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Public Service Labour Relations and Employment Board Act and *Public Service Labour Relations Act*

Before a panel of the Public Service Labour Relations and Employment Board

BETWEEN

NAIM RAHMANI

Grievor

and

DEPUTY HEAD
(Department of Transport)

Respondent

Indexed as
Rahmani v. Deputy Head (Department of Transport)

In the matter of an individual grievance referred to adjudication

Before: Marie-Claire Perrault, a panel of the Public Service Labour Relations and Employment Board

For the Grievor: Marie-Claude Chartier, labour relations officer, Professional Institute of the Public Service of Canada

For the Employer: Michel Girard, Legal Services, Treasury Board Secretariat

Heard at Ottawa, Ontario,
November 23 to 25 and 27, 2015.
(PSLREB Translation)

[1] This decision deals with a grievance referred to adjudication at the Public Service Labour Relations Board ("the former Board") on June 26, 2013. On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board ("the new Board") to replace the former Board. Pursuant to section 393 of *Economic Action Plan 2013 Act, No. 2* (S.C. 2013, c. 40), a proceeding commenced under the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2) before November 1, 2014, is to be taken up and continue under and in conformity with the *Public Service Labour Relations Act* as it is amended by sections 365 to 470 of the *Economic Action Plan 2013 Act, No. 2*.

I. Individual grievance referred to adjudication

[2] On April 4, 2013, Transport Canada ("the employer") terminated Naim Rahmani ("the grievor") for committing a violent act in the workplace on February 10, 2012. The grievor filed a grievance against his termination; he alleged that the employer did not consider his state of health at the time of the incident.

[3] The issue in dispute is simple: was the termination justified?

[4] Since the termination was a disciplinary measure, it must first be established whether misconduct occurred and, if so, whether the sanction was appropriate. Since the grievor raised a discrimination issue in his grievance, the analysis of the reasons behind the termination must include the employer's human rights obligations.

[5] For the following reasons, I find that misconduct occurred that merited a severe penalty but that the employer failed to account for the grievor's medical state. That behaviour of the employer also constituted a discriminatory act. The termination is annulled, with certain conditions.

II. Summary of the evidence

[6] The employer called six witnesses: Patrick Desbiens, the grievor's immediate supervisor and the victim of the violent act; Rémy Knoerr, who in February 2012 was chief of engineering, Standards Branch, National Aircraft Certification, and Mr. Desbiens's hierarchical superior; Nicole Pharand, type certificates officer in the section in which the grievor worked; Branimir Dulic, senior engineer and the grievor's colleague; David Turnbull, director, National Aircraft Certification, and Mr. Knoerr's

hierarchical superior; and Martin Eley, then director general, Civil Aviation, who signed the termination letter.

[7] The grievor testified on his own behalf. Also testifying for him were Dr. Richard Bergeron, psychiatrist; Dr. Stanislaw Maziarz, family physician; and Dr. Gilles Hébert, clinical psychologist. The labour relations officer who represented the grievor at the hearing testified briefly about the disciplinary meetings in which she participated. Counsel for the employer did not object to that testimony.

[8] The evidence was about the facts that led to the incident, the incident itself and its disciplinary consequences, and psychological and medical expertise. Undisputed facts will be presented without attribution. When the witnesses' versions differ, the contradiction will be noted and resolved.

A. Background

[9] The grievor is an engineer and a member of the Architecture, Engineering, and Land Survey group. He is represented by the Professional Institute of the Public Service of Canada (PIPSC). His group is subject to the collective agreement that the Treasury Board and PIPSC concluded and that has September 30, 2014, as its expiry date.

[10] The grievor worked as a senior engineer in the Standards Branch, National Aircraft Certification, in the Electronic Equipment Design Assurance Section. Three engineers work in that section, under a team manager's direction. Their role consists of working with clients looking to have their airplanes accredited so as to obtain a type certification, which is an essential condition for receiving authorization to use the device as an airplane in Canada. Aircraft certification work necessarily includes different elements aimed at ensuring the integrity of the engine, fuselage, flight controls, etc. The section in which the grievor worked is responsible for checking computer components. Thus, the engineers in that section must work in close cooperation with the aircraft industry.

[11] The grievor started working for the employer in 2003 in the same section; he was first classified at the ENG-3 level and then moved to the ENG-4 level around 2005 or 2006.

[12] Patrick Desbiens, first the grievor's colleague and then his supervisor, began working for the employer at around the same time but at the ENG-4 level from the

start. When the grievor's classification moved up to ENG-4, their duties were identical, but they worked on different projects that their manager, Mr. Rao, assigned to them.

[13] For reasons that remain unexplained, the relationship of the grievor and Mr. Desbiens deteriorated over time. Mr. Desbiens testified that starting in 2008, the grievor criticized him for his incompetence and his lighter workload and for the favouritism from which he benefited. Mr. Knoerr testified that the grievor often denigrated his colleagues, Mr. Desbiens and Mr. Dulic, in conversations with him. For his part, the grievor testified that his colleagues did not work as hard as he did and that the criticisms that he levelled against them were strictly professional. Mr. Desbiens testified that he once expressed doubts to management about how the grievor had proceeded with one or more files.

[14] Until the end of 2008, the grievor's performance evaluations were satisfactory and showed that clients were satisfied. Starting in 2009, the employer seemed to note a dissatisfaction, especially because of the strained relations between the grievor and his colleagues.

[15] Starting then, the witnesses agreed that the grievor began looking to leave the section. He asked to be deployed or transferred elsewhere. One position in particular interested him, in avionics, but he was told that he did not have the required qualifications.

[16] He also sought a year or two of leave without pay, but Mr. Knoerr refused. According to Mr. Knoerr, the section's operational needs did not allow it.

[17] Throughout that period, from 2009 to the start of 2012, it seems that the grievor's relationships with his colleagues and superiors were strained at that the grievor occasionally had outbursts. However, he noted that he had harmonious relationships with clients and colleagues in other sections with whom he worked on aircraft certification projects. He submitted as evidence a few congratulatory emails for team dedication in different projects in which he had worked and for a good number of type certifications, which were the outcome of the certification work he participated in.

[18] During that period, the grievor took sick leave several times, supported by medical certificates. He also took parental leave of around eight months for the birth

of his son in 2010.

[19] At the start of 2012, the grievor was very unhappy and sought desperately to leave the section. He had just been refused for the avionics position, which was unfair, according to him. Mr. Knoerr testified about staffing the position in question, and no evidence on file led me to believe that anyone was seeking to harm the grievor by selecting another candidate whose occupational profile was better suited to the position. The grievor took a three-week sick leave in January 2012, which was supported by a medical certificate.

[20] When he returned to work, he learned on February 10, 2012, by email that Mr. Desbiens had just been appointed manager of his team. The grievor testified that he took that news very badly; he had the impression that the door to the cell in which he found himself confined had been firmly locked.

[21] A few minutes after the email, Mr. Desbiens appeared in the grievor's office. According to Mr. Desbiens, he wanted to check the grievor's working hours because he had just received a request for travel authorization from the grievor that included a calculation of overtime to be paid. The grievor perceived that check as a personal attack that came as soon as Mr. Desbiens was assigned the manager's role. He reacted negatively. Mr. Desbiens left the grievor's office and returned to his own. The grievor rose to go see Mr. Knoerr, who was absent. He then decided to clear things up with Mr. Desbiens. He entered Mr. Desbiens's office.

[22] At this point, the versions differ considerably. Since the incident is the actual reason for the termination, I will summarize both the versions.

[23] Mr. Desbiens testified that he was seated in front of his computer with his back to the door. Suddenly, he felt the grievor's presence just behind him and heard his voice above him. The reflex was immediate — he rose and turned towards the grievor, who insulted him. Mr. Desbiens told him twice to leave his office. The grievor struck him on the left side of his face, knocking his glasses off. Mr. Desbiens picked up his glasses and quickly left his office. He headed for Mr. Knoerr's office, who was still absent. He was afraid because the grievor was following him. He ran down the stairs from the third floor to the ground level to ask for help from the Commissionaires' security station. The grievor followed him closely.

[24] The grievor testified that he calmly showed up in Mr. Desbiens's office to tell him that it was regrettable that Mr. Desbiens had started so poorly in his manager role. Mr. Desbiens got up immediately when he came in. The grievor pushed him in a defensive move. He admitted that he might have pushed somewhat strongly because Mr. Desbiens's cheek stayed red for at least a half hour, as other witnesses noted. According to the grievor, he had no intention of hitting Mr. Desbiens or of doing him harm. He followed Mr. Desbiens to be certain that his version of the facts was heard and not only Mr. Desbiens's, which he feared would be exaggerated.

[25] After the incident, an external investigation was conducted. It found that Mr. Desbiens's version was the most credible, for several reasons. First, according to all the witnesses, Mr. Desbiens's face had an obvious mark on it. His two cubicle neighbours, Ms. Pharand and Mr. Dulic, heard the slap and loud voices. The security officers noted Mr. Desbiens's emotional state. Finally, the grievor's explanation was rather implausible; had he felt threatened, he had only to leave the office — no obstacles had been between him and the door.

[26] Once Mr. Desbiens and the grievor were in the Commissionaires' office, management took matters into its own hands. The two men were placed in different rooms so that each could give his version of events. Management immediately revoked the grievor's access card. He was placed on telework.

[27] So the grievor worked from home on several projects. He reported directly to Mr. Knoerr. In July 2012, he produced a medical certificate ordering two months' sick leave from the start of July to the start of September. The grievor requested sick leave from management. Since his sick leave credits were almost all used up, he was refused paid sick leave for those two months. He then requested that he receive paid leave from his accumulated annual leave, which was also refused. His physician then sent another note, stating that he was fit to work.

[28] At the hearing, Mr. Turnbull explained that regular leave cannot be used instead of sick leave. On one hand, the employee is fit to work, but not on the other, thus causing a contradiction.

[29] In cross-examination, the grievor's representative pointed out to Mr. Turnbull that he had offered the grievor four weeks from his accumulated leave credits but that he had refused the grievor the seven weeks required for the sick leave. Mr. Turnbull

did not explain that contradiction. However, he testified that the number of times sick leave had already been taken had irritated him, along with in particular the fact that the grievor appeared to use his sick leave as blackmail — when he did not get what he wanted, he threatened to go on sick leave yet again.

[30] As already indicated, the February 10, 2012, incident led to an investigation. Once the investigation report was finished, the grievor was called to an interview to give him the chance to present his point of view before the disciplinary measure to impose was decided. The investigation found that the grievor had committed a violent act in the workplace. Two meetings took place. During the first on June 29, 2012, the grievor declared that his act was regrettable and inappropriate. He added that if he struck or injured someone, he apologizes for it. He refused to answer further questions from the employer, which wanted to question him about the investigation report's contents. He wanted the questions provided to him in advance.

[31] A second meeting took place on August 22, 2012. The grievor maintained his version of the February 10 events and spoke of the prejudices that he suffered while on the team, particularly from Mr. Desbiens (jealousy, exclusion, and derogatory comments to a client). Toward the end of the meeting, his union representative presented a medical certificate dated August 16, 2012, which implied that the grievor's medical condition or his medication might explain what he did on February 10. It was the first time that the employer had heard of a medical explanation.

[32] Mr. Turnbull then asked Health Canada to assess the grievor's fitness to work. No disciplinary measure had yet been imposed for the February 10 incident. The grievor was still being salaried at home. However, starting in September 2012, he stopped receiving work. Mr. Knoerr testified that once the projects underway were finished, it was difficult to assign him others. The work required team cooperation, and the employer did not want to give the grievor access to its buildings.

[33] The letter that Mr. Turnbull sent Health Canada indicated, in the form of questions, the employer's two main concerns, which were: Did the grievor's medical condition in February 2012 explain what he did? Could he be reinstated at work and, if so, under what conditions?

[34] Health Canada tasked Dr. Given with performing the evaluation. He asked for a psychological evaluation from Dr. Hébert and then sent three letters to the employer.

[35] The first one, dated January 24, 2013, stated that the grievor was unfit for work. It included the following passage:

> [Translation]
>
> *Mr. Rahmnai [sic] is considered unfit for any work at present. Our specialist proposed certain therapeutic initiatives, and a copy of his final report was provided to Mr. Rahmani so that he could discuss it further with his physician. If the therapeutic initiatives prove effective, a return to work may take place in May 2013. We can re-evaluate Mr. Rahmani before his return to work, at your request.*

[36] Mr. Turnbull then communicated with the grievor to inform him that he would be on sick leave from January 24 to April 30, 2013. He had only 56 hours of sick leave credits left. The remaining 461 hours were counted as unpaid sick leave.

[37] Dr. Given's letter does not mention any link between the grievor's medical condition and his act on February 10. The employer requested clarification on that issue. Dr. Given replied in a second letter, dated January 25, 2013, as follows:

> [Translation]
>
> *I cannot rule on the medical aspect of the February 10, 2012, events since I did not evaluate Mr. Rahmani then. The medical conditions for which Mr. Rahmani is being treated have the potential to affect a person's behaviour and his or her ability to react to stress.*

[38] Dr. Given also wrote that he expected to see the employee again before his return to work so that he could make specific recommendations about his return-to-work terms.

[39] On February 6, 2013, Mr. Turnbull wrote once again to Dr. Given, about causality. He cited Dr. Maziarz's August 2012 note, which stated that the grievor's behaviour and aggressiveness might have been caused by his state of health or medication. Mr. Turnbull asked the following question: "[translation] Does the objective medical evidence in Mr. Rahmani's medical file support Dr. Stanley Maziarz's recommendations that he provided in his medical certificate?"

[40] On February 14, 2013, Dr. Given replied as follows:

> [Translation]

> *The medical documentation on file, which dates from Mr. Rahmani's recent fitness-for-work evaluation, would be consistent with the above recommendations* [the text of the August 16, 2012, note was reproduced] *if Mr. Rahmani's medical condition were similar in February 2012. Because our service did not evaluate Mr. Rahmani before November 14, 2012, I cannot enunciate further except to state that it is plausible and consistent with the medical information in his file that his medical condition was similar in February 2012.*

[41] The employer and Health Canada had no further exchanges. On April 4, 2013, Mr. Rahmani was terminated for "[translation] voluntarily committing a violent act at work", which behaviour "[translation] irredeemably broke the bond of trust that must exist with the employer".

[42] Two themes emerged regularly from the employer's witnesses' statements: first, the fact that the grievor did not seem to show genuine remorse and never properly apologized to either Mr. Desbiens or the employer, and second, his colleagues feared his return to work because his angry explosion had scared them.

[43] Mr. Turnbull testified that the employer terminated the grievor's employment because trying was not worth the trouble. The bond of trust was broken because of the violent act and because the grievor was difficult, poisoned the workplace, and did not recognize his wrongdoings.

B. <u>The medical evidence</u>

[44] The medical evidence presented at the hearing was not contradicted. It was detailed and presented the grievor's diagnosis. To respect his privacy, I will present the highlights of the adduced evidence. Therefore, the existence of a medical condition, the prognosis, and the accommodation that would be necessary on a return to work will be emphasized.

[45] Dr. Maziarz, the grievor's family physician, testified at the hearing. He has been treating the grievor since 1999. Since 2009, the grievor has suffered from a disorder that has worsened over time. There was no doubt in Dr. Maziarz's mind that the February 10, 2012, incident and the grievor's state of health at that time were connected. In addition, the grievor was taking medication then that according to the pharmacological literature could cause irritability and mood swings. According to

Dr. Maziarz, the act cannot be otherwise explained. According to him, someone who has such a specialized profession, earns an excellent salary, and is head of a family does not slap his supervisor without a psychiatric explanation behind it.

[46] In December 2012, Dr. Hébert, clinical psychologist, presented a diagnosis of serious psychiatric disorders when Dr. Given from Health Canada sent the grievor to him. The employer did not contradict Dr. Hébert's careful and detailed report. Dr. Hébert also testified that a rather serious syndrome does not develop overnight. Therefore, according to him, it is very likely that in February 2012, the grievor already suffered from a disorder that would have certainly contributed to worsening his irritability.

[47] Finally, Dr. Bergeron, the psychiatrist currently treating the grievor, testified as to his current condition and prognosis. He agreed with Dr. Hébert's diagnosis and affirmed that it is possible to treat the condition with medication and psychological therapy, treatments that the grievor is currently receiving. With those treatments, the chances that the incident will be repeated are very low. However, in his opinion, it would be difficult for the grievor to be reinstated in his team without a serious effort from the employer to facilitate his reintegration.

III. Summary of the arguments

A. For the employer

[48] According to the employer, this case raises three questions: 1) Was there misconduct on the grievor's part? 2) Was the termination clearly unreasonable or wrong? 3) Did the employer violate the non-discrimination clause in the collective agreement? The employer maintained that the answer to the first question must be in the affirmative and in the negative to the two other questions.

[49] First was the misconduct. The investigation found a violent act in the workplace. It was extremely serious misconduct, particularly since the victim was the grievor's supervisor.

[50] Then was the penalty. Given the severity of the infraction, the adjudicator cannot intervene to modify the penalty even if it was clearly unreasonable. However, according to the facts, the penalty was proportional to the severity of the act.

[51] Several aggravating factors were present, including the grievor's absence of remorse. He never genuinely apologized to either Mr. Desbiens or the employer. Instead, he tried to minimize it by stating that he pushed Mr. Desbiens instead of hitting him. In addition, he justified his behaviour by blaming Mr. Desbiens, the employer, or the workload. However, he neither made a complaint nor filed a grievance about any presumed harassment or supposedly excessive workload.

[52] This is not about a momentary lapse. The grievor maintained a negative climate with his coworkers for a long time. In addition, according to witnesses, around 10 minutes passed after Mr. Desbiens talking to the grievor about his hours and the grievor hitting him. The grievor could have resolved his conflict differently.

[53] He could not blame his stress level; in his job description, the working conditions section describes a high-pressure work environment. A professional must know how to adapt.

[54] There are no mitigating factors. His supervisor showed no provocation. In fact, it is perfectly normal to ask a subordinate questions about work hours. The fact that Mr. Desbiens asked the grievor to leave his office did not constitute provocation.

[55] The employer was not aware of the grievor's medical situation. Six months after the incident, a note was submitted that mentioned a possible connection. However, causality was never established. It seems strange that six months passed before an explanation was proposed.

[56] The employer's opinion is that no medical evidence can justify a physically violent act. Even if the medical condition constituted at the limit a mitigating circumstance, it would take nothing away from the fact that the grievor must recognize his responsibility by expressing remorse and offering apologies. Furthermore, he did not establish that his medical condition caused his alleged act. The experts' medical evidence was established well after the February 2012 events.

[57] Among the mitigating factors in such a case is the desire to assume responsibility for what he did and to recognize its seriousness, which the grievor did not do. On the contrary, he tried to blame others and minimized what he did and did not recognize its effect on Mr. Desbiens.

[58] Finally, the employer did not discriminate. Violence in the workplace cannot be

tolerated; it is a question of safety and security for all employees under the employer's responsibility. It cited *British Columbia (Public Service Agency) v. British Columbia Government and Service Employees Union*, 2008 BCCA 357 (*Gooding*), to affirm that discrimination could not have occurred since all employees are subject to the same rule.

[59] In that case, Mr. Gooding had worked for a long time for the British Columbia Liquor Distribution Branch. He became an alcoholic and started systematically stealing alcohol over a period of more than a year. The issue before the British Columbia Court of Appeal was the following: Did the employer have a duty to accommodate an employee who stole because he suffered from an alcohol dependence?

[60] A majority of the Court of Appeal responded that there was no duty to accommodate, given the absence of *prima facie* discrimination. To establish such discrimination as part of employment, three conditions are required: 1) a characteristic protected by the human rights Act, 2) adverse differentiation by the employer, and 3) a connection between those two conditions. However, in these circumstances, causality was not established; Mr. Gooding was dismissed not because he was an alcoholic but because he stole. The same rule would apply to any employee who stole, and as a result, discrimination did not occur.

[61] In the same way, in this case, even if it were accepted that the grievor's medical condition could have played a role, causality was not established. The termination was not based on a medical condition that the employer was not aware of at the time of the incident; instead, it was based on a violent act. The jurisprudence confirms that violence can be a ground for termination even in the absence of a past disciplinary record.

[62] Therefore, the employer asked that the grievance be dismissed. However, if the Board decides to uphold the grievance, the employer asked that compensation be ordered instead of reinstatement.

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

[63] The grievor did not dispute that misconduct occurred. However, according to him, the employer did not account for mitigating circumstances and showed discrimination under the terms of both article 44 of the collective agreement and the

provisions of the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; *CHRA*).

[64] The evidence showed that discrimination occurred. The medical evidence clearly established the grievor's state of health, probably dating from December 2011 and even before, which was confirmed by Dr. Maziarz's testimony and by the certified sick leave the grievor took.

[65] The employer did not account for Health Canada's opinion, according to which a connection between the grievor's alleged act and state of health was plausible, and with an adequate medical follow-up, he would be fit to return to work. Instead, the employer chose to sever the employment link without accounting for his state of health.

[66] In his testimony, Mr. Turnbull indicated the point at which the employer became uninterested in giving the grievor another chance. The employer became irritated with the grievor's difficult relationship with his workplace and his sick leave requests. The February 10 events were the culmination that sealed his fate. However, by that logic, the employer did not at all account for its human rights obligations.

[67] The employer stated that it was not informed of the grievor's health problems. Instead, it chose to ignore the obvious signs of distress, particularly the numerous times he requested sick leave.

[68] The employer decided to terminate the grievor without waiting for the Health Canada process to end. As to why, Mr. Turnbull replied as follows, sounding concerned: "[translation] What good would have come from waiting? Why export the misery to another office?" In other words, the employer had already decided to terminate the grievor, regardless of the medical evidence.

[69] As demonstrated in the questions that Mr. Turnbull asked of Health Canada, the employer knew its obligations but decided not to wait for a response.

[70] The employer strongly emphasized the fact that the grievor showed no remorse and did not apologize. That was false. He offered apologies during the disciplinary investigations. He expressed his remorse to his physicians. If communication was difficult with the employer, it might not have been entirely his fault.

[71] The grievor also described the termination's effect on his health. According to

the medical testimonies, his state of health clearly worsened after the termination. Furthermore, the fact that he was terminated made it very difficult for him to find another job in this specialized field in which everyone knows everyone.

[72] Without a doubt, the misconduct merits a penalty, but a lesser one. Aside from reinstatement, the grievor asked for remedies set out under the *CHRA*, namely, payments for pain and suffering and special compensation because the employer willfully and recklessly acted in a discriminatory manner.

[73] The grievor also asked for an order that his managers and colleagues attend awareness sessions.

IV. Reasons

A. The misconduct

[74] Violence in the workplace is serious and can justify termination, especially if the person who committed the violent act shows little or no remorse (see *Niagara Health System v. Service Employees International Union, Local 204*, [2005] O.L.A.A. No. 426 (QL); *TNT Logistics v. U.S.W.A., Local 9042*, [2003] O.L.A.A. No. 798 (QL), 118 L.A.C. (4th) 109; and *United Food and Commercial Workers, Local 401 v. Lucerne Foods, a Division of Canada Safeway Ltd.*, [2004] A.G.A.A. No. 27 (QL)).

[75] When assessing the penalty in a case of a work altercation, aggravating or mitigating factors must be accounted for, as applicable (see *Shaver v. Deputy Head (Department of Human Resources and Skills Development)*, 2011 PSLRB 43; *Ward v. Treasury Board (Revenue Canada - Taxation)*, PSSRB File Nos. 166-02-16121 and 16122 (19861229); and *Dominion Glass Co. v. United Glass & Ceramic Workers, Local 203* (1975), 11 L.A.C. (2d) 84), as well as the following factors in particular:

- the expression of remorse and the offering of apologies;
- the seriousness of the action and the wrong caused;
- whether the action resulted from a momentary lapse or was premeditated;
- the provocation;
- the years of service;

- the disciplinary file's status; and
- a later improvement in mental health, if it was an issue in the incident that gave rise to the termination.

[76] The evidence showed that misconduct occurred. The grievor admitted that his act was regrettable. The employer wanted him to show greater remorse. I believe that the grievor showed remorse while also exhibiting a feeling of injustice. After hearing all the testimony, I could see that he had the impression of being alone against everyone. That being said, the employer was right that violence in the workplace is absolutely unacceptable. It traumatizes not only the victim but also those close to the victim. The employer must oversee workplace health and safety and provide a healthy and safe working environment for its employees; that is entirely founded. For that reason, his misconduct deserves a severe penalty.

B. The penalty

[77] Once misconduct is established, it must be determined whether the employer's penalty was proportional to its severity. According to the employer, the penalty was reasonable, and the Board should not intervene. According to the grievor, the penalty was too severe and furthermore was discriminatory.

[78] An adjudicator (in this case, the Board) can address the issue in two ways: from the discipline angle or from the discrimination angle. Both led me to the same conclusion: termination was too severe a penalty.

[79] The employer declared that it accounted for aggravating factors. It added that there were no mitigating factors. I do not agree. I believe that it failed to consider several important factors, such as the absence of a disciplinary file, testimony about the grievor's serious and professional work, Mr. Desbiens's provocation, and the grievor's state of health.

[80] According to the employer, Mr. Desbiens was the innocent victim of the grievor's attack. In my opinion, it seems that the evidence revealed another reality.

[81] For several years, in the words of all the witnesses, animosity existed between the grievor and Mr. Desbiens. Its origin is not clear. Both the grievor and Mr. Desbiens agree that in the beginning, their relationship was harmonious, but something

happened to poison it. Mr. Desbiens testified about sudden outbursts and invectives from the grievor, who described surly and jealous statements. It is certain that each party used disagreeable words.

[82] On February 10, 2012, when Mr. Desbiens's appointment as team supervisor was announced, it is impossible to believe that he did not think of spiting the grievor. Why did Mr. Desbiens appear just a few minutes after his appointment was announced to ask the grievor about his work hours? How can that not be seen as an affirmation of authority?

[83] That does not justify the grievor's act 10 minutes later. I agree entirely with the investigation report: the grievor was not physically threatened and could have left Mr. Desbiens's office. The grievor slapped him in an act of anger.

[84] However, I remain astonished at the employer's lack of sympathy; it refused to see the grievor's distress. His adversary was appointed to a management position and hastened to affirm his authority. Of course a supervisor has the right to check his or her subordinates' work hours. At the hearing, the employer presented everything in the context of a request for travel authorization, which Mr. Desbiens received, according to the email, at 11:05 a.m. The events took place immediately after that. The evidence established that Mr. Desbiens's appointment had just been announced.

[85] Why twist the knife in the wound? The grievor went on sick leave again. He was unhappy in that section, which he wanted to leave at all costs. Relations with Mr. Desbiens were negative. The provocation does not excuse the violent act, but it cannot be ruled out when analyzing the event. The strained relationship between Mr. Desbiens and the grievor, which dated back several years, is not listed in the investigation report's conclusions, even though the grievor tried to allude to it in his version of the facts.

[86] As for the grievor's state of health, the employer maintained that the physicians did not prove a causal connection sufficient to attribute his act to his mental health state on February 10, 2012. I think that based on the evidence, it is probable that the grievor's mental state and possibly his medication influenced his behaviour on that day. The balance of probabilities tips in that direction, and I think that the employer simply refused to consider that evidence.

[87] Starting in 2009, the grievor took sick leave several times. He asked his employer for two years of leave without pay; it refused.

[88] During a disciplinary meeting in August 2012, six months after the February 10, 2012, incident, the grievor produced a note signed by his family physician, Dr. Maziarz, which mentioned that the grievor's February 10 act might have been attributable to his mental health state or medication. In his testimony, Mr. Turnbull was skeptical of that document. Why did the grievor present it so late and not on February 11, 2012?

[89] Dr. Maziarz testified at great length during the hearing. According to him, since 2009, the grievor has suffered from a health disorder that has worsened. In March 2012, he decided to modify the grievor's medication to treat his medical condition. Before that, the grievor had been taking medication that according to the pharmacological literature could cause some aggressiveness. His medical condition could also make him short-tempered and subject to mood swings.

[90] In September 2012, after receiving Dr. Maziarz's note that seemed to at least partially explain the grievor's behaviour, Mr. Turnbull wrote to Health Canada to ask for an evaluation of the grievor's fitness for work and to have its opinion of Dr. Maziarz's note.

[91] At the hearing, the grievor explained that he delayed asking for a note from his physician because he did not want to share his health problems at work. That pride is completely understandable, especially with respect to mental health. In any case, the employer cannot deny that when the grievor was terminated in April 2013, it was aware of a medical situation that could at least partly explain the grievor's unfortunate act. Furthermore, according to Health Canada, a return to work was foreseeable.

[92] Mr. Turnbull said that the family physician's certificate and Dr. Given's statement did not convince him that the grievor's state of health might have played a role in his behaviour. It is true that it is not because of psychiatric problems that some react violently at work. However, such an important factor cannot be ruled out; nor can its existence be denied.

[93] The employer chose to impose a penalty without accounting for the grievor's state of health by ruling out the following mitigating factors: his professional

performance, as attested to by the witnesses and congratulatory emails he received for his teamwork; the absence of past disciplinary measures (however, I am aware of the interpersonal difficulties that were reported in his performance evaluations); a certain provocation as part of the events that led to the February 10, 2012, incident; and the isolated, spontaneous, and unique character of the act. Given all those factors, I find that the termination penalty was unjustified, and I would substitute a suspension for it.

[94] Furthermore, the grievor pointed out that discrimination occurred. For the following reasons, I find that the fact that the employer refused to consider his state of health at the time of the termination constituted discrimination that contravened the collective agreement and the *CHRA*.

C. Discrimination

[95] The collective agreement provision prohibiting discrimination can be found in clause 44.01, which reads as follows:

> ***44.01*** *There shall be no discrimination, interference, restriction, coercion, harassment, intimidation, or any disciplinary action exercised or practiced with respect to an employee by reason of age, race, creed, colour, national or ethnic origin, religious affiliation, sex, sexual orientation, disability, family status, marital status, a conviction for which a pardon has been granted or membership or activity in the Institute.*

[96] Section 7 of the *CHRA* states that refusing to employ or to continue to employ an individual, if it is based on a prohibited ground of discrimination, constitutes a discriminatory practice.

[97] Section 3 states that disability is one of the prohibited grounds of discrimination. Section 25 of the *Act* states that the term disability includes any earlier or existing mental or physical disability.

[98] In terms of human rights, it falls upon the complainant to establish *prima facie* evidence of discrimination; that is, the complainant must present evidence "… which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer." (*Ontario Human Rights Commission v. Simpson-Sears*, [1985] 2

SCR 536 at para. 28). To establish *prima facie* discrimination under section 7 of the *CHRA*, the complainant must establish the following:

(i) the respondent refused to employ or continue to employ or adversely differentiated the complainant in employment; and

(ii) there is a link between that practice and a prohibited ground of discrimination under section 3 of the *CHRA* (*Moffat v. Davey Cartage Co. (1973) Ltd.*, 2015 CHRT 5; and *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39).

[99] In that respect, it is not necessary for discrimination to be the sole ground for the alleged acts to establish *prima facie* discrimination; it is sufficient for the discrimination to constitute a factor, as the Supreme Court of Canada emphasized in *Bombardier Inc.* at para. 52 (and see *Moore v. British Columbia (Education)*, 2012 SCC 61 at para. 33).

[100] In response, the respondent can refute the allegation of *prima facie* discrimination or present a defence based on section 15 of the *CHRA*, for which the relevant provision in this case reads as follows:

> ***15(1)*** *It is not a discriminatory practice if*
>
> > ***(a)*** *any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a* bona fide *occupational requirement . . . .*

[101] The employer's behaviour will not be considered discriminatory if it can be established that its refusal with respect to any employment is based on a bona fide occupational requirement (BFOR).

[102] The Supreme Court of Canada stated in *British Columbia (Public Service Employee Relations Commission v. BCGSEU*, [1999] 3 SCR 3 (*Meiorin*), how to determine whether a standard imposed by an employer is in fact a BFOR. The respondent must establish the following, on a balance of probabilities:

1. that it adopted the standard for a purpose rationally connected to performing the job;

2. that it adopted the particular standard in the sincere belief that it was necessary to fulfilling that legitimate work-related purpose; and

3. that the standard is reasonably necessary to accomplishing that legitimate work-related purpose. To show that the standard is reasonably necessary, the respondent must demonstrate that it is impossible to accommodate the complainant without imposing undue hardship on itself. It is up to the respondent to demonstrate that it considered and reasonably rejected all viable forms of accommodation (*British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 SCR 868 (*Grismer*)).

[103] Subsection 15(2) of the *CHRA* states that undue hardship is defined in terms of health, safety, and costs.

[104] In this case, I find that *prima facie* discrimination occurred. The evidence showed the grievor's medical condition (his disability), the adverse differentiation of the termination (refusal to continue to employ), and the link between those two facts. As I already determined, his mental condition and possibly his medication influenced his behaviour during the incident. The behaviour that was penalized via the termination was at least partly attributable to his state of health. The prohibited ground of discrimination does not have to be the only factor in the termination; it is enough that it is one.

[105] The employer tried to refute the allegation of *prima facie* discrimination by maintaining that according to the *Gooding* principles, when the same rule is applied to all employees, there is no discrimination. I do not retain the reasoning in *Gooding* for the following reasons.

[106] First, the Supreme Court of Canada emphasized on several occasions the injustice of the same rule being applied to all and not accounting for prohibited grounds of discrimination (for example, *Meiorin* or *Grismer*). According to those cases, an apparently neutral rule has a different effect from one person to the next because not all are in the same situation due to their personal characteristics.

[107] Second, the Supreme Court of Canada does not list *Gooding* in the general development of human rights, particularly if more recent decisions in *Bombardier* and

Moore are taken into account. In the majority decision in *Gooding*, the British Columbia Court of Appeal indicated that even if the employee's misconduct was influenced by a disability (alcoholism), it was not relevant because the disability did not play a role in the decision to terminate, in the absence of a causal connection. Even so, the Supreme Court of Canada clearly stated in *Bombardier* that it is sufficient that the prohibited ground of discrimination is a factor in the decision for it to be recognized that the respondent engaged in a discriminatory practice. The Court explicitly rejected the proposal that a "causal connection" be proved. At paragraph 51 of the decision, the Court stated the following:

> *[51] A close relationship is not required in a discrimination case under the* [Quebec] Charter [of human rights and freedoms]*, however. To hold otherwise would be to disregard the fact that since there may be many different reasons for a defendant's acts, proof of such a relationship could impose too heavy a burden on the plaintiff. Some of those reasons may, of course, provide a justification for the defendant's acts, but the burden is on the defendant to prove this. It is therefore neither appropriate nor accurate to use the expression "causal connection" in the discrimination context.*
>
> [Emphasis added]

[108] As I already indicated, I find in this case that the grievor's disability was a factor in the decision to terminate him. The facts in this case are similar to those in *Mellon v. Canada (Human Resources Development Canada)*, 2006 CHRT 3. In that case, the complainant argued that her mental health was a factor in her termination, but the employer submitted that her deficient performance was the only reason for the termination. The Canadian Human Rights Tribunal ruled in favour of Ms. Mellon. Once made aware, the employer was obligated to consider the grievor's state of health before making its decision.

[109] Since it did not refute the *prima facie* evidence of discrimination, did the employer establish a defence under section 15 of the *CHRA*? As explained earlier, the employer's justification must include three elements (from *Meiorin*): 1) the standard was adopted for a purpose rationally connected to performing the job; 2) the employer sincerely believed that the standard was necessary; 3) the standard was reasonably necessary in that the employer could not accommodate the claimant's situation without undue hardship.

[110] There is no doubt that prohibiting violence in the workplace is a valid rule, adopted in good faith, which ensures that an important employer objective is fulfilled, which is ensuring workplace safety. Therefore, the third element should be examined, namely, whether the respondent showed that it considered and reasonably rejected all viable forms of accommodation.

[111] In his testimony, Mr. Turnbull simply ruled out the possibility of foreseeing a lesser penalty for the grievor and an eventual return to work. According to his testimony, he was clear that the employer had had enough. Several sick leave requests had been made, many conflicts had occurred with colleagues and managers, and finally, the culminating incident had occurred, which had frightened those who had witnessed it.

[112] Clearly standing out from that testimony and the employer's actions is that it simply refused to consider the medical evidence. In Mr. Turnbull's words, it appeared improbable and inconclusive because Health Canada could not unequivocally confirm a cause-and-effect relationship between the grievor's medical condition and the act that he committed.

[113] In my view, such a degree of evidence is unreasonable. It is sufficient to conclude that the grievor's medical condition probably influenced his behaviour. Dr. Maziarz was very clear and had no doubt about the relationship between the medical condition and the alleged act. The employer chose not to believe it because his note arrived six months later. It also chose not to retain Health Canada's advice, which mentioned that a connection was very likely.

[114] At this point, I must point out the employer's rather negative attitude toward the grievor's many uses of sick leave. They had to have been a clue. According to Mr. Turnbull's testimony, the employer saw them as a form of blackmail. Such casualness is disconcerting. The grievor requested sick leave several times, all supported by medical certificates. He also requested two years of leave without pay, which the employer refused.

[115] When the grievor asked to use his annual leave to take sick leave (while he was teleworking from home and Mr. Knoerr confirmed that he had less work), the employer refused to allow him seven weeks of annual leave but did allow him to use four. At the hearing, Mr. Turnbull was not able to explain why he was able to allow four weeks but

not seven.

[116] The employer was reluctant to recognize the seriousness of the grievor's medical condition. Since it did not retain the medical explanation, it never considered accommodation. Its refusal to foresee accommodation, given a real medical condition that led to adverse differentiation at work, was contrary to the *CHRA* and the collective agreement.

[117] The employer could have raised the issue of undue hardship, but since it did not even recognize discrimination and therefore did not foresee any reasonable accommodation, undue hardship was never mentioned. As a result, it did not establish a justification for its decision to impose a termination in response to an isolated act. The employer did not prove a bona fide occupational requirement.

V. Conclusion

[118] Misconduct took place, and a severe penalty was merited. However, termination was too severe a penalty. The employer did not account for any mitigating factors that would have applied to the alleged act; that is, provocation and state of health. It did not account for the grievor's clean disciplinary file and professional performance.

[119] By not considering the grievor's state of health and by refusing to foresee a possible return to work, the employer displayed discrimination.

[120] From February 11, 2012, until January 24, 2013, the grievor was teleworking and receiving his salary. Starting January 24, 2013, following Health Canada's declaration that he was unfit to work, he was placed on sick leave until his termination on April 4, 2013. Between his termination date and today, the grievor has been receiving disability benefits to which he was entitled since he was unfit for work.

[121] The attending psychiatrist declared that the grievor would be fit to return to work in January 2016. I order the grievor's reinstatement as of the date of this decision. The terms for the return to work will need to be determined in cooperation with the employer, the grievor, the bargaining agent, Health Canada, and if necessary the attending physicians.

[122] Given the seriousness of the alleged act, the grievor will not be entitled to a salary reimbursement. However, the employment bond is deemed to not have been

broken for the purposes of seniority and pension calculations.

[123] Paragraph 226(2)(b) of the *Public Service Labour Relations Act* states that the Board may, in relation to any matter referred to adjudication, give relief in accordance with paragraph 53(2)(e) or subsection 53(3) of the *CHRA*. As a result, the Board can order the person found guilty of a discriminatory practice to compensate the victim by an amount not exceeding $20 000 for pain and suffering under paragraph 53(2)(e) of the *CHRA*.

[124] The grievor cooperated with the Health Canada process and complied with his physicians' instructions. Despite those efforts, the employer did not understand its responsibility to seriously foresee accommodation.

[125] The fact that it was about mental health is a very important factor. I am compelled to note that mental illness remains stigmatized in our society. The grievor had to admit to himself, his physicians, and finally his employer that he had psychiatric difficulties that kept him from functioning properly. It was unduly humiliating to see the employer thoroughly ridicule that difficult initiative; it had no concern for the grievor's situation and never tried to understand his point of view. All the health professionals who testified described how devastating the termination was for the grievor given his deep psychological vulnerability, which the employer could not ignore.

[126] As for special compensation, the Board can order a respondent to pay the victim of a discriminatory act compensation not exceeding $20 000 if it determines that the act was wilful or reckless. I find that the employer's practice of not accounting for the physicians' conclusions, particularly those of the Health Canada doctor, was inconsiderate. The employer had laudable concerns, such as ensuring a violence-free workplace, but it was obligated to consider the situation's medical aspect, which it did not do. In his testimony, Mr. Turnbull confirmed that he had rejected outright any possibility of the grievor remaining at work. According to Mr. Turnbull, that refusal was linked less to the grievor's violent act and more to his difficult interpersonal relationships. For that reason, I feel that the employer acted inconsiderately and that a penalty is required.

[127] Given all the circumstances, I award $15 000 for pain and suffering and $10 000 as special compensation. Once again, the fact that it was a mental health issue weighed

heavily in the calculation, given the particular difficulty of admitting to such a problem.

[128] I am not prepared to order training or awareness sessions for the grievor's managers or colleagues. As an accommodation initiative, it may be necessary to plan for mediation sessions for reinstatement, as Dr. Bergeron proposed. I prefer that the parties in question find the appropriate solutions.

[129] The employer will need to cooperate with the grievor, his bargaining agent, Health Canada, and, as needed, health professionals to allow the grievor to be reinstated. Solutions had already been found while the grievor was teleworking. If he can participate in other certification teams' work, as in the past, without encountering his former colleagues, including Mr. Desbiens, it seems to me that it should be possible to find him a position at Transport Canada.

[130] For his part, the grievor must comply with the treatments prescribed for his condition, with follow-ups according to his attending physicians' advice.

[131] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

VI. Order

[132] The grievance is upheld.

[133] Mr. Rahmani shall be reinstated to his position as of the date of this decision, without either a service interruption or a loss of seniority but without retroactive pay.

[134] The employer shall pay Mr. Rahmani $15 000 under paragraph 53(2)(e) of the *Canadian Human Rights Act*.

[135] The employer shall pay Mr. Rahmani $10 000 under subsection 53(3) of the *Canadian Human Rights Act*.

[136] Mr. Rahmani shall comply with the treatment regimen that his attending physicians prescribed.

[137] I will remain seized of this file for 90 days in the event of difficulties implementing this decision.

February 5, 2016.

PSLREB Translation

Marie-Claire Perrault,
a panel of the Public Service Labour Relations and Employment Board