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Federal Public Sector Labour Relations and Employment Board Act and *Federal Public Sector Labour Relations Act*

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

DANY DUVAL

Grievor

and

TREASURY BOARD
(Correctional Service of Canada)

Respondent

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

In the matter of an individual grievance referred to adjudication

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

For the Grievor: Olivier Rousseau, Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN

For the Respondent: Andréanne Laurin, counsel

Heard at Montreal, Quebec,
November 2 and 3, 2017, and March 20 to 22, 2018.
(FPSLREB Translation)

I. Individual grievance referred to adjudication

[1] On August 27, 2012, the grievor, Dany Duval, filed a grievance against the Correctional Service of Canada (CSC) for a failure to accommodate. He is a correctional officer at the CX-2 group and level. He is part of a bargaining unit represented by the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN ("the bargaining agent"), which entered into a collective agreement with the Treasury Board on June 26, 2006, the terms of which were maintained until November 5, 2013. That collective agreement applies in this case because the grievance deals with the period from January to June 2012.

[2] On February 4, 2013, the grievance was referred to adjudication. On February 1, 2013, notice was given to the Canadian Human Rights Commission (CHRC) in accordance with s. 210(1) of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2). On February 26, 2013, the CHRC informed the Board that it would not make representations in this case.

II. Legislative changes

[3] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board to replace the former Public Service Labour Relations Board. On the same day, the consequential and transitional amendments contained in ss. 366 to 466 of the *Economic Action Plan 2013 Act, No. 2* (S.C. 2013, c. 40) also came into force (SI/2014-84.) Pursuant to s. 393 of the *Economic Action Plan 2013 Act, No. 2*, a proceeding commenced under the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2) before November 1, 2014, is to be taken up and continue under and in conformity with the *Public Service Labour Relations Act* as it is amended by ss. 365 to 470 of the *Economic Action Plan 2013 Act, No. 2.*

[4] On June 19, 2017, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c. 9) received Royal Assent, changing the name of the Public Service Labour Relations and Employment Board and the titles of the *Public Service Labour Relations and Employment Board Act* and the *Public Service Labour Relations Act* to, respectively, the Federal Public Sector Labour Relations and Employment Board, the *Federal Public Sector Labour Relations and Employment Board*

Act, and the *Federal Public Sector Labour Relations Act*.

[5] To ease reading this decision, the term "Board" refers to both the Public Service Labour Relations and Employment Board and the Federal Public Sector Labour Relations and Employment Board. Similarly, the term "*Act*" refers to both the *Public Service Labour Relations Act* and the *Federal Public Sector Labour Relations Act*. Finally, the term "employer", depending on the context, refers to either the Treasury Board, which is the legal employer, or the CSC, to which the employer's powers are delegated.

III. Summary of the evidence

[6] The grievor testified on his own behalf. He also called to testify Pierre Dumont, the regional president of the bargaining agent for Quebec from 2004 to 2013; and Catherine Quintal, legal counsel for the bargaining agent from 2010 to 2014. The employer called to testify Suzanne Robitaille, the regional advisor for the Return to Work Program from May 2011 to September 2013; Alessandria Page, the deputy warden of Cowansville Institution from 2010 to 2013; and Marc Lanoie, the warden of Donnacona Institution from January to June 2012.

[7] The grievor began working for the CSC as a correctional officer in November 1995. At first, he worked at La Macaza Institution. Then, in July 1996, he agreed to be transferred to Port-Cartier. He returned to La Macaza in 1999. He was part of a team that handled difficult interventions (cell extractions, interventions in situations of violence, etc.).

[8] In 2006, the grievor was charged with spousal abuse. He spent approximately a month in prison. The charge resulted in a conditional discharge, with probation conditions that were lifted after a year. He has a child over whom he shares custody with his ex-spouse.

[9] On January 31, 2008, an inmate charged at the grievor and uttered death threats. From that point on, the grievor stopped working after being diagnosed with post-traumatic stress disorder (PTSD). After an attempt to return to work on February 16, 2009, which failed due to a relapse on June 4, 2009, the medical advice given in February 2010 was that the grievor could never again work in a penitentiary environment. Thus, the CSC stopped paying his salary, and he received benefits from the Commission de la santé et de la sécurité du travail du Québec (CSST), which

encouraged him to find a different job. He began a heavy machinery course, but he was arrested in October 2010 for impaired driving. The matter was settled around December 2011, which included suspending his driver's licence for one year.

[10] The heavy machinery course no longer seemed a good option. Gradually, as he thought about the professions he could pursue, the grievor realized that his best option was being a correctional officer. He knows the job, and he did it well. He wants to help people, which he thought he could do in that area.

[11] The grievor underwent therapy, which the CSST paid for, to treat the PTSD. He continued seeing a psychologist.

[12] As of summer 2011, the grievor took steps towards returning to his CX-2 position by communicating with the warden of Port-Cartier Institution. In autumn 2011, he met with the bargaining agent representatives Mr. Dumont and Ms. Quintal and Robert Jacques, who was in charge of reinstating employees who were injured on the job. According to the testimonies of Mr. Dumont and Ms. Quintal, they were impressed by the grievor's determination and seriousness and decided to help him return to work despite the medical advice stating that he could no longer work in a correctional environment.

[13] Ms. Quintal testified to the intransigence of CSC management, which in fall 2011 refused to consider the grievor returning to work. At the same time, according to Ms. Robitaille's testimony, the employer decided to sever the employment relationship due to the medical advice of February 2010. The grievor received a letter from the CSC that presented him with three options: medical retirement, resignation, or dismissal.

[14] The grievor discussed this letter with his doctor, who reassessed the grievor and signed a letter on January 30, 2012, according to which the grievor was ready to return to work, with the only accommodation measure being that he was not to return to work at La Macaza Institution.

[15] The doctor's letter was addressed to the CSST. According to the testimony of Ms. Robitaille, who coordinated the Return to Work Program, she was informed of it only around February 20, 2012, when the grievor called her to ask when he could return to work. Her notes on his file, which were adduced at the hearing, confirm it. Starting in May 2011, when she took office, she kept highly detailed notes of the

grievor's situation. There are no entries from September 20, 2011, to February 20, 2012, the date on which he called her.

[16] In fact, as Ms. Quintal testified, the employer considered that the grievor was able to return to work as of February 1, 2012. Indeed, during a meeting of the regional return-to-work committee (which was a joint employer-bargaining agent committee) on April 19, 2012, the grievor's case was discussed. According to the review that the employer prepared, the grievor had been able to return to work since February 1, 2012.

[17] After receiving the grievor's call, Ms. Robitaille started searching for positions for him. They both testified about that time. He was required to fill out a form to apply for a transfer, which he did as of late February 2012. Before the fiscal year ended (March 31), he had to fill out a new form.

[18] The results of the grievor's second-language evaluation had expired. The evaluation comprises three tests: comprehension, written expression, and oral expression. The third test cannot be taken until the other two are successfully completed. The new evaluation took some time because the grievor failed the written expression test by a few points. He took it again and passed it a month later (which is the minimum wait period between attempts). Ms. Robitaille searched for a position for him, but she could search only for unilingual positions until he successfully completed the second-language evaluation.

[19] During this time, the grievor asked to receive his salary, under his understanding of the Global Agreement between the CSC and the bargaining agent. It sets out that people injured at work (according to the CSST) are entitled to their salaries while they are unable to work, provided the CSST confirms that they will return to work and that they are following therapy adapted to their needs. Ms. Robitaille told him that it depended on the institution's warden. Since the grievor's substantive position was still at La Macaza, the warden of that institution had to make the decision. However, that Warden refused to pay his salary because the grievor was unable to return to work there. That Warden did not testify at the hearing.

[20] Throughout that time, Ms. Robitaille and the grievor had frequent discussions. She testified that despite clearly being worried, he was always polite and respectful. On many occasions, he took the initiative of calling to inquire about the state of his file.

[21] On February 21, 2012, Ms. Robitaille sent the transfer application to the grievor. He filled it out and sent it in on February 28, 2012. On March 20, he called her. She explained to him that he had to redo his transfer application because they have to be renewed when a new fiscal year begins on April 1. He sent a new application on March 30.

[22] In addition, Ms. Robitaille testified about the steps taken with the CSST from the end of February to the start of March 2012 to reconcile the treating psychiatrist's two contradictory notes. By telephone on February 29 and then via a letter dated March 13, 2012, the CSST confirmed that the February 2, 2010, ban on working in a penitentiary environment was lifted. The grievor was now fully able to return to his position, other than at La Macaza Institution.

[23] Ms. Robitaille contacted the CSC's headquarters and the authorities at Cowansville and Donnacona institutions (which were two of the three choices in the transfer application) to find the grievor a position. There were no suitable positions in Ottawa. At Cowansville, the positions to be filled were bilingual, and the grievor had not yet successfully completed his second-language evaluation. At Donnacona Institution, management had some concerns about his reinstatement. The union local had some reservations due to his past and his difficulties at La Macaza Institution. In addition, the inmate involved in the accident at work on January 31, 2008, was then incarcerated at Donnacona Institution.

[24] Ms. Robitaille also spoke of the suspension of the grievor's driver's licence as problematic. Mr. Lanoie did not seem to consider it an obstacle to reinstatement.

[25] The grievor called Ms. Robitaille on April 10 because he was worried that he did not have a retake date for his second-language written expression test. She confirmed with the staffing service that it would take place on April 18. On May 3, he called her to say that he had passed this test, and he passed the oral test on May 9. Therefore, as of that date, he could be placed into a bilingual position.

[26] Ms. Page, the deputy warden of Cowansville Institution, testified that management had concerns about the spousal abuse charges from the past because the grievor's ex-spouse was at Cowansville. She added that many inmates at Cowansville were serving sentences for spousal abuse, which also preoccupied management. In addition, throughout March and April, the grievor did not have his bilingualism result.

In May, the possibility of Donnacona Institution was discussed, which was his second choice. Ms. Page stated that from that point on, discussions were no longer held with Cowansville Institution.

[27] At the hearing, both parties' witnesses spoke about the closing of Leclerc Institution in April 2012, which forced the employer to quickly move approximately 200 employees. At the same time, a position still had not been found for the grievor. On May 17, he informed Ms. Robitaille that he had passed his English oral proficiency test. She left him a message on May 18 stating that she was awaiting a "[translation] decision on priority management following budget cuts/Leclerc's closing". She added in her message that he would receive an update the following week.

[28] Ms. Robitaille's testimony implied that the grievor had told her that he had to undergo an operation in early May and that he would be in recovery for three or four weeks. For his part, he testified that he recalled telling her only that during that time, he could perform administrative duties but that he would not be able to lift more than 10 pounds.

[29] On May 24, 2012, Ms. Robitaille indicated in her notes that she left the following message: "[translation] … informed him that I am still awaiting instructions considering the current situation with budget cuts … and priority management vs RTWP [Return to Work Program]".

[30] At the end of May 2012, Ms. Robitaille spoke with Josée Tremblay, the deputy warden of Donnacona Institution. There were no longer any obstacles to the grievor's reinstatement. The union local agreed. Mr. Lanoie, the warden there, testified that effectively, the regional union (notably, Mr. Dumont) had intervened in the grievor's favour and that from then on, the possibility became real. Nonetheless, Mr. Lanoie insisted on meeting the grievor because according to him, the decision to agree or not was entirely up to him as the warden.

[31] The meeting took place on June 15, 2012. On June 19, the grievor began the mandatory training before returning to his position, given his extended leave. From that date on, he was back at work and therefore was paid. The last entry in Ms. Robitaille's notes indicates that on August 19, 2013, he was transferred to Cowansville, his first choice of institution in the transfer application.

[32] The grievor testified about how the January to June period had been stressful. He had been ready to work and had found it difficult to accept the obstacles that the employer seemed to be erecting.

IV. Summary of the arguments

A. For the grievor

[33] The grievance is about the employer's failure to offer the grievor adequate accommodation measures.

[34] The grievor suffered an accident at work on January 31, 2008. After being away for close to four years (including an attempt to return to work that failed), he once again became fully able to return to work. Rather than facilitate his return to work, the employer used false pretences to delay his reinstatement.

[35] According to the medical certificate, the grievor was once again able to work on January 30, 2012. It is possible that the employer was not informed of it immediately, but the CSC indicated in the document from the regional return-to-work committee that the grievor was fit on February 1, 2012. However, he had to wait until June 19, 2012, to be reinstated.

[36] What caused that delay? The grievor's return was not a surprise. The bargaining agent had already spoken with the employer about it in fall 2011. Note that according to Ms. Robitaille's notes, at that time, the CSC had already decided to sever the employment relationship. This explains the obstacles to reinstatement that began in February 2012 despite the employer's duty to accommodate.

[37] Ms. Robitaille clearly explained that the approach consisted of carrying out a transfer, which was the reason for the bilingualism requirement and the search for a permanent position rather than a temporary one while awaiting a permanent one. While the grievor had been waiting since February for a position to be found for him, the employees of Leclerc Institution were quickly moved when that institution's closure was announced in April 2012.

[38] The testimonies of Ms. Page and Mr. Lanoie confirmed that the steps the grievor took to return to work were considered steps toward a transfer, because he could not return to his home institution, instead of steps toward accommodation, during which the employer could have made adjustments to consider its duty to accommodate,

particularly with respect to the bilingualism requirements.

[39] Nevertheless, in the event that it failed to find the grievor a position immediately, it was the employer's duty, under the Global Agreement and Bulletin 2006-05, to pay the grievor his salary as soon as he was once again fit to work.

[40] The grievor claims compensation for pain and suffering under s. 53(2)(e) of the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; *CHRA*). During his attempts to return to work as quickly as possible, he encountered the CSC's obstacles, which caused him much frustration, distress, and insomnia. The CSC was aware of his profound concern, as testified to many times by Ms. Robitaille's notes. During her testimony, she also acknowledged the grievor's transparency, proactivity, and politeness during that period. For failing to accommodate and for his anxiety (as in Ms. Robitaille's testimony and notes), the grievor requests $10 000 in compensation.

[41] From the instant the CSST confirmed that the grievor was able to return to work, on February 29, 2012, the employer had a duty to reinstate him. However, the attitude of Ms. Robitaille, who was in charge of the return-to-work process, was passive. Sometimes the grievor and sometimes the CSST kick-started the process. For its part, the CSC was clearly slow and reluctant to return the grievor to work. Ms. Page and Mr. Lanoie both stated that temporary accommodations were possible but that they had not been considered for the grievor. A permanent transfer was sought for him without considering the employer's duty to accommodate.

[42] Ms. Quintal testified to management's reaction in fall 2011, which was that accommodating the grievor was out of the question. Ms. Robitaille indicates in her notes that steps had been taken toward severing the employment relationship. Furthermore, the grievor received the letter outlining his options. The actions taken by CSC's management contradicted Directive 2010-43, which sets out that human rights considerations must take precedence over all other considerations. However, no temporary assignments were considered for the grievor, and he was put in charge of taking all the necessary steps (redoing his transfer application, communicating with the deputy wardens of institutions, etc.). Starting in summer 2011, he communicated with the Warden of Port-Cartier Institution to explore a return to work. Ms. Robitaille did not help at all at that time. On the contrary, according to Ms. Robitaille's notes, the strategy was to terminate the grievor's employment, which she confirmed in her

testimony.

[43] It is also clear that beginning when the CSC considered the grievor returning, as of February 20, 2012, the day on which Ms. Robitaille received his call, the situation was considered to involve a transfer, not an accommodation. The file dragged on. The failed second-language evaluations and the suspension of the driver's licence were considered obstacles to the reinstatement; once again, the possibility of providing accommodation was in no way considered.

[44] Finally, once the second-language tests were successfully completed, nothing stood in the way of the reinstatement at Cowansville Institution. Despite the grievor's preference for that institution, and despite the fact that Donnacona Institution is a maximum-security facility and that the inmate involved in the incident that provoked the PTSD was there, the CSC did not choose the Cowansville Institution option; it is a medium-security institution.

[45] As remedy, the grievor asks for his salary from February 1 to June 19, 2012, with the proviso that he repay the CSST. He also requests that he be paid for the overtime he would have worked from March 13, the date on which the CSST confirmed his ability to work.

[46] In addition to the $10 000 in damages for the pain and suffering to which he was subjected, he also asks for $5000 in damages because the CSC acted recklessly.

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

[47] The employer believes that the grievance should be dismissed.

[48] The grievor's treating psychiatrist declared him unfit to work in a correctional environment on February 2, 2010. From that point on, under the Global Agreement and Bulletin 2006-05, he stopped receiving his salary and moved to the CSST benefits plan.

[49] On January 30, 2012, the same psychiatrist signed a report indicating that the injury was consolidated and that the only functional limitation was not to return to his home institution, La Macaza.

[50] As soon as Ms. Robitaille was informed of this by phone, she began taking action. She asked the grievor to send her his CV and a transfer request. At the same time, she emailed headquarters to find out whether employment opportunities were

open in Ottawa.

[51] Furthermore, the CSC needed more clarification because the two reports from the psychiatrist were contradictory. Written clarification from the CSST dated March 13, 2012, specified that the absolute limitation of February 2, 2010, was cancelled and confirmed that the only limitation was not returning to La Macaza Institution.

[52] From that point on, the reinstatement was under way. The grievor's bilingualism qualification had expired, so he had to retake the tests if he wanted to apply for a bilingual position. He failed the written expression test, and he had to wait a month to retake it. He passed this second test in April, which was a condition for taking the third test, the oral proficiency test, which he passed on May 9.

[53] In May 2012, the grievor was to have an operation. On May 24, he informed Ms. Robitaille that his recovery period was over. On June 15, he met with the Warden of Donnacona Institution, Marc Lanoie. He was reinstated in a CX-02 position on June 19, 2012.

[54] These facts do not lend themselves to a discrimination allegation. On the contrary, the CSC showed diligence in helping the grievor to return to work as quickly as possible given the circumstances.

[55] According to the employer, this case poses the following two questions: Is there *prima facie* discrimination? If so, did the CSC offer reasonable accommodation?

[56] According to the well-known principle set out in *Ontario Human Rights Commission v. Simpsons-Sears*, [1985] 2 S.C.R. 536 at 558 and 559, it is first up to the grievor to provide sufficient evidence of discrimination; that is, evidence that "… covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the [grievor's] favour in the absence of an answer from the respondent-employer." In return, the employer is required to "… show that he has taken such reasonable steps to accommodate the employee as are open to him without undue hardship."

[57] Based on the employer's argument, I find that *prima facie* discrimination is substantiated and that the grievor was entitled to reasonable accommodation measures because the employer's entire argument consisted of showing that reasonable accommodation had effectively taken place.

[58] The employer argues that according to case law, reasonable accommodation does not necessarily have to be perfect or immediate. Being reasonable means that it is acceptable. In addition, in its search for a solution, the employer can certainly consider its operational needs.

[59] In this case, the employer argues that it exercised due diligence. From the grievor's first call to report that he was fit to work, Ms. Robitaille took steps to help him return to work. However, in addition to the grievor's reality, the reality of correctional services must also be considered.

[60] Ms. Page and Mr. Lanoie testified about the particular difficulties that arose in their respective institutions with respect to reinstating the grievor. At Cowansville Institution, the positions to be filled were bilingual, and the grievor had not yet successfully completed his second-language evaluation. And the spousal abuse charges laid against him were a concern. His ex-wife was at Cowansville, and a large portion of the inmate population there serves sentences for spousal abuse.

[61] As for Donnacona Institution, the union local had expressed some reluctance in light of comments from correctional officers at La Macaza Institution. Furthermore, security measures had to be implemented because the inmate involved in the incident that caused the PTSD was at Donnacona Institution.

[62] Eventually, all those fears were resolved, but the CSC cannot be faulted for exercising caution when it reinstates an employee in such a way as to ensure a successful return, with the support of management and the union. Furthermore, according to Ms. Robitaille, the objective was a permanent reinstatement, such that a temporary assignment would not have been useful.

[63] The grievor's situation also needed to be considered. The CSC had contradictory information on the functional limitations, which had to be clarified; the CSST did so only in mid-March 2012. The operation the grievor underwent in May required a certain recovery period. Finally, given his extended absence, much training had to be brought up to date.

[64] Given all these factors, the grievor's reinstatement, which took place between the end of February and June 19, 2012, was rather successful. The CSC could not begin its efforts before being informed on February 20, and the three- or four-week recovery

period represented another obstacle.

[65] Ms. Robitaille's efforts were not in bad faith, as Mr. Dumont testified. The facts relating to a "strategy" to sever the employment relationship predate the period covered by the grievance and were never addressed as part of the grievance procedure. They are not relevant, according to the principle in *Burchill v. Canada (Attorney General)*, [1981] 1 F.C. 109 (C.A.).

[66] Finally, the employer claims that the grievor was not penalized by the delay in the reinstatement because during this time, he received CSST benefits. Furthermore, the overtime he claims was not guaranteed and therefore should not be paid. In closing, the employer emphasized that if the Board allows the grievance, the remedy cannot go back more than 25 days before the grievance was filed.

V. Reasons

[67] The grievance is about a failure to accommodate. The employer acknowledged the need for accommodation and maintained that it met its obligations in this respect.

[68] The legal duty to accommodate arises from the fact that without it, it could be concluded that an employee was the victim of discrimination based on one of the reasons prohibited by the *CHRA*. For the grievor, who suffered an accident at work that resulted in PTSD, it is clear that a psychological disability, from the PTSD, is responsible for his extended absence from work. Due to the nature of his injury, his doctor imposed a functional limitation — he must not return to his home institution. However, the reinstatement to work, when he was fit to work, did not take place immediately, and as a result, he was deprived of his salary during this time.

[69] Therefore, the three parts of *prima facie* discrimination according to *Simpsons-Sears* are present: the grievor is part of a group with a characteristic (disability) that is a prohibited ground of discrimination, he was subject to adverse treatment (he was not immediately reinstated when he was fit to work), and a connection between those two facts exists because his disability made it necessary to search for a position outside his home institution. I do not think I have to further explore *prima facie* discrimination. As in *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43, the issue is entirely the adequacy of the accommodation.

A. <u>The adequacy of the accommodation</u>

[70] The employer argues that it could not have initiated the accommodation; that is, the return to work in a position elsewhere than at the home institution, before February 20, 2012, the date on which the grievor informed Ms. Robitaille of his fitness to work.

[71] I am not prepared to impute motives to Ms. Robitaille. I believe that she took the steps she considered necessary to successfully reinstate the grievor to the CSC. The bilingualism requirement for positions at Cowansville, the charge of spousal abuse while the grievor's ex-wife was at Cowansville, and the CSC's concerns about the objections of the union local at Donnacona Institution and the presence of the inmate involved in the accident at work — none of these facts are excuses; rather, they are legitimate concerns.

[72] The grievor noted the absence of attempts to find a temporary assignment while waiting for a permanent position. Again, I recognize that the employer's reasoning was valid. In a CX-02 position, it is preferable to carry out a successful and long-term reinstatement.

[73] In my opinion, Mr. Lanoie's testimony confirmed the CSC's willingness to reinstate the grievor. The union local's initial opposition was countered by the intervention of the union at the regional level, and efforts were made to deal with the presence of the inmate involved in the accident at work. Mr. Lanoie's meeting with the grievor led to his transfer the following week.

[74] Nevertheless, I find that the grievor's accommodation was deficient because the employer addressed the issue as if it were about staffing rather than human rights.

[75] The employer referred me to *City of Toronto v. Canadian Union of Public Employees, Local 79*, [2001] O.L.A.A. No. 668 (QL) ("*CUPE*"), which deals with an accommodation issue and sets out a list of criteria drawn from case law to assess whether an accommodation is reasonable, as follows:

- the nature of the employee's work before the disability began;
- the nature of the disability;
- the available information on the functional limitations;

- the injured employee's cooperation;
- the nature of the enterprise and its size;
- the employer's knowledge about accommodation;
- the opportunities for an adequate accommodation; and
- the number of accommodation measures required.

[76] The list is useful, but the context of the *CUPE* decision is very different. That case concerned an employee who suffered from cerebral palsy and who, over the years she worked, had developed serious carpal tunnel syndrome. She needed specific accommodation measures, and evidence showed that the employer was late by approximately 14 months from when it became aware of the situation in implementing the necessary measures.

[77] The employer distinguished this case by indicating that only three-and-a-half months were needed to reinstate the grievor into his position. I think that a completely different distinction must be made.

[78] This is not a matter of accommodation measures being needed to facilitate carrying out tasks. Only one measure was required, namely, finding a position at a different institution. The CSC made the grievor responsible for finding another position. He had to apply for a transfer, which he then had to renew after two months. It was implied that his transfer was complex, given the number of employees moving from Leclerc Institution, the staffing specific to institutions, budget questions, and so on. His return to work was not dealt with as an accommodation issue but as a transfer issue, which Ms. Robitaille and Mr. Lanoie confirmed.

[79] I understand that a return to work means that the CSC has to consider many factors to ensure a successful return rather than a relapse. However, the accommodation was deficient because in how the grievor was dealt with, it was never acknowledged that he had the right to return to his position following an accident at work and that it was up to the employer to facilitate the return.

[80] The return to work was equated to a transfer process, at the employee's discretion, rather than the employer's duty. The accommodation was deficient because the grievor's right to employment was not recognized.

[81] According to Ms. Robitaille's notes, the grievor called her many times to ask her what was going on with his case. She answered the calls and explained the difficulties encountered, but according to her testimony, she did not reassure him with respect to the employer's duty to find a solution.

[82] The CSC failed to recognize the return to work as an accommodation and instead treated it as a simple transfer. Mr. Lanoie gave as an example someone deciding to move for personal reasons. In the grievor's case, the transfer was not a personal choice but a medical necessity, which gave rise to the employer's duty to find a reasonable accommodation.

[83] The consequence to the grievor from the employer's attitude was being deprived of his salary, which he had a right to because he was ready to work. The other consequence was the uncertainty he was left with, especially when it came to budgets and operational issues, even though he had a right to his job and it was up to the employer to find an adequate accommodation. The cooperation of the grievor and the bargaining agent was clearly established by the evidence in such a manner that the principle established in *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970 (all parties must collaborate in the effort), was well respected.

B. Remedy

[84] The grievor relied on the Global Agreement to argue that he was entitled to his full salary from the instant he was fit to work. I agree that he was entitled to his salary, but I do not rely on the Global Agreement to reach this conclusion.

[85] The CSC and the bargaining agent negotiated the Global Agreement outside the collective agreement. The agreement sets it out in the following very clear words on page 33 of the one signed on June 26, 2006:

> *It is understood that the provisions contained in this global agreement are not part of the collective agreement for the CX group and therefore are not subject to grievances….*

[86] I am seized of this grievance under s. 209(1)(a) of the *Act*, which deals with interpreting and applying a collective agreement. The grievance involves a failure to accommodate under the collective agreement and the *CHRA*. The Global Agreement cannot be used to support a grievance referred to adjudication, so I cannot rely on it as a basis for a remedy.

[87] The grievor has a right to his salary and his benefits for the period in which he was fit to work. The fact that he cannot work at La Macaza made the transfer necessary as an accommodation measure. However, the transfer should not be a condition for paying the grievor his salary. He has the right to it because he is fit to work. The fact that he might not have duties to perform does not depend on his will. Instead, it is related to the employer's duty to offer him an accommodated position.

[88] The employer claims that it was not informed of the grievor's fitness to work until he called Ms. Robitaille. He does not have to pay for communication delays between the CSST and CSC. The evidence adduced, which was not contested, is that on January 30, 2012, the doctor informed the CSST that the grievor was fit to return to his duties with only one accommodation measure, which was to not return to La Macaza so as not to trigger a recurrence of PTSD. The evidence also shows that as of February 1, 2012, the CSC considered him fit to return to work, as attested to by the document the CSC prepared for the regional return-to-work committee meeting.

[89] To the extent possible, the grievor must be placed in the state in which he should have been as of February 1, 2012. Therefore, the employer will have to pay his salary and all benefits from that date forward.

[90] In its arguments, the employer briefly mentioned the fact that the remedy should apply only to the 25 days before the grievance was filed. The grievor responded that since the grievance is about a failure to accommodate, such reasoning does not apply. I agree.

[91] Failing to accommodate is discriminatory. Should this be the case, the discriminatory act qualifies for relief under the *Act*. The grievor filed the grievance once he returned to work. The employer did not raise a failure to comply with a deadline during the reference to adjudication. Therefore, it cannot at this time invoke the deadline based on the reasoning in *Canada (National Film Board) v. Coallier*, [1983] F.C.J. No. 813 (QL).

[92] The grievor also asked to be paid the overtime that he would have worked according to the average established for his group in the institution. I do not think that overtime has to be paid, the calculation of which would be based on speculation.

[93] The grievor requested compensation under the *CHRA*. The *Act* sets out the

following at ss. 226(2)(a) and (b):

> ***226 (2)*** *An adjudicator or the Board may, in relation to any matter referred to adjudication,*
>
> ***(a)*** *interpret and apply the* Canadian Human Rights Act *and any other Act of Parliament relating to employment matters, other than the provisions of the* Canadian Human Rights Act *that are related to the right to equal pay for work of equal value, whether or not there is a conflict between the Act being interpreted and applied and the collective agreement, if any;*
>
> ***(b)*** *give relief in accordance with paragraph 53(2)(e) or subsection 53(3) of the* Canadian Human Rights Act ….

[94] Sections 53(2)(e) and (3) of the *CHRA* read as follows:

> ***53 (2)*** *If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:*
>
> …
>
> ***(e)*** *that the person compensate the victim, by an amount not exceeding twenty thousand dollars, for any pain and suffering that the victim experienced as a result of the discriminatory practice.*
>
> ***(3)*** *In addition to any order under subsection (2), the member or panel may order the person to pay such compensation not exceeding twenty thousand dollars to the victim as the member or panel may determine if the member or panel finds that the person is engaging or has engaged in the discriminatory practice wilfully or recklessly.*

[95] Assessing the amount to grant when an adjudicator determines that a grievor is entitled to compensation under s. 53(2)(e) is not an exact science, as other adjudicators have pointed out.

[96] In *Stringer v. Treasury Board (Department of National Defence) and Deputy Head (Department of National Defence)*, 2011 PSLRB 110, the adjudicator reviewed many decisions to attempt to establish the amounts to grant as compensation under the *CHRA*. He concluded his review with the following comment:

> ***36*** *When analyzing the eight decisions referred to by the parties (disregarding* Hughes*), it became apparent that most of them do not include a detailed analysis of the rational [sic] used by the Tribunal or the adjudicator to arrive at the specific amount ordered for pain and suffering and for special compensation, if applicable. However, it is clear that the seriousness of the psychological impacts that discrimination or the failure to accommodate had on the complainants or the grievors is the main factor that justified each decision. It is also clear that recklessness rather than wilfulness was the principal ground used to grant special compensation to the grievors or the complainants.*

[97] In *Stringer*, the employer failed to offer an employee with a hearing impairment the tools he needed to carry out his work properly over a period of almost three years. The adjudicator awarded $10 000 for pain and suffering, given the indignity and humiliation that Mr. Stringer suffered throughout that time. In addition, the adjudicator awarded the maximum in special damages, $20 000, for the employer's reckless attitude, because it had completely neglected its obligation to accommodate.

[98] The grievor submitted as case law *Nicol v. Treasury Board (Service Canada)*, 2014 PSLREB 3, in which the adjudicator awarded significant amounts under the *CHRA*'s compensation provisions. In that case, the adjudicator found that the employer had completely failed in its duty to accommodate. She concluded as follows:

…

> ***113*** *The employer took no steps to complete a vocational rehab assessment and refused to discuss how to restructure any of the jobs to meet the recommendations for less demands on the grievor or less stringent duties and performance standards.*

…

[99] Furthermore, Mr. Nicol was deprived of the opportunity to work for four years because the employer refused to consider the slightest solution. After four years, Mr. Nicol resigned himself to taking medical retirement. In addition to ordering the payment of his salary from 2008 to 2011, the adjudicator awarded $20 000 for pain and suffering and $18 000 as special compensation as a result of the employer's wilful conduct over nearly four years, which is described in the following words at paragraph 157: "… repeated, sustained and calculated to ensure [Mr. Nicol] would not return to work."

[100] In *Rogers v. Canada Revenue Agency*, 2016 PSLREB 101, a failure to accommodate eventually led to Mr. Rogers being dismissed as unfit to work. The employer had received information from a doctor, who supported the return to work, and for almost one year, it did not make any efforts with Mr. Rogers and his bargaining agent to make his return to work possible. The Board found that Mr. Rogers had a right to his salary for the period in which he was fit to return to work and that the distress that the employer had caused him justified damages for pain and suffering. The Board awarded $15 000 for that reason and $10 000 as special damages because the employer had completely neglected to apply its accommodation policy.

[101] In *Rogers* and *Nicol*, failing to accommodate led to employment being ended. The facts in this case are completely different because the return to work took place within four months of the medical certificate authorizing it being issued. However, the fact that salary was not paid to the grievor, despite his repeated requests, caused him undue stress following his return from an extended leave for PTSD. He was not informed that he had a right to his employment. Instead, he was told that he had to be transferred. Budgets and priorities were discussed with him. However, he had a right to his job. I think that as a result, waiting for the reinstatement was particularly stressful. By neglecting that aspect of accommodation, the CSC caused the grievor to experience pain and suffering, which it is right to compensate. In the circumstances, I find damages of $5000 appropriate to compensate for that pain and suffering.

[102] In this case, I am not prepared to impose special damages, which are more punitive in nature. Ms. Robitaille handled the grievor's file, and Mr. Lanoie's testimony showed openness on the CSC's part to successfully reinstate the grievor. The accommodation was deficient, but there was no intentional or reckless conduct by the CSC aimed at not reinstating him.

[103] A final comment is required. The grievor worked very hard to overcome many challenges to return to work. As confirmed by Ms. Robitaille in her testimony, he was polite and respectful at all times, despite his strong concerns, which were particularly related to the loss of earnings.

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

(The Order appears on the next page)

VI. Order

[105] The grievance is allowed.

[106] The employer will pay the grievor his salary and associated benefits for the period from February 1, 2012, to June 18, 2012.

[107] The employer will pay the grievor $5000 in damages under s. 53(2)(e) of the *Canadian Human Rights Act*.

[108] The amounts owing under paragraphs 106 and 107 must be paid within 60 days of this decision.

[109] I will remain seized for 90 days from the date of this decision of all issues related to calculating the amounts due under paragraph 106.

June 21, 2018.

FPSLREB Translation

Marie-Claire Perrault,
a panel of the Federal Public Sector
Labour Relations and Employment Board