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166-2-30732

Citation: 2002 PSSRB 45



Public Service Staff
Relations Act

Before the Public Service
Staff Relations Board

BETWEEN

ROBERT PROULX

Grievor

and

THE TREASURY BOARD
(Solicitor General of Canada - Correctional Service)

Employer

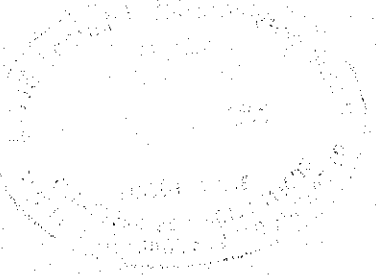
Before: Léo-Paul Guindon, Board Member

For the Grievor: Paul Taylor, Public Service Alliance of Canada

For the Employer: Karl G. Chemsy, Counsel, Treasury Board



Heard at Montreal, Quebec,
October 22 to 26, 2001 and February 11 and 12, 2002.



DECISION

[1] The grievor filed two grievances, dated September 13 and 19, 2000, challenging a suspension without pay for the duration of a disciplinary investigation and a 20-day disciplinary suspension following incidents that occurred on August 11, 2000. On June 29, 2001, the grievances were referred to adjudication in accordance with paragraph 92(1)(b) of the Public Service Staff Relations Act (PSSRA).

[2] The grievance dated September 13, 2000 (file 166-2-30730) reads in part as follows.

[Translation]

...

STATEMENT OF GRIEVANCE

Disagree with the administrative decision to impose a suspension without pay for the duration of the disciplinary investigation, reference 1300-1-00.

CORRECTIVE ACTION REQUESTED

That the employer set aside the suspension; reinstate the employee in his position as soon as possible; and ensure that the employee recovers his salary, with interest and including fringe benefits - see Appendix I.

...

[3] The grievance dated September 19, 2000 (file 166-2-30732) reads in part as follows.

[Translation]

...

STATEMENT OF GRIEVANCE

In a letter from my employer dated September 9, 2000, six (6) disciplinary infractions by me are at issue. Under these circumstances, my employer suspended me without pay for a 20-day period. I challenge this disciplinary measure, which I consider abusive to me.

CORRECTIVE ACTION REQUESTED

That this disciplinary measure be set aside; that the days without pay be paid to me; that interest on this amount at

the Bank of Canada rate be paid to me; and that all my rights be reinstated (see appendix).

[4] A copy of the following document is attached to each of the grievances:

[Translation]

C. CORRECTIVE ACTION REQUESTED

1. *That all documentation concerning the grievance be withdrawn from my personnel file and destroyed in the presence of myself and/or my union representative.*
2. *That I be given assurance that I will not be subject to prejudice following the filing of this grievance.*
3. *That the employer hold consultations at all levels of the grievance procedure, subject to any mutual agreement to eliminate one or more levels.*
4. *That I be present at all these consultations, at the employer's expense, and at the adjudication.*
5. *That I be represented by the P.S.A.C.*
6. *That the employer respect article 1 of my collective agreement.*

[5] The two grievances are being heard jointly, the parties having agreed and acknowledged that the 20-day disciplinary suspension imposed on Robert Proulx included the days of suspension for the duration of the disciplinary investigation.

[6] At the time set for the hearing, on October 22, 2001, only the employer was present and prepared to proceed. At my request, the Board's Assistant Secretary, Operations, set up a conference call among the grievor's representative, counsel for the employer, and myself. The grievor's representative attributed his absence to confusion apparently created by the notice of hearing, which had led him to believe that the hearing was to be held on October 26, 2001.

[7] The Board had notified the bargaining agent's co-ordinator on October 19, 2001 that the cases would be heard on October 22, and that the co-ordinator was to notify the parties concerned. Under these circumstances, the bargaining agent is solely responsible for the confusion alleged by its representative and for the resulting inconvenience to the representatives of the employer and of the Board.

[8] The hearing was adjourned until October 23, 2001 at 9:30 a.m., since the grievor's representative stated that he was prepared to proceed on that date.

[9] When the hearing was re-convened, the grievor's representative applied for a recess, so that he could file a complaint with the Canadian Human Rights Commission (CHRC) concerning the disciplinary measures being challenged in the present cases, which allegedly constituted discrimination on the basis of mental disability. The recess was to extend until the CHRC made a decision on the complaint.

[10] Counsel for the employer argued that the adjudicator did not have jurisdiction to rule on a grievance of which the subject matter was under the CHRC's jurisdiction, according to the Federal Court decisions in *Canada (Attorney General) v. Boutilier*, [1999] 1 F.C. 459 (T.D.) and *Canada (Attorney General) v. Boutilier*, [2000] 3 F.C. 27 (C.A.). The adjudicator may therefore not recess or adjourn the hearing, but may only dismiss the grievances on the basis of lack of jurisdiction. By means of this application, the grievor is trying to alter the nature of his grievance, which cannot be done according to the Federal Court of Appeal decision in *Burchill v. Canada (Attorney General)*, [1981] 1 F.C. 109. The grievor's application is therefore barred.

[11] I have taken this application under advisement, subject to the evidence and arguments to be produced on the merits of the cases, so that I can establish the actual nature of the grievances and assess whether I have jurisdiction to rule on them.

[12] Counsel for the employer produced his evidence on October 23, 2001, and called four witnesses. The sequence of the events set out below in this decision summarizes the evidence produced by the employer and by the grievor. A recess of the hearing was then called until October 26, 2001, at the request of the grievor's representative, who wished to clarify his mandate with his client and with the bargaining agent authorities.

[13] When the hearing was re-convened, the grievor's representative renewed his application for a recess until a decision had been made by the CHRC, arguing that the psychiatric assessment (Exhibit F-1) and the medical assessment (Exhibit F-2) produced during cross-examination of the witnesses called by counsel for the employer would establish discrimination on the basis of mental disability. I do not accept that argument because, although these documents establish that the grievor experienced depression, there is no indication of discrimination by the employer against the grievor

that would change the nature of the grievances. In the absence of evidence of discrimination, the grievances in this case are strictly disciplinary in nature, as is shown by the wording of the grievances set out in paragraphs 2 to 4 of this decision. The grievor's representative must therefore proceed.

[14] The grievor's representative called three witnesses and produced a psychiatric assessment dated May 11, 2001 (Exhibit F-3) and a history of Mr. Proulx's state of health dated October 20, 2001 (Exhibit F-4).

[15] The sequence of events was related somewhat differently by each witness, as follows.

[16] The grievor has been employed by the Correctional Service of Canada since 1983; he has occupied a position as a grounds maintenance officer at Sainte-Anne-des-Plaines Institution since April 1995. A number of inmates work under the grievor's supervision in the maintenance shop. On the date of the incidents leading to the disciplinary measures, Mr. Proulx was president of the local of the Public Service Alliance of Canada (PSAC), had had union responsibilities as regional representative of the PSAC for two years, and also had certain responsibilities concerning the PSAC treasury at the national level.

[17] In the first week of August 2000, Mr. Proulx returned to work after five weeks of annual leave. During his period of leave, he had returned to the institution on occasion to deal with various union matters. For some time he had been impatient, quicker to raise his voice, tense and fatigued, particularly since the most recent (union) election period, which had been difficult. The previous year, marked by negotiations, pressure tactics, and a period of raiding, had been particularly hectic for the PSAC. Both Mr. Proulx's co-workers and some management representatives noticed that he was stressed and more tense, but no one anticipated the "loss of control" that occurred on August 11, 2000.

[18] On August 11, 2000, Mr. Proulx accepted an invitation from two co-workers, Guy Trottier and Martin Quesnel, to have lunch at the hotel. They regularly had lunch in this manner once or twice a week. Mr. Proulx apparently had one beer as well as part of another that his companions had offered him.

[19] Around 12:30 p.m., the regular time for employees to return to work, Claude Martel, acting maintenance supervisor, made the rounds of the shops under his responsibility. He saw that Mr. Proulx was not in his shop, returned the inmates to their quarters, and closed the shop. He was unable to ascertain from Jean-Claude Chaumont (the supervisor usually responsible for maintenance) why Mr. Proulx was absent from his shop, and called Mr. Proulx on his cell phone. Mr. Proulx told him that there was no problem and that he was returning to work.

[20] Mr. Proulx reached the institution at around 1:15 p.m. (approximately 45 minutes late) and used the institution's loader. He called to Mr. Martel about the maintenance work that a millwright was doing on a CORCAN vehicle. According to Mr. Proulx, the institution could not do maintenance work on CORCAN vehicles. Mr. Martel considered it normal to do maintenance work on these vehicles, but Mr. Proulx disagreed with this explanation and raised his voice. He asked Mr. Chaumont to intervene to settle the issue. Mr. Martel called Mr. Chaumont, and the three employees agreed to meet at the mechanical maintenance shop.

[21] Mr. Proulx arrived at the mechanical maintenance shop in his own vehicle. The discussion about the maintenance work on a CORCAN vehicle was resumed, and Mr. Proulx gave the millwright a "union order" to stop working on the vehicle. Mr. Proulx very soon raised his voice and shouted at Mr. Chaumont that Mr. Chaumont was a climber, had not kept certain promises concerning classification, was a liar, and so forth. Mr. Chaumont tried to calm Mr. Proulx down by telling him that they were not going to resolve this issue on a Friday afternoon but, although he avoided raising his voice or provoking Mr. Proulx, Mr. Proulx's attitude became increasingly aggressive. Mr. Proulx appeared to have lost control; a number of employees, hearing the shouting, gathered. Some inmates also witnessed the altercation.

[22] Mr. Proulx gesticulated more and more, threw his keys, punched a window of his own vehicle, and kept on shouting that Mr. Chaumont was [translation] "a goddamned climber". He punched and kicked a vehicle belonging to the institution, causing damage amounting to \$559.97 (Exhibit E-1). The employees present tried to hold Mr. Proulx back, separate him from Mr. Chaumont, and calm him down. The institution's plumber parked his own vehicle behind Mr. Proulx's vehicle in order to prevent Mr. Proulx from driving again, because he did not seem fit to drive a vehicle. Mr. Chaumont kept his distance in order to avoid being struck by Mr. Proulx. Twice

Mr. Proulx fell down, holding his chest. When he got up, he shouted at Mr. Chaumont: [translation] "I'm gonna kill you, you son of a bitch". Mr. Proulx retrieved his keys and started his vehicle. He backed his vehicle into the plumber's vehicle, and then drove forward into a picnic table. Tires screeching, he then sped off the grounds of the institution, headed for the village of Sainte-Anne-des-Plaines, where he lived.

[23] Mr. Quesnel was afraid for his friend Mr. Proulx and, with Roger Bastien, tried to catch up with him. After some time, on the highway to the village, Mr. Quesnel and Mr. Bastien passed Mr. Proulx, who was speeding back toward the institution. By the time they found a spot to turn around and headed back toward the institution, they had lost sight of Mr. Proulx's vehicle. Photographs taken the following day by Mr. Martel suggested that Mr. Proulx skidded on a curve and landed in the ditch (Exhibit E-2).

[24] Approximately 15 minutes after seeing Mr. Proulx leave the institution, Mr. Chaumont saw him coming back and feared the worst. He took the advice of another employee, took refuge inside the mechanical maintenance shop to avoid another confrontation with Mr. Proulx, and called the security officer (Richard Hamel). Mr. Hamel came to meet Mr. Proulx with another employee. Other persons joined the group and encountered Georges Flanagan (director, management service). Mr. Proulx then pointed his finger at Mr. Flanagan and told him: [translation] "You're nothing but a damned boss. Get back in there, or I'll fix you." Michel Desormeaux (Employee Assistance Services (EAS)) arrived on the scene and took Mr. Proulx to the union office in order to calm him down. The EAS psychologist (Serge Simard) met with Mr. Proulx at the union office. Mr. Quesnel and Mr. Bastien then took Mr. Proulx home. Mr. Quesnel argued that the employer subsequently did nothing to help Mr. Proulx, except through Health Canada and the EAS.

[25] The testimony of Mr. Martel and that of Mr. Chaumont corroborated each other on the essential points of the above-related events.

[26] Mr. Chaumont was greatly disturbed by the incident and suffered post-traumatic stress (Exhibit E-3). Although the resulting period of disability was set from August 11 to September 4, 2000, Mr. Chaumont was able to return to work after two weeks' absence, since he was responsible for a construction project at which he was isolated from the other workers. Approximately one week after August 11, 2000, Mr. Proulx requested and obtained agreement to a meeting with Mr. Chaumont in order to clarify the situation. A meeting was held at Mr. Chaumont's home, in the presence

of a union representative. According to Mr. Chaumont, Mr. Proulx admitted to the August 11, 2000 incidents and stated that he regretted what had been done. The employees present at the August 11, 2000 altercation were disturbed by the incident, and a stress debriefing session was organized by the employer and held on September 1, 2000 (Exhibit E-9).

[27] In his testimony, Mr. Proulx admitted to all the events, and admitted that his attitude and words toward Mr. Chaumont and Mr. Flanagan had been threatening. He did not recall uttering a death threat against Mr. Chaumont. Allegedly he told him that he had nothing to be afraid of, that he would not hit him, and that he would not dirty his hands with him. No other witness recalled hearing these words during the altercation. Mr. Proulx added that he was "combative" in union matters but not "aggressive", and that he had never hit anyone. He never intended to strike Mr. Chaumont and did not try to do so, even though Mr. Chaumont might have felt threatened. He explained that he returned to the institution in order to apologize to his co-workers; allegedly he repeated a number of times during the incidents: [translation] "It's all over for me ... I can't ever come back to work after an incident like that...". He stated that he did not recall skidding on a curve (Exhibit E-2) because he would have had trouble getting out of the ditch unassisted. He added that he might have stopped near the ditch on his way back to the institution.

[28] Mr. Proulx attributed his deteriorating state of health to a set of circumstances related to the accumulation of his union responsibilities and the marked deterioration of the working atmosphere at Sainte-Anne-des-Plaines Institution. Mr. Flanagan was the main person identified by Mr. Proulx and Mr. Quesnel as being responsible for the deterioration of the working atmosphere, because of a very authoritarian management style that showed little openness toward the employees. Mr. Proulx's state of health had begun to deteriorate well before August 11, 2000: he was more irritable, had trouble sleeping, and smoked increasingly heavily. He continued to think that he could "take it" and, although he realized how tired he was, he did not anticipate losing control as he did on August 11, 2000. His five weeks of vacation leave had not given him an opportunity to rest, since he had returned to the institution on a number of occasions because of union problems.

[29] Mr. Proulx did not reveal to the employer that he experienced depression (Exhibits F-1 to F-4), which was diagnosed after August 11, 2000. He explained that, in

the corrections environment, psychological illnesses were viewed askance and that it was preferable to conceal such a fact in order to avoid being stigmatized. Mr. Proulx did not even tell his friend and confidant, Mr. Quesnel, about his deteriorating state of health before August 11, 2000. The calls for help Mr. Proulx made to Mr. Quesnel after August 11, 2000 were referred to the EAS. Mr. Proulx's depression was not mentioned to the employer during the disciplinary investigation, the disciplinary meetings, or the various meetings concerning the grievance procedure. However, Mr. Proulx's level of fatigue and stress was noted by the employer and taken into consideration both when the disciplinary measure was imposed and at the various levels of the grievance procedure. In May 2001, during discussions about Mr. Proulx's assignment to Leclerc Institution (before his reinstatement at Sainte-Anne-des-Plaines Institution), Mr. Proulx referred to a medical assessment but did not provide it to his Warden. It was only at the hearing that this information was provided to the employer. Mr. Proulx also testified that he had experienced depression in 1988 when he was employed at another correctional institution, and had been treated with antidepressants for five or six weeks.

[30] The Warden of the Institution (Paul-André Beaudry) apparently [translation] "completely demolished" Mr. Proulx during a meeting held after the investigation report was produced; at that meeting, Mr. Proulx was apparently told that he was weak, and that weak persons had no business being union representatives. The medical reports produced by Mr. Proulx and signed by Dr. Préfontaine specify that Mr. Proulx was depressed at the time of the August 11, 2000 incidents. On January 23, 2001, Dr. Préfontaine wrote as follows (Exhibit F-1):

[Translation]

...

My evaluations indicated that Mr. Proulx had been depressed for several months, even before the August 2000 event. . . .

...

. . . He seemed to present a number of stressors, mainly related to his union work and relations with the inmates.

...

[31] On October 20, 2001, Dr. Préfontaine wrote as follows (Exhibit F-4):

[Translation]

...

... I took Mr. Proulx's history and, after physical and mental examinations, concluded that he had been suffering from a major depression of moderate to severe intensity since the spring of 2000. It goes without saying that he experienced a number of symptoms including irritability, insomnia, loss of concentration, loss of interest, and aggressiveness. As a result, after a series of events, Mr. Proulx found himself in a situation where he lost control of his emotions.

...

The pathogenesis of Mr. Proulx's depression can be explained by the fact that he invested a great deal of energy in various aspects of his work. As a result of that fact, combined with other personal factors, depression ensued.

I trust these brief comments will help explain the state of mind in which Mr. Proulx found himself on August 11, 2000.

Yours truly,

...

[32] The psychiatric assessment carried out by Dr. Marc Gu erin at the request of Health Canada's Occupational Health and Safety Agency reads in part as follows (Exhibit F-2, April 24, 2001):

[Translation]

...

When I met with Mr. Proulx in December 2000, he had already been absent from work since August 14, 2000. At that first meeting, he reported anxio-depressive indicators over a period of one and one-half years. He had become tense and irritable, lost weight, and completely lost his libido; against this background, he experienced an unusual mood swing at work. He told off a co-worker and a superior, and began to strike a vehicle. Following this incident, he was suspended for a 20-day period. He then consulted Dr. Patrick Pr efontaine.

...

[33] The grievor expressed a negative perception of the employer: [translation] "They treated me practically like a criminal. They banned me from the premises. I was tortured by not being allowed back at Sainte-Anne-des-Plaines. They made no effort to see if it was mental health before they rapped me on the fingers." Mr. Proulx stated that the disciplinary measures and the "punitive" attitude applied by the employer undermined his self-esteem and offset the positive effect of the work by his physicians.

[34] In May 2001, the employer agreed that Mr. Proulx could return to work at Sainte-Anne-des-Plaines Institution, following an argument by Mr. Proulx's representative during an internal mediation process that it might be harmful for Mr. Proulx to be assigned to Leclerc Institution, without, however, providing the employer with the medical assessment (Exhibit F-2).

[35] At pages 3 and 5 of the assessment produced as Exhibit F-2, Dr. Guérin writes as follows:

[Translation]

...
Today, Mr. Proulx reported that his employer did not want to reinstate him in his position at Sainte-Anne-des-Plaines Institution. Instead, the employer suggested a transfer to another institution, which did not suit him at all.

...
The fact remains that his return to work had been delayed, and he perceived the employer's decision as an indication that the employer was trying to punish him. He said he felt as if he were a wrongdoer and a criminal, and had the impression that the employer was trying to "break him".

The entire incident produced a profound bitterness towards the system in Mr. Proulx, whose anxiety apparently increased over a period of time.

...
I therefore suggest that the possible mediation be carried out as soon as possible, so that this employee can be reinstated in his position.

...
[36] Mr. Van Johnson (Assistant Warden at La Macaza Institution) carried out the disciplinary investigation. Mr. Proulx considered that Mr. Johnson did a good job. The list of witnesses was drawn up on the basis of the report produced by Mr. Flanagan (Exhibit E-5). Mr. Johnson met with the witnesses to the incidents and with Mr. Proulx, and produced his investigation report (Exhibit E-4) on August 31, 2000. In his testimony, Mr. Johnson stated that Mr. Proulx admitted to the incidents and regretted what had happened. During the investigation, Mr. Proulx explained his loss of control by the accumulation of stress, but made no reference to depression or mental illness on that occasion. Mr. Johnson was not provided with any information about

Mr. Proulx's psychological state at the time of the incidents, although he was informed of follow-up by the EAS psychologist. The disciplinary investigation report concluded that a number of infractions of the Correctional Service of Canada Code of Discipline, some of them quite serious, had occurred, and recommended that severe disciplinary measures be taken regarding Mr. Proulx. The investigator gave the Warden of the Institution responsibility for determining the appropriate disciplinary measures (Exhibit E-4).

[37] Mr. Beaudry, Warden of Sainte-Anne-des-Plaines Institution at the time of the events, knew Mr. Proulx well because he usually met with him once a month in Mr. Proulx's capacity as a union representative. No management-union meetings were held during the summer of 2000. Following the August 11, 2000 incidents, at least two meetings were held with Mr. Proulx and the union representatives before the disciplinary measure was imposed. Neither Mr. Proulx nor the union representatives provided any information about Mr. Proulx's mental health, although the accumulation of stress and fatigue was considered an attenuating factor. At the meetings, Mr. Proulx admitted to the acts at issue and expressed regret for the consequences. Although he had been informed that Mr. Proulx was absent for medical reasons starting on August 14, 2000, Mr. Beaudry was unaware of the nature of the medical reasons, which the grievor provided directly to Health Canada. Mr. Beaudry added that he considered the stress to which Mr. Proulx was subject to be an attenuating factor since, when the disciplinary measure was determined, Mr. Proulx's employee record included no other disciplinary infractions. The negative effects on Mr. Chaumont and all the employees involved were aggravating factors, as was the fact that the incidents took place in the presence of inmates. Mr. Beaudry added that, although uttering death threats to another employee usually resulted in dismissal, under the circumstances a 20-day suspension was imposed on Mr. Proulx on September 6, 2000. The disciplinary measure letter reads in part as follows (Exhibit E-8):

[Translation]

...

SUBJECT: AUGUST 11, 2000 DISCIPLINARY INFRACTION

The disciplinary investigation carried out following the August 11, 2000 incidents indicates that on that afternoon you committed a number of disciplinary infractions, some of

them serious. These infractions are listed and described in detail below.

1. "An employee has committed an infraction, if he or she [...] is late for duty, absent from duty or leaves his/her assigned place of duty without authorization".

On August 11, 2000, your lunch break lasted from 11:30 a.m. to 1:40 p.m.; it is normally one half-hour, from 11:30 a.m. to 12:00 noon. Your supervisor, who had not been informed of the situation, was obliged to call you by cell phone in order to ascertain your whereabouts.

2. "An employee has committed an infraction, if he or she [...] wilfully or negligently causes unjustified waste, loss, or damage to any property of the Service or the property of any other person in the course of the performance of his or her duty".

On August 11, 2000, you damaged a vehicle belonging to the Service by punching and kicking it. The damage amounted to \$559.97.

3. "An employee has committed an infraction, if he or she [...] displays appearance and/or deportment which is unbecoming to an employee of the Service while on duty or while in uniform".

On August 11, 2000, you insulted your supervisors for several minutes and uttered threats, to the point where some co-workers were obliged to intervene in order to prevent you from taking action. This loss of control constitutes behaviour that is unbecoming to an employee of the Service.

4. "An employee has committed an infraction, if he or she [...] is abusive, by word or action, to other employees, while on duty or under circumstances related to his or her duties".

On August 11, 2000, you repeatedly tried to strike your supervisor Jean-Claude Chaumont, and even uttered repeated death threats to him. You also uttered threats to Georges Flanagan, the A.D. (M.S.).

5. "An employee has committed an infraction, if he or she [...] coerces, incites or attempts by any means to obtain the participation of another employee(s) in an illegal strike, concerted action, or in the commission of an infraction of the Standards of Professional Conduct".

On August 11, 2000, you gave Réal Martineau, a mechanic, a union order to stop his work on a CORCAN vehicle.

6. **"An employee has committed an infraction, if he or she [...] disregards established safety practices".**

On August 11, 2000, you drove dangerously in the complex. You not only struck a picnic table as you were leaving; you also drove around the shops at excessive speed. In this area, there is considerable pedestrian and vehicular traffic.

Under the circumstances, and given the seriousness of the infractions, I suspend you without pay for a period of 20 days, retroactively from the time you were suspended for administrative reasons related to the August 11, 2000 incidents. In closing, I remind you that much more severe disciplinary measures up to and including dismissal may be taken if such behaviour by you recurs.

...

[38] Mr. Proulx was reinstated at Sainte-Anne-des-Plaines Institution on June 12, 2001 following an internal mediation procedure that allowed the employer to change its decision to assign Mr. Proulx to Leclerc Institution.

[39] On February 11, 2002, the parties stated that they had closed their cases.

[40] Mr. Proulx's representative then requested that the hearing recess until February 13, 2002 and that the arguments be presented in Ottawa, so that he could attend his law courses on February 12, 2002. This request was challenged by counsel for the employer because the proposed conditions were inconvenient for the employer. Since the parties had stated that they were available to proceed from February 11 to 13, 2002 when the Board had consulted them in order to schedule the hearing, the adjudicator should dismiss this request. I dismiss the request by Mr. Proulx's representative, on the basis of the arguments presented by counsel for the employer and the fact that the scheduling of the hearing was definitive since the hearing had already been adjourned twice at the request of Mr. Proulx's representative. The hearing was re-convened on February 12, 2002 at 9:30 a.m. in the same location.

Arguments

[41] Counsel for the employer has argued that there is no evidence establishing that the CHRC has jurisdiction to hear the case, which is therefore strictly disciplinary in nature and which the adjudicator has jurisdiction to hear.

[42] Although the medical reports produced as evidence establish that Mr. Proulx experienced depression, they do not establish a link between the depression and the acts at issue. Mr. Proulx did not provide the employer with evidence that he was mentally disturbed at the time of the August 11, 2000 incident. The employer did all it could to assist Mr. Proulx under the circumstances, by ensuring that the EAS practitioners intervened. The EAS practitioners intervened after the August 11, 2000 incident; it was their duty to ensure that the information obtained remained confidential. Under these circumstances, the employer considers EAS intervention normal, not an indication of mental disability or depression.

[43] The acts by Mr. Proulx that are at issue following the August 11, 2000 incident, and that are listed in the disciplinary notice, actually occurred. Witnesses Martel and Chaumont are not managers, and have no interest in distorting the facts in order to harm Mr. Proulx. The testimony of Mr. Martel and that of Mr. Chaumont corroborated each other on the essential points, and were confirmed by the investigation report produced by Mr. Johnson, who has no interest in Sainte-Anne-des-Plaines Institution.

[44] The Warden of the Institution, Mr. Beaudry, considered all the facts and imposed a reasonable disciplinary measure that took into account the attenuating factors (clean disciplinary record, admission of the facts, remorse, and accumulation of stress). The testimony by the witnesses called by the employer was credible and must be accepted by the adjudicator.

[45] Witnesses Trottier and Quesnel have an interest in protecting their friend Mr. Proulx. Mr. Quesnel showed a great deal of bitterness against the employer, and is a member of a union team along with Mr. Proulx. The credibility of the testimony by the witnesses called by the grievor is therefore questionable.

[46] Mr. Proulx never categorically denied uttering death threats against Mr. Chaumont; instead, he testified that he did not recall having uttered them. He also testified that he did not intend to strike Mr. Chaumont, thus contradicting testimony

by two credible witnesses. As well, he admitted to threatening acts. Since Mr. Proulx's testimony about uttering threats is not very credible, the adjudicator should accept the testimony by Mr. Martel and Mr. Chaumont and conclude that Mr. Proulx did indeed commit the acts at issue in the employer's suspension letter (Exhibit E-8).

[47] The nature of the acts at issue, and their greater seriousness given that they occurred in a correctional institution and in the presence of other employees as well as inmates, calls for a severe penalty. The 20-day suspension imposed by Mr. Beaudry is reasonable; the attenuating factors were taken into account. The adjudicator should uphold this penalty and not second-guess the employer.

[48] According to Mr. Proulx's representative, the authorities and the CHRC decisions he cited establish that depression is a mental disability. The employer has an obligation to accommodate an employee with a mental disability, just as it has an obligation to accommodate an employee with a physical disability. Employees are not obliged to inform the employer of their needs. Persons experiencing depression are not always aware of their condition. The changes in the employee's behaviour should have led the employer to look into the matter. The employer should have reacted to the changes in its employee's behaviour that pointed to stress and made the employee more irritable. The employer cannot wait passively until an instance of discrimination occurs, but must be accepting of persons who exhibit social difficulties.

[49] Looking into the matter would have allowed the employer to identify Mr. Proulx's disability and the effect of his illness on his behaviour. In this case, the employer imposed a penalty without looking into the matter or considering how it could help the employee recover. It is clear from Mr. Proulx's testimony that the penalty imposed on him delayed his recovery and his return to work. That penalty runs counter to the obligation to accommodate and, under these circumstances, is discriminatory. To some extent, the employer took the situation into consideration by allowing Mr. Proulx to return to work at Sainte-Anne-des-Plaines Institution on June 12, 2001 and by changing its decision to assign him to Leclerc Institution in early June 2001.

[50] The principles of progression of disciplinary measures cannot be applied to a person with a mental disability. The analysis of attenuating and aggravating factors cannot be applied since this procedure discriminates against a person with a mental disability. In this case, the employer was aware of the employee's symptoms, referred

him to the EAS psychologist, and discriminated against him by subjecting him to the disciplinary procedure. In the case of an employee with a mental disability, the employer must think and act differently: the obligation to accommodate runs counter to the disciplinary procedure, although this fact does not mean that an employee with a mental disability can do anything with impunity.

[51] The above-mentioned authorities and principles cited by Mr. Proulx's representative were taken from a publication by the Centre for Labour Management Development and from the decisions in the following cases: *Willems-Wilson v. Allbright Drycleaners Ltd.*, 98 CLLC 230-007 (B.C. H.R. Trib.); *Zaryski v. Loftsgard and Percival Mercury Sales Ltd.*, 95 CLLC 230-008 (S.H.R.B.I.); *K.H. v. CEP*, 98 CLLC 220-030 (S.L.R.B.); *Mager v. Louisiana-Pacific Canada Ltd. (1998)*, 33 C.H.R.R.D./457 (B.C. Trib.); *Boucher v. Canada, T.D. 3/88 (C.H.R. Trib.)*; *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3.

[52] Mr. Proulx's representative has renewed his October 23 and 26, 2001 application for a recess until a decision was made by the CHRC on a complaint to be lodged.

[53] In rebuttal, counsel for the employer has argued that in this case the employer did not discriminate at all. The grievor's representative has distorted the concept of the obligation to accommodate in contrasting it with the disciplinary procedure. The employer has fulfilled its obligation to accommodate: it has adopted and applied an accommodation policy and adapted the workplace to the needs of persons with disabilities. The federal government has also fulfilled its obligation in full, by allowing universal equal access to employment.

[54] The disciplinary procedure penalized behaviour that is unacceptable in the workplace and cannot be held to run counter to the obligation to accommodate, which is a different type of requirement altogether. Although reinstating Mr. Proulx at Sainte-Anne-des-Plaines Institution is no longer at issue, his reinstatement shows that the employer accommodated Mr. Proulx by taking into account the effect on the state of his health of an assignment to another institution.

[55] Subsidiarily, if the adjudicator accepts the argument that the employer discriminated in this case, he will have to determine whether that discrimination forms the substance of the grievance, in accordance with the decision in *Boutilier (supra)*. In the present case, discrimination would necessarily be secondary, since the employer

imposed a disciplinary measure on the basis of culpable acts that had significant negative consequences on all the employees in general and on Mr. Chaumont in particular. The grievor has not established that the employer imposed a suspension on Mr. Proulx because he was ill. The grievor has alleged that the employer discriminated by not looking into the needs for accommodation created by the grievor's deteriorating state of health, which cannot form the substance of the grievances challenging the disciplinary measures. In addition, the grievor has tried to alter the nature of his grievance, which, in accordance with the decision in *Burchill (supra)*, cannot be done.

Reasons for Decision

[56] In *Boutilier (T.D.) (supra)*, McGillis J. of the Federal Court of Canada (Trial Division) set out the test to be applied when discrimination is alleged, writing as follows at pages 480 and 481:

...

(iii) *Nature of grievance lodged by Mr. Boutilier*

[46.] *I must now consider the nature of the grievance lodged by Mr. Boutilier in order to determine whether the Adjudicator had jurisdiction to entertain it.*

[47.] *In the present case, the question raised by Mr. Boutilier in his grievance is a complex, controversial and fundamental human rights issue concerning the availability of an employment benefit, namely marriage leave, to a homosexual couple. The entire substance of his grievance is an allegation of discrimination based on the denial of an employment benefit to him for reasons directly related to his sexual orientation. In other words, the allegation of discrimination underlies and forms the central, and indeed the only, issue in the grievance. To phrase the grievance in the terms of sections 2 [as am. by S.C. 1998, c. 9, s. 9] and 7 of the Canadian Human Rights Act, Mr. Boutilier alleges that the employer differentiated adversely in relation to him in the course of employment, on a prohibited ground of discrimination, namely his sexual orientation, by denying him marriage leave. In my opinion, his case falls squarely and directly within the terms of the statutory mandate accorded to the Commission and the Human Rights Tribunal under the Canadian Human Rights Act.*

...

This decision by McGillis J. was upheld by the Federal Court of Appeal in its decision in *Boutilier (C.A.) (supra)*, expressed as follows by Linden J.A. at page 40:

...

[17]. [. . .] Madam Justice McGillis held that the Adjudicator had no jurisdiction in this case, which, she concluded, clearly raised a "fundamental human rights issue". [...] I am of the view that Madam Justice McGillis was entirely correct in her decision and her reasons for that decision [...].

...

I must therefore determine whether the grievance is based on alleged discrimination that forms the main substance of the grievance.

[57] The evidence has established that neither Mr. Proulx himself nor his friend and confidant Mr. Quesnel anticipated the loss of control that occurred on August 11, 2000. However, Mr. Proulx should have been able to anticipate that loss of control because, having experienced depression in 1988, he is familiar with the warning signs of depression. I consider that the employer was in no better a position to assess Mr. Proulx's loss of control than were Mr. Proulx and his friends and co-workers. Nothing allows me to impose on the employer an obligation to check the state of its employees' health when they show signs of greater-than-normal stress or fatigue. Therefore the employer was not obliged to look into the matter in order to determine the source of the deterioration in Mr. Proulx's behaviour that culminated in the August 11, 2000 incident.

[58] At no time during the grievance procedure did the grievor or his representatives produce evidence from Mr. Proulx's medical record. As was the case during the disciplinary investigation and disciplinary meetings, the grievor and his representatives adduced no exculpatory evidence related to the state of Mr. Proulx's mental health. As well, no exculpatory evidence was produced at the hearing. Under these circumstances, I fail to see how there could be any obligation for the employer to look into the source of the behavioural problems of one of its employees, beyond the disciplinary investigation, disciplinary meetings, and the various stages of the internal grievance procedure aimed at assessing this behaviour.

[59] Nor does anything allow me to impose on the employer an obligation to look more deeply into the matter than it did by conducting its investigation into the reasons for the grievor's incriminating acts. Following the August 11, 2000 incidents, the employer conducted a disciplinary investigation, followed by disciplinary meetings, before the disciplinary measure that has been challenged was imposed. These procedures led the employer to conclude that the grievor committed culpable acts. Neither during the disciplinary investigation nor at the disciplinary meetings did the grievor or his representatives produce any evidence that Mr. Proulx was experiencing depression on August 11, 2000 or that, because of the state of his mental health, he was unaware of the consequences of his acts. The employer respected the confidentiality of all aspects of Mr. Proulx's medical record held by Health Canada, and the confidentiality of his file at the institution's EAS, to which Mr. Proulx had been referred.

[60] The employer had a duty to respect the confidentiality of the employee's medical record and his EAS file. I cannot imagine how discrimination on the basis of mental disability can be alleged when the evidence has clearly established that the employer was unaware of the existence or the nature of the mental disability when it decided to impose a disciplinary measure.

[61] In addition, the grievor has not established that the employer discriminated by failing to fulfil its obligation to accommodate. No evidence was produced of existing special needs that might be directly or indirectly related to Mr. Proulx's depression. The only evidence produced that might resemble a "need for accommodation" has to do with Mr. Proulx's reinstatement at Sainte-Anne-des-Plaines Institution on June 12, 2001. The evidence has shown that the employer changed its decision following representations on this point during mediation, specifying that it had not previously been provided with evidence of Mr. Proulx's depression. Thus the employer could not have discriminated by failing to fulfil an obligation to accommodate that it was unable to identify and that neither Mr. Proulx nor his representatives had asked it to fulfil.

[62] According to the medical reports produced as evidence, Mr. Proulx's depression was triggered by an accumulation of stress and fatigue. According to the physicians, the source of the stress and fatigue, and thus the source of the depression, was clearly the accumulation of Mr. Proulx's union responsibilities. The employer cannot be

blamed for personal decisions made by Mr. Proulx on the basis of his union convictions. In this regard, the employer has no obligation to accommodate: the purpose of the obligation to accommodate is simply to ensure that employees' working conditions allow them to perform their duties fully and without discrimination, not to react to employees' personal choices that have no direct relation to their duties.

[63] I cannot accept the argument by the grievor's representative that the employer discriminated in analysing the attenuating and aggravating factors in the case of Mr. Proulx, who apparently has a mental disability. It has not been established how or in what way Mr. Proulx was treated detrimentally or differently than other employees facing disciplinary procedures involving analysis of attenuating and aggravating factors. No evidence has been produced to support the argument that Mr. Proulx's apparent mental disability negatively influenced the employer's decision when it assessed the severity of the penalty to be imposed.

[64] I cannot accept the argument by the grievor's representative that it is discriminatory to apply a disciplinary procedure to an employee with a mental disability. In *Re Corporation of the City of London and Canadian Union of Public Employees, Local 101* (2001), 101 L.A.C. (4th) 411, Arbitrator Marcotte indicated the factors considered by adjudicators in a similar case, writing as follows at pages 443 and 444:

...

The above review of the submitted awards indicates, relevant to our purposes, that if an employee has a condition that is a handicap pursuant to the provisions of the Human Rights Code, (and Article 4 of the collective agreement in the instant case) the existence of that condition of itself does not act as a shield against employer-imposed discipline where the employee engages in misconduct: Re Toronto Transit, supra. Rather, whether the behaviour is found to be culpable or non-culpable for purposes of determining whether or not the chosen discipline is warranted, this consideration involves arbitral determination of whether or not there exists a causal link between the action that attracts discipline and the condition at issue: Re Weston Bakeries, supra, Re Maritime, supra, Re Loblaws Supermarkets, supra, Re Fraser Lake Sawmills, supra. In that regard, the characteristics of the condition are assessed in terms of their effects on the grievor's rationality, e.g. Re Weston Bakeries, supra, broadly in terms of judgmental ability, e.g. Re Loblaws Supermarkets, supra. In light of that assessment, the specific

[page 444] behaviour or behaviours at issue are considered in order to determine whether or not there can be said to be a causal link between the condition and the behaviour for purposes of deciding whether the grievor is accountable or culpable for his behaviour for disciplinary purposes, in particular, for purposes of determining the appropriateness of the discipline penalty imposed by the employer.

[65] In the present case, no evidence has been produced establishing a causal link between the acts at issue and Mr. Proulx's depression. In the absence of such a causal link, Mr. Proulx's mental disability cannot shield him from a disciplinary penalty.

[66] Under the circumstances, I conclude that the grievances are strictly disciplinary in nature and do not have to do with discrimination by the employer against the grievor. For these reasons, the allegation by Mr. Proulx's representative of discrimination cannot form the substance of the grievances, and this case does not meet the test set out by McGillis J. in *Boutilier (T.D.) (supra)*. The grievor's grievances fall within the jurisdiction of an adjudicator under section 91 of the PSSRA, since the grievor has not established that no other administrative procedure for redress is provided to him under an Act of Parliament.

[67] The application by the grievor's representative for an adjournment, on the ground that discrimination by the employer formed the substance of the grievance, is dismissed. In any case, if I were to conclude that a procedure for redress was provided to the grievor under another Act of Parliament, lack of jurisdiction on the merits of the case would prevent me from granting an adjournment.

[68] I shall therefore exercise my jurisdiction by rendering a decision on the merits of the grievances before me. It should be noted that the grievor's representative opted to present no arguments on the merits of those grievances.

[69] The facts underlying the grievances have not been substantially contested. Although Mr. Proulx testified that he did not recall uttering death threats to Mr. Chaumont, he did not directly deny that the incriminating words were spoken. The testimony by Mr. Chaumont and Mr. Martel was credible and has clearly established that Mr. Proulx uttered death threats to Mr. Chaumont. The other elements of their testimony about the August 11, 2000 incidents were consistent, corroborated each other, and were admitted by Mr. Proulx during his own testimony, which confirmed

these witnesses' credibility. Although Mr. Proulx denied that he intended or tried to strike Mr. Chaumont, he acknowledged that his behaviour might have indicated that he was threatening Mr. Chaumont. He also admitted threatening Mr. Flanagan when he returned to the institution. He admitted the seriousness of the acts at issue, and was aware of their seriousness at the time of the events since he stated that it was "all over" for him and that he could no longer return to work after such incidents. During the investigation conducted by Mr. Johnson, at the disciplinary meetings with Mr. Beaudry, and at the meeting at Mr. Chaumont's home, Mr. Proulx admitted to all the acts at issue.

[70] Under these circumstances, I can only conclude that Robert Proulx did commit the acts and speak the words at issue in the disciplinary suspension letter dated September 6, 2000, that is: being late returning to duty after lunch on August 11, 2000; damaging a vehicle belonging to the Service; insulting his supervisors; uttering threats; trying to strike Mr. Chaumont; inciting a mechanic to stop working on the CORCAN vehicle; and driving his vehicle dangerously.

[71] Although Mr. Proulx testified that he did not recall certain events (uttering death threats to Mr. Beauchamp), the medical assessments do not specify or explain those memory losses. As well, at no time during his testimony did Mr. Proulx state that he did not realize the consequences of his acts when he lost control on August 11, 2000. On the contrary, it was precisely the fact that he felt guilty and wanted to apologize to his co-workers that made him return to the institution. It was also the feeling of guilt that made him say that it was "all over" for him and that he could no longer return to work after committing such acts. While Mr. Proulx lost control of his emotions during the August 11, 2000 incidents, I consider that he was aware of the seriousness of his words and acts, even though those words and acts may have gone beyond what he was thinking.

[72] The grievor explained that the accumulation of stress and fatigue caused by his union responsibilities in addition to his work were apparently one trigger of his depression. He told his physicians that he had experienced symptoms well before the incidents (trouble sleeping and impatience), but added that he had not anticipated depression. However, having experienced depression in 1988, Mr. Proulx was in a position to assess whether his state of health was deteriorating and whether depression was again imminent. I consider that Mr. Proulx pushed his stamina to the

limit, erroneously believing that he could "take it". The excerpts from the above-quoted medical assessments and reports clearly indicate that Mr. Proulx was experiencing depression at the time of the August 11, 2000 incidents. The physicians did not specify whether the depression meant that Mr. Proulx did not realize the consequences of his acts. According to Mr. Proulx's testimony, the remorse he felt following the incidents was what made him return to Sainte-Anne-des-Plaines Institution in order to apologize to his co-workers on August 11, 2000. He also acknowledged to Mr. Beaudry at the disciplinary meetings, and to Mr. Chaumont at a meeting with him held shortly after the incidents, that he had behaved badly. On these different occasions, therefore, Mr. Proulx acknowledged that he was aware of the acts he had committed and of the seriousness of those acts. As well, he was aware that those acts could lead to disciplinary measures because, according to his testimony, he apparently said it was "all over" for him and that he could no longer return to work after such incidents.

[73] According to the testimony at the hearing, the employer took Mr. Proulx's state of health into consideration in determining the disciplinary measure. Although the Warden of the institution had not been informed by either Mr. Proulx or his representatives that Mr. Proulx was depressed, and although the Warden was unaware of the medical assessments and reports submitted to Health Canada, he was well aware that Mr. Proulx was fatigued and stressed. This stress and fatigue constituted an attenuating factor that the employer took into consideration in determining the severity of the penalty it imposed. This factor was also taken into consideration at the various levels of the grievance procedure, as was emphasized by Deputy Commissioner Watkins' reference to [translation] the "state of human weakness" in his response dated November 3, 2000.

[74] I conclude that the 20-day suspension imposed on Mr. Proulx is reasonable, given the circumstances and the seriousness of the effects on Mr. Chaumont's health (post-traumatic stress). The negative consequences on a number of employees, and the need to hold a debriefing session, confirm the seriousness of Mr. Proulx's acts and justify the severe penalty of a 20-day suspension.

[75] The grievor's grievances are therefore dismissed, and the disciplinary measures are upheld.

**Léo-Paul Guindon,
Board Member**

OTTAWA, May 6, 2002.

PSSRB Translation