Date: 20140911

File: 566-02-3112

Citation: 2014 PSLRB 82

Public Service Labour Relations Act

Before an adjudicator

BETWEEN

NATHALIE NADEAU

Grievor

and

DEPUTY HEAD
(Correctional Service of Canada)

Respondent

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

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Steven B. Katkin, adjudicator

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

For the Employer: Léa Bou Karam, counsel

For the Canadian Human Rights Commission: Samar Mussalam, counsel

Heard at Québec, Quebec,
December 4 and 5, 2012.
Written submissions filed October 25 and November 1 and 11, 2013.
(PSLRB Translation)

I. Individual grievance referred to adjudication

[1] The grievor, Nathalie Nadeau, holds a correctional officer position classified at the CX-01 group and level. She works for the Correctional Service of Canada (CSC or "the employer") at the Donnacona Institution, located in Donnacona, Quebec ("the institution"). On May 22, 2009, the grievor filed a grievance concerning the interpretation or application of clause 43.03 of the collective agreement between the Treasury Board and the bargaining agent, the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - UCCO-SACC-CSN ("the union"), which expired on May 31, 2010 ("the collective agreement").

[2] The description of the grievor's grievance is as follows:

> [Translation]
>
> *Under clause 43.03, I challenge the fact that the employer refuses to pay me the $600 clothing allowance. The employer is also unable to and refuses to provide me with a uniform for a pregnant woman.*

[3] In terms of corrective measures, the grievance indicates the following:

> [Translation]
>
> *Pay me the $600 allowance or provide me with an appropriate uniform for a pregnant woman.*
>
> *And all other rights that the collective agreement gives me, as well as all real, moral or exemplary damages applied retroactively with legal interest without prejudice to other acquired rights.*

[4] The employer's response at the final level of grievance process reads as follows:

> [Translation]
>
> . . .
>
> *Clause 43.03 of the CX Group collective agreement states that the employer shall pay a $600 allowance to CXs "who are not required to wear a uniform routinely during the course of their duties." That paragraph also states, "The provision applies to those CX-1 and CX-2 employees assigned to such duties for periods of time of not less than six (6) months per fiscal year" and that an employee "receiving this allowance shall not be eligible to receive points toward a uniform issue."*

> *According to the information obtained, you were reassigned to an administrative assistant position between February 23, 2009, and August 14, 2009, in accordance with article 45 of your agreement. Thus, it appears that you were not assigned to those duties for a period of more than 6 months.*
>
> *In addition, according to the Correctional Service of Canada's (CSC) uniforms guidelines (CD 351-1), employees assigned to positions for which they are not required to wear a uniform will receive pro rata yearly maintenance points when they return to their substantive positions.*
>
> *However, it appears that you will receive the yearly maintenance points when you return from maternity leave, as set out in the CSC guidelines. Therefore, you cannot receive both the clothing allowance provided in clause 43.03 of your agreement and points for the uniform.*
>
> *By refusing to pay you the clothing allowance, management fully respected the provisions of your collective agreement.*
>
> *Consequently, your grievance and requested corrective measures are dismissed.*

[5] The grievance was referred to adjudication on September 4, 2009, using Form 20, in accordance with subparagraph 89(1)(*a*)(i) of the *Public Service Labour Relations Board Regulations* (SOR/2005-79). Form 20 is used for grievances concerning the interpretation or application of collective agreement provisions or arbitral awards.

[6] The grievor referred her grievance to adjudication under paragraph 209(1)(*a*) of the *Public Service Labour Relations Act* (*PSLRA*), which provides as follows:

> ***209.*** *(1) An employee may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to*
>
> > *(*a*) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award . . . .*

[7] On Form 20, the union indicated that it agreed to represent the grievor, in accordance with subsection 209(2) of the *PSLRA*.

[8] Form 20 indicates that the grievor's grievance refers to clauses 41.03 and 43.03 of the collective agreement. Clause 41.03 indicates that several directives are part of

the collective agreement, including the *Uniforms Directive*. Clause 43.03 deals with the clothing allowance.

[9] During a pre-hearing conference call on March 5, 2012, with a view to the hearing scheduled for March 27 and 28, 2012, the grievor's representative indicated that she intended to raise a human rights argument at the hearing.

[10] On March 7, 2012, the union gave notice to the Canadian Human Rights Commission (CHRC), in accordance with section 210 of the *PSLRA*. It alleged that the grievance raised an issue of the interpretation or application of the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; *CHRA*), namely, discrimination on the grounds of sex, because the employer had refused or failed to provide a uniform adapted to the grievor's condition as a pregnant woman. In a letter dated March 30, 2012, the CHRC informed the Public Service Labour Relations Board ("the Board") that it intended to make submissions in this regard.

[11] In a letter dated March 14, 2012, the grievor's representative requested that the hearing be postponed, as most of the union's witnesses were not available. The employer did not object to that request. I granted the postponement following a second conference call held with the parties on March 21, 2012.

II. Employer's preliminary objection

A. Employer's argument

[12] The employer made a preliminary objection that I took under advisement, which was that the grievance wording does not mention that the employer was to cease a discriminatory practice and that instead the grievance is about an issue of interpreting and applying clause 43.03 of the collective agreement. The employer added that although the adjudication referral form refers to clause 41.03 of the collective agreement, that provision was not mentioned in the grievance.

[13] According to the employer, the union's intention was not to turn it into a discrimination grievance, as it did not send the notice to the CHRC until March 7, 2012. The employer pointed out that only two-and-a-half years after the grievance was filed did the union mention discrimination in a procedural notice. It also argued that the discrimination issue was not raised at the different levels of the grievance process.

[14] The employer argued that applying clause 43.03 of the collective agreement gave rise to the grievance and that the union could not present one clause to the employer and another to the adjudicator. It added that the grievance was not correctly referred to adjudication and that it was an ambush. The employer cited *Lee v. Deputy Head (Canadian Food Inspection Agency)*, 2008 PSLRB 5, at paragraphs 20 and 21, which read as follows:

> ***20*** *As mentioned above,* Burchill *interpreted the provisions of the former* Act*, now replaced, as did the courts in* Shneidman*, 2006 FC 381 and 2007 FCA 192. In my opinion, however,* Burchill *continues to apply equally under the current* Act*. Its force flows from the stipulation under subsection 209(1) that an employee may only refer to adjudication an individual grievance ". . . that has been presented up to and including the final level in the grievance process . . ." When a grievor fails to raise an issue until after the conclusion of the grievance process, the* Burchill *interpretation holds that the grievor has not in fact presented a grievance regarding the newly raised issue ". . . up to and including the final level in the grievance process . . ." That failure constitutes a bar to adjudication under any paragraph of subsection 209(1), as it did under the comparable provisions of the former* Act*.*
>
> ***21*** *The principle enunciated in* Burchill *persists in no small part because it makes good labour relations sense. The employer should be entitled to know the specifics of a grievor's complaint so that it may properly address the issues raised and, if possible, resolve them during the grievance process. When a grievance is recast or has new elements after the internal grievance procedure has ended, the very purpose of that procedure can be undermined.*

[15] In support of its arguments, the employer also referred me to *Burchill v. Attorney General of Canada,* [1981] 1 F.C. 109 (C.A.), and to *Shneidman v. Canada (Attorney General),* 2007 FCA 192.

B. <u>Union's argument</u>

[16] According to the union, the discrimination issue is implicit in the grievance. In the grievance's wording, the grievor requested that the employer provide her with a uniform for a pregnant woman. The union pointed out that the grievance's wording also contained the following sentence: "[translation] The employer is also unable to and refuses to provide me with a uniform for a pregnant woman." The union pointed

out that the employer's position means that it will be limited to the allowance issue and that it cannot deal with the second part of the grievance.

[17] The union pointed out that because the grievor did not have any legal training, the fact that the word "discrimination" did not appear in the grievance wording could not in and of itself have prevented her from advancing such an argument. It pointed out that the employer could not argue that it was taken by surprise by the discrimination allegation because it was aware that it had not provided a maternity uniform to the grievor.

[18] The union pointed out that *Burchill* did not apply in the circumstances because that issue was never raised during the grievance process. Yet, the union argued that the grievance wording indicated that it was an issue of discrimination but that the employer had decided to limit itself to the allowance issue.

[19] In support of its argument, the union referred me to *Delage v. Treasury Board (Department of Fisheries and Oceans)*, 2008 PSLRB 56; and *Northwest Territories v. Union of Northern Workers (Public Service Alliance of Canada)* (2010), 199 L.A.C. (4th) 429 (application for judicial review allowed in *GNWT v. UNW,* 2011 NWTSC 32).

C. Employer's reply

[20] The employer pointed out that had the discrimination issue been raised in the grievance, it would have referred to discrimination in its responses at the different levels of the grievance process. One should not read into intentions. Furthermore, those who respond to grievances are not legal experts.

D. The CHRC's observations

[21] The CHRC emphasized that it was not necessary for the word "discrimination" to appear in the grievance's wording as it is implicit on reading the grievance. The fact that the grievance mentions a uniform for a pregnant woman indicates that it only concerns women. Even if a policy is clear, failing to apply it may constitute discrimination.

E. Preliminary objection: decision

[22] The grievance filed at the first level of the grievance process is worded as

follows:

> [Translation]
>
> *Under clause 43.03, I challenge the fact that the employer refuses to pay me the $600 clothing allowance. The employer is also unable to and refuses to provide me with a uniform for a pregnant woman.*

[23] The grievor requested the following remedy: "Pay me the $600 allowance or provide me with an appropriate uniform for a pregnant woman."

[24] On reading the grievance's wording, it seems to me that the second sentence, which concerns a pregnancy accommodation measure, clearly raises a human rights issue. Neither the grievance wording nor the requested remedy was amended since the grievance was filed. As the employer emphasized, it is true that the notice of referral to adjudication mentions clause 41.03 of the collective agreement, although it is not found explicitly in the grievance form. However, I consider that adding clause 41.03 to the referral to adjudication form does not constitute amending the grievance. That provision stipulates that, among other things, the public service National Joint Council (NJC) Uniforms Directive ("the *Uniforms Directive*") is an integral part of the collective agreement. When a grievance is sufficiently detailed at first glance, the employer is made aware of its nature at all levels of the grievance process (see *Shneidman*, at para 27). In this case, the grievance clearly indicates that one of the issues is the employer's refusal to provide the grievor with a uniform for a pregnant woman. In addition, in its response at the final level of the grievance process, the employer mentioned that the grievor was not required to wear a uniform when she was assigned to administrative tasks. Therefore, it is clear that the uniform argument was before the employer.

[25] With respect to *Burchill* and *Shneidman,* cited by the employer, in my opinion, those decisions do not apply in this case, as stated by the adjudicator in *Delage*, who expressed his reasons as follows:

> ***16*** *The rule established in* Burchill *is irrelevant to resolving the employer's objection. In* Burchill*, the Court states that a grievance presented at adjudication cannot differ from the one presented in the internal grievance procedure. The complaint to be considered by the adjudicator must be stated in the grievance. In this case, the grievance referred to adjudication is identical to the one filed internally. In addition, the complaint is clearly stated in the grievance.*

. . .

> ***18*** *In* Shneidman*, the employee challenged the termination of her employment, asserting in the grievance that the decision was unjustified, unreasonable and excessive. At adjudication, she also argued that there had been a failure to comply with the collective agreement because the disciplinary procedure it set out had not been respected. The Court determined that the adjudicator lacked jurisdiction to dispose of the allegations of non-compliance with the collective agreement because they had not been raised at the final level of the grievance procedure. In this case, the failure to comply with the collective agreement was brought to the employer's attention in the wording of the grievance.*

[26] The situation in this case is clearly distinguishable from *Lee*. In *Lee*, the grievor's excluded position was reclassified under a newly created classification. He filed a grievance about the effective date of the new classification standard and the remuneration for duties performed before the effective date. He first referred his grievance to adjudication under paragraph 209(1)(*a*) of the *PSLRA*. Having been advised that he could not refer his grievance to adjudication under that provision because he was not represented by a bargaining agent, the grievor filed the same grievance under paragraph 209(1)(*b*) of the *PSLRA*, alleging that the refusal to pay for the services that he had provided constituted a disciplinary measure. Ruling on the employer's preliminary objection, the adjudicator concluded that the grievor did not raise the issue of the disciplinary measure during the grievance process, and consequently, the *Burchill* rule applied.

[27] The employer argued that the union's discrimination argument took it by surprise. However, as will be demonstrated in the summary of the evidence in this decision, the employer knew of the discrimination allegation. During his examination-in-chief, Jean Simard, then Assistant Director of Operations at the institution, testified to having a discussion in March 2009 with the grievor and her union representatives. During that discussion, he said that he was aware that women do not choose the schedules of their pregnancies and that he did not want the assignment period of more than six months per fiscal year set out in clause 43.03 of the collective agreement to discriminate against pregnant women. Therefore, he proposed applying clause 43.03 of the collective agreement in a way that would extend it over two fiscal years; according to Mr. Simard, everyone agreed with that proposal.

[28] Therefore, I conclude that the grievance wording raised a human rights issue and

that the employer was aware of it during the grievance process. Consequently, I dismiss the employer's preliminary objection.

III. Summary of the evidence

[29] At the outset of the hearing, the parties filed a joint statement of facts dated December 4, 2012, which reads as follows:

> [Translation]
>
> *1. The Correctional Services (CX) collective agreement that the Treasury Board and the UCCO-SACC-CSN concluded (the expiration date is May 31, 2010) applies to this grievance.*
>
> *2. On January 27, 2009, Mr. Jean-Guillaume Dufour, the complainant's spouse, emailed Mr. Jean Simard, Assistant Director of Operations, to inquire about the status of the process for his spouse's maternity uniform, and Mr. Simard replied to him on January 28, 2009 (see email attached as Exhibit S-1).*
>
> *3. On February 13, 2009, Mr. Jean-Guillaume Dufour put the complainant's medical certificate (see Exhibit S-2) in Mr. François Bénard's (correctional manager) box, located in the correctional managers' operational office.*
>
> *4. On February 13, 2009, Mr. Bénard was on sick leave, and therefore, he became aware of it a few days later.*

A. For the grievor

1. Marie-Christine Ross's testimony

[30] Marie-Christine Ross is a correctional officer at Donnacona Institution. She is also the union local's steward for the status of women at the institution.

[31] During Ms. Ross's testimony, the union wanted to introduce a bundle of seven grievance forms that correctional officers employed at several of the employer's institutions had filed to demonstrate that the employer discriminated against pregnant correctional officers in a systemic manner. Some of those grievances pointed out that the maternity uniforms were not adequate, and others claimed the clothing allowance under clause 43.03 of the collective agreement. The employer objected to that evidence.

[32] At my request, the Board's registry made a list of grievances in its system about the clothing allowance that had been referred to adjudication. It provided that list to the parties on November 22, 2012, with a view to a pre-hearing conference call scheduled for November 29, 2012. The grievances that the union wanted to adduce were on that list.

[33] During the conference call, I asked the grievor's representative if, given the list of grievances the Board prepared, the grievor's case would serve as a test case. The representative informed me that it would not as she had not had the chance to discuss the details of those grievances with her colleagues from the institutions at which the grievances originated.

[34] I admitted those grievances as evidence (Exhibit S-3, bundled), subject to their probative value.

[35] Ms. Ross stated that a pregnant correctional officer must notify her manager of the date of her medical appointment and the expected date of her return.

[36] Ms. Ross testified that no security reason prevents a correctional officer from wearing the uniform in an institution's administrative area. According to her, a pregnant woman who wears the uniform is not required to intervene in emergencies.

[37] Under cross-examination, Ms. Ross stated that before scheduling an appointment with a doctor, an officer wears the uniform to work, as she does not know that she is pregnant. According to her, in general, three, four or even up to eight weeks may pass before seeing the doctor.

[38] Ms. Ross testified that after the doctor's appointment, once the return-to-work date and functional limitations, if necessary, are established, the officer stays at home on paid leave until she is reassigned to other tasks. In general, the officer is reassigned to administrative tasks.

[39] According to Ms. Ross, at the institution, pregnant women have been the subjects of about 10 files in the last 4 years.

[40] Ms. Ross affirmed that the institution's visits and personal effects positions require wearing the uniform. When questioned about whether the uniform is required when performing administrative tasks, Ms. Ross replied that it depends on the other

tasks to which the officer could be assigned.

2. Nathalie Nadeau's testimony

[41] The grievor has worked for the employer since November 1998. In that time, she has been pregnant twice, in 2006 and in 2009. She stated that she normally wears the uniform at work, in accordance with the Correctional Service of Canada's "Commissioner's Directive 351, Employee Clothing Entitlements," published on December 19, 2008 (Exhibit S-4; "CD 351"), and "Guidelines 351-1, CSC Uniforms, Dress Code and Scale of Issue," also published on December 19, 2008 (Exhibit S-5; "Guidelines 351-1").

[42] The grievor referred to paragraph 12 of CD 351 (in the French version), which reads as follows (as paragraph 14 of the English version):

> ***ENTITLEMENTS***
>
> *14. The following groups of employees are entitled to the full scale of issue of the Correctional Officer uniform:*
>
> a. *Correctional Officers/Primary Workers, including Admission and Discharge Officers and Visits and Correspondence Officers, at institutions where uniforms are authorized . . .*

[43] The grievor also mentioned paragraphs 45 and 46 of Guidelines 351-1, which state the following:

> ***MATERNITY CLOTHING***
>
> *45. Officers will be permitted to wear a special maternity uniform only after receiving a physician's written confirmation of pregnancy. The officer may continue to wear these uniforms for up to 60 days following childbirth.*
>
> *46. Officers requiring maternity uniforms may wear a pullover jumper and alter the waist of their uniform work pants or dress trousers for maternity purposes. The cost of clothing manufacturing and alteration will be funded at the local (institutional) level. The garment must be midnight blue and must be made from the work uniform material. The appropriate uniform shirt and pants or trousers must be worn under the maternity jumper.*
>
> . . .

[44] The grievor said that wearing a uniform is advantageous because employees

doing so do not need to buy clothing for work. She added that she had been reassigned to administrative tasks during her first pregnancy, in 2006. She also stated that she requested the allowance under clause 43.03 of the collective agreement but was told that she was not entitled to it because the maternity uniform was provided to her.

[45] The grievor referred me to a series of emails, the first of which is dated August 15, 2006, and the last September 1, 2006, of which she received a copy (Exhibit S-6). I accepted that exhibit as evidence, subject to its probative value. That series of emails is about interpreting clause 43.03 and article 45 of the collective agreement, which deals with maternity-related reassignment.

[46] The email dated August 15, 2006, is addressed to Susan Dibble, Senior Labour Relations Advisor, Labour Relations Management, Policy and Planning, at the employer's headquarters, from one of the employer's labour relations advisors in its Quebec Region. It contains the following question:

> [Translation]
>
> . . .
>
> *A correctional officer 1 at Donnacona Institution . . . requests the $400 clothing allowance provided in the CX collective agreement because, due to her pregnancy, following written confirmation from her doctor, she was reassigned to administrative tasks for the remainder of her pregnancy, until her childbirth. She would like to receive that allowance as she says that she had to buy maternity clothes.*
>
> *Will she be entitled to that allowance, as worded in the collective agreement, on March 31, 2007, or does she have to wear a special maternity uniform, as prescribed in Guidelines 351-1 . . . even if, in Quebec, most correctional officers are removed from their CX positions during their pregnancies?*
>
> . . .

[47] In an email dated August 22, 2006, a copy of which was forwarded to Marc Lacroix, of the collective bargaining group, Labour Relations and Compensation Operations, Treasury Board Secretariat, Ms. Dibble replied as follows:

> [Translation]
>
> . . .
>
> *I confirmed with the staff responsible for the CSC uniform policy that maternity uniforms, or large uniforms altered to*

> *meet the needs of a pregnant woman, are provided free of charge to pregnant employees of the CX group.*
>
> *An employee who requests the allowance is required to wear a uniform to perform the tasks of her substantive position. At her request and following her doctor's advice, she was reassigned to administrative tasks, in accordance with article 45 of the collective agreement. Given that the pregnant employee is still part of the CX group, she is entitled to a maternity uniform. In these circumstances, the usual practice consists of providing a maternity uniform to the employee.*
>
> *The employee has purchased maternity clothes and claimed a $400 allowance. Is she entitled to that allowance? According to my understanding, the purpose of the clause is to pay a clothing allowance in place of a uniform, to ensure all employees are treated fairly, whether or not they are required to wear a uniform.*
>
> . . .

[48] On September 1, 2006, Mr. Lacroix sent the following email to Ms. Dibble:

> [Translation]
>
> . . .
>
> *Your interpretation of article 43.03 is correct. She [the employee] is not eligible for the clothing allowance because uniforms (including maternity uniforms) are provided to her.*
>
> . . .

[49] The same day, Ms. Dibble forwarded Mr. Lacroix's email to the labour relations advisor who had originally asked the question and to the labour relations regional manager, with the following message:

> [Translation]
>
> . . .
>
> *I just received the response from Marc Lacroix of the TBS about the clothing allowance. Given that the maternity uniform is available for correctional officers during their pregnancies, those employees are not entitled to the clothing allowance.*
>
> . . .

[50] The grievor received a copy of that interpretation on September 1, 2006.

[51] As for her second pregnancy, the grievor said that she learned that she was pregnant on December 14, 2008. She called François Bénard, her correctional manager, to inform him about it, but he was absent. When he contacted the grievor at her home, he told her to stay home until she had an appointment with her doctor. The grievor said that she immediately requested the maternity uniform because, during her first pregnancy, she experienced a long wait. She wanted to ensure that she had her maternity uniform in time for her return to work. According to the grievor, Mr. Bénard told her that he would make the arrangements and that he would communicate with her later on.

[52] As mentioned in paragraph 2 of the joint statement of facts, Mr. Dufour, the grievor's spouse, emailed Mr. Simard, Assistant Director of Operations for the institution, on January 27, 2009, because Mr. Bénard was taking a long time to reply to him. In his email, Mr. Dufour inquired about the status of the process for the grievor's uniform. Mr. Simard replied the next day, as follows (Exhibit S-1):

> [Translation]
>
> . . .
>
> *As this has never happened in the past, we must implement a new practice that is as accommodating as possible for pregnant officers. That process will begin as soon as an officer notifies us of her condition. Everything is currently available.*
>
> - *Her CM will communicate with her to inform her of the process.*
>
> - *The officer will have to make arrangements with Ginette Julien to order two pairs of pants that will be altered (elastic waistband) and two shirts.*
>
> - *We will provide the officer (through Ginette Julien) with the pattern, the material and the thread for the pullover top.*
>
> - *The officer may make alterations with the seamstress of her choice (an invoice is mandatory) to maximize her comfort. If she wishes, a seamstress has been identified at Donnacona.*
>
> . . .

[53] A memo dated February 2, 2009, having as its subject the procedure for making a pullover jumper and of which the union received a copy (Exhibit S-7), identified Linda

Bédard as a seamstress at Donnacona.

[54] The grievor said that the instructions in Mr. Simard's email about maternity clothes raised difficulties for pregnant women. She communicated her concerns to Mr. Bénard during a telephone discussion. Mr. Bénard then asked her to make her requests in writing, which she did in a letter that she addressed to him on February 10, 2009 (Exhibit S-8).

[55] The grievor had an appointment with her doctor on February 11, 2009, and obtained a medical certificate (Exhibit S-2). The certificate mentioned that she was then 12 weeks pregnant and described her functional limitations. As she was ready to return to work, she tried to contact Mr. Bénard the same day, but he was absent. As stated in the joint statement of facts, the grievor's spouse put the medical certificate in Mr. Bénard's box on February 13, 2009.

[56] The grievor said that she was able to reach Mr. Bénard around February 15 or 16, 2009. She told him then that she wanted to return to work as soon as possible. Mr. Bénard replied that he would look for a position compatible with her medical limitations. The grievor asked him about the status of her uniform, and he told her that he was waiting for a response. A few days later, Mr. Bénard contacted her to inform her that she would be assigned to a job with the administrative assistant at scheduling and deployment beginning on February 24, 2009.

[57] When she returned to work, the grievor still did not have a maternity uniform. She met with Mario Goulet, Assistant Director of Operations at the institution, who asked her to make an appointment with the seamstress with whom the employer did business and to bring Ginette Julien, an employer representative, with her.

[58] The grievor met with Ms. Bédard, the seamstress, on March 3, 2009. In an email sent that same day and addressed to Mr. Goulet, which she forwarded to Mr. Simard (Exhibit S-10), the grievor mentioned that meeting. She also attached a report from Ms. Bédard, dated March 3, 2009, (Exhibit S-11), which mentioned the difficulties of making the necessary alterations to the uniform so that it would be suitable for a pregnant woman. She also mentioned that Ms. Julien refused to accompany her to the seamstress.

[59] The grievor said that she asked to meet with Mr. Simard on March 19, 2009, to

find out the steps to take about a uniform for a pregnant woman (Exhibit S-12). She met with him a few days later. During that meeting, she noted that the employer's discourse had changed. Mr. Simard told her then that pregnant correctional officers did not need to wear a maternity uniform because they were reassigned to other areas. He said that if she wore a uniform, she could intervene with inmates if so required. She replied by asking him why correctional officers with functional limitations could wear the uniform, while pregnant women could not. She testified that Mr. Simard replied that officers with functional limitations had the right to wear their own clothes and that they were not entitled to the allowance in clause 43.03 of the collective agreement.

[60] The grievor testified that Mr. Simard was aware that pregnancies were not connected with a fiscal year and proposed a pro rata application of clause 43.03 of the collective agreement.

[61] On April 30, 2009, after a discussion the day before with Mr. Simard, the grievor sent him an email requesting a written explanation of the employer's refusal to pay her the clothing allowance for a pregnant woman. Mr. Simard's response, on May 5, 2009, consisted of copying and pasting Guidelines 351-1, about maternity clothes, and clause 43.03 of the collective agreement (Exhibit S-13).

[62] On May 11, 2009, the grievor emailed the following to Mr. Simard (Exhibit S-14):

> [Translation]
>
> . . .
>
> *We received your reply to the email about the refusal to authorize the allowance and to provide us with a uniform tailored to a pregnant woman.*
>
> *To improve our understanding, in other words, we do not have the right to wear the uniform provided for a pregnant woman because we do not perform CX tasks.*
>
> *What is strange is that we have made arrangements to have the uniform altered so that women can wear it. You ordered fabric from the region, purchased material, met with seamstresses and sent out memos to staff about how to proceed, and after all that, we are being told that we cannot wear it. We do not understand.*
>
> *We await further explanations.*

[63] On May 18, 2009, Mr. Simard replied as follows:

[Translation]

. . .

> *Exactly. I made arrangements because you asked about the possibility of receiving the allowance. . . The has had the effect that we now have a clear position for the future. Your representatives can now, in turn, make clear representations. As discussed, the allowance article will apply . . . if six months have been completed.*

[64] The grievor stated that she started her maternity leave on August 14, 2009, and that she never received a maternity uniform. She had to buy more clothes than she would have had she had a uniform as she needed more professional clothes for work. She testified that she had to spend $1832.35 on maternity clothes. In relation to this, she filed in evidence the monthly account statements for her credit card from December 2008 to August 2009 (Exhibit S-15).

[65] The grievor mentioned other pregnant correctional officers. According to her, Nathalie Godin did not receive the allowance and Dominique Turmel did not receive the uniform, but Mélanie Banville received the allowance.

[66] In cross-examination, the grievor acknowledged the form "[translation] Certification of employee having access to the HRMS" (Human Resources Management System) that she signed on February 24, 2009 (Exhibit E-2), i.e., the first day of her return to work. She said that she performed administrative assistant duties that consisted mainly of data entry. She had no connections to or interactions with inmates.

[67] The grievor stated that during the first part of her pregnancy, she worked in an administrative centre located within the institution's security perimeter. After that, she worked in another service building located within the perimeter of the institution but not inside the security perimeter. According to her, about one-and-a-half months passed before she was reassigned to the service building.

[68] The grievor acknowledged receiving points for maintaining her uniform when she returned to her substantive position.

[69] The grievor testified that Ms. Banville received the clothing allowance because she worked more than six months and that that time overlapped more than one fiscal year.

[70] The grievor affirmed that Mr. Simard brought up the pro rata idea at a meeting she attended with Ms. Banville and Robert Jacques, a union representative. She said that Mr. Simard did not make any promises in that sense but that he raised it as a point of discussion. During the meeting, he stated finally that he preferred to wait for the next collective agreement. When the employer representative mentioned that Mr. Simard would argue that the grievor had raised the pro rata issue, the grievor maintained her version.

[71] The employer's counsel asked the grievor to detail her maternity clothing purchases indicated on her credit card account statements. She stated that the stores at which she purchased her maternity clothes, as well as the amounts spent in each store, were indicated with an "x" on her account statements.

[72] The grievor was able to specify certain details of her purchases but acknowledged returning some of the clothes to the store after they were purchased. She also acknowledged that some of those clothes were for work and others were for home, while others were suitable for work and home.

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

[73] Mr. Simard was the employer's only witness. He retired in August 2011, after working 30 years for the employer. He held the assistant director of operations position as of September 2007. Before September 2007, for two years, he held the assistant director of security position, the predecessor of the assistant director of operations position. His duties consisted of the institution's daily operations and managing Operations Division employees, i.e., about 300 correctional officers, and Operations administrative staff. In addition to the special teams, the branches under his responsibility included visits and personal effects, where correctional officers worked. Mr. Simard said that the support employees working in administrative services in charge of data entry and staff management are not correctional officers.

[74] With respect to the procedure to follow during a pregnancy, Mr. Simard said that the pregnant officer must report her absence by telephone, at all times, in order to find a replacement. The pregnant officer must stay home on paid leave until her appointment with her doctor. After that appointment, she must communicate her limitations and her return-to-work date. On her return, an appointment with the correctional manager is scheduled within 48 hours to determine the tasks she can

perform given her limitations, competencies and interest in other positions. Mr. Simard stated that sometimes, more than one meeting is necessary. If the reassignment is not finalized, the officer returns home on paid leave while verifications are made to determine the employer's operational needs. Often, the officer proposes the work to be done or makes arrangements with an employee who works in her field of interest. While waiting to be reassigned, the officer can perform administrative tasks, such as photocopying. In general, the officer is reassigned a few days after her return to work. Mr. Simard said that the decision to reassign an officer is made by mutual agreement with management, the employee and the employee's representative, while respecting the collective agreement and the officer's medical limitations.

[75] Mr. Simard said that his involvement in the grievor's case began earlier than usual because she indicated that she wanted a maternity uniform. According to him, before 2000, pregnant correctional officers at Donnacona worked in uniform and performed the tasks of their positions. He said that the officers did not request uniforms when working in other than officer positions, as they wanted to work in civilian clothes.

[76] Mr. Simard stated that telephone and email exchanges took place with the grievor about the uniform. He communicated with the unit responsible for employee uniforms about uniform procedures and policies. He stated that according to the standards, an employee who wears the uniform performs tasks associated with that uniform. When the discussions with the grievor began in January 2009, Mr. Simard still did not have her medical certificate in hand. Once he received it and the medical limitations, he held discussions with the health and safety representative and with the representative for the status of women. He also discussed the grievor's case with a labour relations advisor at the regional directorate. Mr. Simard stated that the employee took part in the discussions because the employer understood that her condition brought risks and that she should not be afraid or stressed by threats or intimidation. Therefore, she was assigned administrative tasks.

[77] When questioned about why the grievor did not receive a uniform for a pregnant woman, Mr. Simard replied that it was not that the employer did not want to give her a uniform but that it would have been contrary to her medical certificate. He said that it emerged from his discussions with the health and safety and status of women representatives that women assigned to administrative tasks worked in civilian clothes.

According to Mr. Simard, the president of the union local agreed.

[78] Mr. Simard stated that in a maximum-security institution such as Donnacona, the risk of encountering an inmate is elevated. An employee who wears the uniform is seen as being in a position of authority and as a correctional officer. That is the only reason for not giving the grievor the uniform. Other correctional officers who worked with the uniform did not have the same limitations as she did.

[79] Questioned about whether some correctional officers perform officer duties without wearing the uniform, Mr. Simard mentioned shooting range instructors and officers acting as mediators and facilitators for complaints and grievances. He stated that those officers are entitled to the clothing allowance if they meet the requirements of clause 43.03 of the collective agreement. According to him, between 2007 and 2011, only mediation officers and pregnant women were entitled to the clothing allowance.

[80] Questioned about whether it was possible to determine in advance where an officer would be reassigned, Mr. Simard replied affirmatively in the case of women not in their first pregnancy. Those officers are familiar with the institution and their limitations. According to him, it also depends on the number of women pregnant at the same time and on the employer's needs. In the grievor's case, the employer needed support for the leave and schedule management system.

[81] As for the grievor's testimony that Mr. Simard had raised the pro rata idea, he stated that in March 2009, he met with Richard Paquet, who ensures that officers' work is going well, and three union representatives, notably, Mr. Jacques. Ms. Banville and the grievor attended. The discussion was about clause 43.03 of the collective agreement and the fact that he did not want a fiscal year to result in discrimination against pregnant women because officers do not choose their pregnancy schedules. Mr. Simard then proposed that clause 43.03 be applied over two fiscal years, to which everyone agreed.

[82] Mr. Simard testified that in the following days, they discussed the six-month period in clause 43.03 of the collective agreement. The grievor stated that she would not work for six months before her maternity leave, and the pro rata option was then proposed to her. Mr. Simard asked her what it all would lead to. He told the grievor that if she did not work the six months to be entitled to the allowance, she would be entitled to the maintenance points.

[83] Mr. Simard specified that when he replied "Exactly" in his email to the grievor on May 18, 2009 (Exhibit S-14), he did so with respect to the following sentence from the grievor's email: ". . . [W]e do not have the right to wear the uniform provided for a pregnant woman because we do not perform CX tasks."

[84] Mr. Simard stated that the grievor initiated her uniform request in January 2009, i.e., before receiving her medical certificate. He added that he had to wait to receive the certificate before determining whether she could wear the uniform.

[85] Under cross-examination, Mr. Simard could not recall whether Ms. Turmel and Ms. Godin requested maternity uniforms at the same time as the grievor did. He admitted that the grievor's medical certificate did not stipulate that she could not wear the uniform but that a risk existed of her coming into contact with inmates.

[86] Questioned about whether an employer standard prevented pregnant officers from wearing the uniform, Mr. Simard replied that officers performing a correctional officer's tasks have to wear an officer's uniform.

[87] When the grievor's representative pointed out that one of the officers with functional limitations had been assigned to the personal effects position, Mr. Simard replied that the employer took measures to prevent that officer from intervening in emergencies. Mr. Simard acknowledged that that officer had contact with inmates, adding that he had no restrictions concerning visual contact with inmates. He said that that officer wore a uniform because he performed a correctional officer's duties.

IV. Summary of the arguments

A. For the grievor

[88] According to the grievor, the issues in dispute are the following:

- Did the employer's failure to provide the maternity uniform constitute discrimination on the grounds of sex?
- If so, did the employer have a reasonable explanation to justify the discriminatory act?
- Does clause 43.03 of the collective agreement constitute indirect discrimination of pregnant women?

- If so, does the employer have a reasonable explanation to justify applying clause 43.03 of the collective agreement in this case?

- If I conclude that pregnant women are being discriminated against, what damages should be awarded in the circumstances?

[89] The grievor pointed out that she asked the employer for a maternity uniform as soon as she knew she was pregnant. She emphasized that the uncontradicted evidence was that she did not receive a maternity uniform. According to the employer's directives, the grievor met with the employer's authorized seamstress, who noted that it was not possible to alter the grievor's current uniform to a maternity uniform.

[90] The grievor maintained that correctional officers should be provided with a maternity uniform because it would mean fewer expenses for them. She said that she had been disadvantaged and discriminated against due to her pregnancy because, had it not been for that, she would not have needed a maternity uniform. Since she did not receive a uniform, she had to incur expenses to purchase clothes for work. In support of that argument, she referred me to clause 37.01 of the collective agreement concerning the elimination of discrimination, and to subsection 7(*b*) of the *CHRA*, about prohibiting direct or indirect discriminatory acts in the course of employment.

[91] The grievor submitted out that if an employer provides benefits to its employees, it cannot make discriminatory exclusions. In this regard, she referred me to *Brooks v. Canadian Safeway Ltd.*, [1989] 1 S.C.R. 1219. She pointed out that given that she had established *prima facie* (at first sight) evidence of discrimination, the employer had to demonstrate that providing her with a maternity uniform constituted undue hardship. On that point, the grievor referred me to a Canadian Human Rights Tribunal (CHRT) decision, *Buffett v. Canadian Forces*, 2006 CHRT 39 (application for judicial review allowed, and the case was referred back to the CHRT in *Canada (Attorney General) v. Buffett*, 2007 FC 1061.)

[92] The grievor suggested that the employer did not demonstrate that it faced undue hardship. In fact, it arranged for her to obtain the maternity uniform as of February 26, 2009 (Exhibit S-9). Similarly, the employer let her know that, through Mr. Simard during a meeting around the end of March 2009, she could not wear the uniform in the administrative centre for security reasons. She pointed out that the employer's position was not based on any standard or directive but rather on her medical

certificate, which the employer became aware of around February 15 or 16, 2009. The grievor underlined Ms. Ross's testimony that no security reason existed for a correctional officer not to wear the uniform in the institution's administrative area. She also emphasized her own testimony and that of Mr. Simard, which was that some male correctional officers with functional limitations wore the uniform even when not required to intervene in emergencies.

[93] The grievor mentioned the employer's position, which was that she was not entitled to the clothing allowance set out in clause 43.03 of the collective agreement because her reassignment did not exceed six months. She pointed out that according to Ms. Dibble's interpretation in 2006, which Mr. Lacroix confirmed (Exhibit S-6), she was not entitled to the clothing allowance because she was entitled to the maternity uniform, given that her substantive position was that of a correctional officer. In 2009, the employer told her that she could not wear the maternity uniform during her reassignment to administrative duties and that since the reassignment was for a period not exceeding six months, she was not entitled to the clothing allowance in clause 43.03 of the collective agreement. She pointed out that pregnant women should not be required to complete the six-month period to be entitled to the clothing allowance.

[94] The grievor submitted that clause 43.03 of the collective agreement, while seemingly neutral at first sight, has a prejudicial effect because of the *CHRA*'s prohibited ground toward pregnant women. She argued that the employer did not demonstrate that accommodating her caused undue hardship or that her job was rationally connected to the particular standard, i.e., the obligation to perform six months of work in a fiscal year, in accordance with clause 43.03. In support of that argument, she referred me to *Commission scolaire régionale de Chambly v. Bergevin*, [1994] 2 S.C.R. 525, and *British Columbia (Public Service Employee Relations Commission) v. BGSEU*, [1999] 3 S.C.R. 3 ("*Meiorin*") at para 22.

[95] The grievor pointed out that pregnant correctional officers were doubly discriminated against by how the employer applied clause 43.03 of the collective agreement. The employer does not provide the maternity uniform, and those officers are not compensated for the clothes that they must purchase to work during their reassignments.

B. For the employer

[96] According to the employer, there is only one issue in dispute. Did it violate clause 43.03 of the collective agreement by refusing to pay the grievor the clothing allowance? The employer pointed out that the grievor has to demonstrate that, on a balance of probabilities, the employer incorrectly interpreted or applied the collective agreement.

[97] The employer referred me to several decisions concerning the rules of interpretation for collective agreements. A collective agreement reflects the intent of the parties; see *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp and Paper Ltd.*, 2002 NBCA 30; and *Chafe et al. v. Treasury Board (Department of Fisheries and Oceans)*, 2010 PSLRB 112. It is presumed that the parties intended to say what is expressed in the collective agreement, which must be interpreted according to the normal and ordinary meaning of the words; see *Irving Pulp and Paper Ltd.*; *Lamothe v. Canada (Attorney General)*, 2009 FCA 2; and *Canada (Attorney General) v. McKindsey*, 2008 FC 73. Meaning must be given to each word of a collective agreement, to avoid any redundancy; see *Stevens v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2004 PSSRB 34. An adjudicator cannot add or remove words from a collective agreement. In this regard, it referred me to section 229 of the *PSLRA* and to *Greater Essex County District School Board v. United Association of Journeymen*, 2011 ONSC 5554. A clear intent is required to grant a monetary benefit in a collective agreement; see *Lamothe, McKindsey,* and Brown and Beatty, *Canadian Labour Arbitration*, 4th Ed., at para 4:2120 ("Brown & Beatty").

[98] The employer pointed out that five conditions have to be respected to apply clause 43.03 of the collective agreement: the employee must be classified at the CX-01 or CX-02 group and level; the employee must not be required to wear a uniform while performing duties; the employee must be assigned to duties that do not require wearing a uniform; the assignment must be for a period exceeding six months per fiscal year; the employee receiving the clothing allowance must not be eligible to receive points toward a uniform. The employer acknowledged that the grievor met the first three conditions. It maintained that she did not demonstrate that her reassignment exceeded six months.

[99] The employer maintained that under the terms of the clothing allowance, a correctional officer who is not required to wear a uniform must wear civilian clothes.

The correctional officers required to wear civilian clothes are not disadvantaged by the employer because they are entitled to an allowance. All officers must be on an equal footing.

[100] The employer submitted that the parties agreed that the clothing allowance would be granted only when the reassignment period exceeded six months. In addition, the term "fiscal year" in clause 43.03 of the collective agreement must be interpreted according to its meaning. The employer referred me to the following decisions, in which the complainants did not meet the periods defined in the collective agreements: *Canada Post Corp. v. Canadian Union of Postal Workers*, [2002] C.L.A.D. No. 470 (QL); *London and District Building Service Workers, Local 220 v. Centre Grey General Hospital* (1970), 22 L.A.C. 266; and *Foran v. Campbellton Nursing Home Inc.*, [2004] N.B.L.A.A. No. 14 (QL).

[101] The employer emphasized that the grievor could not allege that she did not receive anything as she testified that she received points toward a uniform under clause 43.03 of the collective agreement. It argued that had the grievor been reassigned for more than six months, she would have been entitled to the allowance. As that deadline applied in the circumstances, the monetary benefit she claimed would result in amending the collective agreement. In that regard, the employer referred me to *Lannigan v. Treasury Board (Correctional Service of Canada)*, 2006 PSLRB 34. The employer pointed out that the parties had decided that a prejudicial effect could arise only after six months.

[102] According to the employer, paragraph 13 of Guidelines 351-1 applies to the grievor. That paragraph reads as follows:

> ***Secondments, Term and Part-Time Employees***
>
> *13. Full-time employees entitled to the full scale of issue who are seconded to a position where they are not required to wear their uniform, will be entitled to replace uniform items they require only when they return to their substantive position. Upon return to the substantive position, full-time employees who are required to wear the CSC uniform will be entitled to yearly maintenance points. These will be pro-rated on a monthly basis, according to their tenure in their base position.*
>
> . . .

[103] The employer argued that although paragraphs 45 of Guidelines 351-1 and those that follow deal with maternity clothing, the grievor was not required to wear such clothing during her reassignment.

[104] For article 45 of the collective agreement, entitled "Maternity-Related Reassignment or Leave," the employer pointed out that it in no way amends clause 43.03 of the collective agreement.

[105] The employer pointed out that the grievor did not discharge her burden of demonstrating that clause 43.03 of the collective agreement was interpreted or applied incorrectly.

[106] The employer then addressed the grievor's arguments concerning her allegations of discrimination. According to the employer, she did not provide any *prima facie* evidence of discrimination by the employer on the grounds of her status as a pregnant woman, and consequently, I must dismiss that argument. On that point, the employer relied on *Souaker v. Canadian Nuclear Safety Commission,* 2009 PSLRB 145. It pointed out that the grievor had to demonstrate that she received discriminatory treatment and that that treatment motivated the employer's refusal to provide her with a maternity uniform.

[107] The employer submitted that according to *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4 ("*McGill*"), two essential elements are required to demonstrate that discrimination occurred: first, a distinction that imposes a burden or obligations on the grievor, which is not imposed on other employees, and second, that distinction must be based on a ground prohibited under the *CHRA*. The employer argued that the grievor did not demonstrate that distinction. She was reassigned to a position classified CR-04 and, according to Mr. Simard, no employee classified CR-04 in the institution wears a uniform. In addition, the example of a correctional officer acting as a mediator demonstrated that some correctional officers do not wear a uniform.

[108] The employer referred me to clause 41.03 of the collective agreement, which states that, among other things, the NJC *Uniforms Directive*, approved by the Treasury Board, forms part of the collective agreement. The employer pointed out the following paragraph of the *Uniforms Directive*, under the heading "Purpose and scope":

> *It is the policy of the government to provide appropriate items of clothing to employees where the nature of the work is such that special protection is required or where special identification at the local, national or international level will aid in the effective performance of duties and in meeting program objectives.*
>
> . . .

[109] The employer argued that the nature of the work, not the employee's classification, determines whether he or she wears a uniform. According to the employer, clause 43.03 of the collective agreement provides that some correctional officers are not required to wear a uniform.

[110] The employer raised that, as noted in *Association of Justice Counsel v. Treasury Board*, 2012 PSLRB 32, plans or benefits are compensatory or non-compensatory in nature. It pointed out that correctional officers accommodated by reassignments to positions classified CR-04 because of pregnancy cannot claim all the benefits granted to correctional officers performing correctional officer duties.

[111] The employer added that the second discrimination element is that it must be based on a prohibited ground. However, the reason the grievor did not receive the maternity uniform was not prohibited. She did not receive the maternity uniform because she was pregnant but because her CR-04 duties did not require it.

[112] With respect to the allegation that the employer tolerated correctional officers wearing a uniform even if it was not required for their duties, the employer claimed that it does not follow that the grievor was entitled to the uniform. The employer cannot be penalized for being flexible.

[113] The employer pointed out that at the grievor's request, it accommodated her according to her functional limitations. It pointed out that the accommodation did not have to be perfect. In any case, the fact that the accommodation was imperfect did not make it discriminatory in itself. In support of that argument, the employer referred me to *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970 ("*Renaud*"). The grievor was reassigned to a position in the administrative centre because she had temporary functional limitations due to her pregnancy. She was not entitled to a uniform because the position did not require it.

[114] The employer stated that it disagreed with the grievor's argument that she

should have been compared to other correctional officers who wore a uniform. According to it, clause 43.03 of the collective agreement provides for situations in which correctional officers are not required to wear a uniform, even if the employee is not pregnant. The employer argued that it did not impose the six-month period and that the parties had negotiated clause 43.03.

[115] The employer then addressed the bundle of seven grievances alleging violations of clause 43.03 of the collective agreement that the grievor filed in an attempt to demonstrate that the employer discriminated against pregnant correctional officers in a systemic manner. It pointed out that stronger evidence was needed than that such grievances were in the Board's system to demonstrate the existence of systemic discrimination. The grievor had to demonstrate that the practice had a prejudicial effect on pregnant women. As for Ms. Ross's testimony about 10 files from pregnant women at the institution in the last 4 years, the employer alleged that it was false to claim that all the pregnant women had suffered hardship.

[116] The employer commented on some of the exhibits the grievor filed. It claimed that Exhibit S-6, the emails between Ms. Dibble and Mr. Lacroix, had no probative value, was irrelevant and constituted hearsay. According to the employer, Exhibit S-11, the letter from the seamstress, also constituted hearsay.

C. Grievor's reply

[117] The grievor pointed out that *Canada Post*, *Centre Grey General Hospital* and *Foran*, cited by the employer, were not relevant because they did not address the discrimination issue.

[118] The grievor pointed out that although she received uniform points, she could not use them because of her pregnancy.

[119] As for the employer's argument that the collective agreement does not provide an entitlement to the uniform, the grievor stated that she was required to perform other tasks because of her pregnancy. Had it not been for her pregnancy, she would not have found herself in such a situation.

[120] As for the element of distinction, the grievor stated that no distinction would have occurred had she not been pregnant. She pointed out that she had one benefit: the uniform. As the employer refused to provide her with one during her pregnancy,

she had to purchase clothes that were suitable for work. She pointed out that the argument that employees classified CR-04 do not wear a uniform was irrelevant.

[121] As for the employer's argument that an accommodation need not be perfect, the grievor pointed out that the employer was confusing two things, i.e., accommodation as a result of her functional limitations, and not providing a uniform, which constituted discrimination.

D. The CHRC's comments

[122] At the beginning of the hearing, the CHRC representative filed written comments based on allegations contained in the file and not on the evidence. The comments are about certain concepts, i.e., *prima facie* evidence of discrimination, the definition of systemic discrimination, legislative provisions and the applicable jurisprudence.

[123] For the CHRC, the following are the issues in dispute:

> - *Did the complainant receive adverse differential treatment, in the sense that the employer's refusal to provide uniforms adapted to the condition of pregnant women, because of a prohibited ground of discrimination?*
>
> - *If so, does the employer have a means of justification, in this case, a policy or a practice in that regard?*
>
> - *Does that policy or practice differentiate against women? In other words, is this a case of systematic discrimination?*

[124] The CHRC reproduced the relevant provisions of the *CHRA*, i.e., sections 3, 7 and 15, which deal with the prohibited grounds of discrimination, direct and indirect discrimination in employment, and exceptions to discriminatory practices, respectively.

[125] The CHRC noted that a *prima facie* case is one that covers the allegations and that, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the employer (see *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Limited,* [1985] 2 S.C.R. 536 ("*O'Malley*"), at page 558). The CHRC pointed out that the complainant could submit *prima facie* evidence that she was discriminated against on a ground prohibited by the *CHRA*.

[126] Citing *Brooks*, at page 1242, the CHRC noted that discrimination based on pregnancy constitutes discrimination based on sex because of the biological reality that only women can become pregnant.

[127] The CHRC argued that subsection 15(2) of the *CHRA* states that for a standard, rule or practice to be considered a *bona fide* justification, it must be established that accommodating the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, particularly in terms of cost.

[128] The CHRC indicated that, in this case, the employer had to demonstrate that it met the third *Meiorin* criterion, which is that that standard is reasonably necessary for the duties, that it could not accommodate the complainant or other persons in the same situation without suffering undue hardship, and that that hardship assumed the form of an impossibility, a serious risk or an exorbitant cost.

[129] The CHRC also discussed the complainant's eventual reply argument. It mentioned her allegation that the standard clearly has a disproportionate prejudicial effect toward women, considering that women are the only gender that can become pregnant.

[130] It submitted that one would have to ask whether, despite appearances, cases of discrimination could arise, like the complainant's, in the sense that a standard or occupational requirement could have a discriminatory effect on women, particularly those that are pregnant.

[131] The CHRC also mentioned *Lavoie v. Treasury Board of Canada,* 2008 CHRT 27, to illustrate such a situation. In that case, the employer established a policy in which the term of an unpaid maternity or parental leave was not included as work time in the calculation of the three cumulative years of work required to advance from term employee status to indeterminate employee status in the federal public service. In that decision, the CHRT concluded that by not including maternity leave or parental leave, the employer's policy had adversely differentiated against women employed for terms who took maternity or parental leave, and that it could deprive those employees of employment or advancement opportunities due to their sex (section 10 of the *CHRA*).

V. Reasons

[132] Since the grievor's grievance alleges that the employer refused to provide her with a uniform or to pay her the clothing allowance under clauses 41.03 and 43.03 of the collective agreement, it is appropriate to begin with an analysis of the applicable provisions and of the legal context when dealing with an issue of discrimination.

A. Collective agreement context

[133] Clause 37.01 of the collective agreement, which deals with eliminating discrimination, reads as follows:

> ***ARTICLE 37***
> ***NO DISCRIMINATION***
>
> ***37.01*** *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 age, race, creed, colour, national origin, religious affiliation, sex, sexual orientation, family status, mental or physical disability, membership or activity in the Union, marital status or a conviction for which a pardon has been granted.*

[134] As stipulated as follows in clauses 41.01 and 41.03 of the collective agreement, the NJC *Uniforms Directive* is an integral part of it:

> ***ARTICLE 41***
> ***NATIONAL JOINT COUNCIL AGREEMENTS***
>
> ***41.01*** *Agreements concluded by the National Joint Council (NJC) of the Public Service on items which may be included in a collective agreement, and which the parties to this Agreement have endorsed after December 6, 1978 will form part of this Agreement, subject to the* Public Service Labour Relations Act *(PSLRA) and any legislation by Parliament that has been or may be, as the case may be, established pursuant to any Act specified in section 113(b) of the PSLRA.*
>
> . . .
>
> ***41.03***
>
> *a. The following directives, as amended from time to time by National Joint Council recommendation and which have been approved by the Treasury Board of Canada, form part of this Agreement*:
>
> . . .

Uniforms Directive;

. . .

[135] In the "General" section of the directive, the circumstances under which a uniform must be provided free of charge are indicated as follows:

> ***7. General***
>
> *7.1 Uniforms and other items of identification shall be issued to employees free of charge when there is a requirement for identification of employees. There are four distinguishing conditions under which identification of the employee may be required:*
>
> *1. when identification of the employee is required by management to provide a sign of vested authority in directing, inspecting or enforcing specific laws and regulations;*
> *2. when identification of the employee is required by management to provide an appropriate identification of the employee's function;*
> *3. when identification of the employee is required by management, either permanently or in an emergency, to control emergency equipment and direct persons during an emergency. Such employees must be readily identifiable by the local public;*
> *4. when identification of an employee's authority is required by management to access and work in a secure area. (Identification clothing may supplement the primary form of identification.)*
>
> *7.2 Items of wearing apparel of the same pattern or material or colour are supplied free of charge for the following purposes:*
>
> - *for occupational identification and worn as required by local management;*
> - *for image distinctiveness and worn uniformly throughout a sector in accordance with orders.*
>
> . . .
>
> *7.5 Bulletins shall be issued to employees when the wearing of uniform clothing is required. Such bulletins normally will identify and enumerate clothing commodities, state the employee's responsibility for clothing received and specify the manner of accounting for clothing when the employee is no longer eligible to receive or retain it (e.g. on promotion, demotion, separation or due to a change in working conditions).*

. . .

[136] On reading the directive's wording, it seems clear to me that the department or agency in question is responsible for how issues of wearing a uniform are administered.

[137] Paragraph 1 of clause 7.1 of the *Uniforms Directive* states that uniforms and other items of identification shall be issued to employees free of charge when it is necessary to identify employees. Additionally, the condition set out in paragraph 2 mentions that measures must be taken to identify an employee ". . . when identification of the employee is required by management to provide an appropriate identification of the employee's function."

[138] Clause 7.2 of the *Uniforms Directive* indicates that certain articles of clothing of the same pattern, material or colour are supplied free of charge ". . . for occupational identification and worn as required by local management . . ." and ". . . for image distinctiveness and worn uniformly throughout a sector in accordance with orders."

[139] Clause 7.5 of the directive indicates that information bulletins shall be issued to employees required to wear uniforms and sets out the content of those bulletins. Among other things, those bulletins must indicate how employees account for clothing they receive when they are no longer eligible to receive or retain it, such as on promotion, demotion or exit or due to a change to working conditions.

[140] CD 351 and Guidelines 351-1 cite the *Uniforms Directive* as an authority. In CD 351, the only reference to maternity clothing is in paragraphs 45 to 48 of Guidelines 351-1. Although CD 351 and Guidelines 351-1 are not integral parts of the collective agreement, they can nonetheless help interpret it. Paragraphs 45 and 46 of Guidelines 351-1 refer to "officers." Paragraph 45 indicates that medical confirmation is required before wearing a maternity uniform, and paragraph 46 describes the alterations permitted when an officer requires a maternity uniform. Those paragraphs read in part as follows:

> *45. Officers will be permitted to wear a special maternity uniform only after receiving a physician's written confirmation of pregnancy. . .*
>
> *46. Officers requiring maternity uniforms may wear a pullover jumper and alter the waist of their uniform work pants or dress trousers for maternity purposes. . . .*

[141] Clause 41.03 of the collective agreement, the *Uniforms Directive*, CD 351 and CD 351-1 do not explicitly address wearing a maternity uniform during the accommodation period.

[142] As for the clothing allowance, clause 43.03 of the collective agreement, cited earlier in this decision, is reproduced as follows for ease of reference:

> ***43.03 Clothing Allowance***
>
> *Those Correctional Officers I (CX-1) and Correctional Officers II (CX-2) employees who are not required to wear a uniform routinely during the course of their duties shall receive an annual clothing allowance of four hundred dollars ($400.00). This allowance will be payable March 31st of each year. Effective April 1, 2007, the allowance is increased to six hundred dollars ($600.00).*
>
> *The provision applies to those CX-1 and CX-2 employees assigned to such duties for periods of time of not less than six (6) months per fiscal year.*
>
> *Any employee receiving this allowance shall not be eligible to receive points toward a uniform issue.*
>
> *As well, if a correctional officer is involved in an altercation and his or her personal clothing is damaged in the performance of his or her duties, the employee's claim for compensation will be handled according to the ex-Gratia Payment Policy.*

[143] Article 45 of the collective agreement deals with maternity-related reassignment or leave:

> ***ARTICLE 45***
> ***MATERNITY-RELATED REASSIGNMENT OR LEAVE***
>
> ***45.01*** *An employee who is pregnant or nursing may, during the period from the beginning of pregnancy to the end of the twenty-fourth (24th) week following the birth, request the Employer to modify her job functions or reassign her to another job if, by reason of the pregnancy or nursing, continuing any of her current functions may pose a risk to her health or that of the foetus or child.*
>
> ***45.02*** *An employee's request under clause 45.01 must be accompanied or followed as soon as possible by a medical certificate indicating the expected duration of the potential risk and the activities or conditions to avoid in order to*

eliminate the risk. Dependent upon the particular circumstances of the request, the Employer may obtain an independent medical opinion.

45.03 *An employee who has made a request under clause 45.01 is entitled to continue in her current job while the Employer examines her request, but, if the risk posed by continuing any of her job functions so requires, she is entitled to be immediately assigned alternative duties until such time as the Employer:*

a. modifies her job functions or reassigns her,
or
b. informs her in writing that it is not reasonably practicable to modify her job functions or reassign her.

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

45.05 *Where the Employer concludes that a modification of job functions or a reassignment that would avoid the activities or conditions indicated in the medical certificate is not reasonably practicable, the Employer shall so inform the employee in writing and shall grant leave of absence without pay to the employee for the duration of the risk as indicated in the medical certificate. However, such leave shall end no later than twenty-four (24) weeks after the birth.*

45.06 *An employee whose job functions have been modified, who has been reassigned or who is on leave of absence shall give at least two (2) weeks notice in writing to the Employer of any change in duration of the risk or the inability as indicated in the medical certificate, unless there is a valid reason why that notice cannot be given. Such notice must be accompanied by a new medical certificate.*

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

. . .

[144] I will now address the general principles of the legal context of this case.

B. Legal context

[145] When the issues involve the *CHRA*, an adjudicator has the powers set out in paragraphs 226(1)(*g*) and (*h*) of the *PSLRA*, which read as follows:

> ***226.*** *(1) An adjudicator may, in relation to any matter referred to adjudication,*
>
> . . .
>
> *(*g*) interpret and apply the* Canadian Human Rights Act *and any other Act of Parliament relating to employment matters, other than the provisions of the* Canadian Human Rights Act *related to the right to equal pay for work of equal value, whether or not there is a conflict between the Act being interpreted and applied and the collective agreement, if any;*
>
> *(*h*) give relief in accordance with paragraph 53(2)(*e*) or subsection 53(3) of the* Canadian Human Rights Act . . . .

[146] It is appropriate at this point to note certain general provisions of the *CHRA* concening prohibited grounds of discrimination:

> ***3.*** *(1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.*
>
> *(2) Where the ground of discrimination is pregnancy or child-birth, the discrimination shall be deemed to be on the ground of sex.*
>
> ***3.1*** *For greater certainty, a discriminatory practice includes a practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds.*

[147] The grievor relied on paragraph 7(*b*) of the *CHRA*, which reads as follows:

> ***7.*** *It is a discriminatory practice, directly or indirectly,*
>
> *(*a*) to refuse to employ or continue to employ any*

> *individual, or*
>
> *(*b*) in the course of employment, to differentiate adversely in relation to an employee,*
>
> *on a prohibited ground of discrimination.*

[148] Section 10 of the *CHRA* is relevant to discriminatory guidelines:

> ***10.*** *It is a discriminatory practice for an employer, employee organization or employer organization*
>
> *(*a*) to establish or pursue a policy or practice, or*
>
> *(*b*) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment,*
>
> *that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.*

[149] Subsections 15(1) and (2) of the *CHRA* are also relevant to this case. They read as follows:

> ***15.*** *(1) It is not a discriminatory practice if*
>
> *(*a*) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a* bona fide *occupational requirement . . . .*
>
> . . .
>
> *(2) For any practice mentioned in paragraph (1)(*a*) to be considered to be based on a* bona fide *occupational requirement and for any practice mentioned in paragraph (1)(*g*) to be considered to have a* bona fide *justification, it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.*

[150] The jurisprudence has recognized that although a clause in a collective agreement may appear neutral on its face, a prejudicial effect due to a ground prohibited by the *CHRA* is a violation of the *CHRA* (*Meiorin, Renaud*).

[151] Discrimination on the grounds of pregnancy or childbirth is discrimination on the grounds of sex (subsection 3(2) of the *CHRA*, and *Brooks*).

[152] Although the collective agreement is the fruit of an agreement between the union and the employer, its clauses cannot contravene the *CHRA*'s requirements. On that point, the Supreme Court of Canada stated the following at page 986 of *Renaud*:

> *. . . Adverse effect discrimination is prohibited by the* Human Rights Act *no less than direct discrimination. In both instances private arrangements, whether by contract or collective agreement, must give way to the requirements of the statute. . . .*

[153] To demonstrate discrimination, a grievor first has to establish *prima facie* evidence of discrimination. The Supreme Court described the nature of *prima facie* proof of discrimination as follows in *O'Malley*, at page 558:

. . .

> *. . . The complainant in proceedings before human rights tribunals must show a* prima facie *case of discrimination. A* prima facie *case in this context is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer.*

. . .

[154] If the grievor is able to establish *prima facie* proof of discrimination, the employer must refute the allegations or provide another reasonable explanation that is not based on discrimination. That explanation cannot be summed up as a simple pretext aimed at justifying the discriminatory conduct.

[155] Under paragraph 15(1)(*a*) of the *CHRA*, a standard or practice is not a discriminatory act if it is shown that it is based on a *bona fide* occupational requirement. Under subsection 15(2) of the *CHRA*, the respondent party must also demonstrate that for any practice mentioned in paragraph 15(1)(*a*), accommodating the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.

[156] *Meiorin* identifies three elements for establishing a *bona fide* occupational

requirement. Its identification of the three elements clarifies the analysis to conduct to determine whether a standard or conduct that is discriminatory *prima facie* can be justified under subsection 15(2) of the *CHRA*. According to that test, the employer must establish the following criteria:

- that it adopted the standard for a purpose rationally connected to performing the job at issue;
- that it adopted the particular standard in an honest belief that it was necessary to fulfill that legitimate work-related purpose; and
- that the standard is reasonably necessary to accomplish that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate employees sharing the claimant's characteristics without imposing undue hardship on the employer.

[157] It is recognized that the burden of proof applicable in cases of discrimination is that of a balance of probabilities.

[158] In order to succeed, the grievor is not required to demonstrate that discrimination was the only motive behind the alleged acts. She has only to demonstrate that discrimination was among the factors that influenced the employer's decision (see *Souaker*, at para 132).

C. The *prima facie* evidence in this matter

[159] The employer argued that the grievor provided no *prima facie* evidence of discrimination and that therefore I must dismiss this grievance.

[160] Traditionally, an adjudicator seized of a human rights issue must decide two questions. First, he or she must establish that the *prima facie* evidence demonstrates "on its face" that the complainant was a victim of discrimination absent any justification from the employer. The respondent party must then demonstrate that it did not act in a discriminatory manner or that its conduct was otherwise justified. In *Souaker*, at para 131, the adjudicator cites *Lincoln v. Bay Ferries Ltd.,* 2004 FCA 204, to explain the meaning of *prima facie* evidence. In *Lincoln*, the Federal Court of Appeal reiterated the test set out in *O'Malley*.

[161] Although the legal terms "*prima facie*" and "balance of probabilities" are sometimes used interchangeably, they are two separate concepts. The concept of "*prima facie*" is an interim or provisional tool that imposes an obligation to respond on the respondent. An analysis of this concept can determine the result of a situation in which the respondent elects to not submit evidence in response to the allegations of discrimination. In such a case, the decision maker can draw an adverse inference. However, if the respondent chooses to present evidence on the merits of the allegations of discrimination, it is not always necessary to first go through the stage of *prima facie* evidence.

[162] In this matter, the employer argued that the grievor provided no *prima facie* evidence of discrimination, and therefore, I must dismiss this grievance. First, I must determine if there is sufficient evidence to support a *prima facie* case of discrimination, absent justification by the employer. It must be noted that the nature of *prima facie* evidence of discrimination, as described in *McGill*, does not change the test for *prima facie* evidence as described in *O'Malley.* While recognizing a difference between discrimination and a distinction and that not every distinction is discriminatory, *McGill* does not undermine the importance of the *prima facie* evidence test as described in *O'Malley.* In *McGill*, Abella J. reiterates the concept of *prima facie* evidence, indicating that it is ". . . the link between that group membership and the arbitrariness of the disadvantaging criterion or conduct, either on its face or in its impact, that triggers the possibility of a remedy" (at paragraphs 49 and 50). Otherwise, from the outset of the analysis, the test of *prima facie* evidence could undermine the importance of the discriminatory effects and of indirect discrimination in the human rights domain.

[163] Subsection 3(2) of the *CHRA* states than a prohibited distinction on the grounds of pregnancy is deemed based on the grounds of sex. Paragraph 7(*b*) of that Act states that discriminating against someone in the course of employment on a prohibited ground of discrimination constitutes a discriminatory practice.

[164] The grievor's evidence demonstrated that she was required to routinely wear a correctional officer's uniform in the course of her duties. At the relevant time, she was pregnant and had duly advised her employer of that fact. Shortly after learning she was pregnant, she took steps with the employer to obtain a maternity uniform: she followed the employer's instructions in that regard. The uncontradicted evidence

demonstrated that acting on the employer's instructions, the grievor met with the employer's approved seamstress, who found that it was not possible to alter the grievor's uniform to a maternity uniform. During the process, the employer advised the grievor that she could not wear the uniform because, according to the functional limitations described in her medical certificate, she was assigned to administrative duties for which she was not required to wear a uniform.

[165] In addition to taking steps to obtain a uniform, which was eventually refused, the grievor stated that she was treated differentially because she had to purchase work clothes. Additionally, she claimed the clothing allowance of $600, which was also refused.

[166] The grievor indicated that it was beneficial to wear the uniform because that negated the need to purchase work clothes. In 2006, she submitted a claim for the allowance under clause 43.03 of the collective agreement, but was told that she had to wear the maternity uniform because she remained in her substantive position as a correctional officer during her assignment to administrative duties.

[167] As for the grievor's eligibility for the clothing allowance, the evidence demonstrated the following: she is a CX-01 correctional officer; at her request, she was reassigned to administrative duties, in accordance with article 45 of the collective agreement (maternity-related reassignment or leave); her reassignment was for less than six months, from February 24 to August 14, 2009; her assignment overlapped two fiscal years; and she acknowledged receiving points to maintain her uniform when she returned to her substantive position, but she was not able to use them due to her pregnancy.

[168] Thus, based on the grievor's evidence, her pregnancy is linked to the fact that she could not benefit from a maternity uniform or the clothing allowance during her assignment to administrative duties. Consequently, she had to incur expenses to purchase maternity clothing appropriate for work.

[169] I find that the grievor's evidence was complete and sufficient to establish a *prima facie* case of discrimination on a balance of probabilities. It is now incumbent on the employer to justify its conduct.

E. Employer's justification

[170] The employer provided two main grounds for refusing to allow the grievor to wear the maternity uniform: the nature of her duties during her assignment to administrative tasks, and her limitations, as described in her medical certificate.

[171] In addition, one of the employer's main arguments for refusing the clothing allowance was based on the interpretation of clause 43.03 of the collective agreement, which was specifically that the grievor did not meet the eligibility conditions in that clause as her reassignment did not exceed six months in a single fiscal year. The employer refused her request for the clothing allowance set out in clause 43.03 of the collective agreement on the grounds that she did not meet the other eligibility conditions in that clause: she was not required to wear the uniform during her pregnancy, and she was entitled to accumulate "points" for wearing the uniform during her pregnancy.

[172] The employer submitted that its refusals for both the uniform and clothing allowance were not discriminatory. It submitted that they were justified, given the nature of officers' duties and the wording of the clothing allowance clause.

[173] I will now address the three questions in the test established in *Meiorin*, cited earlier in this decision, to determine whether the employer established that, on a balance of probabilities, a *prima facie* discriminatory standard is a *bona fide* occupational requirement.

1. Did the employer adopt the standard for a purpose rationally connected to performing the job at issue?

[174] At this first stage, the analysis does not examine the validity of the particular standard but instead the validity of its more general purpose (*Meiorin*, at para 57). The NJC *Uniforms Directive* seems reasonable to me. Its purpose is to establish in general the situations in which an employer must pay for uniforms. It does not specifically describe the situation of a change in duties for a pregnant woman. Instead, it delegates the description of such circumstances to the relevant department or agency.

[175] For that reason, it is important to also consider the relationship between the *Uniforms Directive* and CD-351 and with Guidelines 351-1. In CD-351, the only reference to maternity clothing states that written confirmation of the pregnancy is

required from a physician before the officer will be authorized to wear a uniform, and it sets out the permitted alterations to the uniform as follows:

> *45. Officers will be permitted to wear a special maternity uniform only after receiving a physician's written confirmation of pregnancy. . . .*
>
> *46. Officers requiring maternity uniforms may wear a pullover jumper and alter the waist of their uniform work pants or dress trousers for maternity purposes. . . .*

[176] I consider that the use of the term "officer" seems to support Mr. Simard's testimony that only employees carrying out a correctional officer's tasks wear the uniform.

[177] Clause 41.03 of the collective agreement and CD 351-1 do not prohibit wearing a uniform when a correctional officer is temporarily assigned to certain duties, in this case, administrative tasks. I will discuss this more fully later in this decision.

[178] However, even if there exists a rational link, it does not end this matter, as the grievor raised an issue of discrimination on the grounds of sex in the application of the collective agreement, and the collective agreement contains a non-discrimination clause (*Renaud*).

[179] As for the clothing allowance clause in the collective agreement, I find that the employer was not able to demonstrate, based on the evidence presented, a rational link between the grievor's job and the specific standard under clause 43.03 of the collective agreement, i.e., the obligation to work six months in a single fiscal year.

[180] The wording of clause 43.03 states that correctional officers classified CX-01 and CX-02 ". . . who are not required to wear a uniform routinely during the course of their duties shall receive an annual clothing allowance . . . ." It is clear that the purpose of clause 43.03 of the collective agreement is to cover the cost of civilian clothing worn by correctional officers in certain circumstances. It must be noted that the time required to cover the cost is not the main element of that policy. In addition to the examples provided by Mr. Simard about shooting range instructors and officers acting as labour relations mediators, such circumstances can include officers in training or with certain functional limitations resulting from injuries.

[181] In my view, the expression ". . . who are not required to wear a uniform routinely

. . .” in clause 43.03 of the collective agreement does not prohibit a correctional officer from wearing a uniform when temporarily assigned to certain duties, which in this case were administrative duties.

[182] It is true that, based on the evidence, and as the employer pointed out in its argument, employees at the institution who carry out administrative duties do not wear a uniform. I do not believe that that is relevant in this case. Those employees do not hold substantive positions classified in the CX group, but rather positions at the CR-04 group and level. Therefore, they do not have a choice but to wear civilian clothes.

[183] In its argument, the employer attempted to link wearing the uniform as a *bona fide* occupational requirement to the grievor’s accommodation measures. However, the evidence clearly demonstrated that the employer accommodated her by assigning her to administrative duties, due to her status as a pregnant woman and her functional limitations ordered by her doctor, and not because she wore or did not wear a uniform.

[184] It must also be noted that although the general principle of that clause is reasonable, the time requirement of six months in a fiscal year is not, under certain circumstances. According to clause 41.03 of the collective agreement, which incorporates the NJC *Uniforms Directive*, departments and agencies must account for employees whose duties are modified and the issue of whether, under such circumstances, they wear a uniform. The employer is aware that situations will arise, such as in this case, in which correctional officers will become pregnant. The time requirements in the collective agreement may then be disadvantageous. As Mr. Simard mentioned in his testimony, correctional officers do not choose the schedules for their pregnancies.

[185] The employer argued that the parties to the collective agreement had agreed that the clothing allowance would be granted only when the reassignment period exceeded six months and that the term “fiscal year” should be interpreted according to its meaning. In support of that argument, the employer cited three decisions in which the complainants had not met the time frames defined in the applicable collective agreements. In *Canada Post Corp.*, according to the employer’s performance plan, employees could receive a team bonus if they achieved a certain performance rating and only if they were on active duty for three months in a fiscal year. The grievor in that case was not on active duty because she was on maternity leave. As she had not

met the requirements of the plan, the arbitrator dismissed the grievance. In *Centre Grey General Hospital*, the grievor left her job after six months of continuous service, which was less than one year. She requested a payment of two weeks of vacation. Under the collective agreement, she was entitled to one week of vacation because two weeks were granted only upon completion of one year of continuous service. Accordingly, the arbitration board dismissed the grievance. In *Foran*, the arbitrator dismissed a grievance in which the grievor, who had retired, claimed a severance allowance for her partial years of service, while the applicable provisions required complete years.

[186] I consider those decisions of little use in this matter as they do not raise any issues of conflict between the applicable provisions and human rights legislation (see *Renaud*, at page 986).

[187] Furthermore, the facts in *Association of Justice Counsel* are different from those in this case. In that decision, and in *Canada Post Corp.*, the arbitrators examined performance pay policies, which provided for an evaluation of an employee's competency for a period each year. In *Association of Justice Counsel*, the adjudicator conducted a comparative analysis of employees on maternity leave and employees on leave for other reasons. In this case, such an analysis is not appropriate, given that the nature of pregnancy is such that alterations to clothing become important in the early months.

[188] In *Association of Justice Counsel*, the adjudicator addressed the issue of non-compensatory and compensatory benefits. Those benefits are also raised in *Lavoie*. In that decision, it was determined that the right to the conversion from term employee status to indeterminate is a non-compensatory benefit, that is, a benefit that is intrinsically connected to the employee's status. *Lavoie* indicates that the accrual of seniority, the right to employment, the right to keep one's employment and the right to tenure are non-compensatory benefits. In this case, the right to the clothing allowance is related to the status of employees in the CX group on assignment, not to the provision of work as such.

[189] The employer submitted that the grievor admitted that she received points toward a uniform under clause 43.03 of the collective agreement and that therefore she could not allege that she had not received anything. I find this argument irrelevant and false. The employer submitted that one of the five conditions to be met for clause

43.03 of the collective agreement to apply was that the grievor could not be eligible to receive points toward a uniform. Nothing in clause 43.03 indicates that the grievor had to be ineligible to receive points toward a uniform. Clause 43.03 states that an ". . . employee receiving this allowance shall not be eligible to receive points toward a uniform issue." The employer indicated that the points would replace the allowance, while the clause states the opposite. Therefore, I dismiss that argument of the employer.

[190] Furthermore, the grievor was unable to use the accumulated points during her pregnancy. She had to purchase maternity clothing and was disadvantaged in the interpretation of the standard. Under clause 43.03 of the collective agreement, an employee receives points only if he or she does not receive the clothing allowance. However, in the grievor's case, the employer denied the clothing allowance because she did not meet the time requirements of clause 43.03 related to her pregnancy. Moreover, Exhibit S-9 demonstrated that the employer informed her that no points were deducted for the maternity uniform order.

[191] I will now address the second stage of the *Meiorin* analysis.

2. Adopting a particular standard in an honest belief that it was necessary to fulfill a legitimate work-related purpose

[192] *Meiorin* reiterates that it is not necessarily true that a particular standard is not discriminatory simply because its general objective is rationally connected to job performance. In that second stage, the analysis shifts ". . . from the general purpose of the standard to the particular standard itself" (*Meiorin*, at para 61).

[193] The employer provided explanations concerning the refusal to provide the maternity uniform when the clothing allowance was also denied. In my opinion, and based on the evidence, neither the clothing allowance standard nor the uniforms standard was adopted sincerely.

[194] I reached that conclusion for the following four reasons.

a. The employer was sufficiently aware of the consideration of a discriminatory act that it suggested the possibility of accommodation

[195] The employer raised the fact that the grievor's assignment did not exceed six

months, as required under clause 43.03 of the collective agreement. Mr. Simard testified that she advised him that she would not be able to work more than six months before her maternity leave, which began on August 14, 2009, 24 weeks after her appointment with her doctor. At that time, she was already 12 weeks pregnant, as indicated on the medical certificate.

[196] The grievor was about a dozen days short of the six-month threshold. She advised Mr. Simard on the first day of her reassignment, February 24, 2009, that, due to the chronology of her pregnancy, she would be unable to exceed six months of work.

[197] Mr. Simard's testimony demonstrated that he was aware that discrimination was possible and that he wanted to accommodate the grievor. She found out she was pregnant on December 14, 2008. At her appointment with her doctor on February 11, 2009, she received her medical certificate, which was placed in Mr. Bénard's box on February 13, 2009. He became aware of it a few days later. She began her reassignment to administrative duties on February 24, 2009.

[198] The fiscal year is from April 1 of one year to March 31 of the next year. Thus, in this case, it was impossible for the grievor to complete her assignment within a single fiscal year, as the period of her assignment necessarily overlapped two fiscal years.

[199] At a meeting in March 2009 with the grievor, Ms. Banville, Mr. Paquet, Mr. Jacques and other union representatives, Mr. Simard acknowledged that because correctional officers do not choose the schedules for their pregnancies, he did not want them to be discriminated against due to a fiscal-year issue. Therefore, he proposed applying clause 43.03 of the collective agreement over two fiscal years. I conclude that Mr. Simard acknowledged that clause 43.03 had a discriminatory effect on the grievor.

b. Lack of consistency in managing standards and the uniform allowance

[200] Second, even overlooking how the uniform standards and clothing allowance were interpreted during the grievor's first pregnancy in 2006, the evidence demonstrated that by trying to clarify her rights during her second pregnancy, she received conflicting messages from the employer. For example, the employer claimed that the nature of her duties, not her classification, determined whether she wore a

uniform. According to the employer, clause 43.03 of the collective agreement provides that some correctional officers do not wear the uniform. In support of that argument, the employer cited the following paragraph of the *Uniforms Directive*:

> *It is the policy of the government to provide appropriate items of clothing to employees where the nature of the work is such that special protection is required or where special identification at the local, national or international level will aid in the effective performance of duties and in meeting program objectives.*

[201] The evidence demonstrated that the employer did not seem to apply that policy consistently. At the hearing, I admitted into evidence Exhibit S-6, subject to its probative value, which is an email chain from 2006 concerning the employer's interpretation of clause 43.03 of the applicable collective agreement about correctional officers wearing a uniform while pregnant. That interpretation was made following the grievor's request to receive the clothing allowance during her first pregnancy when she was reassigned to administrative tasks and had purchased maternity clothing. Despite the employer's objection, as they are documents explaining its interpretation, I consider that exhibit to be relevant.

[202] The history of clause 43.03 of the collective agreement was not adduced in evidence, and nothing leads me to conclude that the employer did not act in good faith by agreeing to include that clause in the collective agreement. However, I find that the employer did not act in good faith in the manner it applied clause 43.03 to the grievor. Based on the employer's interpretation of clause 43.03 during her first pregnancy, the grievor took steps to obtain a maternity uniform during her second pregnancy. The employer not only approved her efforts but also instructed her to meet with its approved seamstress. Then it suddenly changed its position. For the following reasons, I disagree with the grounds the employer presented in support of its position.

[203] As demonstrated in Exhibit S-6, in 2006, the employer concluded that the grievor's substantive position was that of a correctional officer and that she retained her status as an officer while reassigned to administrative tasks during her pregnancy. Consequently, as the grievor was entitled to a uniform as a correctional officer, including a maternity uniform, the employer refused to pay her the clothing allowance, according to its interpretation of the clothing allowance clause.

[204] At the start of her second pregnancy, in December 2008, the grievor began the

process of obtaining a maternity uniform. On January 27, 2009, Mr. Dufour, her spouse, emailed Mr. Simard, inquiring about the status of the process for the maternity uniform. Mr. Simard's response the next day described the procedure to follow to obtain the uniform.

[205] In a memo dated February 2, 2009, of which the union received a copy, the employer indicated its procedure for designing the pullover jumper and altering pants for pregnant correctional officers (Exhibit S-7). The document also had contact information for Ms. Bédard, the employer's approved seamstress.

[206] As she still did not have a maternity uniform at the start of her reassignment on February 24, 2009, the grievor met with Mr. Goulet, Assistant Director of Operations at the institution. He asked her to make an appointment with Ms. Bédard, which she did on March 3, 2009.

[207] The same day, the grievor emailed Mr. Goulet and then forwarded it to Mr. Simard. In it, she mentioned that she was having trouble making the necessary alterations to her uniform.

[208] It was only in a discussion with Mr. Simard later in March 2009 that the grievor learned that the employer's discourse had changed. At that time, Mr. Simard told her that pregnant correctional officers did not need to wear a maternity uniform because they were reassigned to other areas. He told her that the fact that she was wearing a uniform meant that she could intervene with inmates if a situation called for it.

[209] On April 30, 2009, the grievor emailed Mr. Simard, requesting a written explanation for the employer's refusal to provide her the clothing allowance for a pregnant woman. Mr. Simard's response, on May 5, 2009, contained only copies of certain paragraphs of Guidelines 351-1, about maternity clothes, and clause 43.03 of the collective agreement (Exhibit S-13).

[210] On May 11, 2009, the grievor emailed Mr. Simard, requesting explanations for the employer's refusal to pay the clothing allowance or to provide a uniform adapted for a pregnant woman, given that it had implemented a procedure for altering the uniform for a pregnant woman (Exhibit S-14). Mr. Simard's response on May 18, 2009, began with the word, "Exactly." He testified that that term was related to the following phrase in the grievor's email: "[translation] To improve our understanding . . . we do not have

the right to wear the uniform provided for a pregnant woman because we do not perform CX tasks."

[211] Thus, during the grievor's first pregnancy in 2006, the employer refused to pay her the clothing allowance because, according to the employer, she was entitled to wear the maternity uniform during her assignment to administrative tasks. In 2009, during her second pregnancy, the employer first told her to take the steps to obtain a maternity uniform, based on the procedure to follow that it issued in a memo on February 2, 2009. Only in late March 2009 did the employer change its position when Mr. Simard first advised the grievor that she could not wear the maternity uniform.

[212] Although the employer did not follow its own interpretation from 2006 in this case, I feel that neither the wording of clause 43.03 nor the collective agreement as a whole prohibited the grievor from wearing the maternity uniform during her assignment to administrative tasks.

c. Analysis of the accommodation based on the issue of wearing or not wearing the uniform rather than on the medical certificate

[213] Third, the analysis of the grievor's accommodation shifted from a consideration of functional limitations to a single issue: whether or not she wore a uniform.

[214] It must be noted that the issue is not an accommodation for a restriction on wearing or not wearing the uniform. The principle of accommodation in the context of human rights is limited to issues about the grievor's functional limitations during her pregnancy. The employer accommodated her under article 45 of the collective agreement and in accordance with the restrictions set out in her medical certificate. That certificate does not indicate that she could not wear a uniform. Instead, it is a matter of determining whether the employer discriminated against her by applying a benefit conferred under the collective agreement, namely, the clothing allowance set out in clause 43.03 of the collective agreement.

[215] Among other explanations, Mr. Simard stated that the employer did not provide the grievor with a maternity uniform because that would have gone against the restrictions described in her medical note, namely, that she could not have any contact with inmates. Mr. Simard testified that wearing a uniform would have meant that the employee would have been in a position of authority and viewed as a correctional

officer. According to her undisputed testimony, Mr. Simard told her in March 2009 that the fact that she was in uniform would have meant that she could have intervened with inmates if so required.

[216] I do not consider this to be a reasonable explanation in the circumstances. First, Mr. Simard testified that his discussions with the grievor about her request for a maternity uniform began in January 2009. However, at that time he had not yet received her medical certificate, which was required to begin the process, according to him. The grievor's medical certificate was placed in Mr. Bénard's box on February 13, 2009. On about February 15 or 16, 2009, she had a discussion with him to determine the status of her maternity uniform. A few days later, Mr. Bénard contacted her to advise her that she would be assigned to administrative tasks as of February 24, 2009.

[217] Still without a uniform when she returned to work, the grievor met with Mr. Goulet, who asked her to make an appointment with the seamstress, which she did on March 3, 2009. Until that date, although the employer had had her medical certificate in hand for some time, indicating her functional limitations, none of its representatives advised her that she could not wear the maternity uniform.

[218] The explanation that by wearing a uniform the grievor would have been seen as being in a position of authority and as being able to intervene with inmates if so required gives me pause.

[219] According to the testimony of a correctional officer, Ms. Ross, no security reason prevents a correctional officer from wearing the uniform in the institution's administrative area. According to her, a pregnant woman who wears the uniform is not required to intervene in emergencies that may arise.

[220] Clearly, it is the employer that determines the rules applicable within the institution, not Ms. Ross. The employer was perfectly aware of the grievor's functional limitations, described in her medical certificate. I have difficulty in imagining that even if the grievor wore a maternity uniform during her assignment to administrative duties, the employer would have asked her to intervene in an emergency. Nothing in the evidence indicates that the employer would have endangered the grievor's health or that of her fetus in that way. To the contrary, Mr. Simard testified in cross-examination that a correctional officer with functional limitations is assigned to the personal effects position, where the officer is in contact with inmates, and that the

employer took steps to avoid the officer in question intervening in emergencies, even though wearing a uniform. All the more so, as the grievor worked in an administrative area where, as she testified, she had no contact with inmates, I conclude that the employer would have taken the same precautions for her.

d. Use of a secondment policy that did not clearly apply in this case

[221] Fourth, the employer argued that paragraph 13 of Guidelines 351-1 applied to the grievor. That paragraph reads as follows:

> ***Secondments, term and part-time employees***
>
> *13. Full-time employees entitled to the full scale of issue who are seconded to a position where they are not required to wear their uniform, will be entitled to replace uniform items they require only when they return to their substantive position. Upon return to the substantive position, full-time employees who are required to wear the CSC uniform will be entitled to yearly maintenance points. These will be pro-rated on a monthly basis, according to their tenure in their base position.*
>
> . . .

[222] Among other things, that section refers to employees seconded to a position in which they are not required to wear their uniforms. The difference between a secondment and an assignment is defined as follows on the Treasury Board Secretariat's Human Resources Management website:

> *A secondment is a temporary move of an employee to another department or agency in the core public administration (*Schedule I and IV of the Financial Administration Act*), and other organizations for which the Treasury Board is the Employer.*
>
> *Secondments and assignments are both temporary lateral movements of an employee to perform the functions of a position that already exists or to take on a special project. However, while secondments are to another department (interdepartmental), assignments are within a department or agency (intradepartmental). In both cases, the employee maintains his/her substantive position in the home department/agency or organization, and is paid by the home department/agency or organization.*
>
> . . .

[223] In this case, the grievor was not seconded to another department or agency. Instead, she was reassigned within her institution under article 45 of the collective agreement. As paragraph 13 of Guidelines 351-1 does not refer to reassigned employees, I do not accept this argument by the employer.

[224] I will now address the third stage of the *Meiorin* test.

3. Is the standard reasonably necessary to accomplish the legitimate work-related purpose?

[225] To show that the standard is reasonably necessary, the employer must demonstrate that it was impossible to accommodate employees with the claimant's characteristics as the grievor without imposing undue hardship on itself.

[226] In my view, the employer did not establish that it faced undue hardship. The only related evidence that it adduced concerned security. As I already determined earlier in this decision, in the circumstances I do not accept that security reasons would have constituted an undue hardship for the employer. Others were allowed to wear a uniform even though they were unable to intervene in institutional emergencies. Therefore, I find that the employer's evidence did not meet the threshold for undue hardship.

[227] Given the questions the Supreme Court asked at paragraph 65 of *Meiorin*, although the employer began an individual evaluation based on the uniform standard (i.e., by instructing the grievor to have her uniform altered and by later proposing greater flexibility in applying the clothing allowance standard), it seems that it short-circuited that process. Similarly, the employer first decided that wearing a uniform did not contravene the *Uniforms Directive.* Only later did it raise the security issues. I accept that the process of examining the means of accommodation can sometimes lead the employer or employee to fine tune what would or would not be acceptable. However, in this case, the employer's explanations are not convincing. The wording of the uniform standard and of the clothing allowance standard in the collective agreement did not preclude some flexibility in the circumstances in which the grievor's duties would have been modified. Wearing a uniform was not prohibited when a correctional officer was temporarily assigned to certain duties or administrative tasks in this case; nor was paying the clothing allowance in a fiscal year prohibited. Furthermore, the evidence demonstrated that, in other circumstances, standards could

be adopted that reflected the differences. It is quite clear that the grievor and her union took steps to cooperate in the accommodation process.

[228] In terms of the collective agreement's clothing allowance clause, a collective agreement's provisions cannot exempt the parties from the duty to accommodate. However, the effect of the collective agreement is relevant to assessing the degree of hardship caused by interfering with its terms. A substantial departure from the normal operation of its conditions of employment may constitute undue interference with the operation of the employer's business (see *Renaud,* at page 987). The employer did not establish that undue hardship would have occurred in its business operations by it adopting greater flexibility in applying that clause.

[229] I am therefore of the opinion that, in the circumstances, the employer did not establish that the standards in question were *bona fide* occupational requirements. In addition, I find that, on a balance of probabilities, the employer discriminated against the grievor on the grounds of sex (pregnancy) by refusing to pay her the clothing allowance or to provide a maternity uniform and that in that regard, it failed to establish a defence under section 15 of the *CHRA*.

E. Allegation of systemic discrimination

[230] I will now address the seven grievance forms that I allowed in evidence, subject to their probative value (Exhibit S-3, bundled).

[231] The grievor filed the grievances in an attempt to demonstrate that the employer systemically discriminated against pregnant correctional officers. They are in a list of grievances concerning the clothing allowance or the uniform that were referred to adjudication. The Board's registry prepared that list at my request. It was provided to the parties for the purpose of a pre-hearing conference call to find out if the union would designate this case as a test case. Some of those grievances alleged that the maternity uniforms were inadequate, while in others, the clothing allowance was claimed. During the course of that conference call, the grievor's representative informed me that this case would not serve as a test case.

[232] The employer submitted that, in this matter, stronger evidence was needed than the fact that the Board's system contained such grievances in order to demonstrate that systemic discrimination existed. I agree. The grievances were filed with nothing

more. No evidence was adduced as to the details of those grievances that would allow me to consider them from the perspective of systemic discrimination. In addition, the grievor did not request a systemic remedy. In the circumstances, I give those grievances no probative value.

[233] Furthermore, I am not seized of those grievances as an adjudicator. The only grievance before me for which I must determine the outcome is the grievor's individual grievance. Although the remedy granted to a complainant in an individual complaint may have systemic consequences, the remedy must arise from the request.

[234] Nonetheless, it must be noted that in *Meiorin*, McLachlin J., delivering the judgment for the Court, noted that since few rules are worded in an explicitly discriminatory manner, the human rights issue generally consists of asking whether the complainant suffered prejudicial effects. She noted that the distinction between direct and indirect discrimination in the conventional analysis may legitimize systemic discrimination (see *Meiorin*, at para 39). One of the objectives of establishing the test in *Meiorin* was to minimize the distinction between direct and indirect discrimination (see *Meiorin*, at para 27 to 49). The Court clearly indicated that employers designing workplace standards must be aware of the differences between people and differences that characterize groups of people (see *Meiorin*, at para 68). Thus, eliminating discrimination, in the *Meiorin* test, means that a remedy granted to a complainant in an individual complaint may have an effect at the systemic level.

[235] I found that clause 43.03 of the collective agreement had a discriminatory effect on the grievor and that the employer's explanations did not succeed in rebutting the *prima facie* evidence that she established. Furthermore, the employer did not demonstrate that it was facing undue hardship. After all, the choice of a maternity uniform or the clothing allowance was already provided in clause 43.03 as a benefit to which the grievor should have been entitled. In the circumstances, her grievance will be allowed.

[236] I asked the parties to file written submissions concerning the remedy to be granted should the grievance succeed, paying particular attention to the divisibility of the clothing allowance in clause 43.03 of the collective agreement. I will now address those submissions.

VI. Summary of the remedy arguments

A. For the grievor

[237] As corrective measures, the grievor's grievance indicates the following:

> [Translation]
>
> . . .
>
> *Pay me the $600 allowance or provide me with an appropriate uniform for a pregnant woman.*
>
> *And all other rights that the collective agreement gives me, as well as all real, moral or exemplary damages applied retroactively with legal interest without prejudice to other acquired rights.*

[238] At the hearing, the grievor indicated that because she was no longer pregnant, the appropriate remedy could no longer be to provide her with a maternity uniform. Therefore, she claimed $600, representing the clothing allowance to which she was entitled under clause 43.03 of the collective agreement, $1500 to cover buying clothes and the time spent on undertaking efforts and on travelling to the seamstress, $2500 to cover the pain and suffering she endured, and interest at the legal rate from the date on which the grievance was filed.

[239] As for an adjudicator's authority to award damages, the grievor referred me to paragraphs 2:1500 and 2:1501 of Brown and Beatty and to *Chénier v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2003 PSSRB 27.

[240] Based on the evidence and her credit card statement, the grievor submitted that she was required to spend $1832.85 on clothing appropriate to her work (Exhibit S-15). Subtracting the $600 claimed as the clothing allowance, the grievor submitted that she disbursed an additional $1232.85 that she would not have had to disburse were it not for the employer's failure to provide her with a uniform adapted for a pregnant woman.

[241] The grievor noted that she had to make many efforts with the employer to obtain a maternity uniform, as demonstrated in Exhibits S-6 to S-14, including visiting a seamstress. Therefore, she claimed $267.50, the difference between $1500 and $1232.85, to cover the time spent on those efforts and her travel costs.

[242] In terms of the evidence for pain and suffering, the grievor noted the numerous efforts she had to make alone, without help from the employer, at a time she was vulnerable. She alleged that that caused stress and that it left her with a feeling of injustice about her condition as a pregnant woman.

[243] The grievor argued that it is appropriate in this case to award damages because the employer contravened article 37 of the collective agreement ("No discrimination") and sections 7 and 15 of the *CHRA*. The grievor referred me to paragraph 2:1504 of Brown and Beatty and to *Stringer v. Treasury Board (Department of National Defence) and Deputy Head (Department of National Defence)*, 2011 PSLRB 110. *Stringer* was the subject of a judicial review on several points. As both parties referred to that decision, it is best to clarify the reasons for the judicial review.

[244] In *Stringer v. Canada (Attorney General)*, 2013 FC 735 ("*Stringer FC*"), the Federal Court laid out the issues before it as follows:

> *[1] These reasons for judgments and judgments are for three judicial reviews of three components of a single underlying proceeding, a decision of an adjudicator (the adjudicator) of the Public Service Labour Relations Board (PSLRB or the Board). The first judicial review (Court file T-633-11) challenges the arbitrator's finding that Jeffrey Stringer's (the grievor) termination was not a result of discrimination on the basis of disability. The second judicial review (Court file T-1657-11) is brought by the Attorney General of Canada (the AGC) and challenges the adjudicator's awarding of interest on damages as part of the remedy for a failure to accommodate. The third judicial review (Court file T-1669-11) is brought by the grievor challenging the adjudicator's failure to grant a systemic remedy for the failure to accommodate.*
>
> *[2] In Court file T-633-11 (the merits or termination judicial review), the grievor seeks an order setting aside part of the adjudicator's decision which dismissed the grievance concerning termination and the Court directing that the grievance be sustained. In the alternative, the grievor asks that the matter be returned to a different adjudicator for redetermination. Both parties seek costs.*
>
> *[3] In Court file T-1657-11 (the interest judicial review), the AGC seeks an order setting aside the part of the adjudicator's decision ordering the employer to pay interest on the sums awarded. Both parties seek costs.*
>
> *[4] In Court file T-1669-11 (the systemic remedy judicial review), the grievor seeks an order setting aside the*

> *adjudicator's decision and returning the matter to a different adjudicator of the PSLRB for redetermination consistent with the appropriate human rights principles with instructions from this Court. Both parties seek costs.*

[245] The Federal Court's orders read as follows:

> ***THIS COURT'S JUDGMENT on Court file T-633-11 (the merits or termination judicial review) is that*** *the adjudicator's finding relating to failure to accommodate will remain and the part of the decision relating to termination is set aside and that issue is returned to the same adjudicator for redetermination. The applicant shall have his costs of the application.*
>
> ***AND THIS COURT'S JUDGMENT on Court file T-1657-11 (the interest judicial review) is that*** *the application for judicial review is allowed to the extent that the arbitrator's award with respect to the awarding of interest on damages is set aside. The applicant shall have its costs of the application.*
>
> ***AND THIS COURT'S JUDGMENT on Court file T-1669-11 (the systemic remedy judicial review) is that*** *the application for judicial review is allowed, with costs to the applicant, and the matter is referred back to the same adjudicator for redetermination.*
>
> [Emphasis in the original]

[246] An appeal of that decision to the Federal Court of Appeal was discontinued (Court File No. A-329-13).

[247] The grievor submitted that in *Stringer* the adjudicator considered section 53 of the *CHRA* when establishing the amount of damages to which the complainant was entitled. That section reads as follows:

> ***53.*** *(1) At the conclusion of the inquiry, the member or panel conducting the inquiry shall dismiss the complaint if the member or panel finds that the complaint is unsubstantiated.*
>
> *(2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:*
>
> *(a) that the person cease the discriminatory practice and*

> *take measures, in consultation with the Commission on the general purposes of the measures, to redress the practice or to prevent the same or a similar practice from occurring in future, including*
>
> *(i) the adoption of a special program, plan or arrangement referred to in subsection 16(1), or*
>
> *(ii) making an application for approval and implementing a plan under section 17;*
>
> *(*b*) that the person make available to the victim of the discriminatory practice, on the first reasonable occasion, the rights, opportunities or privileges that are being or were denied the victim as a result of the practice;*
>
> *(*c*) that the person compensate the victim for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice;*
>
> *(*d*) that the person compensate the victim for any or all additional costs of obtaining alternative goods, services, facilities or accommodation and for any expenses incurred by the victim as a result of the discriminatory practice; and*
>
> *(*e*) that the person compensate the victim, by an amount not exceeding twenty thousand dollars, for any pain and suffering that the victim experienced as a result of the discriminatory practice.*
>
> *(3) In addition to any order under subsection (2), the member or panel may order the person to pay such compensation not exceeding twenty thousand dollars to the victim as the member or panel may determine if the member or panel finds that the person is engaging or has engaged in the discriminatory practice wilfully or recklessly.*
>
> *(4) Subject to the rules made under section 48.9, an order to pay compensation under this section may include an award of interest at a rate and for a period that the member or panel considers appropriate.*

[248] In this matter, the grievor submitted that she was entitled to an award of amounts under paragraphs 53(2)(*b*) to (*e*) of the *CHRA*, inclusive. According to her, paragraph 53(2)(*b*) refers to the clothing allowance. In addition, paragraphs 53(2)(*c*) and (*d*) refer to the $1500 added to the $600 allowance for buying work clothing, the efforts made on her own time and her travel to the seamstress. She submitted that paragraph 53(2)(*e*) covers the $2500 in pain and suffering.

[249] The grievor referred me to several decisions that dealt with pain and suffering. For a definition of pain and suffering, she cited *Bou Malhab c. Métromédia CMR Montréal inc.,* 2003 CanLII 47948 (QC CA), at para 63. She cited the following decisions from the Quebec Human Rights Tribunal to support awarding amounts to compensate for pain and suffering in cases of exclusions on prohibited grounds: *Québec (Commission des droits de la personne et des droits de la jeunesse) c. Filion*, 2004 CanLII 468 (QC HRT); *Commission des droits de la personne et des droits de la jeunesse c. Roger Poirier Automobile Inc.*, 2004 CanLII 71677 (QC HRT); *Commission des droits de la personne et des droits de la jeunesse c. Montréal (Ville)*, 2003 CanLII 33420 (QC HRT); *C.D.P.D.J. (Dewe) c. Panagiotis Macrisopoulos*, T.D.P.Q. MONTRÉAL, 1998 CanLII 5977 (QC HRT); and *C.D.P. c. Camping et Plage Gilles Fortier Inc.*, T.D.P.Q. QUÉBEC, 1994 CanLII 2350 (QC HRT). In each Quebec Human Rights Tribunal decision, $1000 was awarded for pain and suffering.

[250] The grievor submitted that once pain and suffering arises following discrimination on a prohibited ground, awarding an amount is appropriate, even if the complainant's behaviour was not exemplary. In support of that argument, she cited *Pitawanakwat v. Canada (Attorney General)*, [1994] 3 F.C. 298 (T.D.). She submitted that because her behaviour was exemplary and because she suffered a certain amount of pain and suffering due to the employer's actions, she should be entitled to an amount for pain and suffering.

[251] The grievor also referred me to *Tellier-Cohen v. Canada (Treasury Board)*, 1982 CanLII 4 (CHRT), a decision that, according to her, appears very similar to her situation. In that case, the employer refused the complainant access to sick leave or annual leave during her period of incapacity following childbirth. The CHRT awarded her an amount equal to the amount lost plus $2000 as compensation for the prejudice suffered when her employer discriminated against her.

[252] The grievor referred me to paragraph 36 of *Stringer*, in which the adjudicator, analyzing the decisions cited by the parties, stated the following:

> ***36.*** *When analyzing the eight decisions referred to by the parties (disregarding* Hughes*), it became apparent that most of them do not include a detailed analysis of the rational [sic] used by the Tribunal or the adjudicator to arrive at the specific amount ordered for pain and suffering and for special compensation, if applicable. However, it is clear that the seriousness of the psychological impacts that*

> *discrimination or the failure to accommodate had on the complainants or the grievors is the main factor that justified each decision. It is also clear that recklessness rather than wilfulness was the principal ground used to grant special compensation to the grievors or the complainants.*

[253] The grievor did not claim that she suffered serious psychological trauma from the employer's wrongdoing. However, she submitted that all of the efforts she had to make gave her the impression that the employer did not respect her and that her condition, being pregnant, was a burden. She reiterated that the maze of procedures in which she found herself left her stressed and with a feeling of injustice when she was vulnerable. The amount of $2500 being claimed for pain and suffering is for the wrong she suffered.

B. For the employer

1. Divisibility of the allowance

[254] The employer first addressed the divisibility of the clothing allowance in clause 43.03 of the collective agreement. According to it, the purpose of that allowance is to ensure that a correctional officer who is not required to wear a uniform is not disadvantaged compared to another correctional officer who is required to wear one, in order to place all correctional officers, whether or not their positions require them to wear a uniform, on equal footing. The employer submitted that by adopting clause 43.03, the parties to the collective agreement agreed that a correctional officer is disadvantaged compared to another correctional officer only after six months or more of work. According to that argument, if an officer is not working, then no prejudice arises compared to a working officer since he or she has no duties and therefore does not use civilian clothes to carry them out. Thus, it is clear from the wording of clause 43.03 that the parties to the collective agreement did not want the clothing allowance to be divisible on a pro rata basis.

[255] The employer emphasized that granting the clothing allowance on a pro rata basiswould create an absurdity, as a correctional officer would be entitled to an allowance each time he or she carried out duties not requiring a uniform.

2. Expenses

[256] According to the employer, awarding an amount beyond the $600 clothing

allowance for purchasing maternity clothes would have the effect of amending the collective agreement, which the adjudicator is prohibited from doing under section 229 of the *PSLRA*.

3. <u>Damages other than pain and suffering</u>

[257] The employer submitted that paragraphs 53(2)(*b*), (*c*) and (*d*) of the *CHRA* set out certain remedies. However, the jurisdiction of an adjudicator seized of a grievance claiming a violation of the *CHRA* is limited by paragraph 226(1)(*h*) of the *PSLRA*, which reads as follows:

> ***226.*** *(1) An adjudicator may, in relation to any matter referred to adjudication,*
>
> . . .
>
> (h) *give relief in accordance with paragraph 53(2)*(e) *or subsection 53(3) of the* Canadian Human Rights Act . . . .

[258] Consequently, an adjudicator cannot order damages under paragraphs 53(2)(*b*), (*c*) or (*d*) of the *CHRA*. The employer emphasized that in *Stringer* the adjudicator awarded damages under paragraph 53(2)(*e*) and subsection 53(3) of the *CHRA*, not under paragraphs 53(2)(*b*), (*c*) or (*d*).

[259] In support of its argument concerning the interpretation of awarding damages under subsection 53(2) of the *CHRA*, the employer cited *Stringer FC*, in which the Federal Court, referring to the Federal Court of Appeal's decision in *Nantel v. Canada (Attorney General)*, 2008 FCA 351, stated the following at paragraph 100:

> *[100] Even if I did not have the benefit of the Court of Appeal's view on subsection 226(1), it seems to me that the most coherent reading of paragraphs 226(1)*(g) *and* (h)*, is that the exception to application of the CHRA in* (g) *refers to its substance (by removing pay equity provisions), while* (h) *provides an exception to its remedies (by omitting the incorporation of CHRA's section 53(4) when 53(2)*(e) *and (3) are explicitly mentioned). There is little other way to read these paragraphs coherently, given that the specific mention of the CHRA's remedies in (h) would be redundant to allowing the application of the entire CHRA in* (g)*, were it not intended to exclude 53(4) by omission.*

[260] Thus, the employer argued that the only remedies available to the adjudicator are those under paragraph 226(1)(*h*) of the *PSLRA*.

[261] Alternatively, the employer submitted that the grievor did not demonstrate that she had incurred expenses from the discrimination she allegedly suffered. Her credit card statements (Exhibit S-15) are not invoices and do not provide a breakdown of her purchases for personal use and her purchases for work purposes. The employer submitted that in her testimony, the grievor admitted that she did not remember everything she purchased, that she sometimes wore the clothes on weekends and that she had returned merchandise, some of which was included on the statement, while others were not.

[262] The employer also submitted that since the clothing the grievor bought was not solely for work, she could not claim that such purchases were related to the alleged discrimination. Consequently, the $1500 claimed is not justified.

4. Pain and suffering

[263] The employer argued that the grievor did not present any evidence to support pain and suffering. It submitted that in *Chénier*, the adjudicator's opinion was that damages must be certain and not speculative. Similarly, in *Tellier-Cohen*, the evidence was clear about several prejudices that the complainant suffered.

[264] According to the employer, the grievor's allegation that she was stressed was not supported by the evidence. At most, it was the opinion of a witness who is not an expert in that area. On that point, the employer referred me to *Canada (Attorney General) v. Demers*, 2008 FC 873, in which the Federal Court stated the following at paragraph 34:

> *[34] In her decision, the adjudicator referred to Mr. Demers' psychological distress. Bear in mind that the adjudicator's field of expertise is in labour relations and, unless she refers to the opinion of either a physician or a psychologist in determining that a certain event caused psychological distress to Mr. Demers, she is clearly exceeding her powers.*

[265] In support of that argument, the employer also cited *Lebeau v. Treasury Board (Statistics Canada)*, 2013 PSLRB 131, at para 38 and 39, as follows:

> ***38** Even if Statistics Canada violated the collective agreement and the* CHRA *by imposing an additional premium on the grievor as a condition for keeping her reserved spot (which I doubt), it is impossible to conclude that she would be entitled to moral damages. In* Canada (Attorney General) v. Tipple,

> *2011 FC 762 (appeal allowed on other matters in 2012 FCA 158), the Federal Court expressed the opinion that an adjudicator should not award compensation for psychological injury in the absence of evidence of such an injury, preferably provided by a health professional. Furthermore, the evidence should indicate that the injury is significant and long lasting. Justice Zinn wrote as follows at paragraph 60 of that decision:*
>
> > [60] . . . Second, there was no evidence offered by Mr. Tipple other than his own evidence that he experienced a lack of confidence, hurt feelings, low self esteem [*sic*], humiliation, stress, anxiety and a feeling of betrayal. Specifically, there was no evidence that Mr. Tipple was required to obtain medical treatment or was provided with a psychological diagnosis that was premised on the employer's conduct in the manner of termination, other than the mere fact of the termination of his employment. Third, unlike the facts in Zesta Engineering, there is nothing in the decision to suggest that the psychological injury to Mr. Tipple was "significant, long lasting, and ongoing." . . .
>
> ***39*** *In her testimony, the grievor described how she felt because of Statistics Canada's discriminatory practice but did not state that she had to consult a health professional about it. She filed no evidence of that pain and suffering other than her testimony. Nor did she mention that she continues to experience it.*

5. <u>Interest</u>

[266] The employer submitted that paragraph 226(1)(*i*) of the *PSLRA* allows an adjudicator to award interest only in grievances involving terminations, demotions, suspensions or financial penalties. The employer also cited the following excerpt from *Stringer FC*:

> *[99] The grievor argues that this passage is only concerned with paragraph 226(1)(i) and not with paragraph 226(1)(g), which empowers the adjudicator to apply the CHRA. To accept this argument would require me to conclude that the Court of Appeal, in using such broad language as "all other cases" and "non-exhaustive list", failed to consider other paragraphs of the very subsection it was interpreting. I cannot accept that argument, as it would require too much deviation from the clear words of that Court that the common law immunity of the Crown from payment of*

> *interest prevails in any PSLRA proceeding except those specifically identified in paragraph 266(1)(i).*

[267] As indicated earlier in this decision, the Federal Court quashed the portion of the adjudicator's decision referring to the remedies involving interest.

[268] In *Chénier*, cited by the grievor, the employer submitted that it concerned a case of termination, not discrimination. The adjudicator did not award any compensation, although he felt that his remedial powers allowed him to do so.

[269] The employer submitted that interest on damages could not be awarded for grievances involving the interpretation of a collective agreement or alleging discrimination.

C. Grievor's reply

[270] I note that a portion of the grievor's reply argument goes beyond what constitutes a reply. In effect, the purpose of the grievor's reply is to respond to the respondent's arguments, which were presented in response to the grievor's main arguments.

[271] In this case, the grievor's reply contains several paragraphs concerning the merits of the discrimination issue. However, the written submissions were to be limited to the issues of remedy. Furthermore, in its written submissions, the employer did not address issues of the remedies' merits. In addition, I determined the merits of the dispute earlier in this decision, and I have already addressed the grievor's arguments in that regard.

1. Clothing allowance divisibility

[272] In terms of the divisibility of the clothing allowance, the grievor submitted that the total amount should be awarded to her, as she cannot be held responsible for delays arising from the date of her reassignment. Alternatively, the allowance should be awarded to her prorated to the time worked.

[273] The grievor then addressed the employer's argument that awarding the allowance on a pro rata basis creates an absurdity, as it would allow a correctional officer to be compensated while assigned to training. The grievor submitted that in the case of a rule that creates indirect discrimination, the rule remains for all staff, but the

employer must accommodate the person or group of persons suffering discrimination.

[274] According to the grievor, awarding an amount greater than $600 would not contravene section 229 of the *PSLRA* because the employer's failure to provide her with a uniform for a pregnant woman was prejudicial to her. In addition to the $600 allowance, an additional amount of $1500 should be awarded for the prejudices actually suffered.

[275] The grievor submitted that the employer's argument that the jurisdiction of an adjudicator seized of a grievance involving a *CHRA* violation is circumscribed by paragraph 226(1)(*h*) of the *PSLRA*, is an overly restrictive interpretation. The *PSLRA* does not state that in cases of discrimination, the adjudicator is limited to making orders under paragraph 53(2)(*e*) and subsection 53(3) of the *CHRA*. According to the grievor, the employer's reasoning would result in limiting damages in all cases as they are not specified in the *PSLRA*. She submitted that, nonetheless, an adjudicator could award damages based on paragraphs 53(2)(*b*), (*c*) and (*d*) of the *CHRA*.

[276] The grievor noted that in *Stringer FC* the Court did not challenge the fact that the adjudicator could make an order under paragraph 53(2)(*a*) of the *CHRA*, even though that is not specified in the *PSLRA*. In addition, that same decision does not mention that the adjudicator could not award other types of remedies, as the Court referred the case to the adjudicator to examine the possibility of awarding a systemic remedy.

[277] In *Chénier*, the adjudicator decided not to award damages because the employee had committed serious misconduct. However, in this matter, the grievor's behaviour was exemplary.

[278] Concerning her testimony about buying clothing, the grievor emphasized that she was precise about it and that she would not have had to buy all that clothing were she not required to wear it at work.

[279] As for pain and suffering, the grievor submitted that the evidence demonstrated that she had to bear an additional burden due to the employer's lack of cooperation and support. The grievor reiterated that she was stressed and vulnerable because of her pregnancy and that therefore she deserves $2500 in damages.

VII. Reasons for remedies

A. The adjudicator's remedial powers

[280] Under paragraph 209(1)(*a*) of the *PSLRA*, I have the jurisdiction to hear this grievance, as it involves the interpretation or application of collective agreement provisions. Subsection 228(2) of the *PSLRA* states that after considering the grievance, I must render the decision that I consider appropriate. When an adjudicator has jurisdiction to hear a grievance, he or she also has the power to interpret and apply the *PSLRA* and the *CHRA*, in accordance with paragraph 226(1)(*g*) of the *PSLRA*. Similarly, under paragraph 226(1)(*h*), he or she can award damages for pain and suffering set out in paragraph 53(2)(*e*) and subsection 53(3) of the *CHRA*.

[281] Although the remedial power under subsection 228(2) of the *PSLRA* does not give an adjudicator "carte blanche," nothing in the wording of that provision or in paragraphs 226(1)(*g*) or (*h*) suggests that my powers under subsection 228(2) are limited in any way when a grievance raises a human rights issue in a labour relations context. Thus, although there are some exceptions, an adjudicator appointed under the *PSLRA* has the power to order the remedies that he or she deems appropriate under the circumstances. In particular, those remedies can sometimes be systemic or have a systemic impact. They can include accommodations, reimbursing lost wages and related expenses, certain damages, costs (but not legal costs), and offsetting expenditures.

[282] It is important to note that a grievance that raises a human rights issue cannot be separated from its context, i.e., labour relations. The grievance concerns the interpretation or application of a collective agreement's provisions or the presumed violation of a labour relations principle, while raising a human rights issue, whether explicitly or implicitly. Establishing a distinction between remedies for human rights grievances and other labour relations grievances would go against the *PSLRA*'s mandate.

[283] The Federal Court confirmed that principle in *Stringer FC*, as it referred the matter back to the adjudicator to examine the systemic issues, which are set out in paragraph 53(2)(*a*) of the *CHRA* but are not recognized in paragraph 226(1)(*h*) of the *PSLRA*.

B. Remedies for other than pain and suffering

[284] The employer submitted that the jurisdiction of an adjudicator seized of a grievance about a *CHRA* violation is limited by paragraph 226(1)(*h*). Consequently, an adjudicator cannot order damages under paragraphs 53(2)(*b*), (*c*) or (*d*) of the *CHRA*.

[285] The adjudicator in *Stringer* ruled otherwise. His reasoning was summarized as follows in *Stringer FC*:

> *[79] The adjudicator then turned to his jurisdiction to order remedies other than those under paragraph 53(2)(e) and subsection 53(3), such as interest on damages and a systemic remedy. The adjudicator did not agree with the employer's argument that his remedial jurisdiction was limited to those sections, since this would mean that the remedies available for human rights grievances would be more limited than for other labour grievances. It would require complainants to file both a grievance and a complaint under the CHRA to be made whole. It was not the intent of the legislator in drafting paragraph 226(1)(h) of the PSLRA. Rather, that paragraph was included in the PSLRA to specify that human rights issues could be grieved and to outline the new expanded jurisdiction of adjudicators over human rights issues.*
>
> *[80] Rather, the adjudicator's jurisdiction to deal with grievances and order remedies comes from paragraph 209(1)(a) of the PSLRA. Further to that basic authority, paragraph 226(1)*(g) *of the PSLRA gives the power to interpret and apply the CHRA without references to any specific provisions of the CHRA, except for the exclusion of pay equity provisions. This interpretation is consistent with Supreme Court rulings holding that in general, labour relations tribunals have jurisdiction to deal with all disputes between the parties arising from a collective agreement. To conclude otherwise would mean that the grievor would have to go to the CHRT for other remedies.*

[286] The Federal Court made no comment on those findings by the adjudicator. When it referred the case back to him to determine if he should order the implementation of a systemic remedy, the Federal Court seems to have implicitly approved his decision.

[287] Paragraphs 98 to 100 of *Stringer FC*, which seem to have been added as commentary, may give the impression that the Court contradicted itself. However, it is important to consider the Court's comments in the context of its discussion concerning the meaning of paragraph 226(1)(*i*) of the *PSLRA*. That provision allows an exception to a well-established common law rule that protects the Crown from paying interest and sets out the detailed circumstances in which that exception applies. It is in

that context that the Court refused to extend that exception to human rights issues.

[288] In her reply, the grievor claimed that in *Stringer FC* the Court did not challenge the fact that the adjudicator could make an order under paragraph 53(2)(*a*) of the *CHRA* even though that is not specified in the *PSLRA*.

[289] However, an adjudicator appointed under the *PSLRA* does not have the powers described in paragraph 53(2)(*a*) of the *CHRA*.

[290] In addition, given the powers granted to me under subsection 228(2) of the *PSLRA*, I feel that the grievor's request for a systemic remedy was vague and impressionistic and that it was not appropriate to the circumstances of this grievance. The request was submitted in a general manner, and in light of the evidence before me and my findings, my opinion is that such a measure is not appropriate in this case.

[291] That said, I have already expressed my perspective on the evidence earlier in this decision when I discussed the issue of systemic discrimination. As I explained it, one of the consequences stemming from *Meiorin* is that a remedy in the context of an individual grievance can sometimes have a broader effect due to the elimination of the distinction between direct and indirect discrimination.

C. <u>The $600 clothing allowance</u>

[292] As it is futile to consider the maternity uniform as a remedy three years after the grievor's pregnancy, the clothing allowance must therefore be examined.

[293] The grievor submitted that she should be awarded the entire allowance as she cannot be held responsible for delays related to the date of her reassignment. That argument is not convincing. There is no evidence that the employer deliberately or in bad faith delayed finding a temporary assignment for her after she submitted her medical certificate. In addition, nothing in the evidence indicates that the process of assigning the grievor to administrative tasks did not follow the normal course described by Mr. Simard in his testimony.

[294] It was established in *Renaud* that a text that results in discrimination because of its prejudicial effect must give way to human rights legislation, in this case, the *CHRA*. I have already determined that clause 43.03 created such discrimination. In the circumstances, I find that the most appropriate remedy would be for the employer to

pay the grievor the clothing allowance prorated to the time she worked during her temporary assignment. Had she worked only one or two months in the temporary assignment, I do not see how she could have justified claiming the entire allowance.

[295] In his testimony, Mr. Simard recognized that pregnant correctional officers would be discriminated against had the grievor been required to respect the fiscal year criterion in clause 43.03 of the collective agreement. I feel that the same argument applies to the six-month time restriction. It is possible for a correctional officer to meet the time requirements in clause 43.03 during her pregnancy, but it is not certain that that will always be so.

D. Expenses

[296] The grievor claimed $1500 minus the amount awarded for the clothing allowance to cover buying clothing, her time spent undertaking efforts and her travel to the seamstress.

[297] As for the clothing purchases, I consider that granting the grievor's request would put her in a more advantageous position than had the employer paid her the clothing allowance. In that case, she would still have had to personally pay for any clothing purchases exceeding the amount of the allowance.

[298] Furthermore, the grievor's credit card statements do not distinguish between what she purchased for personal use and for work purposes. In her testimony, she was able to identify some of those purchases but could not remember them all. She also indicated that she returned merchandise, including some itemized on the statements, and others that were not. In my view, there is insufficient evidence to award her the amount she claimed. Consequently, I dismiss this claim by the grievor.

[299] In her arguments, the grievor mentioned numerous efforts she had to undertake with the employer to obtain the maternity uniform and the clothing allowance as well as travelling to the seamstress.

[300] However, in her testimony, the grievor did not specify whether the employer had paid her for the various efforts she had to undertake. Mr. Simard testified that when an officer is pregnant, she must report her absence by telephone at all times so that a replacement can be planned for. She must stay at home on paid leave until her appointment with her doctor. According to the evidence, the grievor was on paid leave

from the time she submitted her medical certificate until her reassignment began on February 24, 2009. Furthermore, nothing in the evidence indicates that the grievor did not receive a salary from the employer before submitting the medical certificate.

[301] As for travelling to the seamstress on Tuesday, March 3, 2009, the grievor did not indicate in her testimony that that travel was outside work hours or that she had to incur expenses for it. No supporting documents for such expenses were presented as evidence.

[302] The grievor had to demonstrate that she incurred expenses for her efforts and her travel. She did not. Consequently, I reject her claim for $1500 in expenses.

E. Pain and suffering

[303] The grievor submitted that all of the efforts that she had to make gave her the impression that the employer did not respect her and that her condition as a pregnant woman was a burden. She stated that the maze of procedures in which she found herself left her stressed and with a feeling of injustice when she was vulnerable.

[304] In terms of the stress that the grievor experienced, there was no evidence that she consulted a health professional about it or that she continued to suffer from it. There was only her testimony. I agree with the Federal Court in *Demers* and the adjudicator in *Lebeau* that that is not enough to justify awarding damages for pain and suffering. It is not up to an adjudicator to rule on such an issue without the evidence of a health professional's opinion.

[305] However, I feel that the employer's procrastination about the maternity uniforms policy and the clothing allowance at the very least confused the grievor. She was required to make several efforts, which proved futile. To use a common expression, because of the employer's conduct, the grievor did not know where to turn. Although she felt disturbed by the employer's actions, her conduct throughout the process was exemplary. As I have already determined, the employer discriminated against her on the grounds of sex by denying her access to a benefit to which she would normally have been entitled. In the circumstances, it is my view that she is entitled to compensation under paragraph 53(2)(*e*) of the *CHRA* for the pain and suffering she endured.

[306] Estimating the appropriate remedy amount is not a simple mathematical

calculation. As the adjudicator in *Stringer* noted at paragraph 36 of his decision (quoted earlier in this decision), most of the decisions that he analyzed did not set out a detailed rationale for determining the exact amount to award.

[307] The grievor claimed $2500 for pain and suffering. Given the lack of evidence from a health professional of the stress she suffered, it is not appropriate to award the full amount claimed. I establish the amount the employer must pay the grievor at $1500, for the pain and suffering she endured, under paragraph 53(2)(*e*) of the *CHRA*.

F. Interest

[308] The grievor claimed interest. Paragraph 226(1)(*i*) of the *PSLRA* states the following:

> ***226.*** *(1) An adjudicator may, in relation to any matter referred to adjudication,*
>
> . . .
>
> *(i) award interest in the case of grievances involving termination, demotion, suspension or financial penalty at a rate and for a period that the adjudicator considers appropriate . . . .*

[309] In *Stringer FC*, the Federal Court overturned the portion of the adjudicator's decision ordering interest on the grounds that paragraph 226(1)(*i*) is an exception to the common law rule by which the Crown is not responsible for interest on amounts owing. As such, the Federal Court stated that it was bound by the Federal Court of Appeal ruling in *Nantel*, which stated the following at paragraphs 6 and 7, cited in *Stringer FC*:

> *[6] It is unnecessary to address this question since, in our opinion, the amendments brought about by the* Public Service Labour Relations Act, *S.C. 2003, c. 22, s. 2 (PSLRA), which came into force on April 1, 2005, render the conclusion reached by Justice Pinard unavoidable, regardless of the standard of review applicable to the adjudicator's decision. Indeed, the PSLRA provides at paragraph 226(1)(i) that the adjudicator may "award interest in the case of grievances involving termination, demotion, suspension or financial penalty [emphasis added] at a rate and for a period that the adjudicator considers appropriate".*
>
> *[7] When this amendment is considered in light of the consistent line of case law that Justice Pinard relies on in his reasons, which has interpreted the PSSRA, without exception,*

> *in the same way for over 30 years, it demonstrates unequivocally that Parliament was indeed aware of the state of the law under the PSSRA, and that as of April 1, 2005, it chose to waive the benefit of the common law rule in the specific cases provided at paragraph 226(1)*(i)*. It therefore follows that the common law rule remains in effect for all other cases. The amendment cannot be construed otherwise.*

[310] In *Stringer FC*, the Federal Court added the following:

> *[99] The grievor argues that this passage is only concerned with paragraph 226(1)(i) and not with paragraph 226(1)(g), which empowers the adjudicator to apply the CHRA. To accept this argument would require me to conclude that the Court of Appeal, in using such broad language as "all other cases" and "non-exhaustive list", failed to consider other paragraphs of the very subsection it was interpreting. I cannot accept that argument, as it would require too much deviation from the clear words of that Court that the common law immunity of the Crown from payment of interest prevails in any PSLRA proceeding except those specifically identified in paragraph 266(1)(i).*

[311] The Federal Court continued as follows at paragraph 100:

> *[100] Even if I did not have the benefit of the Court of Appeal's view on subsection 226(1), it seems to me that the most coherent reading of paragraphs 226(1)(g) and (h), is that the exception to application of the CHRA in (g) refers to its substance (by removing pay equity provisions), while (h) provides an exception to its remedies (by omitting the incorporation of CHRA's section 53(4) when 53(2)(e) and (3) are explicitly mentioned). There is little other way to read these paragraphs coherently, given that the specific mention of the CHRA's remedies in (h) would be redundant to allowing the application of the entire CHRA in (g), were it not intended to exclude 53(4) by omission.*

[312] As the Federal Court stated at paragraph 102 of that same decision, to ". . . render a decision conflicting with clear case law is unreasonable." In light of that, I dismiss the grievor's claim for the payment of interest.

VIII. Sealing order

[313] The grievor's credit card statements, filed as Exhibit S-15, contain personal information about her, including her credit card number and home address. Given the serious risk to the grievor's privacy and the lack of prejudice to the administration of

justice, I have decided on my own to order Exhibit S-15 sealed.

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

(The Order appears on the next page)

IX. Order

[315] The grievance is allowed.

[316] The employer is directed to pay the grievor, within 60 days of the date of this decision, the clothing allowance set out in clause 43.03 of the collective agreement, prorated to the time she worked during her assignment to administrative duties.

[317] The employer is directed to pay the grievor, within 60 days of the date of this decision, $1500 for pain and suffering under paragraph 53(2)(*e*) of the *CHRA*.

[318] I order Exhibit S-15 sealed.

[319] I will remain seized of this grievance for 60 days from the date of this decision to resolve any issues arising from its implementation.

September 11, 2014.

PSLRB Translation

Steven B. Katkin,
adjudicator