Date: 20090409

File: 566-02-416

Citation: **2009 PSLRB 44**

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

RICHARD SIOUI

Grievor

and

DEPUTY HEAD
(Correctional Service of Canada)

Respondent

Indexed as
Sioui v. Deputy Head (Correctional Service of Canada)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Michele A. Pineau, adjudicator

For the Grievor: Himself

For the Respondent: Karl Chemsi, counsel

Heard at Quebec,
March 10 to 14, October 14 to 16 and October 21 to 23, 2008.
(PSLRB Translation)

Individual grievance referred to adjudication

[1] Richard Sioui ("the grievor") has worked as a correctional officer with the Correctional Service of Canada ("the employer" or CSC) since 1986. He holds a CX-02 position at Donnacona, a maximum security institution.

[2] On April 18, 2006, Mr. Sioui was dismissed under the provisions of subsection 12(1) of the *Financial Administration Act*. The employer gave the following three reasons for its decision: Mr. Sioui had been absent since November 16, 2001 following a work-related accident and had never returned to work; he had become permanently unable to hold his position as a correctional officer because he could no longer work with inmates and carry a firearm; and efforts to find him other employment in the public service had been unsuccessful.

[3] Mr. Sioui filed a grievance contesting his dismissal, which is the subject of this decision. I must decide if the employer made the necessary accommodation, without suffering undue hardship, to reinstate Mr. Sioui in the workplace.

Summary of the evidence

[4] On November 16, 2001, Mr. Sioui witnessed a violent altercation at the penitentiary involving another correctional officer. He consulted the nurse with the Employee Assistance Program, who mentioned that he might be suffering from post-traumatic stress disorder. On November 22, 2001, Mr. Sioui consulted Dr. Alain Beaumier. Dr. Beaumier diagnosed post-traumatic stress disorder and recommended that Mr. Sioui stop working. Mr. Sioui consulted a psychologist, Jocelyne Carrier, who found that the traumatic event of November 16, 2001 triggered symptoms related to a similar traumatic event that had occurred two years earlier, which Mr. Sioui had not reported. On November 17, 2001, Mr. Sioui consulted Dr. Nancy Tremblay, who supported the diagnosis of post-traumatic stress disorder.

[5] On November 29, 2001, Mr. Sioui filed a work-related accident claim with the employer alleging that two incidents had occurred, the first on May 31, 1999, in which an inmate allegedly had a violent altercation with him that had not been previously reported, and the second on November 16, 2001. Mr. Sioui did not return to work. Since the Commission de la santé et de la sécurité du travail (CSST) had not yet rendered a decision, the employer deemed that Mr. Sioui was on sick leave.

[6] On August 5, 2002, Dr. Martin Gourgue, a psychiatrist, became Mr. Sioui's attending physician. In his consultation notes, Dr. Gourgue reports that there is a causal relationship between the May 31, 1999 and November 16, 2001 incidents. During these events, Mr. Sioui was faced with situations in which he feared for his physical safety, which gave rise to a reaction of intense fear. The May 31, 1999 incident was more significant because Mr. Sioui was confronted directly. The November 16, 2001 incident triggered an inner fear that was the last straw. Dr. Gourgue made a diagnosis of post-traumatic stress disorder for which he has continued to provide medical treatment.

[7] On February 11, 2002, the CSST denied Mr. Sioui's claim.

[8] In March 2002, at the employer's request, Dr. Bruno Laplante, a psychiatrist, assessed Mr. Sioui. In his July 12, 2002 expert report, Dr. Laplante states that Mr. Sioui shows symptoms compatible with post-traumatic stress disorder but believes that there is no connection between the November 16, 2001 incident and Mr. Sioui's symptoms. Thus, he concludes that Mr. Sioui has a non-specific anxiety disorder, with no permanent effects and that Mr. Sioui is not disabled with respect to his work.

[9] The CSST's decision was confirmed by an administrative review on October 2, 2002. Mr. Sioui then filed an application with the Commission des lésions professionnelles (CLP) contesting the CSST's ruling. He asked the CLP to recognize the diagnosis of post-traumatic stress disorder caused by two work-related accidents, on May 31, 1999 and on November 16, 2001. On January 13, 2004, the CLP allowed Mr. Sioui's application, overturned the administrative review of October 2, 2002 and ruled that he had suffered a work-related accident that required him to stop work as of November 19, 2001. The CLP found that Mr. Sioui had a permanent functional mental disability of 15 percent and an inability to work.

[10] On February 20, 2004, Mr. Sioui provided the employer with a medical report from Dr. Gourgue recommending that Mr. Sioui be redirected to another occupation, not necessarily related to his work, where he would not have contact with inmates and where he would not possess a firearm. He was of the view that it was difficult to predict whether limitations deemed permanent would continue forever or whether there would be an improvement over the years. However, with two years of hindsight, Dr. Gourgue was of the opinion that Mr. Sioui would always be affected psychologically.

[11] Because of the contradictory medical opinions of Dr. Laplante and Dr. Gourgue, the employer requested that Dr. Jean-Pierre Fournier evaluate Mr. Sioui. In his evaluation report of March 18, 2005, Dr. Fournier reviews in great detail all of the previous evaluation reports, the rulings of the CSST and the CLP, the work description of a correctional officer, and the documents that Mr. Sioui provided to him on the day of the evaluation. Although Mr. Sioui appeared asymptomatic at the time of the examination and tended to considerably trivialize his situation, as a physician, Dr. Fournier supported the findings of the CLP and Mr. Sioui's attending psychiatrist to the effect that Mr. Sioui could no longer work as a correctional officer for the following reasons. The psychic symptomatology was severe enough for Mr. Sioui to have been unable to work for four years, and he sought psychotherapy and drug treatment measures. Mr. Sioui still presents a significant psychic fragility, although he may be in remission. Given the nature of a correctional officer's work, he remains at risk of a relapse in the event of stress at work or the reoccurrence of incidents similar to those that he has already suffered. Lastly, Dr. Fournier remains convinced that, given Mr. Sioui's psychological history and the nature of his duties, the grievor is likely not to react appropriately in an emergency and, consequently, that he represents a potential danger to his or others' safety. At the hearing, Dr. Fournier testified as an expert witness about the opinion he gave on March 18, 2005 and drew the conclusion that Mr. Sioui will be unable to perform the duties of a correctional officer for the rest of his career. Dr. Fournier's testimony was not contradicted by any other expert testimony.

[12] Jean-Yves Bergeron, Deputy Warden of the Donnacona penitentiary, testified that the clientele of the Donnacona penitentiary consists of about 300 inmates who have committed violent crimes (armed assault, robbery, murder or attempted murder, smuggling with intimidation, etc.), are repeat offenders or are offenders who have had difficulty adapting in other institutions. A CX-02 correctional officer (the position held by Mr. Sioui) supervises CX-01 correctional officers and is a front-line worker. Front-line workers escort inmates and control their movements in the institution. Correctional officers wear firearms and can be called on to intervene in altercations, fights or assaults among inmates, in riots, or in any other violent situation in a penitentiary. About 60 incidents occur annually that necessitate the use of force (with weapons). Incidents can involve a correctional officer in any part of the institution, and the officer on site has no choice but to intervene when an alarm is raised.

[13] At Donnacona, all positions, including administrative positions, involve contact or a risk of contact with inmates, whether by employees of the store, the workshop, the school, the kitchen, the laundry or those in administration, including the telephone operator. In that institution, although their movements are controlled, inmates move about in the different sectors. All areas of the penitentiary are at risk of violent situations in the event of an attempted escape, a hostage taking or an attack. Incidents occur every week. Altercations with inmates are common in penitentiaries and are part of the risks of the job.

[14] Mr. Bergeron testified that, in January 2005, the employer examined the possibility of a position that corresponded to Mr. Sioui's permanent functional limitations, i.e., a modified position in which he would have no inmate contact. The employer concluded that removing all inmate contact from a correctional officer position makes that position unproductive and that it correspondingly increases the work of the other correctional officers in the group. Accordingly, no correctional officer position at the Donnacona penitentiary was likely to correspond to Mr. Sioui's permanent functional limitations.

[15] In 2005, Christian Rioux was put in charge of Mr. Sioui's return-to-work file. Mr. Rioux is a training officer who coordinates the CSC's Return to Work Program (RWP) for the Quebec region. The RWP's purpose is to ensure that employees who have experienced a work-related accident or illness return to work as quickly as possible into a safe context in keeping with functional limitations established by experts. Mr. Rioux's role is to maintain a partnership with local and regional programs and with various stakeholders (the employee, the union, the manager and the program coordinators). He is involved in the return-to-work file of an employee when that file is transferred to the regional level, which normally occurs when the work-related accident file has been completed and the functional limitations have been established.

[16] Mr. Rioux made initial telephone contact with Mr. Sioui on March 17, 2003 and then had a more formal telephone interview with him on March 18, 2003 to determine his needs, expectations, interests and desire to benefit from the program. At that time, the extent of Mr. Sioui's functional limitations was not yet known because his application to the CLP had not yet been decided. Mr. Rioux discussed with Mr. Sioui the possibility of reorienting his career because that was the conclusion of his attending

physician. At the time that he took charge of the file, Mr. Rioux's intervention was a preventive measure. Mr. Sioui was to send his curriculum vitae to Mr. Rioux.

[17] Mr. Rioux told Mr. Sioui that he had to commit to actively seeking work and to keep Mr. Rioux informed of his efforts if he wanted to participate in the RWP. On March 24, 2003, after the initial interview, Mr. Rioux provided Mr. Sioux with resources to facilitate his job search, which consisted of an information kit with a model curriculum vitae, a list of relevant Internet sites, a document on the career opportunities system and instructions on how to subscribe to the *À l'écoute* program to electronically receive job opportunities in the federal public service.

[18] For his part, Mr. Rioux mobilized his partners to assist in seeking employment for Mr. Sioui and kept an ongoing record of progress. On May 26, 2003, Mr. Rioux called the Department of Indian and Northern Affairs to see if there were any job opportunities, since Mr. Sioui is identified as Aboriginal, but there were no positions available at that time.

[19] On June 19, 2003, Mr. Rioux called Mr. Sioui to follow up on his curriculum vitae, which he received from Mr. Sioui on July 7, 2003.

[20] Mr. Rioux alerted his network of interdepartmental contacts to find a possible position for Mr. Sioui. Mr. Sioui did not contact Mr. Rioux about his own efforts. On December 2, 2003, Mr. Rioux sent Mr. Sioui's curriculum vitae to Statistics Canada. Mr. Rioux still had not heard from Mr. Sioui. He learned of the nature of Mr. Sioui's permanent functional limitations shortly after the CLP's ruling on February 20, 2004. On April 6, 2004, Mr. Rioux met with officials from Donnacona Institution (the local RWP, the regional RWP and a management representative) to update Mr. Sioui's file. Mr. Rioux learned that on February 21, 2004, Mr. Sioui had been invited to apply for a position as a painting instructor at the Donnacona penitentiary but that he did not follow up on the letter of invitation.

[21] On May 4, 2004, Mr. Rioux called Mr. Sioui to discuss the progress on his job search now that Mr. Sioui was able to work. Mr. Rioux reiterated to Mr. Sioui that he had to collaborate in the job search. At Mr. Sioui's request, a meeting was set for May 10, 2004 in Quebec to review his file, but Mr. Sioui did not show up. He did not return Mr. Rioux's message, which he had left in an effort to determine why the grievor had not attended the meeting.

[22] On May 11, 2004, Mr. Rioux again launched a search for a vacant position at the Donnacona penitentiary that would suit Mr. Sioui. No vacant position met Mr. Sioui's functional limitations. On the same day, Mr. Rioux urged Mr. Sioui to contact the Canada Border Services Agency and gave him the contact information for a resource person. Since Mr. Sioui had not yet registered for the career opportunities program *À l'écoute*, Mr. Rioux did it for him.

[23] A meeting was held on June 23, 2004 at Donnacona with Mr. Sioui and his union representative to agree on a job search strategy. Because Mr. Sioui wanted to work in the area of the Wendake reserve where he lived, Mr. Rioux informed him that his job opportunities for another CSC position were limited. The Quebec region has few job opportunities compared to the Laval or Montreal regions. There were no vacant positions in the Quebec region at that time that corresponded to Mr. Sioui's functional limitations. Mr. Sioui told Mr. Rioux that he had been in contact with the Canada Border Services Agency.

[24] On June 30, 2004, Mr. Rioux contacted the Department of National Defence to verify job opportunities in Quebec, and the department agreed to circulate Mr. Sioui's resumé. Mr. Rioux also contacted the Canada Border Services Agency. Mr. Sioui's application had been received too late; the examinations for the Quebec region had been held on June 11, 2004.

[25] On July 5, 2004, Mr. Sioui called Mr. Rioux to update him about his approach to the Department of Indian Affairs, which had been unsuccessful, and to tell him that he was waiting to meet with a career advisor when that person returned from holidays.

[26] On July 8, 2004, Mr. Rioux took steps to enable Mr. Sioui to write the Canada Border Services Agency test in Montreal on July 23, 2004. Mr. Sioui did not pass the test.

[27] Around July 14, 2004, Mr. Sioui indicated his interest in taking training to become a truck driver. Mr. Rioux encouraged him to obtain his class 3 licence (heavy vehicles) and to take language training at the CSST's expense and that of any other agency that might approve his request. Mr. Rioux called Mr. Sioui when a competition opened at the Department of National Defence for a truck driver position for which he would be qualified after his driver training.

[28] In August 2004, Mr. Sioui began his truck-driver training. He completed it in December 2004 and obtained a class 3 licence, which enabled him to drive certain classes of heavy vehicles.

[29] On November 18, 2004, at Mr. Sioui's request, Dr. Gourgue issued a new report. This time, he supported Mr. Sioui's decision to want to return to work as a correctional officer but with the qualification that there was still "[translation] a mathematical probability of a relapse should the stressors at work be significant or if elements of a serious depression should reappear spontaneously. Moreover, he is not immune, of course, to a new traumatizing event occurring, as it did in the past."

[30] On December 10, 2004, the CSST ruled that it considered Mr. Sioui able, as of December 8, 2004, to perform appropriate employment, i.e., as a truck driver, and that he would be covered until December 8, 2004. Mr. Sioui contested that decision to the CLP.

[31] On May 3, 2005, Mr. Rioux conducted a virtual (anonymous) marketing campaign concerning Mr. Sioui's availability for employment in all departments.

[32] On May 9, 2005, Mr. Rioux emailed Mr. Sioui's union representative, Robert Jacques, informing him that Mr. Sioui met all the conditions for a CR-04 position with the Canadian Food Inspection Agency in the Quebec region, specifically that he was Aboriginal and francophone. Mr. Rioux was unable to contact Mr. Sioui directly because Mr. Sioui had changed his email address without notice. Mr. Jacques forwarded Mr. Rioux's email to Mr. Sioui, but Mr. Sioui did not follow up on the job opportunity.

[33] On July 1, 2005, Mr. Sioui stated that he was now available for work in the Laval region, where there were truck driver positions. Mr. Rioux sent a notice of interest concerning Mr. Sioui, which included his curriculum vitae and summary of competencies, to the Human Resources Branch of the CSC in Laval for a vacant position.

[34] On July 25, 2005, Mr. Sioui changed his mind; he was no longer able to move for a position in Laval. Mr. Rioux withdrew the notice of interest that had been sent.

[35] Mr. Rioux subsequently accepted a position at the CSC's school and withdrew from Mr. Sioui's case.

[36] Mr. Sioui was dismissed on April 18, 2006 for the following reasons: as diagnosed by his own physician and by an independent medical evaluation (that of Dr. Fournier), Mr. Sioui was no longer able to hold his position as a correctional officer with inmates and to carry a firearm, and efforts to assist him under the RWP had proven unsuccessful.

[37] Mediation took place on January 12, 2007 at Mr. Sioui's request and with the union's collaboration, which resulted in a memorandum of understanding by which the employer undertook, among other conditions, to repay Mr. Sioui certain benefits, to reinstate him in his position as a correctional officer but on leave without pay so that he could take advantage of public service reintegration services, and to provide him with a career planning service. For his part, and among other conditions, Mr. Sioui agreed to actively seek employment in the CSC and in the federal public service with the help of someone from human resources, Marie-Claire de Lottinville. He agreed that, on March 5, 2008, the employer would terminate his employment on the grounds of medical disability if he had not been offered any appropriate employment by then. On January 31, 2007, as one of the conditions of implementation of the memorandum of understanding, Mr. Sioui's attending psychiatrist confirmed that Mr. Sioui was able to appreciate the contents of the memorandum of understanding and to sign it. On February 6, 2007, Mr. Sioui requested by email a one-on-one meeting with Pierre Laplante, the new warden of the penitentiary. Mr. Laplante did not agree to meet with Mr. Sioui alone, citing the terms of the memorandum of agreement and the absence of the union's participation. On March 1, 2007, Mr. Sioui informed his union representative, Mr. Deschambault, that he was available to seek employment outside the Quebec region in minimum security institutions and halfway houses.

[38] On April 19, 2007, Mr. Laplante reinstated Mr. Sioui in his duties on leave without pay.

[39] On April 19, 2007, Ms. De Lottinville emailed Mr. Sioui, copying his union representative, informing him of the announcement of a process to fill officer positions with the Canada Border Services Agency in the Quebec region and to encourage him to apply for the competition. On April 25, 2007, following a series of email exchanges with Mr. Sioui, Ms. de Lottinville clarified certain points. Mr. Sioui was continuing to insist on reinstatement as a correctional officer, a possibility excluded under the terms of the memorandum of understanding and to insist that there was

"[translation] no action plan needed." She told him that if that was his position, the services of a career advisor, agreed to in the memorandum of understanding, were not needed. Nonetheless, Ms. de Lottinville urged him to seriously pursue his job search and renewed her offer of help. Mr. Sioui did not reply to that email.

[40] Mr. Laplante called Mr. Sioui, through his union representative, to a meeting on June 14, 2007 to try to sort out the disagreements about implementing the memorandum of understanding. Mr. Sioui was informed of the meeting in writing on May 30, 2007 by Pierre Dumont, the union president for the Quebec region. Mr. Laplante, a labour relations advisor and two union representatives, Mr. Deschambault and Mr. Jacques, attended the meeting. Mr. Sioui did not show up.

[41] On June 29, 2007, Mr. Laplante wrote to Mr. Sioui to inform him that he had not complied with the conditions of the memorandum of understanding signed on January 12, 2007 and that he wanted to discuss the situation and learn Mr. Sioui's intentions by July 27, 2007. At the hearing, Mr. Laplante testified that the reasons for his letter were:

- Mr. Sioui had not withdrawn his grievances and had refused any collaboration with the union to do so.
- Mr. Sioui was actively pursuing his cases with the CLP, contrary to what he had agreed.
- Mr. Sioui wrote directly to Keith Coulter, Commissioner, CSC, on April 17, 2007, to inform him of his dissatisfaction with the conditions of the memorandum of understanding and the contents of the medical reports. Mr. Sioui threatened to take further action, including filing a harassment complaint and a civil suit. Mr. Sioui asked to be reinstated in a CX-02 correctional officer position as of April 19, 2007.
- Mr. Sioui had not accepted Ms. de Lottinville's invitation to create an action plan to find him work other than as a correctional officer and had not, from all appearances, taken any initiative to find another position.

[42] In reply to Mr. Laplante's June 29, 2007 letter, Mr. Sioui emailed Mr. Bergeron on July 19, 2007 stating that he was now available for reassignment within the penitentiary at the CR-04 level in the building services sector.

[43] On October 4, 2007, Mr. Laplante wrote to Mr. Sioui, informing him that he was terminating the memorandum of understanding signed on January 12, 2007 and reactivating the April 19, 2006 dismissal on the grounds that Mr. Sioui had not fulfilled his commitments under the memorandum of understanding.

[44] Manon Houle, a labour relations advisor at the CSC, testified that, after the CLP's decision and the medical reports of Dr. Fournier and Dr. Gourgue, she and Ms. de Lottinville clearly explained to Mr. Sioui that, because of his permanent functional limitations, he could not return to work with inmates and could not carry a firearm. The risk of relapse was too high, according to the findings of the medical experts. Dr. Gourgue had concluded that, nevertheless, those limitations did not prevent him from working but that he had to change careers. Mr. Sioui had voluntarily trained as a truck driver, which the CSST paid for, to help him find new employment. Yet, Mr. Sioui continued to insist in his correspondence and telephone conversations with Ms. Houle that he wanted to come back as a correctional officer. On March 1, 2007, Mr. Sioui made it known that he was interested in a transfer to a position as a probation officer in a halfway house or as a correctional officer in a minimum security institution. According to Ms. Houle, those positions were not suitable because they involved contact with inmates and situations where inmates may have to be controlled.

[45] Ms. Houle also testified that when Mr. Sioui was certified as a truck driver, the employer wanted to find him work related to his training. No drivers were employed at the Donnacona penitentiary, but there were some at the Ste-Anne-des-Plaines administrative centre in Laval. A truck driver position became vacant in Laval, but Mr. Sioui stated that he was not available to work outside the Quebec region. Mr. Sioui continued to write to Mr. Bergeron and to Mr. Laplante to try to convince them to reinstate him in a correctional officer position, while Ms. de Lottinville worked to find him a position suited to his functional limitations.

[46] Mr. Sioui testified about the following facts. After the November 16, 2001 incident, he met with the representative of the Employee Assistance Program, Marie-Claire Beaudry. Mr. Sioui told her about a similar incident that had taken place

on May 31, 1999 but had involved him directly. He did not report the incident at the time and tried to forget it. Ms. Beaudry made the connection between the two incidents and suggested to Mr. Sioui that he might be suffering from post-traumatic stress disorder. She encouraged him to consult a doctor. On November 22, 2001, Mr. Sioui consulted Dr. Beaumier and spoke to him about Ms. Beaudry's conclusion. According to Mr. Sioui, Dr. Beaumier suggested the diagnosis of post-traumatic stress disorder in just a few minutes and ordered Mr. Sioui to stop working. Dr. Gourgue suggested the same diagnosis as Dr. Beaumier. Mr. Sioui attributes his work-related accident and subsequent functional limitations to the false "diagnosis" offered by Ms. Beaudry and the blindness of the physicians who subsequently confirmed that diagnosis. Mr. Sioui asked me to rescind the "diagnosis" given by Ms. Beaudry and the subsequent medical reports, to withdraw and cancel the CLP's medical ruling of February 20, 2004 and to remove his permanent functional limitations.

[47] Mr. Sioui pointed out that Dr. Laplante's medical report in 2002 was contradicted by that of Dr. Fournier in 2004 and by that of Dr. Gourgue in 2005. He asked me to consider only Dr. Laplante's opinion. He asked me to order that he be assessed by Health Canada to determine his current state, which he believes would enable him to be reinstated in his duties as a correctional officer. Mr. Sioui stated that he is healthy, functional and without any mental illness. He believes that the post-traumatic stress disorder diagnosis was incorrect and that it contributed to the ruin of his career. He believes that he suffered work-related burnout or depression. He was upset by the suicide of one of his co-workers at the penitentiary on September 19, 2004; he was unable to make clear decisions for a few weeks. He indicated that he regretted consulting a psychiatrist because that decision led him down a very difficult road, and he feels like he has been a failure in his work. He added that, if it were not for the support of his family and the Aboriginal reserve on which he lives, he would have lost everything. He asked me to put an end to the problems that he has endured by reinstating him in his work. He testified that, if I were to reinstate him in his work, he would agree to withdraw all other recourses that have already been launched.

[48] During Dr. Fournier's cross-examination, Mr. Sioui adduced a document that he had prepared and that he said was his "[translation] counter-expertise" to Dr. Fournier's testimony. In the document, he repeats certain parts of the conversation he had with Dr. Fournier at the time of his visit for an evaluation, including that he had

not considered other work if the employer did not reinstate him, that his training as a truck driver was the result of his own initiative and his own efforts with the Wendake reserve, and that he does not really want to be truck driver.

[49] Under cross-examination, Mr. Sioui admitted that he went before the CLP to confirm the diagnosis of post-traumatic stress disorder. He was following the advice of his union and his counsel at that time. In hindsight, Mr. Sioui is now convinced that it was a mistake and that he received poor advice in moving forward with his work-related accident claim, although he has not filed a complaint against his union about it. He admitted that, at the time of the CLP hearing, he contested Dr. Laplante's medical opinion and that he presented Dr. Gourgue's opinion in support of his opposition to the CSST's findings.

[50] Mr. Sioui admitted that he did not follow up on a letter from his employer dated February 21, 2004 in which he was offered the possibility of a position as a painting instructor and that he had received poor advice from his union on that issue. He stated that he did not attend a meeting with Mr. Rioux in Laval because his union representative told him that there was no purpose to be served by attending such a meeting. Mr. Sioui denied receiving a call from his union representative, Mr. Jacques, on May 29, 2007 to remind him of the location of the June 14, 2007 meeting. He stated that he did not attend the June 14 meeting because his counsel, Marc Bellemare, told him not to attend, and moreover, it was the exam period for the courses he was taking at that time. Mr. Sioui testified that he did not sign the forms withdrawing his dismissal grievance or those related to his objection before the CLP because he did not believe that the memorandum of understanding had been signed in good faith by the employer.

[51] Mr. Sioui stated that he signed the memorandum of understanding even though he disagreed with certain conditions because he was upset by the recent death of his mother and the suicide of his co-worker. He admitted that he did not mention those mitigating factors to Dr. Gourgue, the employer or the union before this hearing. He acknowledged that his union representative and his spouse were present when the mediation took place, but he stated that he had been so upset that he was unable to fully understand what was happening.

[52] Mr. Sioui testified that, after signing the memorandum of understanding, he showed it to Mr. Bellemare but that Mr. Bellemare did not realize that pursuing his case

before the CLP risked contravening one of the conditions of the memorandum of understanding.

[53] Mr. Sioui testified that he did everything he felt was necessary and tried to find work. He applied to the Canada Post Corporation for work as a mail carrier and clerk, and he worked part-time on a few occasions. He worked for the recreation department of the Wendake reserve. He applied to the Canada Border Services Agency and wrote a test. He was not considered for the clerk position in procurement and inventory at the Donnacona penitentiary. The position was filled through the relocation of another employee. He applied for the position of material handler-linen keeper, but he did not have his class 3 licence at that time.

Summary of the arguments

The employer

[54] The employer argued that it was justified in dismissing Mr. Sioui because of his medical condition and because it was unable to accommodate him in his position. The evidence showed that Mr. Sioui was not interested in any position other than that of correctional officer at Donnacona and that he still is not. Mr. Sioui never took seriously the employer's efforts to find him a position other than as a correctional officer. The employer argued that Mr. Sioui's permanent functional limitations are incompatible with a correctional officer position and that my decision should be limited to that analysis.

[55] The employer considers that its efforts to find another position failed because Mr. Sioui was not motivated to find something else. Moreover, he was not available to move when positions that might have accommodated him became vacant. According to the employer, Mr. Sioui expected the employer to provide him with work without doing his part. The memorandum of understanding must be considered another effort by the employer to assist Mr. Sioui, even after his dismissal. Once again, Mr. Sioui refused to cooperate by not adhering to the conditions of the memorandum of understanding, by not attending a meeting on June 14, 2007 and by not responding to the employer's letter of June 29, 2007 to clarify the situation. Mr. Sioui fixated on wanting to return as a correctional officer to the point of undermining the agreement and limiting his chances of finding work elsewhere.

[56] In the employer's opinion, Mr. Sioui raised both novel and unusual issues. Mr. Sioui has denied that he had any medical condition, despite having been absent from work for several years for such a condition. He has denied that the employer tried throughout that period to find a solution because of that medical condition, which he used as the basis for several legal proceedings. The employer challenged me to find any logic in Mr. Sioui's arguments and urged me to find that the employer acted in good faith in trying to find a valid accommodation for Mr. Sioui. The employer argued that it could not be held responsible for failing to find Mr. Sioui a job.

[57] The employer asked that I accept the medical evidence on file because it refutes Mr. Sioui's claim and because he has provided no evidence to counter it. Mr. Sioui has blamed everyone who gave him advice, including the nurse in the Employee Assistance Program, the attending physicians, his union representatives and his counsel.

[58] The following facts have been clearly established. Mr. Sioui experienced post-traumatic stress following an altercation that he witnessed on November 16, 2001. He made a claim to the CSST for the condition to be recognized as a work-related accident. The employer challenged the connection between the accident and the symptoms by producing Dr. Laplante's report. The CLP upheld Mr. Sioui's claim that his post-traumatic stress was the result of a work-related accident. Mr. Sioui's absence since November 16, 2001 is related to a medical condition. That condition was confirmed on February 20, 2004 by the opinion from Dr. Gourgue, Mr. Sioui's attending physician, who recommended that his patient not return to the prison environment. Mr. Bergeron explained that the clientele of the Donnacona penitentiary comes from among the most violent criminal groups in Canada. Inmates move freely according to their work schedules, including in the yard and the gymnasium. All correctional officers have contact with inmates and must carry a firearm. Violent incidents are unpredictable. The employees of the penitentiary who do not carry firearms still have more or less direct contact with inmates.

[59] The medical evidence is clear and uncontradicted. Mr. Sioui's attending physician is of the same opinion as the employer's expert that Mr. Sioui is suffering from a permanent functional limitation that is incompatible with the work of a correctional officer. He is asymptomatic because the stressors that might trigger the symptoms, specifically violent incidents, are absent. The employer cannot take the risk

of reinstating Mr. Sioui, knowing that he is a threat to his own safety and to that of his co-workers should a violent incident occur while he is on duty.

[60] The employer tried, through the RWP, to find Mr. Sioui work. Except for three weeks in 2005, Mr. Sioui indicated that he was not able to move outside his region. He delayed preparing his curriculum vitae, and he did not register for the electronic job opportunities program; Mr. Rioux had to do it for him. He did not actively pursue the employment opportunities that Mr. Rioux suggested to him. He did not attend two strategic meetings. He did not keep Mr. Rioux informed of his own efforts to find work. Mr. Sioui stated he was able to move in March 2007, but continued to insist on a return to his correctional officer position. He did not make real efforts to relocate. Mr. Sioui did not mention the death of his mother or the suicide of his co-worker as mitigating factors to anyone before the hearing.

[61] The employer argued that it tried to accommodate Mr. Sioui to the point of undue hardship on two occasions, the first time before dismissing him and the second time after reinstating him. At the time of the reinstatement, Mr. Sioui was clearly told that he would not be returning to a correctional officer position, but Mr. Sioui continued to pursue that possibility. Mr. Sioui continued his action before the CLP to have the decision concerning appropriate employment as a truck driver overturned. Since Mr. Sioui did not offer the necessary cooperation to find work that met his functional limitations, the employer had reached the end of its obligation to accommodate. The employer asked that the grievance be dismissed.

[62] In support of its position, the employer referred me to the following decisions: *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; *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4; *Pepper v. Treasury Board (Department of National Defence)*, 2008 PSLRB 8; and *Lafrance v. Treasury Board (Statistics Canada)*, 2007 PSLRB 31.

Mr. Sioui

[63] Mr. Sioui argued that the employer did not make the necessary efforts to accommodate him. He did his part by submitting several job applications (as shown by the documents adduced in evidence) and by twice sending his curriculum vitae to the penitentiary to be considered for a position in the laundry and as a storekeeper.

Mr. Sioui stated that he was rejected and abandoned. The employer did not take into account that he was able to move in July 2005 and in March 2007. According to Mr. Sioui, the memorandum of understanding is still valid because he has not resigned from his job. The requirement to withdraw his various legal recourses was not a valid condition of the memorandum of understanding. He obtained his class 3 driver's licence solely to obtain employment as a storekeeper at the Donnacona penitentiary. He would like the storekeeper position.

[64] Mr. Sioui contested the accuracy of the diagnosis suggested by Ms. Beaudry and argued that the other physicians questioned his state of health but rallied behind Ms. Beaudry's diagnosis. Mr. Sioui claimed that the reports by Dr. Laplante and Dr. Fournier are contradictory. Dr. Laplante stated that the incidents that he witnessed were inconsequential, while Dr. Fournier stated that they were serious. Mr. Sioui asked that I give preference to Dr. Laplante's opinion, which is favourable to him, because Dr. Laplante has much more experience with penitentiaries than Dr. Fournier. Dr. Fournier's expert testimony was not credible because the evaluation meeting lasted only one hour, and he could not have observed in one hour everything that was written in the report. Mr. Sioui argued that the employer must now accept that he is fit to work because that was its position before the CSST and the CLP. Mr. Sioui asked me to order an evaluation of his current health by Health Canada.

[65] Mr. Sioui stated that he sought the remedy that led to the determination of permanent functional limitations because of the union's actions. It was a mistake. In 2004, he told Ms. Houle that he was better and that he could resume his duties, but she insisted on a report from his physician. He contacted her several times about the matter. The day that he consulted his physician to get the requested report, he was still upset by the news of his co-worker's suicide. Accordingly, he was not surprised by Dr. Gourgue's conclusions on that day. In 2005, he made a decision to stop taking his medication. He stated that he is now healthy and that he is able to occupy a position at the penitentiary's gate, which would be an unarmed position. Mr. Sioui argued that a CX-01 correctional officer has less direct contact with inmates and that it would be a suitable position for him. He argued that many other employees who have experienced work-related accidents have been reinstated in correctional officer positions and that they are no worse for it. He stated that he did not understand the distinction that the employer is making in his case.

[66] Mr. Sioui claimed that the employer adduced selective evidence that did not consider Dr. Laplante's opinion and that, from 2001 to 2004, he was deemed to be on sick leave and not someone suffering from a work-related injury. Mr. Sioui stated that he has passed inmates on the street since 2004 without any relapse. He considers it inappropriate that, after 15 years of service, he has to take part in public competitions to find a job.

[67] Mr. Sioui argued that the truck driver training that he received had absolutely nothing to do with the employer. It was a personal initiative with the Huron nation of Wendake, which the CSST eventually confirmed. He never asked the CSST to identify the job as suitable for him.

[68] Mr. Sioui argued that the January 12, 2006 memorandum of understanding reinstated him to his correctional officer position and that the employer is obliged to reinstate him. He admitted that he did not always keep the RWP coordinators informed of his job search efforts but claimed that Ms. de Lottinville should have been proactive on his behalf. He deplored the inability of the RWP to find him a job.

[69] Mr. Sioui pointed out that he was called to the June 14, 2007 meeting by the union, not by the employer. In the telephone conversation with Mr. Jacques concerning the matter, he was told that it was a question of signing the notices of withdrawal for the legal action still under way and that there was the possibility of an offer of settlement. Mr. Bellemare advised him not to show up to sign such documents. It was also Mr. Sioui's exam period. He pointed out that the employer did not provide evidence that it tried to contact him for the June 14, 2007 meeting. He asked me to believe that the illness and subsequent death of his mother greatly affected him and that he was not able to act in his best interests. He asked that I consider that, in summer 2004, he injured his arm and was unable to register for the *À l'écoute* job search program.

[70] Mr. Sioui stated that he was abandoned by the employer and by the union, which no longer supports his actions. All doors have been closed, and he has been left to his own devices. He questioned the relevance of the testimonies of Mr. Bergeron and Mr. Laplante, who were not involved in his job search. He argued that Mr. Rioux's testimony is biased because, on one hand, he advised him during the job search process and, on the other hand, he helped the employer prepare its case.

[71] Mr. Sioui deplored the fact that the employer went so far as to dismiss him without making a serious effort to find him a job in the prison environment. Mr. Sioui claimed that the employer did not show evidence of any effort whatsoever to find him work between April 19, 2007, the date of his reinstatement, and October 4, 2007, the date of his true dismissal. He argued that the employer did not try to accommodate him to the point of undue hardship and that, for that reason, he should be reinstated in his correctional officer position. Mr. Sioui asked that all trace of this work-related accident and its consequences be removed from his file. He claimed that, were it not for this annoying incident, he would be productive and moving forward with his career. Accordingly, Mr. Sioui asked to be reinstated in his career as it was on November 16, 2001 with all the consequences and all the benefits that might encompass.

Reasons

[72] In the federal public service, the obligation to accommodate in the workplace is a principle set out in the *Canadian Human Rights Act* (*CHRA*) and applied by the *Public Service Labour Relations Act* (*PSLRA*). Canadian courts have issued several decisions interpreting this principle. The courts have examined both the obligation of "undue hardship" in the context of accommodations made for an employee with a disability and the principles related to that concept.

[73] In short, the obligation to accommodate arises when the employer attempts to apply an employment standard that causes prejudice to an employee because of specific characteristics protected by statute.

[74] The following statutory provisions are relevant to this case: subsection 3(1) of the *CHRA* prohibits discrimination based on disability; under paragraph 7(*a*) of the same *Act*, the refusal to employ or to continue to employ an individual constitutes a discriminatory practice if the decision is based on a prohibited ground of discrimination; and subsection 208(2) of the *PSLRA* provides adjudicators with the authority to decide individual grievances related to human rights.

[75] The application of the obligation to accommodate was interpreted in *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (BCGSEU)*, [1999] 3 S.C.R. 3 (*Meiorin*), at para 54. To summarize, when an employer applies an employment standard, it must justify

that standard by showing that (1) it is rationally connected to job performance, (2) the standard was adopted because it was necessary to fulfill a legitimate work-related purpose and (3) the standard is reasonably necessary for accomplishing that job. The employer must be able to demonstrate that it is impossible to accommodate employees with the same characteristics without suffering undue hardship.

[76] The criteria developed in *Meiorin* have provided a framework for assessing the legitimate purpose of an employment standard and the intent of the employer when the standard was adopted in order to determine its validity. In addition to those criteria, there is a test — reasonableness — used to assess whether the standard was necessary in the context of the job in question. The courts have also ruled that the criteria must be applied with common sense and flexibility: *Meiorin*, at paragraph 63; *Commission scolaire régionale de Chambly v. Bergevin*, [1994] 2 S.C.R. 525, at 546; *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489, at 520-521; and *McGill University Health Centre (Montreal General Hospital)*, at para 15.

[77] In short, until the Hydro-Québec decision, the employer was required to demonstrate that it could not accommodate the employee without so-called "undue hardship," as set out in *Meiorin*.

[78] In *Hydro-Québec*, the Supreme Court of Canada refined the definition of the scope of "undue hardship" and clarified the extent of the employer's obligation to accommodate. The Supreme Court was of the opinion that the employer had met its obligation to accommodate an employee with a record of chronic absenteeism, given its many efforts to repatriate her over a seven-year period. Hydro-Québec had made many adjustments to the employee's work schedule to take into account her medical condition, including accommodated work and a gradual return to work. The medical opinion provided by the employee's attending physician and the employer's medical expert was that the employee was unable to return to work in a reasonable period of time, which justified her dismissal.

[79] The Supreme Court ruled that the test is not whether it was impossible for the employer to accommodate the employee's characteristics. Although the employer does not have a duty to change working conditions in a fundamental way, it does have a duty, if it can do so without undue hardship, to arrange the employee's workplace or duties to enable the employee to do his or her work.

[80] In *Honda Canada Inc. v. Keays*, 2008 SCC 39, the Supreme Court of Canada accepted that the employer closely monitored absences in an effort to control its employees' attendance at work and to accommodate their return to work in the case of extended absences. The Court stated that the systemic management of presence at work to accommodate disability-related absences is not discriminatory. Presence at work is a legitimate condition of employment.

[81] Moreover, the Ontario Divisional Court decided in *ADGA Group Consultants Inc. v. Lane et al.* (2008), 91 O.R. (3d) 649 (see also *Lane v. ADGA Group Consultants Inc.*, 2007 HRTO 34 (CanLII)), that the employer has the burden to demonstrate both objectively and subjectively that it was impossible to accommodate an employee. In that case, the employer had decided, based on what it perceived were the needs of a major client (the Department of National Defence), that, without any supporting medical evidence, a newly hired bipolar employee could not meet the criteria of his consultant's duties. The employer relied on information obtained from the Internet by a supervisor to decide that the nature of the medical condition prevented any accommodation and that the employee should be dismissed. The Divisional Court ruled that undue hardship cannot be established by relying on impressionistic or anecdotal evidence or after-the-fact justifications.

[82] Let us examine how this case law applies to the circumstances of this case. The employer argues that the purpose of the Donnacona maximum security penitentiary is to house and monitor inmates acknowledged as among the most violent in the country. Inmates move about the penitentiary according to their work schedules and their activities in the workshops, the gymnasium and the yard. A correctional officer's work consists of supervising and controlling inmates. Given that context, a correctional officer necessarily has ongoing contact with inmates and is called on to control them in the event of incidents, which could require the use of a firearm. The timing of incidents cannot be predicted, but they occur frequently and can happen anywhere in the institution. If an incident occurs, the correctional officer must react appropriately to ensure his or her own safety and that of co-workers. The correctional officer must be able to work independently and cannot necessarily depend on another correctional officer when confronted with a violent incident.

[83] Given that premise, the employer argues that there are no half measures. To be functional, a correctional officer must necessarily have contact with inmates and carry

a firearm. Given the organization of the work at the penitentiary, all employees who work there, armed or not, have or risk contact with inmates.

[84] Therefore, the employer takes the position that, for a correctional officer, the duties of having contact with inmates and carrying a firearm cannot be altered or accommodated if that officer has functional limitations that require not having contact with inmates or carrying a firearm. A correctional officer must be in full possession of all faculties and have control of work tools at all times. Otherwise, the risk to the officer's and co-workers' health and safety is too great. Simply put, the employer does not want to assume a risk that could include injury or loss of life.

[85] The grievor provided no evidence to contradict the employer's position. Rather, the grievor stated that he was fit to occupy positions "[translation] outside the walls" of the penitentiary or at the gate, which do not require carrying a firearm. The grievor believes that he is asymptomatic, that he no longer has functional limitations and that he can return to his former position. The grievor's position that he is able to return to his former position is based on a self-assessment rather than on medical data.

[86] The employer's witnesses contradicted the grievor's statements. There are in fact unarmed positions at the CSC, which do not require contact with inmates or carrying a firearm, but those positions are not at Donnacona; they are in Laval or in the Montreal region. The employer submitted that it was prepared to support reinstating the grievor in such positions but that the grievor did not cooperate with the process. He did not follow up on the employment opportunities that were suggested to him and did not make himself available for work outside the Quebec region.

[87] Based on the previous analysis of court decisions, I must conclude that the obligation to accommodate is not unlimited nor one sided. It requires that the employer examine the possibility of adjusting the occupational requirements of the work to facilitate the employee's return to work or that it make serious efforts to find the employee alternative work. The employer may not refuse to help the employee return to his job unless it can demonstrate that the changes to the occupational requirements would themselves cause undue hardship. For his or her part, the employee must show cooperation and open-mindedness to the efforts by the employer to find a solution to his or her return to work.

[88] The evidence clearly showed that the grievor has permanent functional limitations in the order of 15 percent. The functional limitations are not impressionistic or anecdotal or after-the-fact justifications, as in *ADGA*. The functional limitations actually prevent the grievor from pursuing a career in which the tasks require contact with inmates and carrying a firearm. His condition will not change and will not improve. Being asymptomatic is not a reprieve. Witnessing another violent incident similar to the one that caused his current medical condition could trigger a new post-traumatic stress disorder. In the prison context, the unpredictable reaction by a correctional officer to a violent incident becomes a threat to his or her safety and to that of co-workers. An inappropriate or poorly considered action could endanger lives. This is a real and not a hypothetical risk. It is a situation over which the employer has no control. Therefore, I reject the grievor's claim that he does not have functional limitations.

[89] Evidence was adduced to show that it is impossible for a correctional officer to work in the prison environment, given his duties of supervising inmates, without having contact with inmates and without carrying a firearm. Those occupational requirements cannot be altered. The employer established that other positions at the penitentiary require more or less direct contact with inmates during their comings and goings and that is it impossible to prevent a worker from having such contact without making the work meaningless.

[90] For those reasons, the obligation to have contact with inmates and to carry a firearm constitute, in my opinion, justified and unequivocal occupational requirements that cannot be altered without putting the health and safety of other employees at risk.

[91] As the Supreme Court of Canada concluded in *Hydro-Québec*, it is my opinion that the employer must also take into consideration the work context, in this case the health and safety of its other workers. In the circumstances of this case, the employer cannot change, in a fundamental manner without undue hardship, the occupational requirements of the position.

[92] I am also convinced that the employer fulfilled its obligation to accommodate by making numerous efforts to find another job for the grievor. It initiated a support mechanism by putting at his disposal Mr. Rioux, a job search specialist, who provided the grievor with job search tools, activated his contacts and provided him with the means to search for employment across the public service. Over a two-year period,

Mr. Rioux informed the grievor of competitions and position openings. He contacted the grievor by telephone on numerous occasions and tried to meet with him several times to move his file forward. Mr. Rioux actively supported the grievor in his efforts by ensuring that, for example, the grievor could write the tests to become an officer for the Canada Border Services Agency at a centre other than Quebec, even though the grievor applied after the deadline. He supported him in his training as a truck driver, a job adapted to his functional limitations. Along the same lines as in *Keays*, the employer is entitled to take measures to ensure that its employees are present at work and to require that, to maintain the employment relationship, the employee make a serious effort to ensure his or her return to work as soon as possible. In this case, the employer did its part by setting up an RWP for the grievor and by giving him resources to facilitate his job search. Given the job opportunities that came up, the employer was entitled to expect that the grievor could reintegrate in the workforce.

[93] In contrast, the grievor, even if he was willing, delayed sending his curriculum vitae to Mr. Rioux. He did not register for the *À l'écoute* program; Mr. Rioux did it for him. He did not follow up on the competition opportunities for positions for which he was able to qualify. Despite doing his own job searches, the grievor did not keep Mr. Rioux informed of these efforts as he was required to do. He did not attend a meeting to update his file, and did not explain his absence or apologize. The grievor did not follow up on his truck driver training, which was the subject of a CLP ruling. In 2005, he indicated his availability for work outside the Quebec region only for a period of three weeks. As for the shared responsibility to find work suited to the grievor's functional limitations, I note that the grievor focused his efforts on employment in the Quebec region, and more specifically at the Donnacona penitentiary, despite knowing that he could no longer work with inmates and carry a firearm. By limiting his job search in that way, he made the employer's task of finding him work suited to his functional limitations impossible.

[94] Despite everything, the employer gave the grievor a second chance under a memorandum of understanding that reinstated him in the public service and allowed him to continue his job searches.

[95] The grievor apparently did not take the opportunity seriously. In March 2007, he said that he was available for work outside the Quebec region but told Ms. Houle and Ms. de Lottinville that what he really wanted was reinstatement in his correctional

officer position. He refused all assistance from Ms. de Lottinville. Between the time of his reinstatement on April 19, 2007 and his final dismissal on October 4, 2007, there is no evidence that Mr. Sioui made any serious job search efforts within the CSC or in any other department of the federal public service. Once again, he failed to attend a crucial meeting to update his file and did not respond to the letter from the warden of the penitentiary asking him to make his intentions known.

[96] While I can understand that the grievor went through some difficult times, such as the illness and death of his mother and the suicide of one of his co-workers, I note that those events were not brought to the employer's attention or, from all appearances, the attention of union representatives. It is too late at the hearing stage to invoke mitigating factors to justify a failure to act.

[97] Under these circumstances, I must conclude that the employer fulfilled its obligation to accommodate with respect to his correctional officer position and its duty to find a reasonable arrangement that would allow the grievor to continue to work within the federal public service.

Procedural fairness

[98] At the beginning of the hearing on the merits of the grievance, Mr. Sioui raised the fact that there was no recording. I explained to Mr. Sioui that the Public Service Labour Relations Board does not have a policy of regularly recording hearings. Each request for recording is unique and is left to the adjudicator's discretion. I also explained to Mr. Sioui the process for judicial review of decisions by an adjudicator before the Federal Court. Mr. Sioui then requested that, during the presentation of the evidence and arguments, I take into consideration the fact that he was self-represented.

[99] The hearing lasted several days. I allowed Mr. Sioui to fully cross-examine the employer's witnesses and gave him some latitude given his absence of legal knowledge and because he was self-represented. Mr. Sioui did not call any witnesses to support his version of the facts. I allowed him to adduce all the documents that he considered appropriate, and I accepted, without prejudice, less relevant documents to which the employer objected. I ordered the employer to produce documents that I considered relevant to Mr. Sioui's defence. Lastly, Mr. Sioui was given the opportunity to explain to me in detail his reasons for acting as he did and the impact that this case had had on

him. I took that information into account when reaching this decision, even though I do not find in his favour.

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

(The Order appears on the next page)

Order

[101] The grievance is dismissed.

April 9, 2009.

PSLRB Translation

Michele A. Pineau,
adjudicator