Date: 20180709

File: 566-02-11222

Citation: 2018 FPSLREB 58

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

EKARINA SANTAWIRYA

Grievor

and

TREASURY BOARD
(Canada Border Services Agency)

Employer

Indexed as
Santawirya v. Treasury Board (Canada Border Services Agency)

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: Jean-Michel Corbeil, counsel

For the Employer: Jena Montgomery, counsel

Heard at Ottawa, Ontario,
April 24 to 27, 2018.

I. Individual grievance referred to adjudication

[1] On February 12, 2015, Ekarina Santawirya ("the grievor") filed a grievance against the Canada Border Services Agency ("CBSA") for failing to accommodate her during a staffing process in which she had priority status. The CBSA never responded to the grievance; it was referred to adjudication with the Public Service Labour Relations and Employment Board on June 4, 2015. A notice was also given to the Canadian Human Rights Commission at that time to the effect that the grievor intended to raise discrimination issues under the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; *CHRA*) at adjudication.

[2] 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 Board"), the *Federal Public Sector Labour Relations and Employment Board Act*, and the *Federal Public Sector Labour Relations Act* ("the *Act*"). For ease of reading, references to "the Board" in this decision include both the Public Service Labour Relations and Employment Board and the Federal Public Sector Labour Relations and Employment Board and to "the *Act*" include both the *Public Service Labour Relations Act* and the *Federal Public Sector Labour Relations Act*.

II. Preliminary decision

[3] Before applying for a position with the CBSA, the grievor worked for Industry Canada. She was declared a surplus employee with priority status. She applied to the CBSA for an AS-01 security analyst position. She grieved that the CBSA discriminated against her by not considering her application.

[4] When the grievance was referred to adjudication, the Treasury Board, the employer for government departments and agencies including Industry Canada and the CBSA, objected to it on the following grounds:

- the substance of the grievance concerned a staffing process, over which an adjudicator does not have jurisdiction;

- the grievance was not properly before the Board because the grievor was not an employee when it was filed;

- another administrative procedure for redress was provided under the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12 and 13; *PSEA*), depriving the adjudicator of jurisdiction. The employer later withdrew that objection;

- the grievance was filed outside the time limit prescribed in the relevant collective agreement, and the Board should not exercise its discretion to extend it; and

- an additional objection was raised after a panel of the Board had held a hearing on the first four objections. This last objection concerned the fact that the grievance had been filed under a collective agreement between the Canadian Association of Professional Employees ("CAPE") and the employer, which covered the position the grievor occupied at Industry Canada; the position to which she had applied was covered by a different collective agreement negotiated with the employer by a different bargaining agent, the Public Service Alliance of Canada.

[5] After considering all the evidence and the parties' arguments on the preliminary issues, the panel of the Board decided that an adjudicator did have jurisdiction to hear the grievance (see *Santawirya v. Deputy Head (Canada Border Services Agency)*, 2017 FPSLREB 10).

[6] The panel first addressed the timeliness issue and dismissed it. Under the *Public Service Labour Relations Regulations* (now the *Federal Public Sector Labour Relations Regulations* (SOR/2005-79)), an objection to timeliness must be raised at each level of the grievance process for it to be raised at the adjudication stage. The CBSA had not done so and thus had waived its right to raise it.

[7] As to whether the grievor was an employee when she filed the grievance, the employer based its reasoning on the fact that once she had ended the surplus period, she was no longer an employee. The grievance was filed after that date. However, the panel ruled that the events giving rise to the grievance had occurred while she was still an employee, which according to the case law, entitles a person to file a grievance related to his or her employment, even after it has ended.

[8] The employer also argued that the grievance essentially concerned a staffing process, which is outside an adjudicator's jurisdiction. Moreover, the grievor was not employed at the CBSA.

[9] The grievor's argument in response was that the grievance concerned discrimination under the collective agreement and under the *CHRA*, an issue for which an adjudicator would have jurisdiction. The panel declared that the Board had jurisdiction on a potential violation of the anti-discrimination clause in the collective agreement and of the Workforce Adjustment Directive ("WFAD"), also part of the collective agreement.

[10] The last objection was whether the applicable collective agreement was the Economics and Social Science Services ("EC") collective agreement between the CAPE and the Treasury Board, given the fact that a different collective agreement applied to the CBSA.

[11] As the panel of the Board stated, the employer is the Treasury Board. The WFAD was part of the collective agreement between the CAPE and the Treasury Board, and the allegation was that the WFAD's terms had not been properly applied to the grievor. The panel of the Board concluded as follows: "… the WFAD sets out the obligations of the Treasury Board on behalf of appointing departments or other portions of the federal public administration, in this case the CBSA, which may be grieved under the EC collective agreement."

III. Summary of the evidence

[12] For the purposes of the preliminary decision, the parties prepared an agreed statement of facts, which was also introduced by the parties at the hearing of the grievance. The following evidence summary includes facts from this statement, as well as the evidence heard from witnesses at the hearing. The grievor testified on her own behalf. The employer called the following witnesses: Karine Hince, a priority advisor with the Public Service Commission ("PSC"); Kim MacDonald, a human resources ("HR") advisor with the CBSA; Monique Poivre, an HR manager and Ms. MacDonald's supervisor at the time of the grievance events; and Catherine Power, a security project manager at the CBSA who was the CBSA lead and part of the selection board in the staffing process from which the grievor was screened out.

[13] The grievor was hired under the employment equity program at Industry Canada as a research assistant (subsequently, as a data analyst) starting on August 31, 2000. She has a disability that requires some accommodation. Her mobility is severely restricted, as her knees were gravely damaged in a car accident many years ago. It took a great deal of willpower and rehabilitation efforts to walk again. She walks with difficulty, with the support of two canes, and can cover only short distances. The accommodation requirements at work are essentially ergonomic.

[14] On June 26, 2012, she was informed that her services were no longer required, in the context of government-wide expenditure reductions. Pursuant to the WFAD, she was offered three options. She chose Option "A" on October 24, 2012. This meant that for the next year, she would continue to work in her position. She would benefit from "surplus priority" status when applying to public service positions. In other words, she was entitled to be appointed to another position in the core public administration if she met the essential qualifications of that position, ahead of any other candidate. After 12 months, she would be laid off and would then benefit from an additional period of 12 months of priority status. Her employment would end after that second period, unless she had obtained another position in the public service.

[15] In September 2014, the CBSA advertised an appointment process for security officer, regional security officer, and personnel security screening analyst positions, all classified at the AS-01 group and level. The closing date to apply was October 3, 2014. On September 23, 2014, the grievor emailed the CBSA to apply, attaching her résumé and a cover letter. She identified herself as a surplus employee with priority entitlement. Her résumé indicated that she had been hired under the employment equity program.

[16] According to the CBSA, the cover letter did not sufficiently show how the grievor met the essential requirements of the position, despite the fact that the advertisement for the process clearly required such a cover letter. On October 2, 2014, an administrative assistant from the CBSA emailed the grievor, asking her for a more complete cover letter. The next day, one of the selection board members also emailed the grievor to verify if she was still interested in applying to the process.

[17] The CBSA received no reply from the grievor, and accordingly, Ms. MacDonald informed her by email on October 14 that her application would not be considered any further as she had not provided a complete cover letter.

[18] On October 15, 2014, the grievor received an automated message from the PSC, referring her to a security officer appointment process at the CBSA. At the hearing, Ms. MacDonald explained that when persons with priority entitlement self-referred, she would inform the PSC. In this case, she notified the PSC of both things at once: the grievor had applied, and she had been screened out. Ms. MacDonald was applying to the PSC for a priority clearance number, a required step in an appointment process to ensure persons with priority entitlement are offered opportunities for which they seem to meet the essential qualifications.

[19] Ms. Hince explained that when the PSC receives a priority clearance application for an appointment process, it will notify those persons with priority entitlement whose qualifications seem to match the essential qualifications specified for the position. The email is generated automatically. There is no room for someone to step in and counter the absurdity of sending a notice to apply to a person who has already received a negative answer for the same position.

[20] From the grievor's perspective, the scenario unfolded thus. On October 14, she received an email informing her that she had been screened out. On October 15, she received an email telling her that she could apply for the position. According to the PSC's automatic email, she had five working days to provide her cover letter and résumé to the CBSA.

[21] The grievor immediately contacted Ms. MacDonald to verify that it was the same appointment process. Ms. MacDonald confirmed that it was. The grievor then asked if she could apply again, given the PSC's email, despite the fact that she had been screened out.

[22] Ms. MacDonald then asked her why she had failed to follow up on the emails sent to her on October 2 and 3 that requested a more complete cover letter and enquired whether she still wanted to apply.

[23] The grievor explained to Ms. MacDonald, and testified to this at the hearing, that on October 8, she had had eye surgery. In the week preceding the surgery, she had

to attend the hospital for several pre-surgery appointments. After the surgery, she found working on computer screens difficult, so she did not see the October 2 and 3 emails before the October 14 email.

[24] In addition to the eye surgery, the grievor's ability to communicate by email was complicated by two other facts — she does not have a computer at home, and she relies on Para Transpo for transportation (Para Transpo is a service in Ottawa, Ontario, for those with mobility difficulties).

[25] The grievor uses a computer at the Ottawa Public Library for job searches and for email. It is available two hours per day and must be reserved. Because of her mobility restrictions, she depends entirely on Para Transpo to get around once she leaves her house. It is unclear how much of the mobility issue came up in discussions with Ms. MacDonald in the October 15 conversation, but the eye surgery was certainly raised.

[26] Ms. MacDonald consulted her supervisor, Ms. Poivre. They decided to give the grievor another opportunity. Although Ms. MacDonald hesitated somewhat when testifying on this, I am satisfied that, given the email exchange at that time, she discussed the possibility for the grievor to reapply at the earliest on October 16. Ms. Poivre testified that the policy was to put everything in writing when exchanging with candidates. On October 17, Ms. MacDonald sent an email to the grievor stating that the CBSA would consider her application anew, provided she sent a satisfactory cover letter, as well as proof of the eye surgery, by 9:00 a.m. on October 20.

[27] October 17, 2014, was a Friday. The email requesting a complete cover letter and a medical certificate attesting to the eye surgery was sent at 11:23 a.m. on that day. October 20, 2014, was the following Monday morning.

[28] The grievor testified that she worked very hard at the library to correct her cover letter. Since the library opened only at 10 a.m. on the Monday morning, she had to send it before closing time, 5 p.m., on the Sunday afternoon. She testified that she did send it. She also stated that due to the recent eye surgery, her eye condition made it difficult to work on the computer, but she persisted, as she was highly motivated to obtain the position.

[29] However, the cover letter was not received by 9:00 a.m. on the Monday morning. That day, the grievor arrived at the library around 10:30 a.m. She realized that there were email problems, because a correspondent who had always been prompt to answer had not answered an email that she had sent the day before, on Sunday afternoon. The grievor then feared that her cover letter had also not been received. She spoke to the librarian, and with the help of the library's information technology services, the cover letter was recovered. She sent it at 12:53 p.m.

[30] The doctor's note attesting to the eye surgery on October 8 was produced the next day, Tuesday, October 21, but was faxed only on November 3, to the attention of Ms. Poivre at the CBSA. The grievor explained that she had had difficulty convincing the secretary to fax it, as it was something that the surgeon's office did not normally do.

[31] On October 21, the grievor received the following email from Ms. MacDonald:

…

> *Unfortunately, we cannot consider your application as you have not provided the information requested by Monday October 20, 2014 at 9:00 am.*
>
> *1. A [sic] proof that you have sent your cover letter to my attention before Monday October 20, 2014 at 9:00 am*
>
> *2. A copy of you [sic] medical certificate*
>
> *3. A copy of your accommodation file*
>
> *Consequently, you will not be considered further in this selection process.*

…

[32] The last requirement had not been mentioned in any earlier email. Ms. MacDonald explained that had the cover letter been accepted, the accommodation file would have been necessary for further assessment, as the CBSA believes in the importance of properly accommodating applicants.

[33] When she received that email, the grievor contacted Ms. MacDonald to argue that her application should still be considered. She made it clear that not only did she just recently have eye surgery but also that her mobility problem and her dependence on the public library computer had aggravated the situation.

[34] At the hearing, both Ms. MacDonald and Ms. Poivre strongly insisted that they were guided only by notions of fairness. Any applicant who required accommodation would receive it, but there had to be medical evidence. In the same way, a deadline might be postponed, but again, only with clear medical evidence. All applicants were subject to such requirements, and not applying them to some applicants would have been unfair to the other candidates.

[35] On October 22, the CBSA received accommodation information from the grievor's treating physician. On October 23, the Coordinator of the public library where the grievor used the computer emailed the CBSA and indicated that there had been issues with the library server.

[36] The grievor's priority status expired on October 24, 2014. There were some contradictions among the employer's witnesses as to the significance of this date with respect to the appointment process. Ms. Poivre testified that she believes that as long as a person with priority entitlement has been assessed and has been found qualified for a position before the entitlement period expires, it does not matter when the appointment actually takes place. In the case of the process the grievor was involved in, the evidence shows that the appointment was made in May 2015.

[37] The evidence from Ms. MacDonald and Ms. Hince was that there had to be a letter of offer (it could be conditional) before the entitlement period expired. The employer supported the latter position in argument. What is clear is that once the priority status ended on October 24, the PSC no longer considered the grievor a viable candidate. The CBSA was relieved of its obligations to hire priority candidates and obtained the priority clearance. All the employer's witnesses, from the CBSA and the PSC, were aware of the date on which the priority status would end. Ms. MacDonald corresponded with the PSC on October 17 to enquire about the consequence once the deadline expired. The answer she received was that the grievor would no longer have to be considered as a priority candidate.

[38] Ms. Power, who was part of the selection board, was asked questions about the grievor's cover letter and résumé. She stated that for priority candidates, it is possible to hire them even if they do not meet all the qualifications and to then provide training on the job for up to two years.

[39] Apparently, the October 21, 2014 decision to not consider the grievor's application was entirely made by the CBSA's HR section, namely, Ms. MacDonald and Ms. Poivre.

[40] The grievor spoke of her unfruitful search for employment since then. Her workstation must be modified because of her physical condition. She believes that because of employment equity, only the federal government is willing to hire people with disabilities. She relies on the Ontario Disability Support Program ("ODSP") for income.

IV. Summary of the arguments

A. For the grievor

[41] According to the grievor, she was deprived of her rights under the WFAD and suffered discrimination from the CBSA. She submits that there were two discriminatory actions: imposing an arbitrary deadline for the new cover letter and the medical note, without considering her limitations, and more importantly, refusing to reassess her application despite the absence of any real operational reasons, with no consideration for her limitations. The employer has not shown that accommodating her would have caused it undue hardship. For that reason, because there was a failure to accommodate, she is entitled to a remedy.

[42] There was no operational reason for imposing a 9 o'clock deadline on the Monday morning for the cover letter and the medical note. The grievor tried her best to meet the deadline with her cover letter, and she missed it by less than four hours. As for the medical note required from a surgeon, it was unrealistic to think it could be obtained over a weekend, before 9 o'clock on the Monday morning. No explanation was given as to why it had to be provided at that time.

[43] The rigid application of the Monday morning deadline meant that the grievor was not assessed before her priority status expired on October 24.

[44] The WFAD is part of the collective agreement between the CAPE and the Treasury Board, under clause 39.03(11). At article 4.3, that concerns persons that are laid off, the WFAD states that training can be offered to a person with priority status, under certain conditions, so that that person may qualify for a vacant position. The letter of offer in such a case would be conditional on successfully completing

the training.

[45] Discrimination in employment is defined in the following terms in the *CHRA*, at s. 7:

> ***7*** *It is a discriminatory practice, directly or indirectly,*
>
> ***(a)*** *to refuse to employ or continue to employ any individual, or*
>
> ***(b)*** *in the course of employment, to differentiate adversely in relation to an employee,*
>
> *on a prohibited ground of discrimination.*

[46] Disability is one of the prohibited grounds. In the grievor's case, she submits her disabilities are well established, both the mobility restriction and her eye condition, following surgery. Disability must be understood as a functional limitation, which need not be permanent (see *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City)*, 2000 SCC 27).

[47] The Supreme Court of Canada's decision in *Ontario Human Rights Commission v. Simpsons-Sears*, [1985] 2 S.C.R. 536, ("*Simpsons-Sears*") defines the parameters to establish discrimination in employment. First, the complainant must make a case for *prima facie* discrimination: whether the grievor is part of a group characterized by a prohibited ground such as disability, whether she suffered adverse treatment, and whether the prohibited ground was a factor in the adverse treatment. In the context of employment, the employer can defend against a *prima facie* case of discrimination by stating that a requirement imposed on the grievor was justified and that no reasonable accommodation was possible without undue hardship for it (see s. 15 of the *CHRA*).

[48] According to the grievor, she clearly meets the test for *prima facie* discrimination. She qualifies for Para Transpo and the ODSP, both of which require medical evidence of a disability. The medical note stating that she had had eye surgery was uncontested. She was deprived of the possibility to be assessed, and her disabilities certainly were a factor. The Supreme Court of Canada has clearly stated that disability need not be the cause of the adverse treatment for the purposes of *prima facie* discrimination; it need only be a factor (see, for example, Quebec (*Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39) ("*Bombardier*").

[49] The grievor adds that her disabilities singularly complicated her attempt to meet the challenging deadline that had been set for her. Had it not been for the eye surgery, she would have seen the October 2 email sooner and would have been able to respond with the proper cover letter. Her restricted mobility, the fact she worked on the computer at the library, and her vision problems following surgery made working on the computer more difficult. Finally, having to produce a medical note before 9 o'clock on a Monday morning was completely unrealistic.

[50] In the grievor's view, the CBSA set arbitrary and unnecessary conditions. If medical evidence was required from the grievor, there was no explanation as to why it had to be provided on the Monday morning before 9 o'clock. Time was of the essence, according to the witnesses from HR, but time was of the essence to assess the grievor before her priority ended; the medical evidence could have waited. Moreover, the application had been restarted because the grievor had received the PSC's email, which had given her five working days to apply. That would have brought the date to resubmit her cover letter to Wednesday, October 22, without any need for medical evidence.

[51] The grievor submits that the employer had a duty to accommodate her and failed to fulfil it, both by setting an arbitrary and impossible deadline and by refusing to assess the cover letter that it received, albeit four hours late. Reasonable accommodation means considering each case individually. The employer's rigid approach of applying the rules in a uniform manner to all candidates (as both Ms. MacDonald and Ms. Poivre confirmed), is the opposite of reasonable accommodation.

[52] The PSC had set a deadline of October 22 to respect the date on which the priority status ended. According to the grievor, this shows that there would have been no undue hardship for the employer to consider the cover letter received on October 20 and to carry out a further assessment, if necessary.

[53] As administered by the PSC, priority status is meant to ensure that people with it have opportunities to apply, which was Ms. Hince's explanation of the automatic email generated when a department applies for priority clearance. The grievor did receive notice of the position from the PSC. The system worked as it was designed to, yet the proffered opportunity was removed by the CBSA's actions.

[54] Ms. MacDonald and Ms. Poivre spoke of applying the same rules to all candidates, but the fact is that the priority system is different; different rules apply. The grievor submits that the area of selection and the closing date do not apply to priority candidates, and provided they meet minimum requirements, they can even be offered training to ensure they meet all the requirements of the position. In such a context, it is clear the intent is to give an extra chance to priority candidates to preserve their employment in the public service. Given that context, it makes no sense to suddenly impose rigid and unnecessary rules. There was no reason not to assess the grievor fully before October 24 and not to extend at least a conditional offer of employment, if the employer insisted on medical evidence to justify reopening the application.

[55] The grievor seeks compensation under the *CHRA* both for her pain and suffering and for the employer's reckless behaviour. Under s. 53(2)(e), compensation for pain and suffering is to be assessed based on the impact of the discrimination on the victim. This opportunity was her last chance to continue her employment in the public service. She was exposed to a great deal of confusion, at a time where her recent eye surgery made her more vulnerable. She was devastated by the lack of empathy she encountered. She seeks $15 000 in damages for pain and suffering.

[56] She also seeks $15 000 in compensation under s. 53(3) of the *CHRA* for the CBSA's reckless treatment of her disability. Despite accepting the eye surgery as a sufficient reason to extend the time for her application, the CBSA then set a completely unrealistic deadline for her to prove it. The witnesses from HR repeated a number of times that they had given her the weekend to do it. However, in her circumstances, that period was not useful. The surgeon's office was closed over the weekend. The library opened only at 10 a.m. Monday morning. She could work only for two-hour periods on the library computer, and only with difficulty, because of her eyes.

[57] The PSC's email was generated automatically, to ensure she could apply. Yet, the CBSA then added other requirements (three days instead of five days and a medical certificate) that would not have been added had she not applied initially (which she says shows her diligence) and had not undergone the eye surgery. Instead of accommodating her, the CBSA added obstacles. This would justify special compensation, which is meant to sanction wilfully or recklessly wrong behaviour by the person responsible for the discrimination.

[58] The grievor also seeks an appointment at the AS-01 group and level at the CBSA. If the Board should find that it does not have the authority to appoint her to a position, then it should order her assessment as a person with priority status with the possibility of retraining. The Board should also compensate her for the loss of salary and benefits from May 19, 2015, the date at which an appointment was made following the CBSA's appointment process.

[59] In *Canada (Attorney General) v. Brooks*, 2006 FC 1244, the Canadian Human Rights Tribunal had ruled that Mr. Brooks, a black man, had been a victim of discrimination by his employer, the Department of Fisheries and Oceans. However, reinstatement and back pay were not available remedies because, despite the discrimination, it had not been established that he would have been appointed to the position he had been competing for had the competition been entirely non-discriminatory. The Federal Court found that the Tribunal had erred by not considering whether there was a serious possibility that Mr. Brooks could have obtained the position were it not for the discrimination.

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

[60] The legal test for *prima facie* discrimination has already been stated: the grievor must be part of a group that is characterized by one of the prohibited grounds, she must have suffered adverse treatment, and there must be a link between the two. The duty to accommodate, part of the employer's justification, arises only once *prima facie* discrimination has been established (see *Lincoln v. Bay Ferries Ltd.*, 2004 FCA 204).

[61] The employer acknowledges that the grievor has a disability. However, it denies that there has been adverse treatment. The grievor was treated like others in her situation — a person claiming a medical impediment to request accommodation must prove it. The CBSA would have imposed the same conditions on anyone.

[62] The employer also denies that there is a link between the grievor's disability and failing to assess her. It had little evidence of a disability. Even the note received on November 3 stated only that there had been eye surgery, not the limitation it had created. At the time the decision was made not to assess her further, on October 21, the employer had no idea that there was also a mobility issue. The decision not to assess her was made simply because the employer had not received the necessary

information on time. Any other candidate would have been treated the same way. This treatment could not be considered a disadvantage that perpetuated a stereotype.

[63] The employer cited *Gibson v. Treasury Board (Department of Health)*, 2008 PSLRB 68, for the proposition that it is not sufficient for a person to claim disability — there must be some strong independent medical evidence to support the claim.

[64] The CBSA gave the grievor the opportunity to correct her cover letter on October 2. At that time, the CBSA was not aware of any disability. When the grievor informed it on October 15 that she had had eye surgery, a decision was made to try to accommodate her by giving her a further opportunity to correct her cover letter. At the same time, the accommodation needed to be justified by a confirmed medical reason. In the end, no medical reason was received until long after the priority period had ended. Even by the deadline set by the PSC, October 22, no medical note had been received on the eye surgery.

[65] Setting deadlines cannot be seen as discriminatory. It is a way to safeguard the fairness and integrity of the process. Had the grievor been assessed before the end of her priority period, when she had not met the deadlines, it would have been preferential treatment, which had not been afforded to others who also claimed a medical exemption or priority status.

[66] The employer argues that there is no *prima facie* discrimination. Should the Board conclude otherwise, then the employer would argue that the grievor failed to cooperate in efforts to find accommodation measures by not providing proper documentation for her disability. It cited *Cann v. Rona Ontario Inc.*, 2012 HRTO 754, to state that the duty to accommodate arises when an employer is aware or ought to be aware that an employee has a disability. In this case, the employer had not been aware, as insufficient information had been provided. The employer also cited *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970, for the grievor's duty to cooperate in the accommodation process.

[67] The employer cited *Canada (Attorney General) v. Cruden*, 2013 FC 520 (upheld in *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2014 FCA 131), for the proposition that if accommodation is impossible because of undue hardship to the employer, then there can be no finding of discrimination. The grievor's failure to meet the deadlines could not be attributed to the employer. The grievor had not

followed the initial instructions for the cover letter, had not responded to the employer's invitation to complete the letter, and had failed to meet new deadlines. In sum, she had not exercised due diligence, which was not linked to a disability.

[68] The grievor did not cooperate in any effort to accommodate her in the appointment process, as she provided no information to the CBSA about difficulties with the library computer or with blurred vision. She did not question the deadline that was confirmed by email on October 17 or state that it would be impossible to meet.

[69] As to the remedy, the employer stated that the Board does not have the authority to appoint the grievor to a position. The employer also mentioned a number of cases that seem to limit the Board's authority to order a remedy.

[70] In *Tchorzewski v. Treasury Board (Correctional Service of Canada)*, 2015 PSLREB 86, the Board member ordered that Ms. Tchorzewski be placed on a priority list, as it had found that her previous placement on the list had been unduly delayed by some nine months. On judicial review (*Attorney General of Canada v. Tchorzewski*, Federal Court of Appeal File No. A-527-15), on consent of both parties, the Federal Court of Appeal set aside that part of the order in the interest of procedural fairness, since the PSC had not been consulted on the remedy. No further reason was given.

[71] In *Nesic v. Treasury Board (Health Canada)*, 2016 PSLREB 117, the grievor's priority status had ended. Despite finding a violation of the WFAD under the relevant collective agreement, the Chairperson of the Board declined to grant the requested remedy, namely, reinstatement and compensation, as she was not satisfied that the grievor would have qualified for an employment offer and for retraining.

[72] In *Song v. Deputy Minister National Defence*, 2016 PSLREB 73, a decision on a staffing complaint, the Board found that the respondent had failed to accommodate a complainant during an assessment. Despite this finding, the Board declined to grant any remedy under the *CHRA*, as the complainant had failed to provide any evidence to support her claim for compensation. In that case, the selection board had failed to put an end to an assessment, despite the fact that the complainant had shown signs of illness during it.

V. Analysis

[73] The issues to be decided are the following:

- Was the CBSA's decision not to consider the grievor's application for the AS-01 position discriminatory?
- If so, what is the proper remedy?

A. Was the CBSA's decision not to consider the grievor's application for the AS-01 position discriminatory?

[74] Both parties agreed on the test for discrimination in the context of employment as described by the Supreme Court of Canada, which is a *prima facie* case of discrimination sufficient to establish a discriminatory action in the absence of sufficient justification from the employer (see *Simpsons-Sears*). Justification from the employer in this case would be an operational requirement that could not have allowed accommodation without causing it undue hardship.

[75] Section 7 of the *CHRA*, prohibiting discrimination in employment, has already been quoted. Section 15, which provides justification for the employer when the test for *prima facie* discrimination has been met, reads as follows:

> ***15 (1)*** *It is not a discriminatory practice if*
>
> ***(a)*** *any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a* bona fide *occupational requirement ….*
>
> …
>
> ***(2)*** *For any practice mentioned in paragraph (1)(a) to be considered to be based on a* bona fide *occupational requirement and for any practice mentioned in paragraph (1)(g) to be considered to have a* bona fide *justification, it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.*

[76] Section 16.01 of the collective agreement also prohibits discrimination in the workplace:

> ***16.01*** *There shall be no discrimination, interference, restriction, coercion, harassment, intimidation, or any disciplinary action exercised or practiced with respect to an employee by reason of age, race, creed, colour, national or ethnic origin, religious affiliation, sex, sexual orientation, gender identity and expression, family status, marital status, mental or physical disability, membership or activity in the Association, a conviction for which a pardon has been granted.*

[77] The *prima facie* case has three components: a prohibited ground of discrimination, adverse treatment, and a link between the two.

[78] There is sufficient evidence to show that the grievor suffers from a permanent disability that restricts her mobility and that at the time of the events giving rise to the grievance she had undergone eye surgery, which affected her vision and ability to use a computer. It is unclear when the employer learned she had mobility issues, but it was certainly before October 24, when the employer still had the possibility to assess her application.

[79] I find that the fact that she was denied the opportunity to be assessed for the AS-01 position at the time her priority entitlement was ending was adverse treatment. There is no doubt that the loss of her employment in the federal public service has had a profound negative impact.

[80] As to the third component of the test, both parties acknowledged that the case law is clear that the disability need only be a factor in, not the cause of, the adverse treatment (see *Bombardier*).

[81] The employer denies that the grievor's disability was a factor in its decision to end her participation in the appointment process. It maintains that it was not aware of her mobility restrictions at the time and that it had properly asked for medical evidence for the eye surgery. Others who claimed a physical ailment to obtain special treatment were also asked for medical evidence; therefore, there was no discriminatory action on the part of the CBSA.

[82] The CBSA's actions have to be understood in the wider context of the grievor's situation, of which the CBSA was well aware. She had reached the end of her priority entitlement period, and this was truly the last opportunity she had to maintain her employment with the federal public service. Because of the WFAD background,

the CBSA, as the hiring organization, had an obligation to the grievor that went beyond the usual relationship between the hiring organization and the candidates to an appointment process.

[83] The WFAD is a protocol that has been integrated into the collective agreements between the Treasury Board and the different bargaining agents. In the EC collective agreement, it appears at clause 39.03(11). It states the following as an objective:

…

> *It is the policy of the Treasury Board to maximize employment opportunities for indeterminate employees affected by work force adjustment situations, primarily through ensuring that, wherever possible, alternative employment opportunities are provided to them. This should not be construed as the continuation of a specific position or job but rather as continued employment.*

…

[84] Therefore, the CBSA had an obligation, as part of the Treasury Board, to ensure that the grievor would benefit from the WFAD. She had been screened out as of October 14, but the PSC's automatic email had reset the wheels in motion. She was told that she could apply for the position and that she had five working days to do it, despite the CBSA's October 14 rejection email.

[85] The eye surgery played a role in the grievor not responding to the October 2 and 3 emails. Once she explained her incapacity to respond earlier to emails from the CBSA, it was aware of the situation. Her disability (the eye condition) was a factor in the adverse treatment, since she would have responded earlier had it not been for the surgery. The restricted mobility, complicating her access to the library computer, also played a role in preventing her from responding to the October 2 and 3 emails, since her Para Transpo service was used to attend hospital appointments. The insistence of the CBSA in having a medical certificate to justify her participation in the process, despite her right as a priority, is also linked to the eye condition.

[86] I find that the grievor has established a *prima facie* case of discrimination. The issue then becomes the employer's justification for the discriminatory practice. In *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 ("*Meiorin*"), the Supreme Court of Canada established the following three-step test for determining whether a *prima facie* discriminatory standard is a

bona fide occupational requirement which justifies a discriminatory practice. In that case, the issue was a standard that was imposed on forest firefighters. The test can be reworded to fit the circumstances of the present case in the following manner:

- Is the requirement rationally connected to the employer's legitimate objectives in the appointment process?
- Was the requirement adopted in an honest and good-faith belief that it was necessary to the process?
- Is the requirement reasonably necessary? In other words, was it possible for the employer to accommodate the grievor without suffering undue hardship?

[87] Both Ms. MacDonald and Ms. Poivre strongly insisted on the requirement to be fair to all candidates, which is why the grievor had to present a proper cover letter and had to prove that she had indeed had eye surgery. The requirement that was imposed on the grievor, which was to provide a new cover letter and a medical certificate, was rationally connected to the employer's objective to be fair to all candidates.

[88] However, the deadline that was set was irrational. The deadline was not necessary to carry out the appointment process, as evidenced by the fact that the PSC had provided a more generous deadline for the grievor to apply, even in view of the imminent expiry of her priority status.

[89] It is incomprehensible that a medical certificate from a surgeon's office would be requested on a Friday for production by the following Monday, before 9:00 a.m. The employer stated that it was probably requested over the phone on Thursday, October 16. Perhaps. However, Ms. Poivre was very clear that all exchanges with candidates were immediately documented in writing, by email, to ensure clear and transparent communication. The email is very brief. If the conversation happened on the Thursday, then one would have expected the email to follow. It was sent only on the Friday.

[90] The employer states that it was not aware then of the grievor's use of the library computer and her mobility restrictions entailing the use of Para Transpo. I have difficulty believing that she had not already explained this when she spoke with

Ms. MacDonald to explain why she had not seen the October 2 and 3 emails. In any event, when the employer rejected the grievor's application on October 21, it certainly learned of it then. There was still time to reverse its decision and assess the grievor.

[91] As the grievor stated, the medical certificate was an operational requirement that was not urgent in the situation. What was urgent was assessing her before the end of her priority status. It is clear from the evidence that a conditional letter of offer would have been sufficient to secure her priority, pending confirmation of the surgery.

[92] The employer argued that the fact that the cover letter was four hours late cannot be attributed to the grievor's disability. I accept the grievor's evidence that she was convinced that the cover letter had been properly sent on the Sunday afternoon and that she realized otherwise only at around 10:30 a.m. on the Monday morning.

[93] The library opens at 10 o'clock. Para Transpo brought the grievor to the library at around 10:30 a.m. She has to depend on both the availability of computers at the library and Para Transpo for her communication needs. The fact that she does not have a computer at home is not linked to a disability. Her limited mobility and the strain of using a computer are linked to a disability.

[94] By setting a rigid deadline of 9:00 a.m. on the Monday morning for the cover letter, the employer decided that no explanation, however reasonable, would be sufficient to allow a four-hour delay.

[95] Was the requirement to meet the deadline adopted in good faith and in an honest belief that it was necessary? Both Ms. MacDonald and Ms. Poivre insisted on the need to be fair to all candidates and to not show any favouritism. I believe that they held an honest belief that this meant that the rules could not be made more flexible.

[96] However, this goes against the logic of the third part of the test, which is whether the requirement is reasonably necessary; that is, whether accommodation is possible.

[97] The grievor did not dispute the fact she had to provide a new cover letter; in fact, she provided it on the day it was required, albeit four hours late. I accept her evidence that she believed that the cover letter had been properly sent on the Sunday afternoon. She did not dispute the fact that she had to provide proof of the eye

surgery. She was diligent in obtaining that proof, as the note was issued on October 21. Its communication to the employer was much slower, but that in itself should not have been an obstacle to assessing her.

[98] In both *Meiorin* and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 ("*Grismer*"), the Supreme Court insisted that adverse effect discrimination can arise where an apparently neutral rule, applied to everyone equally, causes adverse effects on some groups of people with a characteristic that is a prohibited ground of discrimination. The solution is to apply the rule in a more individualized fashion.

[99] In the case of Ms. Meiorin, the rule was a test standard that forest firefighters had to meet. The evidence showed that women, because of their lung capacity, would have great difficulty meeting the standard. The Court determined that this high standard was not necessary for Ms. Meiorin to carry out her forest firefighter duties.

[100] In the case of Mr. Grismer, he was denied a driver's license because of a severe vision defect. The rule appeared rational; however, it was not necessary for Mr. Grismer. Over the years, he had adopted driving strategies that ensured he was a safe driver, despite his vision problem.

[101] There was no reasonable operational requirement for the grievor to meet a deadline of 9 o'clock on the Monday morning, in other words, no evidence that accommodating the grievor in the circumstances of this case would have caused the employer any undue hardship. Nothing prevented making an assessment on the basis of the cover letter received on October 20. The consequence of applying the rules rigidly, as was done in this case, was to deny the grievor an opportunity to be assessed for a position that was the last chance for the WFAD and the priority status to be applied to her situation, as they were meant to be.

[102] The terrible irony, as the grievor pointed out in her submissions, is that the medical certificate would not have been required at all, had her application been considered under the PSC's priority system. The cover letter arrived well within the time limit that the PSC had set for her to submit her application. If the priority system is meant to be useful, surely it needs to be applied to the benefit of employees whose employment is threatened through no fault of their own, especially in light of disability considerations.

[103] Therefore, I find that the employer has not proven that its *prima facie* discriminatory conduct was based on a *bona fide* occupational requirement. It failed to accommodate the grievor by imposing an unreasonable deadline and by not assessing her application after October 21, despite being aware of her disability and mobility restrictions. As such, I find the employer discriminated against the grievor contrary to the collective agreement and the C*HRA*.

B. If the decision was discriminatory, what is the proper remedy?

1. Under the *CHRA*

[104] The grievor has claimed compensation under the *CHRA*. Paragraph 226(2)(b) of the *Act* allows the Board to grant a remedy under paragraph 53(2)(e) and subsection 53(3) of the *CHRA*, which 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.*

[105] Obviously, being deprived of the last opportunity to remain in the public service caused considerable distress to the grievor. As has been stated many times before, determining a proper amount of compensation is not an exact science. The grievor has presented me with several decisions the Board made when it was confronted with establishing a compensation amount.

[106] In *Legros v. Treasury Board (Canada Border Services Agency)*, 2017 FPSLREB 32, Ms. Legros was deprived of the opportunity to participate in a job alternation allowed

under the WFAD, and age discrimination was a factor. She was awarded $15 000 for pain and suffering because the situation had been prolonged and particularly humiliating. The employer's egregious behaviour also warranted special compensation of $10 000.

[107] In *Nadeau v. Deputy Head (Correctional Service of Canada)*, 2014 PSLRB 82, the grievor was denied the clothing allowance she would have been entitled to when she was temporarily reassigned to other duties while pregnant. There was no medical evidence of the harm done, but the adjudicator awarded her $1500 for her pain and suffering, as the employer's behaviour had caused her a great deal of confusion.

[108] In *Rogers v. Canada Revenue Agency*, 2016 PSLREB 101, the employer had treated the grievor callously, his return to work was unnecessarily delayed, and he was finally terminated for incapacity, a harrowing experience that caused him profound distress. He was awarded $15 000 for pain and suffering and an additional $10 000 in special damages because of the employer's inconsiderate conduct.

[109] In this case, the pain and distress can be seen from a perspective of vulnerability. The grievor was recovering from eye surgery, her access to the computer that was an essential tool in her application was limited, she was under stress because she had not secured employment, and time was fast running out. In that context, the employer failed to extend the necessary accommodation to give her a chance. She had been hired in 2000 under the employment equity program, and she feared that her accommodation needs (because of her mobility restrictions) would be met only by the public service as opposed to the private sector.

[110] However, the discriminatory action was limited both in time and to the specific actions in the CBSA's appointment process. This is not a case of prolonged discrimination but rather of actions that led to an unfortunate conclusion for the grievor because of the employer's lack of understanding of its obligations under the WFAD, the priority system, and human rights law. I will award $10 000 to the grievor for pain and suffering.

[111] I do not think the employer's conduct was reckless or wilful. The rules were applied rigidly but not in bad faith. I found a failure to accommodate but not egregious behaviour. Therefore, I will not award special compensation under s. 53(3).

2. Employment

[112] The grievor has asked to be appointed to the AS-01 position at the CBSA. I do not have the authority to make an appointment, as it is the PSC's exclusive authority or that of its delegates to make appointments in the core public administration (see ss. 11 and 15 of the *PSEA*).

[113] The grievor has also asked to be reinstated on the priority list, with a possibility of training. Given the loss of opportunity she suffered by not being assessed for the AS-01 position, I believe that I should consider the remedy of placing her once again on the priority list, as she was just before October 24, 2014, for a period of 12 months.

[114] I am aware of the Federal Court of Appeal's decision in *Tchorzewski*, in which an order of this nature was set aside following a joint application of the parties because of a breach of procedural fairness in not notifying the PSC, which is in charge of the priority system. Therefore, this decision will be served on the PSC, for it to make submissions on the possibility of reinstating the grievor on a priority list for a period of 12 months. Both the grievor and the employer may respond to the PSC's submissions. Unless the Board believes that an oral hearing is necessary, a decision will be rendered on that remedy based on these further written submissions.

[115] Finally, the grievor has asked for compensation for the loss of salary and benefits. I reserve my decision on this point, pending further submissions of the PSC and the parties on the placement on the priority list.

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

(The Order appears on the next page)

VI. Order

[117] The grievance is allowed in part.

[118] The employer shall pay the grievor $10 000 in compensation for pain and suffering under s. 53(2)(e) of the *Canadian Human Rights Act*.

[119] This decision will be served on the Public Service Commission. The Public Service Commission will serve and file submissions on the remedy of reinstatement on the priority list for a period of 12 months. The proposed timeline is 30 days from this decision, subject to the Public Service Commission making representations for more time.

[120] The parties may make submissions on the remedy of reinstatement on the priority list within 15 days of the filing of the Public Service Commission's submissions.

[121] I will remain seized of this matter for the time necessary to decide the remedy of reinstatement on the priority list as well as compensation for loss of salary and benefits.

July 9, 2018.

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