Date: 20111031

File: 566-02-4371

Citation: 2011 PSLRB 122

Public Service Labour Relations Act

Before an adjudicator

BETWEEN

DERM PAUL KING

Grievor

and

TREASURY BOARD
(Correctional Service of Canada)

Employer

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

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Augustus Richardson, adjudicator

For the Grievor: John Mancini, counsel

For the Employer: Léa Bou Karam, counsel

Heard at Moncton, New Brunswick,
July 6-8, 2011.

I. Preliminary Matters

A. The Grievance

[1] This decision deals with a grievance filed by Derm Paul King ("the grievor"), dated May 20, 2010. The details of the grievance and the corrective action requested are set out below:

> [Details]
>
> > *I grieve that the employer has discriminated against me on the grounds of my disability in violation of The Canadian Human Rights Act (37, CLA)*
>
> [Corrective action requested]
>
> > *That the employer cease this discriminatory practice forthwith and take immediate action to redress this practice.*
> >
> > *That the employer makes available the accommodation required by my disability on the first reasonable occasion.*
> >
> > *That the employer compensate me for all wages, expenses incurred, and all additional costs and expenses resulting from this discriminatory practice.*
> >
> > *That the employer compensate me in the amount of $20,000.00 for pain and suffering as a result of the Discriminatory Practice.*
> >
> > *That the employer compensate me the additional amount of $20,000.00 for engaging in the Discriminatory Practice willfully and recklessly.*
>
> [*sic* throughout]

[2] The parties agreed that the grievance was filed under the collective agreement for the Correctional Services Group between the Treasury ("the employer" or CSC) and the Union of Canadian Correctional Officers-Syndicat des agents correctionnels du Canada-CSN ("the union"), which expired May 31, 2010 ("the collective agreement"; Exhibit U8).

[3] The relevant part of clause 37.01 of the collective agreement provides as follows:

> *"There shall be no discrimination, interference, restriction, coercion, harassment, intimidation, or any disciplinary action exercised or practiced with respect to an employee by reason of ... mental or physical disability ...."*

[4] The grievor is a correctional officer 2 with the employer and has been for years. The central issue is whether the employer accommodated the grievor whom the parties agreed was diagnosed with Post-Traumatic Stress Disorder (PTSD). The employer's position was that the grievor was accommodated when he was posted to a minimum-security facility known as "Unit 58", which is physically located within Springhill Institution ("Springhill"), a medium - security facility. The grievor and his union, on the other hand, insisted that the only suitable accommodation would have been a posting to Westmorland Institution ("Westmorland"), a minimum - security facility located next to, but not within, Dorchester Penitentiary ("Dorchester"), which, like Springhill, is a medium - security facility.

[5] Notice of Mr. King's grievance, as required under sub-section 93(1) of the *Public Service Labour Relations Act* ("the *Act*"), was given to the Canadian Human Rights Commission (CHRC). The issue was described as a "… refusal to accommodate" on the grounds of "disability." The corrective action sought was set out in the "attached grievance." At the same time, the grievance was referred to adjudication. Both the notice and the reference were dated August 26, 2010. Both were filed with the Public Service Labour Relations Board ("the Board") on or about September 3, 2010. The CHRC filed notice with the Board on or about September 14, 2010 that it did not intend to make any submissions.

B. <u>Setting the hearing date</u>

[6] On December 23, 2010, the grievor's counsel emailed the Board to ask that it "schedule Mr. King's grievance on an urgent basis." Counsel went on to write that Mr. King's "… accommodation for disability has been disregarded for years now and every attempt to resolve the accommodation by the bargaining agent has failed." The Board agreed to schedule a case management conference to obtain the parties availability dates. A teleconference was scheduled for January 31, 2011. Dates were canvassed by both counsel and the Board at that time, and later that day, the parties agreed that they would both be available July 6 to 8, 2011. On February 1, 2011, the Board advised the parties that the hearing had been scheduled for July 6 to 8, 2011 and that the dates

were considered final on the understanding that the parties had already confirmed their availability and that of their witnesses for those days.

C. Mediation and adjudication

[7] At the start of the hearing, counsel for the parties advised me that they were attempting to negotiate a settlement. After some time, both counsels requested that I act as a mediator, in the hope that I could help them reach a settlement. The parties agreed that, were the mediation not successful, I could continue as the adjudicator and hear evidence and decide the grievance.

[8] The mediation was not successful. Towards the end of the first day, it was decided that the adjudication should proceed. Counsel for the parties consented to my continuing to act as adjudicator.

D. Site visit

[9] Before any evidence was heard, the grievor's counsel moved that I visit of Westmorland and Unit 58. The employer opposed the motion on the grounds that the facilities could be described in the testimony of the witnesses or, if necessary, in photographs or maps.

[10] Given that the parties agreed that the evidence would involve descriptions of the two facilities and that a central issue was whether either would have been a suitable accommodation for the grievor, I decided that visiting each facility would assist my understanding the evidence. Accordingly, the parties, their representatives and I visited Westmorland in the early evening of July 6 and Unit 58 on the morning of July 7.

[11] The hearing commenced on July 7. On behalf of the grievor, I heard his evidence, and that of Doug White, currently the regional president of the union. Also present was Justin Harris, a union representative at Springhill, although he did not testify. On behalf of the employer, I heard the evidence of Jeff Earle, Warden of Springhill, and of David Niles, Assistant Deputy Commissioner of Institutional Operations, Atlantic Region, CSC. Also present, although they did not testify, were Tracey Theriault and Andrew Crain, labour relations advisors with the employer.

[12] All the witnesses testified in a straightforward manner. I was impressed with their candour. It was also apparent that the issues dividing the parties did not really turn on questions of fact, about which there was substantial agreement amongst the witnesses. The central issue was really a question of law, or of mixed fact and law, turning on whether a posting to Unit 58 constituted suitable accommodation for the grievor's disability or whether that could have been achieved only through a posting to Westmorland.

[13] Given that issue, it is unnecessary to reproduce or summarize the evidence of each of the witnesses, except when necessary to resolve differences in their testimonies concerning a material fact. In my opinion, it is enough that I have based my findings on their testimonies as well as on the documents introduced as exhibits at the hearing.

II. Summary of the facts

[14] Before proceeding, it is appropriate to briefly describe the CSC's operations at Unit 58 and Westmorland which will provide the context necessary to understanding the issue and the evidence.

A. Categories of inmates, assessing risk, and minimum and medium-security facilities

[15] Mr. Earle and Mr. Niles testified that each inmate within CSC facilities is assessed for the following three risk factors: risk of escape, risk of a danger to the public if they do escape and risk of physical harm to other inmates or correctional staff. Inmates who rate low in all three areas are suitable for minimum - security facilities. Inmates who have higher degrees of risk in one or more of the factors may be and usually are assigned to medium - or maximum - security facilities, as the case may be.

B. Westmorland

[16] Westmorland is a minimum - security facility. Minimum - security institutions do not have physical walls or fences that would prevent an inmate from escaping. Correctional officers do not carry weapons. There are no armed posts. Inmates generally have free and complete movement within the facility, subject to rules designed to maintain peace. Heavy reliance is placed on "dynamic security," meaning

that compliance with the rules and regulations of the institution is secured through interaction between correctional staff and inmates rather than through physical force or restraint. Inmates comply and do not run off because they want to stay in the minimum - security setting. They know that, if they do not comply, or if they escape, they will be removed to a more secure medium - security institution, complete with fences, walls and other forms of "static" security.

[17] Inmates in minimum - security institutions also have many more privileges and freedoms than they would have in medium - security facilities. They have their own rooms within "pods." At Westmorland, 8 or 10 inmates live in a pod, sharing a common kitchen facility where they prepare and cook their own food. The kitchen knives and other utensils are not secured in any way. Inmates have their own rooms with doors, as opposed to bars. They are free to move about within their pods or on the grounds. There are relaxed rules with respect to what they can wear. Recreational facilities may be used without the need to have a correctional officer present.

[18] Westmorland is located physically next to but not within Dorchester which is a medium - security facility. So is Springhill, where Unit 58 is located. Medium - security facilities, as the name suggests, have a higher degree of security, and the inmates have a corresponding lesser degree of freedom of movement and activity. There is greater reliance on "static" as opposed to "dynamic" security. Static security refers to the use of physical means of restraining or restricting the movement of inmates. The most visible sign of this difference is that medium - and maximum - security facilities have walls or fences to prevent inmates from escaping. Their living arrangements are those the public is more accustomed to seeing in movies or on television: cells with bars or solid doors on ranges radiating out from enclosed central control or observation booths that separate correctional staff from inmates. There is more and greater physical separation between the inmates and the correctional officers. Correctional officers wear protective vests and carry batons and "OC", a form of pepper spray. Inmates do not cook for themselves. Recreation does not take place without the surveillance of one or more correctional officers.

C. Unit 58

[19] Unit 58, although physically located within Springhill's fence, is in fact a minimum - security facility. Once an inmate enters Unit 58, his life mimics much of what he could expect to experience at Westmorland. As at Westmorland, more reliance

is on dynamic than static security. Inmates have individual rooms in pods or ranges that have common kitchens and living areas. Inmates have their own food and do their own cooking. They are free to move about their pods and in the common kitchen and living areas. When cooking, they use knives that, in one of the few differences from Westmorland, are tethered with a few feet of wire to a block (to prevent their removal or use as weapons away from the kitchen). Many of the inmates in Unit 58 are awaiting transfer to Westmorland or some other minimum - security institution, if not release on parole. According to Mr. Niles, inmates in Unit 58 have been rated very low on the "institutional adjustment" risk factor scale (that is, the risk of causing harm to other inmates or staff). They may rate higher in another factor (such as risk of escape), but from the point of view of "institutional behavior they are similar to those in Westmorland." As an example, Mr. Earle noted that, although there might be on average zero or one "incident" involving inmates in Unit 58 per month, in the Springhill facility as a whole, there was on average 40 incidents per month.

[20] There are some differences, at least as far as correctional officers are concerned, between Westmorland and Unit 58. Officers do not wear stab-proof vests at Westmorland; they do in Unit 58. Nor do they carry OC spray or cuffs; they do in Unit 58. On the evidence, I was satisfied that the reason for the differences stemmed from the fact that Unit 58 is within a medium - security facility, the rules and regulations of which require all officers (regardless of whether or not they are assigned to a minimum - security setting within that facility) to carry such equipment. In other words, the differences do not reflect a difference between the inmates of Westmorland and Unit 58.

[21] It was clear to me that, for both inmates and corrections officers, a posting to a minimum - security facility like Unit 58 or Westmorland was generally considered a preferred placement. However, for some, the dynamic, informal approach to security was too flexible. On both the visits to Westmorland and Unit 58, and during the hearing, references were made to both inmates and correctional officers who were uncomfortable in a dynamic security setting. Inmates who found self-control difficult were not suited to the informal dynamic security of a minimum - security setting. Similarly, correctional officers who were nervous (for whatever reason) with close personal contact with inmates found a greater sense of personal security with the static security of a medium - or maximum - security facility.

III. The Grievance

[22] Mr. King began working as a correctional officer 1 ("CX-1") at Springhill in or about summer 1997. He became a correctional officer 2 ("CX-2") in 1998.

[23] This grievance has its origins in an incident that took place on May 25, 2006, when confronted an inmate who, wielding a shiv, had stabbed another inmate. Mr. King chased the man, eventually cornering him in the yard. The inmate threw the shiv down and gave himself up to Mr. King.

[24] Mr. King testified that the investigation that followed found fault with his decision to chase the inmate without backup. He was upset with what he thought was an unfair and unreasonable criticism of conduct that he thought was appropriate (since he saw himself as defending the life of the inmate who had been attacked). The investigation also revealed that, while he had been chasing the inmate, another inmate had been behind him. He had not known that at the time, but learning of it later, he realized that he had been at risk. He was also upset that other staff who had witnessed the incident had not reported his efforts to secure the inmate. All that combined to cause a severe disabling emotional reaction. He was off work for several weeks after the incident (a precise date was not given to me) and was eventually diagnosed by his treating psychologist, Dr. LeBlanc, as having developed PTSD.

[25] Mr. King wanted to return to work after a few months. He testified that Dr. LeBlanc would not let him, stating that he was not ready. That caused Mr. King frustration for, as he said, "I like my job, I just don't like the politics and foolishness involved in it." In any event, he was gradually eased back into work. He testified that he eventually returned to work full-time on October 1, 2007.

[26] Mr. King testified that, on his return to full time duties, he was assigned to work the scanner. That device (not unlike an airport scanner in form and purpose) is at the entrance to Springhill. Mr. King was there for only one day, for the following reasons.

[27] First, before being off work with PTSD, Mr. King's postings to the scanner had resulted in friction between him and some of the visitors to particular inmates. As a result, the employer had issued instructions that he should not work the scanner. Accordingly, he thought that he ought not to have been posted to the scanner because of those earlier instructions.

[28] The second reason stemmed from difficulties in the grievor's relationship with his corrections manager. Mr. King testified that "to get away from him" he requested and received a transfer to segregation. Segregation, as its name suggests, is a unit that has more static security, akin to a maximum - security setting. He also testified that another reason for his request was that he thought that "because there was more control, it might help him." I took this to mean that the increased static security would give him a sense of security, minimizing the possibility of a recurrence of his PTSD.

[29] Mr. King testified that he was deployed to segregation on October 2, 2007. While there, he had an incident with an inmate who, wanting to get out of segregation and to be reassigned to Atlantic Institution, a maximum - security facility in Renous, New Brunswick, began to act out in the yard. The grievor turned a hose on him. A few weeks later, that same inmate pushed Mr. King aside, attempting to get at another inmate. Mr. King's evidence was that management had expressed some concern over his handling of those two incidents. Nevertheless, he continued to work in the segregation wing at Springhill.

[30] Mr. King testified that, in May 2008, roughly six months after his deployment to segregation, he "… blew out my shoulder." He left work to undergo surgery to correct the problem and then was in rehabilitation for six months. He testified that, while he was off work, he put in a request for a transfer to Unit 58. He had two reasons for that request. First, the corrections manager with whom he had difficulty while working the scanner had apparently been transferred to segregation, and Mr. King "felt it best to get out of segregation when he [the corrections manager] came over." Second, he wanted to be transferred to a minimum - security setting. To put his request "in motion", he requested and received a letter from his treating psychologist, Dr. LeBlanc.

[31] The employer acknowledged that Dr. LeBlanc was an experienced and qualified psychologist who had had extensive experience diagnosing and treating correctional officers over the years - and who was familiar with the CSC's operations and facilities in its Atlantic region. On May 1, 2008, Dr. LeBlanc wrote a letter to "whom it may concern" (Exhibit U1). He stated that he had seen Mr. King "… intermittently through the years for treatment of traumatic anxiety following his exposure to situations involving threatened death or serious injury." Mr. King testified that some of those incidents occurred during his two years with the military as well as during his work as a corrections officer.

[32] Dr. LeBlanc noted that the May 2006 incident involving the shiv-wielding inmate had "… led to the development of a Posttraumatic [*sic*] Stress Disorder which required extensive psychiatric and psychological treatment over a period of one year." He went on to note that "currently" Mr. King continued "… to harbour fear regarding his safety at work and to feel unsafe in a medium correctional setting and to be tense, irritable, and hypervigilant, anticipating at all times being involved in another incident of inmates being stabbed and his having to deal with the situation." As a result of his "hypervigilant frame of mind," Mr. King tended "… to overreact to many situations because he anticipates threats to his physical integrity or serious threats and he feels unprotected from such incidents and insists on carrying protective devices to protect himself."

[33] Dr. LeBlanc concluded with the observation that, because of Mr. King's state of mind at that time, he "… recommended that, in the best interests of his health, he meet with his superiors and that he explore with them the possibility that he could finish his remaining career years working in a minimum security prison setting."

[34] Dr. LeBlanc's letter appears to have had the desired effect, since Mr. King was deployed to Unit 58 permanently when he returned to work in, according to Mr. King, December 2008 or January 2009. Unfortunately, as Mr. King testified, a new problem arose. As he explained, correctional officers working in Unit 58 worked a 9-, 9-, 16-, 9- and 9-hour shift rotation. During their 9-hour shifts, they were deployed to Unit 58. However, during their 16-hour shift, they could be deployed anywhere within Springhill (including Unit 58) to fill in for other officers either sick, on leave or on vacation. Mr. King testified that when he first returned to work after his shoulder injury, he was redeployed from time to time outside Unit 58 on those 16-hour shifts.

[35] Mr. King came to feel that he could not tolerate deployment outside Unit 58. The culminating event appears to have been an assault (Mr. King was spit on) while deployed to segregation sometime in late 2009. On December 4, 2009, Mr. Paul Harrigan emailed Mr. Niles, requesting that Mr. King "… be allowed to work there [Unit 58] exclusively until the issue of his deployment out of that site" (Exhibit E10). Mr. Niles replied that he would look into it and promised to get back to him in five working days (Exhibit E10). The result, Mr. King testified, was an order that he be deployed permanently to Unit 58 and in particular that he not be redeployed outside of that unit during 16-hour shifts. (References in this decision to a "permanent posting

to Unit 58" refer only to the employer's decision to ensure that Mr. King, unlike other officers normally posted to Unit 58, would never be posted outside of Unit 58 into the medium - security setting of Springhill. They do not mean that Mr. King could not apply for a posting to Westmorland in the same way as any other officer, subject to the same normal qualification and seniority practices.)

[36] However, another problem arose. If Mr. King was not deployed outside Unit 58 on those 16-hour shifts, it meant that other officers, normally assigned to Unit 58 for a 9-hour shift, could find themselves deployed elsewhere to cover for Mr. King's inability to work outside Unit 58. Both the union and Mr. King were concerned that, although his colleague officers might have been prepared to accept such a disruption in their normal deployment schedule for a short time, they would grow resentful if it evolved into a long-term accommodation of Mr. King's disability.

[37] Mr. King's evidence as well as that of Mr. White was that the existence of the problem with permanent deployment to Unit 58 had been identified as a potential issue from the very beginning of Mr. King's deployment to that unit. Mr. King and the union had both considered deployment to Unit 58 as a short-term accommodation of his PTSD. It could only be for the short - term because, as a long - term solution, it could cause resentment amongst the other officers assigned to Unit 58 who had to give up their "normal" deployment to Unit 58 during their 9-hour shifts to make up for Mr. King's inability to be deployed outside Unit 58 during his 16-hour shift. As Mr. White stated in his evidence, "when you accommodate someone in a good posting the others are willing to help out that way for a short time, but if it's extended over time the members get ugly . . . they don't like to give up the preferred postings for a long time . . . that situation causes conflict amongst the members." That being the case, both the union and Mr. King saw deployment to Westmorland as the only viable, long-term and appropriate accommodation of Mr. King's inability to work outside a minimum - security setting.

[38] For that reason, Mr. King and his union felt that the only proper and reasonable accommodation would be transferring him from Springhill to Westmorland. Mr. White explained that he and Mr. Harrigan, the union's regional president at that time, told Mr. Niles that the only proper long-term accommodation for Mr. King "was Westmorland, because of the conflict that would arise at Unit 58" if Mr. King's accommodation there stretched out over the long term. The same issue would not arise at Westmorland

because correctional officers there were not normally required to post into Dorchester during any of their shifts (although they did have to go there in emergencies).

[39] Mr. White testified that, each time he met with Mr. Niles to discuss Mr. King's situation, he would leave with the impression that, if Mr. King obtained the appropriate report from Dr. LeBlanc, "it would be a possibility that Mr. King would be accommodated to Westmorland." He would then inform Mr. King, Mr. King would eventually receive a report from Dr. LeBlanc (discussed elsewhere in this decision), which would then be provided to the employer. Mr. White testified that, every time they received a report, "we thought we had the problem solved . . . but we'd find out later that the transfer would not happen and that they [the employer] needed more information." That, he said, happened three different times "over a couple of years span." Mr. White never spoke personally with Dr. LeBlanc, but he felt, that, every time he met with Mr. Niles, he was given assurances that, "if I [he] got the right document Mr. King would be accommodated." Thus he called Mr. King after every meeting to tell him to obtain a better report from Dr. LeBlanc.

[40] Mr. Niles' evidence was slightly different. He agreed that he met with Mr. White and Mr. Harrigan on more than one occasion to discuss Mr. King's case. He recalls the issue coming up in September 2009. Dr. LeBlanc's most recent report was presented to him, and he indicated that he would "look into it." In mid-October, Mr. Niles met with Mr. King personally, to "hear from him directly his needs and history and concerns and issues, so I could hear the facts myself." Mr. Niles' evidence was that he then told Messrs. Harrigan, White and King that "I would look into the issue, that I would consult my labour relations experts on accommodation and that with the parameters of the collective agreement and the accommodation policy we would accommodate him if possible." He said that he meant that, if the medical evidence was such that Westmorland was the only suitable accommodation for Mr. King's disability, then he "would aim for that."

[41] Mr. Niles testified that the upshot of his consultation was that, because Dr. LeBlanc did not place any restriction on Mr. King's ability to work in a minimum-security setting and because he did not state that Mr. King could not work at Unit 58 because it was within Springhill, then "we were meeting the intent of the accommodation policy by having him work at Unit 58, which is where he was when I met him." He testified that he informed Mr. Harrigan of that conclusion. He said that

he did so because Dr. LeBlanc's letter "did not specifically state that he could not work in some capacity at Springhill. . . and unless Dr. LeBlanc told us that Mr. King could not work in any capacity at Springhill and that Westmorland was the only accommodation option," then he felt that they were accommodating Mr. King appropriately.

[42] Mr. Niles stressed in cross-examination that his position was not based on any argument of undue hardship. Had Westmorland been the only suitable accommodation, then Mr. King would have been there once a position became available.

[43] I am satisfied on that point and find that management never assured or guaranteed the union or Mr. King that "all that was needed" for a posting to Westmorland was a letter from Dr. LeBlanc. Mr. White's evidence did not go that far. I am satisfied based on the evidence of Messrs. White and David and on the exchange of correspondence between Dr. LeBlanc and Mr. Earle that the union was told that, <u>if</u> a doctor had advised that Mr. King could be accommodated <u>only</u> at Westmorland, then it would have happened. But a letter that fell short of such advice or that stated that Westmorland would be one but not the only suitable accommodation, would not guarantee such a posting. It makes sense to me that an employer would agree to consider accommodation, to a specific place, on the basis of medical documentation. It also makes sense to me that an employer could not and would not make such a commitment <u>before</u> receiving and considering that medical documentation.

[44] With respect to the issue of the potential for resentment by Mr. King's fellow officers in the event that he was never deployed outside Unit 58, Mr. Niles did not agree that this issue had been raised with him in the earlier discussions with union representatives. His recollection was that the 16-hour shifts (and deployment outside Unit 58 on those shifts) arose, as I understood it, in the context of Mr. King booking off sick on those shifts (because of his insistence that he could not work outside unit 58) and his consequent request for the reimbursement of those sick days. When pressed in cross-examination as to whether it was not reasonable to expect such resentment to develop, he said that it was not, for two reasons. First, no officer regularly assigned to Unit 58 could reasonably expect to avoid deployment outside the unit during a shift. Second, his officers were professionals, and he expected them to accept such deployments as part of their regular duties and, their obligation to assist in accommodating a fellow officer.

[45] Mr. King and the union continued their efforts to get the employer to reassign him to Westmorland. On January 6, 2010 Dr. LeBlanc again wrote to "whom it may concern" (Exhibit U2). He repeated that he had been treating Mr. King for PTSD since June 2006 noted that, because of his past, the grievor had had difficulty recovering from the May 2006 incident. In Dr. LeBlanc's opinion, Mr. King's history of traumatic events left him "… with reduced reserves for coping with potentially dangerous situations at work." Dr. LeBlanc noted that Mr. King "… continues to feel unsafe in a medium security correctional setting and to be tense, hypervigilant, and to overreact to many situations." Dr. LeBlanc referred to the December 2009 incident and its impact on Mr. King and went on "… to submit for your consideration that he can no longer function in a medium security correctional facility for reasons of health and well-being and that it would be in the best interest of his health if he were deployed as soon as possible to a minimum security institution for the remainder of his career." Dr. LeBlanc concluded with the observation that Mr. King had "… the emotional stamina and stability to be able to function effectively in a minimum level security correctional environment."

[46] In cross examination, Mr. Earle stated that he understood that Dr. LeBlanc's reference to a "minimum level security correctional environment" was in fact a reference to Westmorland. However, he also testified that some of Dr. LeBlanc's comments in his January 6 letter caused him to wonder whether <u>any</u> correctional institution would be appropriate for Mr. King. Accordingly, on February 8, 2010, Mr. Earle wrote to Dr. LeBlanc requesting "… more information regarding . . . [Mr. King's] abilities to perform his duties as a Correctional Officer II" (Exhibits E6 and E7). The request was made in part because of Dr. LeBlanc's observations about the risk that Mr. King might not be able to deal with "potentially dangerous situations at work." Mr. Earle attached a work description for the CX-02 position and pointed out that it requires officers to "… remain calm, composed and professional during emergency situations" and that they need to be able to "… intervene in threatening or violent situations." Mr. Earle pointed out that the increased use of dynamic security measures at a minimum-security setting and the greater degree of interaction between officers and inmates that that necessitated meant that a minimum-security setting might not in fact be "… the best option for Mr. King" (Exhibit E6).

[47] Dr. LeBlanc responded to Mr. Earle's letter on March 24, 2010 (Exhibit U3). Dr. LeBlanc indicated that in spite of adequate treatment Mr. King "… still exhibits chronic,

residual features of traumatic anxiety." It manifested itself clinically as "… a fractured sense of safety and hyper vigilance" and behaviourally as "… anxious preoccupation with safety issues, insistent requests for protective devices such as OC spray and collapsible batons, invocation of s.128 of the labour code, and absences from work." It all added up to a "… struggle to remain at work with reduced coping reserves." Still, Mr. King demonstrated "adequate emotional composure and control" in "… emotionally charged or violent or emergency situations." For that reason, Dr. LeBlanc's opinion was that Mr. King was "… emotionally and psychologically fit to carry out the duties described in the Correctional Officer II work description." Nevertheless, Mr. King was "… functioning at the lower threshold or limit of such fitness."

[48] Based on his assessment, Dr. LeBlanc's opinion was that Mr. King's "… principal limitation resides in his greater vulnerability to be seriously affected by future exposure to trauma." Dr. LeBlanc went on to say that he was familiar with maximum -, medium - and minimum - security institutions and with the work done in those places by correctional officers. Based on that experience, he acknowledged that the risk of exposure to traumatic situations existed in any type of correctional institution. However, given Mr. King's "… increased vulnerability to trauma and given the lower probability of exposure to trauma in a minimal security institution," Dr. LeBlanc submitted "… that the solution to the problem presented by this employee would be an accommodation whereby he could be re-assigned [*sic*] to a minimum security work setting where his exposure to traumatic situations would be reduced."

[49] Mr. Earle reviewed Dr. LeBlanc's letter of March 24, 2010. He consulted with the employer's Human Resources department. He concluded that Mr. King could in fact be accommodated at Springhill by being permanently posted to Unit 58. He wrote to Mr. King on May 13, 2010 to inform him of that decision and that he would not be "… assigned outside of HU#58 for as long as you remain at this institution or until your medical situation changes" (Exhibit U5). As for Mr. King's request for a compassionate deployment, Mr. Earle pointed out that, in accordance with "established protocol," an employee seeking compassionate deployment "… must obtain the union's support before management can give any consideration to the request" (Exhibit U5; see also Exhibit E11, *Correctional Service Canada, Human Resource Bulletin 2009-37*).

[50] Mr. King testified that, upon receiving Mr. Earle's letter of May 13, he filed this grievance. He testified that, until that point his co-workers had not been happy with

the fact that he was not being deployed outside of Unit 58 (meaning that they had to be) but that they had been prepared to tolerate it because they thought it had been "only a temporary thing." However, after the letter, they became aware that the situation was "a permanent thing." Mr. King's evidence was that, "within a few months" of the letter, he began to sense that his fellow officers were avoiding him. He provided as an example the fact that, when he entered a room, officers already there would drift out. Mr. King said that, while he "didn't want to sour the working relationship," he was "only able to work in that one place."

[51] Mr. Earle responded to Dr. LeBlanc on August 23, 2010 (Exhibit E7). He stated that Dr. LeBlanc's comment that Mr. King was functioning at "the lower threshold or limit" of a correctional officer's job description caused him some concern. The concern stemmed from the fact that, while the inmates at Westmorland and Unit 58 shared the same low risk for interpersonal violence, such incidents could happen. If they did, there were fewer officers and fewer static security measures available at Westmorland. Nor did the officers at Westmorland carry protective devices. That being the case, Dr. LeBlanc's comments suggested that Mr. King, because of his increased anxiety levels, might "… be at a higher risk of being exposed to traumatic situations" at Westmorland than in Unit 58 at Springhill. Accordingly, Mr. Earle requested "further clarification" of Mr. King's "lower threshold" and "… a clear determination of Mr. King's fitness to carry out the duties of his substantive position."

[52] There was no immediate response from Dr. LeBlanc.

[53] In the meantime, Mr. King's grievance made its way to the Board. On December 23, 2010, the employer, in response to an inquiry from the Board about the lack of any formal response from the employer to the grievance, filed its final level grievance response. The employer's position, as set out in the response, was that Mr. King's doctor had "… recommended that [he] be reassigned to a minimum - security institution." It noted that it had been uncertain whether a minimum - security setting would in fact be appropriate for Mr. King, "… given the challenges and realities of the more dynamic security environment [in a minimum - security setting], as well as the greater associated degree of interaction with offenders." It added that, based "… on the limitations outlined by [the grievor's] doctor, [he was] granted a permanent assignment in Housing Unit # 58 for as long as [he would] remain at Springhill Institution or until [his] medical situation changes." The employer indicated that,

returning to the grievor, it remained "… committed to working with you, your doctor, and your union representative with respect to your accommodation needs." It advised that it had written to Dr. LeBlanc on August 23, 2010 to ask whether the posting to Unit 58 was "suitable," concluding that, until a response was received, "Management believes that you have been appropriately accommodated."

[54] Dr. LeBlanc responded to Mr. Earle's letter of August 23, 2010 on January 17, 2011 (after Mr. King's grievance had been scheduled for a hearing). He apologized for not responding to Mr. Earle's August 2010 letter sooner and stated that he had not seen Mr. King since June 2010 and hence that he lacked his permission to respond (Exhibit U4). However, he had "recently been in contact" with Mr. King, who had consented to Dr. LeBlanc's response.

[55] Dr. LeBlanc went on to write that he could not "add anything to the information" that was already in his letters of January 6 and March 24, 2010, except that "… Mr. King continued to present with a "… mild residue of traumatic anxiety," which increases his vulnerability to be harmed by further exposure to trauma" (Exhibit U4). He added that "[t]his vulnerability to future traumatization is really the main concern regarding this man."

[56] Dr. LeBlanc concluded by opining that Mr. King was "… capable emotionally and mentally to discharge the duties of a Correctional Officer II as described in his job description." He added that Mr. King's "… accommodation in Unit 58 appears to meet most of his needs; however, a residual level of anxiety persists and placement in an institution where there is less potential for violence remains preferential, if this can be arranged, and in the best interests of his health" (Exhibit U4).

[57] Mr. King's evidence was that the situation finally "blew up" on June 13, 2011. He had been waiting for the hearing in July, hoping that he could "put up" with the situation, but on June 13, it "got out of hand." A situation developed involving an inmate who was "mouthing off." Mr. King ordered him back into his pod. After the inmate returned to his pod, "a number of officers got in my face, saying what the fuck is going on, why am I [the other officers] getting bounced out of my postings." Mr. King said that three officers indicated that they were "sick and tired" of the situation, that he was "a topic of conversation" and that "no one was impressed" with him. Mr. King said that the situation got heated and "out of hand" and that he decided to "pull

[himself] out of the situation." Accordingly, he went on leave, pending the outcome of his grievance hearing.

IV. Dr. LeBlanc's absence

[58] I note that Dr. LeBlanc did not appear as a witness at the hearing. At the beginning of the hearing, the grievor's counsel advised that he had not subpoenaed Dr. LeBlanc. Nor had he received written confirmation from Dr. LeBlanc that he would attend. He said that he had phoned Dr. LeBlanc and that he was trying to get in touch with him to have him testify in support of his submission that the only accommodation possible was deployment not just to a minimum - security "setting" (for example, Unit 58) but to a minimum - security facility (for example, Westmorland).

[59] The employer agreed that the grievor could call his witnesses, introduce his evidence and then close his case, subject to a right to call Dr. LeBlanc once the grievor's counsel contacted him. The only condition (accepted by grievor's counsel) was that, were Dr. LeBlanc called as a witness after the employer closed its case, it would be permitted to recall some of its witnesses or to call other witnesses.

[60] The hearing proceeded on that footing. At the close of the employer's case, the grievor's counsel advised that he had spoken to Dr. LeBlanc who said that he had retired and that he did not want to give evidence. The grievor's counsel then moved for an adjournment so that he could find a new expert to review Dr. LeBlanc's file, notes and reports, meet with Mr. King, and provide an opinion. The employer opposed the motion.

[61] After hearing the submissions of the parties, I dismissed the motion for a number of reasons.

[62] First, there was the question of delay and prejudice. The hearing had long been delayed. Normal practice for the attendance of witnesses requires a subpoena or, at the least, written confirmation from the witness that he or she is planning to attend. Absent such written confirmation, a subpoena ought to be issued. If neither step has been taken the affected party must be taken as either being ready to proceed without the witness or as having accepted the risk that the witness will not attend. Indeed, in its February 1, 2011 letter to the parties confirming the July hearing dates, the Board stated that the dates "… are considered 'final.' It is understood that, before confirming

their availability, the parties have already advised witnesses of the dates of the hearing." To permit an adjournment because a party that elected to risk that a witness would not be available discovers that the risk has materialized would be unfair to the other side which has prepared for hearing. It creates havoc with scheduling and risks having to hear the evidence of (in this case) the employer again (because of the potential need to respond to evidence adduced by the witness following the adjournment, evidence that should have been adduced first the first time around).

[63] Added is the fact that the grievor's counsel, on December 23, 2010, requested scheduling the hearing on "an urgent basis." He knew (and had agreed to) the July hearing dates on January 31, 2011. Thus, the grievor's counsel had sufficient time and notice of the hearing to secure Dr. LeBlanc's attendance or to request an adjournment in enough time before the hearing to ensure that the parties were not put to the expense of preparing for and attending the hearing.

[64] For that reason alone, I would have denied the motion to adjourn.

[65] In addition, was the fact that the grievor's counsel sought to introduce the evidence not of Dr. LeBlanc but of a new expert. Any other expert could not give direct evidence that was relevant to the first part of the grievance (that is, the period up to July 2011). He or she could give only hearsay evidence, based on Dr. LeBlanc's file materials for that period. Any first-hand evidence could concern only the period after his or her retention. Such evidence, given that accommodations are not necessarily permanent, might be relevant to a new grievance (that is, a failure to accommodate after July 2011). It would be of limited weight with respect to any period before that date.

[66] Finally, the question of the employer's duty to accommodate had always depended on the strength of Mr. King's evidence as well as that of Dr. LeBlanc's reports. That evidence was already before me. So, it was difficult to understand how anything material could have been added by Dr. LeBlanc's live testimony or by that of a new expert especially given that no one had any idea of the new expert's actual testimony.

[67] In my opinion, the first reason was enough to justify a dismissal of the request for an adjournment. The other two supported that decision since they satisfied me that denying the motion would not prejudice the merits of the grievor's case.

V. Summary of the submissions

A. For the grievor

[68] The grievor's counsel relied on the decisions of the Supreme Court of Canada in *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union*, [1999] 3 S.C.R. 3, *Hydro-Quebec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Quebec, section locale 2000 (SCFP-FTQ),* 2008 SCC 43 ("*Hydro-Quebec*"), and *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal,* 2007 SCC 4. He submitted that accommodation required cooperation between three parties: the employer, the union and the grievor. He submitted that the duty to accommodate "necessarily" required an accommodation "… tailor fit to the needs of the employee." It required "honest, frank and ongoing discussion" amongst the parties to arrive at a suitable accommodation. And it required the employer to address the impact of an accommodation decision on the rights (such as seniority) of other employees in the bargaining unit.

[69] The grievor's counsel then made a two-pronged attack on the employer's position that Unit 58 represented a suitable accommodation of Mr. King's PTSD disability.

[70] First, the grievor's counsel submitted that a posting to Unit 58 was not a proper accommodation. He submitted that Dr. LeBlanc's reports made it clear that Westmorland, and not Unit 58, was the place to where Mr. King should have been posted. He pointed out that Mr. Earle understood that Dr. LeBlanc urged Westmorland as the preferable accommodation. He also emphasized that the employer knew or ought to have known that Mr. King's fellow correctional offices at Unit 58 would resent the impact of his accommodation on their shift assignments and that that resentment meant that a posting to Unit 58 was not a suitable accommodation. He emphasized the events of June 2011, noting that Mr. King "felt so bad about what happened that he declared himself sick, and if that's not a sign of cracking, then what is?"

[71] The grievor's counsel found support for his position in the fact that officers at Unit 58 (but not at Westmorland) wore stab-proof vests and carried OC spray. In his submission, that fact meant that "… there must be a greater perception of risk at Unit 58 than at Westmorland."

[72] Nor was the fact that Mr. King had worked for quite some time at Unit 58 evidence that it was a suitable accommodation, since the accommodation generated tensions with his fellow officers. Mr. King had a mortgage and bills to pay. He had to work at Unit 58 once the employer posted him there. He had no choice but to work there.

[73] Second, the grievor's counsel attacked the process used by the employer when it decided to accommodate Mr. King by posting him to Unit 58. The grievor's counsel submitted that an authentic accommodation effort by the employer required the following two things:

1) A meeting with the grievor when the disability first arose, not years later.

2) Discussions with the union.

[74] The employer did not meet with the union or the grievor before deciding to assign Mr. King to Unit 58; nor did it obtain its own medical assessment from another expert in PTSD or talk to Dr. LeBlanc. The grievor's counsel submitted that those failures tainted the process of accommodation by the employer.

[75] The grievor's counsel submitted that the employer's correspondence with Dr. LeBlanc was not done in good faith. Instead of accepting Dr. LeBlanc's recommendation, it corresponded with him in an effort to persuade him to alter his opinion. The employer's correspondence with Dr. LeBlanc demonstrated that it "… kept pushing and pushing to get the opinion that it wanted." Mr. Niles had promised the union (and hence Mr. King) that if he obtained a medical letter supporting accommodation to Westmorland, Mr. Niles would post him there. However when he was provided with the letter, he reneged on his promise. Dr. LeBlanc's letters were worded in the way Mr. Niles required, but when he received them "he didn't follow through; he didn't transfer Mr. King" according to the grievor's counsel. That was bad faith on the part of the employer.

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

[76] The employer acknowledged that Mr. King suffered from a disability (PTSD) and that it owed him a duty to accommodate. However, the onus was on the grievor to establish that the employer failed to accommodate his disability. The employer's counsel submitted that the grievor's counsel failed to establish that a posting to Unit

58 was not a suitable accommodation of Mr. King's disability. Indeed, Mr. King, by his actions in working at Unit 58 for more than a year (if not years), had demonstrated its suitability as an accommodation.

[77] The employer submitted that the accommodation decision was ultimately the employer's to make. Dr. LeBlanc was able to advise or recommend, but in the end, the employer was in the best position to decide whether a particular posting was a suitable accommodation for the disability described by the grievor and Dr. LeBlanc.

[78] Moreover, the duty in question was one of reasonable not perfect accommodation. The goal of the duty to accommodate "… is to ensure that an employee who is able to work can do so;" *Hydro-Quebec*, at paragraph 14. What that means in practice is that "… the employer must accommodate the employee in a way that, while not causing the employer undue hardship, will ensure that the employee can work;" (*Hydro-Quebec*). However, the duty to accommodate is not meant, "… to completely alter the essence of the contract of employment, that is, the employee's duty to perform work in exchange for remuneration;" *Hydro-Quebec,* at paragraph 15. This means that the employer's duty is "… not infinite, and it permits an employer to select options that will serve its purposes as well as the employee's;" *Spooner v. Treasury Board (Correctional Service of Canada),* 2009 PSLRB 60 at paragraph 141. Although the employer indeed has a duty to vigorously investigate options and ways to accommodate an employee's disability, it does not extend "… to finding an accommodation that will meet the employee's preferences" (*Spooner* at paragraph 146).

[79] Dr. LeBlanc's role to provide advice and opinions on Mr. King's disability and the resulting limitations. He was not able to dictate Mr. King's particular posting. The employer had the duty, in consultation with the union and the grievor, to consider the advice and to decide whether a particular posting matched those limitations.

[80] The disability described by Dr. LeBlanc was, as set out in Exhibit U3, a "… greater vulnerability to be seriously affected by future exposure to trauma." Given that the inmates at both Westmorland and Unit 58 had the same low risk of harming each other or staff, Mr. King's posting to Unit 58 represented a balancing of psychological factors that were relevant to the risk identified by Dr. LeBlanc. On one hand, an increased risk might have occurred (in that it was within a medium - security facility,

but on the other hand, an increased sense of security existed, in that the officers carried protective gear.

[81] The evidence established no more than that a posting to either Unit 58 or Westmorland would have met the limitations identified by Dr. LeBlanc in his correspondence, as he apparently recognized in his letter of January 17, 2011 (Exhibit U4). Moreover, the fact that the union and Mr. King agreed to the initial posting to Unit 58 and the fact that he worked there for so long represented a recognition that work in Unit 58 represented a suitable accommodation of his disability. That other employees might complain was of no relevance to the duty to accommodate, at least in the absence of knowledge on the employer's part about such tension and, once the knowledge existed, its failure to do anything about it. The evidence did not establish that any tension in fact existed until the incident in June 2011. Once that occurred, the employer took steps to correct it by reminding the other officers of their duty to reasonably cooperate in the accommodation of one of their colleagues.

C. Reply of the greivor's counsel

[82] In reply, the grievor's counsel took the position that, since Mr. King's return to work, positions opened at Westmorland that Mr. King could have been posted to. The employer failed to do so when it ought to have. The employer had a duty under article 37 of the collective agreement to not discriminate because of, amongst other things, disability. Its failure to accommodate Mr. King, by not posting him to Westmorland, constituted a breach of that duty.

VI. Analysis and Decision

[83] Mr. King alleged that the employer breached article 37 of the collective agreement by discriminating against him. The discrimination was its refusal to post him to Westmorland. The employer accepts that Mr. King has a disability (PTSD) and accepts that the disability makes him more susceptible to be adversely affected by witnessing or being subject to traumatic events. However, it stated that its posting of Mr. King to Unit 58 constitutes a reasonable accommodation of that disability.

[84] The duty to accommodate is an outgrowth of the duty to not discriminate. An employer has a duty not to discriminate on the basis of a disability. The employer of an employee who has a disability that prevents him or her from fulfilling the

requirements of a particular position has a positive duty (subject to undue hardship) to modify the requirements of that position or to find another comparable position to enable the employee to continue to fulfil his or her obligations under the contract of employment. The test of whether a reasonable accommodation has been offered is not whether the employee likes or wants to perform the duties of the modified or alternate position. Rather, it is whether the position represents a reasonable accommodation of the disability. In other words, the question to be answered is whether the employee is able to perform the position despite the disability. If he or she can, then the duty to accommodate is satisfied. That does not mean necessarily that any position (so long as it is compensated in equal fashion to the original position) will do. Offering a skilled machinist a position as a parking lot attendant will not represent a fulfilment of the employer's duty to accommodate, at least in the absence of any efforts to fashion or find a position more commensurate with the employee's skills, training and expertise.

[85] Before addressing the question of whether the posting to Unit 58 satisfied the substantive aspect of the duty to accommodate, I should address the procedural aspect, and in particular the union's criticism of that aspect set out at paragraphs 73 to 75 above.

[86] On this point, I was not satisfied that the procedural aspects of the duty to accommodate require, in all cases, a meeting between the employer and the person seeking accommodation - or that it requires the employer, in all cases, to secure its own independent medical review. Every case depends on its facts. In this case the employer had before it the reports of Dr. LeBlanc as well as the fact that Mr. King had initially requested posting to Unit 58 and appeared to be able to work there as long as he was not posted outside of it. There was no evidence that Mr. King had information that he had not been able to pass on to Dr. LeBlanc. Nor is there any evidence that the employer ignored Mr. King's disability or refused to take it into account when posting him as he requested. On the evidence, I am satisfied that the employer did discuss Mr. King's case a number of times with his union. In these circumstances, I see nothing wrong or inappropriate in the procedure adopted by the employer in responding to and addressing Mr. King's requests for accommodation.

[87] Nor did I read the employer's correspondence with Dr. LeBlanc as an attempt to persuade him to alter his opinion. The correspondence, which I set out above, indicates no more than a desire to understand the exact nature of Mr. King's disability, how that

disability might be accommodated and whether Unit 58 was a suitable accommodation. Dr. LeBlanc's comments on these questions were not entirely clear, particularly given that Mr. King was working in an environment that he was nevertheless alleging was not suitable. In such circumstances, it does not strike me as surprising or untoward that the employer would seek clarification as to whether Unit 58 was a suitable accommodation.

[88] Since Mr. King alleged that a posting to Unit 58 was not a suitable accommodation of his disability, the onus was on him to establish that fact on a balance of probabilities. The evidence on which he relied is essentially twofold as follows:

1) The reports of Dr. LeBlanc.

2) The fact that the posting to Unit 58 could, would or did cause tension with the other officers posted there when those tensions would not exist at Westmorland.

A. Dr. LeBlanc's reports

[89] The position of the grievor's counsel rested on his reading of Dr. LeBlanc's reports. He submitted that the reports constituted proof that, in the doctor's opinion, only a posting to Westmorland would accommodate Mr. King's disability. Of course that begs the question of the exact nature of the disability and whether Dr. LeBlanc's reports do in fact constitute that proof.

[90] Based on the reports entered into evidence, as well as Mr. King's testimony (including the fact that he worked for well over a year at Unit 58), I am satisfied that Mr. King suffered from PTSD, which had partially resolved by the time of his return to work in December 2008 or January 2009. By that I mean that his PTSD had receded to the extent that he was able to work, with the caveat that his ability was restricted. The restriction - the disability – was his diminished ability to handle the psychological stresses that would result from exposure to traumatic events. He was what would be called in a tort case as a "thin-skulled plaintiff." He was more likely to become disabled if he exposed to a psychologically traumatic event. He was, as Dr. LeBlanc explained in his letter of January 17, 2011 (Exhibit U4), left with "… a mild residue of traumatic anxiety which increases his vulnerability to be harmed by further exposure to trauma."

That vulnerability "to future traumatization," according to Dr. LeBlanc, "… is really the main concern regarding this man."

[91] On the evidence, that increased vulnerability did not mean that the grievor could not work in a minimum - security setting such as Unit 58. Indeed, all the evidence points to him having been able to. By Mr. King's own evidence, he applied for a posting to Unit 58 when he returned from rehabilitation for his shoulder injury. He worked there from roughly January 2009 to June 2011. He (or at least his union) requested and received a further accommodation by way of an agreement on the employer's part not to post him outside of Unit 58. In short, the evidence establishes to my satisfaction that, in terms of Mr. King's functional capacity, a permanent posting to Unit 58 accommodated the heightened vulnerability he laboured under because of his PTSD.

[92] It is true that Dr. LeBlanc thought that, although the posting to Unit 58 appeared "… to meet most of his [Mr. King's] needs . . . a residual level of anxiety persists and placement in an institution where there is less potential for violence remains preferential, if this can be arranged, and in the best interests of his health" (Exhibit U4). However, I was not persuaded that this statement can be read as an opinion that no other posting was suitable.

[93] First, it is not clear what Dr. LeBlanc meant by "… an institution where there is less potential for violence. . . ." Were he referring to inmates, no evidence was adduced that the inmates at Unit 58 were more violent than those at Westmorland; indeed, the evidence was to the contrary.

[94] On the other hand, Dr. LeBlanc may have had in mind the fact that Unit 58 was located within a medium - security facility where there was, presumably, an increased potential for violent events. The difficulty is that Mr. King's permanent posting to Unit 58 meant that he would not in ordinary course be expected to work in the medium - security setting during his shifts and that he hence would remain in a setting where there was "less potential for violence." That being the case, it was not established (and the onus was on the grievor) that, in terms of a "… potential for violence," there was any difference between what Mr. King would or could have experienced working at Unit 58 and what he might have experienced working at Westmorland. Nothing in the evidence before me supports Dr. LeBlanc's opinion (if it was an opinion) that the potential for exposure to violence at Westmorland was lower than at Unit 58. An

expert's opinion is only as good as the facts on which it is based. The onus of proving those facts lies with the grievor. If the facts do not exist or are not proved, then the opinion loses most if not all its persuasive effect. Indeed, the fact that stress with co-workers, rather than a violent event, caused Mr. King to leave work after working at Unit 58 for well over a year, persuades me that, as far Mr. King's disability is concerned, there is no difference between working at Unit 58 and working at Westmorland.

[95] In the end, I was not persuaded that Dr. LeBlanc's reports could be read as stating that Mr. King's permanent posting to Unit 58 did not constitute a reasonable accommodation of his disability. Mr. King asked for the posting initially. The fact that he may have asked for it to be temporary does not detract from the conclusion that he could do the job with his disability. Indeed, it supports that conclusion, for otherwise, he would not have been able to perform the task for as long as he did. Further support for that conclusion is found in the fact that what eventually caused Mr. King to go on leave was not an exposure to a traumatic event but rather the reactions of his co-workers. This brings us to the second prong of the argument of the grievor's counsel which is the tension the grievor's accommodation allegedly caused with his co-workers.

B. <u>Tension between the grievor and his Unit 58 co-workers</u>

[96] The question is whether the fact that Mr. King's fellow officers might resent the burden placed on them by the employer's decision to accommodate him at Unit 58 is or should be sufficient to make such an accommodation inappropriate.

[97] It is true that an employer is not entitled to use the duty to accommodate one employee as an opportunity to ride roughshod over the rights (such as seniority) of other employees. An employer is obligated to consider other means of accommodation before asking a union to ask its members to yield their own rights under a collective agreement; see, for example, *Central Okanagan School District No. 23 v. Renaud,* [1992] 2 S.C.R. 970 ("*Renaud*").

[98] The difficulty is that no evidence was adduced that Mr. King's co-workers at Unit 58 had a vested right under the collective agreement to not be posted outside Unit 58 on any particular shift. At best, the evidence pointed only to the possibility that Mr. King's permanent posting to Unit 58 meant that his co-workers there had an increased

chance of being posted, from time to time and from shift to shift, outside Unit 58. Even for that chance, the evidence fell short of establishing an actual statistical difference or that all or even the majority of Mr. King's fellow officers resented the situation.

[99] The grievor's counsel could only point out a potential for resentment by his co-workers that accommodating Mr. King's disability meant that their expectation of an easy shift on Unit 58 was being frustrated. Should that potential for resentment have dictated a decision by the employer to accommodate Mr. King by posting him to Westmorland instead of to Unit 58?

[100] In answering that question, I accept that as a general rule employee morale is a factor for an employer to consider when deciding any particular accommodation; see *Renaud*. However, it is "… a factor that must be applied with caution" (*Renaud*), particularly since Mr. King's fellow officers had no vested right that was being infringed by the accommodation. Since no vested right was infringed, then the most that could be said was that Mr. King's fellow officers might resent changes to their routines caused by the need to recognize his disability. That type of resentment or impact on employee morale is not something that the employer needed to pay attention to. For, as was noted by the Supreme Court in *Renaud*, "… objections based on attitudes inconsistent with human rights are an irrelevant consideration."

[101] Moreover, a potential is just that: a potential. An employer is entitled to adopt a wait-and-see approach as far as employee morale is concerned when seeking an appropriate accommodation, particularly when the potential reaction is not based on the infringement or alteration of rights vested under a collective agreement but on "… attitudes inconsistent with human rights" (*Renaud*).

[102] Of course, an employer that ignores the manifestation of such tension might in certain circumstances be failing in its duty to accommodate if it chooses to ignore the effect of the tension on the employee being accommodated or to let him or her sink or swim in such adverse waters. However, the employer's obligation is not necessarily to yield to such tension; *Renaud.* The evidence was that, once the tension came to the employer's attention in June 2011, it spoke to the co-workers involved, pointed out that they had no vested right or any reasonable expectation not to be posted outside of Unit 58 from time to time, and informed them that as employees and as professionals, they had a responsibility to accept that accommodating Mr. King might mean a few

more postings outside Unit 58 than might normally be the case. In other words, the employer took steps to deal with the tension that, on the evidence, did not manifest itself clearly until June 2011 and appeared to have been the reaction of only one or two co-workers.

VII. Conclusion

[103] I am not persuaded that Mr. King made out a case that the employer discriminated against him by failing to accommodate his disability. The evidence and the facts go no further than establishing that a permanent posting to either Unit 58 or Westmorland would have constituted a suitable and reasonable accommodation of Mr. King's disability. The fact that a posting to Westmorland would also have accommodated Mr. King's disability does not mean on the evidence that such a posting was the only possible accommodation. The choice between two or more appropriate accommodations is normally the employer's to make; see, for example, *Spooner*, at paragraphs 141 and 146. Neither the union, Mr. King nor Dr. LeBlanc were entitled in law or under the collective agreement to dictate which of two possible accommodations was appropriate. The employer's decision to permanently post Mr. King to Unit 58 as opposed to Westmorland did not constitute discrimination. It merely constituted an operational decision on the employer's part to select one of two possible ways of reasonably accommodating Mr. King's disability. It was entitled to make that decision.

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

(The Order appears on the next page)

VII. Order

[105] The grievance is dismissed.

October 31, 2011.

Augustus Richardson,
adjudicator