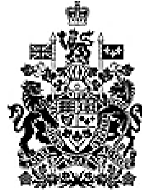
Date: 20170112

Files: 560-02-114 and 117
and 566-02-9459

Citation: 2017 PSLREB 4



Public Service Labour Relations and Employment Board Act, Public Service Labour Relations Act and *Canada Labour Code*

Before a panel of the Public Service Labour Relations and Employment Board

BETWEEN

COREY NASH

Complainant and Grievor

and

DEPUTY HEAD
(Correctional Service of Canada)

Respondent

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

In the matter of a complaint made under section 133 of the *Canada Labour Code* and in the matter of an individual grievance referred to adjudication

Before: Margaret T.A. Shannon, a panel of the Public Service Labour Relations and Employment Board

For the Complainant and Grievor: James Craig, Public Service Alliance of Canada

For the Respondent: Joel Stelpstra, counsel

Heard at Edmonton, Alberta,
August 16 to 18, 2016.

I. Complaint before the Board

[1] The complainant and grievor, Corey Nash (“the grievor”), filed two complaints under s. 133 of the *Canada Labour Code* (R.S.C., 1985, c. L-2; “the *Code*”), in which he alleged that he had received threats from the respondent, the Correctional Service of Canada (“the employer”) after he had invoked his right to refuse unsafe work. He also filed a grievance. At the hearing, he withdrew the complaint assigned file number 560-02-117 by the Public Service Labour Relations and Employment Board (“the Board”). Therefore, this hearing dealt only with the complaint assigned file number 560-02-114, along with the grievance, file number 566-02-09459. The grievance alleged that the employer failed to accommodate the grievor’s family related needs by denying him the right to work a compressed workweek during the summer months in 2013.

[2] 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 Board to replace the former Public Service Labour Relations Board as well as the former Public Service Staffing Tribunal. The Board heard this complaint and grievance under the authority of the related implementing statutory instruments.

II. Summary of the evidence

A. The complaint

1. The grievor’s evidence

[3] The grievor works as a parole officer for the employer in its Edmonton Area Parole Office in Edmonton, Alberta. As part of his duties, he issues warrants for the apprehension of offenders for violations of their parole conditions, which may result in the revocation or suspension of an offender’s parole. He has the authority to waive or cancel a warrant if he believes that the risk the offender poses is still manageable within the community. The grievor may recommend to the Parole Board of Canada that an offender’s parole be revoked if he believes that the related risk is no longer manageable in the community, if the offender has breached a condition of his or her parole, or to prevent a breach of a parole condition.

[4] As a parole officer, the grievor assists offenders with training and employment and with obtaining treatment in the community. He makes recommendations to the Parole Board of Canada about offenders’ suitability for release and about the

conditions that should be imposed on an offender who is released. He meets with offenders to ensure that they are following their correctional plans by monitoring their employment, relationships, and accommodations. Meetings are one-on-one and may be held in the employer's office in Edmonton, Alberta in the community, at the offenders' worksites, or at their homes or anywhere they may be spending their time. He deals with high-risk and violent offenders. If the grievor recommends that an offender's parole be revoked, the offender is returned to an institution, and his or her sentence is recalculated to the next statutory release date.

[5] When an offender who once had a parole revoked is rereleased to the community, he or she is usually assigned to a different parole officer. In his lengthy career, the grievor has worked with only one offender whose parole had been revoked on the grievor's recommendation, and in that case, the revocation had occurred 10 years earlier. The grievor testified that in that case, enough time and distance had passed for the grievor to supervise him again.

[6] In the grievor's opinion, the risks of reassigning an offender whose parole has been revoked to the same parole officer outweigh any possible benefit. The animosity the offender would feel because of the revocation of his or her earlier parole would mean that the offender would not likely cooperate with any of the parole officer's plans.

[7] A parole officer's job according to the grievor is inherently dangerous. The risks in a parole officer's job range from repetitive strain injuries up to assault, harassment, and death at the hands of a parolee or by accident. Threats by offenders against parole officers span the community and institutions and are often very subtle. The grievor testified that multiple times, offenders have threatened him. The employer has protocols for parole officers who deal with violent offenders, including a staff safety assessment checklist. All parole officers have cell phones, through which the employer can monitor them when they are working alone. Despite those safeguards, one of the grievor's colleagues was murdered by an offender in 2004. Parole officers do not carry weapons.

[8] The circumstances that gave rise to the grievor's complaint had to do with an offender who had been convicted of manslaughter. The offender had been on day parole before he was released into the community. Within a week, he had violated the

conditions of his release twice and had been returned to the institution on the grievor's recommendation until he reached the point at which he was given a statutory release. During the week that the grievor supervised the offender, the grievor found the offender accommodation at a residential facility in the Edmonton area as the grievor had concluded that the offender posed a risk to his home community. A week later, the offender was apprehended in his home community in an impaired state and was returned to the institution on the grievor's recommendation.

[9] On his next statutory release, the offender was assigned to the grievor's caseload. The grievor was concerned about this and spoke to his manager, Kevin Horbasenko, and the supervisor who assigned the offender to his caseload, John Holzmann. The grievor expressed his concerns about information that the offender had disclosed to his psychologist, which noted that the offender had acted out of revenge when committing the offence for which he was imprisoned. This information differed from what was in his profile, which did not mention him acting out of revenge. The grievor feared that since he was responsible for the offender's return to the relevant institution, the offender might seek revenge against him.

[10] The employer refused to reassign the offender to a different parole officer. The grievor considered that refusal differential treatment, in terms of case assignment. At a meeting held to discuss the assignment and attended by Mr. Horbasenko; Mr. Holzmann; Dr. Greg Cotfas, the offender's psychologist; a Royal Canadian Mounted Police representative; and the grievor and his union representative, the employer's representatives refused to listen to the grievor's concerns, which he expressed at the meeting. He described that at the meeting, those representatives were hostile to him.

[11] The grievor expressed concerns that because he had recommended the revocation of the offender's parole rather than recommending his admission to a residential treatment centre, the offender posed a threat to the grievor's safety if he were reassigned to the grievor's caseload. The offender had acted out of revenge while under the influence of intoxicants, which resulted in his incarceration. It was shown that the offender was not abstaining from the use of intoxicants; the grievor preferred to avoid the possibility of becoming the target of the offender's need for revenge.

[12] The grievor testified that the employer did not follow any specific "rhyme nor reason" when assigning cases to parole officers. Other offenders could have been

assigned to the grievor rather than the offender in question. The employer's arbitrary assignment of this offender to the grievor's caseload was an act of workplace violence. Other parole officers could have supervised the offender rather than the grievor.

[13] On the day the offender arrived at the Edmonton Area Parole Office to meet with the grievor, the grievor emailed Mr. Horbasenko, reporting the offender's presence in the office, advising Mr. Horbasenko that he perceived working with this offender to be unsafe, and noting that he was exercising his right to refuse to perform unsafe work under the *Code* by refusing to meet with the offender.

[14] Mr. Horbasenko and the grievor met to discuss this refusal. Mr. Horbasenko gave the grievor a direct order to meet with the offender in the presence of Mr. Horbasenko. This did not address the grievor's concerns with the caseload assignment, and he continued to refuse to meet with the offender. According to the grievor, Mr. Horbasenko advised him that he would be disciplined if he continued to refuse. At some point after Mr. Horbasenko ordered him to meet with the offender, the grievor exercised his right to refuse unsafe work officially, via email (Exhibit 2).

[15] The grievor requested that his refusal to work be referred to the Occupational Health and Safety Committee and that no investigation be carried out. His request was denied; the employer had to investigate his refusal to work. However, it refused to investigate with the grievor present. Throughout this period, he continued to refuse to work with the offender in question, and the matter was escalated to the Labour Program at Employment and Social Development Canada (Labour Canada).

[16] In the month after he exercised his right to refuse unsafe work, the grievor was assigned three more offenders who had had their paroles revoked. In the previous 10 years, he had been assigned only 5 such offenders. The grievor was under extreme pressure due to his workload and his ongoing refusal to work with the first offender. The grievor expressed concerns with being assigned a second such offender; his email request to have that offender reassigned went without a response from his supervisor, Frank Winkfein (Exhibit 1, tab 8).

[17] This second offender had served time in the same institution as the first offender with whom the grievor had refused to work. He had apparently told the institutional parole officer that he was not afraid of the grievor. This comment indicated to the grievor that the offender demonstrated a clear spirit or feeling of

strong hostility towards the grievor and that the offender's indifference towards him rendered him incapable of effectively supervising the offender.

[18] When the second offender arrived at the Edmonton Area Parole Office, the grievor emailed Mr. Winkfein and Mr. Horbasenko (Exhibit 1, tab 8), advising them that he was exercising his right to refuse unsafe work for a second time and that he refused to perform any of his parole officer duties. Mr. Horbasenko and Derek Stankey, the employer's area director, asked to meet with the grievor in person. According to the grievor, they told him at the meeting that if he did not want to do any work, he would be sent home without pay. The grievor then felt under extreme duress.

[19] Eventually, Mr. Stankey told the grievor that that offender would be reassigned to another parole officer in exchange for which the grievor would withdraw his refusal to work that he had filed in relation to working with that offender. The grievor also agreed to complete his assigned parole officer duties. The work refusal process related to the first offender continued (Exhibit 1, tab 8). Mr. Stankey told the grievor he would not be disciplined as a result of his second work refusal.

[20] This proved not to be true. The grievor testified that he was disciplined via retaliation by the employer, harassment, workplace violence, and comments in his performance review. He was never suspended with or without pay. Eventually, Labour Canada ruled that the grievor was not in danger. The employer accommodated him while he appealed that ruling, by not assigning him any more offenders who have had their paroles revoked, a practice that the employer has maintained ever since.

2. <u>Mr. Horbasenko's evidence</u>

[21] Mr. Horbasenko described the events that led to the grievor refusing to work with the first offender. He testified that until the offender walked into the office, there had been no indication of the grievor's concerns for his safety if he worked with the offender. On that day, November 13, 2014, the grievor told Mr. Horbasenko that he was uncomfortable supervising the offender because he had previously supervised him in the community. Mr. Horbasenko reviewed the files and the casework records and found no indication of any animosity between the offender and the grievor or of any danger if the grievor were to supervise the offender.

[22] Nothing in the employer's policies or practices stipulates that a parole officer is not to be reassigned an offender whose parole had once been revoked on the basis of the officer's recommendation. In response to the grievor's request to have the offender reassigned, Mr. Horbasenko and Mr. Holzmann met with him. He maintained that his concerns were for his safety and that they were related to supervising the offender. Despite this, the offender's case was not reassigned, and when the offender reported as scheduled, the grievor emailed (Exhibit 2) Mr. Horbasenko that he would not meet with the offender.

[23] In response, Mr. Horbasenko met with the grievor again on November 21, 2014. The grievor raised the revenge killing offence committed by the offender as the cause of his concern for his safety. According to Mr. Horbasenko, that offence was not actually a revenge killing but rather was the fallout of friends drinking together. Solutions were offered to the grievor to resolve the impasse. He maintained his refusal to work. Mr. Horbasenko cautioned the grievor that he might be disciplined if he continued to refuse to perform his duties, but no discipline was ever imposed. Mr. Horbasenko just wanted to make sure that the grievor was aware of the potential consequences of not fulfilling his parole officer duties.

[24] Mr. Horbasenko completed reports pursuant to ss. 127 and 128 of the *Code* and submitted them to the Occupational Health and Safety Committee. To prepare these reports, Mr. Horbasenko reviewed the Offender Management System and the casework records. He verified with the security and intelligence office at the institution at issue whether it was aware of any concerns; there were none. The conclusion in both reports was that there was no danger.

[25] The initial work refusal was ongoing when the grievor was assigned the second offender who had once had his parole revoked. Once the grievor became aware that he had been assigned the second such offender, the grievor reported that he intended to refuse to work with this offender as well. When the offender reported to the parole office, the grievor refused to see him. The grievor stated that he still had safety concerns resulting from his first work refusal that had yet to be addressed to his satisfaction. He then advised the employer that he refused to perform all parole officer work.

[26] Mr. Horbasenko met with the grievor to discuss his concerns with meeting with the offender who had reported to the office to meet with the grievor and the impact on the grievor's caseload in general. The grievor's concerns were specific to the offender. In the midst of the meeting, the waiting room filled with offenders who had come to see the grievor; they were met by other parole officers, which upset the grievor's co-workers and agitated the offenders. Faced with that, Mr. Horbasenko asked the grievor if he intended to refuse all his duties, and if so, he recommended that the grievor leave the workplace (Exhibit 1, tab 1, page 3). He did not indicate that the grievor might be disciplined.

3. Mr. Stankey's evidence

[27] When the grievor expressed concerns about being assigned the first offender, Mr. Horbasenko and Mr. Holzmann both reviewed the case. On November 17, 2014, the grievor asked Mr. Stankey to review it as well, which he did. He reviewed the case in the Offender Management System and considered the information provided by the grievor, Mr. Horbasenko, and Mr. Holzmann. He examined the offender's criminal profile and the staff safety assessment and verified whether the offender was identified as requiring a tandem case management team, meaning that two parole officers were to meet with him and that there were to be no one-on-one meetings.

[28] The offender did not meet the criteria for a tandem team. The circumstances that gave rise to the offender's return to custody were not related to the grievor. There was no evidence that the offender was hostile or aggressive towards the grievor or parole office staff in general. On November 26, 2014, when the offender was released, the grievor refused to work with him, citing it as unsafe work. He provided no new information or concerns to support this refusal; he merely reiterated that the assignment was unsafe.

[29] When the second offender was assigned to the grievor on December 8, 2014, he emailed his supervisor and Mr. Stankey and again expressed his concerns with the assignment. The grievor had had nothing to do with the second offender's parole revocation, unlike the first offender, and yet he still claimed that working with that offender constituted unsafe work. On December 17, 2014, the grievor emailed Mr. Horbasenko and Mr. Stankey, refusing to meet with the offender and refusing to perform all his parole officer duties (Exhibit 1, tab 8).

[30] Mr. Stankey met with the grievor and Mr. Horbasenko after receiving this email while the offender waited in the reception area with other offenders waiting to see the grievor. The grievor asked to delay the meeting until his union representative could come in. When the representative arrived, Mr. Stankey met with Mr. Horbasenko, the grievor, and the union representative to discuss the grievor's latest work refusal. The grievor told Mr. Horbasenko that the offenders were going to start backing up in the waiting room but showed no concern for the impact on the office's operations, according to Mr. Stankey.

[31] The grievor provided no new information about his refusal to work with the second offender. As for refusing to perform all his other parole officer duties, he told those at the meeting that his attention was diverted to dealing with the demands of his first work refusal, and as a result, he was unable to complete his duties as required. When he was asked about the duties he intended to complete, the grievor responded that he would complete none of them. The conversation continued, and he was told that if he was not willing to complete any work, he might be subject to discipline, including being sent home on leave without pay. It was a cautionary note about how he was conducting himself in the workplace. He was not sent home.

[32] The grievor was given time to confer with his union representative. After a lunch break, the meeting resumed, and they settled on a response. The second offender in question was reassigned, and the grievor returned to his duties. At no time was he disciplined.

B. <u>The grievance</u>

i. <u>The grievor's evidence</u>

[33] The grievor claimed that the employer discriminated against him on the basis of his family status, in violation of article 19 of the agreement between the Treasury Board and the Public Service Alliance of Canada for the Program and Administrative Services Group (all employees) with an expiry date of June 20, 2014, by denying his request to work a compressed schedule for eight weeks during the summer months of 2013 so that he could be at home to supervise his children.

[34] The grievor has 6 children who ranged in age from 10 to 18 as of the date of the hearing; 2 were in high school, 2 were in junior high school, and 2 were in elementary

school in 2013. The three youngest could not legally be left home alone without supervision. The grievor's wife had been the primary caregiver for the children until she returned to work in 2012. By 2013, she was in the process of opening her own business. The children's grandmothers were not able to provide regular assistance. The cost of day camps or babysitters for the children was prohibitive.

[35] The grievor submitted his request in writing for an adjustment to his work hours and to work a compressed week and offered to be flexible in how he compressed his time. He could see no reason it should have caused the employer concern. He indicated to the employer that he would be flexible in how he compressed his time. His caseload and the number of hours he was to work would remain at the full-time level for a parole officer. He was willing to work Monday to Friday when needed and would work via phone. No files would have needed reassigning (Exhibit 1, tab 13).

[36] Despite the fact that the grievor was willing to discuss his request with management, the employer never asked him to. On May 24, 2013, he was advised that his leave request was denied (Exhibit 1, tab 14) on the basis of operational requirements. Mr. Horbasenko offered him the option of continuing to work a flexible schedule as he had done in the past and informed him that his working hours could be completed between 07:00 and 18:00.

[37] The grievor was concerned that the proposed flexible work schedule would not ensure that someone would be at home with his children. His intention was to ensure that someone was at home at all times. As a result of the employer's denial of his request to work compressed hours, on several occasions, the grievor's children were left home alone, with the elder children in charge, which led to family arguments. The older children did not want to be responsible for their younger siblings, and in the grievor's opinion, it was not their responsibility.

[38] When the grievor was denied the opportunity to work a compressed schedule, he requested family related leave for the month of July, which was also denied. Leave with income averaging was not an option as he had not paid into it the year before. Leave without pay was also not an option; nor was paying for other daycare options.

[39] The employer eventually provided the grievor with a laptop so that he could work from home. He worked from home Mondays, Wednesdays, and Fridays. He went into the office or performed his supervision visits on Tuesdays and Thursdays. His

attempts to work from home were unsuccessful in terms of meeting his desired goals, as his children felt ignored. He was not available to his children or able to provide for their direct care on Mondays, Wednesdays, and Fridays because of his work obligations.

2. Mr. Horbasenko's evidence

[40] The grievor emailed Mr. Horbasenko his request for a compressed work schedule for the summer months of 2013. He proposed that he would work from 06:00 to 18:00 hours three days per week (Exhibit 1, tab 13, page 5). In his response, Mr. Horbasenko asked the grievor for more information about how he intended to manage his caseload and about the reasons for his request. Mr. Horbasenko reviewed the request with Mr. Stankey. Together, they looked at the staff who would be in the office and who would be available to cover for the grievor. If an issue arises with an offender on a weekend, status reports are due the following Monday. Urinalysis reports require action as they come in. All that had to be covered in the grievor's absence.

[41] The employer's decision, which was emailed to the grievor, was that operational requirements did not permit granting his request. He was also advised that alternate options for his proposals were available; for example, he could work flexible hours between 07:00 and 18:00 daily, five days per week, or he could telework.

[42] The grievor's request in 2013 was different from what he had requested the previous year. In 2012, he had just returned from an assignment and did not have an active caseload. In addition, he had booked annual leave for this period that year, so the operational impact in 2012 was low. In 2013, after being granted annual leave for the entire month of August, he merely asked for leave, stating that it was for family reasons, with no specifics, while in 2012, when he asked for the leave, it was to accommodate camps for his children.

[43] Mr. Horbasenko met with the grievor and his union representative with the hope of clarifying the family reasons that required the compressed schedule the grievor proposed. The grievor was told that additional information was required because his leave request was under review, but he provided no further information. He merely responded that it was for general family matters. He was again offered the option of working flexible hours and a laptop, which would have allowed him to work from home. He accepted the laptop and asked to work from home as a temporary

accommodation while his leave request was addressed (Exhibit 1, tab 15).

[44] The grievor worked from home on Mondays, Wednesdays, and Fridays starting in late May or June 2013. He took the month of August 2013 off as annual leave.

3. Mr. Stankey's evidence

[45] The grievor's request for family related leave came to Mr. Stankey's attention in May 2013. The grievor had requested a period of annual leave, which had been approved, and then he asked to work a compressed workweek for family reasons during the months of June and July 2013. Mr. Horbasenko consulted Mr. Stankey about the request. The grievor emailed Mr. Stankey, inquiring as to the status of his request. Mr. Stankey responded on May 23, 2013 (Exhibit 1, tab 13), outlining his concerns with the request.

[46] Parole officers work within jurisdictional deadlines, which must be met. If the work is not concluded, it falls on the institutional parole officers. Had the grievor been allowed to work his entire schedule over 3 days, he would have worked 13-hour shifts, which are very long. In addition, he would have been unavailable two days per week. And he had already booked five weeks of annual leave during the peak leave season when his coworkers wanted time with their families. His two requests put considerable stress on the Edmonton Area Parole Office, and as a result, other parole officers' requests for leave during that period had to be denied.

[47] The grievor provided no information about or rationale for his request; he merely stated that it was for general family reasons.

[48] Flexible hours were available, which would have meant that the grievor would work five days per week and would adjust his start and end times to meet his family needs. He also had the option of working from home during the day with a laptop that the employer was willing to provide to him.

[49] On May 30, 2013, Mr. Stankey met with Mr. Horbasenko, the grievor, and his union representative to discuss these options. The grievor was asked if he would provide more information about his family status and the motivation for his request. He was not prepared to discuss any of it and advised the employer representatives that he would not provide any such clarification. This meeting served no purpose, in Mr. Stankey's opinion; the only acceptable solution to the grievor was that his request be

granted, which the employer could not do given the operational requirements it faced and the grievor's reluctance to provide any information to support his request.

[50] Mr. Stankey was aware of the circumstances in the summer of 2012 when the grievor was allowed leave to meet his family needs, without impacting his performance. The circumstances then were such that allowing him to take the leave posed no significant operational impact as he had just returned from an assignment outside the office and did not have a caseload to manage. Generally, parole officers have two to three weeks off each summer; the grievor had been approved for five weeks of annual leave in 2013 before he filed his compressed schedule request. At that very busy time, it was not possible to grant the grievor's request for a compressed workweek and still meet the needs of the other employees in the same office.

III. Summary of the arguments

A. For the grievor

[51] The test for establishing a violation of the *Code* can be found at paragraphs 62 and 64 of *Vallée v. Treasury Board (Royal Canadian Mounted Police)*, 2007 PSLRB 52. The grievor had to demonstrate that he exercised his rights under the *Code*, that he suffered reprisals, that the reprisals were disciplinary, and that the exercise of his rights and the reprisals the employer took against him were directly linked.

[52] In his evidence, the grievor established that a parole officer's duties are dangerous. In November 2013, he was reassigned an offender for whom the grievor had been instrumental in revoking his parole. The grievor exercised his right under the *Code* to refuse unsafe work because of his concerns with that offender's revengeful nature. The evidence of the grievor and of Mr. Horbasenko is that the grievor was threatened with discipline because he refused to work with the offender. Therefore, the grievor has met the first part of the test in *Vallée.*

[53] When the second offender was assigned to the grievor, he again invoked his right to refuse unsafe work, this time refusing to perform all parole officer duties because he was concerned that the workload caused by his first work refusal would lead him to distraction and possibly to making mistakes. At the meeting between the grievor, his union representative, and the employer, the grievor was threatened with being sent home without pay because he refused to carry out his parole officer duties.

That threat satisfies the rest of the *Vallée* test.

[54] The employer could have assigned the grievor clerical duties in December 2014 rather than threatening to send him home without pay. A suspension without pay or a threat of such a suspension constitutes a disciplinary threat related to the second work refusal. An employer is entitled to discipline an employee as long as there is no nexus to a work refusal, which has been clearly established in this case. The caution the grievor received constituted a verbal reprimand and a threat of discipline. The *Code* is clear that threats of discipline are prohibited, and there is enough proof in this case to find that the *Code* was breached (see *Martin-Ivie v. Treasury Board (Canada Border Services Agency)*, 2013 PSLRB 40).

[55] As for the question of the employer discriminating against the grievor on the basis of family status, he could not have been expected to know what information he was required to share with the employer to help it make its decision. He had received approval for family related leave in 2012. The information provided then had been sufficient to meet the employer's needs. The grievor actively participated in the process of securing the accommodation. He responded to the employer's questions via email (Exhibit 1, tab 15). He addressed its operational concerns. The only difference was that in 2013, he requested twice the length of leave as he had in 2012. The employer had all the information it required in 2012 to grant the request and should have considered that information in 2013.

[56] The accommodations proposed by the employer did not strike the balance required by the grievor's family. The children would not have had his undistracted attention while he worked at home (see *Canada (Attorney General) v. Johnstone*, 2014 FCA 110 at para. 21).

[57] A procedural and substantive accommodation process must be followed to determine an appropriate accommodation, which the employer did not do. If a *prima facie* case of discrimination has been established, the onus switches to the employer to show that a *bona fide* occupational requirement exists and that the grievor could not be accommodated without undue hardship (see *Johnstone*, at para. 75). The employer is at fault because it did not investigate whether the grievor's requested compressed workweek could have worked out. There was no trial period. Based on the facts of 2012, it had worked out once before. There is no evidence that the employer even tried

to make a compressed workweek work out.

[58] The employer's solution was not reasonable. As a result, the grievor fell short in his childcare arrangements. Working from home did not minimize his impairment; he could not work and meet the needs of his children at the same time. Teleworking was a move in the right direction, but it did not minimize his burden. The employer's priority was to seek a solution that had a minimal impact on its operations. It is at fault for not asking the right questions.

[59] For that reason and for its failure to accommodate him, the grievor seeks $10 000 for pain and suffering and an additional $10 000 for general damages because of the arguments he had with his children, wife, and in-laws and because his children were left home alone when he did not want them to be because of the employer's refusal to accommodate him on the basis of family status.

B. For the employer

[60] The grievor is correct that the test for establishing a violation of the *Code* is set out in *Vallée*. There is a reverse onus on the employer under s. 133(6) of the *Code* to prove that a violation of s. 147 did not occur, which can be satisfied if the employer can establish any one of the following (see *White v. Treasury Board (Correctional Service of Canada)*, 2013 PSLRB 63 at para. 142, as quoted; and *Court v. John Grant Haulage Ltd.*, 2010 CIRB 498 at para. 121):

> 1. *The complainant did not act in accordance with section 128.*
> 2. *The respondent neither disciplined nor financially penalized the complainant.*
> 3. *If the respondent either disciplined or financially penalized the complainant, it was not in any way related to the complainant exercising his rights under section 128 of the Code.*

[61] When the second offender arrived in the waiting room in December 2014, the grievor had known for at least two weeks that the offender had been assigned to his caseload. He expected that the employer would generalize his concerns expressed in the context of the first work refusal to all offenders whose parole had been revoked. The grievor perceived the employer's failure to generalize his concerns and the subsequent assignment of the second offender as a reprisal for invoking his right to

refuse unsafe work. The assignment was part of the employer's normal business and was not a reprisal, as argued by the grievor.

[62] When the employer cautioned the grievor about the completion of his other duties, the offenders in question were in the waiting room. There was no lingering threat of discipline related to their appearance. The employer was merely trying to manage a difficult situation while offenders accumulated in the waiting room. Following both meetings between Mr. Horbasenko, Mr. Stankey, and the grievor in November and again in December, the grievor was asked if he understood the potential consequences of refusing to do all his parole officer work. He did have the right to refuse dangerous work, but he did not have the right to invoke a work stoppage. The employer would have been within its rights to send him home without pay for the work stoppage.

[63] The required nexus between the work refusal and the grievor's behaviour does not exist (see *Martin-Ivie*, at para. 59). He was not sent home; he was merely told that if he continued in his work stoppage, he could be. The grievor's representative argued that the employer should have assigned him other duties. This was not possible; there was nothing to assign him as he was refusing to perform all parole officer duties.

[64] After some reflection, the parties found a solution. The work resumed, and the possibility of being sent home was removed from the table. The employer merely intended to defuse workplace conflict and keep the workplace functioning.

[65] With respect to the grievor's claim that he has been discriminated against, he failed to make out a *prima facie* case of discrimination. Even if he had, management was not provided with sufficient opportunity to respond to his request for accommodation as he provided no information to support it. The employer granted him substantial flexibility in the performance of his duties and had *de facto* accommodated his needs. Only once the grievor has discharged his burden of establishing a *prima facie* case of discrimination is the employer obligated to justify its actions (see *Johnstone*; and *Souaker v. Canadian Nuclear Safety Commission*, 2009 PSLRB 145).

[66] The fact that the grievor did not know the test for establishing a *prima facie* case of discrimination does not absolve him from his obligation to participate in the accommodation process. Just because a person has a family does not establish a *prima*

facie case of family status (see *Halfacree v. Deputy Head (Department of Agriculture and Agri-Food*), 2012 PSLRB 130). Furthermore, there must be a link between the membership in an identified group and the arbitrariness of the employer's decision (see *Veillette v. Canada Revenue Agency*, 2010 PSLRB 32 at para. 66).

[67] The grievor provided no evidence of any legal obligations vis-à-vis the children that could not have been met through other arrangements. In fact, he did meet those obligations in other ways, through his wife, teenage children, and other family members. Child rearing is a shared responsibility, and unlike the situation in *Johnstone*, this is not a case in which all the children are infants and both parents are shift workers. This request was based on the grievor's personal preferences and not on some legal obligation.

[68] The grievor provided no logical explanation of how a compressed work schedule would have met his parental obligations and choices to the exclusion of other options. Teleworking provided him more time at home than a compressed workweek would have. The employer tried to work with him to meet his parental obligations. If teleworking was not to his liking, the grievor had other options available to him, such as leave without pay, which he did not consider because those options did not meet his financial circumstances. An employee's financial needs do not put a burden on the employer to accommodate the employee.

[69] The options proposed by the employer were reasonable, and they met the grievor's stated needs. They substantially complied with his identified requirements. If they did not, it was up to him to demonstrate that there were needs beyond the fact that his children would be out of school for the summer and he did not want to leave them home alone. He refused to discuss his family circumstances, and as a result, the employer made up its mind based on the information it had at hand.

[70] The accommodation process is a two-way street. An employee is not entitled to a perfect accommodation, only a reasonable accommodation. To determine what a reasonable accommodation is, an employer needs the information necessary to make that determination. The onus is on the employee to identify his or her needs; the grievor did not. A failure to participate in the accommodation process is sufficient to dismiss this grievance (see *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970 at 994). Regardless, the grievor was *de facto* accommodated.

[71] No hardship was shown that would support a claim for damages under the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6).

IV. Reasons

A. The complaint

[72] The grievor refused to work when the offender was reassigned to him. He invoked s. 128(1) of the *Code*, which provides that an employee can refuse to work or perform an activity if it constitutes a danger to the employee. It is not my role to determine whether the work that the grievor refused was a danger, even though much of his evidence was targeted at that point. My role is to determine whether any acts of reprisal occurred and, if so, were they as a direct consequence of exercising his right to refuse unsafe work, which would have violated the *Code*.

[73] The relevant sections of the *Code* are 133 and 147. Subsection 133(1) provides as follows:

> ***133 (1)*** *An employee, or a person designated by the employee for the purpose, who alleges that an employer has taken action against the employee in contravention of section 147 may, subject to subsection (3), make a complaint in writing to the Board of the alleged contravention.*

[74] Section 147 of the *Code* states as follows:

> ***147*** *No employer shall dismiss, suspend, lay off or demote an employee, impose a financial or other penalty on an employee, or refuse to pay an employee remuneration in respect of any period that the employee would, but for the exercise of the employee's rights under this Part, have worked, or take any disciplinary action against or threaten to take any such action against an employee because the employee*
>
> > ***(a)*** *has testified or is about to testify in a proceeding taken or an inquiry held under this Part;*
> >
> > ***(b)*** *has provided information to a person engaged in the performance of duties under this Part regarding the conditions of work affecting the health or safety of the employee or of any other employee of the employer; or*
> >
> > ***(c)*** *has acted in accordance with this Part or* ***has sought the enforcement of any of the provisions of this Part.***

[Emphasis added]

[75] Subsection 133(6) of the *Code* is also relevant because it provides that once an employee has established that he or she filed a complaint under s. 133(1) of the *Code* in respect of the exercise of the right to refuse to perform work under ss. 128 or 129, the burden of proof shifts to the employer to show that s. 147 was not contravened (see *White* at para. 141):

> ***133 (6)*** *A complaint made under this section in respect of the exercise of a right under section 128 or 129 is itself evidence that the contravention actually occurred and, if a party to the complaint proceedings alleges that the contravention did not occur, the burden of proof is on that party.*

[76] It is not contested that the grievor filed a complaint pursuant to s. 133(1) within the applicable time limits, so the grievor's initial burden has been met and it is now up to the employer to show that s. 147 was not contravened.

[77] From the types of reprisals listed in s. 147, the grievor only really alleged that he had been disciplined or threatened with discipline for having exercised his right to refuse work. For it to be determined that there was a disciplinary reprisal, there must be a link between the exercise of the grievor's rights under Part II of the *Code* and the disciplinary action taken by the employer (see *Gaskin v. Canada Revenue Agency*, 2008 PSLRB 96 at para. 62; *Tanguay v. Statistical Survey Operations*, 2005 PSLRB 43 at para. 14; *Vallée* at para. 64; and *Martin-Ivie*).

[78] There is no evidence whatsoever before me that the grievor was disciplined for invoking his rights. Furthermore, there is no evidence that the employer threatened him in any way as a result of exercising his rights.

[79] The evidence of both parties focused on the circumstances of the work refusal and provided no insight into the allegations of reprisal. While Mr. Horbasenko's comments about the potential for discipline might have been unwise, they were related to the grievor's refusal to perform any of his parole officer duties and not the assignment to him of the revoked-parole offenders, for which the grievor had invoked his right to refuse unsafe work. The evidence does not support that there was any nexus between the grievor invoking his *Code* rights and the employer's cautions in reply to his refusal to perform any or all of his parole officer duties, which, in and of themselves, did not constitute discipline or a threat to discipline.

[80] The grievor refused to perform his parole officer duties, including meeting with the second offender, because his first work refusal was still outstanding. While a portion of the grievor's duties that he refused to carry out in December 2014 might have been unsafe in his opinion, his preoccupation with pursuing his rights related to a previous work refusal was not a reason to refuse to perform all the duties of the job in the case of the second work refusal. Being reminded of that was not discipline. As the grievor's representative argued, alternate duties could have been assigned to the grievor, but since he had refused all parole officer duties, he had tied the employer's hands.

[81] Brown and Beatty, in *Canadian Labour Arbitration*, 4th edition, discuss the nature of disciplinary sanctions at s. 7:4210. When deciding whether an employee has been disciplined, an arbitrator or adjudicator must consider both the purpose and the effect of the employer's actions. The essential characteristic of disciplinary action is the intention to correct bad behaviour. An employer's assurance that it did not intend its actions to be disciplinary often, but not always, settles that question. The employer is entitled to ask for clarification in the course of an employee's work refusal, to determine what exactly the employee claims is unsafe work. In the case of the grievor's first refusal to work, it was clear. It was unclear in the second, since he refused to do any work related to his parole officer job.

[82] A disciplinary sanction must at least have the potential to prejudicially affect an employee. In this case, the grievor being cautioned that if he refused to do any work, and not just that for which he had exercised his rights under the *Code*, he would be sent home, in my opinion is not disciplinary in the context of either of the work refusals. A reasonable employer can expect an employee in the workplace to perform the duties of his or her position. A failure on the employee's part to meet his or her employment obligations warrants a caution that he or she may end up without pay for that failure. Such a caution is not disciplinary. Furthermore, the employer was entitled to assign legitimate work to the grievor regardless of whether or not he had previously invoked his rights under the *Code* in relation to other work.

[83] The grievor's first invocation of his right to refuse to do unsafe work was related to a specific offender. The grievor feared that that offender would carry out an act of revenge against him as he had been instrumental in the offender's parole being revoked at one point in the past, which did not imply that the grievor was refusing to

work with any offender who had had his parole revoked. The employer assigns the offenders to caseloads depending on the operational circumstances of the day. There was no evidence to support the assertion that the assignment to the grievor of a second previously revoked offender was anything other than the normal conduct of business. No nexus between the grievor's refusal to perform unsafe work and the assignment of the second offender has been shown. Therefore, I conclude that assigning the second such offender was not an act of reprisal.

[84] The grievor also made an allegation that he was subjected to workplace violence and harassment, and that his performance review contained negative comments, all of which the employer denies. These claims were nothing more than bare assertions on his part. He did not provide any additional details about them nor any corroborating evidence, be it in the form of documentation or witness testimony. In my view, his evidence about these claims was so weak that it did not even warrant an explanation from the employer, and was certainly insufficient to draw any conclusions about reprisals.

[85] With respect to the non-disciplinary grounds listed in s. 147, regarding which the grievor basically made no allegations, it is uncontested that the grievor was not dismissed, laid off, or demoted. Furthermore, there was no evidence of a financial or other penalty, or that he was refused any payment. At paragraph 19 of the *Tanguay* decision, the Board's vice-chairperson accepts the definition of "penalty" as a "[translation] punishment or award to ensure the performance of an action" or as a "punishment established or inflicted by a law or some authority to prevent a prohibited act." The grievor was not punished for pursuing his rights under the *Code*.

[86] It is a pure question of fact whether the grievor was subject to discipline or penalties within the meaning of s. 147 and, if so, whether there was a nexus between them and the exercise of his rights under the *Code*. The employer discharged its onus under s. 133 of the *Code*, as described in *White*. Based on the evidence before me, I conclude that the grievor was not subject to any actions at all, let alone related to exercising his rights under s. 128 of the *Code*. His complaint is dismissed.

B. <u>The grievance</u>

[87] The grievor has alleged that the employer failed to accommodate his family related needs and in so doing discriminated against him. To substantiate these types

of claims, grievors must first make out a *prima facie* case of discrimination. Once that *prima facie* case has been established, the analysis moves to the second stage where the employer must show that it accommodated these needs or that the policy or practice applied is a *bona fide* occupational requirement and that those affected cannot be accommodated without undue hardship.

[88] As the Board noted in the recent case of *Fleming v. Treasury Board (Canada Border Services Agency)*, 2016 PSLREB 96 at para. 120, the Federal Court of Appeal's decision in *Johnstone* is the definitive case in this area of discrimination. The court in *Johnstone* sets out a four-part test that must be met in order to establish a *prima facie* case of discrimination based on family status in relation to child care responsibilities:

1. that a child or his children are under his or her care and supervision;

2. that the childcare obligation at issue engages his legal responsibility for the children, as opposed to a personal choice;

3. that he has made reasonable efforts to meet those childcare obligations through reasonable alternative solutions, and no such alternative solution is reasonably accessible; and

4. that the impugned workplace rule interferes in a manner that is more than trivial or insubstantial with fulfilling the childcare obligation.

[89] For the reasons that follow, I find that the complainant has failed to make out a *prima facie* case of discrimination.

[90] There is no question that the grievor's non-adult children are under his and his spouse's care and supervision and that the three youngest could not legally be left at home alone without supervision. Tests 1 and 2 are therefore satisfied as he has a legal obligation to ensure that the younger children are properly cared for in his absence.

[91] However, the grievor has failed to demonstrate that he meets the third part of the test. This factor requires that the employee demonstrate that reasonable efforts have been expended to meet those childcare obligations through reasonable alternative solutions, and that no such alternative solution is reasonably accessible. Employees must therefore show that neither they nor their spouse can meet their enforceable childcare obligations while continuing to work, and that an available childcare service

or an alternative arrangement is not reasonably accessible to them so as to meet their work needs (*Johnstone* at para. 96).

[92] In the present case, the grievor did not demonstrate that all reasonable efforts have been expended. He mentioned that his spouse is opening a new business but he did not demonstrate that she is unable to meet their enforceable childcare obligations while continuing to operate her business. The grievor says that the children's grandmothers are not able to provide regular assistance but did not indicate if anyone else is in a position to provide this assistance.

[93] In fact, the grievor effectively acknowledged that he was able to meet his enforceable childcare obligations by leaving them in the care of his one adult child and the two other older children. It is merely because this arrangement led to "family arguments" that he rejected it. However, in my view, this is not a reasonable basis for dismissing this childcare option and demonstrates that not all reasonable efforts were expended before approaching the employer for the adjustment to his work schedule. Finally, I find that although the grievor testified that the cost of day camps is "prohibitive", he did not lead any specific evidence to show what those costs are and establish how they are truly prohibitive to him.

[94] In contrast to the present grievance, I note that in *Johnstone*, the complainant there adduced detailed evidence of her efforts with unregulated childcare providers, including family members, as well as the broader inquiries she made to secure flexible childcare arrangements that would meet her work schedule. The Canadian Human Rights Tribunal panel that initially heard the complaint received evidence about both spouse's work schedules and determined that neither could provide the childcare needed on a reliable basis. No similar evidence was advanced by the grievor here.

[95] Consequently, I find that the grievor has not satisfied the third part of the *Johnstone* test.

[96] I am also not persuaded that the fourth part of the test was satisfied. In *Johnstone* at para. 107, the court noted that expert evidence had been presented of the impact of the parents' unpredictable work schedules on finding childcare, particularly given their extended work hours outside standard operating hours. There is no indication here that the grievor's schedule, which included the option of working flexible hours between 07:00 and 18:00 and ultimately working from home Mondays,

Wednesdays and Fridays, interfered in a more than trivial or insubstantial way with his ability to fulfill the childcare obligation. The grievor testified that when working from home he felt "unsuccessful" in terms of meeting his desired goals, as his children felt ignored. This does not establish, however, that his children were without supervision, which is the **legal** obligation that he claims he was prevented from fulfilling.

[97] For these reasons, I conclude that the grievor has not established a case of discrimination on a *prima facie* basis.

[98] In any event, even if the grievor had made out a *prima facie* case, I would find that the employer demonstrated that it had reasonably accommodated the grievor by providing him a laptop with which he could telework and allowing him to work a flexible schedule.

[99] The Supreme Court of Canada noted in *Central Okanagan School District No. 23* that employees seeking accommodation have a duty to cooperate with their employers by providing information as to the nature and extent of their accommodation needs, which will enable the employers to determine the necessary accommodations. The employer asked the grievor to clarify his needs, and he provided none, other than that he needed the leave for general family reasons, which can hardly be considered cooperating with the employer in its search for a suitable accommodation. The grievor provided no clarification of his needs when asked, and it is unfathomable that the employer should be considered to have acted unreasonably because, as the grievor's representative argued, "It did not ask the right questions." If the grievor was not willing to be open and forthright in identifying his needs, then the employer cannot be held responsible.

[100] The employer in this case made the effort to find a reasonable accommodation for the grievor based on the information it had been provided. He accepted the options put forward as an interim measure and then grieved; he did not like them, but nonetheless, they met his needs. The employer worked with him to develop the options; it addressed his primary concern of being home with his children in the summer and provided a reasonable accommodation, which met his needs while being minimally disruptive to the workplace. The grievor's preferred option would have had him out of the home three days per week for extended periods. An employee is not entitled to a perfect accommodation, only a reasonable one (see *Andres v. Canada*

Revenue Agency, 2014 PSLRB 86). An employer is not obligated to implement an accommodation that is disruptive to the workplace when other less-intrusive accommodation options are available and meet the employee's identified needs.

[101] The employer assessed the grievor's request based on the information he provided and created a workable solution for it that allowed the grievor to be home full-time with his children while school was out. The employer cannot be faulted for finding a solution that had a minimal impact on its operations.

[102] Thus, the employer provided a reasonable explanation demonstrating that the grievor was in fact fully accommodated. While the accommodation might not have been perfect, it met the grievor's limitations and was reasonable. Therefore, even if a *prima facie* case of discrimination had been established, the employer provided a valid defence. The grievor's allegations that the employer engaged in a discriminatory practice have not been substantiated.

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

(The Order appears on the next page)

V. Order

[104] The complaint is dismissed.

[105] The grievance is dismissed.

January 12, 2017.

Margaret T.A. Shannon,
a panel of the Public Service Labour
Relations and Employment Board