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Citation: 2016 PSLREB 122

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

LOUISE HOTTE

Grievor

and

TREASURY BOARD
(Royal Canadian Mounted Police)

Employer

Indexed as
Hotte v. Treasury Board (Royal Canadian Mounted Police)

In the matter of an individual grievance referred to adjudication

Before: Nathalie Daigle, a panel of the Public Service Labour Relations and Employment Board

For the Grievor: James Cameron, counsel

For the Employer: Zorica Guzina, counsel

Heard at Montreal, Quebec,
May 17 to 19, 2016.
(PSLREB Translation)

I. Introduction

[1] Louise Hotte ("the grievor") was an employee of the Royal Canadian Mounted Police (RCMP or "the employer") who attempted to return to work following sick leave. However, due to a permanent functional limitation, she could not return to work for the RCMP. She feels that her employer discriminated against her as it did not provide her with any support to help her return to work in another department. Approximately 20 months later, discouraged and without a regular income, she chose to take early retirement because she could not find work.

[2] The employer claims that it had no duty to accommodate as the grievor was unable to return to work for her employer. It notes that nonetheless, it took all necessary measures to register her in the Priority Information Management System (PIMS) to help her find work elsewhere in the public service.

[3] The "Notice of Reference to Adjudication" of the grievance was filed with the former Public Service Labour Relations Board ("the former Board") on April 3, 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 Board"). The Board replaced the former Board and the Public Service Staffing Tribunal, and now carries out the same functions as did the former Board.

[4] As I will explain later in this decision, I conclude that the grievor established a *prima facie* case of discrimination and that the employer did not demonstrate that its actions were not discriminatory. Moreover, the employer did not raise a defence set out by law to justify the discrimination. Therefore, the grievor's allegation is founded.

II. Background

[5] The grievor worked in the federal public service for 24 years. From 1995 to 2008, she worked at the RCMP, and then left on sick leave. In 2008, she held an AS-02 position as supervisor, medical benefits and services - Health Services, in Montreal. Among other things, she handled the return to work for police officers following a sick leave.

[6] The grievor was on extended sick leave from September 29, 2008, until she was declared fit to return to work on November 28, 2011. Following a medical examination

at the employer's request, Health Canada concluded that she was fit for a gradual return to work but that she had a permanent functional limitation, i.e., she could no longer work for the RCMP. The letter stated that when a position that respected that limitation was identified, the attending physician would approve her gradual return to work.

[7] The RCMP then took measures to register the grievor in PIMS to help her find another job in the public service. The RCMP initially had difficulty obtaining certain information from her that was required to complete her registration. In particular, confusion arose about her return-to-work date, which needed to be indicated on the medical certificate prepared by her attending physician. In July 2012, her registration was successfully completed.

[8] The employer feels that the Public Service Commission ("the PSC") is responsible for referring the grievor to different positions within the public service. According to the employer, it had no duty to accommodate the grievor, as she was unable to return to work for it.

[9] In December 2011, the grievor filed her grievance, which she amended at the hearing. The corrective action requested is now as follows:

> [Translation]
>
> *(b) I am seeking salary protection;*
>
> …
>
> *(e) I seek the full reimbursement by the employer of the contributions to my pension fund, both its and mine, retroactive to September 29, 2008;*
>
> *(f) I seek the reimbursement of my accumulated and unused sick days;*
>
> *(g) I seek the payment of 12 weeks of annual leave since 2008 (4 weeks times 3 years);*
>
> *(h) I seek to receive all benefits, such as medical, dental, and vision care insurance;*
>
> …
>
> *(j) I seek an amount of $300 for professional assistance and for the preparation of a résumé;*

> *(k) I seek $25 000 in damages for harm to my psychological and physical health over a long period;*
>
> …
>
> *(o) I seek the reimbursement of $500 for the use of my personal laptop and printer.*

[10] It must be noted that on June 29, 2012, the grievor filed two other grievances (566-02-8373 and 8374) about a disciplinary measure that the employer had imposed on her on June 6, 2012, with respect to a harassment complaint that had been filed against her. Those grievances were eventually referred to the Board, but they were withdrawn at the hearing.

III. Issue

[11] There is essentially only one issue in this case: Did the employer discriminate against the grievor?

[12] However, that issue raises the following three issues:

1. Did the grievor establish a *prima facie* case of discrimination?
2. Did the employer provide a reasonable explanation demonstrating that the supposed discrimination did not occur as alleged or that the conduct was not discriminatory?
3. Was the grievor cooperative and open about the steps her employer took to register her in PIMS or to accommodate her?

IV. Reasons

[13] The grievor alleges that her employer discriminated against her in relation to her disability, contrary to article 19 of the collective agreement between the Treasury Board and the Public Service Alliance of Canada (PSAC), which expired on June 20, 2014, and the *Canadian Human Rights Act* (*CHRA*).

[14] Article 19 of the collective agreement states that there shall be no discrimination exercised or practiced with respect to an employee due to mental or physical disability, among other grounds.

[15] Under paragraph 226(2)(a) of the *PSLRA*, an adjudicator and the Board may, in relation to any matter referred to adjudication, "interpret and apply the [*CHRA*] … other than the provisions of [the *CHRA*] that are related to the right to equal pay for work of equal value …", whether or not there is a conflict between the *CHRA* and the collective agreement.

[16] Section 2 of the *CHRA* states that that the purpose of that Act is to promote the following principle: "… 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 … without being hindered in or prevented from doing so by discriminatory practices based on … disability …".

[17] Under section 7 of the *CHRA*, it is a discriminatory practice to differentiate adversely against an employee in the course of employment on a prohibited ground of discrimination. Disability is a prohibited ground of discrimination (subsection 31(1) of the *CHRA*). According to the definition set out in section 25 of the *CHRA*, a disability is a "… previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug …".

[18] To establish that an employer has discriminated, a grievor must first establish a *prima facie* (or "at first sight") case of discrimination. A *prima facie* case "… is one which covers the allegations made and which, if they are believed, is complete and sufficient …" (see *Ontario Human Rights Commission v. Simpsons-Sears*, [1985] 2 SCR 536 at para. 28; "*O'Malley*").

[19] The grievor must show a connection between a prohibited ground of discrimination and the distinction, exclusion, or preference of which he or she complains or that, in other words, the ground in question was a factor in the distinction, exclusion, or preference (see *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Centre),* 2015 SCC 39 at para. 52).

[20] An employer can avoid an unfavourable conclusion by either presenting evidence that refutes the allegation of *prima facie* discrimination or by putting forward a defence justifying the discrimination or both. When the employer refutes the allegation, its explanation must be reasonable. It cannot be a pretext to conceal discrimination (see *Moffat v. Davey Cartage Co. (1973) Ltd.*, 2015 CHRD 5 at para. 38).

[21] Paragraph 15(1)(a) of the *CHRA* is one of the means of defence set out by law. It states that the employer's conduct will not be considered a discriminatory practice if it can be shown that the distinction, exclusion, or preference is based on a *bona fide* occupational requirement ("BFOR") (paragraph 15(1)(a) of the *CHRA*). For a practice to be considered a BFOR, it must be established that accommodating the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety, and cost (subsection 15(2) of the *CHRA*).

[22] The burden of proof in discrimination cases is the civil burden of the balance of probabilities (see *Bombardier*, at paras. 65 to 67).

1. Did the grievor establish a *prima facie* case of discrimination?

[23] For the following reasons, I find that the grievor established a *prima facie* case of discrimination.

[24] The grievor explained that she was passionate about her work and that until 2008, she received much recognition from her employer. She had accumulated a large amount of vacation credits, and she took annual leave in August and September 2008. When she returned to work on the morning of September 29, 2008, a superior from Ottawa advised her that facts were being gathered about a harassment complaint filed against her. The grievor was asked to return home to prepare her defence.

[25] The grievor did not return to work. On September 29, 2008, she left on long-term sick leave. She noted that on June 21, 2010, the Commission des lésions professionnelles (CLP) rendered a decision entitling her to compensation from the Commission de la santé et sécurité au travail (CSST) due to a permanent injury suffered as the result of an occupational illness. The payment of those benefits, equivalent to one-third of her salary, began on September 29, 2008, and was to end once she reached age 68.

[26] The grievor stated that beginning in the summer of 2011, her union representatives unsuccessfully attempted to have discussions with the employer to prepare for her eventual return to work. Similarly, her attempts to contact the employer were unsuccessful. According to her, she was not welcome at the RCMP due to the investigation that had been conducted about her. She was prohibited from

entering the workplace.

[27] The employer then asked Health Canada to assess the grievor's health. On November 28, 2011, it advised the employer that she was fit to gradually return to work but with a permanent functional limitation, i.e., that she was not to work for her employer, the RCMP. The letter stated that when a position that respected that limitation was identified, the attending physician would approve the grievor's gradual return to work.

[28] The grievor explained that she needed help to prepare a résumé, as she had not looked for work for more than 24 years. She also needed information and assistance and possibly training. However, her attempts to obtain assistance were all unsuccessful. The employer either provided her with vague responses or ignored her.

[29] According to the complainant, before registering her in the PSC's PIMS, her employer continued to ask her for several medical certificates. On several occasions, the medical certificates that she sent to it were deemed insufficient.

[30] Registering the grievor in PIMS was completed on July 24, 2012. In October 2012, the PSC notified her of a first job opportunity at the Correctional Service of Canada. However, as indicated in a psychiatric report prepared about her, it was not recommended that she be "[translation] in environments in which there is a certain danger, such as correctional services…". Therefore, the grievor did not pursue that job opportunity. Then, in November 2012, the grievor was notified of a second job opportunity at the RCMP. However, she could not return to the RCMP due to her permanent functional limitation of not returning to work there. So, she did not pursue that job opportunity either.

[31] Similarly, the grievor was notified of a few other job opportunities, but she explained that she was not qualified for those positions, as they required that she have a university degree, which she did not have. Therefore, she did not apply for them.

[32] In late 2012, the grievor's health progressively declined. She explained that she had relapsed because she had not received any assistance finding a new job from her employer for a year. She became discouraged. At her request, due to her inability to work, the PSC suspended her status as a person with a priority entitlement.

[33] The grievor stated that as soon as she was entitled to CSST compensation, she

received income replacement benefits from it equal to one-third of her salary. When she was declared fit to work by Health Canada, those income replacement benefits from the CSST increased to 90% of her salary for one year. When that one-year grace period ended, in December 2012, her income replacement benefits from the CSST were reduced to one-third of her salary.

[34] In December 2012, the grievor used 55 days of sick leave that she had accumulated. During that period, from December 19 to March 12, 2013, she received her full salary. On March 13, the grievor was on unpaid leave, and her income was limited to the income replacement benefits from the CSST, equal to one-third of her salary.

[35] On March 25, 2013, the grievor's attending physician prepared a new medical certificate indicating that his patient was "[translation] still unfit to work and unfit to look for work".

[36] In August 2013, the grievor gave in to discouragement and chose to take early retirement. She explained that her income replacement benefits from the CSST gave her only one-third of her salary, which was not enough to meet her needs. According to her, with the exception of the referral to PIMS, her employer did not provide her any support with finding a new job. On the contrary, in different ways, it clearly put off or set aside the issue of her return. It also advised her to not attend the certificate of merit ceremony for her years of service. She felt that it rejected her.

[37] The grievor called Guylaine Bourbeau, grievance and adjudication officer at the PSAC, to testify at the hearing. Ms. Bourbeau stated that she had 38 years of experience in the area of returns to work. She explained that she offered advice to the grievor's union representatives in April 2011. As will be noted, in June 2011, she also attended a meeting with the employer and the CSST about the grievor.

[38] Ms. Bourbeau explained that based on her experience, a return to work can take place in several ways. Sometimes, employees may need certain accommodations to return to their substantive positions. In some cases, employees who cannot return to their substantive positions can be assigned to other positions within the same organization. If a return to the organization is not possible, other measures must be considered. Ms. Bourbeau noted that the organization is nonetheless responsible for establishing a return-to-work plan (intervention or action plan) as employees who are

fit to return to work are part of the organization. In such cases, according to her, imagination and creativity are needed to find ways to facilitate the employee's return to work.

[39] According to Ms. Bourbeau, in this case, even though the grievor could not return to work at the RCMP, her employer should have prepared an action plan to facilitate her return and her integration into the labour market, particularly as she was in an at-risk category because she was over the age of 50 and suffered from a disability recognized by the PSC and the CSST. According to Ms. Bourbeau, to facilitate her return to work, the employer should have provided her with what she needed to return, particularly assistance in preparing a résumé, training, and other useful services as part of a job search (such as coaching and interview techniques).

[40] According to Ms. Bourbeau, such support would have helped the grievor regain self-confidence and boost her energy. At the very least, the employer should have identified a resource person within the department to help her and support her during her job search.

[41] Ms. Bourbeau added that in her opinion, although the PSC plays an essential role in administering PIMS, it was not responsible for preparing an action plan for the grievor's return to work. That was the RCMP's responsibility, as the grievor's employer. She also added that it was not simply a return to work following an unpaid leave but a return to work for an employee who needed accommodation short of the threshold of undue hardship.

[42] Ms. Bourbeau also stated that a follow-up in PIMS can be highly complex for a worker who has been off the labour market for some time. In this case, the grievor was not familiar with the job descriptions that were posted. According to Ms. Bourbeau, in particular, the employer should have provided her with technical assistance and support services to help her better understand how PIMS works and the potential jobs posted, among other things.

[43] Ms. Bourbeau also stated that in the past, she has witnessed situations in which employers proactively facilitated a return to work for a worker returning from an extended absence. Based on her experience, when a return to the organization is not possible, some employers turn to other departments to find out about upcoming job opportunities. Word of mouth also remains a good means of learning of job

opportunities. Very often, employers have access to a broad network of internal and external knowledge to which employees do not have access. In this case, Ms. Bourbeau mentioned that the employer could have advised other potential employers that the grievor was ready to return to work. A secondment would also have been possible and would have allowed the grievor to work temporarily in another department. Similarly, an agreement to share her salary would have been possible; such an agreement can be implemented to train a worker before he or she is hired.

[44] In June 2011, Ms. Bourbeau and another union representative attended a meeting with a CSST representative and an employer representative to discuss the grievor's file. During that meeting, the CSST representative asked if an action plan had been prepared to facilitate the grievor's return to work. Ms. Bourbeau stated that the union then contacted the employer on many occasions to propose a meeting to prepare an action plan.

[45] Finally, a meeting was held on September 29, 2011, between the grievor's union representative and Karine Cousineau, human resources integrated services manager, Montreal Region of the RCMP. According to Ms. Bourbeau, the PSAC hoped to prepare the grievor's return to work during that meeting. However, Ms. Cousineau had been advised by the CSST that the grievor could not return to the RCMP. According to Ms. Bourbeau, thus, Ms. Cousineau did not see the need for preparing an action plan to facilitate the grievor's return to work.

[46] Ms. Bourbeau stated that between September 29, 2011, and November 28, 2011, the union then tried on several occasions to meet with the employer to prepare an action plan, as the RCMP remained the grievor's employer and home department. However, no meeting took place and no action plan could be developed.

[47] Therefore, this grievance was filed in December 2011 to challenge the employer's decision to not accommodate the grievor's return to work.

[48] No one is questioning the fact that the grievor has a disability. However, according to the evidence that she submitted, she did not have the opportunity to return to the public service when her health improved and she was deemed fit to return to work. She finally took early retirement because she was isolated, discouraged, and short money.

[49] Applying the criteria set out in *O'Malley*, I find that that evidence, if I believe it, is complete and sufficient to justify a verdict in the grievor's favour, in the absence of an answer from the employer. Through her evidence, the grievor has shown that she has a disability and that she suffered prejudice by the employer because she was unable to return to work when her health improved. That contributed to her precarious financial situation that in the end, led her to decide to take early retirement. Consequently, the grievor established a *prima facie* case of discrimination in the course of employment due to her disability, within the meaning of paragraph 7(b) of the *CHRA*.

2. Did the employer provide a reasonable explanation demonstrating that the supposed discrimination did not occur as alleged or that the conduct was not discriminatory?

A. Allegation that the supposed discrimination did not occur

[50] The employer did not challenge the fact that the grievor had a disability. However, it claimed that she was not treated differently from other employees with statutory or regulatory priorities due to her disability, and that therefore, there was no discrimination.

[51] Thus, according to the employer, the grievor did not suffer discrimination, as she was not treated differently from other employees with an employment priority. The employer showed that it registered all its employees with priority in PIMS in the same way, as required by the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12 and 13; *PSEA*) and the *Public Service Employment Regulations* (SOR/2005-334; *PSER*). The employer also claimed that the PSC is responsible for administering and monitoring the *PSEA* and *PSER* provisions dealing with priority rights (see sections 39 to 46 of the *PSEA*).

[52] I cannot conclude that the supposed discrimination did not occur because the grievor was not treated differently than were other employees with employment priorities. Although the employer adopted the same approach for the grievor as for all its employees with a priority (i.e., it respected the requirements of the *PSEA* and *PSER*), I find that the result of that practice for the grievor is more important. As the Supreme Court stated in *O'Malley*, at 551, an employment rule honestly made for sound economic or business reasons and equally applicable to all to whom it is intended to

apply, may yet be discriminatory if it affects a person differently from others to whom it may apply. Therefore, in this case, how that employer's practice affected the grievor must be examined.

B. Allegation that the conduct was not discriminatory

[53] The employer claimed that its conduct was not discriminatory because it had no duty to accommodate the grievor other than following up with the PSC about her file as a person with priority status. The employer cited *Fontaine v. Deputy Head (Department of Fisheries and Oceans)*, 2012 PSLRB 91, to support its position.

[54] Inspector Erika Sheridan, who was the officer responsible for occupational health and safety services in the RCMP's Central Region from 2009 to 2013, acknowledged at the hearing that an employer has a duty to accommodate an employee until it becomes an undue hardship. However, according to her, the employer can have such a duty only if the employee returns to his or her workplace. That is why she stated the following in her decision on the grievance dated June 4, 2012: "[translation] It was clearly established that you cannot return to work at the RCMP; therefore, the department has no duty to accommodate you."

[55] In this case, the issue is whether the employer had a duty to take certain steps to accommodate the grievor's return to work and whether the effort that it made, namely, registering her in PIMS to help her find a job in another department, was reasonable and sufficient.

(i) Did the employer have a duty to take certain steps to accommodate the grievor's return to work?

[56] The employer stated that registering the grievor in PIMS constituted an honest effort to assist her. It submitted that the circumstances in which that effort was made must also be defined. Specifically, the employer claimed that it did not know that the grievor had difficulties with her job search. It stated that like in *Yeats v. Commissionaires (Great Lakes)*, 2010 HRTO 906, the grievor did not notify it of her needs.

[57] As a human resources manager, Ms. Cousineau confirmed that she met with the grievor's union representatives on September 29, 2011. The PSAC's goal was to prepare her return to work. However, Ms. Cousineau felt that it was too early to discuss the

grievor's return to work, as it was unclear whether she would be able to return to work at the RCMP. She indicated that the PSAC made no direct request at that time about preparing a return-to-work plan.

[58] Ms. Cousineau stated that the CSST benefits officer informed her in October 2011 that the grievor could not return to the RCMP. She then asked Health Canada to assess the grievor's health.

[59] Ms. Cousineau also mentioned that the employer had received a formal demand from the complainant on November 17, 2011. It was not submitted as evidence, and its contents were not disclosed at the hearing. However, Ms. Cousineau stated that she was advised that given the reception of that letter, she was no longer to discuss several subjects or issues with the grievor.

[60] On November 28, 2011, Ms. Cousineau read the letter from Health Canada advising the employer that the grievor was fit to return to work but that she had a permanent functional disability, namely, she could not return to the RCMP.

[61] In the meantime, the disagreement between Ms. Cousineau and the union representative about the employer's role in facilitating the grievor's return to work led the union representative to file a complaint against Ms. Cousineau. Therefore, Ms. Cousineau's superior and the union representative met on December 6, 2011. According to the union representative, the employer was required to play a greater role in facilitating the grievor's return to work, while Ms. Cousineau disagreed on the grounds that the grievor could not return to the RCMP. Ms. Cousineau also acknowledged that she and the union representative had a communication problem.

[62] On December 8, 2011, the grievor filed the current grievance with the employer. In it, she claimed that after receiving Health Canada's letter in early December, she asked the employer on several occasions to accommodate her but that she received no response, as explained earlier. In it, she asked in particular to be reinstated to an equivalent position in the public service and to receive an amount of $300 in assistance for the professional preparation of a résumé.

[63] As indicated in *Kelly v. Treasury Board (Department of Transport),* 2010 PSLRB 80 at para. 105, when an employee cannot return to his or her substantive position, the home department retains a duty to accommodate the

grievor's return to work. For example, in *Nicol v. Treasury Board (Service Canada)*, 2014 PSLREB 3 at para. 143, and in *Fontaine*, at para. 48, the adjudicators concluded that the employers in both cases had conducted diligent searches to find an appropriate position for each employee involved as their searches were conducted both inside and outside their respective departments.

[64] Specifically, in *Kelly*, the grievor in question could not return to his position as an aircraft maintenance engineer with the Department of Transport and requested a new position in St. John's (Newfoundland). The grievor and his home department then made significant efforts to facilitate his return to work. However, despite the efforts made by the home department, the adjudicator felt that it could have done more to help the grievor find another position before he was required to use his leave.

[65] The efforts by the home department in that case included paying a portion of his tuition as the grievor had undergone training in the field of conflict resolution in view of a career shift. The employer also considered creating a position for the grievor, but Health Canada declared that he was not fit to hold the position. The employer also offered to pay six months of the grievor's salary for a position that he would hold in another department. Despite all that, the adjudicator concluded that the employer's efforts to find a new position for the grievor did not meet the requirements stemming from its duty to accommodate. In particular, there was no evidence indicating that the employer had informed other employers of its offer to pay six months of the grievor's salary.

[66] Thus, the adjudicator found as follows that the primary responsibility for accommodating the grievor fell to his home department (at paragraph 105):

> *The primary responsibility for accommodating the grievor falls to his home department, the Department of Transport. While the grievor has a role to play in such cases, the primary responsibility falls to the employer. What action did they take in this regard, and was it sufficient?*

[67] I agree with that statement, and I apply the same obligation to this case. Therefore, the measures that the RCMP took and whether they were sufficient must be examined. In other words, did the RCMP make a serious effort to find alternative work for the grievor?

(ii) Did the RCMP make a serious effort to find alternative work for the

grievor, and was this effort reasonable and sufficient?

[68] The employer claimed that it took the necessary measures to accommodate the grievor by registering her in PIMS. Ms. Cousineau took steps to register her in PIMS. The PSC administers the priority rights system in the public service. At that time, the grievor had the regulatory priority granted to employees who, due to a disability, are no longer able to carry out the duties of their positions. Section 7 of the *PSER* grants this class of persons who meet specific conditions the right to appointment in priority to positions in the federal public service. That right was valid for a limited period of two years.

[69] Thus, Ms. Cousineau emailed the grievor on December 16, 2011, informing her that because she could not return to the RCMP, the employer would register her in the PSC priority system so that her name would be sent in priority to other departments for staffing processes. Ms. Cousineau also told her that she had to obtain a medical certificate as soon as possible from her physician confirming that she was fit to work and indicating a return date, as well as her updated résumé and a signed consent form.

[70] On December 19, 2011, the grievor sent a letter to Ms. Cousineau asking for help preparing her résumé. She also asked that any correspondence be sent to her by mail rather than by email.

[71] On February 17, 2012, Ms. Cousineau contacted the grievor's union representative by email. She asked that the grievor send her résumé as soon as possible in electronic format so that it could be saved in PIMS, which is computerized.

[72] On February 20, 2012, the grievor's union representative replied to Ms. Cousineau that the grievor had still not received a response to her request for assistance preparing her résumé. She added that a response would be appreciated, as two months had passed since the request.

[73] That same day, Ms. Cousineau replied that there seemed to be some confusion about the request for assistance preparing the résumé because, in the grievance the grievor filed with the employer on December 8, she requested an amount of $300 as assistance for preparing her résumé. Therefore, Ms. Cousineau asked whether those costs had already been incurred. She also added that since that request was part of the grievance, the employer did not intend to deal with it separately. Ms. Cousineau then

stated the following in her email about the requested assistance for preparing the résumé:

> [Translation]
>
> *In response to Louise's request about the résumé, employees are responsible for and have a duty to provide a résumé. Several online tools are available, so in this case, for her registration in the priority system, the sooner we receive her résumé and the consents, the sooner she will be entered and can be referred. This must in no way be interpreted as a response to the corrective action claim … in the grievance. Only Insp. Sheridan is delegated to make a decision on that aspect. Her registration in the priority management system is completely separate from all that.*

[74] Thus, Ms. Cousineau acknowledged at the hearing that she did not respond to the grievor's request for help on December 19 to prepare her résumé. She stated that only Inspector Sheridan had the authority to approve such a request.

[75] Inspector Sheridan was called to testify at the hearing. She confirmed that she was informed that the grievor was fit to return to work on November 28, 2011. She explained that at the time in question, she was responsible for two health centres, including the one in Montreal. At that time, the team at the Montreal health centre included doctors, nurses, psychologists, an office manager (i.e., the grievor), and support staff. When Inspector Sheridan began in her position in March 2009, she was aware that the grievor was on extended sick leave.

[76] Inspector Sheridan was also informed that the grievor was requesting professional assistance preparing her résumé. The Inspector stated that she knew that the Human Resources department at the RCMP could offer her such assistance. Moreover, on February 29, 2012, at the first-level hearing for the grievance filed by the grievor, she offered the grievor's union representatives the services of the manager of staffing and labour relations in Ottawa to help the grievor prepare her résumé. According to Inspector Sheridan, the grievor's union representatives accepted that offer. At the grievance hearing, it was also agreed that the employer would send the grievor a paper version of the consent form for PIMS registration as she was unable to open the document sent to her electronically. That form was to be sent to her by priority post.

[77] On March 22, 2012, the grievor's union representative wrote to Ms. Cousineau to

inform her that, among other things, the grievor was still awaiting a copy of the consent form. The union representative also asked Ms. Cousineau about the fact that in a recent email, she suggested that the grievor ask for help from one of her daughters to prepare her résumé.

[78] On March 22 and 23, 2012, Ms. Cousineau responded to certain questions from the union representative. Among other things, she stated that she would ensure that the missing documents would be sent to the grievor that day. She also added that the grievor was supposed to provide her share of the information about herself for her résumé and asked if she would do so. Finally, she tried to find out if the grievor would agree to contact the RCMP to receive help preparing her résumé. Ms. Cousineau also stated in one of her emails that the grievor might benefit from a statutory priority, in addition to her regulatory priority, as she was beginning an unpaid leave.

[79] In an email to the grievor's union representative dated March 26, 2012, Ms. Cousineau indicated the documents she had sent on March 23. She also asked the grievor to provide responses to certain questions asked of PIMS users, particularly on her availability date, her mobility, and the type of position she was seeking. Ms. Cousineau added the following:

> [Translation]
>
> *I will have other questions, but for now, I need a résumé. The current workload allows us to help Ms. Hotte prepare her résumé if she does not have her own resources. Has it been started, as agreed (personal information, education, etc.)?*

[80] On March 28, 2012, the grievor sent the completed consent form to the employer by mail.

[81] On March 30, 2012, the union representative sent Ms. Cousineau the grievor's responses to the questions asked in PIMS. At the same time, the union representative notified Ms. Cousineau that the grievor was polishing her résumé with the help of a professional and that everything should be ready within a few days. The email also stated the following:

> [Translation]
>
> *I thank you for the help offered to Ms. Hotte in your last email dated last March 26 for preparing her résumé but since, at the first-level grievance hearing on February 29,*

> *2012, we agreed that help would be provided to Ms. Hotte for preparing her résumé, and since, on March 19, she had not received any offer from you, she went to a professional for help preparing her résumé.*

[82] During the same period, the manager who was to help the grievor prepare her résumé contacted her to confirm their next meeting in Montreal. However, the manager in question reported in an email that the grievor advised her at that time that she no longer needed her services as she had finished preparing her résumé.

[83] On April 2, 2012, Ms. Cousineau asked the union representative when the grievor would send her résumé. Finally, she mentioned that if she had used a professional to prepare her résumé, there was no need to respond to the request for assistance dated December 19, 2011.

[84] On April 3, 2012, after being advised that the grievor no longer needed help preparing her résumé, Inspector Sheridan sent an email to Ms. Cousineau's immediate supervisor to notify her that the grievor had waived the assistance from the manager in question for preparing her résumé.

[85] A series of exchanges then occurred on the grievor's availability date and return to work. Other emails were exchanged on her request to the PSC that her priority right be interrupted. Finally, other communications were about her decision to retire. The details of those exchanges are summarized in the following sections.

[86] As for the employer's position on the accommodation needed in this case, Inspector Sheridan confirmed in her testimony that the employer did not think that it needed to do anything more than register the grievor as priority in the PSC's PIMS.

[87] Therefore, it must be determined whether the employer demonstrated that its effort to help the grievor find work elsewhere in the public service, i.e., by registering her in PIMS, was reasonable and sufficient.

[88] The grievor claimed that the RCMP should have made greater efforts to "market" her within the federal public service. In addition to preparing a plan for her return to work, the employer could have used less traditional arrangements to increase her chances of finding a job. It could have advised other potential employers that she was ready to return to work and could have explored opportunities for a secondment or an agreement to share her salary for a specific period. Such an agreement could

have served to train her before being hired.

[89] The employer claimed that the grievor did not submit any evidence to demonstrate that it did not want to work with her or her union representatives. It also claimed that as indicated in *McNeil v. Treasury Board (Department of National Defence)*, 2009 PSLRB 84 at para. 91, the adjudicator's role is not to determine what, if anything, the employer could have done differently.

[90] The employer's witnesses acknowledged that they would have made efforts to accommodate the grievor if she had been able to return to work at the RCMP. However, since she was not returning to the RCMP, they were of the opinion that they had no duty to accommodate.

[91] As has been noted, it is reasonable to conclude that when an employee cannot return to his or her substantive position, the home department still has a duty to accommodate the grievor's return to work. Thus, although the grievor could not return to her substantive position, the RCMP had a duty to accommodate her return to work.

[92] On the one hand, I agree with the employer that to some extent, the RCMP "marketed" the grievor's availability for a government position by registering her in PIMS. In this case, the grievor had two priority rights and, from the date of her registration in PIMS, on July 24, 2012, to approximately November 27, 2012, she received some invitations to apply for positions. The purpose of the priority rights granted under the *PSEA* and the *PSER* is in fact to promote the continuity of employment and help retain competent employees. Even though the team of PSC priority administration advisors took over the grievor's case because she was entitled to two priorities, the fact remains that her registration in PIMS allowed her to be referred to positons in other departments within the employer's organization (in this case, the Treasury Board).

[93] However, registering the grievor in PIMS was not enough.

[94] Ms. Cousineau acknowledged that the only exchanges she had with the grievor from November 28, 2011, until she was registered in PIMS, were about information the grievor needed to provide to her for her registration in PIMS. According to her, she was unable to support the grievor, and she could not be accommodated because she was unable to return to the RCMP. Ms. Cousineau also reminded the grievor on several

occasions that she was personally responsible for preparing her résumé.

[95] The employer also claimed that it failed to help the grievor because it did not know that she was having difficulties in her job search. However, in my opinion, it failed to support her because it felt that it had no such obligation. Moreover, the evidence demonstrated that the union and the grievor attempted on numerous occasions to initiate communication with the employer, to no avail.

[96] Therefore, the employer provided no support to the grievor, other than registering her in PIMS to help her find work. However, it was required to make a serious effort to find her alternative work. I feel that if the employer had sincerely wanted to accommodate the grievor, it would have made a much greater effort to find a solution adapted to her case. Among other things, it certainly could have provided assistance preparing her résumé, training, coaching or mentoring, and support services to help her better understand how PIMS worked and the positions posted there.

[97] I also feel that in cooperation with the grievor's union representatives, the employer should have agreed to prepare an action plan to foster her return to work. That plan could have included any accommodations deemed useful and any interventions aimed at helping the grievor return to work. Ms. Cousineau stated that as the grievor could not return to work at the RCMP, it was not logical or judicious to prepare a plan for her return to work, as the RCMP would not have the authority to prepare a plan that would be binding on another department. I understand that that intervention or action plan between the RCMP, as the home department, and the grievor could not have been binding on the grievor's future employer. In particular, as indicated in *Fontaine*, a department cannot appoint one of its employees to a new position in another department as that would be contrary to the *PSEA*. However, the intervention plan could have included the type of actions that the employer could take on its own and that are set out in the previous paragraph. However, the employer failed in this case to create a return-to-work plan that reflected the constraints faced by the grievor due to her disability.

[98] I note that the employer cited *McNeil* in its claim that the role of an adjudicator is not to determine what the employer could have done differently. In my opinion, that case differs from the case at hand because, in *McNeil*, the adjudicator found that the grievor did not cooperate as he should have and that his lack of desire to help himself

hindered the employer's attempts to make accommodations for him. However, in this case, the employer did not attempt to accommodate the grievor, other than by meeting its statutory and regulatory obligation to register her in PIMS.

[99] In fact, the employer did not even agree to enter into dialogue with the grievor or her representatives about how to support her to facilitate her return to work. It also did not offer her any technical assistance. However, it was clear that she was not welcome in the workplace.

[100] Ms. Cousineau mentioned that since the department received a formal demand from the grievor on November 17, 2011, she was advised not to speak any further with her. As indicated, the formal demand was not submitted as evidence and its contents were not disclosed at the hearing. Therefore, I cannot conclude that it is a valid reason to justify the employer's decision to not provide any support for the grievor. In my opinion, the employer had a duty to provide the grievor with any assistance needed for her to be able to return to work as soon as possible, especially since she was in an at-risk category because she was over the age of 50 and suffered from a disability recognized by the PSC and the CSST.

[101] Similarly, despite the fact that the grievor's grievance, dated December 8, 2011, included the following demand: "[translation] I am seeking an amount of $300 for professional assistance and the preparation of a résumé", the employer gave no valid justification for its failure to respond in a timely manner to her request on December 19, 2011, for assistance preparing her résumé. That request merited a quick response. Although the employer was the subject of a grievance filed by the grievor, that did not entitle it to ignore her request for assistance as it had a duty to accommodate her.

[102] Similarly, the employer should have respected its commitment made on February 29, 2012, to promptly send the grievor the required consent form, without needing, on March 22, 2012, to be reminded that it had not yet been received.

[103] I also note that although the grievor had a role to play in that situation, the initial responsibility rested on the employer, and the measures that it took in that area were insufficient. In particular, the evidence revealed that the grievor made the necessary arrangements herself to obtain help preparing her résumé because she did not receive a diligent response to her request on December 19, 2011.

(iii) Did the employer demonstrate that its conduct did not constitute a discriminatory practice because its failure to provide what was requested was based on a *bona fide* occupational requirement ("BFOR")?

[104] As explained, according to subsection 15(1) of the *CHRA*, the employer's conduct will not be considered a discriminatory practice if it can be shown that its refusal with respect to any job was based on a BFOR. Subsection 15(2) of the same Act states that for any practice to be considered based on a BFOR, it must be established that accommodating the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety, and cost (see *Audet v. Canadian National Railway*, 2006 CHRT 25).

[105] That duty to accommodate was interpreted in *Sioui v. Deputy Head (Correctional Service of Canada)*, 2009 PSLRB 44 at para. 87, as follows:

…

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

[106] In *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 SCR 970 at 984, the Supreme Court of Canada also stated that more than mere negligible effort is required to satisfy the duty to accommodate. As stated as follows by the Court: "The use of the term 'undue' infers that some hardship is acceptable; it is only 'undue' hardship that satisfies this test."

[107] In this case, the grievor feels that her employer should have provided her with timely assistance preparing her résumé. She also would have liked a work plan to be prepared to help her return to work. The work plan could have identified a resource person within the RCMP to assist her and support her during her job search. The work plan could also have included training to help her improve her skills. She and her

union representatives attempted several times to approach the employer to address these issues, but to no avail.

[108] It remains to be determined whether the employer has demonstrated that those additional measures deemed necessary by the grievor to meet her needs constituted undue hardship in terms of cost, health, and safety.

[109] In my opinion, the employer has not demonstrated that.

[110] In fact, the employer did not submit any evidence to demonstrate that the measures the grievor desired would have resulted in undue hardship. It also did not claim that it would have suffered undue hardship had it been required to call on professionals to offer such accommodations if it lacked the internal resources to do it.

[111] Finally, the last question to be addressed is that of whether the grievor worked with her employer to find a solution for her return to work.

3. ***Was the grievor cooperative and open about the steps her employer took to register her in PIMS or to accommodate her?***

[112] Did the grievor fail to cooperate when the time came to register her in PIMS or accommodate her?

[113] The employer claimed that the delay registering the grievor in PIMS was caused by her lack of cooperation when providing the necessary information. Had she provided the documents when they were requested, her registration in PIMS would not have been delayed. Similarly, the employer submitted that she requested that her priority right be suspended and that, as a result, it was not responsible for her lost salary.

[114] It is important for persons requesting accommodation to cooperate in the process and to be open to actions taken for them by their employers. As the Supreme Court of Canada indicated in *Renaud*, at para. 43, an employee who requests accommodation is required to cooperate with his or her employer by providing information about the nature and scope of the supposed disability that will allow it to determine the necessary accommodations.

[115] To determine whether the delay registering was caused by the grievor's lack of

cooperation, in addition to the evidence summarized so far, the circumstances surrounding her registration in PIMS must also be considered. Similarly, why she asked to have her priority right suspended must be examined.

(i) Details with respect to the delay that occurred before the grievor's priority right came into effect

[116] On April 2, 2012, Ms. Cousineau emailed the grievor's union representative to confirm the receipt of the grievor's signed consent and her medical certificate. However, she noted that the medical certificate needed to indicate her date of availability. Ms. Cousineau added that although the employer was prepared to help the grievor, she also had to do "[translation] her part with respect to personal information".

[117] Between March 26, 2012, and May 9, 2012, the parties exchanged several emails on the grievor's return-to-work date, which was required to complete her registration in PIMS. Confusion arose about the return date, as the medical certificates she submitted indicated that she was fit to return to work, while the PSC required a specific availability date.

[118] To eliminate any confusion about the grievor's return-to-work date, on May 9, 2012, a PSC priority administration advisor advised the employer that the PSC's opinion was that no availability date was indicated in Health Canada letter of November 28, 2011. However, the PSC advised the employer that if "[translation] confirmation from Health Canada of the actual date on which she is fit to return to work" could be obtained, it would feel that the grievor's priority right had in part elapsed because it had been in effect since November 2011.

[119] On May 28, 2012, the grievor sent a new medical certificate to the employer.

[120] On May 31, 2012, the PSC priority administration advisor sent another email to Ms. Cousineau to notify her that according to the PSC, the medical certificate provided on May 28, 2012, still lacked essential information, namely, the return-to-work date. The certificate stated that the grievor was fit "[translation] for an eventual return to work", while the PSC required a return-to-work date.

[121] Another of the grievor's union representatives then contacted the PSC priority administration advisor to clarify the situation. The advisor responded to the union

representative by explaining that under the *PSER*, the priority right begins "… on the day on which the person is ready to return to work, as certified by a competent authority …", not the date on which certification is received from the competent authority.

[122] The union representative then asked the PSC priority administration advisor to indicate in writing that the PSC rejected the medical certificates submitted to date. A team leader in the Priority Administration section at the PSC then advised the union representative that the PSC Priority Administration Advisor's decision was correct. According to the PSC, the medical certificates submitted did not include "[translation] an effective date of being fit to return to work".

[123] On July 10, 2012, the RCMP sent a letter to the grievor to confirm that her priority right was still not in effect because the employer was awaiting a medical certificate that met the requirements. Similarly, the employer notified the grievor that because her substantive position was staffed on June 26, 2012, for an indeterminate period, she had priority for appointment over all other persons under section 41 of the *PSEA*. Therefore, the employer asked the grievor to confirm if she was available to work immediately and if she wanted the PSC to be advised of her status as a person with statutory priority.

[124] In a new medical certificate dated July 17, 2012, the grievor's attending physician indicated that the grievor was fit "[translation] to return to work as of July 17, 2012".

[125] On July 19, 2012, the Acting Regional Manager of Staffing and Labour Relations at the RCMP sent the PSC the documents needed to register the grievor in PIMS. The PSC accepted the latest medical certificate, and the grievor's registration could be completed.

[126] On December 19, 2012, the RCMP sent the grievor a letter to confirm the change to her priority status because, as indicated previously, her substantive position had been staffed on June 26, 2012, for an indeterminate period.

(ii) Interruption in priority entitlement at the grievor's request

[127] At the hearing, the issue was raised of a medical certificate dated November 27, 2012, which stated that the grievor was unfit to be referred to jobs and to work. That

certificate was not submitted as evidence as it could not be found. It might have been submitted to the PSC.

[128] At the grievor's request, the PSC suspended her status as a person with a priority entitlement.

[129] On February 27, 2013, a human resources employee from the RCMP advised the grievor that the employer had not received a medical certificate to allow job offers to be ceased through PIMS. The grievor then replied that she would obtain a certificate of illness at her next appointment with her physician.

[130] On March 25, 2013, the grievor's attending physician indicated in a new medical certificate that his patient was "[translation] still unfit to work and unfit to look for work (therefore, the situation has not changed)".

[131] On April 23, 2013, Ms. Cousineau checked with the PSC to see if there were any developments in the grievor's case. Ms. Cousineau added the following:

> [Translation]
>
> …
>
> *It seems that she has been sick since October or November. Are you in contact with her? What is the implication for her status and her rights?*
>
> *We have very little contact with her. Her case is very particular. In November 2011, Health Canada noted that she would never return to the RCMP due to her permanent condition.*
>
> *However, the employer-employee relationship still exists and we are trying to handle her case with diligence.*
>
> *Does she still have priority status?*

(iii) Conclusion concerning the grievor's duty to cooperate

[132] Therefore, the issue is whether the grievor was cooperative and open about the steps her employer took to register her in PIMS or to accommodate her. I conclude that she was. She did not fail to cooperate when the time came to register her in PIMS or accommodate her. Based on the evidence, the grievor and her union representatives acted in good faith throughout the process.

[133] In particular, I note that in the summer of 2011, the grievor's union representative made considerable efforts to prepare her return to work. The union representative invited the employer to take part in a collaborative process to prepare her return, but no plan could be established. Therefore, the union did its best to improve the situation, but had no success with the employer.

[134] Based on the evidence, the grievor also did her best to advise the employer of her need for assistance. She very legitimately asked the employer for help prepare a new résumé. However, the help was slow in coming.

[135] It is true that at some point, the grievor asked her union representative to handle communications with her employer for her. However, she made that request because she felt helpless and because her situation with her employer was tense.

[136] It is also true that a delay of more than two months was caused by the confusion that reigned for some time on the grievor's "[translation] effective date of being fit to return to work". The PSC required that date to complete her registration in PIMS. Neither the employer nor the grievor are responsible for the misunderstanding that persisted for some time on that matter. Neither the grievor nor her union representatives understood what the PSC wanted, which is why many changes were needed to resolve this issue. At the employer's request, and in a spirit of cooperation, the grievor consulted her physician on several occasions and submitted the requested medical certificates.

[137] Similarly, I note that although the grievor was referred a few times for potential positions through PIMS and that she chose not to pursue them, those opportunities did not reflect the medical constraints of which she had advised her employer or required university diplomas that she did not hold. The grievor explained that she wanted to be open with respect to those opportunities but that they were not realistic.

[138] Therefore, I conclude that the grievor met her obligation to cooperate with implementing accommodations.

4. Conclusion with respect to the discrimination allegation

[139] For all these reasons, I conclude that it has been established that the employer discriminated against the grievor. On the one hand, the grievor established a *prima facie* case of discrimination. On the other hand, the employer did not provide a

reasonable explanation demonstrating that the supposed discrimination did not occur as alleged or that the conduct was not discriminatory. The employer's efforts to facilitate her return to work were insufficient compared to its duty to accommodate short of undue hardship. For these reasons, I conclude that the grievance is founded.

[140] Finally, I note that the employer also cited many other decisions in support of its allegation that there was no discrimination in this case. I have read and examined each one. However, I chose to cite only those that were of particular importance in this case.

V. Redress

1. Compensation, benefits, and costs incurred

[141] The grievor requested "salary protection"; the full reimbursement of all contributions (the employer's and the employee's) to her pension fund since September 29, 2008; the reimbursement of her accumulated and unused sick days; the payment of 12 weeks of annual leave since 2008 (4 weeks for 3 years); benefits such as medical, dental, and vision care insurance; and the reimbursement of the costs incurred as cited in her grievance.

[142] The grievor referred me to *Kelly* and submitted that the same conclusion should apply in this case. In that case, the grievor was forced to remain at home until he obtained a position in another department, in the field of conflict resolution. Therefore, he sought the restitution of the sick leave and annual leave credits that he used while he was at home, looking for work. Adjudicator Potter ordered the employer to reimburse the grievor the sick leave and annual leave credits that he had to use on the grounds that the employer was better positioned to cover the costs when attempts by both parties to find the grievor another job are unsuccessful. He also added the following at paragraph 111:

> *The employer, having decided that it had not reached the point of undue hardship (otherwise it would have, as it first warned him, dismissed him for disability) and being willing to continue the search, should also bear the cost of his being at home without work. In this instance, this could be a form of accommodation.*

[143] I support that principle. Therefore, I order the employer to compensate the grievor for all amounts lost in terms of remuneration, annual leave credits, and

benefits for the period from November 28, 2011, until her attending physician declared her unfit to pursue her job search and to work.

[144] If the grievance were allowed, the grievor asked that I give the parties time to determine themselves the amounts she is due for lost salary, accumulated sick leave, vacation, and other benefits set out in the collective agreement. The employer agreed to that request. Therefore, I order that the parties jointly determine the amount the grievor is due within 60 calendar days of the date of this decision. The parties must also consider the different amounts the grievor requested in her grievance.

[145] It could be noted that the employer cannot be held responsible for the grievor's decision to take early retirement instead of exploring the option of a medical retirement. It is generally more financially advantageous to take medical retirement because, with early retirement, a penalty is imposed in terms of the pension. In this case, if the grievor had qualified for medical retirement, she could have received a larger retirement benefit each year, from the beginning of her retirement until the end of her life.

[146] On this matter, I note that on June 25, 2013, the grievor advised the employer that she felt that her health no longer allowed her to hold a job and that she planned to retire soon. She included with her letter a medical certificate indicating that her physician agreed with that decision.

[147] On July 12, 2013, Ms. Cousineau advised the grievor that to make her retirement official, she needed to send a letter of resignation from the public service and include the date on which she wished to retire. Ms. Cousineau stated the following in her email:

> [Translation]
>
> *If it were a medical retirement, the procedure would be slightly different. If that is the case, you can advise me and I will then provide you with the necessary information. Not knowing whether it is a medical retirement, I will not send you too much information, as that could be confusing.*
>
> *If you have any questions, feel free to ask.*

[148] On July 15, 2013, the grievor sent her resignation letter to the RCMP, indicating that her last day of employment would be August 23, 2013.

[149] Ms. Cousineau did not receive any request for information from the grievor or her union representatives on the medical retirement option. Since the grievor's physician approved her decision to retire, it would have been better for her to explore the option of a medical retirement. However, the employer cannot be held responsible for her decision to take early retirement instead of exploring the option of a medical retirement. The employer offered to provide the grievor with information on that matter, but she did not pursue it.

2. Damages for pain and suffering and special compensation

[150] The Board has the authority under paragraph 226(2)(b) of the *PSLRA* to award the grievor damages due to the employer's discriminatory practice, in accordance with paragraph 53(2)(e) and subsection 53(3) of the *CHRA*, which read 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.*

[151] In his final observations, counsel for the grievor submitted that his client's claim in her grievance for "$25 000 in damages for harm to [her] psychological and physical health over a long period" is in fact a claim for the amounts set out in paragraph 53(2)(e) and subsection 53(3) of the *CHRA*. He referred me to the Board's decisions in *Kirby v. Treasury Board (Correctional Service of Canada)*, 2015 PSLREB 41,

and *Nicol* as comparisons with respect to assessing damages for pain and suffering and special compensation.

[152] In *Kirby*, Adjudicator Shannon awarded an amount of $10 000 to the grievor, payable by the employer under paragraph 53(2)(e) of the *CHRA*, due to the employer's arbitrary decision to not appropriately accommodate the grievor and other evidence. She also awarded an amount of $2500 to the grievor, payable by the employer under subsection 53(3) of the *CHRA*, in acknowledgement of its wilful and reckless disregard for its obligations.

[153] In *Nicol*, Adjudicator Howes awarded an amount of $20 000 to the grievor, payable by the employer under paragraph 53(2)(e) of the *CHRA*, for pain and suffering, attributable to the discrimination and psychological and physical damages that the grievor suffered and would continue to suffer due to the employer's neglect and inability to correct the situation during what should have been his normal pre-retirement years. In that case, the grievor lost that possibility of returning to work due to his retirement for medical reasons. So Adjudicator Howes ruled that he was to receive the maximum monetary compensation due to the long-term repercussions for him. In particular, the circumstances were such that the situation could not be remedied other than financially.

[154] Adjudicator Howes also ruled that it was an appropriate case for awarding special compensation under subsection 53(3) of the *CHRA*. She noted that it was not an academic exercise and that it was not about enriching the grievor; it was about acknowledging the employer's actions and the redress that resulted from those actions. Thus, she awarded the maximum damages, i.e., $18 000, under subsection 53(3) of the *CHRA*, on the grounds that the employer engaged in discriminatory practices and that its conduct was repeated, sustained, and calculated to ensure that the grievor would not return to work; the situation lasted almost four years. According to the adjudicator, the effect of that conduct justified awarding near the upper end of damages.

[155] I note first that with respect to paragraph 53(2)(e) of the *CHRA*, the jurisprudence shows that in such cases, the evidence leads to a variety of monetary damages. As indicated in *Nicol*, each case is different in terms of the amounts awarded, based on the complainant's ability to return to work.

[156] In this case, I find that if the employer had agreed to help the grievor prepare her return to work, she would have had better chances of remaining a productive employee for a certain number of years. Instead, she was abandoned at a critical time in her career. The evidence submitted by the grievor and her union representative established that she suffered considerably during that period. Her health deteriorated. She decided to take early retirement because she was discouraged and short money. In other words, the employer's failure to honour its duty to accommodate the grievor had a major impact on her life.

[157] Therefore, I award an amount of $15 000 for pain and suffering, in accordance with paragraph 53(2)(e) of the *CHRA*, attributable to the discrimination and pain and suffering that the grievor endured and will continue to endure due to the long-term repercussions on her and the fact that the harm caused to her cannot be repaired. Awarding near the maximum amount is justified by the fact that the discrimination and the pain and suffering that the grievor endured had a serious impact on her career and her health. Her suffering is real, and her opportunities for personal fulfillment are reduced.

[158] Finally, as for subsection 53(3) of the *CHRA*, I find that the employer's conduct is an example of its ignorance of its obligations and of its indifference toward the grievor. It constitutes reckless conduct under subsection 53(3) of the *CHRA*. Under the circumstances, I award an amount of $5000 in special compensation in accordance with that subsection. That compensation is justifiable at the bottom end of the scale because the employer, despite its carelessness, nevertheless registered the grievor in PIMS, which mitigated its reckless behaviour.

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

VI. Order

[160] The grievance is allowed.

[161] The employer shall pay the grievor the amount of $15 000 under paragraph 53(2)(e) of the *CHRA* within 60 days of this decision.

[162] The employer shall pay the grievor the amount of $5000 under subsection 53(3) of the *CHRA* within 60 days of this decision.

[163] The issue of other compensatory amounts the grievor is due shall be referred to the parties for a period of 60 days from the date of this decision, during which time they shall establish those amounts, as indicated in this decision.

[164] No later than 60 days from the date of this decision, the parties shall advise the Board whether they have reached an agreement, as indicated in this decision.

[165] If the parties are unable to reach an agreement, as indicated in this decision, another hearing shall be scheduled to be held no later than 120 days after the date of this decision or when the adjudicator is available after that time.

[166] I shall remain seized of the matters stemming from this order for a period of 180 days from the date of this decision.

December 23, 2016.

PSLREB Translation

Nathalie Daigle,
a panel of the Public Service Labour Relations and Employment Board