the area after the end of his shift. When the contact occurred in the hallway leading to the washrooms, it is clear that the inmate-cleaner's shift had ended.

[151] Based on Supreme Court of Canada case law, both the employer and Ms. Turmel were obliged to ensure the success of the accommodation. While the employer cannot excuse any breach of the collective agreement by claiming that Ms. Turmel should have called before leaving her office, nor can Ms. Turmel excuse herself from her obligation to contribute to the accommodation's success by refusing to call. Furthermore, according to the evidence in this case, which was not contradicted, the practice at the time of Ms. Turmel's first pregnancy while working at Donnacona was to escort or direct the inmate-cleaner outside the area where he had been working at the end of his shift. Again, an examination of the uncontested medical certificate reveals several conditions, including, "[translation] [t]he possibility of leaving her office at all times." I

add that the employer did not argue that that practice could not continue. Thus, the employer cannot claim that it is an undue restriction. Even though her medical certificate clearly indicates "[translation] [t]he possibility of leaving her office at all times," the employer also had made a clear instruction to call before leaving, as an additional precaution, to avoid contact with the inmate-cleaner. Unfortunately, Ms. Turmel did not make the call that might have prevented the contact.

[152] It should be noted that, between the first two contacts, the representatives of the two parties had discussions but that no additional precautions were taken, except to advise Ms. Turmel that she should not assume that the inmate-cleaner had left the premises at the end of his shift. In the case of the second contact, both parties are at fault.

[153] The third contact took place in a third location, on October 26, 2006, in the computer room. In that area, several people, in addition to Ms. Turmel, come and go for work purposes. Therefore, that room's door is always open out of necessity and for the institution's efficiency.

[154] For this contact, I accept in part the employer's argument that Ms. Turmel was at fault because, when it happened, Ms. Turmel should have known that the inmate-cleaner was in the area precisely during the shift on the schedule. The employer does not contest that contact occurred. The restrictions on Ms. Turmel's medical certificate were breached due to the contact between an inmate and Ms. Turmel. However, the breach is attributable both to the employer and to Ms. Turmel because both parties were not sufficiently vigilant in the circumstances.

[155] The fourth contact happened on October 27, 2006 in the general administration office with Ms. Fortier and Ms. Girard present. Ms. Turmel had been loaned to general administration to replace the absent telephone operator. For this contact, which is not contradicted by the employer, the employer is at fault. However, the employer questions whether contact actually occurred. No definition of contact and no case law were adduced and no arguments were presented on that specific point. According to the balance of evidence and the general meaning of the word, I conclude that contact with Ms. Turmel occurred, in violation of her medical certificate. There is no question that it was contact in front of two witnesses who were members of the supervisory team. One of the key questions at issue is whether the employer breached the collective agreement by not respecting the medical certificate, which specified that no

contact could take place. In this instance, and based on the balance of the evidence, the employer breached the collective agreement.

[156] The balance of the evidence indicates that this was not a physical contact with the inmate but close visual contact within a reasonable radius in the same room or location where Ms. Turmel was working. It is clear from the evidence that Ms. Turmel saw the inmate-cleaner in the same room as she on that day and that the contact was contrary to the medical certificate.

[157] For the fourth contact, it is not enough for the employer to make excuses by arguing that it acted quickly and effectively to have the inmate-cleaner escorted out of the room where the contact occurred. Nor is it enough to point out that Ms. Turmel said that she was satisfied with manner in which the inmate-cleaner was quickly escorted from the room where she was also located.

[158] The fact remains that the fourth contact was in flagrant violation of Ms. Turmel's medical certificate and in breach of the spirit and letter of the *CLC* provisions and collective agreement protecting pregnant women at work.

[159] The fifth contact occurred on November 14, 2006, again in the preventive security section, under Mr. Chicoine's responsibility. At the time, Ms. Turmel was at a fax machine outside her office during the inmate-cleaner's shift. For this contact, the employer and Ms. Turmel are at fault for different reasons. Ms. Turmel is at fault because she did not follow the instructions and also because it was the fifth contact and she should have been more careful, especially during the inmate-cleaner's shift. The employer's fault is more serious because the instructions of the attending physician are clear: no contact. The fact that five contacts occurred means that it was the employer's responsibility to be more vigilant to avoid any contacts.

[160] The sixth and final contact happened on November 23, 2006 at the institution's entrance, outside Ms. Turmel's work site. This contact did not involve an inmate-cleaner but rather an inmate transfer at the entrance to Donnacona Institution. Ms. Turmel noticed the transfer of inmates when she was in the institution's parking lot, and despite that, she got out of her vehicle and walked toward the location, which posed a risk to her and to her fetus. The employer cannot be held responsible or be placed at fault even though contact took place. Ms. Turmel must assume part of the responsibility for the success of the accommodation, which she did not by not

avoiding the contact. The sixth contact does not constitute a violation of the collective agreement by the employer because it resulted from an inexplicable lack of vigilance and care by Ms. Turmel alone.

[161] It is important to point out that six contacts occurred in the space of five weeks of work for Ms. Turmel. However, despite the employer's argument to the contrary, I find that all three parties (it is a three-party obligation as follows: (1) the employer, (2) the employee and (3) the bargaining agent) honestly tried to ensure the success of Ms. Turmel's reassignment. In Ms. Turmel's case, in spite of six contacts, she wanted to continue to work for her employer, in accordance with her medical certificate. As for the employer, there is no question that it also wanted Ms. Turmel's reassignment to succeed.

[162] Both parties are obliged to make the reassignment (accommodation) work, and they did not fully succeed in this case. Even though I have decided that both parties showed good faith, and even though six contacts occurred between inmates and Ms. Turmel — four of which were breaches of the collective agreement — it is my opinion that both parties failed to make the necessary accommodation a success.

[163] Although there was goodwill by both parties, both failed at times during the reassignment period. I have mentioned just a few.

[164] In addition to the deficiencies associated with each of the six contacts, I must also mention the following shortcomings, which might facilitate the success of future reassignments of pregnant women in Canadian penitentiaries.

[165] It was obvious in this case that there was a lack of communication and collaboration between the different sectors of the institution to ensure that no contacts occurred. First, the different sectors to which the reassignment was to take place were close enough to each other to promote effective coordination, which would have made it possible to avoid all contacts. Second, why not reinstate the practice of calling an escort to accompany the inmate-cleaner out of the area to which a pregnant woman has been reassigned once he has completed his shift, according to a preset schedule? That is not difficult. The uncontradicted evidence indicates that it worked well at Donnacona in the past.

[166] A better analysis of the contacts that did occur and the follow-up might have

enabled drawing lessons from the mistakes in order to avoid them in the future and to improve the situations of pregnant women, especially in a workplace that everyone knows is high risk. The parties specifically covered that high-risk element for pregnant women in clause 45.07 of the collective agreement, which is explicit about the risk. If the contacts had been thoroughly analyzed, it is possible that, in the context of this case, the six incidents would not have occurred.

[167] As I stated in paragraph 162, neither party fully met their accommodation or reassignment obligations. Relying on the documentary evidence and the testimony, it is clear to me that Ms. Turmel could have done more to avoid some of the contacts with the inmate-cleaners and that she did not. The employer also could have done better and did not. For those reasons, I have decided not to grant Ms. Turmel full compensation for the period in question. I believe that her lack of cooperation played a role in her leave without pay.

[168] Moreover, and without any pretense, pregnant women working in penitentiaries might perhaps be safer and thus more disposed to continue working in penitentiaries during their pregnancies, right up to the delivery.

[169] Even if the instructions are simple, it may be appropriate to explain them more thoroughly before beginning a reassignment by providing examples of past mistakes and experiences not only at Donnacona Institution but also at other penitentiaries across Canada.

[170] The sole purpose of these reflections is to ensure the future success of reassignments by seeking the full cooperation of the employer, the pregnant employee and the bargaining agent while respecting the pregnant woman's medical certificate.

[171] The parties showed that they wanted to allow pregnant women to continue to work in penitentiaries while pregnant until their physicians determine that they must stop working to avoid endangering their health and the health of their fetuses.

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

(The Order appears on the next page)

V. Order

[173] Accordingly, I allow the grievance in part and order the employer to pay Ms. Turmel 8 weeks of the 10 weeks of remuneration claimed.

October 5, 2009.

PSLRB Translation

Roger Beaulieu,
adjudicator