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File: 566-02-5573

Citation: 2015 PSLREB 41

Public Service Labour Relations Act Before an adjudicator

BETWEEN

LARRY KIRBY

Grievor

and

TREASURY BOARD
(Correctional Service of Canada)

Employer

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

In the matter of an individual grievance referred to adjudication

Before: Margaret T.A. Shannon, adjudicator

For the Grievor: David Yazbeck, counsel

For the Employer: Magdalena Persoiu, counsel

Heard at Kingston, Ontario,
January 14 to 17 and July 14 to 17, 2014.

I. Individual grievance referred to adjudication

[1] The grievor, Larry Kirby, alleged that he was discriminated against, in violation of articles 1 and 19 of the collective agreement between the Treasury Board and the Public Service Alliance of Canada ("the bargaining agent") for the Operational Services Group (all employees) with an expiry date of August 4, 2011 ("the collective agreement"; Exhibit 21) and the *Canadian Human Rights Act* (R.S.C. 1985, c. H-6; *CHRA*), when the Correctional Service of Canada (CSC or "the employer") failed to accommodate his disability in the workplace and to provide him with a harassment-and discrimination-free workplace. Despite the allegation of harassment, the grievor relied on the failure to accommodate at the hearing of this matter.

[2] The grievance was referred to the former Public Service Labour Relations Board ("the former Board") for adjudication on July 4, 2011, and the hearing into the grievance occurred in January and July 2014. On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) was proclaimed into force, creating the Public Service Labour Relations and Employment Board ("the new Board") to replace the former Board as well as the former Public Service Staffing Tribunal. Adjudicators who were seized of a grievance before November 1, 2014, continue, however, to exercise the powers set out in the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2) as that *Act* read immediately before that day (see *Economic Action Plan 2013 Act, No. 2,* S.C. 2013, c. 40, s. 396).

II. Summary of the evidence

A. The grievor's evidence

[3] The grievor testified that he had been employed with the CSC since 1992. He started his career as a correctional officer 01 (CX-01). In 1998, he accepted a position at Kingston Penitentiary (KP) as an institutional driver. His duties as an institutional driver involved delivering freight, messenger services and escort services on a weekly rotation. In 2000, escort duties were assigned to correctional officers as a means of accommodating injured or ill correctional officers rather than assigning these duties to the drivers.

[4] In 2005, the grievor injured his back at work and was no longer able to perform the freight part of his duties. Also in 2005, the KP reduced its number of drivers, increasing the grievor's workload. His ability to perform his driver duties was further

impaired by depression and anxiety issues, which caused him difficulties focusing on multiple tasks at a time. He was off work from September 7, 2005, to January 23, 2006, when he commenced work as an escort driver at the KP. (Escort duties were a single focus and met both his physical and mental disability accommodation needs.)

[5] During the period he was off work, the grievor and the employer worked together to identify his limitations and a suitable accommodation to meet his needs. Several positions were considered based on the grievor's qualifications and limitations, including a parole officer position and a position handling inmate complaints and claims against the Crown, which he agreed to do in combination with escort driving duties.

[6] On October 31, 2005, his bargaining agent representative, Louise Flanagan, advised the grievor that she had met with the Warden and the Assistant Warden, Material Services, to facilitate the grievor's return to work. She relayed their message to him that there was no possibility of offering him accommodation as an escort driver as a correctional officer was being accommodated in that role. According to the Warden, the grievor had to be accommodated within his job. Furthermore, she could not justify additional training, which the grievor required for the parole officer job, because he had turned it down in the past. According to the Assistant Warden, the grievor had also already turned down a four-month opportunity to return to work handling claims against the Crown.

[7] The process of identifying a suitable accommodation continued, and on January 6, 2006, the grievor was advised that the correctional officer was being removed from his accommodation as an escort driver. The grievor met with representatives from the KP (Dave Reynolds), CSC labour relations and his bargaining agent on January 13, 2006. The grievor was advised that he would likely start as an escort driver at the KP on January 23, 2006, and that in the employer's opinion, this was a permanent accommodation.

[8] The grievor did return to work on January 23, 2006, as anticipated. He received a letter on January 24, 2006, from Dave Reynolds, Chief, Material Management, CSC, who was at the meeting on January 13, 2006, advising him of his assignment and that it would be reviewed in three to six months. The grievor was very concerned about this apparent change to the employer's approach to his accommodation. At no time did he

anticipate that this was a short-term assignment. His restrictions were permanent and ongoing, and he required long-term workplace accommodation.

[9] On February 10, 2006, the grievor attended a meeting with Donna Morrin, who was Warden at the KP at the time; Gerry Henderson, KP Deputy Warden; Cheryl Hogan, from the local CSC labour relations office; and Derek Dunnets, his bargaining agent representative. The meeting was called so that the Warden could discuss the grievor's accommodation as an escort driver with him. At that meeting, the Warden told the grievor that his physician was the grievor's advocate and so would say whatever he wanted his physician to say. She stated that all employees were expected to perform all the functions of their jobs, which in the grievor's case included freight and messenger services.

[10] The period of accommodation progressed, and on May 1, 2006, the grievor was asked to provide the employer with an updated medical report, which he did. The doctor advised the employer that the grievor was progressing well with the accommodation measures in place. This was one of the 17 doctors' reports the grievor provided to the employer throughout the accommodation process. According to him, every time one was provided, the employer wanted another one and was never satisfied with the information, always wanting more.

[11] At the meeting on February 10, 2006, Warden Morrin asked the grievor why he had not accepted the parole officer position offered to him. He explained that he was interested in it and had qualified for such a position through a competition but that he had never been offered such a position at the KP. He clarified that he had turned down an acting assignment as a parole officer but that he had never refused a full-time offer. With this clarification, the Warden offered the grievor an acting assignment as a parole officer at Millhaven Institution.

[12] Despite the grievor's expressed interest in the Warden's offer, nothing materialized until September 11, 2006, when the grievor was contacted by a Human Resources representative, who advised him that it appeared that the Millhaven Institution assignment was going to come to reality. On September 12, 2006, the grievor was informed that the Millhaven Institution opportunity had been offered to another employee. The grievor was offered a parole officer opportunity at Collins Bay Institution (CBI) instead. He felt pressured to accept without being afforded the time to consider the offer. He agreed to take the positon, but as soon as he began working

there the same day, he started feeling ill. The next day, September 13, 2006, he was again offered an assignment at Millhaven Institution, which he accepted.

[13] On October 25, 2006, the grievor began treatment for high blood pressure. Five days later, on October 30, 2006, he started work at Millhaven Institution and immediately felt unwell. By November 1, 2006, he could no longer stay at work because he felt so ill. He went home and called his bargaining agent representative to discuss returning to the escort driver position at the KP. On November 2, 2006, the grievor spoke to Acting Assistant Warden, Material Services, KP, Michelle Vermette, and advised her that he was unable to work at Millhaven Institution and requested that he be immediately returned to the escort driver position at the KP.

[14] The grievor returned to the KP escort driver position on November 6, 2006. On April 17, 2007, he met the new assistant warden, Material Services, Tim Byrne, in the corridor at the KP. In the presence of another employee, Mr. Byrne advised the grievor that he intended to meet with him to discuss his accommodation. This upset the grievor as he felt that Mr. Byrne had breached his privacy. The grievor claims that Mr. Byrne again breached his privacy on June 22, 2007, when he called the grievor's physician in an attempt to obtain his medical information. The grievor reported these breaches of privacy to his bargaining agent representative, stating that in his opinion, he was being harassed by Mr. Byrne. On July 5, 2007, the grievor filed a harassment grievance against Mr. Byrne. The new warden at the KP, Theresa Westfall, upheld the grievance on September 10, 2007.

[15] A month later, the grievor met with Ms. Westfall, Mr. Byrne, his bargaining agent representatives and members of the CSC's Human Resources Division to discuss the continuation of his accommodation as an escort driver. Ms. Westfall reiterated and agreed with Ms. Morrin's statement that employees are expected to carry out the full range of duties in their job descriptions. On February 13, 2008, Ms. Westfall advised the grievor that he was being referred to Health Canada for an assessment in order to clarify his limitations. At the same time, Ms. Westfall reiterated that CSC policy was that accommodations were temporary in nature and could not be permanent. She also reiterated that the grievor was expected to be able to complete all his job duties as set out in his job description. He agreed to participate in the process but reserved the right to challenge it if he felt the need.

[16] When not driving escorts, the grievor spent his time on duty in the drivers' room at the KP. If he was needed, the correctional supervisor in the Keeper's Hall would contact him via cellphone, radio or email or via a telephone located at his workstation. On July 9, 2008, Mr. Byrne advised the grievor that the drivers' room was no longer available and that he was to vacate it and relocate to other premises near the Security Division offices. The grievor disagreed with this change as the drivers' room was strategically located directly outside the KP perimeter wall and close to the Keeper's Hall, which provided for the efficient and swift performance of his duties. He advised Mr. Byrne that he considered this retribution for the harassment complaint he had filed and that it constituted intimidation and an abuse of authority.

[17] When Ms. Westfall became aware of the grievor's allegations, she asked Mr. Byrne to meet with the grievor and remind him that he was accommodated as an escort driver for the Security Division, which needed him nearby. There had been complaints from the Security Division to the warden about being able to access the grievor when he was located in the driver's office.

[18] On September 8, 2009, the employer received the Health Canada assessment of the grievor's needs. Following this, the grievor received an email from Brian Joyce, the new Assistant Warden, Material Services, KP, stating that due to the several limitations mentioned in the Health Canada assessment, the current escort driver accommodation was no longer viable. The grievor's accommodated work duties were terminated immediately, and the grievor was sent home on sick leave.

[19] The next day, the grievor received a letter from Ms. Westfall advising him that there were no positions at the KP that met the restrictions outlined in Health Canada's assessment despite the conclusion by its physician that the grievor could work full-time as a passenger driver performing escort duties. He was directed to apply for long-term disability on the expiry of his sick leave credits.

[20] The grievor sought other employment as a driver and discovered that he required an upgrade to his driver's licence. On November 19, 2009, he emailed Mr. Joyce, requesting CSC assistance with the cost of this upgrade training. The grievor had found positions within CORCAN (a CSC rehabilitation program) and with the Department of National Defence, which required a class A driver's licence; he had a class B licence. Mr. Joyce acknowledged this request and reminded the grievor of the employer's request that he provide it with an updated resume, which it could forward

to prospective employers. The grievor eventually provided the requested resume in hard copy; but he refused to provide it in electronic format. Nor did he agree that his resume could be scanned by the employer and forwarded to potential employers.

[21] The grievor never returned to work at the KP. His search for alternate employment continued as did his request to be returned to escort duties full-time, consistent with the recommendations of his physicians and Health Canada. Ms. Westfall did not consider rebundling duties as an option. In January 2011, the grievor's psychologist again recommended a return to escort driver duties. However, all attempts by the grievor to re-establish his accommodation as an escort driver were rebuffed by the employer. The escort driver duties were again being assigned to correctional officers regardless of the fact that they fell within the institutional driver job function.

[22] During the period after the grievor was put off work, the CSC proposed several options for him to consider. He was asked to register with the Public Service Commission (PSC) for admission to its priority placement list, which caused him concern as he was required to provide the PSC with a doctor's certificate stating that he was fit to return to work when he had never been unfit to work in the first place. He merely required accommodation. Driver's positions at the CBI and Bath Institution were discussed with him, but nothing materialized that met his limitations.

[23] In May 2012, Jay Pyke became the warden at the KP. He met with the grievor in September 2012, and for the first time, the concept of rebundling duties was considered. On September 12, 2012, Mr. Pyke contacted the grievor's physician, Dr. MacLeod, concerning the possibility of a driver position at the CBI, where it was possible to modify the work of the driver so that the grievor could be assigned solely to escort duties. Mr. Pyke's areas of concern were related to the transfer of prisoner effects and to the grievor's ability to lift more than 20 pounds.

[24] Dr. MacLeod replied to Mr. Pyke on October 16, 2012, after having met with the grievor. In the response, Dr. MacLeod stated that given how the grievor had been treated by the CSC to that point, a return to work in any capacity there would likely make the grievor ill and it was not in his best interests to return to work there.

[25] The grievor was angry about the way in which the employer had approached his request for accommodation. He had always been fit to work as an escort driver, yet the

employer had kept him out of the workplace since 2009. He was willing to take on the task of investigating inmate claims, as suggested by Ms. Westfall, but the employer did nothing to facilitate this after he indicated his interest. Other requests to meet and for training and telework went unanswered. He was never contacted for follow-up about his allegations of harassment against Ms. Westfall as the Assistant Commissioner, Human Resource Management, promised in response to his grievance dated July 6, 2010 (Exhibit 1, tab 44).

[26] In January 2013, the grievor was added to the PSC priority system. The last contact the grievor had with the CSC was following a meeting on February 12, 2013, with Mr. Pyke and other CSC representatives. He did receive notices from the PSC when positions became available, but he did not qualify for 99.5% (according to the grievor's assessment) of them based on the job titles and descriptions posted on the PSC website.

[27] From the time he was put off work by Ms. Westfall, the grievor has not returned to the workplace. While he was never formally dismissed or laid off from the public service, work has not been assigned to him since the escort driving duties were terminated. In the interim, he exhausted all his sick leave benefits and the long term disability benefits to which he was entitled

B. <u>Dave Reynold's Testimony</u>

[28] Mr. Reynolds testified that he was Chief, Material Management, KP, beginning in 2002 and that he supervised the grievor during this time. The grievor was one of three drivers at the KP reporting to him, who were later reduced to two, and by fall 2005, it was further reduced to one driver. An institutional driver was expected to operate a variety of vehicles, provide freight delivery and messenger services, and drive security vehicles for inmate transfers at the KP. With the reduction in the number of drivers, duties and services were eliminated, and the driver schedule was revised. After the first round of reductions, both drivers performed all three functions until it became too much. As a result, the escort driver function was turned over to correctional officers.

[29] The grievor was the last of the KP's three drivers. He was initially accommodated with light duties while he healed from a back injury. He subsequently requested different duties with less stress. In conjunction with his human resources

advisors, Mr. Reynolds sought information from the grievor's treating physicians on how he could be accommodated and what his functional limitations and abilities were. This information was then used to identify what job the grievor was able to do. While Mr. Reynolds believed that he had sufficient information to do this, his supervisors demanded more, which Mr. Reynolds had difficulty getting from the grievor. At his supervisor's direction, Mr. Reynolds contacted the grievor on at least five more occasions to secure additional information and an explanation of his limitations.

[30] Based on the medical information available, the grievor could not perform several of the job duties that required lifting, including the messenger services portion, which involved delivering parcels exceeding the weight restrictions on what he could lift. The escort duties portion also entailed lifting an inmate's personal effects when the inmate was being transferred to another institution. The freight duties were at times accomplished mechanically but still involved lifting heavy freight since not all freight was moved on pallets. However, the decision was made to accommodate the grievor as an escort driver, which was intended to last six months and to be reviewed three months after it began in January 2006.

[31] It was not uncommon that when the grievor was occupied with an escort, a correctional officer would perform escort driver duties, even though there were no other escort driver positions.

[32] At some point during the period of accommodation, the grievor was moved to the Keeper's Hall, where security duties were managed. Mr. Reynolds was solely responsible for managing his attendance. His schedule was provided to him directly by the Keeper's Hall. Before then, he had been housed in the driver's office with two other drivers. Over time, with driver attrition, the grievor came to treat the driver's office as his own. When another need for the office arose, he was moved to the Keeper's Hall to address issues the security office was having contacting him when he was needed. The grievor viewed Mr. Reynolds' actions as harassment and as an attempt to intimidate him. After the grievor filed a harassment complaint against him, Mr. Reynolds had no further contact with the grievor.

[33] Mr. Reynolds was trained at CSC Staff College on the employer's duty to accommodate before he dealt with the grievor's return to work. This training identified the roles and the responsibilities of those involved in the process. He was not aware of the concept of bundling duties in an attempt to accommodate a disabled employee.

Regardless, it would not have been a possibility when dealing with the grievor's situation, even though the escort driver functions could have been bundled with duties involving the investigation of claims against the Crown.

[34] In June 2008, Mr. Reynolds completed a job analysis form, which CSC Human Resources and the KP Return-to-Work and Accommodations Committee used to identify suitable accommodation options, even though the grievor's accommodation request was made in 2005 and he had been accommodated as an escort driver since January 2006. Mr. Reynolds did not know why it took so long for the employer to seek this information. He used a job description written in 1989 to complete the job analysis form.

[35] Between 2000 and 2005, a correctional officer was accommodated in the escort driver role even though this was part of the driver's job description. Between 2006 and 2009, when he was put off work, the grievor was the KP escort driver. From 2009 until the KP closed in 2013, correctional officers were used as escort drivers. Unscheduled escorts had regularly been assigned to correctional officers.

[36] Mr. Reynolds was not aware of why the grievor was ultimately removed from the escort driver role. Mr. Reynolds was led to believe that there was an inconsistency between the grievor's actual state of health and the description in the grievor's doctors' notes. The employer was apparently concerned that performing escort duties would aggravate the grievor's condition. Elements of the job were considered triggers even though there was no evidence of them triggering anything in the 3.5 years the grievor had been driving escorts. There had been issues with the grievor being unreachable at times, which caused a negative operational impact. Other than that, to the best of Mr. Reynolds' knowledge, the accommodation arrangement had worked well for the KP.

C. Evidence of Theresa Westfall

[37] From August 2007 to March 2010, Ms. Westfall was the warden at the KP. In this role, she dealt with the grievor's return to work and accommodation requests. She was aware of her predecessors' attempts to accommodate him. When she took over as warden, the grievor was performing escort driver duties, which was intended to be a temporary accommodation, not ongoing. The grievor's treating professionals had not indicated that he required a permanent accommodation and that he was unable to

perform the full range of the duties of his institutional driver position. To her knowledge, escort driver duties by themselves did not constitute a legitimate position. However, she admitted that the escort driver duties were a good fit for the grievor, based on his physician's recommendations.

[38] On September 27, 2007, Ms. Westfall sent a request to the grievor's treating professional (Exhibit 1, tab 83), seeking an updated clarification of his medical limitations. Before she sent the request, she met with the grievor about other possible positions, including a clerk (CR-03) position as an inmate grievance coordinator, which was a full-time funded position. The escort driver position in which he was accommodated was not a substantive position, although the KP was funded for the cost of performing prisoner escorts.

[39] The grievor had both physical and psychological limitations, so Ms. Westfall consulted both of his treating physicians, who indicated that the limitations were indefinite and that no circumstances warranted a change. The escort driver role suited both the grievor's physical and mental limitations. Neither physician recommended a return to the full institutional driver position.

[40] Ms. Westfall decided to monitor the case and discuss it on a regular basis with grievor and his bargaining agent. Her plan was to find a full-time indeterminate position that would meet his needs. According to her, the employer was not obligated to create an escort driver position in order to accommodate the grievor even though doing so would have caused the KP no hardship as the cost of escorts was provided for in its budget. In her view, no undue hardship was imposed on the CSC in continuing the escort driver position either temporarily or permanently.

[41] Ms. Westfall allowed the escort driver arrangement to continue on a temporary basis. She met with the grievor and his bargaining agent representative and advised them that this was an interim measure, to remain in place only until a suitable full-time funded indeterminate position was found. In the meantime, Ms. Westfall asked the grievor whether he would be able to deal with inmate complaints.

[42] Consequently, the grievor advised his psychologist that he had been denied the escort driver position and sought her opinion of the inmate grievance coordinator position. According to the psychologist, the grievance coordinator position was not suitable for the grievor (Exhibit 1, tab 78). Given the psychologist's opinion, it was

agreed that he would continue as an escort driver until a suitable position could be found.

[43] In July 2008, Ms. Westfall referred the grievor to Health Canada for an assessment. In her letter to Dr. Glass of Health Canada, Ms. Westfall expressed her concerns with the grievor continuing as an escort driver, which were that he was not fully occupied 40 hours per week and that as a result of his assignment solely to escort duties, his home department was short-staffed (Exhibit 2, tab 20).

[44] About a year later, in August 2009, Dr. Glass responded to Ms. Westfall's referral (Exhibit 2, tab 25). In his opinion, the restrictions identified by the grievor's treating medical practitioners were valid. Ms. Westfall viewed the grievor's functional limitations as very narrow and as leaving the CSC with no flexibility in assigning work to the grievor. She consulted with her labour relations representative and return-to-work coordinators and determined that there were no funded positions within the KP that would suit the grievor's limitations. According to Ms. Westfall, the grievor would only consider an escort driver position within the KP and was unwilling to look elsewhere. This was not an option, in her opinion, since an indeterminate full-time escort driver position did not exist.

[45] Given that no job could be found to meet the grievor's limitations, he was put on sick leave with pay until a job could be found. When his sick leave ran out, he was directed to apply for long-term disability. Ms. Westfall was willing to bundle driver duties with the CR-03 inmate grievance co-ordinator position, but the CR-03 component would not have been suitable to meet his limitations. When all options were exhausted, Ms. Westfall referred the grievor's case to the Regional Return-to-Work and Accommodations Committee to review and determine if a suitable position was available elsewhere in the region. According to Ms. Westfall, the problem in accommodating the grievor was that he was only interested in one position – that of escort driver.

[46] Ms. Westfall tried to find suitable driver positions outside the CSC. This required that the grievor prepare an updated resume and agree to having it shared with perspective employers. He did provide a hard copy of his resume but refused to present it in electronic format, which would have allowed CSC representatives to share it easily. Despite this, the search for a suitable alternate position continued. Throughout the process of searching, several meetings were held with the grievor and

his bargaining agent representative. Ms. Westfall conducted job searches on the employer's websites and forwarded the results to the grievor for his consideration.

[47] According to Ms. Westfall, it is not usual for a warden to be involved in an accommodation process to the degree she was. She undertook this level of involvement because of issues that had developed between the grievor and Messrs. Byrne and Reynolds, who had received complaints from correctional managers who had claimed to have had difficulty finding the grievor when he was needed for an emergency escort. For this reason, he was moved out of the driver's office and relocated to the security area. In addition, he had filed a harassment complaint against Mr. Byrne, alleging that he had shared the grievor's private information inappropriately and had contacted the grievor's doctor directly, without authorization. According to the grievor, Mr. Reynolds also harassed him, although Ms. Westfall was never provided with the details of what Mr. Reynolds was alleged to have done.

[48] Return-to-work and accommodations matters at the CSC are governed by its "Commissioner's Directive CD 254," entitled *Occupational Safety and Health and Return to Work Programs* ("CD 254"; Exhibit 2, tab 76), and its "Guidelines 254-2" (Exhibit 2, tab 77). Paragraph 27 of Guidelines 254-2 speaks to the modification of work methods and procedures and job restructuring as options for accommodating an employee. According to Ms. Westfall, she would have considered rebundling duties within the institutional driver position, but the grievor sought the removal of all duties except escort driving, which would have entailed the creation of a new position that would have been unfunded. He was unable to perform the bulk of the duties of his substantive position (although the cost of performing escorts was funded).

[49] The escort driver position was created as an interim measure. Continuing it on an indeterminate basis would not have been an effective use of the KP's budget as it would have required funding a position over and above the KP's funded allotment. The fact that the grievor continued in the escort driver role for 3.5 years was unusual, and continuing to allow it was no longer an option. In the meantime, resources were allocated to fund a temporary replacement to perform those duties of the institutional driver that the grievor was unable to perform.

[50] The cost of prisoner escorts came out of the security budget envelope for salaries and overtime for correctional officers. The KP was funded for two to three escorts per day as emergency, medical or temporary absence escorts were assigned to

correctional officers performing other duties there. This budget was used to pay the grievor's salary as an escort driver. There was no funded position within the grievor's home department to cover the cost of the escort driver. When the KP budget manager directed that a full-time funded position be found for the grievor, Ms. Westfall contacted Health Canada. She was not able to create long-term accommodation positions without violating her responsibilities under the *Financial Administration Act* (R.S.C. 1985, c. F-11).

[51] Ms. Westfall, together with Josh Bowen, a labour relations subject matter expert at the CSC, reviewed the institutional driver job description in light of the Health Canada report. The majority of the driver duties at the KP had to be eliminated. They looked elsewhere for options as not all driver positions at the different institutions within the CSC's Ontario Region were the same. The grievor was sent home on sick leave while the search continued, despite Dr. Glass's recommendation that he be accommodated as an escort driver, as Ms. Westfall viewed the grievor's accommodation needs as other than temporary; the escort driver role, although long-standing, was never intended to be a permanent accommodation.

[52] CSC representatives continued to identify possible accommodation opportunities. Those that the CSC felt were appropriate were to be sent to the grievor's physicians for review. Every job considered included the possibility of rebundling tasks. The decision to cease the escort driver function as an accommodation for the grievor was financial. At no point did the CSC claim undue hardship as a reason for its decision.

D. Evidence of Josh Bowen

[53] Mr. Bowen provided return-to-work and labour relations advice to KP management. His role in accommodating the grievor was to move the accommodation process along. This was one of his first accommodation-related files. According to him, when determining whether a position is a suitable accommodation, the rule of thumb is to stick as closely to the employer's original job description as possible. If it is not possible to accommodate an employee within his or her job description, then other positions within the same skill set and pay range are considered. In the grievor's case, Mr. Bowen was looking at positions at the CR-03, CR-04 and AS-01 groups and levels, with the closest to the original classification being at CR-03.

[54] Mr. Bowen communicated with the grievor many times in person, through his bargaining agent and via email. The grievor was very involved in the accommodation process and often disagreed with the CSC on the best way to move ahead. KP management was open to hearing his concerns and, to the best of its ability, meeting his preferences. Whether or not he agreed, the CSC might have proceeded if a suitable accommodation solution could have been found.

[55] The grievor was invited to participate in the discussion of his case at the Regional Return-to-Work and Accommodations Committee meeting but declined (Exhibit 2, tab 35). However, his bargaining agent representative did attend, and the Committee reviewed and discussed the grievor's file on November 30, 2010.

[56] At the meeting, certain personal information concerning the grievor's medical condition was discussed, which he felt breached his right to privacy. As a result, he withdrew his consent, and his file was withdrawn from the Committee, which ceased discussing it. Despite this, the search for a suitable position for the grievor continued (Exhibit 2, tabs 40 and 41). Driver positions at 8 Wing Trenton in Trenton, Ontario, and within the CSC's Ontario Region at Bath, Collins Bay, Pittsburgh and Warkworth Institutions were all considered.

[57] In November 2009, the grievor contacted the CSC, inquiring as to the availability of funds with which to upgrade his driver's licence. This request was denied as no information was provided to the CSC to demonstrate that there was a prospect of any job if the training were provided.

[58] According to Mr. Bowen, the goal of an accommodation is to keep the employee within his or her position, to avoid creating a job. Every possible option, starting with the original position, must be considered. His search for a position for the grievor was focused on whole jobs, not duties. The CSC and the grievor fundamentally disagreed concerning this approach and whether escort driver duties constituted a sufficient position to have him employed and productive 40 hours per week. While consideration was given to the grievor's preferences, they did not determine the position to be offered. He and his medical practitioners refused the CSC's attempts to rebundle administrative tasks such as grievance coordination with the escort driver role so that the grievor would be busy when escorts were not required. His psychologist felt that this would require multitasking, which was contraindicated by the grievor's condition.

[59] The medical reports provided to the CSC limited the scope of the search for a proper accommodation for the grievor. While the CSC would have considered new options had he proposed some, none were presented. Consequently, the focus of the search was on clerical or administrative options within the region, with the possibility of bundling certain administrative functions with driving escorts. By 2011, the search was focused on finding a job the grievor could do rather than on rebundling possibilities.

[60] At no point was escort driving intended to be a full-time job. It was offered to the grievor as a temporary accommodation while a search for a suitable indeterminate option progressed. When the search proved unsuccessful, Michelle Vermette, Assistant Warden, Management Services, CSC, asked the grievor to register with the PSC as a disability priority, which broadened his entitlement for placement across the federal public service (Exhibit 2, tab 50). This required the grievor to obtain a medical certificate stating that he was able to return to work on a specified date. He responded to this request in a lengthy email (Exhibit 2, tab 53). He refused to provide further medical certificates certifying his fitness to return to work as he had always been fit to work and still would have been at work had the CSC not sent him home. He did eventually reconsider registering (Exhibit 2, tab 54) and then did so. The medical certificate he provided in support of his disability priority entitlement request indicated that a return to the CSC was no longer a desirable option (Exhibit 2, tab 55). He expressed concerns with the suitability of all the job postings the PSC forwarded to him.

[61] Ms. Vermette contacted her colleagues at the CBI to see if they could accommodate the grievor as an escort driver. The CBI had both regional and institutional driver positions, and it was hoped that there was more possibility to rebundle tasks to suitably accommodate the grievor. The Assistant Warden, Management Services, CBI, felt that it would be possible to bundle enough duties to create a position for the grievor by adjusting the tasks assigned to other drivers there. Ms. Vermette raised this option with the grievor and received no response.

[62] Ms. Vermette and the grievor had further discussions when a garbage truck driver position opened at the CBI. He was licensed appropriately to drive a garbage truck. In addition, Ms. Vermette spoke to her counterparts at other institutions who employed drivers. She also forwarded short-term job postings to the grievor as options

to get him back in the workplace. Ms. Vermette was aware of the Health Canada recommendation that the grievor be accommodated as an escort driver, but this accommodation was intended only to be temporary. Other driver-type positions elsewhere in the region were ruled out based on the grievor's limitations.

E. Evidence of Kelly Wall

[63] Kelly Wall is the CSC's regional return-to-work advisor. She worked closely with the KP and provided assistance with its attempt to accommodate the grievor. Once the grievor was advised in January 2012 that his disability benefits would end in March 2012, she was actively involved with CSC staffing to search for potential positions for him. She used the list of his limitations provided to her by CSC labour relations in her search. She forwarded a job posting for a maintenance technician to Lisa MacInnes, in CSC labour relations, as a possibility. Ms. MacInnes indicated that the grievor thought that this position was unsuitable, which eliminated the possibility of positions at CSC regional headquarters.

[64] Ms. Wall continued to work with Ms. Vermette and the KP's new warden, Mr. Pyke, to find positions at other institutions within the CSC's Ontario Region. She considered positions at the CBI, the regional garage, regional headquarters, CORCAN and Frontenac Institution. She considered modifying positions and rebundling the duties of other positions, which would have allowed the grievor to drive escorts full-time (Exhibit 2, tab 61). More information was required from the site (the CBI) to determine if this would be possible.

[65] When the CSC received the grievor's request for assistance for upgrading his driver's licence, there was a question of whether the employer was obligated to provide the assistance. The grievor had no immediate job prospect, so the CSC determined his request premature. Vocational rehabilitation was not an option for him as he had no compensable injury.

[66] Ms. Wall was not aware of what happened with the other options that were identified. Several people other than her were involved in discussions with the grievor on exploring these options, including Ms. MacInnes.

F. The evidence of Lisa MacInnes

[67] Ms. MacInnes was a labour relations advisor at the KP from April 2010 until October 2013. During that time, she provided advice to management on labour relations issues, discipline, grievances, and return-to-work and accommodation matters. She was actively involved in the grievor's file commencing in April 2010, when she took the file over from Mr. Bowen. In 2012, she had the first conversation with the grievor concerning the PSC priority entitlement list and the possibility that a job for him existed elsewhere than the CSC. Other than that, her communication with the grievor was in writing through his bargaining agent representative. She was involved in drafting an action plan (Exhibit 2, tab 43), the goal of which was to facilitate the grievor's return to work.

[68] Under this action plan, the employer was to send a letter to the grievor's physician to obtain clarification on the grievor's limitations and his ability to perform his substantive position. In addition, the physician was asked to identify what tasks could be taken from other positions in an effort to rebundle tasks and provide the grievor full-time employment. A draft of this letter was shared with the grievor on December 9, 2010. He disagreed with the employer's intention to send the letter to both of his physicians (Exhibit 1, tab 50), which caused Ms. MacInnes concern because addressing the letter to only one of two treating physicians, as the grievor suggested, could have resulted in pertinent information being missed. No agreement was ever reached with the grievor on the letter's content, although it was redrafted based on some of his concerns.

[69] Positions were identified and forwarded to the grievor and his bargaining agent representative. No job offer resulted, as the positions identified were not suitable or, as with the maintenance technician position at Regional Headquarters, the grievor was concerned that he did not have the qualifications. He and his bargaining agent brought forward the escort driver position at the KP as the only option.

[70] After the possibility of a driver's position at the CBI fell through, the employer agreed to rebundle tasks. To this end, Ms. MacInnes met with the grievor in September 2012. Before any offer could be made, additional up-to-date medical information outlining the grievor's limitations was required. The response to this request was that despite being physically able to do the job being considered, it was not possible for him to return to the CSC (Exhibit 2, tabs 67 and 68).

[71] In January 2013, Ms. MacInnes met with the grievor to discuss what other steps could be taken to ensure his return to work. She encouraged him to work with the PSC. As he could not return to the CSC, it was incumbent on him to seek employment elsewhere, with the assistance of the CSC and the PSC. Ms. MacInnes felt that her meetings with the grievor were positive and that they had a common goal. Despite this, after a meeting, Ms. MacInnes would usually receive a written communication (letter or email) from the grievor stating how upset he was with how the meeting went and bringing up unresolved issues he had from the past.

[72] While the grievor was open to considering some proposals, he was not open to others. Despite Ms. MacInnes's genuine efforts to find him something, the grievor was not willing to accept any of the options presented. In the end, the strongest proposal, the precedent setting step at the KP of rebundling duties, failed when the grievor would not agree to letters being sent to his doctors. Telework was eliminated as an option as the problem the parties encountered was task-oriented, not location-oriented. Regardless, in order to telework, a position must exist.

G. Evidence of Jay Pyke

[73] Following the January 2013 meeting with the grievor, the CSC considered severing ties with him. Mr. Pyke put an end to discussions about past concerns; to continue to discuss the past was non-productive. Rather than move directly to terminating the grievor's employment, Mr. Pyke agreed to wait until the outcome of the hearing.

[74] Mr. Pyke was Warden at the KP from April 1, 2010, to September 30, 2013. When he arrived, he met with labour relations and the return-to-work committee for a status update on all outstanding cases. He was briefed by Mr. Joyce, the grievor's manager, on the lack of progress that had been made on the grievor's file. Mr. Joyce raised the question of whether the employer would pay for the training to upgrade the grievor's driver's licence. Mr. Pyke denied the request in the absence of a conditional offer of employment for the grievor.

[75] Mr. Pyke set about implementing the action plan the parties had developed by drafting a letter seeking information on the grievor's limitations from his doctors. He sent two drafts of this letter to the grievor, who responded with further changes.

Following his seven-page response to the second draft, no further drafts were sent to him.

[76] The response Mr. Pyke received in January 2011 from the grievor's psychologist, Dr. Nogrady, caused him concerns; he wondered if the doctor had even seen Mr. Pyke's request for information. Her response (Exhibit 2, tab 25) spoke to self-reported information provided to her by the grievor. It did not speak to the employer's expressed concerns. She merely reiterated that the grievor was able to perform escort duties.

[77] Despite the grievor's apparent lack of compliance with the action plan, Mr. Pyke continued his attempts to accommodate him. He was willing to bundle escort duties with other duties. He and the grievor had cursory discussions about this possibility, but nothing developed, as Mr. Pyke still required further medical information.

[78] When Mr. Pyke received the letter from Dr. MacLeod in October 2012 (Exhibit 2, tab 67) stating that the grievor was no longer able to work at the CSC in any capacity, followed by Dr. Nogrady's letter confirming this opinion (Exhibit 2, tab 68), Mr. Pyke concluded that a return-to-work at the CSC was not an option. The only option was to refer the grievor to the PSC priority list.

[79] The grievor emailed Mr. Pyke, outlining his opinion of his entitlements (Exhibit 2, tab 69), and Mr. Pyke responded on November 30, 2012 (Exhibit 2, tab 70). The grievor wrote a 23-page response to Mr. Pyke's letter (Exhibit 1, tab 64).

[80] After one final meeting with the grievor and his bargaining agent representative, Mr. Pyke concluded that they had come full circle and that an impasse had been reached. After this, no further contact with the grievor was made; the parties agreed that a third party would be required to resolve the matter.

[81] Mr. Pyke described the tone of his meetings with the grievor as strained at times but overall as not bad and not adversarial.

III. Summary of the arguments

A. For the grievor

[82] Between 2006 and 2009, the grievor was accommodated by assigning him the driving escort duties at the KP. Warden Westfall made the decision to remove him from

the workplace because, despite the fact he had been working full-time driving escorts, the escort driver position did not meet the criteria for a full-time indeterminate position. According to Ms. Westfall, the escort driver position was never intended to be a permanent accommodation even though nothing prevented that from happening. She clearly testified that continuing to accommodate the grievor in the escort driver role caused no undue hardship for the CSC. All the medical practitioners involved recognized this as the best accommodation for the grievor.

[83] In the absence of any undue hardship, the employer's refusal to continue to accommodate the grievor as an escort driver was a violation of its duty to accommodate. It should not have sent him home on sick leave. Its insistence on a position in which he could perform all the duties and functions changed with the departure of Ms. Westfall, when CSC management actively began to consider rebundling duties to ensure he was actively employed.

[84] It was open to Warden Pyke to reinstate the previous accommodation arrangement, which was the best way to end the discrimination against the grievor, but this was never considered as an option. What the doctor said in 2012 and whether the grievor cooperated with the search for another position are irrelevant. None of the problems the parties incurred would have happened had the employer not refused to continue to accommodate the grievor as an escort driver.

[85] Section 15 of the *CHRA* requires that the employer prove that it has accommodated an employee to the point of undue hardship. The Supreme Court of Canada (SCC) has said that in the absence of a *bona fide* occupational requirement, accommodation to the point of undue hardship must be proven (see *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union*, [1999] 3 S.C.R. 3, at para 54 and 62; the "*Meiorin*" case).

[86] At paragraph 62 of *Meiorin*, the SCC stated that the employer must establish that it cannot accommodate the claimant affected by a standard without experiencing undue hardship. The burden of proof shifts to the employer once a *prima facie* case of discrimination has been made. To justify sending the grievor home, the CSC had to prove it was an undue hardship to keep him in the workplace as accommodated as the existence of a *bona fide* occupational requirement was not at issue in this case.

[87] The first things to examine when looking to accommodate an employee in the workplace should be that employee's capabilities (*Meiorin*, at para 64). The employer had found an accommodation that used the grievor's capabilities and met his needs for 3.5 years. It should have been changed only if it had become an undue hardship. The employer's witnesses testified that it was not an undue hardship to continue the escort driver accommodation but that doing so did not fit within the employer's policies and procedures. In *Meiorin*, at para 68, the SCC stated that employers must build into workplace standards the concept of equality and change them if necessary to meet the duty to accommodate disabled employers.

[88] At para 22 and 32 of *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868, ("*Grismer*"), the SCC defines accommodation as what is required to avoid discrimination. The employer bears the burden of demonstrating that the standard incorporates every possible accommodation to the point of undue hardship, whether that hardship is serious risk or excessive cost. The employer did not rely on risk as a reason for refusing to continue to accommodate the grievor as an escort driver. The sole reason his accommodation was terminated in 2009 was that the employer was looking at the nature of the position; that is, it was not a full-time indeterminate position.

[89] The Canadian Human Rights Tribunal (CHRT), in *Richards v. Canadian National Railway*, 2010 CHRT 24, at para 216, outlines the method for analyzing the procedural part of the accommodation process followed by the employer. Furthermore, at paragraph 223, the CHRT makes it clear that consistent with the SCC rulings in *Meiorin* and *Grismer*, an employee's individual assessment is an essential step in the accommodation process. Each individual is judged according to his or her personal abilities and not to presumed characteristics, which are frequently based on bias and historical prejudice.

[90] When dealing with an accommodation request, an employer must recognize that handicaps have both physical and mental components (*Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City)*, 2000 SCC 27, at para 77 to 83). The employer must consider both elements when determining the suitability and feasibility of an accommodation. The CSC did not consider the impact of its actions on the grievor when, after more than three years, it terminated his accommodation for financial reasons.

[91] The employer has accepted that rebundling duties was one means of accommodating the grievor (see Exhibit 2, tabs 76 and 77). Its policies allow for a position to be altered in order to accommodate an employee. Rebundling job duties has been recognized as an effective means of accommodating a disabled worker in the workplace when no one job would do so (*Tarxien Co. v. C.A.W. Loc. 1090* (1997), 62 L.A.C. (4th) 129, at 146 and 149). Ms. Westfall refused to look at rebundling duties; she was focused on full-time indeterminate positions in which the grievor could do the full range of duties. Her inflexibility resulted in a breach of the *CHRA*.

[92] The stand Ms. Westfall took that neither she nor the CSC was under any obligation to turn the escort driver role into a full-time indeterminate position for the grievor is inconsistent with the law. The employer is not obligated to create work in order to accommodate the grievor, but in this case Ms. Westfall knew that work existed (*Audet v. Canadian National Railway*, 2006 CHRT 25; *Essex Police Services Board v. Essex Police Association* (2002), 105 L.A.C. (4th) 193; and *Ontario Liquor Boards Employees' Union v. Ontario (Liquor Control Board)*, [2002] O.G.S.B.A. No. 32 (QL)).

[93] There was a positive onus on the employer to explore all options in order to accommodate the grievor, and it did not end when the grievor's treating physicians, Dr. MacLeod and Dr. Nogrady, stated that it was not possible for the grievor to return to work at the CSC based on the effects of his past treatment by the CSC (Exhibit 1, tab 94). The employer could have sat down and discussed the past relationships with management, but Mr. Pyke was not willing to do so. The grievor's problems were linked to the past, which he needed to address in order to return to the workplace. Regardless, whatever happened in 2012 was moot; it would not have happened had Ms. Westfall not withdrawn the escort driver role from the grievor in 2009.

[94] The issues with the grievor's productivity and the employer's ability to find him were performance issues, not accommodation issues. These were the reasons he was sent home; it was not a question of undue hardship. Ms. Westfall stated in her testimony that there was no undue hardship. She did not actually know how occupied he was during the workday. No one at the KP doubted that he was busy. Even if there was a lack of work, the employer should have explored options and assigned the grievor more work. Ms. Westfall admitted that the escort driver role was a good fit for the grievor based on his doctors' recommendation.

[95] The employer knew that the grievor's disability was likely permanent and ought to have considered the escort driver position as a permanent accommodation as recommended by the doctors, including Health Canada's Dr. Glass (Exhibit 1, tabs 85, 89 and 90). The employer chose not to and, as a result, caused further injury to the grievor. Equity says that a wrongdoer cannot benefit from his or her wrongdoing. Nor should the employer in this case be allowed to rely on how sending the grievor home in 2009 affected the grievor as proof of his non-cooperation with the process; otherwise, the employer would benefit from its discriminatory behaviour.

[96] Between 2008 and 2009, the employer looked only for full-time indeterminate positions in order to accommodate the grievor. Ms. Westfall was prepared to create a temporary escort driver position but would not consider creating a full-time indeterminate one. She was interested only in finding a suitable full-time funded position, and when none arose, she decided she had no other option but to send the grievor home on sick leave, which was a clear violation of the employer's duty to accommodate. The employer was obligated to provide him with other viable options to meet his accommodation requirements, not merely sending him home to wait, particularly when, for all purposes, the existing accommodation was working and met all his needs.

[97] Bundling duties should have been given due consideration by Ms. Westfall. Her failure to was a clear violation of the employer's duty to accommodate the grievor. The fact that the employer, subsequent to Ms. Westfall's departure, was willing to consider bundling driver duties at the CBI shows that it recognized that bundling duties to create a position in which to accommodate the grievor was a suitable means by which to meet his accommodation needs.

[98] The grievor was shocked when he was sent home without explanation and put on leave. He was given no opportunity to respond to the employer's concern. He requested the reasons for the termination of his accommodation in writing (Exhibit 1, tab 24) and was advised by Ms. Westfall that no suitable positions existed at the KP or in the CSC's Ontario Region in which to accommodate him (Exhibit 1, tab 25), despite the fact that Dr. Glass of Health Canada stated that the grievor was fit to perform the duties of an institutional driver (Exhibit 2, tab 25).

[99] After Mr. Pyke's arrival as KP warden in April 2010, the grievor's file was reviewed, in December 2010. The only reason Mr. Pyke gave for this delay contacting

the grievor was that he wanted to ensure that he had things in order before he contacted the grievor. This explanation is insufficient since the grievor had been off work since 2009. A further delay of 18 months occurred when the parties could not agree with the content of a letter seeking further clarification of the grievor's medical restrictions. He provided the employer with what he thought was acceptable (Exhibit 1, tab 90) and heard nothing further for 18 months. It was clear from the evidence that at a meeting of the parties on February 12, 2013, Mr. Pyke was not interested in responding to the grievor's concerns over his treatment by KP management.

[100] The employer's witness, Mr. Bowen, suggested that the grievor was uncooperative with the employer's attempts to find him a suitable accommodation. There was clearly a difference of opinion between the grievor and Mr. Bowen, which is not the same as a refusal to cooperate. Both Ms. Westfall and Ms. Vermette stated that the grievor was cooperative. He asked for training, explored options outside the CSC, tried the parole officer position found by the employer, expressed an interest in telework, and was clearly engaged and cooperative with the process until communication from the employer ceased from Mr. Pyke's arrival until September 2012. From the fall of 2012 until January 2013, the grievor attended several meetings in order to resolve his accommodation issues. Even though he was initially reluctant to register for the PSC priority list, he ultimately did.

[101] Human rights jurisprudence requires that the grievor be put in the position he would have been but for the discrimination (see *Impact Interiors Inc. v. Ontario (Human Rights Commission)*, [1998] O.J. No. 2908, at para 2 (QL); *Chopra v. Canada (Attorney General)*, 2006 FC 9, at para 41, and 2007 FCA 268, at para 27 and 29; *Canada (Attorney General) v. Morgan*, [1992] 2 F.C. 401 (C.A.). Had the grievor been allowed to continue as an escort driver, he would likely still be employed full-time. In addition, under sections 53(2)(*e)* and 53(3) of the *CHRA*, if he is successful in proving he was a victim of discrimination, he is entitled to general damages for pain and suffering, plus additional damages for willful or reckless discrimination. The parties should be left to determine the appropriate compensation due him in the event that the grievance is upheld.

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

[102] The main issue to be determined is whether the employer has fulfilled its duty of accommodation to the point of undue hardship. The grievor was employed by the

CSC as an institutional driver. His main duties were to perform messenger duties, to deliver freight and to drive prisoner escorts. Eventually, he was accommodated by removing the messenger and freight functions from his daily activities, leaving only the escort function. According to Ms. Westfall, this accounted for less than 70% of his paid hours. Mr. Pyke and Ms. Westfall both testified that there was no such position as an escort driver at the KP; nor were there sufficient escorts to constitute a full-time position for the grievor.

[103] When the grievor assumed the escort driver role in January 2006, it was clearly indicated to him that this was a temporary accommodation (Exhibit 2, tab 10). There was no indication until the employer received the Health Canada report that the grievor required a permanent accommodation. At no time during the 3½ years he was driving escorts was there any indication that he was permanently disabled. When this was confirmed by Health Canada, the employer began to look for a permanent full-time option in which to accommodate him, according to Ms. Westfall. While the search continued, the employer requested updates on the grievor's limitations. There was nothing malicious in these requests. The employer was entitled to know the status of his limitations to ensure that he was accommodated properly.

[104] Over the course of more than two years, the doctors' reports focused exclusively on the escort driver function as the only accommodation suitable for the grievor. No such position existed, so the employer sought a third opinion, from Health Canada. Its report took more than one year to arrive. The employer should not be penalized for continuing to accommodate the grievor as an escort driver in the meantime.

[105] Once it became evident that the grievor was permanently disabled, a new accommodation was required. The problem, according to Ms. Westfall, was finding the funding for a suitable full-time position that met his extensive limitations. She did not rule out bundling duties as a possibility. When the grievor's physician confirmed that he was not able to perform the duties of an inmate grievance coordinator (Exhibit 1, tab 78) in November 2005, he was accommodated in his existing position doing limited duties, and the idea of combining the inmate grievance coordinator duties with driving escorts was abandoned.

[106] Both Ms. Westfall and Mr. Pyke had concerns over the impact on the grievor of stressful situations occurring while he was on an escort. Such a situation could have posed a safety threat to him and the public. Neither warden was willing to accept the

risk the grievor's continued accommodation posed to the public. Wardens have the liberty to determine the appropriate level of acceptable risk.

[107] Between 2006 and 2012, the employer made continuous and vigorous efforts to find sufficient duties to combine with driving escorts to create a full-time position. The duties sought were within the same group and level to avoid the necessity of classifying a position cobbled together from positions of several groups and levels. The intention was to bundle duties within the same classification to create full-time employment for the grievor. In addition, he was further accommodated by his placement on the PSC priority list.

[108] The evidence is clear that the grievor received notice of approximately 50 job possibilities by virtue of his placement on the PSC priority list. He looked at one, decided he did not meet the qualifications and went no further. He did not apply to any of these positions. Clearly, he was not cooperating with the accommodation process. Returning phone calls and responding to emails did not mean he was cooperating with the employer in the accommodation process. Every proposal made to him was met with a "No." There was no willingness on his part to find a middle ground. The only acceptable option to him was the escort driver position, which was not acceptable to the employer. He was rigid in his approach to accommodating his needs and would not compromise.

[109] The employer's efforts continued after 2009. Ms. Westfall contacted other departments, looking for possible accommodation options (Exhibit 2, tab 33). Eventually, the CBI agreed to accept the grievor as an escort driver. When consulted for their approval of this option, the grievor's doctors indicated that he should not return to work at the CSC. The point of undue hardship was reached.

[110] Since the *Meiorin* decision, the employer's duty to accommodate to the point of undue hardship has been refined (see *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43, and *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4). The duty to accommodate an employee is to ensure he or she is able to work and is not excluded from employment on the basis of a prohibited ground under the *CHRA*. *Gibson v. Treasury Board (Department of Health)*, 2008 PSLRB 68, at para 27 and 28,

set out the proper method of analysis to determine if an employee is being discriminated against by not being accommodated.

[111] According to *Gibson*, the employee is required to establish a *prima facie* case of discrimination. The grievor has not met his burden of proof. The evidence shows that the employer met its obligations when he was offered the escort driver position at the CBI. According to Mr. Pyke, the Warden at the CBI was willing to offer the grievor the escort driver position there if his doctor approved. The doctor did not (see Exhibit 2, tab 65).

[112] There was no misunderstanding of the grievor's limitations, which remained unchanged until October 2012. While he was at work and after he was sent home in 2009, the employer continued its search for options to accommodate his needs. The grievor refused to entertain these options. Nor would he entertain the possibility of being a part-time escort driver (see Exhibit 1, tab 81). The employer made extensive and conscientious efforts to find a solution that would allow the grievor to be gainfully employed in light of his limitations (see *Spooner v. Treasury Board (Correctional Service of Canada)*, 2009 PSLRB 60, at para 137).

[113] In 2009, after receiving the Health Canada report, Ms. Westfall determined that there were safety issues with the grievor driving escorts and that there were insufficient escorts for a driver to constitute full-time employment. The employer must take into account the work context and the health and safety of its other workers (see *Sioui v. Deputy Head (Correctional Service of Canada)*, 2009 PSLRB 44, at para 91).

[114] The employer, as it did in *Sioui*, fulfilled its obligation by making numerous efforts to find the grievor a suitable position as well as ensuring he had access to PSC resources (see *Sioui*, at para 92).

[115] Undue hardship depends on the facts of the situation. The employer was not required to unduly interfere with its workplace; nor was it required to incur undue expense in order to accommodate the grievor (see *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489; *Commission Scolaire Régionale de Chambly v. Bergevin*, [1994] 2 S.C.R. 525; and *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970).

[116] The employer is not required to create a job. The problem that the employer faced was finding enough duties that could be combined to make a full-time position. It accommodated the grievor for 3.5 years as an escort driver and should not be penalized for its effort (see *Shaw Pipe Protection (A Shaw Co.) v. United 59*, [2013] A.G.A.A. No. 20 (QL), and *Lafrance v. Treasury Board (Statistics Canada)*, 2009 PSLRB 113).

[117] The only accommodation the grievor would accept was that of an escort driver. An employee is not entitled to his or her preferred work as a reasonable accommodation (see *Lafrance*, at para 115). The employer made continuous efforts to find the grievor a job in his preferred area, which came to fruition with the position at the CBI. These efforts met their end in October 2012 when his doctor said the grievor could not return to the CSC.

[118] The employer has discharged its duty to accommodate the grievor. He was provided sick leave, was offered other positions and had his employment protected. The employer explored a wide range of options and showed nothing but good faith. It looked at long-term and short-term options, but the grievor was not interested in short-term options. He declined all efforts by the employer to return him to the workplace. He was only interested in escort driver positions. The duty to accommodate does not guarantee an employee an immediate or perfect accommodation. Nor can an employee pick and choose what he or she will do (see *Calgary District Hospital Group v. U.N.A.*, 28 C.L.A.S. 86; *Sysco Foodservices of Toronto v. Teamsters, Local 419*, [2009] O.L.A.A. No. 320 (QL); *Honda Canada Inc. v. Keays*, 2008 SCC 39; and *Callan v. Suncor Inc.*, 2006 ABCA 15).

[119] A grievor loses his or her right to an accommodation by turning down a reasonable option, so the grievor's conduct is relevant in deciding if the employer has discharged its duty to accommodate (see *Renaud*, at pages 30 and 31). The grievor was not contributing positively to the accommodation process. He met every suggestion with a negative response. An employee is expected to accept a reasonable compromise and to communicate his or her limitations (see *Chang v. Federal Express Canada Ltd.*, [2013] C.L.A.D. No. 209 (QL); *Spooner*; and *King v. Treasury Board (Correctional Service of Canada)*, 2011 PSLRB 122).

[120] The employer argues that in the event that I decide that the employer has breached its duty to accommodate the grievor and that he is entitled to damages, he

has a duty to mitigate his losses. He received disability insurance from the time the grievance was filed until March 2012. No evidence has been provided of any loss. It is public knowledge that the KP was closed in 2013 and that many of its employees were subject to workforce adjustment. Any reinstatement of the grievor to the workplace should be limited to the period from when he was removed from the workplace to the date on which he would have been subject to workforce adjustment or laid off.

[121] Any pain and suffering to which the grievor was subjected resulted from his unwillingness to deal with the past and to move on. Mr. Pyke took the approach that he could not fix the past and that he wanted to fix the future. Others continued to work on solutions even after the unsuccessful attempt to resolve the accommodation issues between Mr. Pyke and the grievor. Any humiliation and stress the grievor suffered were not caused by being sent home. Stress was an issue for the grievor before he left the workplace.

[122] The parties developed an action plan (Exhibit 2, tab 43) at a meeting on December 1, 2010. The grievor refused to cooperate with the plan by providing objective medical reports. Those he provided reflected only his version of the facts as relayed to his physicians. His lack of cooperation resulted in a failure by the parties to reach a mutually agreeable resolution. The grievor played a role in any delays accommodating him. He refused to move forward unless perceived wrongs from his employment past were addressed.

[123] There is no evidence of egregious conduct by the employer under subsection 53(3) of the *CHRA*. When Ms. Westfall made the decision to remove the grievor from the workplace in 2009, there were no other duties available that met his limitations and that could have been cobbled together to make him a full-time position.

C. Grievor's rebuttal

[124] There is no evidence before me to prove that the grievor was not occupied on a full-time basis driving escorts. The only evidence that he was came from him. Ms. Westfall acknowledged that he was busy. His evidence was not challenged. At best, the decision was made for monetary reasons. Ms. Westfall acknowledged that the employer would have suffered no undue hardship had the escort driver accommodation continued.

[125] As for the issue of the stressful nature of the work, Health Canada accepted that despite the grievor's need to avoid stressful occupations, driving passenger escorts was acceptable (Exhibit 1, tab 89). With due deference to Ms. Westfall's decision as KP warden, any concerns over safety in the event that the grievor continued to drive escorts was not expressed; nor is there any mention of it in the letter given to him when he was sent home. In order for the possibility of a safety risk to justify the termination of the grievor's accommodation, the employer had to establish a *bona fide* occupational requirement or undue hardship.

[126] *Meiorin* sets out the test for undue hardship. The employer has provided no evidence of a standard rationally tied to the escort driver job or necessary for the fulfillment of a work-related purpose that establishes undue hardship. Speculating about the existence of a safety issue is not sufficient for the purposes of establishing undue hardship. Clear and cogent evidence of safety concerns, which are not anecdotal or impressionistic, are required (see *Meiorin*, at para 79). The employer's concerns, as expressed at the hearing, provided no analysis of the risk concern and were purely speculative and hypothetical.

IV. Reasons

[127] Section 7 of the *CHRA* provides that it is a discriminatory practice to refuse to continue to employ any individual or, in the course of employment, to differentiate adversely in relation to an employee on a prohibited ground of discrimination. Disability is a prohibited ground of discrimination (subsection 3(1) of the *CHRA*). Section 25 of the *CHRA* defines "disability" as any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug.

[128] In order to establish that an employer engaged in a discriminatory practice, a grievor must first establish a *prima facie* case of discrimination, which is one that covers the allegations made and that if the allegations are believed, would be complete and sufficient to justify a finding in the grievor's favour in the absence of an answer from the respondent (see *Ontario Human Rights Commission v. Simpsons-Sears*, [1985] 2 S.C.R. 536, at para 28)). The Board cannot take into consideration the employer's answer before determining whether a *prima facie* case of discrimination has been established (see *Lincoln v. Bay Ferries Ltd.*, 2004 FCA 204, at para 22).

[129] It is not necessary that discriminatory considerations be the sole reason for the actions at issue in order for the claim of discrimination to be substantiated. The grievor had only to show that discrimination was one of the factors in the employer's decision (see *Holden v. Canadian National Railway Company* (1990), 14 C.H.R.R. D/12 (F.C.A.), at para 7). The standard of proof in discrimination cases is the civil standard of the balance of probabilities (see *Public Service Alliance of Canada v. Canada (Department of National Defence)*, [1996] 3 F.C. 789 (C.A.)).

[130] As I will explain later in this decision, I find that the grievor has established a case of discrimination on a *prima facie* basis for which the employer has not presented evidence demonstrating that its actions were in fact not discriminatory or established a statutory defence that justifies the discrimination; as a result, the grievor's claim is substantiated.

[131] The grievor was employed by the CSC at the KP as an institutional driver. Due to his disability, he was unable to perform the messenger and freight functions of his job. The parties recognized his disability and accommodated him on a temporary basis commencing in January 2006 as an escort driver, in accordance with the restrictions identified by the grievor's medical professionals, which were accepted by the employer.

[132] The grievor continued to perform solely escort driver duties rather than the full range of institutional driver duties outlined in his job description between January 2006, and September 8, 2009, when he was advised via email that his accommodation had ended as it was impossible to continue it, due to the detailed limitations outlined in the medical report received from Health Canada (see Exhibit 1, tab 23). This medical report confirmed that the grievor's restrictions were considered a permanent disability and that he required workplace accommodation due to these medical limitations. It also stated that he was capable of continuing in his accommodated duties as an escort or passenger driver provided that sufficient work was available (see Exhibit 2, tab 25). Nonetheless, the employer decided to terminate the grievor's employment duties and directed that he go on sick leave. As such, I find that the grievor has established on a *prima facie* basis that the employer engaged in a discriminatory practice by refusing to continue to employ him and adversely differentiating in relation to his employment on account of his disability (s. 7 of the *CHRA*).

[133] Once a *prima facie* case has been established, the employer can avoid an adverse finding by calling evidence showing that its actions were in fact not discriminatory or by establishing a statutory defence that justifies the discrimination (*A.B. v. Eazy Express Inc.*, 2014 CHRT 35, at para 13). Where the employer leads evidence to rebut the *prima facie* case, it is up to the grievor to establish that the employer's evidence is false or a pretext, and that the true motivation behind the respondent's actions was, in fact, discriminatory.

[134] Ms. Westfall was the KP warden in September 2009 and was responsible for the decision to remove the grievor from the workplace and to end his accommodation of solely performing escort duties. She freely admitted that the escort work existed and was required and that she received funding in her operational budget to pay for the costs of transporting prisoners. Furthermore, she unreservedly testified that to continue to accommodate the grievor as an escort driver would have caused no undue hardship to the employer. Her rationale for ending the accommodation, provided by the grievor, was based on the fact that his disability was considered permanent and that in her opinion he needed to be accommodated in a full-time indeterminate position as it was not the employer's practice to create a position in which to accommodate a disabled employee. Furthermore, she believed that based on the Health Canada report, despite the fact that it recommended that the grievor remain as an escort driver, a safety issue was at play, and she was not willing to accept the risk of allowing the grievor to continue in the escort driver role.

[135] The employer relied on subsection 15(2) of the *CHRA* as a statutory defence to what would otherwise have been an act of discrimination against the grievor. That subsection reads as follows:

> *Exceptions*
>
> ***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; (…)*
>
> *Accommodation of needs*
>
> ***15.*** *(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.*

[136] The former Board has had occasion to consider this issue on several occasions, one of which was in *Sioui*, in which the Vice Chairperson wrote the following:

. . .

> *75. The application of the obligation to accommodate was interpreted in* British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (BCGSEU), *[1999] 3 S.C.R. 3 (*Meiorin*), at para 54. To summarize, when an employer applies an employment standard, it must justify that standard by showing that (1) it is rationally connected to job performance, (2) the standard was adopted because it was necessary to fulfill a legitimate work-related purpose and (3) the standard is reasonably necessary for accomplishing that job. The employer must be able to demonstrate that it is impossible to accommodate employees with the same characteristics without suffering undue hardship.*
>
> *76. The criteria developed in* Meiorin *have provided a framework for assessing the legitimate purpose of an employment standard and the intent of the employer when the standard was adopted in order to determine its validity. In addition to those criteria, there is a test — reasonableness — used to assess whether the standard was necessary in the context of the job in question. The courts have also ruled that the criteria must be applied with common sense and flexibility:* Meiorin, *at paragraph 63;* Commission scolaire régionale de Chambly v. Bergevin, *[1994] 2 S.C.R. 525, at 546;* Central Alberta Dairy Pool v. Alberta (Human Rights Commission), *[1990] 2 S.C.R. 489, at 520-521; and* McGill University Health Centre (Montreal General Hospital), *at para 15.*

. . .

[137] Despite Ms. Westfall's claims that for safety reasons, the grievor could not continue as an escort driver in 2009, there was no evidence led establishing that there was a true threat to the safety of prisoners who were being escorted or correctional officers who accompanied the grievor and the prisoners on those escorts. I find that the employer has not established the existence of a threat to safety to support its claim to the exceptions set out in subsections 15(1) and 15(2) of the *CHRA*. I agree with

the grievor's counsel that more than mere speculation that a threat exists is required to satisfy the *Meiorin* test.

[138] Furthermore, Mr. Pyke, who was also the KP warden, following Ms. Westfall, and who was also involved in refusing to accommodate the grievor either temporarily or permanently as an escort driver, provided nothing in his evidence to support his conclusion that an unacceptable threat to safety would have arisen were the grievor allowed to continue driving escorts.

[139] The decision to terminate the grievor's accommodation as an escort driver was an arbitrary decision by Ms. Westfall, the need for which was unsupported by the evidence. Ironically, the evidence is that the Warden at the CBI did not envisage such a threat. His institution employed escort drivers, and he would have agreed to employ the grievor in this capacity but for a medical report dated October 22, 2012, indicating that due to the stress that the accommodation process caused the grievor, he was unable to work in any capacity within the CSC (see Exhibit 2, tab 68).

[140] I recognize that there was an ongoing attempt to find a full-time permanent accommodation for the grievor. Numerous witnesses testified to that effect, including him. This process was fraught with tension and discord between the parties and no doubt contributed to the lengthy delay returning him to the workplace.

[141] Despite these ongoing efforts, the fact remains that no undue hardship would have been caused by allowing the grievor to remain as an escort driver at the KP even on a temporary basis while a more permanent solution was sought. The employer did not choose to pursue this option; nor would it consider it. Moreover, if the grievor had performance issues related to his discharge of the escort duties, such as described by witnesses for the employer, the proper method of dealing with them would have been under the different performance management policies the employer had in place and not by terminating an otherwise reasonable and effective accommodation.

[142] Based on these facts, the grievor has established that he is disabled and is in need of workplace accommodation. It has also been established that the employer had initially properly accommodated his medical limitations by limiting his driver duties to escorts rather than requiring him to perform the full range of the driver duties in his job description.

[143] However, the employer has not demonstrated that its refusal to continue to employ the grievor was based on a *bona fide* occupational requirement nor has it provided any convincing evidence to rebut the grievor's *prima facie* case of discrimination. Therefore, I conclude that the employer has refused to continue to employ the grievor on the basis of his disability, which is prohibited by section 7 of the *CHRA* and violates article 19 of the collective agreement.

[144] As a member of the new Board, I have the authority pursuant to paragraph 226(2)(*b*) of the *PSLRA* to award damages to the grievor as a result of the employer's discriminatory practice under subsections 53(2)(*e*) and (3) of the *CHRA*, which provide as follows:

> *Complaint substantiated*
>
> ***53.*** *(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:*
>
> *(…)*
>
> (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.*
>
> *Special compensation*
>
> *(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.*

[145] The CSC has accepted that it is under a duty to accommodate its disabled or injured employees as is evidenced by CD 254 (Exhibit 2, tab 76), in which the CSC commits to the following: "2. To provide employees of the Correctional Service of Canada who incur an injury or illness the support and assistance to return to fully productive employment, as soon as medically feasible …."

[146] All the witnesses who testified on behalf of the employer recognized this obligation. Yet, despite medical information provided by the medical professionals who treated the grievor as well as the employer's consultant, and based on the existence of a threat that was speculative at best, the employer not only discriminated against the grievor but recklessly and wilfully disregarded its policies on workplace accommodations as well as the *CHRA*.

[147] Paragraph 27 of the guidelines to CD 254 (Exhibit 2, tab 77) indicates that when essential duties of a job cannot be eliminated, modifications may be made to the work method and procedure and that job restructuring is a possibility. By limiting the grievor's duties to driving escorts, the employer did restructure the grievor's job and successfully accommodated him. There was no reasonable justification for ceasing to accommodate him in this role or for refusing to continue it even temporarily while the search for a suitable permanent accommodation was ongoing. Had the employer done this, at the very least, the grievor would have remained in the workplace.

[148] As I stated in *Taticek v. Treasury Board (Canada Border Services Agency)*, 2015 PSLREB 12, at para 114, the SCC noted in *Renaud,* that employees seeking accommodation have a duty to cooperate with their employers by providing information as to the nature and extent of their alleged disabilities that will enable the employers to determine the necessary accommodations. The grievor properly fulfilled this duty. He was free with the medical information, which identified his restrictions and a suitable accommodation. He did consider other alternatives and did try working in the parole officer position. His doctor reviewed other options proposed by the employer on his behalf. He requested job training. He registered with the PSC, albeit reluctantly, as requested by his employer. His frustration with the process and the employer's lengthy delay in finding a suitable accommodation should not be considered as evidence of his unwillingness to cooperate with the employer in the accommodation process. Like the grievor, I fail to comprehend why the employer arbitrarily decided after more than three years to terminate the escort driver role in which, up to then, he had been successfully accommodated.

[149] The purpose of the *CHRA* as expressed in its section 2 is to ensure that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society,

without being hindered in or prevented from doing so by discriminatory practices based on disability (among other things). The employer has interfered with the grievor's ability to live the life that he wished and would have been able to provide for himself but for the employer's actions.

[150] Counsel for the employer argued that there is no evidence of any measurable degree of pain and suffering for which the grievor should be compensated under s. 53(2)(*e*) of the *CHRA*. Contrary to what the employer's representative has argued, I believe that there is evidence of the grievor's pain and suffering before me, including the physician's letter (Exhibit 2, tab 68), in which she clearly outlines the impact of the employer's actions on the grievor and the amount of stress these actions have caused.

[151] Based on this and the other evidence presented before me, I assess an award of $10 000 to be paid by the employer to the grievor pursuant to paragraph 53(2)(*e*) of the *CHRA*. In addition, I assess an award of $2500 to be paid by the employer to the grievor pursuant to subsection 53(3) of the *CHRA* in recognition of the employer's wilful and reckless disregard of its obligations under the *CHRA*, CD 254 and the Treasury Board *Policy on the Duty to Accommodate Persons with Disabilities in the Federal Public Service* (Exhibit 2, tab 75) and for not taking every reasonable step to properly accommodate the grievor. The employer's attempts at accommodating the grievor after the ill-thought decision to withdraw the escort driving duties from him mitigated the employer's wilful and reckless conduct, as was the case in *Milano v. Triple K. Transport Ltd.*, 2003 CHRT 30. For this reason, I have assessed damages under subsection 53(3) of the *CHRA* at the lower end of the available damages spectrum.

[152] The grievor's counsel requested that in the event that the grievance was allowed, I would allow the parties time to determine between themselves what amounts are due to the grievor under the headings of lost wages, accumulated sick leave, vacation and other benefits under the collective agreement.

[153] As the KP was closed in 2013, any loss of wages shall be calculated to the date of its closing, following which the grievor shall be entitled to any benefits he would otherwise have been entitled to under the workforce adjustment provisions of his collective agreement, including that of consideration for a reasonable job offer. As noted earlier in this decision, the parties have provided me with extensive arguments in support of their cases. Counsel provided me with two volumes of case law to

support their respective arguments. While I read each case, I have referred only to those of primary significance in my decision.

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

(The Order appears on the next page)

V. Order

[155] Grievance 566-02-5573 is allowed.

[156] The employer shall pay the grievor the sum of $10 000 pursuant to paragraph 53(2)(*e*) of the *CHRA* within 60 days of this decision.

[157] The employer shall pay the grievor the sum of $2500 pursuant to subsection 53(3) of the *CHRA* within 60 days of this decision.

[158] The matter will be remitted to the parties for a period of 60 days from the date of this decision, during which time the parties are to determine and agree upon what other compensatory amounts are due the grievor, as set out earlier in this decision.

[159] No later than 60 days from the date of this decision, the parties will advise the Board whether they successfully reached an agreement as set out earlier in this decision.

[160] In the event that the parties are unable to reach an agreement as set out earlier in this decision, the matter will be scheduled for a further hearing to be held no later than 90 days from the date of this decision or at the adjudicator's first availability after that date.

[161] I will retain jurisdiction to deal with matters arising out of this order for a period of 180 days from the date of this decision.

May 11, 2015.

Margaret T.A. Shannon,
adjudicator