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Files: 566-33-9622, 9623, and 9357

Citation: 2016 PSLREB 111

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

MARTIN CYR

Grievor

and

PARKS CANADA AGENCY

Employer

Indexed as
Cyr v. Parks Canada Agency

In the matter of individual grievances referred to adjudication

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

For the Grievor: Wassim Garzouzi, Raven, Cameron, Ballantyne & Yazbeck LLP

For the Employer: Marc Séguin, counsel, Justice Canada

Heard at Sept-Îles, Quebec,
October 5 to 7, 2016.
(PSLREB Translation)

I. Individual grievances referred to adjudication

[1] Martin Cyr ("the grievor") filed two grievances with the Public Service Labour Relations Board ("the former Board").

[2] The first grievance (PSLREB File No. 566-33-9357) was filed on July 3, 2013, and was referred to adjudication on December 11, 2013. It is about a discrimination issue, and so notice was given to the Canadian Human Rights Commission, which indicated that it did not intend to intervene in the case.

[3] The second grievance, about a 10-day disciplinary suspension, was filed on August 23, 2013, and was referred to adjudication on March 5, 2014, for two purposes: PSLREB File No. 566-33-9622, in which the disciplinary measure was contested as being unfair, and PSLREB File No. 566-33-9623, in which the measure was contested under clause 16.03 of the collective agreement between the Parks Canada Agency ("the employer") and the Public Service Alliance of Canada ("the bargaining agent"), with an expiration date of August 4, 2014.

[4] 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"), which replaced the former Board.

II. Summary of the evidence

[5] The employer called three people to testify: Robin Lessard, field unit superintendent at Mingan (Mingan Archipelago National Park ("the "Park")); Chantal Chrétien, human resources specialist for the Mingan and Gaspésie national parks; and Steeve Vigneault, technical services coordinator at the Park and the grievor's manager. The grievor testified on his own behalf. On the whole, the testimonies did not contradict each other. Thus, I will summarize all the evidence, citing the witnesses when it is necessary to understand the facts.

[6] The grievor has worked for the employer since the Park's creation in 1984. He is a permanent but seasonal employee. He works during the Park's operating season every year, from around mid-May to mid-October. The dates vary from year to year, depending on the weather.

[7] The Park is a marine park in the Gulf of Saint Lawrence with more than 1000 islands. Among them, only a few have infrastructure (shelters, managed trails, campgrounds, washrooms, etc.) Visitors and employees have to travel by boat. The work conditions are particularly affected by the risks inherent in a marine environment, which is subject to bad weather and is bathed in glacial water year-round.

[8] The grievor is a maintenance employee classified at the GL-MAN-04 group and level. Mr. Vigneault explained that that classification is specific to the Park, in recognition of the risk posed by the work conditions in a marine environment.

[9] Maintenance employees have a wide variety of tasks. At the beginning of the season, quays and footbridges that allow visitors to access the islands need installation. The infrastructure needs to be maintained (e.g., the visitor welcome centre, shelters, and managed trails). The managed trails include wooden walkways, stairs, and handrails, among other things. Unmanaged trails need to be cleared of debris, such as fallen trees and branches.

[10] During the tourist season, it is important to maintain the managed and unmanaged trails, and the campgrounds must be kept clean and supplied, for example with firewood. Finally, when the season is over, the quays and footbridges need removal and storage for the winter.

[11] The technical services that Mr. Vigneault directs include boat operators. Since travelling is done by water, employees need to be transported. The boat operators are classified higher than GL-MAN-04; they are classified at the SC-DED-04 group and level. However, as Mr. Vigneault explained, once transport is complete, the employer expects that boat operators will work as GL-MAN-04s on the islands. Otherwise, they would have nothing to do.

[12] In 2007, the grievor had some health problems and underwent a quintuple bypass. He returned to work as a seasonal employee without any functional limitations. In 2010, he started feeling pain and cramps in his legs. His treating physician filled out a form in 2011 to report on his functional limitations. The document indicates that the continuous walking distance is limited to 500 metres and that he must climb stairs at his own pace. The form also indicates that he can lift up to 50 pounds.

[13] During the 2011 and 2012 seasons, the grievor held an interim boat operator position with other modified duties; thus, the employer complied with the functional limitations that the treating physician indicated.

[14] At the beginning of the 2013 season, the employer learned of another document about the grievor's functional limitations, which had been completed by the treating physician but had been addressed to Transports Québec (TQ), which employs the grievor as a road worker in the winter. In it, which is also dated 2011, the physician reports a walking distance limit of 500 feet.

[15] So the employer sent a new form about functional limitations to the physician in May 2013 for clarification on the following questions: Was the distance that the grievor was allowed to travel without stopping 500 metres or 500 feet? What were the limitations with respect to working on slopes, given the rough terrain on the islands?

[16] On May 31, 2013, the physician responded that the grievor needed to avoid slopes, that he should not walk more than 500 feet at a time, and that he should avoid going up and down stairs repeatedly. In addition, the physician checked the box on the form indicating that the maximum weight the grievor could lift was 20 pounds (it had been 50 pounds).

[17] Two meetings were held about the physician's report, on June 10 and 17, 2013. First, their context from the employer's perspective should be explained.

[18] Mr. Vigneault testified at length on the details of the tasks the GL-MAN-04s carry out. At the beginning of the season, since most of the work entails installing footbridges and quays for visitors, there is relatively little walking involved. However, when visitors start arriving, it is important to maintain the trails, campgrounds, and shelters on the islands, which can mean a lot of walking, in addition to transporting the equipment to perform the work. Furthermore, access to the islands may be steep once off the boat.

[19] Mr. Vigneault testified that the limitation to the distance that the grievor could walk, which was 500 feet, as well as the limitations with respect to slopes and stairs concerned him greatly. The managed trails often have stairs, and the islands are rough. Mr. Vigneault stated that the employer had a responsibility to ensure that the work conditions did not aggravate the grievor's health problems.

[20] At the beginning of the 2013 season (April or May), the employer posted a permanent boat operator position, which the grievor had held on an interim basis in 2011 and 2012. He applied for it. The position required a medical certificate and an operator's certificate, both issued by Transport Canada. In May 2013, when the candidates were preselected, the grievor's medical certificate had expired (however, his boat operator certificate was valid). For that reason, he was excluded from the process, even though his physician had issued a temporary medical certificate on May 31, 2013 (which was an acceptable solution until Transport Canada carried out a review later on).

[21] When Mr. Vigneault received the physician's update on the grievor's functional limitations toward the beginning of June 2013, he was somewhat perplexed about the duties that he could assign to the grievor. The mid-season was starting, which required long walks to maintain the many islands that visitors can access.

[22] Therefore, Mr. Vigneault met with the grievor on June 10, 2013, along with Ms. Chrétien, a human resources advisor. At the meeting, they discussed the new functional limitations form that the treating physician issued on May 31, 2013, which reported that walking distance was limited to 500 feet, recommended avoiding stairs and slopes, and specified the weight limit that the grievor could lift. The last limitation startled the grievor; he did not understand why his physician would have modified his capacity to lift weight. In fact, it was an error, and it was corrected the next day. During the meeting on June 10, 2013, Mr. Vigneault and Ms. Chrétien implied that the employer was trying hard to adapt the grievor's duties to his functional limitations but that it was not easy. The grievor reacted by stating that he was perfectly capable of continuing to work as he had done to that point, with his co-workers' understanding; they were adapting to his reality.

[23] The grievor was called to another meeting on June 17, 2013. This time, Ms. Chrétien, who divides her time between Havre-Saint-Pierre and Gaspé, participated by telephone. The grievor expected that Mr. Vigneault would present him with ways to deal with his functional limitations, possibly by again offering him an interim boat operator position. So, he declared that he did not see the point of being accompanied by a union representative, as Mr. Vigneault had suggested to him.

[24] At the meeting, Mr. Vigneault announced to the grievor that the employer had

not found duties that corresponded to his functional limitations. So he was ordered to take sick leave, pending a solution. In the letter issued after the meeting and dated June 17, 2013, the key information from the meeting appears as follows:

> [Translation]
>
> …
>
> *As discussed, the employer will make all necessary efforts to accommodate you by exploring the different possible avenues all while respecting your current limitations. For the time being, the limitations that your physician mentioned mean that you cannot perform the duties of your maintenance worker II position (GL-MAN-04).*
>
> *Thus, since you are unfit to hold your position, we have no choice but to place you on sick leave indefinitely as of 09:30 today.*
>
> …

[25] The letter continues, indicating the intention to look for other positions that the grievor would be fit to hold and asking for his and his bargaining agent's cooperation.

[26] All the witnesses agreed that the letter accurately reflected what Mr. Vigneault said to the grievor during the meeting. When the grievor learned of the decision to be placed on sick leave indefinitely because he was unfit to hold his position, he exploded. The witnesses also agreed on that point.

[27] Ms. Chrétien testified that the grievor immediately lost his temper and shouted that the employer was going to pay; that he would cause a ruckus; and that he would take his boat, tour the islands, and bother visitors by playing music very loudly. When Ms. Chrétien tried to calm him down by stating that there were different options to consider, he turned against her, insulted her, and said, "[translation] You're going to pay for this, *ma calice* (curse in Quebecois), when you come back to Havre." His tone was so angry that his words frightened Ms. Chrétien, even though she is inured to the reactions of employees, who do not always like what human resources has to tell them.

[28] Ms. Chrétien testified that it was the first time in her career that she was afraid of an employee, to the point where she filed a complaint against the grievor with the Sûreté du Québec (SQ). During her next trip to Havre-Saint-Pierre (where she goes for one week out of every four or five), she made sure to rent a room on the top floor so

that anyone arriving would have to climb stairs to reach it. On that occasion, she avoided going out at night, while normally she felt completely safe there.

[29] Mr. Vigneault largely confirmed what Ms. Chrétien said. He clearly remembered the grievor's anger, which was directed at the employer and Ms. Chrétien. He remembered the words directed at Ms. Chrétien as the following: "[translation] You're going to pay for this, *ma christ* (curse in Quebecois), when you come back to Havre-Saint-Pierre."

[30] Ms. Chrétien testified that the grievor said "*ma calice* ". During the disciplinary investigation that took place after the June 17 meeting, she said "*ma ciboire* (curse in Quebecois)". In cross-examination, she explained that she was certain that it was "[translation] a church word". The grievor, for his part, remembered calling her "*ma chienne* (curse in Quebecois)". I believe that there are no doubts about the insult and anger toward Ms. Chrétien.

[31] The grievor did not remember threatening Ms. Chrétien. He distinctly remembered losing his temper and insulting her and the employer. He did not deny that he might have threatened her or that he declared that he would take the boat and bother tourists. He testified that his boat was not working at the time, and he said that those words had been driven by anger and that they were truly inconsequential.

[32] In any event, Ms. Chrétien was sufficiently shaken to file a complaint with the SQ. For his part, Mr. Vigneault was rather troubled. He did not really believe that the grievor could commit acts of violence, especially since two hours after the meeting, the grievor spoke to him and appeared rather apologetic for losing his temper. The fact remains that the grievor was angry with the employer and was bitter. Mr. Vigneault spoke about it with his superior, Mr. Lessard, who advised him to make a statement about his concerns to the SQ. At the hearing, Mr. Vigneault repeated several times that he was especially concerned about the gas station on the Park's land at Havre-Saint-Pierre, because if someone decided to blow it up, the damage would be catastrophic.

[33] The grievor testified that a week later (after June 24, 2013), the SQ asked him to appear at the police station for an interview, or a warrant for his arrest would be issued. At that meeting, he was informed of Ms. Chrétien's complaint and Mr. Vigneault's statement. The grievor testified that he was surprised and afraid. He acknowledged that he had become very angry, but the words that he said in his anger

were just words. He never intended to harm anyone or damage the Park's equipment. There was no judicial follow-up to either Ms. Chrétien's complaint or Mr. Vigneault's statement.

[34] The grievor's "explosion" does not appear in the letter dated June 17, 2013, which Mr. Vigneault sent him immediately after the meeting to go over the employer's decision. Starting on June 18, 2013, Mr. Vigneault examined the duties of GL-MAN-04s in detail to determine possible accommodation measures for the grievor.

[35] On July 5, 2013, Mr. Vigneault and Ms. Chrétien (again by telephone) met again with the grievor. This time, a union representative was present. Throughout the meeting, the grievor apologized to Mr. Vigneault for losing his temper. Mr. Vigneault told him that he should instead apologize to Ms. Chrétien, and so the grievor did.

[36] The testimonies were somewhat contradictory on that point. All the witnesses agreed that the grievor apologized on July 5, 2013, but he maintained that he did so the day after the meeting on June 17, 2013, when he called Ms. Chrétien's office to obtain forms for disability insurance.

[37] Ms. Chrétien testified that the grievor did not speak with her until July 5, 2013. Given the little hostility she showed, despite her initial fear, as evidenced by her prompt cooperation to find accommodation solutions for the grievor, I believe her version. I also believe what the grievor said, which was that he called the office, that he spoke with the secretary, that she told him that he would have to speak with Ms. Chrétien because she was the forms expert, and that he then felt embarrassed and told the secretary something like, "[translation] I really cannot speak with her, I got very angry with her yesterday," to which the secretary allegedly replied that Ms. Chrétien was a professional who took care of all employees, including the grievor. I do not believe that the grievor spoke to Ms. Chrétien on that day. However, I do believe that he felt remorse due to his account of this incident and his testimony at the hearing.

[38] At the July 5, 2013, meeting, it was decided that the grievor would hold the boat operator position on an interim basis (the posted position was not filled) starting the following week and then for three weeks from July 8 to 26, 2013. After that date, the employer would endeavour to find him work. In fact, after July 26, 2013, the grievor resumed his GL-MAN-04 duties with accommodation measures, and he worked until the end of the 2013 season.

[39] Mr. Vigneault testified that after the July 5, 2013, meeting, he prepared a complete picture of a GL-MAN-04's duties, of all the work required for Park maintenance, and of the time allotted for the different tasks using software he had developed the year before. One of the solutions to help the grievor was to allow him to use a six-wheeler (a utility vehicle that can travel through the forest) to help him transport equipment and firewood that needed delivering to campgrounds. Mr. Vigneault said that Park policy was to limit the use of six-wheelers to preserve the state of the land but that using one was sometimes necessary. The increased use of the six-wheeler was one of the measures that helped accommodate the grievor.

[40] Therefore, the situation of accommodating the grievor's functional limitations was settled as of July 5, 2013. However, there was still the incident on June 17, 2013, which, according to the employer, needed to be investigated for potential discipline.

[41] Diane Primeau led the investigation. She is an employee and did not testify at the hearing. Ms. Primeau and Mr. Lessard prepared the report. The parties agreed to submit the report and Ms. Primeau's notes from the interviews with those who took part in the investigation: Mr. Vigneault, Ms. Chrétien, the grievor, and Brigitte Grondin, Ms. Chrétien's direct supervisor, who also attended the July 5 meeting, by telephone, and who told the investigator that in her opinion, the grievor's apologies were sincere. Ms. Grondin did not testify at the hearing.

[42] The report details the June 17 incident and the absence of unsolicited apologies from the grievor and concludes as follows:

> [Translation]
>
> *… We observed during the meetings (grievance hearing and meeting during this investigation) that Martin quickly becomes overexcited, agitated, and angry when he finds himself in situations that he does not control or does not understand. Despite this observation, we must take seriously what was said to Chantal Chrétien.…*

[43] On August 14, 2013, Mr. Lessard sent the grievor a discipline letter. The discipline was a 10-day suspension without pay that was based solely on the threat made against Ms. Chrétien, in the following terms: "[translation] You're going to pay, *ma ciboire* (curse in Quebecois), when you come to Havre." The employer found that the grievor had behaved violently toward Ms. Chrétien, which is unacceptable in the

workplace. It said that it accounted for mitigating factors, i.e., the grievor's years of service and his clean disciplinary record, as well as aggravating factors, such as "[translation] … absence of remorse, denial of the facts, and limited feeling of responsibility shown…" during a meeting with Mr. Lessard on July 12, 2013.

[44] The witnesses at the hearing spoke of facts and events from after summer 2013. I do not believe that they are relevant to the analysis of this file.

III. Summary of the arguments

A. For the employer

[45] According to the employer, the following questions must be answered when adjudicating the two grievances. First, was it justified imposing discipline? If so, was the penalty proportional, considering the circumstances? Then, did placing the grievor on paid sick leave constitute discrimination?

[46] With respect to discrimination, the evidence shows the employer's good-faith efforts to accommodate the grievor according to his functional limitations. Cooperation with the bargaining agent allowed finding a first short-term solution on July 5, 2013, then a solution for the rest of the season, which was implemented on July 26, 2013. The employer's flexibility, reflected by the six-wheeler, showed its willingness to be reasonable in its search for solutions.

[47] At the beginning of the season, the employer believed that it could continue as it had done in previous years. It found a change to the grievor's limitations, and it hastened to react. The work conditions change throughout the season, and the employer reacted as quickly as possible to take into account both the work conditions and the grievor's new reality. As Mr. Vigneault pointed out in his testimony, the geographical and meteorological realities of the Mingan Archipelago play an important role in the work conditions.

[48] The period during which the grievor had to use his sick leave was rather short. The employer's counsel spoke of two weeks (in fact, it was three weeks, from June 17 to July 8; the employer paid the grievor a day's wages for attending the meeting on July 5).

[49] Placing the grievor on leave was not motivated by malice but instead by a

concern for his well-being. The employer had the duty to protect him and to take into account his functional limitations when assigning tasks. It acted as quickly as possible to find a solution, starting on July 5, 2013.

[50] As for the alleged misconduct, although the employer acknowledged that the grievor was taken by surprise at the June 17 meeting, that his record was clean, and that he had long years of service, he nevertheless made threats against Ms. Chrétien. Although he is guilty of a violent act, he seems to perceive himself as the victim. In his testimony, he sought to downplay the impact of his words, which created a real fear for Ms. Chrétien. Making threats crosses a line, and the 10-day suspension was fully merited.

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

[51] The bargaining agent and the grievor immediately acknowledged that there were reasons for imposing discipline for the grievor's inappropriate words toward Ms. Chrétien. The grievor acknowledged that he should not have insulted her as he did, and he regrets it. He apologized several times and again at the hearing. That being said, the discipline imposed was disproportionate.

[52] First, the discrimination issue must be examined, since it sets the context for the two grievances. The grievor agreed that a reasonable accommodation measure was put into place on July 5, 2013. The discrimination concerns what came before it, i.e., being placed on sick leave indefinitely because he was declared unfit for work. On June 17, 2013, he did not know that matters would be settled on July 5. He believed that he had been permanently suspended due to a disability. However, he was not disabled. He had performed his duties since the beginning of the season. He was thoroughly familiar with the nature of the work, and knew that, since 2011, he had found a way to perform his work despite his functional limitations.

[53] The bargaining agent acknowledged that it is rare for a period of discrimination associated with a lack of accommodation to be so short. However, the discrimination had heavy consequences, since it needlessly mobilized resources. The employer had been aware of the grievor's functional limitations for a long time. It is inexcusable that its first reaction was to get rid of him and to make him feel like that he was no longer useful because he was unfit for work. Human rights laws aim to stop precisely such treatment.

[54] The employer had new information as of June 11, 2013. The grievor continued to work from June 11 to 17, 2013. Before that date, no analysis was conducted of either the position or the duties. Only after June 17 did Mr. Vigneault launch a serious study, which finished in mid-July. The grievor was told that he was unfit to work. However, three weeks later, a way of accommodating him until the end of the season was found, as a proper study had been done. The employer's mistake was first reacting by talking about an impossibility, which was a serious affront to the grievor's dignity and a perfect example of discrimination.

[55] The bargaining agent maintained that the grievor is entitled to compensation under the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; *CHRA*).

[56] With respect to the disciplinary measure, there is no doubt that the grievor's behaviour during the June 17 meeting was unacceptable. However, punishment was imposed even before the discipline letter, on August 14, 2013. Being called in by the SQ under a threat of arrest deeply affected the grievor, who has never had any problems with the authorities.

[57] One consideration that the employer did not seem to account for, and which the bargaining agent emphasized, is that the grievor is a seasonal worker. A penalty of 10 days is very severe for a job that lasts only 20 weeks. There is no magic number, and the grievor and the bargaining agent acknowledged that a penalty was merited, given the proven misconduct. The bargaining agent suggested reducing it to three days, to a third, which would be a penalty proportional to a seasonal job's duration.

IV. Reasons

[58] The employer had the burden of establishing that the discipline was fair. The bargaining agent had the burden of demonstrating that discrimination occurred.

[59] Both parties pointed out the particularities of the situation. The employer highlighted the work environment's demanding conditions. For its part, the bargaining agent stressed the difficult reality of an employee who was told that he was no longer fit to perform his duties after 30 years of service.

[60] Both parties submitted a number of decisions in support of their arguments. In the circumstances of this case, with all due respect, their usefulness is rather limited. The decisions that the employer cited about the penalty imposed on the grievor show

that, in fact, a 10-day suspension is a very serious penalty for an action made abruptly and thoughtlessly. The decisions that the bargaining agent submitted about discrimination are based on solid cases of discrimination.

[61] In this case, it seems to me that the facts are especially important and that the law that applies for both the suspension and the discrimination is well established and acknowledged.

[62] The employer cannot tolerate violence in the workplace, regardless of its form. It has a duty to protect all its employees. Furthermore, the context of a misconduct, the history of the employee committing it, the genuineness of his or her regret, and the punitive weight of the penalty are all factors that the arbitral jurisprudence takes into account.

[63] Likewise, the employer's duty to accommodate an employee whose job is affected by one of its rules, which creates a distinction based on a prohibited ground, derives from the *CHRA* and has been recognized in the jurisprudence since *Ontario Human Rights Commission v. Simpsons-Sears*, [1985] 2 S.C.R. 536 ("*O'Malley*"). In this case, the employer never denied its duty to offer the grievor accommodation. His criticism is that it took too long to implement.

[64] I am seized with two distinct grievances, but their interaction means that the analysis of one influences that of the other. The grievor's alleged misconduct was a direct result of his perception that he was the victim of discrimination. Therefore, I will begin with the discrimination grievance and then move on to the 10-day suspension grievance.

A. <u>The discrimination grievance</u>

[65] The grievor claimed that he was a victim of discrimination because the employer told him that he was indefinitely unfit for work.

[66] To establish that the employer's action was discriminatory under the *CHRA*, it first must be established that there was a discriminatory act; in other words that, at first glance, a distinction was indeed made that was based on a prohibited ground. At this point, the following relevant provisions of the *CHRA* should be recalled:

…

> ***3 (1)*** *For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.*
>
> …
>
> ***7*** *It is a discriminatory practice, directly or indirectly,*
>
> > ***(a)*** *to refuse to employ or continue to employ any individual, or*
> >
> > ***(b)*** *in the course of employment, to differentiate adversely in relation to an employee,*
>
> *on a prohibited ground of discrimination.*
>
> …

[67] The *CHRA* prohibits differential treatment in employment based on a physical disability. It is well established that the grievor had functional limitations, i.e., a physical disability, which was why he was unwillingly placed on sick leave as of June 17, 2013. Therefore, it is established that *prima facie* discrimination occurred.

[68] However, the employer may defend itself for acting discriminatorily by showing that operational reasons required that the employee comply with its expectations. The *CHRA* states as follows:

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

…

[69] In accordance with the principle established in *O'Malley*, the analysis of the justified occupational requirements stipulates that the employer must consider accommodation for an employee to the threshold of undue hardship.

[70] In *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3, the Supreme Court of Canada emphasized that this analysis must be individualized and that it must truly account for the capacities of the person who may be discriminated against on a prohibited ground.

[71] What, then, about the accommodation that the employer proposed to the grievor?

[72] The employer never denied its duty to accommodate. During the two seasons before the 2013 season, it employed the grievor while considering his functional limitations. At the beginning of the 2013 season, he was employed under a variety of measures to account for his limitations. During his testimony, Mr. Vigneault implied that the grievor occasionally had some difficulties at work, according to the supervisor (who did not testify), which the grievor did not dispute. Instead, at the hearing, as at the June 10 and 17, 2013, meetings, he stated that he was able to do his job and that his co-workers were adapting to his way of working.

[73] I do not believe that it was unreasonable for the employer to ponder, at mid-season, how the grievor's job needed to continue. I believe Mr. Vigneault was sincere when he worried about how the grievor could possibly work with slopes and long walks, considering the form the physician completed on May 31, 2013.

[74] The employer endeavoured to find a solution as of July 5, 2013. Was the accommodation ideal? No. It would have been had it been proposed as of June 17, 2013. Was it reasonable? I believe so, since the grievor was in fact able to work for the rest of the season, except for his suspension period.

[75] The bargaining agent and the grievor accused the employer of not having carried out the study earlier. Based on Mr. Vigneault's testimony, managing the Park's technical services is very complex. About 50 employees work in the summer, and weather and maritime concerns are constant. Organizing the tourist season on several islands and under difficult conditions is not easy. I believe that once it was notified of

the physician's report dated May 31, 2013, the employer worked with due diligence through Mr. Vigneault to find a reasonable accommodation for the grievor. Therefore, the discrimination grievance is dismissed.

B. <u>The 10-day suspension grievance</u>

[76] There is no doubt that the violence of the grievor's words was disproportionate under the circumstances and that they showed a flagrant lack of respect toward Ms. Chrétien and management. Misconduct occurred. It remains to be decided if the penalty was excessive. It is my view that it was, because the employer, by imposing the penalty, ignored certain things that should have included in the calculation.

[77] First, although I dismissed the discrimination grievance because the employer provided a reasonable accommodation, it seems to me that the grievor's distress must be acknowleged. It occurred when he was told that he was unfit for work and was given no prospects for accommodation. The fact that he lost his temper to the point that he frightened Ms. Chrétien cannot be excused, but his anger can be understood.

[78] In its analysis of the June 17 incident, the employer did not seem to acknowledge its part in the grievor's reaction. Mr. Vigneault did so in the comments he provided to the investigator. He recognized that the grievor was afraid and that he reacted because he feared losing his job. When it considered the mitigating factors, the employer considered only the grievor's years of service and clean disciplinary record. In my view, it should have recognized the context in which the grievor became angry. The employer accused him of acting as if he was the victim. As I explained earlier, while he was not the victim of discrimination because the employer provided a reasonable accommodation, nevertheless, he was subject to temporary leave, along with the uncertainty surrounding the continuation of his employment.

[79] Second, when I consider the jurisprudence submitted by the employer, I note that penalties imposed for violent acts or words are, in fact, generally lowered or reduced by adjudicators. (See in particular *Cahill v. Treasury Board (Solicitor General Canada - Correctional Service*), PSSRB File No. 166-02-28730 (19990830); *Frankel v. Treasury Board (Transport Canada)*, PSSRB File No. 166-02-26879 (19961011); *Lachance v. Treasury Board (Agriculture Canada)*, PSSRB File No. 166-02-26840 (19960329); and *Graves v. Treasury Board (Revenue Canada - Customs, Excise & Taxation)*, PSSRB File Nos. 149-02-199 and 166-02-28758 (19990611)).

[80] Finally, the employer accused the grievor of not making unsolicited apologies and of feeling only a limited responsibility for his words during the June 17, 2013, meeting. At the hearing, he turned to Ms. Chrétien several times to repeat his apology. I do not believe that he did so to impress the gallery. I sensed from the grievor both a feeling that people had been unfair to him, hence his rationalization of his anger, and embarrassment for losing his temper with Ms. Chrétien, since she did not deserve it. The employer used the expression "[translation] feeling of limited responsibility" as an accusation. I believe that the grievor felt regret along with a persistent feeling of unfairness for having been cast aside.

[81] Under the circumstances, I believe that the 10-day suspension was excessive. As the grievor pointed out, there is no magic number. I support his suggestion of a 3-day (24-hour) suspension. He should be reimbursed for the other 7 days (56 hours).

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

(The Order appears on the next page)

V. Order

[83] Grievance 566-33-9357 is dismissed.

[84] Grievances 566-33-9622 and 566-33-9623 are allowed in part.

[85] The employer shall pay Mr. Cyr the amount that he would have earned for 7 days of work (56 hours) in the summer of 2013. Simple interest calculated annually at the applicable Canada Savings Bonds rate shall be added to the amount for the period from August 28, 2013, to the date of this order.

[86] I will remain seized for 60 days from the date of this order for any issues arising from its implementation.

November 28, 2016.

PSLREB Translation

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