**Date:** 20170110

**File:** 566-02-9486

**Citation: 2017 PSLREB 01**

*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

**PASCAL GUILBAULT**

Grievor

and

**TREASURY BOARD**
**(Department of National Defence)**

Employer

Indexed as
*Guilbault v. Treasury Board (Department of National Defence)*

In the matter of an individual grievance referred to adjudication

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

**For the Grievor:** Bertrand Myre, Canadian Association of Professional Employees

**For the Employer:** Nadia Hudon, Justice Canada

Heard at Montreal, Quebec,
October 11 and 12 and November 21, 2016.
(PSLREB Translation)

## I. Individual grievance referred to adjudication

[1] Pascal Guilbault ("the grievor") filed a grievance against his employer, the Department of National Defence ("the employer"), because it refused to grant his request for accommodation based on family status.

[2] The grievance was referred to adjudication on January 22, 2014. At the same time, notice was given to the Canadian Human Rights Commission ("CHRC") under subsection 92(1) of the *Public Service Labour Relations Regulations* (SOR/2005-79). On January 30, 2014, the CHRC advised the Public Service Labour Relations Board ("the former Board") of its intent to make submissions on the grievance. In the end, it did not make any submissions.

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

## II. Summary of the evidence

[4] The grievor testified on his own behalf. The employer called Isabelle Veilleux to testify. She was a lieutenant-colonel at the time of the incidents referenced in the grievance and assistant to the judge advocate general, responsible for legal services in eastern Canada, and the grievor's manager during the period in question. It also called Lieutenant-commander Jean-François Morin, who became the grievor's immediate supervisor after Ms. Veilleux (she has since retired from the armed forces; therefore, I will not use her military title in this decision).

[5] The grievor works for the Department of National Defence as a claims officer, classified EC-03. He is a civilian employee and is a member of the bargaining unit

represented by the Canadian Association of Professional Employees (CAPE). The working conditions are governed in particular by the collective agreement for the Economics and Social Science Services Group that expired on June 21, 2014.

[6] The grievor began working for the employer in October 2011. He is a lawyer by training. He practised law for some years and then decided to enter the public service in 2009.

[7] In January 2013, the grievor emailed his manager, Ms. Veilleux, a "[translation] request for accommodation based on the *Canadian Human Rights Act*" (R.S.C., 1985, c. H-6; *CHRA*).

[8] The grievor and Ms. Veilleux both stated that that email marked the beginning of a conflictual relationship that would last until she ceased to be his manager in September 2014. Before it, their relationship had been fine. She testified that she was concerned for her employees' well-being and that she was open to their requests for flexibility to foster work-life balance. Thus, she was somewhat surprised by the fairly formal tone of the email as she had in the past already granted the grievor the possibility of modifying his schedule, of course with the understanding that each employee had to work the 37.5 hours set out in the collective agreement by the end of each week.

[9] The email was about two requests, one for leave and the other for accommodation. The first is not relevant. I have cited the accommodation portion of the email as follows:

> [Translation]
>
> …
>
> *By this, I request accommodation from you in accordance with sections 2 and following of the Canadian Human Rights Act, to allow me to take my two breaks thirty (30) minutes before the end of my day.*
>
> *Here are the relevant provisions of that Act (quasi-constitutional):*
>
> > **2** The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an

> opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, **family status**, disability or conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.
>
> **3 (1)** For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, **family status**, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.

*This request is presented to you in relation to my family status.*

[The grievor describes the health problems of his spouse and the language and development difficulties of 2 of his 4 children, aged 15, 9, 3, and 1.]

*From the time they wake up (6:00 a.m.) until 7:15 a.m., I take care of my four children. However, from 4:00 p.m. until I arrive from work at 7:15 p.m., my spouse is alone when, notably, she picks up three of the four (from the babysitter and daycare), goes to the grocery store, takes care of the two youngest, sees to the homework of the two oldest, and makes dinner.*

*I would hope that you would understand that if I could arrive home 30 minutes earlier, it would greatly reduce the family tasks for my spouse by allowing me to significantly help her.*

*In short, I ask to take my breaks at the end of the day so that thus I can finish 30 minutes earlier, allowing me to arrive home earlier.*

*I respectfully submit to you that from a legal and moral perspective, the right thing to do would be to allow this request.*

*Before making a decision, I invite you to contact your labour relations advisor, who will very likely be able to explain to you the ins and outs of an employer's duty to accommodate.*

*Once again* [the same request was made for leave], *if you refuse this request, I would ask that you advise me of your*

> *reasons **in writing** so that I could forward them to my labour relations advisor.*
>
> [Emphasis in the original]

[10] The grievor explained at the hearing that he has a long commute each morning and evening. He leaves home in Deux-Montagnes by car, parks it to take the commuter train to Montreal, then takes the Metro, and finally, takes a bus or walks to the office. It all takes about two hours. By leaving a half hour earlier in the afternoon, depending on the train he is able to take, he could be home a half hour or even an hour earlier.

[11] Ms. Veilleux testified that the grievor's email had made her quite uncomfortable. She was not sure how to respond, so she consulted the Human Resources and Labour Relations departments to find out what could be done. She also met with him on January 16, 2013, to better determine his needs and to discuss different solutions with him. Despite the text of the email, which referred to the health problems of the grievor's spouse, Ms. Veilleux stated that she understood during that meeting that primarily the time spent with his family, on a specific schedule, was important to the grievor.

[12] From the start, according to Ms. Veilleux, the grievor stubbornly envisaged only one solution, which was not taking his paid breaks during the day, to gain a half hour at the end of the day. For his part, the grievor testified that the means were not important to him. He would have been prepared to accept moving his 30-minute lunch break (unpaid) to the end of the day and to have been allowed to use his two paid breaks to create a half hour for lunch.

[13] At the hearing, Ms. Veilleux explained that using paid breaks to end the workday earlier was in fact a widespread problem for the employer — a "curse", she stated — which the employer wanted to end, for two reasons. First, those breaks are measures negotiated with the CAPE to promote employee health and well-being. They are necessary and should be used during the day, as intended. Furthermore, using them to leave work quicker represents a civil liability problem for the employer. Since they are paid breaks, the employee is considered still at work. Were an accident to occur off work premises during that time, the employer would be responsible.

[14] Ms. Veilleux allowed the grievor to shorten his lunch by 15 minutes and to leave 15 minutes earlier at the end of the day, but that arrangement did not last long. On

February 12, 2013, she wrote to him to inform him that his request would not be granted and that his schedule would remain as it had been.

[15] In her email, Ms. Veilleux explained to the grievor the opinions provided to her by the Labour Relations and Human Resources departments. First, it was a matter of family planning rather than an accommodation. The employer supports work-life balance, but that responsibility is shared with employees, who also have to make efforts to satisfy the requirements of their positions. She then noted that the grievor refused to consider solutions other than the one he wanted, as follows:

> [Translation]
>
> …
>
> *a. A compressed workweek;*
> *b. A variable schedule;*
> *c. Part-time employment;*
> *d. Starting and leaving work earlier;*
> *e. Using his personal vehicle to reduce travel time;*
> *f. Changing daycares;*
> *g. We also invited you to propose other options to us, which was not done;*
>
> …

[16] The grievor did not agree with the other options and explained at the hearing why they were unacceptable. A compressed workweek or a variable schedule would not have allowed him to leave earlier. A compressed workweek means that some days are longer to shorten or even eliminate other days, while working 37.5 hours. The problem is the same for a variable schedule — it still requires being present for 8 hours at work (7.5 hours of work and a half-hour lunch). Part-time work was out of the question for financial reasons. The grievor was unable to start earlier as he drove his children to the daycare, which opened at 7:00 a.m. If he dropped them off when it opened, he could be at work for about 9:00 a.m., but no earlier.

[17] In his opinion, using his personal vehicle would not resolve the issue. It would cost more, and he was not certain that he would arrive any earlier, given Montreal's rush-hour traffic. Changing daycares was a very complicated process. He had applied to daycares at the workplace but to no avail. He required a subsidized daycare, and the daycare his children went to had obtained a grant to purchase special equipment that met the special needs of his three-year-old son. Finally, he did not consider other

options because it seemed clear to him that leaving a half hour earlier was the ideal solution as it did not deprive the employer of his services and certainly did not represent undue hardship.

[18] Ms. Veilleux's email closed with her decision, which was that the two 15-minute breaks could not be moved to the end of the day to leave 30 minutes earlier, as the grievor had proposed. Those breaks were negotiated with the union. The text of the collective agreement provides for "[t]wo (2) rest periods of fifteen (15) minutes each shall be scheduled during each normal day." Therefore, they are two break periods, each between two work periods. Those breaks must be taken within the 7.5 hours of daily work. Ms. Veilleux added the following in her email: "[translation] These breaks are justified for occupational health and safety reasons."

[19] Additionally, although the lunch break is unpaid, its interpretation in the collective agreement (or that of Human Resources) led Ms. Veilleux to conclude that it had to be taken during the day.

[20] Ms. Veilleux testified at the hearing that she was not happy with the opinions that she received because she truly wanted to help the grievor. He was very unhappy. He reiterated in an email dated February 21 that his request had been made in accordance with the *CHRA*, and he asked her to reconsider her decision. She maintained it in an email dated March 5. In her testimony, she stated that in her opinion, and according to the advice that she received, the request did not meet the criteria for a legal obligation under the *CHRA*.

[21] On March 20, 2013, the grievor filed a grievance that read as follows:

> [Translation]
>
> *I contest my employer's decision to refuse to find me a reasonable arrangement to accommodate my needs due to my family status. I consider my employer's refusal to allow me to modify my work hours based on the special needs of my spouse and my children discrimination under the Canadian Human Rights Act and clause 16.01 of my collective agreement.*

[22] The grievor sought the following corrective measures:

> [Translation]

> *I ask that my employer cease all forms of discrimination against me and that it allow me to modify my work hours. I also seek financial compensation under sections 53(2)(e), 53(3), and 53(4) of the Act as indemnification for undue stress.*

[23] On April 26, 2013, Ms. Veilleux rendered a decision at the second level of the grievance process. I pointed out to her that I found it odd that an immediate supervisor would render a second-level decision. She replied that in fact, the practice has since been corrected.

[24] Regardless, a new solution seemed to emerge from that second-level decision. Ms. Veilleux repeated that her opinion was that the employer had no duty to accommodate under the *CHRA*. That being said, she indicated that she was still prepared to consider different alternative measures for the grievor's well-being. She maintained that rest periods could not be used to allow him to leave earlier, but she proposed, in veiled terms, to consider the lunch break as a solution, without explicitly stating how it would be applied. The relevant paragraphs read as follows:

> [Translation]
>
> …
>
> *Now, about rest periods, clause 28.08 of your collective agreement indicates that there are two of 15 minutes each for each normal workday. This is a condition of employment that management and the union negotiated. Those rest periods are granted to allow employees to rest and recharge. They were not negotiated to allow for shortening work hours. Therefore, I cannot authorize you to combine your two rest periods to leave work earlier.*
>
> *As for the lunch break, the collective agreement stipulates as follows at clause 28.01(a):* Except as provided for in clause 28.03, the normal work week shall be thirty-seven decimal five (37.5) hours exclusive of lunch periods, comprising five (5) days of seven decimal five (7.5) hours each, Monday through Friday*… Therefore, a lunch break was negotiated, and it is provided to allow employees to recharge and eat. However, although it must be taken as it was negotiated between the two parties, no duration is mentioned in the collective agreement. Thus, I infer that I have some flexibility with respect to service requirements. Consequently, I would like to meet with you in the next few days to discuss with you again the options that could be considered in this area.*
>
> …

[Emphasis added]

[25] At the hearing, Ms. Veilleux claimed that between February 12 and April 26, 2013, she proposed that the grievor combine the two paid breaks into one, "[translation] with a one-minute interval", to give him the opportunity to have time in the middle of the day to eat, and to take the unpaid half hour at the end of the day. The grievor testified that that was not proposed to him in those terms until September 2014, by his new manager, Lieutenant-commander Morin.

[26] The testimonies were contradictory. Nonetheless, I believe that both witnesses acted in good faith. Given their conflicted relationship, which only became worse after that, they both had the opportunity to reassess the events for themselves. It is not surprising that their versions differed three years later.

[27] Ms. Veilleux explained that she did not want to state too clearly what she had in mind in her April 26, 2013, decision for fear of contradicting the employer's official policies, which took a dim view of employees trying to shorten their days, contrary to a literal interpretation of the collective agreement. I believe that she already had the solution in mind but that she did not expressly communicate it to the grievor. He reacted negatively to the April 26, 2013, decision; he was not granted a lunch break and an early exit. In particular, the discrimination that he suffered was not recognized. He understood from the decision that he could not combine his two rest periods, meaning that at best, he would have had only 15 minutes for his lunch break, which was not enough. On May 2, 2013, he emailed Ms. Veilleux, indicating the following:

> [Translation]
>
> *I discussed your April 26, 2013, decision with my labour relations advisor, Bertrand Myre.*
>
> *Considering the evidence on file and based on his advice, I have decided not to discuss my grievance with you <u>any longer</u>. Therefore, I will ask Mr. Myre to transmit my grievance to the third level.*
>
> [Emphasis in the original]

[28] On January 9, 2014, Susan Harrison, the director general, workplace management, rendered the decision at the final level of the grievance process. In it, she refused to find that the employer's conduct was discriminatory, as follows:

[Translation]

…

*Nothing leads me to believe that management discriminated directly against you by not granting your request to change your work hours, as submitted. I also noted that in her grievance response, your manager proposed to meet with you to discuss alternative options.*

…

[29] However, she acknowledged that the family situation justified leaving earlier. Consequently, she gave the grievor permission to leave a half hour earlier, as follows:

[Translation]

…

*In light of the arguments presented and following my analysis, I am of the opinion that your family status justifies the need to leave your workplace thirty (30) minutes earlier at the end of the day. I find that a reasonable arrangement is to allow you to move your lunch break set out under clause 28.01 of the* Economics and Social Science Services *collective agreement to the end of your workday, to leave the workplace 30 minutes earlier to meet your important family obligations at home.*

…

[30] Finally, she indicated the following in her letter:

[Translation]

…

*Your manager will meet with you to ensure the implementation of this accommodation, which will require a plan signed by the parties in accordance with Department of National Defence directives and procedures.*

…

[31] The grievor was very disappointed with Ms. Harrison's decision. He explained at the hearing why the January 9, 2014, decision was unsatisfactory. First, the employer's discrimination up to that point was not acknowledged. Then, nothing in the decision indicated that he would be entitled to combine the two paid breaks to have a half hour for lunch. He explained that a break of only 15 minutes to eat would not be enough.

Finally, he no longer trusted his manager, Ms. Veilleux. Therefore, there was no question of meeting with her to discuss implementing the proposed measure.

[32] Ms. Veilleux testified that she was delighted with Ms. Harrison's decision, which confirmed the option that she had dared consider. That letter, although it did not acknowledge discrimination within the meaning of the *CHRA*, nonetheless recognized the need to find an accommodation for the grievor's family needs. On January 24, 2014, she proposed meeting with him to determine how to implement that decision.

[33] Unhappy with the January 9 decision, the grievor replied immediately to Ms. Veilleux's invitation, as follows:

> [Translation]
>
> …
>
> *After consulting with my labour relations advisor, I inform you that although I am thankful that the third level admitted that my family status requires that I leave 30 minutes earlier at the end of the day, I disagree with the measure, as proposed, which is illegal and discriminatory.*
>
> *Under these circumstances, based on advice from Mr. Myre, I will not sign any Human Resources form.*
>
> *However, last Monday, I signed a document that Mr. Myre sent to me to have my case heard soon by the Public Service Labour Relations Board.*
>
> *Until the Board rules on my request, I will continue to take my 2 breaks and my 30-minute lunch.*
>
> …

[34] The grievor testified that from January 2013 to January 2014, the relationship with Ms. Veilleux was still civil. When the final-level decision was rendered, he had the impression that things became worse. According to him, she must have viewed Ms. Harrison's decision as a repudiation, which would explain why she then took a disliking to the grievor. She no longer spoke to him and did not greet him when she encountered him; in short, she was so cold that it caused the grievor great pain. At the same time, the situation at home was not improving but was the opposite. The stress that he was experiencing at work was brought home. Apart from the fact that he still not did have the desired half hour to go home earlier, his bad mood caused considerable friction with his spouse and children.

[35] Beginning in February 2014, his work was supervised by Lieutenant (later Lieutenant-commander) Morin, a military lawyer who had just arrived at the workplace. Nevertheless, Ms. Veilleux remained his manager, and the grievor remained very unhappy with his working conditions.

[36] In August 2014, he filed a harassment complaint against his manager. I will summarize its main points. I do not believe that the complaint is relevant to the grievance that I am seized of; however, I believe that it demonstrates the state of their relationship.

[37] The harassment complaint reflected the grievor's interpretation of Ms. Veilleux's conduct. In it, he saw animosity, malice, and harassment. He accused her of not greeting him, of avoiding him, and of wanting to force him to take part in social activities that were not part of his conditions of employment and that otherwise were optional. He was one of the few civilian employees and had the impression that Ms. Veilleux treated him unfairly while she had an excellent relationship with her secretary, who was also a civilian employee.

[38] The harassment complaint was judged unfounded. Some of its points were included in grievances that were filed and that will be dealt with through the grievance process. Ms. Veilleux's immediate supervisor, Captain Geneviève Bernatchez, who dealt with the harassment complaint and signed the response letter to the grievor, decided to separate Ms. Veilleux and the grievor. She appointed Lieutenant-commander Morin as his immediate supervisor.

[39] Ms. Veilleux testified at the hearing that the atmosphere at the office, which had already been difficult since April 26, 2013, became completely unbearable following the January 9, 2014, decision. According to her, the grievor avoided everyone, refused to partake in meals and activities, and, in particular, treated her with animosity. She felt like she was being watched, as though he was watching her to catch her in a mistake. She considered the possibility of a harassment complaint, but let it go, telling herself that it was up to her, as a senior officer, to resolve the problem.

[40] After hearing the two witnesses, I have no doubt that the situation was extremely difficult for both of them. They were stuck in their positions, unable to get out; each constantly rehashed the other's mistakes, and they accused each other of being overly rigid.

[41] The impasse was broken by the harassment complaint in August 2014. When Lieutenant-commander Morin became the grievor's immediate supervisor, he met with him, knowing that the grievor was unhappy. He proposed taking the half-hour lunch break at the end of the day and combining the two paid breaks to create a half-hour lunch. The grievor accepted that offer, as did the Human Resources department. That part of the grievance has been closed. What remains is the grievance against the employer that alleges a violation of the *CHRA* and of the anti-discrimination provision in the collective agreement.

## III. Summary of the arguments

### A. For the grievor

[42] The grievor claimed that he was subject to discrimination. There was *prima facie* discrimination because, for one year and nine months, the employer refused to meet his accommodation needs due to his family status, which represents one the Office of the Judge Advocate General's strategic goals, which is as follows: "Be vigilant leaders in caring for our people and their families."

[43] The duration of the discussions about accommodating the grievor for his family status contradicts that commitment. He demonstrated the particular challenges presented by his family status, given the medical conditions of his spouse and his four children, two of whom have special needs. For example, he indicated that his youngest child needs to do exercises that his spouse cannot handle.

[44] The grievor properly submitted a request, claiming his rights under section 2 of the *CHRA*. He then met with his manager, who proposed alternative measures that were not suitable. The accommodation that he requested met his needs. He had to wait one year and nine months for it.

[45] The grievor's manager was a lawyer by training. She was senior counsel for the Eastern Region of the Canadian Armed Forces. It is inconceivable that she did not understand her obligations under the *CHRA* and the collective agreement. She should have put an end to the grievor's wait, but she did not. However, once Lieutenant-commander Morin arrived, the solution was implemented.

[46] Ms. Harrison's decision at the final level of the grievance process was very clear. She confirmed that the grievor's family status justified him leaving 30 minutes earlier.

In her decision, she tasked Ms. Veilleux with implementing it.

[47] However, Ms. Veilleux did nothing. Following a first invitation to the grievor, in response to which he expressed his disagreement with the proposed measure (eliminating the half-hour lunch), Ms. Veilleux did not follow up. However, the duty to accommodate remained.

[48] That obligation was clear, and yet no reasonable arrangement was proposed to the grievor for one year and nine months. That long wait caused him considerable concern and seriously aggravated the situation at home, particularly with respect to his relationship with his spouse and teenage daughter.

[49] Ms. Veilleux's initial reaction, which seemed to endure, was to treat the grievor's needs as a matter of planning, an organization of his family that he could easily change with a bit of good will. However, his needs were real, given his spouse's state of health and his children's special needs. Ms. Veilleux's refusal to grant him the requested half hour resulted in conflicts with his spouse and daughter, which remain unresolved.

[50] Additionally, the stress at work created additional problems for the grievor, who was separated from the workplace (at first due to a work in progress, and then after the harassment complaint) and who felt ostracized.

[51] The grievor drew a parallel with *Cyr v. Treasury Board (Department of Human Resources and Skills Development)*, 2011 PSLRB 35, in terms of establishing the compensation that he should be paid under paragraph 53(2)(e) and subsection 53(3) of the *CHRA*.

[52] In *Cyr*, the adjudicator found that Ms. Cyr suffered from environmental hypersensitivity and that the employer had a duty to accommodate under the *CHRA*. However, it delayed doing so. First, the employer took nearly five months to recognize Ms. Cyr's right to telework. Once teleworking, she sometimes had to wait months, even years, to obtain the work tools to which she was entitled. The employer knew its obligations. Therefore, the adjudicator found that the employer's conduct was "clearly reckless" and ordered it to pay $8000 for the pain and suffering (paragraph 53(2)(e)) that Ms. Cyr endured and $10 000 as special compensation (subsection 53(3)).

[53] In this case, given that the discrimination continued for 21 months, and given

the difficulties the discrimination caused the grievor at work and at home, he seeks $12 500 for pain and suffering.

[54] As for special compensation under subsection 53(3), the deliberate nature of Ms. Veilleux's conduct must be emphasized; she used a false pretext (i.e., the collective agreement) when she feared a precedent in the Eastern Region for using breaks. The conduct was also inconsiderate, with no attempt to ask the union how to interpret the collective agreement. Clearly, the grievor's needs were not considered, and no effort was made to resolve the situation. Therefore, he seeks the maximum amount of $20 000 for this.

**B. For the employer**

[55] The employer first provided an overview of the facts. The grievor submitted a request in January 2013 to be able to leave a half hour earlier due to his spouse's medical condition and his children's needs. In his meeting with his manager, he spoke mainly about the fact that he was concerned about being there for his children.

[56] The grievor systematically rejected all proposed alternative measures. He had only one solution in mind, using his breaks at the end of the day, and would accept nothing else. Ms. Veilleux testified about her concern for meeting his needs. She reached out to him; he systematically refused.

[57] The employer found in the grievor's favour in the decision Ms. Harrison signed (at the final level of the grievance process), not by acknowledging discrimination within the meaning of the *CHRA* but by conceding that it would be preferable for him to leave a half hour earlier. His request was granted, but he again refused to meet with his manager to implement it. The situation was resolved only when the grievor agreed to discuss his situation with the employer, i.e., with his new manager, Lieutenant-commander Morin.

[58] The employer's position is essentially that there was no legal duty to accommodate the grievor. His problem was that of any employee with a family, exacerbated in his case by the health problems of his spouse and two of his children.

[59] Citing family status and the *CHRA* is not enough to create a legal obligation for the employer, which was more precisely defined in *Canada (Attorney General) v. Johnstone*, 2014 FCA 110. In that decision, the Federal Court of Appeal emphasized the

legal obligation toward children as being the foundation of the employer's obligation toward the employee.

[60] In *Flatt v. Canada (Attorney General)*, 2015 FCA 250, the employee's choice to breastfeed her child did not create an obligation for the employer to find an accommodation. Thus, the difference is between a legal obligation and parents' choice in how they manage family life. In this case, there is no evidence that the grievor returning home a half hour earlier was essential to his children's well-being.

[61] The employer can recognize that an employee is in a difficult situation without necessarily conceding that it is a reason protected by the *CHRA*. The grievor certainly had particular needs, and the employer tried to help him. However, he had to cooperate.

[62] The four-part test set out in *Johnstone* is not met in this case. Certainly, the grievor is responsible with his spouse for supporting and watching over his children. However, his legal responsibility toward his children is not jeopardized by him arriving home earlier or later. That is an element of personal choice. In addition, it was not shown that he truly considered all possible options. Finally, the employer's work rules did not significantly hinder his ability to fulfil his obligations toward his children.

## IV. Reasons

[63] The only issue in dispute at adjudication was whether the employer contravened the collective agreement and the *CHRA* by discriminating against the grievor on a prohibited ground, i.e., family status. In fact, the other aspect of the grievance, the accommodation that the grievor requested, was resolved when the employer granted his requested accommodation in September 2014.

[64] Before analyzing the discrimination based on the law and the jurisprudence, a brief commentary is required on the interactions between the grievor and his manager, from January 2013 to August 2014. Why did it take 21 months to grant him what he initially requested, which was to leave work a half hour earlier without losing any pay? The chosen solution, which was allowing him to combine his breaks at lunchtime, was considered by the grievor from the start, according to his testimony, and by his manager from April 2013, according to her testimony. However, it took the intervention of a new manager, Lieutenant-commander Morin, for the measure to be

implemented.

[65] Lieutenant-commander Morin testified that in his first conversation with the grievor on the matter, they reached an agreement. According to Lieutenant-commander Morin, the Human Resources department had no objection. That means that that the employer had already accepted the solution, confirming Ms. Veilleux's version. However, although it was desired by the grievor and accepted by the employer, the solution took a long time to be implemented.

[66] After Ms. Veilleux's first refusal in February 2013, things became poisoned between her and the grievor to the point of his harassment complaint, which the employer judged unfounded. One thing that emerged from the grievor's testimony and that seems to me is essential to understanding why he pursued his grievance despite the issue's resolution is his feeling that the employer did not take his difficult home situation seriously. That is why his grievance had two parts, accommodation and, I would say primarily, recognition that the employer disregarded its duty to accommodate for family status, which legally required accommodation, according to the grievor.

[67] Therefore, the legal aspect of accommodation is at the heart of the issue, which the grievor wants acknowledged at all costs. According to him, his desire to return home earlier was not based on most employees' general desire to spend more time with their families. No, his request was based on what he felt were needs protected by the *CHRA* under the heading "family status" — the health problems of his spouse and two of his children. (I do not believe that it is necessary, in a public decision, to detail the natures of those conditions. The grievor did not submit any medical documents, but I fully believe that his spouse and his children needed additional support for health reasons. The employer did not challenge that at the hearing.)

[68] The employer did not challenge the health problems, but in her testimony, Ms. Veilleux heavily emphasized the grievor's desire to spend more time at home because his family arrangement required it. In January and February 2013, she proposed several times that he review his "[translation] family planning" as a possible solution to his problems. He was deeply hurt by those statements, particularly because, he stated, they came from a woman with no children, suggesting that she could not understand the difficulty of managing a home with four children and a

spouse with fragile health.

[69] The grievor was not asking a favour of the employer but was requiring that he be recognized as having a right. The employer was prepared to recognize the importance of work-life balance but as a moral and not a legal obligation. Therefore, it is a matter of deciding whether, in fact, the employer had a legal obligation to immediately grant the grievor's request.

[70] The principle of protection granted by the *CHRA* for family status is simple: employees cannot be discriminated against in employment due to their family status. However, the parameters can be difficult to define, as seen in *Johnstone* and in the subsequent decision in *Flatt*.

[71] *Johnstone* is the landmark decision for interpreting this obligation under the *CHRA*. That decision had yet to be rendered when the grievor referred his grievance to adjudication. However, I believe that it applies to this case, as it represents an outcome of the evolution of arbitral and judicial reflection on the duty of an employer to consider its employees' family status. In addition, that decision is part of the law in this area, which the parties were well aware of in their arguments.

[72] In *Johnstone*, the Federal Court of Appeal expressed the principle of *prima facie* discrimination with respect to childcare as follows:

…

> *[88] Normally, parents have various options available to meet their parental obligations. Therefore, it cannot be said that a childcare obligation has resulted in an employee being unable to meet his or her work obligations unless no reasonable childcare alternative is reasonably available to the employee. It is only if the employee has sought out reasonable alternative childcare arrangements unsuccessfully, and remains unable to fulfill his or her parental obligations, that a* prima facie *case of discrimination will be made out.*
>
> *[89] This principle has been recognized in numerous labour arbitration cases dealing with the issue. As noted in* Alberta (Solicitor General) v. Alberta Union of Provincial Employees (Jungwirth Grievance)*, [2010] A.G.A.A. No. 5 (QL), at para. 64, "[i]n order to work, all parents must take some steps on their own to ensure that they can fulfill both their parental obligations and their work commitments. Part of any examination of whether a* prima facie *case has been*

> *established for family status discrimination must therefore include an analysis of the steps taken by the employee him or herself to balance their family life and workplace responsibilities."*
>
> …

[73] The Court then set out (at paragraph 93) the test to apply in the workplace to establish *prima facie* proof of discrimination on the ground of family status resulting from childcare obligations. That test reads as follows:

> …
>
> *[93] … the individual advancing the claim must show (i) that a child is under his or her care and supervision; (ii) that the childcare obligation at issue engages the individual's legal responsibility for that child, as opposed to a personal choice; (iii) that he or she has made reasonable efforts to meet those childcare obligations through reasonable alternative solutions, and that no such alternative solution is reasonably accessible, and (iv) that the impugned workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfillment of the childcare obligation.*
>
> …

[74] The Court applied that test to Ms. Johnstone's situation and concluded that there was discrimination based on family status. Ms. Johnstone and her spouse both worked for the Canada Border Services Agency at Pearson Airport. Their work hours were irregular, with rotating shifts that could be during the day or night. After the birth of her second child, Ms. Johnstone requested a regular full-time schedule as accommodation, to organize daycare services when both parents were at work. The employer refused, offering her only a reduced week if she wanted a regular schedule.

[75] The Court of Appeal upheld the decisions by the Human Rights Tribunal and the Federal Court that that was a discriminatory practice based on family status. Ms. Johnstone's parental obligation was at stake; she needed to ensure the care of her young children at all times. The irregular rotating schedule prohibited her from doing so, as it was impossible to organize a daycare service with such a schedule, and a part-time schedule was not financially beneficial to her. However, it was shown that the employer could have provided her a full-time schedule, with regular hours, without creating undue hardship for itself.

[76] In *Flatt*, the Federal Court of Appeal was again asked to rule on the relationship

between work and family status. In that case, Ms. Flatt asked to work from home after the end of her maternity leave as she wanted to continue breastfeeding her child. The employer tried to find an arrangement, but it was impossible to allow Ms. Flatt to work entirely from home, due to her work. Other solutions were considered, but finally, a choice had to be made between the job and continuing to breastfeed the child.

[77] The adjudicator, and in judicial review the Federal Court of Appeal, found that in Ms. Flatt's case, breastfeeding after the first year, without proof that it was required for the child's health, was a choice and not a legal obligation. Therefore, it was found that there was no discrimination based on family status.

[78] Thus, it seems that family status as a prohibited ground is defined based on the parent's legal obligation being hindered by a work rule of the employer. It must first be found that a legal obligation is being hindered.

[79] In this case, the grievor's situation was not exactly a case of childcare. The children were in the mother's care while awaiting the father's arrival. There was no scheduling problem as in *Johnstone*, in which the children would be alone, without any care. In *Johnstone*, one of the elements considered was the fact that care by someone external was almost impossible to organize due to the parents' irregular work hours.

[80] In this case, the issue is the spouse's medical condition. For health reasons, it would have been preferable for her to have more help with the children at the end of the day. At no time did the grievor mention considering hiring a babysitter for a few hours at the end of the day or taking steps to have someone care for the child who required more of it, for developmental reasons. As such, it seems to me that the second and third elements of the *Johnstone* test are not met; it was not a matter of the grievor's legal obligation toward his children, and there is an element of personal choice when external help is not sought. I am also not certain that all solutions were explored, including extra help. In other words, the fact that the grievor could not arrive home earlier did not engage his legal responsibility toward his children, and there was no indication that the couple considered the possibility of external help.

[81] Between parents' legal obligation to ensure the well-being of their children and the choices they make to meet that obligation, a line must be drawn to identify the employer's legal obligation not to discriminate against an employee based on family status. The grievor's needs were very real and were far removed from such things as

ballet or judo classes. However, the fact remains that the employer cannot have a legal responsibility for the functioning of the family. It seems to me that the obligation that the Court of Appeal acknowledged in *Johnstone* is quite narrow and limited. The employer's work rule must hinder the employee from fulfilling his or her legal obligations toward his or her children.

[82] That is not so in this the case. The legal obligation threshold was not met in the grievor's situation. His spouse required more help, but I did not receive any evidence of a search for a solution other than him returning home early. I cannot conclude that the employer's initial refusal hindered the grievor's ability to meet his legal obligations toward his children or his spouse. Therefore, I conclude that there was no *prima facie* discrimination.

[83] In addition, the employer adopted a moral obligation to help employees seek work-life balance. In his arguments, the grievor's representative seemed to confuse a moral and a legal obligation. The employer finally granted the requested accommodation. That does not prove that it acknowledged its obligation under the *CHRA*; the employer continually denied it. That shows that it acted in good faith by seeking a solution to a work-life balance problem.

[84] Had I concluded that there was *prima facie* discrimination, I still would have found that the employer fulfilled its duty of reasonable accommodation, even though the measure was late. The unfortunate paralysis that hindered implementing the ultimate solution that was finally applied in September 2014 was not attributable to the employer but to the inability of the people involved to agree. The grievor must recognize that through his complete refusal to enter into discussions beginning in April 2013, he played a role in that unfortunate interaction.

## V. Conclusion

[85] I recognize that this case is borderline. Certainly, the employer must not adversely differentiate an employee based on family status. That said, despite the sympathy I feel for the grievor and his family, I cannot conclude that the employer discriminated because it refused the first solution offered and tried to find other ways to resolve the situation. The grievor's children were not in danger, and his legal obligations toward them were fulfilled. It would have been far better for the situation to have been resolved more quickly. However, that did not create a violation of the

*CHRA*. This illustrates that healthy working relationships depend on healthy communication.

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

*(The Order appears on the next page)*

## VI. Order

[87] The grievance is dismissed.

January 10, 2017.

PSLREB Translation

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