Date: 20160728

Files: 566-02-5673 and 5674

Citation: 2016 PSLREB 69

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

MANJIT DHILLON

Grievor

and

TREASURY BOARD
(Correctional Service of Canada)

Employer

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

In the matter of individual grievances referred to adjudication

Before: David Olsen, a panel of the Public Service Labour Relations and Employment Board

For the Grievor: Andrie Lortie, counsel

For the Employer: Genevieve Ruel, counsel

Heard at Abbotsford, British Columbia,
July 7 to 10, 2015.

I. Individual grievances referred to adjudication

[1] On July 20, 2011, the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN ("the bargaining agent") referred to adjudication an individual grievance concerning the application of article 37, the no-discrimination clause, of the collective agreement.

[2] On April 8, 2011, Manjit Dhillon ("the grievor"), who was on leave for a disability, grieved that on March 4, 2011; he had provided a medical note stating that he was able to return to work with no restrictions or limitations effective March 7, 2011. He claimed that as of the date of the grievance, the Correctional Service of Canada ("the employer" or CSC) still had not allowed him to go back to work. He claimed that the employer's actions were contrary to the collective agreement and constituted a discriminatory practice. He requested that the employer immediately allow him to return to work in his previous position and that he be paid all wages lost (his regular wage, shift differentials, and weekend premiums as well as other relief, including $20 000 for pain and suffering under the *Canadian Human Rights Act* (R.S.C. 1985, c. H-6; *CHRA*).

[3] On July 20, 2011, the bargaining agent referred to adjudication a second individual grievance under s. 209(1)(b) of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*") (disciplinary action resulting in termination, demotion, suspension, or financial penalty).

[4] On April 8, 2011, Mr. Dhillon grieved the employer's decision to not allow him to return to work, contrary to the collective agreement and labour laws. He alleged that this action amounted to a suspension without pay, which was unwarranted. By way of corrective action, he requested that he be immediately allowed to return to work and be paid all wages lost since the employer's decision was made, among other things.

[5] The employer, in its reply to both grievances dated May 16, 2011, advised that Mr. Dhillon had not been suspended without pay and that to the contrary, he was collecting disability insurance benefits up to the day he eventually did return to work.

[6] The employer also stated that it has a duty to ensure that employees returning to work following an absence due to a medical condition are medically cleared and are fit to return to work. The employer questioned his fitness for duty after receiving three

different medical notes from three different physicians in a period of one week as the notes contained contradictory information about his ability to safely return to work. The employer did not allow him to return to work requiring him to remain collecting disability insurance benefits until the ambiguity between his medical clearance and fitness for duty had been clarified.

[7] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board ("the new Board") to replace the former Public Service Labour Relations Board ("the former Board") as well as the former Public Service Staffing Tribunal.

[8] On the same day, the consequential and transitional amendments contained in sections 366 to 466 of the *Economic Action Plan 2013 Act, No. 2* (S.C. 2013, c. 40) also came into force (SI/2014-84). Pursuant to section 393 of the *Economic Action Plan 2013 Act, No. 2*, a proceeding commenced under the *Act* before November 1, 2014, is to be taken up and continue under and in conformity with the *Act* as it is amended by sections 365 to 470 of the *Economic Action Plan 2013 Act, No. 2*.

II. Summary of the evidence

[9] The bargaining agent called two witnesses, the grievor and Gordon Robinson, the regional president of the Pacific Region of the bargaining agent. The employer called two witnesses, Gary Monaghan, correctional manager at Matsqui Institution ("the institution"), and Mark Bussey, the assistant warden, operations, at the institution.

[10] I find the following evidence relevant to the disposition of these grievances.

A. Overview

[11] Mr. Dhillon is employed as a correctional officer, CX-01, at the institution. He has been employed as a correctional officer since May 2004 after commencing his employment at Kent Institution. The institution is a high- and medium-security institution housing some 200 male inmates.

[12] A correctional officer CX-01's duties involve taking care of and controlling inmates, escorting them within an institution, breaking up disturbances, and escorting them to appointments outside the institution, such as to court or to doctor's

appointments.

[13] On March 11, 2010, Mr. Dhillon injured his right thumb when it was caught in a key ring while he opened a cell door at work. He was not able to work as a result of the accident.

[14] The Workers' Compensation Board of British Columbia provided Mr. Dhillon with temporary disability benefits to May 9, 2010, when it considered that he had unreasonably refused suitable full-time light-duty work made available to him by the employer.

[15] The employer had offered him duties working in the control post at the front gate of the institution. The physical requirement for working there was to push a button to open and close a security gate. Answering a telephone and occasionally using a portable radio was also required. There was no requirement to respond to emergencies or to have contact with inmates. No physical labour was required. Most of the duties could be accomplished with one hand. The officer at the post was also responsible for the secure storage of firearms.

[16] Mr. Dhillon appealed the Workers' Compensation Board's decision to its Review Division and to the Workers' Compensation Appeal Tribunal of B.C. Both appeals were denied.

[17] The employer's position was that Mr. Dhillon did not make reasonable efforts to return to work to perform the light duties over the relevant period.

[18] When his workers' compensation payments ceased on May 9, 2010, he applied for disability insurance. The claim was accepted, and he was approved for coverage until May 1, 2011. The disability insurance compensated him at 70% of his salary as a correctional officer.

[19] Mr. Dhillon testified that he underwent many hand therapy treatments and, ultimately, cortisone injections. In addition, he underwent two surgeries, one on November 25, 2010, and the second on September 9, 2011, after he returned to work and after the events occurred that gave rise to the grievances. He has permanent nerve damage to two of his fingers that could not be rectified.

B. Specific events giving rise to the grievance

[20] On February 15 and 17th 2011, while absent from work on disability leave, Mr. Dhillon received cortisone injections. He stated that as a result, he felt quite a bit of difference and improvement in the use of his hand, and he felt better. Consequently, he decided to attempt to return to work.

[21] Mr. Dhillon contacted Mr. Monaghan, the correctional manager of scheduling and deployment, and advised him that he wished to return to work. Mr. Monaghan advised Mr. Dhillon that he required a note from his physician to that effect.

[22] Mr. Dhillon wanted to see his treating physician, Dr. Galina Strovskaia; however, she was not available. He attended at the clinic where she practised with Dr. Semion Strovski, whom he saw. He advised Dr. Strovski that he was prepared to return to work. As Dr. Strovski was not Mr. Dhillon's treating family physician, he suggested that Mr. Dhillon try light duties at first.

[23] Dr. Strovski prepared and signed a work certificate dated February 24, 2011, certifying that Mr. Dhillon had been assessed in his office and was unable to work due to illness or injury, that he would be returning to light duties the next week, and that he would need to avoid contact with inmates and not use his right thumb and hand from March 1, 2011, for a two-month period.

[24] Mr. Monaghan believed he received the certificate by fax on February 24, 2011. He showed the certificate to Mr. Bussey, the assistant warden.

[25] Mr. Bussey, is responsible, *inter alia*, for the safety and security of the institution, the staff, the public, and the inmates. From a return-to-work perspective, it is his responsibility to ensure that officers are able to fulfil their mandate and specifically that they are able to safely do their jobs protecting others and themselves. He exercises due diligence to ensure that officers can return to work as quickly and safely as possible.

[26] Mr. Bussey referred to the "Commissioner's Directive 254" ("the directive"), entitled "Occupational Safety and Health and Return to Work Programs", which outlines his responsibilities with respect to when an officer returns to work from a disability.

[27] He referred to the objectives recited in the directive, which are "[t]o promote the establishment and the maintenance of safe and healthy work conditions for employees in order to prevent or reduce the incidence of occupational injuries and illnesses", and "[t]o provide employees of the Correctional Service of Canada who incur an injury or illness the support and assistance to return to fully productive employment, as soon as medically feasible …".

[28] He referred to the policy statement in the directive, which states that the CSC is committed to providing a safe and healthy work environment for its employees, acting promptly and supportively in the rehabilitation of employees who experience injuries or disabling conditions, and facilitating the early reintegration of employees to productive and meaningful employment.

[29] He referred to the CSC's responsibilities, namely, that it is responsible for ensuring the protection of every person in its facilities as well as its employees as it relates to their health and safety at work. The concept of due diligence must be applied by taking every reasonable precaution in any given circumstances to avoid injury or loss.

[30] He also referred to the principles outlined in the directive, which are that, namely, CSC managers, through the return-to-work program, shall provide assistance to employees who incur an injury or illness (either work related or not) to facilitate their return to fully productive employment (depending on the degree of impairment) as soon as medically feasible.

[31] Mr. Bussey described the employer's duty to accommodate as requiring him to find suitable work for employees who are not able to fulfil the complete scope of their duties due to a disability, and he must do so to the point of undue hardship. This requires an analysis of the job and an obligation to provide duties within the employee's limitations. Usually, the officer of scheduling makes the final decision with respect to returning an employee to work; however, ultimately, it is his authority.

[32] When Mr. Monaghan showed the certificate from Dr. Strovski to Mr. Bussey, Mr. Bussey questioned what the light duties were and what the restrictions were. He told Mr. Monaghan he needed more information concerning Mr. Dhillon's restrictions.

[33] Mr. Monaghan contacted Mr. Dhillon and told him he needed more information

concerning his limitations.

[34] Mr. Monaghan was asked whether he explored with Mr. Bussey the possibility of accommodating Mr. Dhillon based on the limitations outlined in Dr. Strovski's medical certificate. He answered "No", because he did not know what the light duties were.

[35] Mr. Dhillon then attended his physiotherapist's clinic to obtain a note from his physiotherapist outlining his restrictions. He did not discuss with his physiotherapist his attendance and consultation with Dr. Strovski.

[36] Mr. Dhillon's physiotherapist provided him with a note dated February 25, 2011, stating the following as the diagnosis and symptoms: "Right thumb tendon release November 25. Remarks GRTW guidelines - lift 10 pounds overhead both hands; 16 pounds to waist height both hands; pull <40 pounds both hands; push 16 pounds both hands."

[37] Mr. Dhillon provided this note to Mr. Monaghan, who stated that he believed he received it on the 26th of February. He showed the note to Mr. Bussey. They had a brief discussion about where in the institution they could accommodate Mr. Dhillon. They were considering the control post at the principal entrance working Monday to Friday on the day shift, the same post that had been offered to Mr. Dhillon in April 2010.

[38] Although Mr. Monaghan believed the information provided by Mr. Dhillon was sufficient to permit him to return to work in an accommodated position, he stated that, however, Mr. Bussey still had concerns about Mr. Dhillon's limitations and that Mr. Bussey decided to take it up with the Institutional Personnel Committee.

[39] Mr. Bussey stated that the note from the physiotherapist was more detailed than the original doctor's note and was more what he was looking for. He recalled asking Mr. Monaghan to perform an assessment of what Mr. Dhillon could and could not do.

[40] Mr. Bussey recalled a meeting on March 1, 2011, with a bargaining agent representative and a labour relations representative, at which they discussed Mr. Dhillon's possible return to work. He recalled discussing the two notes (from the physician and the physiotherapist). The bargaining agent was claiming that there was an urgency surrounding the return to work as Mr. Dhillon did not want to lose his 72 hour line, his preferred shift. Mr. Bussey advised the union representative that this was not a factor in determining what duties Mr. Dhillon would be performing, He also did

not agree that there was any urgency to return him to work as he knew the grievor was receiving disability insurance from Sun Life Financial Canada until May 1, 2011.

[41] He could not recall if Mr. Dhillon was present at the meeting. He recalled offering to accommodate Mr. Dhillon, based on the physiotherapist's note, at the front gate on a Monday-to-Friday schedule. He stated that he left the offer on the table and that Mr. Dhillon never accepted it.

[42] In further testimony, he acknowledged that he did not have a discussion with Mr. Dhillon personally and that he left it with Mr. Monaghan to manage.

[43] Mr. Monahan thought that he had discussed with Mr. Dhillon the possibility of accommodating him at the front gate. However, he acknowledged that he was not certain that he had.

[44] Mr. Dhillon testified that he was not offered an accommodated position at the front gate.

[45] Following the discussions on March 1, 2011, with the union representative and labour relations, Mr. Bussey stated that he needed a definitive statement from the treating physician of Mr. Dhillon's prognosis before he would permit him to return to work full time without restrictions.

[46] On March 2, 2011, he wrote to Mr. Dhillon, stating in part as follows:

> *The purpose of this letter is to advise you that we require additional information regarding your physical limitations which currently preclude you from being able to return to work in a full-time capacity without restriction.*
>
> *According to our file information you are currently approved to continue receiving disability insurance payments until May 1, 2011.*
>
> *I have been advised that it is your wish to return to work as soon as possible and that you are requesting to be accommodated to facilitate this request.*
>
> *I have been provided with copies of two notes from two different physicians with regard to your current limitations. I have reviewed these notes, and unfortunately, they do not provide me the required information as to what your physical limitations are in relation to your duties as a correctional officer. Finally, I am not able to accept notes*

> *from multiple physicians whose statements are contradictory in nature.*
>
> *By way of this letter, I am directing you to provide us with a letter from your treating physician, which details the exact nature of your physical limitations and whether or not they are permanent. I also require an estimate as to how long you will need to be accommodated for. I do not need to know your personal medical information, only the physical limitations resulting from your medical condition. I have attached a copy of the job analysis and the work description to this letter for your physician's reference and use in completing the assessment.*
>
> *For example [not an exhaustive list], I need to know if you can run or not, how much you are capable of lifting, can you sit for extended periods of time, what type and level of physical exertion you are capable of.*
>
> *This letter is to be received in my office by no later than Friday, March 18, 2011.*
>
> *Once we receive the assessment we will review it and determine how we are going to safely accommodate you.*
>
> [Emphasis in the original]

Mr. Dhillon made an appointment with his treating physician and attended at her office. Dr. Strovskaia completed and signed a report dated March 4, 2011, entitled "Work Certificate re: Manjit Dhillon", which reads as follows: "This letter is to certify that Manjit Dhillon was assessed in this office and is able to work with no restrictions or limitations from 7 March 2011".

[47] Mr. Dhillon either took the letter to his workplace or faxed it on the same or the next day.

[48] On Friday, March 4, 2011, he was told to report to work on Tuesday, March 8, 2011. However, he was advised on Monday, March 7, 2011, not to report to work, pending further discussion of his case with Mr. Bussey.

[49] In his view, he did everything possible to facilitate his return to work and provided the necessary information requested by management.

[50] When he received the report from Dr. Strovskaia, Mr. Bussey stated that he was surprised because it stated that the grievor was able to work without restrictions and could return to full duty. As he was uncertain how Mr. Dhillon could have recovered in

such a short period, he spoke with the warden of the day and labour relations. To exercise due diligence, he decided to write to Mr. Dhillon's physician directly for an absolute definitive prognosis.

[51] By letter dated March 10, 2011, Mr. Bussey wrote to Dr. Strovskaia concerning Mr. Dhillon's return to work. The letter stated in part as follows:

> *The reason for this letter is because Mr. Dhillon provided us with a copy of your note dated March 4, 2011, where you indicate that he is fit with no limitations. This note is in contrast to a note provided by Dr. S Strovskaia (Strovski) on February 24, 2011 which identified limitations and a note from his physiotherapist on February 25, 2011 modifying and increasing the limitations… Given that we have received vastly different information over the course of 8 days we want to make absolutely certain that we have the required information in order to safely return to work [sic]. I am asking that you clarify and confirm his fitness for work and explain the differences of the information provided. In addition I require the following information. 1. Is Mr. Dhillon [sic] fit for work? 2. If yes does he have any limitations? 3. If he does have limitations please identify what they are and duration if possible.*
>
> …

[52] Between March 4, 2011, and April 14, 2011, Mr. Dhillon stated that his physical condition remained the same.

[53] Mr. Robinson advised that he had been a member of the National Return to Work Committee. He stated that when a worker who has been absent from the workplace due to an injury wishes to return to work, he or she must obtain a physician's note, preferably from the treating physician. If the worker has limitations, the physician should set them out along with the restrictions and the accommodations necessary to deal with the restrictions. Usually, if an employee returns to work without restrictions, a doctor's note to that effect is sufficient.

[54] Mr. Robinson testified with respect to the content of a physician's note. He advised that since 2006, there has been no requirement for a physician to provide a diagnosis, only a prognosis, any limitations, and the duration of any restrictions. He advised that if the employee is fit to return to work without limitations, then that is all the note is required to state.

[55] He stated that every return-to-work case for all institutions is discussed regionally or nationally if the employee has been absent from the workplace for a period in excess of six months.

[56] Mr. Robinson became involved in Mr. Dhillon's case when the union local ran into difficulties concerning his return to work at the regional level. There was an issue concerning the sufficiency of doctor's notes, including his family doctor clearing him to return to work.

[57] A series of email exchanges between the bargaining agent and management reflect that after Mr. Dhillon provided the first note from Dr. Strovskaia, the bargaining agent was of the view that he had produced a note from the treating physician as requested, which was sufficient to justify his return to work. However, the employer was of the view that it was justified requesting further clarification as Mr. Dhillon had provided three notes within nine days from three separate health care providers.

[58] The case was referred to the National Return to Work Committee, which is composed of both union and management representatives, at its meeting in Ottawa, Ontario, on March 11, 2011. It recommended that Mr. Dhillon should be returned to work.

[59] Mr. Bussey stated that the Committee's opinion is considered when making a decision concerning the return to work of an employee. However, he and the assistant warden make the final decision. Sometimes he heeds the Committee's advice and opinion, and sometimes he does not.

[60] As noted, he had decided to seek further clarification from Mr. Dhillon's treating physician and to not permit him to return to work until he had received that clarification.

[61] Apparently, Dr. Strovskaia was not available to see Mr. Dhillon until April 14, 2011, at which time she replied to Mr. Bussey, confirming that he was fit for work, that he had had additional treatment for his problems that resulted in the fast resolution of his condition, and that he did not have limitations and could start his regular duties as soon as possible.

[62] Mr. Bussey reviewed the note dated April 14, 2011. He consulted with labour relations and the warden and was satisfied that due diligence had been followed. He

permitted Mr. Dhillon to return to full-duty on April 18, 2011.

[63] He stated that the reasons he did not allow Mr. Dhillon to return to work before then was the uncertainty about his limitations and restrictions. He also maintained that he did not discipline Mr. Dhillon.

III. Summary of the arguments

A. For the bargaining agent

[64] It is striking that the employer argued before the Workers' Compensation Board that Mr. Dhillon was able to return to work in an accommodated position at the front gate as of May 2010 but that as of February and March 2011, the employer had changed its mind despite the fact that it was the same injury with the same limitations.

[65] Having reviewed the facts, Mr. Bussey acknowledged that having seen the physiotherapist's note, which was in the nature of what he was looking for, he asked Mr. Monaghan to explore the possibilities of accommodating Mr. Dhillon at the front gate, on the day shift. Mr. Bussey was not able to confirm if the position was actually offered to Mr. Dhillon and recalled leaving the matter with Mr. Monaghan, who believed he had discussed a possible accommodation at the principal entrance with Mr. Dhillon but was not certain. Mr. Dhillon did not recall any offer of such an accommodated position being made to him.

[66] Based on this evidence, on a balance of probabilities, an accommodated position at the front entrance was not offered to Mr. Dhillon.

[67] Mr. Bussey, who apparently was satisfied with the February 2011 note from the physiotherapist, shifted his position and decided to ask for additional information from Mr. Dhillon's treating physician, taking into consideration that he was still receiving benefits from Sun Life Financial and that he would be for an additional two months. Sun Life Financial only provides benefits. It does not examine an injured or disabled employee. It is the employee's responsibility to advise Sun Life Financial if he or she returns to work.

[68] The treating physician cleared him to return to work, without limitations. The doctor's note provided on March 4, 2011, meets all the required information to return Mr. Dhillon to full-time employment without restrictions. Mr. Bussey wanted more,

including the treating physician's opinion. He is not entitled to have the details of the diagnosis, treatment, or type of medication prescribed to an employee.

[69] When the doctor stated that Mr. Dhillon was fit to work without restrictions, it removed liability and responsibility from the employer and shifted it to the physician. Nevertheless, Mr. Bussey acted as if Mr. Dhillon continued to have possible limitations, which constituted discrimination under the *CHRA*.

[70] Dr. Strovskaia's note of April 14, 2011, provides exactly the same information as her note of March 4, 2011. The only thing different is that the later note states that he underwent treatment. Mr. Bussey was not entitled to that information.

[71] It took eight weeks before Mr. Dhillon was permitted to return to work. That was not due diligence; nor was it in compliance with the directive, which requires employees to be returned to work as soon as medically feasible.

[72] The union's position was that Mr. Dhillon was discriminated against, contrary to clause 37.01 of the collective agreement. Clearly, he was never accommodated by the employer in accordance with its policies. He was deprived of 100% of his wages, lost shift differentials, and lost opportunities to perform overtime. He was deprived of an opportunity to accumulate sick leave over the eight-week period as well as the opportunity to accumulate eight weeks of pensionable service. He underwent undue financial hardship and stress.

[73] In *Dumont v. Canadian Human Rights Commission*, 2002 CanLII 5662, the Canadian Human Rights Tribunal ("the Tribunal") upheld a complaint in which an employee alleged that his former employer contravened the provisions of section 7 of the *CHRA* by refusing to continue to employ him by reason of disability.

[74] The evidence showed that the employee in that case suffered from a disability that required surgeries and a period of convalescence. The employer in that case required the employee to produce a medical certificate before giving him work. The complainant in fact obtained a medical certificate stating that he was able to resume work. The medical certificate mentioned no restrictions or limitations. The employer did not give the employee work.

[75] The Tribunal concluded that the *prima facie* evidence submitted by the Canadian Human Rights Commission and the complainant satisfied it that the

complainant was not kept in his job because of a perceived disability and ultimately concluded that he was the victim of a discriminatory practice.

[76] In *Kirby v. Treasury Board (Correctional Service of Canada)*, 2015 PSLREB 41, Adjudicator Shannon stated the following at paragraph 129:

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

[77] In this case, Mr. Dhillon was treated differently from what is required at other institutions. In the bargaining agent's view, this constituted discrimination.

[78] In *Kirby,* Adjudicator Shannon considered the application of the same directive at issue in this case. She stated at paragraph 145 as follows:

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

[79] Based on the facts in that case, the Board awarded $10 000 for pain and suffering and $2500 in recognition of the employer's wilful and reckless disregard of its obligations under the directive.

[80] Mr. Dhillon was medically cleared to return to work as of February 25, 2011, which was confirmed by the medical report of March 4, 2011. He abided by the rules set by the CSC and the Treasury Board. He was not accommodated by the employer, which could have played it safe and accommodated him at the front gate pending a full clearance or permitted him to return to his position without restrictions. The employer allowed him to return to work only on April 18, 2011.

B. For the employer

[81] Mr. Dhillon filed two grievances, one relating to alleged disciplinary action via a claim that he was suspended without pay and the other to alleged violations of the collective agreement and the *CHRA*.

[82] The evidence adduced did not demonstrate that the employer took disciplinary action.

[83] The rationale for not permitting the grievor to return to work was based on a legitimate concern. He had presented three different medical opinions over the course of nine days. No disciplinary action can be inferred from the actions of the employer.

[84] In *Ho v. Deputy Head (Department of National Defence)*, 2013 PSLRB 114, the grievor in that case challenged the employer's decision to not allow him to return to work after being on sick leave despite the opinion of a physician that he was able to return to work. He claimed that the employer's decision was of a disciplinary nature. In that case, the adjudicator stated at paragraph 47 that the onus was on the grievor to demonstrate on a balance of probabilities that the employer's action was taken to discipline him.

[85] In *Attorney General of Canada v. Frazee*, 2007 FC 1176, the Federal Court stated at paragraph 20 as follows:

> *The authorities confirm that not every action taken by an employer that adversely affects an employee amounts to discipline. While an employee may well feel aggrieved by decisions that negatively impact on the terms of employment, the vast majority of such workplace adjustments are purely administrative in nature and are not intended to be a form of punishment….*

[86] The Court also stated the following at paragraph 24:

> *The problem of disguised discipline can also be addressed by examining the effects of the employer's action on the employee. Where the impact of the employer's decision is significantly disproportionate to the administrative rationale being served the decision may be viewed as disciplinary… However, that threshold will not be reached where the employer's action is seen to be a reasonable response (but not necessarily the best response) to honestly held operational considerations.*

[87] There is no evidence to establish a case of discrimination. The employer was only complying with its obligations to ensure that the grievor was medically cleared, to ensure the safety and security of the workplace. This obligation included the need to inquire about Mr. Dhillon's restrictions, which is part of its due diligence in implementing the duty to accommodate when an employee has limitations. The employer acted reasonably, given the facts that it had before it. Given the notes of Dr. Strovski and the physiotherapist, Mr. Bussey, after consulting labour relations, decided that he needed the treating physician's opinion. When he received it, to his surprise, he was advised that the grievor was able to return to work without restrictions. He was confused and was afraid that the grievor might reinjure himself.

[88] An offer was made on March 1, 2011, to the union representative under which Mr. Dhillon could work at the front gate, pending clarification. The offer was still on the table. The employer never received an answer and concluded that it was not accepted. The employer's position was that the union was responsible for speaking to Mr. Dhillon about the offer.

[89] After that, the employer wanted to comply with the duty to accommodate; however, it needed to be certain that Mr. Dhillon was able to perform his full duties. The employer chose to err on the side of caution and to obtain clarification.

[90] In *Halfacree v. Attorney General of Canada*, 2014 FC 360, the Federal Court stated at paragraph 45 as follows:

> *Arbitral jurisprudence holds that the mere existence of a medical note may not be sufficient to justify a claim for sick leave… Moreover, arbitrators have consistently found that an employer has the right to make reasonable requests for medical information when there is a question as to whether the employee has given an adequate explanation for absence. What is reasonable will depend on the circumstances of each case. Factors such as the expected duration of the absence, the inadequacy of documentation tendered by the employee, and the presence of conflicting information about the employee's health may prompt an employer to request more information ….*

[91] In *Ricafort v. Treasury Board (Department of National Defence)*, PSSRB File No. 166-02-17422 (19881129), [1988] C.P.S.S.R.B. No. 321 (QL), the Public Service Staff Relations Board (PSSRB) had to deal with the factual issue of whether the employer had sufficient grounds for questioning the fitness of the grievor (in that case) to return to

work. In that case, the PSSRB found that in the face of the medical certificates provided by the grievor, there were still ample reasons for the employer to doubt his fitness to perform his duties and to conclude that by returning him to work, the employer might have jeopardized his health, and in light of his equivocation about his state of health, it was entirely reasonable that the PSSRB found for the employer to err on the side of caution by requiring the grievor to submit to a further medical examination as a condition of returning to work. The PSSRB stated as follows at page 15:

> *As to whether the employer had the authority to act as it did, in my view the preponderance of arbitral jurisprudence supports the employer's position. In fact, virtually all the arbitral awards cited by the grievor's representative either implicitly or explicitly recognize that the employer has the authority, and indeed the obligation in certain circumstances, to prevent an unfit employee from returning to work.*

[92] It was reasonable, in light of the information provided in the three notes, for the employer to seek more information. The employer was confused and had concerns that the grievor might not be fit to perform his duties. There were legitimate concerns until April 14, when the treating physician explained that Mr. Dhillon had received additional treatment and that he was then fit for work without limitations. There is nothing to suggest the employer was motivated by anything other than legitimate concerns. The employer acted in compliance with the commissioner's directives to act and to take reasonable precautions to avoid injury to the grievor.

[93] There is no evidence to suggest that not permitting the grievor to return to work was disciplinary action. There was no evidence to suggest that the employer was punishing him. There was no misconduct; he was not disciplined. No steps in the normal disciplinary process were taken.

[94] The employer did not perceive that the grievor was disabled. It acted on the information provided in the first medical note. The grievor was still being compensated by Sun Life Financial. The employer did not treat Mr. Dhillon differently.

[95] Even though the National Return to Work Committee recommended that Mr. Dhillon be returned to work, the warden does not take direction from the National Return to Work Committee, which has as its purpose to provide guidance to the institution but not direction.

[96] The evidence was contradictory that Mr. Dhillon could work in an accommodated post at the institution's principal entrance. The employer did not suggest that the medical information would have precluded him from being accommodated there. The contradictory evidence was that he was still being covered by Sun Life Financial.

[97] There was no sense of urgency. Mr. Dhillon was not without income. He was receiving 70% of the salary from Sun Life Financial. Taking the time to assess the risks was more important than putting Mr. Dhillon back in his full duties.

C. Bargaining agent's reply

[98] The need for additional medical information must be based on cogent evidence, not on assumptions.

[99] Everyone understood the return-to-work process and what was required in the way of a medical certification. One of the responsibilities of the National Return to Work Committee is to look into the return to work of employees who have been absent from the workplace for more than one year. The Committee relies on the experts who work with it. No evidence was adduced to demonstrate why the Committee's direction in this case was not followed. Mr. Dhillon was treated differently. The employer ignored the process and the Committee's advice.

[100] A review of the medical certificates was clear. What more was needed to accommodate Mr. Dhillon at the post at the principal entrance? Based on a review of the evidence, he was never offered an accommodated position at the front entrance. If Mr. Bussey still had concerns after he received the first medical report from Dr. Strovskaia, he could have accommodated Mr. Dhillon at the principal entrance. He decided not to because Mr. Dhillon was still being paid for another two months.

[101] The refusal to reintegrate Mr. Dhillon back into the workforce was arbitrary and in the bargaining agent's view disciplinary and constituted a suspension.

V. Reasons

[102] In my view there was no evidence to support the contention that by not permitting Mr. Dhillon to return to work that he was being disciplined. Mr. Dhillon was

not disciplined and accordingly the grievance alleging that he was subject to disciplinary action is dismissed.

[103] With respect to the grievance alleging a failure to comply with the duty to accommodate, Adjudicator Shannon considered the application of the directive CD 254 in Kirby v. Treasury board (Correctional Service of Canada) supra.

[104] She stated at paragraph 145:" the CSC has accepted that it is under a duty to accommodate its disabled or injured employees as is evidenced by CD 254, in which the CSC commits to the following:" to provide employees of the correctional service of Canada who incur injury or illness the support and assistance to return to fully productive employment as soon as medically feasible…"

[105] On the facts of this case I am satisfied that the employer should have returned the grievor to an accommodated position at the post at the front gate of the institution after Mr. Dhillon provided the note from Dr. Strovsky on February 24, 2011 that stated that he could return to light duties as of March 1, 2011 and the note from his physiotherapist outlining his restrictions. I conclude that the employer failed in its duty to accommodate the grievor as soon as medically feasible. The evidence is clear that Mr. Dhillon with these restrictions could perform the duties of a correctional officer 1 at the post at the front gate.

[106] Although there was a discussion about Mr. Dhillon possibly returning to work in an accommodated position at the front gate at the meeting on March 1, 2011 with Mr. Bussey and the labour relations and union representative I am satisfied on a balance of probabilities that Mr. Dhillon was never advised that he could return to work at this post. Mr. Bussey stated that he left the offer on the table and that Mr. Dhillon never accepted the offer. However, he could not recall whether Mr. Dhillon was present at the meeting. In further testimony he acknowledged that he did not have a discussion with Mr. Dhillon and that he left it with Mr. Monaghan to manage. Mr. Monahan thought he discussed the possibility with Mr. Dhillon however acknowledged that he was not certain that he had. Mr. Dhillon stated that he was not offered an accommodated position at the front gate.

[107] Consequently, I find that the employer failed in its duty to accommodate the grievor as soon as medically feasible as stated in its directive by not placing in a accommodated position with limitations at the post at the front gate.

1. Whether the failure to return the grievor to full-time duties as a correctional officer without limitations constituted a failure to comply with the duty to accommodate?

[108] The employer has a duty to ensure that employees returning to work following an absence due to a medical condition are medically cleared and are fit to return to work and to perform their duties. Mr. Bussey stated that it was his responsibility to ensure that an officer is able to fulfil his mandate and more specifically is able to safely do their job protecting others and themselves and that he must exercise due diligence to ensure that an officer can return to work as quickly and safely as possible. This is a heavy responsibility.

[109] Given the ambiguity of the notes from Dr. Strovsky, the physiotherapist and Dr. Strovskaia I am satisfied that Mr. Bussey was exercising due diligence in seeking clarification from Dr. Strovskaia prior to returning Mr. Dhillon to full-time duties as a correctional officer without limitations . While I appreciate that the National Return to Work Committee recommended that Mr. Dhillon be returned to full duties without restrictions, it is the Warden on-site who is authorized to make that decision. It is that person that bears the responsibility for the safety and security of the institution its inmates and its employees. Not returning Mr. Dhillon to full-time duties without restrictions in the circumstances of this case in my view does not constitute a failure to comply with the duty to accommodate.

[110] Given that I have concluded that the employer failed in its duty to accommodate the grievor in the post at the front gate with limitations as of March 1st, 2011, the grievor is to be compensated accordingly.

[111] Mr. Dhillon also requested $20,000.00 for pain and suffering under the *CHRA*. Although s. 53(2)(e) gives the board discretion in granting this remedy, that discretion must be exercised judiciously. In the present case the grievor did not adduce any evidence regarding this claim. As such, a claim of pain and suffering is not justified in the circumstances.

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

(The Order appears on the next page)

V. Order

[113] The grievance alleging disciplinary action is dismissed.

[114] The grievance alleging a failure to comply with the duty to accommodate is allowed. Mr. Dhillon is to be compensated on the basis that he should have been returned to an accommodated post at the front gate of the institution in his CX-01 position as of March 1, 2011.

[115] The parties are directed to consult each other to work out the details of the full compensation including shift differential, missed overtime opportunities, weekend premiums, etc., for the period from March 1, 2011, until April 18, 2011.

[116] No later than 60 days from the date of this decision, the parties will advise the Board whether they successfully reached an agreement on the issue of compensation as set out above.

[117] The Board will remain seized to deal with any issue arising from this order for a period of 180 days following the issuance of this decision.

July 28, 2016.

David Olsen,
a panel of the Public Service Labour Relations and Employment Board