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File: 566-02-3649

Citation: 2016 PSLREB 97

Public Service Labour Relations Act Before an adjudicator

BETWEEN

DENIS LECLAIR

Grievor

and

DEPUTY HEAD
(Correctional Service of Canada)

Respondent

Indexed as
Leclair v. Deputy Head (Correctional Service of Canada)

In the matter of an individual grievance referred to adjudication

Before: Margaret T.A. Shannon, adjudicator

For the Grievor: Edward Kravitz, counsel

For the Respondent: Joshua Alcock, counsel

Heard at Moncton, New Brunswick,
April 28 and September 1 to 4, 2015, and February 16, 2016.

I. Individual grievance referred to adjudication

[1] The grievor, Denis Leclair, grieved that the employer, the Correctional Service of Canada (CSC or "the employer"), violated article 37 of the collective agreement between the Treasury Board and the Union of Canadian Correctional Officers - Syndicat des Agents Correctionnels du Canada - CSN for the Correctional Services Group, which expired on May 31, 2010 ("the collective agreement"), by discriminating against, intimidating, and provoking him and by refusing to accommodate him for his medical disability and union activity.

[2] The grievance was referred to the former Public Service Labour Relations Board ("the former Board") in 2010, and I became seized of it in 2013. On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board ("the new Board") to replace the former Board as well as the former Public Service Staffing Tribunal. 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 396 of the *Economic Action Plan 2013 Act, No. 2*, an adjudicator seized of a grievance before November 1, 2014, continues to exercise the powers set out in the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2) as that Act read immediately before that day.

II. Summary of the evidence

[3] Much of the evidence led by both parties dealt with their actions following the filing of this grievance. As neither party objected to this type of evidence and as it was necessary in my opinion to assess whether or not the employer did refuse to accommodate the grievor, I have considered it in this decision.

The grievor's evidence

[4] The grievor was employed as a correctional officer (CX) at the Springhill Institution in Springhill, Nova Scotia ("the institution"). He began his career at the Atlantic Institution in Renous, New Brunswick, in 1986. In 2002, he transferred to Springhill and for a brief period in 2011, he was on assignment at the CSC's regional headquarters in Moncton, New Brunswick. The grievor alleged that he was forced to retire as a result of the CSC's refusal to accommodate his disability during the period

from 2009 to 2011.

[5] During his career, the grievor was involved in a number of incidents he described as traumatic. He described cell extractions in which the inmates were covered in feces or blood. During his time as a CX, he saw inmates overdose, and at least one inmate died when he was on duty. He was a member of the institution's emergency response team in Renous when riots occurred there. The grievor testified that more inmate stabbings happened at Springhill than at Renous. He was spit on by inmates, and the employer did not bring charges against them. In December 2009, the grievor seized a table used by inmates for gambling. When he did, 10 inmates cursed at him and threatened his family. The grievor's wife worked at the institution as well, and the inmates would have had access to her.

[6] The grievor was the president of the bargaining agent's local for approximately six years. He stopped his involvement in April of 2009, when he started seeing a psychologist, Dr. Charles Emmrys. The grievor consulted Dr. Emmrys after attending a presentation on post-traumatic stress disorder (PTSD) given by the doctor. The grievor testified that he recognized that he had the symptoms described by Dr. Emmrys in his presentation including agitation, anger, behavioural changes, mood changes, lack of sleep, and fatigue. His first appointment with Dr. Emmrys was in March 2009. Dr. Emmrys diagnosed him with PTSD with exhaustion.

[7] The grievor went through a dark period in which he was angry all the time about his work. He felt he could talk about this only to his wife. Between 2009 and 2010, his attendance at work went from bad to worse. Before he was told he had PTSD, the grievor went to work, but after the diagnosis, he became afraid that he would lose his job. He would get dressed for work and would be unable to go, so he would call in sick. He would drive to work, and the closer he got to the institution, the more anxious he became. He would turn around and go home rather than reporting for work. On other days, he managed to get to work and to function for his entire shift. His anxiety prevented him from attending work regularly.

[8] While at home, he would spend his days thinking about going to work. Chores that previously took a day to complete now took the grievor a week. He spent his time in his shed smoking and drinking coffee. If he had leave accumulated, he took it. When he exhausted his leave, he took leave without pay.

[9] The grievor asked the institution's warden, Jeff Earle, for a workplace accommodation at some point after June 2009. He was accompanied at meetings with Mr. Earle by David Harrison, who at the time was a local union shop steward. At these meetings, the grievor identified the security maintenance officer (SMO) position as a suitable accommodation as he knew that there were two positions in that area and they were located outside the institution's fence. He wanted to hold the position only while he recuperated. He was told that it was not possible for him to hold that position as it was classified CX-02, and he occupied a CX-01 position. Despite that fact, the grievor did not understand why he could not be accommodated in that position under the CSC's duty-to-accommodate policy. He offered to do the job as a CX-01; the employer denied his request.

[10] At the third meeting with Mr. Earle and Mr. Harrison, the topic of the SMO position was again raised. By then, the grievor's leave situation was getting worse. He asked Mr. Earle to be paid for his time off taken without pay. Mr. Earle declined as he could not justify paying the grievor to stay home.

[11] According to the grievor, at no time did Mr. Earle suggest accommodation options. He told the grievor that he could not be accommodated without a medical certificate indicating that an accommodation was required. The grievor argued that the Treasury Board policy made it possible for him to be accommodated as long as the employer knew what was needed. He eventually provided a medical certificate (Exhibit 9), which again, according to him, Mr. Earle claimed did not provide the information required.

[12] At the fourth meeting, approximately a month later, the grievor met with Mr. Earle and Jeff Wilkins, who was the local union president at the institution between 2009 and 2013. At other meetings, the grievor had also met with Judy Amos, who was the assistant warden, operations, at the institution, and Lorne Breen, who was the deputy warden there. At all these meetings, the grievor sought to understand why the employer's response to his request to be accommodated in the SMO position was always "No". The grievor knew that he was a fit for the SMO job. He tried to find something else, but there was nothing else. His request to telework from home was denied. He suggested that he be given language training, which was denied because it was not required. The employer assigned no administrative tasks that the grievor could have done at home while he was on leave.

[13] Eventually, on January 7, 2010, the grievor asked Mr. Earle if it were possible to take leave with pay pending the decision on his workers' compensation claim. If the claim was not approved, the grievor proposed to repay the employer from any severance pay he would receive when he retired. Mr. Earle agreed to look into this proposal and to get back to the grievor the next day. He never did receive an answer from Mr. Earle.

[14] In the meantime, on January 8, 2010, the grievor's correctional manager told him to search a cell. The grievor told the correctional manager that he had a meeting with the Warden at 14:00. The correctional manager ordered him to conduct the search anyway; the grievor refused and said that he was going to see the Warden before he conducted any cell search. The correctional manager gave him two more direct orders, which the grievor refused. He was then sent home for refusing the orders. The grievor was afraid that his career was finished. He was too young at 46 to be unemployed. He could not think straight.

[15] The employer sent a letter to Dr. Emmrys seeking more information about the grievor's ability to perform his duties (Exhibit 27). By April 2010, the employer had not made any accommodation proposals. The grievor felt abandoned. His symptoms had worsened, and he sought help but did not receive any. He knew what he needed, which was the SMO position, and could not understand why the employer would not assign it to him. He was off work between April 2010 and May 2011. He filed a worker's compensation accident report claim (Exhibit 48) to be compensated while he was off. The claim was accepted and approved until May 2, 2011.

[16] The employer appealed the Workers' Compensation Board (WCB) of Nova Scotia's decision to allow the grievor's claim (Exhibit 28). The grievor had panic attacks and relived the memories in a larger-than-life way. He was very angry with the employer for many things, including appealing the WCB decision. He took medication, which made him forget but also made him very aggressive. Dr. Gosse, the grievor's psychiatrist, recommended the medication. The grievor was initially reluctant to take it but agreed to try it for six months to a year. He wanted to be weaned off it before he returned to work. He was afraid that he would do something he described as stupid if he returned to work while on the medication. The grievor had Dr. Emmrys convey this message to Dr. Gosse (Exhibit 12). It took six to eight weeks for the grievor to be weaned off his medication so he could return to work.

[17] By May 2011, the grievor had hope of returning to work. While he was off, the employer had hired a CX-01 as an SMO. There was a vacant SMO position, which the grievor hoped he would be assigned to. Unfortunately, this did not happen; the vacant position was not filled until he went on assignment to the employer's regional headquarters. It was then filled as a CX-02. No preparations had been made to accommodate the grievor on his return. He took annual leave for the first two week of May 2011, and for the rest of that month, he did not return to work, as the symptoms had recurred, and he was not able to go to work.

[18] The employer asked the grievor if he would consider working in other institutions (Exhibit 44). He declined, as there was no plan to place him in another job. He would merely have been moved from one institution to another. There were other areas to work in as options, such as visits and correspondence or admissions and discharge, which in both the grievor had previously worked. The best place for him was the Regional Reception Centre, where he was assigned for 10 days. His schedule was changed to four 10-hour shifts per week; he had previously worked a regular 8-hour shift.

[19] Between June and August 2011, the grievor began to suffer from the same symptoms as he had before. He was sure that the SMO position was not an option, so something else had to be found for him. In June 2011, when things were not going well, he emailed the CSC commissioner, who sent personnel from CSC headquarters to meet with the grievor; he thought they had come to fix his problems. Before they met with him, they wanted to meet with his wife. They had concerns about her health and safety and were concerned that the grievor beat her, which both she and he denied.

[20] The employer developed a return-to-work and accommodation plan (Exhibit 23), which was the first time that it offered the grievor an accommodation. The proposed accommodation did not work well as it just involved changing the shift length. The number of days the grievor was required to be at work did not change.

[21] On August 23, 2011, the employer raised the possibility of the grievor working at its regional headquarters, which was the first time it was raised as a possible accommodation; it could have been proposed much earlier. The employer also proposed a transfer to CORCAN, a rehabilitation program at CSC where inmates get on-the-job training in areas such as welding, furniture construction, or print services,

or to an institutional driver position, both of which the grievor refused by email (Exhibit 42).

[22] Dr. Emmrys provided the employer with his recommendations for the grievor's reintegration (Exhibit 19). If followed, the grievor would not have been considered on light duties but rather on an accommodated schedule to address issues related to his difficulties with night shifts. Isolated posts, such as driving posts, were to be avoided. According to Dr. Emmrys' recommendation, the plan was for the grievor to return to only a daytime rotation.

[23] The grievor received a letter from the Warden dated October 7, 2011 (Exhibit 46), in which he was advised that the employer would not consider the SMO position as a possible accommodation. An accommodation plan was developed, which assigned him to the CSC regional headquarters as an assistant to the security project officer for five months (Exhibit 19). This assignment extended to approximately one year.

[24] In October 2012, the grievor was assigned to a post responsible for delivering mail to the different institutions in the region (Exhibit 20). He spent a year doing it. In exchange for this assignment, he agreed to resign when it ended (Exhibit 54).

[25] The grievor went to work every day as the mail driver. This position was different from an institutional driver position as it had no inmate contact. Dr. Emmrys had told him he could be "fixed" within two years of taking this job; the grievor needed accommodation to do that. He needed to stay in the corrections environment, which is why he pushed so hard for the SMO position. After going through this accommodation process, Dr. Emmrys recommended that the grievor consider retiring. Since he could not go back to the institution, he would have had to go off work for another year after the driver assignment finished. Instead, he retired in April 2013, even though he had previously indicated that he would retire in November. The opportunity to fish commercially came up, and he took it. He had to leave in April or lose the opportunity to fish in May.

[26] The grievor's health was much better when he worked every day. He had a life again. However, he was angry with the employer about not being accommodated. He was devastated and could not understand why it would not accommodate him and assign him to the SMO position. He did not know why he needed to be outside the

institution's walls, but he did know that he could not have inmate contact and that the SMO position was where he needed to be. The SMO position was what he wanted, from the time he was diagnosed with PTSD. Dr. Emmrys recognized that the grievor needed to be placed in the SMO position.

[27] Alternatively, since the grievor felt he could do his job 90% of the time, he needed the flexibility to take time off when he needed to or to arrive late when needed. He was able to do just that but became concerned with the financial challenge that taking leave without pay was causing him. Instead, he wanted leave with pay when he could not come to work. He was not looking to be off work but rather was looking for help in taking the time he required to heal. When at work, he coped with the job; his problem was reporting to work. Instead, the employer refused to help; the grievor felt that he had been kicked while he was down.

[28] The grievor's return to work was complicated by long-standing labour relations issues related to his grievance, not his union activity, as noted in Dr. Gosse's report (Exhibit 8, page 4). Dr. Gosse also indicated that the grievor felt that the SMO position at the institution would have been ideal for him (Exhibit 8, page 2). In addition, the grievor told Dr. Gosse that he felt that he should be reimbursed for sick leave and vacation.

David Harrison's evidence

[29] Mr. Harrison was the union local president for the institution in 2012. He worked with the grievor on the union executive in 2009 when the grievor was a member of the local executive committee. He also socialized with the grievor and his wife. Beginning in 2009, Mr. Harrison acted as the grievor's union representative in his dealings with the employer. At that time, the grievor was missing a great deal of work. He would be absent two to three days in a row. He also would come in late and leave early. His leave reports (Exhibit 20) indicated that he had exhausted all his accumulated leave. Some of the leave without pay recorded might have been attributed to the grievor's union activities. In May 2009, the employer began recouping the cost of leave paid to the grievor after he had exhausted his accumulated leave (Exhibit 21).

[30] The grievor consulted Mr. Harrison in the spring of 2009 and asked him to help him secure an accommodation. He explained his situation to Mr. Harrison and asked him to approach the Warden with the accommodation request. His doctor had

suggested that the grievor be off work more, and the SMO helper position suggested by the grievor seemed to Mr. Harrison to be a good fit. Mr. Harrison approached Mr. Earle in March 2009. He explained to the Warden that the grievor had been diagnosed with PTSD and exhaustion and that he needed more time away from the institution. Mr. Harrison suggested that the grievor be placed in the SMO position. No other position was identified to the CSC.

[31] Mr. Earle agreed to look into this possibility but according to Mr. Harrison was concerned with the classification of the SMO position, which was at the CX-02 group and level while the grievor was a CX-01. The grievor agreed to being paid as a CX-01 if he were assigned to the CX-02 position. The idea was that the grievor would backfill the vacant SMO helper position while the SMO helper was away on training. Mr. Harrison and Mr. Earle met again a couple of weeks later. The Warden advised Mr. Harrison that it was not possible for the grievor to be paid at the CX-01 level while performing SMO duties. Mr. Harrison indicated to the Warden that the grievor was also open to options with respect to work that could be performed from his home.

[32] Given all that, Mr. Harrison tried to suggest other options, such as doing inmate casework, reviewing operating procedures, or taking correspondence courses in English. The inmate casework was also at the CX-02 level. The grievor did not have the skills to review policies and procedures, and the CSC did not agree to language training for him as it was not required since he met the linguistic profile for his position. The Warden asked for medical confirmation of the grievor's limitations. He initially refused to provide the information but eventually reconsidered and provided the requested medical certificates. At no time did the CSC refer him to Health Canada for an assessment. In July 2009, Mr. Wilkins became the local president and took over as the grievor's union representative.

Jeff Wilkins' evidence

[33] Mr. Wilkins described the union's accommodation process in the grievor's case. The first request for accommodation in the workplace was made in fall 2009 following Dr. Emmrys' diagnosis of the grievor's PTSD. The grievor received a medical report in October 2009, which was presented to the CSC in November 2009 (Exhibit 9). Mr. Wilkins' work schedule overlapped with the grievor's in 2009, so Mr. Wilkins was aware that the grievor seemed to be absent frequently, without any pattern. The grievor's doctor told him that he should take time off whenever he needed it.

[34] Mr. Wilkins spoke to the Warden about the grievor's need to be accommodated. Mr. Earle was unfamiliar with the process, so he consulted his labour relations advisor. Two weeks later, the group met again. At this point, the SMO position was again discussed. The position was funded at 1.4 full-time equivalents (FTEs). There was one full-time employee; the remainder of the funding was used for training and for covering leave. The union's proposition was to have the grievor trained as an SMO and to use him to cover the time when the incumbent was away due to training. The employer refused because the position was classified at a level higher than the grievor's, yet in 2010, the position was assigned to another CX-01. The circumstances of this appointment were not described at the hearing.

[35] According to Mr. Wilkins, after this second meeting, Mr. Earle did not make any other proposals for accommodating the grievor. There was no Health Canada referral. There was no option for a flexible work schedule as Dr. Emmrys suggested in his October 27, 2009, letter (Exhibit 9). Further meetings were held in December 2009 and January 2010 at which the group discussed whether the Warden would grant the grievor additional leave over and above his exhausted leave credits so that he could avoid taking leave without pay.

[36] In the meantime, the grievor applied for workers' compensation benefits, which were approved in April 2010. Between January and April 2010, the CSC made no offer of accommodation to the grievor. There was no referral to Health Canada or any other doctor for that matter. After the workers' compensation claim was approved, he was off work on paid leave until May 2011. In the meantime, no proposals were made for his return to work or accommodation.

[37] When the grievor was to return to work in May 2011, no accommodation was ready for him. Mr. Wilkins and Doug White, the union regional vice-president, wondered whether the grievor could be accommodated at the CSC's regional headquarters as they could not foresee a successful return to work for him at the institution. The grievor was reluctant to consider working at regional headquarters but agreed to consider the possibility.

[38] Mr. Wilkins spoke to Dave Niles, the assistant deputy commissioner, institutional operations, about that option. Mr. Niles agreed to see if anything could be done. When Mr. Niles got back to Mr. Wilkins a month later, he indicated that he had considered the suggestion and that he was open to the grievor working at the CSC's

regional headquarters but that there was nothing initially offered to the grievor.

[39] In May 2011, Mr. Wilkins once again discussed the SMO position with Mr. Breen. He asked why a CX-01 other than the grievor had been assigned to the position and was advised that that person would not be in the position much longer. Shortly after that, the position was again vacant. Once the grievor began working at regional headquarters, the SMO position was once again filled. Mr. Breen had no other suggestion for accommodating the grievor.

[40] Mr. Wilkins and Mr. White attended a meeting with the grievor and Mr. Niles on May 26, 2011. Mr. Niles raised the possibility of the grievor working at another institution in the CSC's Atlantic Region but did not mention the grievor working at regional headquarters. Between May and August 2011, the grievor was frequently absent from the workplace on either sick leave or annual leave. No plan was in place for his return to work. He was again experiencing anxiety when he entered the institution.

[41] In August 2011, Mr. Wilkins and the grievor again met with CSC management to discuss Dr. Emmrys' letter of August 3, 2011 (Exhibit 22), and to prepare an accommodation plan (Exhibit 23) that reflected Dr. Emmrys' recommendations. The plan was not successful due to the grievor's inconsistent attendance. Further meetings were held in August and September 2011.

[42] In October 2011, a new accommodation plan was developed (Exhibit 19), and the grievor was sent to work at regional headquarters in the security area. This lasted a year until the employer ended it. Another accommodation plan was developed (Exhibit 20), and the grievor began delivering mail across the region. This lasted until he elected to retire in April 2013 because he had found alternate employment.

Jeff Earle's evidence

[43] Mr. Earle's background is in psychology. He has dealt with several accommodation requests from correctional officers, which were made primarily for psychological reasons. He is familiar with both the Treasury Board policy on accommodation in the workplace and the CSC policy concerning the duty to accommodate. In addition, when required, he consulted with his labour relations advisor on the topic.

[44] In 2009, he had received no request from the grievor to accommodate him in the SMO position. It came up in the fall of 2011, when the employer was looking for alternate positions for the grievor. Mr. Earle considered the grievor's duties and his limitations and the position's duties and funding. He concluded that the listed limitations did not require that the grievor be placed in the SMO position and that it was not a good fit for him, in any event. He denied the SMO position request due to the level and the nature of the work, the need to respond quickly, the training requirements to qualify the grievor for the job, and the timing. In addition, the SMO position was classified CX-02 and would have required promoting the grievor. Employees are not entitled to promotions through the accommodation process.

[45] Mr. Earle was dissatisfied with Dr. Emmrys' October 27, 2009, letter (Exhibit 9). It left many questions unanswered. As a result, he did not offer the grievor a flexible work schedule even though they are an option under the accommodation policy. Mr. Earle remembered discussing the possibility of referring the grievor to Health Canada but did not direct it that it be done. He did ask the grievor to apply for workers' compensation benefits, which the grievor did.

[46] Mr. Earle also directed that the approval of the grievor's workers' compensation claim be appealed. Mr. Earle's concerns were that the benefits were approved retroactively, which he believed caused a liability for the employer, and that there was a lack of procedural fairness as the employer had had no input into the decision. The WCB based its decision on documents that the employer had never seen. In addition, Dr. Gosse had changed the grievor's diagnosis in the midst of the process (Exhibits 5 and 6). The employer never received the medical report (Exhibit 6) until after the WCB had issued its decision. The grounds for appeal were over the existence of a workplace trauma and the diagnosis. Alternate explanations existed for the grievor's symptoms, and the validity of a workplace incident causing trauma to the grievor was not explored.

[47] As the warden, Mr. Earle is responsible for the sound financial management of the institution, which includes managing the costs of leave. The grievor's absences and the cost of backfilling for him had a financial impact on the institution. Mr. Leclair wanted paid leave when he was unable to attend work even though he had exhausted his leave entitlements. Mr. Earle told Mr. Leclair that if he was not fit to report to work, he should not report. He also would not stop Mr. Leclair if he needed to leave early, but

he could not authorize paid leave over and above what the grievor had already exhausted. Even leave without pay has a financial impact on the institution in the form of the costs of replacing the employee taking it. The institution cannot operate without correctional officers; replacing missing officers may require overtime and callback expenses, which otherwise would not have been incurred.

[48] Mr. Earle discussed the difficulties finding paid work for the grievor with Dr. Emmrys, with the grievor's permission. The doctor's role, in Mr. Earle's opinion, was not to tell him what positions to offer or where to accommodate the grievor; it was to describe the grievor's limitations. The discussion provided no further clarification.

[49] In January 2010, Mr. Earle received a letter from the union (Exhibit 29) asking him to intervene between the grievor and his correctional managers following the incident in which he had refused to comply with a direction from a correctional manager because he had had a meeting with Mr. Earle. Not only did the letter ask him to intervene between the grievor and the correctional managers, but it also asked that he implement an accommodation. There had been broad discussions up to that point concerning finding an alternate position for the grievor. Mr. Earle was committed to finding a workable solution and did consider alternate positions in visits and correspondence, admissions and discharge, and other CX posts without inmate contact.

[50] Mr. Earle felt that if the grievor accepted a position with less confrontation, he would be more successful in his recovery. He asked the grievor to consider positions outside the institution. The grievor did not want to work outside the uniformed CX role. He told Mr. Earle that he had 18 months to go until retirement and that he did not want to have to learn new procedures at a new location.

[51] Mr. Earle wrote to Dr. Emmrys in January 2010 (Exhibit 30) to clarify the doctor's previous letter and to determine if any new issues had arisen that needed clarification. He posed questions about time frames because he wanted to have something in place that met the grievor's needs but did not want to affect other positions or incur increased financial costs. Dr. Emmrys' response (Exhibit 10) was that the grievor could perform his duties, which indicated to Mr. Earle that he had no limitations other than the possible need to be off work when his symptoms were acute. Otherwise, the grievor was to be at work, and Mr. Earle's challenge was to get him to stay at work and carry out his duties.

[52] Mr. Earle discussed this letter with the grievor, who was not happy with its contents. Mr. Earle reinforced the previous discussions they had had concerning his expectations for the grievor's attendance at work. The grievor expected to be paid his full salary without using his leave credits. He was not interested in any of the other options that had been discussed, like other CX-01 positions at the institution, such as the driver position. He would also not consider other sites, such as CORCAN or regional headquarters. The only option he was interested in other than paid leave was the SMO position.

[53] While the grievor was absent and receiving workers' compensation benefits, Mr. Earle had no interactions with him.

[54] In May 2011, the grievor was determined to be fit to return to work. Dr. Emmrys provided an update on his status and made two recommendations for a return to work. The first was not within the employer's control, and the second suggested that management give some attention to reducing the workplace conflict between the grievor and his correctional managers. It was very difficult to address the second concern since the grievor's stance in the conflict was position-based, and he was inflexible in any discussions and attempts to resolve it. It was not within Mr. Earle's unilateral control to resolve it. Managers need to manage and evaluate performance, and the grievor was not willing to cooperate with his managers or for that matter with others in the workplace. He had conflicts with many people at the institution. Eventually, however, Mr. Earle did manage to find a correctional manager that the grievor thought was neutral and acceptable.

[55] Mr. Earle also agreed to allow the grievor to work four 10-hour shifts, which allowed him more days off. The grievor suggested he be assigned to the Regional Reception Centre; Mr. Earle agreed. Initially, the grievor was brought on as a spare, which meant the post was overstaffed. He was not on the main roster, which gave him the flexibility required for work hardening, a period during which the grievor would reintegrate into the workplace but it was intended only as a temporary measure. Even with that, the grievor's attendance was, according to Mr. Earle, "spotty, at best".

[56] Mr. Earle described the grievor as being "tormented" by labour-management relations issues. Mr. Earle discussed with the grievor options for resolving the complaints so that the grievor could move on. One option was that the return-to-work process would be managed by the warden or deputy warden rather than by the

grievor's correctional manager, as would normally have occurred. In addition, if the correctional manager the grievor agreed to report to was not available, he was to bring his concerns to the deputy warden or to the warden if the deputy warden were not available. However, it was made clear that of necessity, he would have some contact with correctional managers and that he was expected to be civil and to follow directions. He expressed no concerns with the plan, but Mr. Earle had the sense that the grievor had not bought into it.

[57] When the grievor returned to work at the beginning of August 2011 after his holidays, an incident occurred, which Mr. Earle recorded in an email (Exhibit 40). The grievor was not expected at work on the statutory holiday but reported anyway. He refused to cooperate with the Duty Correctional Manager and the Assistant Warden, Operations, following which he was sent home. He refused to respond to either of them, contrary to the requirement that he be responsive to the chain of command.

[58] Meetings to find a suitable accommodation for the grievor continued throughout August 2011. A meeting was also scheduled for the grievor and a representative from the employer's conflict resolution office in Ottawa, Ontario, in an attempt to help resolve his workplace conflicts. It did not go well. The grievor felt that people were becoming involved in his return to work who should not have been, which resulted in the employer reneging on promises that had been made to him during the return-to-work process. The grievor continued to refuse to consider non-uniformed posts, motorized patrol, the principal entrance, the dry cell, and other posts in the institution. He continued to refuse to consider another site. He did agree to consider the employer's regional training facility and regional headquarters, but his primary focus remained the SMO position.

[59] A meeting was scheduled for September 15, 2011, to review the status of the grievor's return to work. At the meeting, the grievor requested a new accommodation plan, specifically that he be assigned to the SMO position. Up to that point, no one had advised the employer of any concerns with the previous plan or had indicated that it did not meet the grievor's return-to-work needs. He categorically refused again to consider other institutional positions. He indicated that he was going to remain at the institution until all his outstanding issues were resolved as it was his job to ensure that things were done properly. Mr. Breen summarized this meeting for Mr. Earle, who did not attend (Exhibit 42).

[60] Dr. Emmrys replied to inquiries Mr. Breen sent him on September 13, 2011 (Exhibits 19 and 43). Dr. Emmrys expressed the grievor's intention to retire in the near future and his desire to leave the institution on good terms. The grievor wanted to work with Mr. Earle on a one-on-one basis, which, according to Mr. Earle, was not feasible. This was the first time that this requirement was expressed as part of the accommodation process.

[61] On September 26, 2011, at a meeting about placement options to meet the grievor's needs, he accused the employer of denying him the SMO job, the one job he could do. He would not consider any other positions; the ultimatum was that it was the SMO position or nothing. Mr. Earle reiterated the problems with that option and stated that the employer was willing to consider other CX-01 positions on-site, off-site, at the Regional Treatment Centre, and at regional headquarters. The grievor responded by accusing Mr. Earle of denying him the one job he could do and of trying to force him off work. The grievor was very angry and, as described by Mr. Earle, was being ugly. Attempts to focus the discussions on options that were on the table and not the SMO position were fruitless. The grievor was not willing to. Eventually, he did accept a temporary assignment with the security section at regional headquarters.

[62] Paulette Léonard was the assistant deputy commissioner, corporate services, and was responsible for among other things human resources at the CSC in 2011 and 2012. She met with the grievor in September 2012 to advise him that his assignment to the regional headquarters was coming to an end and that the employer was considering assigning him to carry out mail runs between institutions. This turned out not to be an option as the grievor would not commit to attending work even four days per week. He again asked to be appointed to the SMO position at the institution. He asked also about the SMO position at Westmorland Institution in Dorchester, New Brunswick. Due to the impact of the federal government's Deficit Reduction Action Plan in 2012, the options available to the employer were very limited. It could justify the cost of assigning the grievor to mail runs as a contracted service would no longer be required, but it would not have been viable were the grievor unable to commit to regular attendance. The only solution was to return him to his CX position at the institution.

[63] Representatives of the grievor's union met with the Regional Deputy Commissioner, who agreed that the grievor would be assigned as a driver on the

condition that he would retire in November 2013. Ms. Léonard explained to the grievor the requirement to submit an irrevocable letter of resignation for this arrangement to be implemented. The grievor did not express any concerns with this requirement. During the life of this agreement, the grievor seemed happy. He told Ms. Léonard that he liked the work. His attendance was excellent. There was no indication that he was unhappy with his decision. Had he not wanted to retire, he would have been found a CX position somewhere in the region.

Dave Niles' evidence

[64] Mr. Niles has been the assistant deputy commissioner, correctional operations, since 2009. His key duties include supervising the operations of the institutions in the region. As part of his duties, he attends regional labour-management committee meetings. Following one such meeting, he met with the grievor and his union representative to discuss the issues being faced by the grievor in his impending return to work at the institution.

[65] At the meeting in May 2011, the grievor and his representative explained that the grievor had been off work for approximately 13 months. Despite the fact that he was still ill, he was being forced to return to work, as the WCB had declared him fit to return to his job and had ceased his benefits. The grievor asked if he could be returned to work without any contact with the Warden and several other managers at the institution. Given this conflict, Mr. Niles asked if the grievor had considered returning to work at another institution. The grievor indicated that he would not work anywhere but at Springhill Institution; it was his institution, which is where he would work until he retired. Given the grievor's preoccupation with the conflict he perceived there, Mr. Niles reminded him that all CSC employees are expected to abide by the CSC's code of professional conduct. Like any other employee, the grievor was required to interact with the Warden and other managers at the institution.

[66] Mr. Niles and the grievor discussed retirement. The grievor indicated to Mr. Niles that it was not possible because he could not afford it. The earliest he could retire was 18 to 24 months from May 2011. The grievor expressed that he was not fit to return to work in his opinion but that he needed to because he had no income. He asked Mr. Niles to consider putting him on a special leave with pay so that he could stay home and still be paid. In Mr. Niles' assessment, this situation did not substantiate the need for the grievor's request, so it was denied.

[67] There was nothing exceptional about the grievor's situation, in Mr. Niles' opinion. The WCB had declared him fit to return to work, and in the absence of any other expert medical information to the contrary, the grievor was fit for work. If so, then there was no need to use special leave or for Mr. Niles to take the exceptional step of approving the type of leave the grievor had requested.

[68] Following a regional labour-management committee meeting in October 2011, Mr. Niles met with Mr. White. They agreed that the grievor's return-to-work attempts at the institution had not generally been successful and that an alternate environment would be beneficial. He agreed with Mr. White that an assignment to regional headquarters would allow the grievor to focus on returning to work outside the environment that was causing his stress. Based on several months of attempting a return to work at the institution and on the information provided by Mr. Earle, Mr. Niles decided that the grievor would be brought to regional headquarters as a CX 01 and assigned to review use-of-force incidents, standing orders, and regional security policies. There was no budget for this position, but as an accommodation, it was temporarily allowed as an unfunded position to bridge the grievor to retirement in the following 18 to 24 months.

[69] Mr. White had three concerns with Mr. Niles' proposal and requested that the grievor work entirely from home, which was denied, but Mr. Niles agreed that on occasion, the grievor could work from home. The second was whether the grievor would be on travel status. Since his work location was relocated to regional headquarters in Moncton, that became his workplace, and he was not entitled to claim travel benefits. Ultimately, however, Mr. Niles agreed to pay the grievor mileage, parking, and out-of-pocket expenses related to travelling to Moncton. The third concern was that the grievor had exhausted his leave banks. As a measure of good faith, Mr. Niles approved several days of special leave to allow him to make the transition from the institution to his new work environment.

[70] A draft assignment agreement was prepared and presented to the grievor (Exhibit 60). He did not sign it and provided the employer with a list of nine demands that had to be met before he would sign it (Exhibit 61). The employer agreed to some of them (Exhibit 62), but each time something was agreed to, other things replaced those that had dropped off the list. It took several months to complete the assignment agreement (Exhibit 19).

[71] The concluded agreement was in place from October 24, 2011, to September 30, 2012, longer than the three months initially intended. However, in May 2012, the CSC was in the midst of its Deficit Reduction Action Plan evaluations, and the grievor was notified that as a result of the budget reductions, the funding used to support his accommodation was no longer available.

Alain Tousignant's evidence

[72] Alain Tousignant was the director general of labour relations at CSC national headquarters in 2011. He became involved in the grievor's accommodation requests when the CSC's commissioner received a letter from the grievor outlining his frustration with how the Atlantic Region was dealing with his accommodation requests. Mr. Tousignant spoke to the grievor twice to obtain the background of his concerns. During the course of his conversations with the grievor, it became clear to him that the grievor was frustrated. One of the grievor's comments, which was that he did not beat his wife, struck Mr. Tousignant as odd and caused him sufficient concern that he felt that following up was necessary.

[73] In June 2011, he met with the grievor and Fraser McCauley, the CSC's assistant commissioner of human resources, which was not a normal occurrence. Mr. McCauley and Mr. Tousignant also arranged to meet with Beth Leclair, the grievor's wife, who was a correctional manager at the institution. They felt that it was important to ensure that she had the assistance and support she needed as an employee and as the wife of a correctional officer. Ms. Leclair felt that she was able to manage all aspects of her life. The group discussed the overall situation of being a correctional manager, of managing at work, and of managing the home situation, all in which her husband was in a dispute with her employer. They also discussed the grievor's difficulty with his medications, him travelling to Halifax, Nova Scotia, to see Dr. Gosse, and his relationship with his doctor.

[74] The purpose of the meeting was not to discuss the grievor but to deal with Ms. Leclair's well-being. She was calm and very open except for one point when she became very emotional. Later that day, Mr. Tousignant and Mr. McCauley met with the grievor. The focus of this discussion was how best to accommodate him in the workplace.

III. Summary of the arguments

A. For the grievor

[75] Starting in 2009, the grievor became sick, disabled, and in need of workplace accommodation. For two years, the employer worked very hard at doing nothing to help him. At the end of 2011, when he was finally accommodated, the employer did nothing that could not have been done in 2009. In so doing, it failed in its duty to accommodate the grievor's disability.

[76] The evidence clearly established that the grievor suffered from a disability, which prevented him from performing his correctional officer duties within the institution. The WCB's decision confirmed as much (Exhibit 53). Based on all the medical information, the grievor suffers from PTSD (Exhibits 53, 6, and 10). If the WCB determines that an employee is disabled, the employer must accept it as fact. According to Dr. Gosse in his correspondence with the WCB, the grievor's PTSD is permanent. He suffers from chronic anxiety, which is an ongoing disability. According to Dr. Emmrys, the grievor's PTSD is linked to his work. The employer has not provided any contrary evidence. In fact, the employer acknowledged as much by accommodating the grievor in 2011.

[77] It is clear from the evidence that the grievor had a very high rate of absenteeism. He had a problem functioning in the workplace due to his disability. The employer did nothing from 2009 to 2011 to accommodate him; therefore, it discriminated against him, contrary to clause 37.01 of the collective agreement.

[78] According to the Supreme Court of Canada in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 SCR 3 ("*Meiorin*"), an absence of a workplace accommodation is a *prima facie* case of discrimination. The employer has the duty to accommodate a disabled employee; the employee and his or her union must cooperate with the employer in its attempts to accommodate the employee. In this case, the employer is best placed to determine a suitable accommodation as it knows the workplace, the budget, and the employee's needs and is responsible for running the institution. Since the employer was able to accommodate the grievor in 2011, why was it not done in 2009? There is no evidence to explain this delay.

[79] When an employee has a psychological disability, he or she cannot be treated the same as others in the accommodation process, particularly when communication

issues and lack of judgement are hallmarks of this type of disability. The grievor cannot be faulted for not participating fully with the employer's return-to-work process, as outlined in its policy (Exhibit 18), when he was precluded from doing so by the symptoms of his disability.

[80] Mr. Earle's evidence was very weak and was contradicted by that of Messrs. Harrison, Wilkins, and Leclair as well as by the documentary evidence. What is clear is that over the course of his career, the grievor was exposed to a number of gruesome events. In January 2009, he went to a PTSD conference and realized that he had all the symptoms of PTSD but one. He attempted to go to work when he was scheduled to. He would get up, put on his uniform, and drive to the institution but often found that he could not enter it. It was clear that he was suffering from a disability and that he was not functioning normally.

[81] In June and July 2009, the grievor met with Mr. Harrison and Mr. Earle. Mr. Harrison made it clear that the grievor needed to be outside the institution's walls. He and the grievor proposed that the grievor be transferred to the SMO position, which the grievor agreed to do at the CX-01 level to avoid being promoted. They also suggested that in the alternative, the grievor be sent on language training or be assigned to casework. The grievor is not asking for the SMO position; he merely seeks recognition that not being assigned to that position is proof that the employer did nothing to accommodate him. Instead of accommodating him, the employer made excuses as to why solutions were not viable.

[82] During the spring, summer, and early fall of 2009, the employer offered nothing to the grievor as an accommodation. He refused to provide the requested medical information, but his refusal was related to his symptoms and was not an unwillingness to participate. His refusal was so insignificant that Mr. Earle did not even remember it happening. The union and the grievor continued to suggest the SMO positon or the opportunity for the grievor to work from home throughout this period. The only answer Mr. Earle provided was that the grievor needed training for either of these types of work, yet he could not say what type of training that was. It is clear that the employer was not looking for a best fit in which to accommodate the grievor.

[83] The fact that the SMO position was classified CX-02 was not a legitimate reason to deny the grievor accommodation in it. Nothing in the employer's policy precluded the grievor from being accommodated at a higher level. The employer claimed that the

SMO position was unfunded, yet there was 1.4 FTE being shared between two people, in addition to a term employee. Whether the position was unfunded or not is irrelevant since the grievor was ultimately accommodated in unfunded positions between 2011 and 2013.

[84] The employer had no legitimate reason for denying the grievor the SMO position. Mr. Earle admitted that his concern was based on the grievor's ability to do the job, and yet no Health Canada assessment was requested to confirm whether he was fit for the position. Dr. Emmrys had earlier advised the employer in October 2009 (Exhibit 9) that the grievor preserved his ability to function fairly well at work. He was being nonchalant with the grievor's health. In January 2010, Mr. Earle again contacted Dr. Emmrys (Exhibit 27), seeking information about the grievor's suitability to be at work.

[85] The employer recognized that the grievor was not functioning and was not suitable for work and that he needed an accommodation. It should have used common sense as the grievor's union representatives did and should have come up with an idea for accommodating the grievor outside the walls of the institution. The employer has a duty to accommodate an employee even in the face of impractical suggestions by the employee's treating physician. If the doctor is not clear in his or her direction or if the employer has reason to question the doctor's recommendations, the employer is obligated to seek clarification.

[86] Eventually, the grievor was approved for WCB benefits and was off work from April 2010 until May 2011. During that year, knowing that he would return, the employer still did nothing to plan for accommodating him upon his return. Once he did return in May 2011, he missed 81 of 88 shifts. It was clear that he needed to return to work in a job other than the CX-01 position he had once held at the Regional Reception Centre.

[87] By May 2011, the union and the employer representative, Mr. Niles, recognized that the grievor had to be removed from the institution. As a result, on August 24, 2011, the grievor received his first accommodation, a structured return to the Regional Reception Centre (Exhibit 5). From then on, the employer attempted to accommodate the grievor, who thus seeks damages for the period from 2009 to August 24, 2011.

[88] The employer tried to portray the grievor as difficult and uncooperative in 2011

while it tried to find him a suitable accommodation. It was aware that he suffered from a mood liability and that anger, emotionality, hypersensitivity, agitation, and aggressiveness were all symptoms of his illness. The employer would also have me believe that the grievor was fixated on the SMO position and that he would not consider anything else. However, the evidence contradicts this, as he did eventually accept accommodation at the employer's regional headquarters.

[89] An employer is required to accommodate an employee to the point of undue hardship. Proof of undue hardship requires substantial evidence of that hardship. It cannot be established based on impressionistic evidence or subjective assessments that the SMO position was not the best fit for the grievor. Once the employer made up its mind to accommodate the grievor, doing so took no time. That being the case, why did it wait until 2011 to do it? It chose to ignore its policy and did nothing to accommodate the grievor for two years, causing two years of frustration, pain, and suffering. In fact, the employer set out to aggravate the grievor's condition by appealing the WCB's position and by scheduling a meeting with the grievor's wife, to ensure her safety. Consequently, the grievor is entitled to the maximum damages allowed under s. 52(2)(e) of the *Canadian Human Rights Act* (R.S.C. 1985, c. H-6; *CHRA*). In addition, by wilfully ignoring its policies, the employer acted recklessly, entitling the grievor to damages under section 53(3) of the *CHRA*.

[90] The grievor eventually retired in 2013 but only after the employer provided him with notice that his accommodation was coming to an end and that if he did not retire, he would have to return to work at the institution. Accommodating a disabled employee is about keeping the employee in the workplace, not throwing him or her out of it. The employer was trying to rid itself of its problem, which in itself was reckless and wilful behaviour.

[91] The case law, such as *Meiorin*, has described a unified approach to adjudicating discrimination claims under human rights legislation. The distinction between direct and indirect discrimination has been erased. Employers and others governed by human rights legislation are now required in all cases to accommodate the characteristics of affected groups within their standards, rather than maintaining discriminatory standards supplemented by accommodation for those who cannot meet them. Incorporating accommodation into the standard ensures that each person is assessed according to her or his personal abilities, instead of being judged against presumed

group characteristics. Such characteristics are frequently based on bias and historical prejudice and cannot form the basis of reasonably necessary standards. (See *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 SCR 868, ("*Grismer*")).

[92] The employer must be flexible when applying its policies and standards (see *Hydro-Québec v. Syndicat des employé-e-s techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43). It must demonstrate genuine efforts, short of undue hardship (see *Holmes v. Canada (Attorney General)*, 1997 CanLII 5101 (FC)). Between June 2009 and August 2011, the employer's efforts were not even negligible — they were non-existent. Even if the medical information the grievor provided was insufficient, there was no reason for the employer to do nothing (see *Panacci v. Treasury Board (Canada Border Services Agency)*, 2011 PSLRB 2).

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

[93] The employer did not contest that the grievor was disabled for the period during which he received workers' compensation benefits, which was from January 9, 2009, to May 1, 2011. The issue is with the period commencing on May 2, 2011. The grievor claims that he was still disabled at that point, yet the WCB had cleared him to return to work with no restrictions.

[94] A disability is a specific impediment that prevents the grievor from performing his duties. Without medical information identifying such an impediment, no disability has been established. To be successful, the grievor had to establish the existence of a disability on the balance of probabilities; he did not. He could have and should have called his treating physicians to provide the medical evidence necessary to establish his disability for the period after May 1, 2011.

[95] The employer suggested that a negative inference be drawn on whether Dr. Gosse's testimony would have been helpful to the grievor. The grievor referred to Dr. Gosse's report a year after he returned to work at CSC regional headquarters (Exhibit 8). In it, Dr. Gosse identified a 10% permanent mild impairment, which he did not describe as a disability. Nor did he identify any workplace accommodation that the grievor required. There is very little medical information for the period commencing May 2, 2011; some is needed.

[96] A workplace accommodation is not a broad and undefined set of solutions to a disability. If an employee has a disability, the purpose of the accommodation process is to identify in what aspects and to what extent the employee is impaired and to find solutions that will allow the employee to perform his or her job without the disability holding him or her back.

[97] In 2009, the CSC was not aware that the grievor needed to be employed outside the institution. Only at some point between January 2009 and October 27, 2009, did the grievor first become aware that he had a disability and provide the employer with the medical information to support it. His conversations with the employer about his disability began in June 2009. At this point, Mr. Earle asked him to provide medical information to support his claim that he had a disability; he refused to. There was some speculation that his refusal to provide the medical information to support his request was a symptom of his disease, but no proof of that was provided. The grievor did not mention any such symptom in his testimony. The truth is that he was not willing to provide any medical information to the employer; he expected the employer to take him at his word. The grievor tried to establish fault on the part of the employer for not seeking a Health Canada assessment, but the truth is that the employer could not do so without a clear appreciation of his medical situation.

[98] An employee is obligated to provide medical information to help the employer build an accommodation. Without it, the employer has no basis upon which to build one. Had the employer acted on what the grievor had provided to it, it would have been speculating. Furthermore, the grievor's refusal to provide the relevant medical information delayed the accommodation process.

[99] Between October 27, 2009, and April 6, 2010, the employer received the medical information it had requested. The first piece of it that it could rely on was provided in a letter from Dr. Emmrys dated October 27, 2009 (Exhibit 9). It became the foundation for what happened next in the accommodation process. Dr. Emmrys stated that the grievor did not require a work stoppage but that he could continue to work if he were allowed to take time off as needed. Mr. Earle allowed the time off if the grievor phoned in sick. He also allowed the grievor to go home early when he needed to. This was an annoyance to the employer but was not an undue hardship. An employer need not accommodate to the point of undue hardship if an employee can be accommodated without incurring it.

[100] Mr. Earle spoke to Dr. Emmrys with the grievor's permission. He spoke as the warden of the institution and not as a fellow psychologist. In May 2011, when the grievor was fit to return to work, according to the WCB, Mr. Earle sought further clarification from Dr. Emmrys (Exhibit 13). The doctor reported that there was no contraindication for the grievor returning to work other than that he was not satisfied with the stipulation that if he could not work, he would be placed on leave without pay. His symptoms did not prevent him performing his duties. The goal of the return to work was to ensure that he stayed at work and performed his duties. He was allowed absences on a variable as-needed basis as suggested by Dr. Emmrys.

[101] The grievor might have been dissatisfied with the employer's approach to accommodating him, but according to the medical information he provided to the employer, it did what was needed. The heart of the matter was that the grievor wanted to be paid when he was off work. The law does not require the employer to pay an employee beyond the rights established in the collective agreement when the employee does not render services. Ultimately, the grievor was paid or had his sick leave credits reimbursed when the WCB approved his claim retroactively.

[102] Dr. Gosse also stated that the grievor was fit for work. He described the grievor's preoccupation with missing time from work and his desire to be able to choose whether he could go into work on time, or at all, without any sick leave penalty (Exhibit 5). The employer did exactly what the doctors recommended to facilitate the grievor's return to work. It did not refuse to do anything, as argued by the grievor.

[103] During the period from May 2, 2010, to August 23, 2011, the employer put forward five reasonable options to the grievor to meet his needs. He refused each one. They were put to him before he returned to the workplace, but he would consider nothing other than full hours and full duties and the SMO position. He was not willing to consider sites other than the institution and when he was there, he did not want to interact with its managers, including the warden. Dr. Gosse assured the WCB and the employer that the grievor was fit to return to duties full-time, without restrictions, which the employer relied on. Even the grievor testified that Dr. Gosse would not have cleared him had he not been fit to return to work.

[104] On May 31, 2011, the grievor and his representative met with Mr. Earle and Mr. Breen to determine what would work best for him as a return to work at the institution. Dr. Emmrys had indicated that to be successful, the grievor's past labour

relations issues needed to be resolved. A plan was developed to return the grievor to the Regional Reception Centre, at his request. An agreement had been reached concerning his schedule and the correctional manager that he would be assigned to. On August 23, 2011, this plan was reduced to writing (Exhibit 23), which the grievor signed, acknowledging that he had been accommodated. The employer did exactly what Dr. Emmrys recommended; it is incorrect to suggest that it was not willing to accommodate the grievor. Despite this, he consistently refused to meet with the management team at the institution. Mr. Earle and Mr. Niles were both concerned that the grievor just did not want to work with management there.

[105] The grievor's focus throughout the accommodation process was the SMO position at the institution. Other possible sites were discussed in May and again in August, but he would not consider any other site. He refused a driver's position with CORCAN and again demanded the SMO position in September 2011. The employer was making every effort to follow the doctor's recommendations; it was not intransigent or unwilling to accommodate him. He simply was not willing to consider any options the employer put to him. He was inflexible and focused on the SMO position that he wanted.

[106] The employer did accommodate the grievor. However, its efforts were thwarted by his refusal to participate in the process and to consider alternate possibilities. Eventually, he was accommodated at regional headquarters doing use-of-force reviews, following which he was accommodated as a driver. The union agreed that he was accommodated, which is evidence of the employer's good faith. The employer was always compliant with the medical information provided. When things did not work, it continued to look for other solutions. At no time did it refuse to accommodate the grievor.

[107] The grievor claimed that he was forced to retire. This too was not the case. In August 2011, he indicated to the employer that he was in the process of buying a lobster boat (Exhibit 40) so that he could fish but stated that he could not retire for 18 months. He indicated the same to Mr. Breen when he met with him (Exhibit 41). Even Dr. Emmrys noted the grievor's intention to retire in his September 2011 letter (Exhibit 19) and again in November 2011 in his report to the WCB (Exhibit 14). Dr. Gosse mentioned the retirement in the near future as well in his report to the WCB (Exhibit 8). They were not the only indications of the grievor's intention to retire (see Exhibit 8). He

intended to retire in 2013 and did just that.

[108] The grievor was not forced to retire when his driver assignment ended; he had the option of returning to the institution. There was no medical reason he could not; he just did not want to. If he felt under duress to return there or did not understand the situation, his union should have advised him against retiring. Alternatively, he could have chosen not to retire and could have provided the employer with medical information stating that he could not return to the institution for medical reasons. There was no coercion or misunderstanding. He retired as he had planned, to pursue the commercial fishery. Retirement is a voluntary severance of employment under the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13); see *Mutart v. Canada (Attorney General)*, 2014 FC 540.

[109] There are no grounds upon which to award damages for a failure to accommodate the grievor. This grievance is not about his retirement or whether the employer appealed the decision to accept his workers' compensation claim. There is no indication that the employer knew that speaking to the grievor's wife would cause harm to his health; nor is there any evidence that in fact his health was harmed. The employer was acting out of concern for an employee. It acted responsibly. Just because the matter might have been handled differently, it does not equate to wilful and reckless behaviour on the employer's part.

[110] The onus was on the grievor to establish the existence of a disability, which arises only when a particular physical or mental condition prevents an employee from performing an important part of his or her job. The person claiming to be disabled must also establish on a balance of probabilities that the disability is severe enough that it would be unreasonable to expect that person to perform the tasks that bring it on (see *Ahmad v. Canada Revenue Agency*, 2013 PSLRB 60 at paras. 123 and 124). The grievor's evidence is not sufficient to discharge this burden of proof (see *Gibson v. Treasury Board (Department of Health)*, 2008 PSLRB 68 at para. 30). An adjudicator's field of expertise is in labour relations, and unless he or she refers to the opinion of either a physician or a psychologist when determining that a certain event caused psychological distress to a grievor, he or she clearly exceeds the powers conveyed to him or her by the *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 2 (see *Canada (Attorney General) v. Demers*, 2008 FC 873 at para. 34).

[111] In the absence of medical evidence from a treating physician to explain a

witness' failure to testify, an adjudicator may draw a negative inference if that witness has material evidence to provide, is the only or the best person who can provide the evidence, is within the party's exclusive control, and is not equally available to both parties. Given that the medical information required could have been provided only with the grievor's consent, that information would have been within his exclusive control, and the failure to provide it when he claimed that his disability prevented him from performing his duties was only reasonable (see *Syncrude Canada Ltd. v. Saunders*, 2015 ABQB 237 at paras. 55 to 75). And employer is not required to obtain its own independent medical information (see *King v. Treasury Board (Correctional Service of Canada)*, 2011 PSLRB 122 at paras. 86 to 90).

[112] If a *prima facie* case of discrimination has been established, the principles in *Meiorin* come into play, and the employer must establish that the grievor could not have been accommodated without undue hardship (see *McGill Université Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal, 2007 SCC 4* at paras. 48 to 50). The employer does not have the duty to completely change working conditions to accommodate an employee (see *Panacci*, at para. 67). The employer has no substantive duty to accommodate the grievor, only a procedural duty.

[113] A grievor is not entitled to an instant or perfect accommodation but only to a reasonable accommodation (see *Andres v. Canada Revenue Agency*, 2014 PSLRB 86). This is not a subjective standard, which the grievor dictates (see *Callan v. Suncor Inc.*, 2006 ABCA 15 at para. 21). The test of whether a reasonable accommodation has been offered is not whether the employee likes or wants to perform the duties of the modified or alternate position. Rather, it is whether the position represents a reasonable accommodation of the employee's disability. The question to be answered is whether the employee is able to perform the duties of the position despite the disability. If he or she can, then the duty to accommodate is satisfied (see *King*, at para. 84). The employer showed that he could, and this case should be dismissed.

C. Grievor's reply

[114] The grievor had a disability as of May 2009, and it was nonsense for the employer to argue that he did not have one. The medical evidence was uncontradicted.

[115] The *Ahmad* case dealt with the assessment of pain and its impact on the

employee's ability to perform his normal job function. In this case, the grievor's psychological impairments continue and have been clearly demonstrated by the medical reports submitted to the employer. No one ever said that he was cured. If the employer did not have sufficient information according to its policy, the grievor could have been referred to Health Canada for an assessment. Mr. Earle said he was not happy with Dr. Emmrys' assessment, but he did nothing about it. He should have been proactive and sought the information he needed to accommodate the grievor.

[116] A return-to-work program is not an accommodation. The SMO position was used to illustrate what the grievor considered a suitable accommodation.

IV. Reasons

[117] I will deal first with the question of whether the grievor was forced to retire because that will have a direct impact on the length of time he required accommodation. The evidence is clear that he stated his intention to retire within 18 to 24 months. He bought a fishing boat with the full intention of fishing commercially once he retired. He entered into an accommodation agreement, which saw him transferred to the employer's regional headquarters, following which he agreed to retire. He submitted in writing a notice of his intention to retire. He both had the intention to retire and took positive steps to accomplish it, including advising administrative staff of his plans.

[118] A retirement notice is a de facto voluntary termination of employment (see *Mutart* and *Stevenson v. Treasury Board (Department of Employment and Social Development Canada)*, 2016 PSLREB 17). The grievor voluntarily severed his employment relationship, and this basis of his grievance must be dismissed.

[119] Article 37 of the collective agreement prohibits discrimination on the basis of physical disability, as follows:

> *37.01 There shall be no discrimination, interference, restriction, coercion, harassment, intimidation, or any disciplinary action exercised or practiced with respect to an employee by reason of age, race, creed, colour, national origin, religious affiliation, sex, sexual orientation, family status, mental or physical disability, membership or activity in the Union, marital status or a conviction for which a pardon has been granted.*

[120] As I stated as follows in *Taticek v. Treasury Board (Canada Border Services Agency)*, 2015 PSLREB 12:

…

> *[103] In order to establish that an employer engaged in a discriminatory practice, a grievor must first establish a* prima facie *case of discrimination. A* prima facie *case is one that covers the allegations made and which, if the allegations are believed, would be complete and sufficient to justify a finding in the grievor's favour in the absence of an answer from the respondent (*O'Malley *at para. 28)). The Board cannot take into consideration the employer's answer before determining whether a* prima facie *case of discrimination has been established (see* Lincoln v. Bay Ferries Ltd.*, 2004 FCA 204 at para. 22).*

[121] An employer faced with a *prima facie* case can refute the allegation or present a defence based on section 15 of the *CHRA*, for which the relevant provision in this case reads as follows:

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

[122] For any such practice to be considered to be based on a BFOR, it must be established that accommodation of the employee's needs would impose undue hardship on the employer, considering health, safety and cost (s. 15(2) of the *CHRA*).

[123] It is clear that from the evidence, the grievor had a disability, which precluded him, from at least August 2009, from performing his CX-01 duties at the institution. The employer acknowledged as much, both at this hearing and in its actions.

[124] Therefore, the question for my consideration is whether for the period from 2009 to 2011 the employer accommodated the grievor's needs and if not, whether accommodating him would have imposed undue hardship on the employer, within the meaning of s. 15(2).

[125] As stated in *Taticek* and again in *Kirby v. Treasury Board (Correctional Service of Canada)*, 2015 PSLREB 41, the SCC noted, in *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970 ("*Renaud*"), that employees seeking accommodation have a

duty to cooperate with their employers by providing information as to the nature and extent of their alleged disabilities that will enable the employers to determine the necessary accommodations. Counsel for the grievor argued that the grievor's refusal to provide the medical information the employer needed to identify a suitable accommodation was related to his symptoms and was not an unwillingness to participate; however, there is no medical evidence to support this assertion.

[126] The employer accepted that the grievor suffered from psychological problems that arose from his employment at the institution. However, the advice provided to the employer by Dr. Emmrys, the grievor's treating psychologist, was that he was fit to work, provided the employer made certain concessions related to time off and to being allowed to leave the workplace early if he felt the need on any day on which he reported to work. The employer agreed to these concessions, and in the absence of any medical information to contradict this or to identify further accommodations, I find that the employer established that it did in fact accommodate the grievor, particularly given his failure to cooperate with it.

[127] The grievor was focused in his dealings with the employer on the SMO position. Even at the hearing, his focus was on that position, although his counsel argued that the grievor was not seeking to be appointed to it. The grievor is not entitled to his choice of accommodation. Nor is an employee entitled to an instant or perfect accommodation but only to a reasonable accommodation (see *Andres*). Furthermore, the employer's decision not to appoint him to the SMO position was not a failure to accommodate the grievor. If reasonable accommodations can be put in place without reaching the point of undue hardship, then they are sufficient to discharge the employer's duty to accommodate.

[128] All the accommodations put in place from 2009 to 2011 were based on the recommendations advanced by the grievor's physician. Furthermore, for much of that period, the grievor was unfit for work, according to the WCB's assessment, and no accommodations were required. Even when he returned in 2011, at Dr. Gosse's recommendation, the employer assigned him to the Regional Reception Centre, to comply with the doctor's assessment that a transitional return-to-work plan that involved reduced hours, minimal confrontation, and gradual inmate contact was required. The Regional Reception Centre was one of the suitable options identified by Dr. Gosse to the employer for the grievor's return to work (Exhibit 36).

[129] The employer met its onus of proving on the balance of probabilities that the duty to accommodate the grievor's disability was met by taking the steps identified in Dr. Emmrys' and Dr. Gosse's opinions, including allowing the grievor to be off work when he felt the need. The fact that he was required to use leave to cover these occasions for pay purposes does not diminish what the employer did. Likewise, the employer allowed the grievor to leave his shift if he felt that he was not able to complete it, as recommended by Dr. Emmrys. Changes were made to his reporting relationship to assist him with his difficulties with the institution's management team, and eventually, he was removed from the situation completely.

[130] The employer met with the grievor and his union representatives starting in 2009 in an attempt to find a suitable work situation that accommodated his disability, yet the grievor was focused on one, the SMO position. Between May 2, 2011, and August 23, 2011, the employer identified no less that than five gradual return-to-work options (Exhibit 36) to the WCB that were put to the grievor. He refused all of them. The employer communicated with him to determine his needs and to find a solution, but the only thing he would accept was either the SMO position or his CX-01 position with full-time hours and full duties.

[131] When the grievor did not return to work as scheduled on May 2, 2011, he was asked to consider working at other sites so that he did not have to return to the institution, even though the WCB had informed the employer that he was fit to return to full duties without restriction or accommodation. However, the employer recognized that with his ongoing battles with the institution's management, the grievor might have been better off someplace other than inside the walls of the institution. The grievor refused to even consider this as an option (Exhibit 44) and continued to ask to be put into the SMO position (see, for example, Exhibit 45).

[132] Finally, on August 23, 2011, when a plan the employer had proposed at the end of May 2011 was put in place, the grievor admitted that he had been accommodated (Exhibit 23).

[133] The employer has a duty to find a reasonable accommodation. It knows its needs, its workplace, and its resources (see *Renaud* at 994-95). Doctors may suggest what type of accommodation is needed, such as the SMO positon in this case, but it is not their role to decide if an employee can be accommodated or direct that an employee be accommodated in a certain position. A physician's role is to provide a

professional opinion and not to act as an advocate for their patient in the employer employee relationship. Their opinion cannot circumvent the employer's workplace organizational needs. The doctors' role is to identify their patients' needs and limitations, and based on that, the employer must determine how best to accommodate those needs and limitations in the workplace.

[134] Many employees, like the grievor, think that finding an accommodation is carte blanche to be given the position of their choice because of the employer's duty to accommodate them to the point of undue hardship. This is a misconception; employees are not entitled to their preferred accommodations. They are entitled to reasonable accommodations that meet their identified needs. The employer in this case made the effort to find a reasonable accommodation based on the medical information it had been provided. The grievor was not willing to consider the options being put forward, and he delayed the process.

[135] The grievor sought damages but given that I have found that the employer did accommodate the grievor and that it did not violate article 37 of the collective agreement, there is no need to assess any in this case.

[136] The focus of this case was based on the accommodation of the grievor's disability. The issue of his involvement in the union, particularly since it ended before the request for accommodation was made, is peripheral to the true nature of this grievance. There was little or no evidence of it. The grievor had ongoing labour relations issues concerning his employment at the institution and in particular his dissatisfaction or dislike of certain members of that institution's management team. No nexus was shown between the employer's development of accommodation options and any of the grievor's union activities. In fact, there was scant evidence of any such activities. Being represented in meetings by a union representative does not constitute union activities. Nor does past involvement in the local union executive automatically create a nexus. Regardless, there is insufficient or no evidence that the employer discriminated against the grievor in this regard.

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

(The Order appears on the next page)

V. Order

[138] The grievance is dismissed.

September 28, 2016.

Margaret T.A. Shannon,
adjudicator