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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

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BETWEEN

**JOHANNE LAVOIE**

Grievor

and

**DEPUTY HEAD  
(Department of National Defence)**

Respondent

Indexed as  
*Lavoie v. Deputy Head (Department of National Defence)*

In the matter of individual grievances referred to adjudication

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

**For the Grievor:** Leslie Robertson, Public Service Alliance of Canada

**For the Respondent:** Marc Séguin, counsel

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Heard at Québec, Quebec,  
from July 10 to 13 and September 14, 2018.  
(FPSLREB Translation)

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**REASONS FOR DECISION**

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**I. Individual grievances referred to adjudication**

1 Johanne Lavoie (“the grievor”) worked as a dental assistant on the Canadian Armed Forces base at Valcartier, Quebec. She was terminated for medical disability on June 24, 2015. She was a member of a bargaining unit represented by the Public Service Alliance of Canada (“the bargaining agent” or PSAC).

2 On December 7, 2015, through the PSAC, she referred seven grievances to the PSLREB, which were essentially based on harassment and discrimination allegations.

3 The PSAC and the Treasury Board of Canada entered into a collective agreement for the grievor’s bargaining unit. It was due to expire on August 4, 2014, but was still in force at the time of the events that gave rise to the grievances. For the purposes of this decision and depending on the context, “employer” refers to either the Treasury Board, which is the legal employer, or the Department of National Defence, to which the employer’s powers are delegated.

4 The grievances are summarized briefly as follows:

File 566-02-11817: grievance filed on March 4, 2013, alleging that the employer did not accommodate the grievor in accordance with the recommendations of the psychologist’s report, dated April 17, 2012; referred to adjudication pursuant to the collective agreement.

File 566-02-11818: grievance filed on March 13, 2013, alleging that a representative of the employer had bullied the grievor; referred to adjudication pursuant to the collective agreement.

File 566-02-11819: second grievance filed on March 13, 2013, alleging that there was an abuse of authority by the employer’s representative towards the grievor; referred to adjudication pursuant to the collective agreement.

File 566-02-11820: grievance filed on May 7, 2015, after the grievor received a letter recommending her termination for disability; referred to adjudication pursuant to the collective agreement.

File 566-02-11821: same grievance as the one before this, but it was referred to adjudication pursuant to s. 209(1)(c)(i) of the *Act*.

File 566-02-11822: grievance filed on June 26, 2015, challenging the grievor's termination; referred to adjudication pursuant to the collective agreement.

File 566-02-11823: same grievance as the one before this, but it was referred to adjudication pursuant to s. 209(1)(c)(i) of the *Act*.

**5** On December 16, 2015, the bargaining agent advised the Canadian Human Rights Commission that it intended to raise an issue involving the interpretation and application of the *Canadian Human Rights Act* (R.S.C. 1985, c. H-6; *CHRA*); i.e., discrimination based on medical disability. The bargaining agent claimed that the employer did not fulfil its duty to accommodate the grievor.

**6** 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 and changed the name of the PSLREB 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*").

**7** For the following reasons, the Board dismisses the grievances.

## **II. Summary of the evidence**

**8** The employer called seven witnesses, Major Tiffany Kisway, dentist; Maryse Binette, Valcartier Base dental clinic coordinator in 2012 and 2013; Captain

Maxime Fournier, dentist; Lieutenant-Colonel Michael Kaiser, commanding officer of the dental detachment of the Valcartier Base from 2011 to 2013; David Jacques, human resources advisor; Lieutenant-Colonel Alain Ouellet, commanding officer of the dental detachment of the Valcartier Base from the end of August 2013 to July 2016; and Colonel Dwayne Lemon, the chief dental officer of the Canadian Armed Forces. The grievor testified and called to testify Dr. Alain Simard, an expert psychologist in neuropsychology, who evaluated her during her employment.

**9** The grievor worked as a dental assistant on the Valcartier Base starting in 2008. According to the employer, she showed performance difficulties between 2008 and 2011, from the start. According to her, the constant monitoring became a form of harassment that prevented her from performing at her best.

**10** At the hearing, the testimony focused primarily on the last three years of the grievor's service, from 2012 to 2015. For ease of understanding the events, the evidence will be presented chronologically, avoiding repetition when the testimony is consistent. It is appropriate to first describe the context in which the events occurred. The different witnesses addressed this situation, and it is not disputed.

**11** The Canadian Armed Forces has 26 dental clinics, including the one on the Valcartier Base, which offers general and specialized dental care. The military commanding officer of the base's dental detachment is responsible for the clinic; that person has the rank of Lieutenant-Colonel. His or her clinic assistant has the rank of Major. A master warrant officer coordinates the dental detachment. Therefore, the chain of command is military. The clinic's personnel (dentists, hygienists, and dental assistants) is made up of civilian and military employees.

**12** Like all military personnel, military dentists have to train two afternoons per week. Furthermore, since Friday afternoon is dedicated to clinic maintenance, there are no appointments then.

**13** The Valcartier dental clinic offers comprehensive services to the base's military personnel. Each member has one examination per year (phase 1), during which the dentist determines whether treatment is necessary. If it is, the member will receive

the care (phase 2). The result of phase 1 and the treatment plan of phase 2 are entered into a database. As much as possible, military personnel receive the most complete dental treatment possible before they are deployed abroad. However, military dentists may also be deployed abroad to offer emergency care.

**14** Every day of the week begins with the “sick parade”, which is a period of approximately 1 hour, from 7:30 a.m. to 8:30 a.m., during which the base’s military personnel may visit the clinic for dental emergencies without an appointment. As of 9:00 a.m., patients are seen by appointment.

**15** Each dental assistant is paired with a dentist. Some dentists are specialized, for example, in maxillofacial surgery or periodontics. The specialists may have more than one dental assistant. The dental assistant’s job is to assist the dentist at the chair, to achieve what dentists refer to as “four-handed dentistry”. While the dentist performs procedures, the dental assistant handles the instruments and materials, which means that she must anticipate the dentist’s needs based on the procedure and prepare the necessary instruments and materials.

**16** Apart from directly assisting the dentist in the context of chair work, the dental assistant performs several other duties. She prepares the room based on the treatments planned for that day. She accompanies patients, which often means helping them manage their anxiety. She is responsible for cleaning and sterilizing instruments. She takes X-rays and takes impressions for casts. Finally, she manages the patients’ electronic records in a database called the CFHIS (Canadian Forces Health Information System) and enters the information for the phase 1 examination. This information includes a treatment plan; i.e., a medico-legal document, for which the dentist assumes full responsibility.

**17** The assistant also enters data into a database called DentiS, where different dental procedure codes are assigned. This database is used to produce statistical reports that enable the Canadian Armed Forces to compile the procedures and to plan necessary dental care.

## A. Major Tiffany Kisway

**18** Major Kisway is a member of the military and a dentist. She began her career as a dentist on the Valcartier Base in June 2010; she was a captain then. She left the Valcartier Base for the Petawawa Base in April 2012. The grievor was her assistant from July 2011 to January 2012. Major Kisway described the experience as difficult.

**19** From the start, the grievor made quite surprising mistakes considering her extensive experience as a dental assistant. She was very nice and meant well but made many mistakes.

**20** As examples of mistakes, Major Kisway referred to a poor choice of burrs or filling material or the fact that she held out a burr that visibly had not been correctly cleaned, even though it was in a sterilization bag. The multitude of small problems led management to ask Major Kisway to carry out an ongoing evaluation of the grievor, which caused the grievor a great deal of stress and did not improve her performance.

**21** In December 2011, Major Kisway prepared a report on the grievor's performance over the five previous months (July to December). The report identified many shortcomings. Everything had to be explained to the grievor, despite her many years of experience. Major Kisway said that she could not trust her and had to constantly check to ensure that the grievor was giving her the correct instrument.

**22** At the hearing, Major Kisway compared the grievor to another dental assistant with whom she was able to immediately establish a good collaborative relationship, which was not the case with the grievor who, according to Major Kisway, did not try to adapt to the dentist's work. The grievor was unable to anticipate the work to be done and therefore had to be constantly guided.

**23** I refer to the following excerpt of the report, which sums up well Major Kisway's testimony:

[Translation]

*... She is unable to anticipate the work to do and to begin a task before she is asked to. For example, if during a surgery, I am suturing a laceration with the hemostatic clips in hand, she takes the scissors from the instrument tray even though I will need them to cut the ends. I know that this may seem like a minor incident, but after months of small "inconveniences" like this, frustration builds, and it becomes obvious that we will never be able to become a team.*

*Ms. Lavoie is a positive employee and reacts to direct feedback. She helps her colleagues when she can. I am aware that she is trying to do her best and to perform well. However, all that willingness cannot compensate for her inability to do her work well. She does not seem to retain anything that she is taught and seems unable to adapt her technical skills to our daily needs.*

...

**24** Major Kisway produced three other evaluation reports, for January 3 to 13, January 16 to 20, and January 23 to 27, 2012. The report for January 3 to 13 is brief and, overall, quite positive. The grievor showed initiative, properly identified the impressions, and followed the dentist's example to clean the endodontic files. Indeed, two small mistakes were identified, but the report concluded with the following sentence: "[translation] We are beginning to work better together." Even though it identified mistakes, the January 16 to 20 report is also brief and quite positive.

**25** The last report is less positive. Major Kisway reported several mistakes and wrote the following: "[translation] I do not understand how anyone with any experience at all would make these mistakes. I would expect someone with six months' experience to perform better than this."

**26** After Major Kisway's departure in January 2012, the grievor was assigned to other duties at the clinic but not at the chair until she began to assist Captain Fournier in October 2012.

**27** On February 3, 2012, the employer asked the grievor to consent to a fitness-to-work evaluation by Health Canada, which she agreed to. However, she went on sick leave on February 14, 2012. On February 15, 2012, the employer sent a request for a fitness-to-work evaluation to the grievor's family doctor, to determine whether she

was able to perform her duties, whether she had a disability, and whether there were functional limitations. The letter described the grievor's difficulties in correctly performing her duties.

**28** On February 29, 2012, the grievor's family doctor indefinitely prolonged the grievor's sick leave and recommended a neuropsychological evaluation, which was on April 3, 2012. The Neuropsychologist filed a report on April 17, 2012, and answered the employer's questions. In the meantime, as of March 14, 2012, the grievor returned to work with her doctor's permission, who prescribed a "[translation] return to light work (office work)".

## **B. The Neuropsychologist's reports and testimony**

**29** Dr. Simard testified at the hearing, and his two reports, dated April 17, 2012, and August 15, 2014, were filed into evidence. In the first report, Dr. Simard concluded that the grievor appeared to have difficulty "[translation] ... in terms of organizational/planning skills" that could "[translation] ... be explained by attention deficit, among other things". He added, "[translation] This condition, once properly handled pharmacologically and in other ways, does probably not preclude normal and adequate performance at work."

**30** In his first report, Dr. Simard answered the employer's question as to whether the disability was permanent or temporary with, "[translation] For now, we can talk about temporary disability until there is a pharmacological protocol and an adequate psychological follow-up." He also stated the following:

[Translation]

*Madam should be able to progressively resume her duties in a few weeks once the pharmacological and psychological follow-ups are in place. It would be worthwhile to clarify the situation with respect to what she claims is harassment and to ensure that relevant administrative interventions are implemented if necessary.*

**31** Finally, with respect to the nature and duration of the functional limitations, Dr. Simard wrote the following:



[Translation]

*Madam must take her time to be able to offer quality service. She must not try to increase her pace to be more productive, to the detriment of the quality of her work. She must evolve in a structured environment free from interference. She must not be under pressure so as not to increase her anxiety.*

**32** In his first report, Dr. Simard did not specify the duration of these limitations.

**33** Dr. Simard testified at the hearing that attention deficit can be effectively treated with the help of medication. In his opinion, after the first evaluation, a psychological follow-up is also useful for treating anxiety, but it can also negatively affect performance. The return to work had to be done without pressure, to increase the grievor's chances of functioning well.

**34** Dr. Simard stated that he was surprised that he was contacted again in 2014 because, in the majority of cases, attention deficit is resolved with the help of medication and the adjustment of work methods. As part of his second mandate, he was asked the three following questions:

[Translation]

(1) *Is Ms. Lavoie able to perform, on a full-time basis, the duties of her position as a dental assistant, as described in her job description (attached)?*

(2) *If Ms. Lavoie has functional limitations, please describe them.*

(3) *If Ms. Lavoie has limitations, are they temporary or permanent? If there are temporary limitations, when will Ms. Lavoie be able to perform the duties of her position without limitation?*

**35** In his second report, Dr. Simard answered the three questions as follows:

[Translation]

[First question:]

*There is progress when compared to the results of*

*April 2012. Madam is currently able to perform, on a full-time basis, the duties of the dental assistant position. A progressive return to work could be planned under conditions that respect her pace, to help her manage the pressure.*

[Second question:]

*Madam must not attempt to increase the pace of her work to the detriment of service quality. She has difficulty managing pressure and criticism. She has difficulty performing different and complex tasks that require a high degree of reasoning.*

[Third question:]

*Progress is detected when compared to the results of April 2012. The limitations are probably permanent, although progress may be possible with an adjustment to the medication. I leave it to Madam and to her family doctor to make the appropriate pharmacological choices.*

**36** At the hearing, Dr. Simard explained that even though he is not a physician, he is very familiar with the medications used to treat attention deficit. He pointed out that according to the pharmacological treatment standards, the grievor was taking a well-known medication, and the dosage could have been increased. He stated that it was indeed a conversation that she should have with her attending physician, to discuss different medications, their therapeutic effects, and their side effects. Thus, Dr. Simard did not want to take a position on the permanent nature of the limitations, as indicated by his response to question 3. Nevertheless, he suggested that after two years of treatment, it was possible to reach a plateau with respect to the pharmacological intervention; however, he pointed out that many medications were available and that the grievor had been well under the maximum dosage.

**37** To summarize his observations during the second examination, Dr. Simard said that he had noted an improvement in the grievor's concentration and fluency but that an issue remained with storing information.

**38** In his opinion, there was no reason the grievor could not do her work, since the work of a dental assistant consists of relatively simple tasks. There are no great responsibilities or major repercussions. He repeated that attention deficit could be countered with medication and an adjustment to the duties.

**39** Dr. Simard did not contact the grievor's family doctor, and was not aware that on September 20, 2012, the Doctor had recommended a return to work without limitations. In his opinion, the limitations should still have applied. A progressive return to work was also preferable. The grievor told him that she had to suddenly resume all her duties in September 2012 and that she was placed immediately "[translation] into the heat of the action", which in his opinion was not advisable.

**40** He agreed entirely with the Family Doctor's recommendations dated September 2, 2014, which repeated verbatim his recommendations of question 2. He agreed with the following statement by the Family Doctor: "[translation] The limitations are permanent, although progress may be possible via adjusting the medication."

## **C. Maryse Binette**

**41** Ms. Binette worked as a dental assistant from 1989 to 2010, always in military clinics. Beginning in 2010, she worked as a supervisor. She was the master warrant officer and the dental clinic coordinator at the Valcartier Base from August 2012 to June 2013. She retired from the Canadian Armed Forces two years ago and still works in the dental field in the public service.

**42** As the Valcartier Base dental clinic coordinator, her role was to assist the commanding officer of the dental detachment by assigning duties and evaluating the performances of the hygienists and dental assistants. The commanding officer was responsible for disciplinary decisions, with recommendations from the clinic coordinator.

**43** When Ms. Binette first took up her duties at the Valcartier Base dental clinic, in August 2012, the grievor was not working with a dentist at the chair. She had been reassigned to other duties as a floating assistant, which included sending casts to the laboratory, receiving patients, entering data in DentiS, making X-rays, and helping other assistants, for example, with sterilizing instruments.

**44** In September 2012, Ms. Binette received two notes from the grievor's family doctor. The first, dated September 19, stated the following: "[translation] The patient may continue her work with limitations. (X-rays allowed). Request for a

consultation in a specialty (PSYCHIATRY) for a medical opinion.”

**45** The second note, dated the next day, September 20, read as follows: “[translation] Return to regular work authorized without limitation – psychiatry discussion. Attention deficit treated medically.” Under the Doctor’s signature, the following handwritten note was added: “[translation] Dated 21/9/2012”.

**46** After receiving the second note, Ms. Binette discussed with the grievor her return as an assistant at the chair. Ms. Binette drew up a performance agreement that covered all aspects of a dental assistant’s work. Ms. Binette and the grievor signed it on October 12, 2012. It specified the following:

[Translation]

*Ms. Lavoie will begin her team work with Capt. Fournier beginning on Monday, October 22. Capt. Fournier will undertake to meet with Madam at least once a week or more if necessary, for feedback, until further order from the commanding officer of the detachment or the clinic coordinator.*

[Sic throughout]

**47** At the hearing, Ms. Binette explained that Captain Fournier was a dentist and a military officer. She thought that he would be the ideal person to facilitate the grievor’s return to the chair, because he was calm, composed, and even-tempered. He had never worked with the grievor, and therefore would not have had any preconceived notions.

## **D. Captain Fournier**

**48** Captain Fournier has been a dentist since 2011. His first assignment was on the Valcartier Base beginning in October 2011. He remained there until July 2014. In October 2012, he was asked to work with the grievor and to evaluate her, which he did, for six weeks.

**49** According to Captain Fournier’s understanding, his role was to help the grievor return to her dental assistant chair duties, after an eight-month absence. He

testified that in the beginning, he was pleasantly surprised. She obviously had a good deal of experience, and she had taken the time to speak with the other dental assistants who had worked with him to inquire about his methods and the instruments that he liked to use.

**50** In the first few weeks, Captain Fournier attributed the grievor's mistakes to the fact that she had returned to the chair after an eight-month absence and told himself that an adjustment period should be expected. Unfortunately, the mistakes persisted, and the learning curve seemed negative. According to him, the level reached was too low, and it was never raised afterward.

**51** Captain Fournier wrote a weekly evaluation of the grievor's performance. For the first week, he noted the strengths and weaknesses, and concluded as follows:

[Translation]

*In general, despite a few shortcomings that should be evaluated more, my first week with Ms. Lavoie went well. At the chair, she is an efficient dental assistant who really knows her job. However, there are still several aspects to evaluate over the coming weeks.*

**52** The report for the second week also includes strengths and weaknesses. Captain Fournier reported an error in the choice of syringe to administer a local anesthetic, which caused "[translation] significant discomfort" to the patient and delayed the treatment. However, he reported improvements and positive initiative.

**53** The report for the third week referred to a recurring mistake in placing the dental dam (a rubber screen to facilitate isolating the area that the dentist is working on). The grievor had a tendency to use the wrong clamp or to position it incorrectly. At the hearing, Captain Fournier testified about how often this mistake occurred over the entire the six weeks, and how much it irritated him. However, there were also positive comments in the report, like this one:

[Translation]

*The rest of the week went fairly well. Ms. Lavoie knows the steps of my treatments well. We also had several extractions,*

*and she was well prepared for those procedures. She also confirmed all the patients for the week in advance.*

**54** He noted the grievor's difficulties with working on a computer, for example in entering treatment plans and making appointments for patients. He pointed out an error in identifying X-rays. He observed that she was not working at the same pace as the other dental assistants.

**55** The tone continued in the report for the fourth week. However, he pointed out that the grievor worked well at procedures performed frequently, that she monitored the time elapsed in accordance with the requirements of the different procedures, that she suggested instruments, and that she properly prepared the instruments necessary for appointments.

**56** In contrast, he pointed out that she had difficulty mastering new techniques and that in his opinion, she spent more time on it than the other assistants did. He ended the report with the following remark:

[Translation]

*In general, everything is going relatively well. However, I notice that some days go much better than others. I do not know what affects these highs and lows, but on some days, Ms. Lavoie seems distracted, which slows down the work.*

**57** In the report dated November 23, Captain Fournier noted that the grievor seemed to forget what she had learned. He also noted that she told him how stressful she found being constantly evaluated.

**58** The final report filed into evidence is dated November 30. He again reported how slow the grievor was with the software, as well as an error of inattention. Captain Fournier concluded the report as follows:

[Translation]

*I find these lapses in judgment and computer weaknesses quite frustrating in the long run. My days seem more onerous than before, and I am exhausted at the end of the week. In the beginning, I overlooked the small mistakes in the details, like the dam that was not relaxed in the centre to facilitate*

*placement. But on Thursday, the intern who has a few weeks' experience prepared it for me the right way. After six weeks together, I thought that we would make an efficient and dynamic team; however, I have not seen great improvement since the beginning. It's true that she learned a few techniques, but just when I thought she had mastered them, she forgot the steps (as noted in the weekly evaluation of November 19 to 23, 2012).*

[Sic throughout]

**59** In December, the grievor was assigned to another dentist, Captain Lucsanszky, to carry out data entry in the context of phase 1 examinations.

## **E. Lieutenant-Colonel Michael Kaiser**

**60** On February 12, 2013, Lieutenant-Colonel Kaiser, the commanding officer of the Valcartier Base dental unit from 2011 to 2013, addressed a letter to the grievor indicating his recommendation for termination for inadequate performance. The following passage illustrates the substance of it:

[Translation]

*Since March 2009, we have worked with you by providing you verbal and written feedback about your performance and our expectations. After more than three years of follow-ups, guidance, and action plans, you still do not meet the requirements of your position in the HS-PHS-06 group and level. It is now clear to me that you do not have the skills and competencies required to work as a dental assistant.*

**61** Lieutenant-Colonel Kaiser is a dentist. When he became commanding officer of the Valcartier Base dental unit, the base dental clinic coordinator at that time brought to his attention the shortcomings in the grievor's performance. After a while, it became obvious that her skills were inadequate to be a dental assistant at the chair, hence the decision to place her as a floating assistant.

**62** Lieutenant-Colonel Kaiser was informed of the doctor's note indicating that the grievor could return to all her duties, without limitations. He decided to assign her to Captain Fournier, on Ms. Binette's recommendation, with the obligation that Captain Fournier evaluate the grievor's performance.

**63** Captain Fournier's unsatisfactory evaluation led Lieutenant-Colonel Kaiser to recommend the grievor's termination. The information that the employer had at that time was that the grievor was able to work, without medical limitations. According to Lieutenant-Colonel Kaiser, she was not able to offer care at the required level. She was unable to form a team with a dentist in such a way as to truly offer four-handed dentistry service.

**64** The employer did not follow through with the February 2013 termination recommendation because of the events that followed, described by the next witness.

## **F. David Jacques**

**65** Mr. Jacques worked as a human resources generalist at the time of the events that gave rise to the grievances. His role was to advise management. He had been involved in the grievor's case since 2011.

**66** In May 2012, after receiving Dr. Simard's report, Mr. Jacques prepared consent forms for a fitness-to-work evaluation and an authorization for disclosure of medical information for the grievor's signature. The documents were intended for Health Canada. The employer found that the information from Dr. Simard was insufficient to answer all the questions, and therefore, it asked for Health Canada's opinion on the medical limitations, temporary or permanent, which applied to the grievor.

**67** Several exchanges took place. Finally, on August 26, 2013, Health Canada responded that it could not take a position in the case because the issues seemed administrative rather than medical. It added that the performance issues appeared to be distinct from the medical issue and that it was beyond its purview to state whether a person was able to do a specific task (it gave instrument sterilization as an example).

**68** In March 2013, the grievor filed three grievances against the harassment that she said she suffered at work, including the termination recommendation for inadequate performance. At the hearing of the grievances, on April 30, 2013, she gave the employer a note from her family doctor, dated March 27, 2013, which stated,



“[translation] Respect the functional limitations (cf expertise [illegible] neuropsychologist Dr. Simard)”.

**69** On July 23, 2013, the employer wrote to the Family Doctor to resolve the contradiction between his two notes, the one dated September 20, 2012, which stated that the grievor can work without limitations, and the most recent, dated March 27, 2013, which stated that the limitations prescribed by the Neuropsychologist must be respected. Thus, the employer asked the attending physician to answer the following questions:

[Translation]

*Are Ms. Lavoie's limitations temporary or permanent?*

*In the event that they are temporary, when will she be able to perform the duties of her position without limitations?*

**70** The letter continued with the following indication:

[Translation]

*Based on your recommendations as to Ms. Lavoie's medical condition, the employer will be able to make an enlightened choice to deal with her performance record and will be able to adequately honour its duty to accommodate, if applicable. However, if her limitations are permanent, given the nature of the duties involved in the dental assistant position, we do not see how we can respect these limitations, in particular when she works at the chair with a dentist. Please find attached Ms. Lavoie's job description. We have highlighted, in yellow, the conditions that we believe are inconsistent with the functional limitations indicated by Dr. Simard.*

**71** On September 21, 2013, the Family Doctor recommended a new evaluation by Dr. Simard “[translation] ... to decide on her condition and her temporary or permanent limitations”.

**72** In addition, at the same time, the employer's Human Resources branch attempted to help the grievor find another position. In particular, the employer filed into evidence several emails that demonstrate Mr. Jacques' efforts to find a position for her, including by ensuring a follow-up was made for her to redo her CV, communicating with

his colleagues to find out whether a position was available, encouraging her to apply, and sending her links for that purpose. In the meantime, she continued to work as a floating assistant.

**73** In July 2014, the employer wrote to the grievor's family doctor for a validation of the limitations imposed by Dr. Simard. A new evaluation by the latter was planned for August 2014. On September 2, 2014, the Family Doctor answered the employer's questions as follows, taking into account Dr. Simard's new conclusions:

[Translation]

**Question 1:** *Is Ms. Lavoie able to perform, on a full-time basis, the duties of her position as a dental assistant, as described in her job description, attached?*

**[Answer]** *In agreement with Dr. Simard's conclusions.*

*Ms. Lavoie is able to perform the duties of her dental assistant position on a full-time basis.*

*Progressive return to work as a dental assistant for 2 days spaced apart 1 week x 2 weeks to increase by 1 day/week x 2 weeks, along with her related work (X-rays, secretarial, etc.) the other days.*

**Question 2:** *If Ms. Lavoie has functional limitations, please describe them.*

**[Answer]** *In agreement with Dr. Simard's conclusions.*

*Ms. Lavoie must not attempt to increase the pace of her work to the detriment of the service quality.*

*She has difficulty managing pressure and criticism.*

*She has difficulty performing different and complex tasks that require a high level of reasoning.*

**Question 3:** *If Ms. Lavoie has limitations, are they temporary or permanent? If there are temporary, when will she be able to perform the duties of her position without limitation?*

**[Answer]** *In agreement with Dr. Simard's conclusions.*

*The limitations are permanent, although progress may be possible with an adjustment of the medication.*

*Currently [dosage]. The dosage of the medication will be reassessed depending on the progress.*

**74** The limitations specified in question 2 repeat Dr. Simard's recommendations verbatim in his second report, dated August 15, 2014.

## **G. Lieutenant-Colonel Alain Ouellet**

**75** Lieutenant-Colonel Ouellet was the commanding officer of the dental detachment of the Valcartier Base from August 2013 to July 2016. At the hearing, he described the framework of the care given in the dental clinics of the Canadian Armed Forces. He explained the Canadian Armed Forces' responsibility for the dental health of soldiers deployed abroad. Because public funds are used, it is important to use the allocated resources in the most efficient way possible.

**76** Lieutenant-Colonel Ouellet was aware of the grievor's difficulties when he was at the Valcartier Base clinic as a dentist, from 2009 to 2011. When he returned there in 2013, he was informed that in February 2013, a recommendation had been made to terminate the grievor for inadequate performance. That process was interrupted, and from fall 2013 to spring 2014, attempts were made to help her find another job. Meanwhile, she continued to work at the clinic as a floating assistant, offering support services to other dental assistants.

**77** Lieutenant-Colonel Ouellet testified about the uncertainty surrounding the grievor's case. In September 2012, a doctor's note recommended her return to work without limitations, but her reinstatement at the chair failed. Therefore, the employer sought to determine the limitations and whether they were temporary or permanent.

**78** At the hearing, Lieutenant-Colonel Ouellet went through a document dated December 2, 2014, which he had prepared for the grievor's case. In it, he had carried out a detailed analysis of the dental assistant's work in light of the accommodations requested by the Family Doctor and the Neuropsychologist. He also took into account the accommodation requests that the grievor sent to him on September 14, 2014.

**79** In her requests, the grievor repeated the recommendations of the

Neuropsychologist and the Doctor and stated how she wanted them implemented. She requested the following:

[Translation]

*1. Must not attempt to increase the pace of her work to the detriment of the service quality.*

- Progressive return to the phase 1 system with support to finalize the case and not have my first phase 1s evaluated.*
- Gradual return to my dental assistant duties to not have the impression of being faulted for the slightest act.*
- Not do a strict evaluation for the first weeks, just sterilizations to avoid pressure.*

*2. Difficulty managing pressure*

- I need time to find a work technique to be efficient*
- Do not compare with other assistants how long it takes to clean my rooms the first times*
- Do not evaluate me with the interns*
- Do not evaluate me over the slightest mistake (only if I endanger the patient's life)*

*3. Difficulty managing criticism*

- It would be good to have a just and fair evaluation adapted to my situation*
- Consider that it takes a reasonable adjustment period to be comfortable with a dentist, so account for this before evaluating me.*
- If I am slower on the computer, it is normal in the beginning; I have to go gradually*

*4. Difficulty performing different and complex tasks that require a high level of reasoning.*

- Receive some training when there is a new program because if a lot is given, I think that I will not be able to learn that on one occasion. And do not evaluate this the first time.*

[Sic throughout]

**80** The document from Lieutenant-Colonel Ouellet begins with a description of the dental assistant's work, with an allocation of the percentage of time devoted to each task, as follows:

[Translation]

- *Chair work: 77.5%*
- *Preventive dentistry service (treatments): 0.5%*
- *X-rays: 6%*
- *Laboratory procedures: 4%*
- *Dental material maintenance: 9%*
- *Inventory turnover: 1%*
- *File administration: 2%*

**81** The analysis continued with only chair work, since according to Lieutenant-Colonel Ouellet, it is more than 75% of a dental assistant's duties. He established in his analysis that the limitations imposed by the Family Doctor and the Neuropsychologist, along with the resulting accommodation requests, were inconsistent with the work requirements.

**82** With respect to the first limitation, he referred to the following factors: the work pace is fast; the dental assistant must have excellent computer skills, and she must be able to adapt quickly to different situations and to follow the dentist's rhythm. The first limitation cannot be respected (do not increase the work pace to the detriment of quality) because no practical solution is available to slow the clinic's work pace.

**83** For the second limitation, which is difficulty managing pressure, Lieutenant-Colonel Ouellet noted that "[translation] pressure is an integral part of a dental assistant's work". The assistant must anticipate and prepare to react quickly; she must deal with emergencies, the patients' psychological state, and the wide range of duties. The employer cannot alleviate this pressure.

**84** The third limitation involves the difficulty managing criticism. In his analysis, Lieutenant-Colonel Ouellet points out that at all times dentists must ensure the safety and security of their patients. If a mistake is made, the dentist must address it immediately. No accommodation can be contemplated on this point.

**85** Finally, the fourth limitation involves the grievor's difficulty performing tasks that require a high level of reasoning. Lieutenant-Colonel Ouellet indicated in his report that the Valcartier Base dental clinic offered an entire range of highly varied and specialized care. Therefore, dental assistants must be able to anticipate and provide assistance for all kinds of procedures. They are indeed relied on to perform different duties and to show a sound ability to reason. Once again, no accommodation was feasible.

**86** Lieutenant-Colonel Ouellet testified that he had also considered and then discarded the solution of keeping the grievor in the floating assistant role of providing general assistance in the clinic, without an assigned dentist. In his opinion, that role is not one of the positions at the clinic. The dental assistant must be able to perform chair work because it is the assistant's main role. The assistant must also be able take responsibility for other related duties. By attributing those duties to the grievor, twice as much was paid for the same service; the other dental assistants did not fully fulfil their role, and a parallel unnecessary role was created for the grievor.

**87** The report concluded as follows:

[Translation]

*After a review and analysis of Ms. Lavoie's permanent functional limitations and her dental assistant duties at the chair (77.5% of her duties), we conclude that no accommodation can be implemented without compromising the health and safety of the patients of Valcartier's dental detachment. Therefore, we consider it impossible to accommodate Ms. Lavoie in her chair duties because the characteristics and very nature of those duties are not compatible with her identified permanent limitations. Accordingly, it would be an undue hardship for the organization to accommodate Ms. Lavoie in her main duties.*

**88** At the hearing, the Lieutenant-Colonel summarized his position by stating that the grievor's permanent functional limitations did not fit with the reality of a dental assistant's work. Since her arrival in 2008, the grievor never successfully adapted to the work pace of the Valcartier Base dental clinic. The work constraints were not dependent on the employer's will but rather on the work itself, dictated by operational, surgical, and sanitary realities. He determined that it was not possible to accommodate the grievor without compromising patients' health and safety.

**89** In January 2015, after receiving Lieutenant-Colonel Ouellet's report, the grievor requested a new evaluation for her chair work. In an email dated March 31, 2015, the Lieutenant-Colonel refused the request because there was no new medical information that changed the functional limitations identified by the Neuropsychologist in September 2014, so the conclusions of the report remained unchanged.

**90** On April 28, 2015, the Family Doctor sent a letter that indicated on one hand that the grievor was "[translation] able to perform full-time the duties of her dental assistant position, including her chair duties ..." and on the other hand that "[translation] [t]he functional limitations are identical to those already issued by the neuropsychologist".

**91** In a letter addressed to the grievor dated April 30, 2015, Lieutenant-Colonel Ouellet stated that the Doctor's letter did not change his analysis. He also tackled the notion of alternative duties as a means of accommodation. He wrote that it added nothing to the clinic's productivity to have the grievor perform the ancillary duties of the hygienists or assistants; that did not make it possible to treat more patients. Accordingly, he wrote, "[translation] My chain of command would not be justified in giving permission to create such a position since it would not be productive for the organization." He told the grievor that he would recommend termination for medical disability.

**92** Therefore, on May 26, 2015, Lieutenant-Colonel Ouellet recommended to Colonel Lemon and Brigadier-General Bernier (Chief Medical Officer for the army, who had the necessary delegation for a termination at the Department of National Defence)

terminating the grievor for medical disability.

## **H. Colonel Lemon**

**93** In 2011, Colonel Lemon was appointed the chief dental officer of the Canadian Armed Forces. On May 26, 2015, Lieutenant-Colonel Ouellet addressed to him the recommendation for the grievor's termination. Colonel Lemon read the recommendation and report, requested advice from Human Resources, and discussed it with Lieutenant-Colonel Ouellet. In the end, he agreed with the recommendation, and he explained why at the hearing.

**94** The dental unit under his command is responsible for the hygiene and dental care of all military personnel. It must ensure first-class care. The responsibility is delegated to the detachments, including at Valcartier. Colonel Lemon has known Lieutenant-Colonel Ouellet for 20 years and trusts him. He observed that the analysis of the situation was exhaustive and complete. All the accommodation options were considered but, in the end, it was most important to ensure patient safety. And, despite inquiries being made, no other employment was found for the grievor. Therefore, it was recommended to the Brigadier-General that she be terminated.

## **I. The grievor**

**95** The grievor first completed the nursing assistant course, then her dental assistant course, from 1984 to 1986. Beginning in 1987, she worked for regular dentists, with whom she performed dental assistant duties. In 2008, she obtained a position at the Valcartier military base. She had to pass several tests to obtain it.

**96** The grievor recognized that she had made some mistakes but, in her opinion, all assistants make mistakes from time to time. She was subjected to a constant, stressful evaluation regime, which increased her anxiety, and accordingly, the mistakes made.

**97** She had a great deal of difficulty with the Coordinator who preceded Ms. Binette. That Coordinator, according to the grievor, was always angry and criticized everything that she did.



**98** In February 2012, she had to take leave because she felt harassed and could no longer sleep. She returned to work in March 2012, with a doctor's note that recommended a gradual return to work; i.e., administrative work three days per week to start that would then progressively increase.

**99** In April 2012, the Neuropsychologist evaluated the grievor. He diagnosed attention deficit. She understood his recommendations to mean that the employer was to put less pressure on her and to stop monitoring her slightest actions to identify mistakes. He told her that increased stress amplifies attention deficit issues.

**100** In his report, the Neuropsychologist referred to a pharmacological follow-up. The grievor explained that at that time, she was not prepared to take medication to resolve her problem and that she preferred to pass the summer taking natural remedies. She was worried about side effects. She talked about the medication with her family doctor, who reassured her by telling her that he had a similar problem and that the medication had helped him.

**101** The grievor was a little vague about the Doctor's two consecutive notes, dated September 19 and 20, 2012, respectively. The first refers to work with limitations and the second to a return to regular work without limitations. At the hearing, she said that the Doctor forgot to refer to medication in his note dated September 19, while he did refer to it in his note dated September 20. She did not know why, from one day to the next, he went from "with limitations" to "without limitations".

**102** When she began to work with Captain Fournier, things went well. However, she was a little nervous about the fact that he immediately began to evaluate her when, in her opinion, it takes about a month for a dental assistant to learn to work well with a dentist.

**103** She did not contradict Captain Fournier's testimony or reports, but she provided explanations for her behaviour. For example, to explain holding out a burr that was not clean despite being sterilized, she said that it was in the sealed bag after the sterilization. She did not see that it was not clean, and it was not shown to her. With respect to being slow to enter data, she stated that she had not practised for several

months. As for asking Captain Fournier to repeat the information to enter in the treatment plan, she pointed out that there were a lot of numbers and that other dental assistants did so as well.

**104** She admitted that she presented the X-ray of another patient to the dentist.

According to her, with respect to the dental dam, she placed it correctly but using different clamps that Captain Fournier was not used to. She explained the syringe error as a miscommunication.

**105** Captain Fournier's evaluation stressed her immensely. She was under the impression that each mistake was amplified, which increased her stress and her mistakes.

**106** At the hearing, she said that she was "[translation] really surprised" when she received the letter in February 2013 recommending her termination for inadequate performance. According to her, the problem was due to the fact that her limitations had not been respected. The evaluations were not adapted to her condition. For that reason, she filed her first grievance in March 2013.

**107** The employer's assistance in finding another position for the grievor was not entirely positive. She provided as an example an email dated December 22, 2014, which a labour relations advisor had sent to several contacts (human resources personnel on different military bases) to inform them that she was available. The substance of the email was as follows:

[Translation]

*Almost a year ago [January 15 and March 14, 2014], David [Jacques] sent you the CV of an employee (HS-PHS-06) who is no longer able to perform the duties of her dental assistant position (see emails below). Thus, David was seeking an administrative support position for that employee at Valcartier or Québec. The employee has in fact been assigned to administrative duties at the dental clinic for more than two years given that she is unable to perform her dentistry work. In recent months, this employee was the subject of a medical evaluation, and permanent functional*

*limitations were issued that are very likely to be the cause of her inability to perform her dental assistant duties. As these limitations are permanent, there is no possibility that the employee can return to her substantive position.*

*Please find below the employee's functional limitations. If you have an administrative support position available (even if it is an entry-level position that is therefore lower than the employee's substantive position), do not hesitate to let us know — David or me. This is an employee who has good interpersonal relationships and great determination and who performs simple and routine tasks well.*

*With respect to her CV, the employee stated in her profile that she has a good ability to work in a computerized environment. However, I would like to put a caveat on this statement since according to the comments and management's evaluation, a computerized environment may be challenging for this employee.*

*Limitations:*

*1- Must not attempt to increase the pace of her work to the detriment of the service quality.*

*2- Difficulty managing pressure.*

*3- Difficulty managing criticism.*

*4- Difficulty performing different and complex tasks that require a high level of reasoning.*

*Thank you!*

**108** At the hearing, the grievor commented that the message was not favourable to her and did not encourage anyone to hire her. In his testimony, Mr. Jacques referred to the email and said that Human Resources must be honest when seeking to place an employee.

**109** The grievor said that she did not have problems with computers since she had entered data for the phase 1 examinations and that she was able to learn.

**110** The grievor testified that she was able to work with a dentist but that she had to be given time to adapt. Accordingly, she should not have been evaluated from the start. The pressure of the job, for her, does not come from the patients or the

instruments but rather from the stress of getting used to a new dentist, which takes at least a month. She said that she was able to keep up with the pace of the clinic and the dentist and to respond to medical emergencies that according to her occur frequently.

**111** With respect to receiving criticism, she stated that it must first be positive, which then helps her accept criticism to improve herself. She found it difficult to manage criticism because it was always negative. She also had difficulty being evaluated on procedures that she did not know and that she had to learn.

**112** She did not find that the number given by Lieutenant-Captain Ouellet was realistic as to the percentage of time the dental assistant spent at the chair. In cross-examination, she stated that this figure should be 60%, a number that she calculated by taking into account the two afternoons that the military dentists are in training such that their dental assistants are not at the chair. According to her, X-rays take more time, 12% rather than 6%.

**113** After her termination, she worked as a dental assistant for a year in Québec City, in a specialist's clinic. The work was complex, but she liked it very much, and everything went well. Unfortunately, the salary was not attractive, and there were no benefits. However, the experience did boost her confidence as she rediscovered the dental assistant she had been before working at the Valcartier Base. After that, she worked part-time as a dental assistant.

**114** Currently, the grievor is completing training as an educator.

### **III. Summary of the arguments**

#### **A. For the employer**

**115** The grievor was terminated for a medical disability. Lieutenant-Colonel Ouellet's thorough analysis demonstrated that her functional limitations were not compatible with her dental assistant position in a military dental clinic, where the work is particularly demanding.

**116** The employer referred to *Sioui v. Deputy Head (Correctional Service of*

Canada), 2009 PSLRB 44, to point out that the workplace environment context is important when evaluating the employer's duty to accommodate. In that respect, it also referred to *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, to state that the employer does not have to modify the fundamental elements of the position.

**117** The employer reviewed the evidence. Major Kisway worked with the grievor for five months, and her conclusion was that the grievor was not able to do chair work because of the mistakes that she made. After a period of leave, the grievor gradually returned to work, and she was assigned administrative duties, in accordance with her doctor's recommendations. The employer had Dr. Simard carry out a neuropsychological evaluation. He concluded that she was suffering from attention deficit that could be treated and that certain limitations had to be implemented.

**118** In September 2012, the employer received a note from the attending Physician authorizing a return to work without limitations. Ms. Binette created a performance plan to supervise the grievor's work, given her past difficulties. The grievor said that she was ready to return to chair work. Ms. Binette waited a month before reinstating her to chair work, to give time for the medication to take effect. Captain Fournier was asked to work with the grievor; counted on were his calm personality and the fact that he had never worked with her.

**119** Captain Fournier's reports indicated difficulties at work, mistakes, and slow learning of new techniques or complying with the dentist's techniques. The employer concluded that the grievor had to be terminated. However, it changed its mind when it received the medical note submitted on April 30, 2013, in the context of the hearing of the grievor's grievances (against the failure to accommodate and the recommendation for termination). In that note, contrary to what he wrote on September 20, 2012, the Family Doctor stated that the functional limitations recommended by Dr. Simard had to be respected.

**120** The employer requested an evaluation by Health Canada, which responded that the problem was administrative, as it involved the grievor's performance. The Family Doctor recommended a new neuropsychological evaluation, which gave rise

to the report dated August 15, 2014.

**121** In the meantime, the grievor worked at the clinic as a floating assistant for the dental assistants and received her full salary. She performed several of their duties, without working at the chair. The Human Resources (HR) branch tried to help the grievor redo her CV and apply for other public service positions.

**122** In September 2014, the Doctor confirmed the grievor's limitations. Lieutenant-Colonel Ouellet exhaustively analyzed the dental assistant work based on the recommended limitations and concluded that it was impossible to continue to employ the grievor as a dental assistant at the Valcartier Base.

**123** Despite the Family Doctor's statement that the grievor was "... able to perform full-time the duties of her dental assistant position, including her chair duties ...", Lieutenant-Colonel Ouellet recommended termination, which took place on June 24, 2015.

**124** The employer acknowledged that the grievor had established a medical condition that required accommodation. According to the employer, the issue is to determine whether it fulfilled its duty to accommodate.

**125** The employer took measures to accommodate the grievor when she returned to work in March 2012 by complying with the Doctor's instructions (a progressive return, desk work, and a gradual increase in duties). It made efforts to reinstate her to all her duties in October 2012, once again following the Doctor's recommendation.

**126** The employer did not proceed with the planned termination of February 2013 following the receipt of the medical note in April 2013. It waited for the new expert report by the Neuropsychologist and the Doctor's answers, which were received in September 2014. Lieutenant-Colonel Ouellet then exhaustively analyzed the grievor's position with respect to the limitations that continued to apply. The conclusion was that accommodation was not possible in that position. The search for another position was not fruitful.

**127** The employer does not have the obligation to create a position that is of no value to it (see *Kerr-Alich v. Treasury Board (Department of Social Development)*, 2007 PSLRB 33 at para. 144).

## **B. For the grievor**

**128** The grievor contended that the employer did not have a valid reason to terminate her. It did not establish that she could not fulfil her duties and did not help her keep her federal public service job.

**129** The termination was discriminatory; the employer was bound to offer accommodation to the threshold of undue hardship. The grievor has the right to be reinstated to her position.

**130** The grievor began working at the Valcartier Base clinic in 2008. According to her, her difficulties began in 2012, when she was subjected to weekly evaluations in which the dentist documented her mistakes. She was placed on work leave by her doctor in February 2012, for about a month; she then returned to work progressively, carrying out administrative tasks.

**131** In April 2012, the Neuropsychologist diagnosed attention deficit, a condition that does not preclude working if it is handled pharmacologically. In September 2012, the grievor's family doctor issued two consecutive notes, one indicating that she was able to work with limitations, the other, without limitations. Despite this obvious contradiction, the employer did not ask for an explanation.

**132** The grievor was reinstated to her duties, without accommodation, but with a daily evaluation. Her needs were not taken into account, and her return to the chair was a failure, to the point that in February 2013, her termination was recommended.

**133** In March 2013, the Family Doctor reiterated that the Neuropsychologist's recommendations had to be respected. It is important to point out that after February 2013, the grievor never returned to chair work. She was never given the chance to work with her limitations being respected.

**134** In August 2014, the Neuropsychologist completed a new evaluation, noting an improvement. But he maintained the limitations. The employer did not attempt to offer the grievor the opportunity to perform her duties while considering her functional limitations. Yet, the Doctor and the Neuropsychologist were of the opinion that she could do all her duties, after taking note of her job description.

**135** On April 29, 2015, the Family Doctor confirmed once again that the grievor was able to do all her duties. The next day, Lieutenant-Colonel Ouellet recommended her termination. He completely dismissed the Doctor's opinion.

**136** The grievor considers that *prima facie* discrimination has been established; in fact, the employer did not dispute it. The conditions set out in the leading decision *Ont. Human Rights Comm. v. Simpsons-Sears*, [1985] 2 SCR 536, have been met in that she is part of a protected group (has a disability) and she suffered negative repercussions in her employment (a failure to accommodate and the termination), and it is clear that the disability was a factor, since the termination was based on the medical disability.

**137** The employer did not justify its discriminatory practice. According to *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 ("*Meiorin*"), it had to establish that its work rule, namely, the grievor's performance at the chair, could not be adapted without undue hardship. Yet, according to her, it would have been possible to adapt the work conditions but the employer did not make the necessary effort. The termination was not based on a valid ground because the employer did not establish that the grievor was unable to do her work.

**138** The complaints by Major Kisway and Captain Fournier, who worked with the grievor, referred to mistakes that were, all in all, quite minor. In fact, the witnesses pointed out that the grievor was excellent with patients, that she was willing to work well, and that she performed the clinic tasks without issue.

**139** The grievor referred to the following decisions: *Kelly v. UBC (No. 3)*, 2012 BCHRT 32; *Giroux v. Treasury Board (Canada Border Services Agency)*, 2008 PSLRB 102; *Rogers v. Canada Revenue Agency*, 2016 PSLREB 101; and *Kirby v. Treasury*



*Board (Correctional Service of Canada)*, 2015 PSLREB 41. I will come back to those cases in my analysis.

**140** The grievor was deprived of her right to return to chair work. She was not given any help while she worked at the chair, despite the Neuropsychologist's recommendations. The employer argued that she had received additional training, without providing a specific example. Captain Fournier's daily evaluation was ongoing criticism, which did not help the grievor at all.

**141** *Meiorin* emphasizes (at paragraph 66) that it is important for the employer to work with the union to find forms of accommodation. The evidence shows that the bargaining agent often received a certified copy of the exchanges on the grievor's situation, but no evidence was submitted about meetings to discuss accommodation options.

**142** The employer asked questions about the recommended limitations, but it appears that it misunderstood how to apply them. No follow-up was done to see how the chair duties could be modified based on the recommendations, as illustrated by Lieutenant-Colonel Ouellet's analysis. In fact, it seems to have never considered how chair work could be modified to take into account the grievor's limitations. The employer never requested clarification to understand how the work pace could be modified or how to evaluate her without putting too much pressure on her. Even Major Kisway recognized that it must have been demoralizing for the grievor to feel that she did not have any margin of error.

**143** The grievor made reasonable suggestions that could have helped her in her work, including that she receive training, that she no longer be subject to comparisons, and that she be evaluated on her chair work but without undue pressure.

**144** The employer did not seriously consider other employment options; for example, keeping the floating assistant position. It also did not make a serious effort to find the grievor another job.

**145** The grievor was not given the right to the accommodation to which she was entitled; instead, she was the victim of harassment and intimidation, which is why

her grievances should be allowed.

**146** The grievor seeks reinstatement to her position. She also seeks the reimbursement of the salary and benefits lost from the termination date, as well as compensation pursuant to the provisions of the *CHRA*.

## IV. Analysis

**147** The grievor was terminated for medical disability pursuant to s. 12(1)(e) of the *Financial Administration Act* (R.S.C. 1985, c. F-11). It must be determined whether the termination was justified.

**148** The grievor alleged that the termination was not justified on the grounds that it was discriminatory. Thus, the employer had to establish that it was not discriminatory.

**149** From the outset, the employer recognized its duty to accommodate but argued that it could not accommodate the grievor without suffering undue hardship.

**150** The legal basis for such a defence is well established. The more difficult issue to determine is the exact location of the threshold for undue hardship.

**151** The duty to provide reasonable accommodation arises from the text of the statute that prohibits discrimination, the *CHRA*. The relevant sections are the following:

...

**3 (1)** *For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.*

...

**7** *It is a discriminatory practice, directly or indirectly,*

**(a)** *to refuse to employ or continue to employ any individual ...*

on a prohibited ground of discrimination.

...

**25** In this Act,

...

**disability** means any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug ....

...

**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.

...

**[Emphasis in the original]**

**152** According to s. 226(2)(a) of the *Act*, in any matter referred to adjudication, the Board may interpret and apply the *CHRA*, other than its provisions related to the right to equal pay, whether or not there is a conflict with a collective agreement.

**153** There is no doubt that there is *prima facie* discrimination in this case: the grievor suffers from a disability, namely, attention deficit, and her termination was connected to that disability. The employer had to justify that within the meaning of s. 15 of the *CHRA*, the performance of her dental assistant work, as the employer described it, was a justified standard that could not be adapted to her needs without causing undue hardship.

**154** Undue hardship is defined in the *CHRA* in terms of cost, health, and safety. The employer raised the health of its patients and the costs of unjustified remuneration to support its undue hardship argument.

**155** With respect to the health argument, the employer contended that the grievor's mistakes could put patients at risk. Considering the Doctor's recommendation to reduce the work pace and spare criticism, it could be difficult to accommodate her needs in an environment in which patient health is paramount.

**156** If the employer considers that patient health may be at risk, it may still contemplate duties that do not put them at risk, such as the ancillary duties that the grievor performed for almost three years. The employer's argument against this solution turned on the cost and lack of productivity of a supplemental job in the long term. The other dental assistants did both their chair duties and the related duties. The creation of a floating assistant position added a financial burden, with no value to the employer. Additionally, the employer's efforts to help her find another position were unsuccessful. According to the evidence, it would appear that that she did not seek a position other than in the dental clinic. She took some time to work on her CV, and I do not have any evidence from her of an active job search. The HR emails show the employer's efforts to find her an assignment so that she could gain experience elsewhere.

**157** Did the employer reach the threshold for undue hardship?

**158** The test to determine whether a work standard is justified is set out in the following terms in *Meiorin*:

*54 Having considered the various alternatives, I propose the following three-step test for determining whether a prima facie discriminatory standard is a BFOR. An employer may justify the impugned standard by establishing on the balance of probabilities:*

- (1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;*
- (2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and*

- (3) *that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.*

**159** In this case, the work standard was the work expected from the grievor, namely, her dental assistant work. In the analysis of this case, the issue is whether “it is impossible to deal with employees who have the same characteristics as the grievor without the employer suffering undue hardship.”

**160** In *Hydro-Québec*, the Supreme Court revisited this notion of “impossible” to qualify its thinking in the following terms:

*[16] The test is not whether it was impossible for the employer to accommodate the employee’s characteristics. The employer does not have a duty to change working conditions in a fundamental way, but does have a duty, if it can do so without undue hardship, to arrange the employee’s workplace or duties to enable the employee to do his or her work.*

**161** Therefore, the issue is the extent of the duty to arrange the grievor’s workstation or duties.

**162** The grievor brought many decisions to my attention in which the decision maker determined that the employer had not fulfilled its duty to accommodate because it had not adequately considered the options for modifying the employee’s duties so that the employee could carry out his or her work.

**163** *Kelly* involved a doctor in a family practice specialty program. The University of British Columbia (UBC), responsible for the specialty residency program, terminated Dr. Kelly’s enrolment. He also had received an attention deficit diagnosis and was being followed by a psychiatrist.

**164** UBC determined that it was not possible to accommodate Dr. Kelly in his training program. The British Columbia Human Rights Tribunal found in favour of Dr. Kelly’s complaint against UBC on the ground that UBC did not make sufficient

efforts to accommodate Dr. Kelly in his specialization training. Dr. Kelly had experienced some failures in his program but had also succeeded in certain aspects. That partial success showed that efforts to accommodate could perhaps help him. In short, UBC had given up too quickly on its efforts to support learning.

**165** *Giroux* involved a customs inspector with 31 years of service, whose performance had always been impeccable. She had suffered a work injury, and her return to work had been difficult. Four years after the return, the employer ended her employment on the grounds that she was no longer able to perform the duties of her position. The Adjudicator found that the employer never gave her the chance to demonstrate whether she was able to perform her duties and that it had not heeded the medical opinions that stated that she was fit to perform them.

**166** *Kirby* involved a correctional services driver who after an accident, was no longer able to perform all his duties but still was able to work as an escort driver. The employer ended the accommodation, and the employee found himself on work leave, without income, having exhausted his leave and disability benefits. The Adjudicator considered that the employer had not justified its refusal to keep Mr. Kirby in the modified position, such that the allegation of discrimination was found to have merit.

**167** In *Rogers*, the employer refused to implement the conditions necessary for Mr. Rogers' return to work, who ultimately was terminated. The Adjudicator determined that there had been discrimination and that the employer had not at all justified its refusal to collaborate with Mr. Rogers' return to work.

**168** The grievor drew a parallel between these cases and her situation. In each case, the employer failed to adapt duties to respond to the employee's accommodation needs. In *Kelly*, UBC assumed that Dr. Kelly's performance problems were insurmountable because they were related to a permanent condition. However, UBC did not genuinely consider the options that would have enabled him to succeed. In *Giroux*, Ms. Giroux was never given the opportunity to carry out her duties, such that the conclusion that she could not perform them was hasty and unfounded.

**169** In *Kirby*, the employer did not justify why Mr. Kirby could not continue to

occupy an existing position. Finally, in *Rogers*, the discrimination was due to the employer's bad faith efforts to reintegrate Mr. Rogers in his workplace.

**170** It is obvious that each case is unique and that the decision maker has to apply the existing law based on specific facts. In this case, I find that the employer reviewed the grievor's situation seriously and that it tried to consider how her position or tasks could be arranged so that she could remain employed at the Valcartier Base dental clinic.

**171** I accept from the evidence presented at the hearing that according to her testimony, the grievor had successfully carried out dental assistant duties before going to the Valcartier Base dental clinic. She also passed the tests to obtain the position. However, the evidence established that she had trouble following the pace of chair work, as Major Kisway and Captain Fournier testified.

**172** In his evaluation of dental assistant duties, Lieutenant-Colonel Ouellet calculated that chair work represented 77.5% of the work; according to the grievor, it was more like 60%. According to the evidence that was filed, the clinic offers care every day, except Friday afternoons, and the military dentists are absent for training 2 afternoons a week. The civilian dentists are not absent then.

**173** Even calculating that a dental assistant, who is paired with a military dentist, is not called to work at the chair with another dentist, the fact remains that chair work occupies 7 of the 10 half-days of the workweek, therefore approximately 70% of the time. Lieutenant-Colonel Ouellet stated that it was unrealistic for the employer to not employ a dental assistant at the chair and to give her only ancillary duties.

**174** The grievor's position on that point was twofold. On the one hand, she contended that she was ready and able for chair work but that she was never given a reasonable opportunity for it because the employer refused to consider the limitations that Dr. Simard set out. In fact, her first grievance is about the employer's failure to provide her with the accommodation necessary to succeed.

**175** The grievor had her share of responsibility in this lack of accommodation. In September 2012, when a discussion arose about her resuming chair work, she

obtained a note from her doctor that stated she was able to perform all her duties, without limitations. The note is clear. Ms. Binette discussed it with the grievor, who did not ask for Dr. Simard's suggested limitations to be respected; it was quite the contrary. She said that she was able to perform chair duties. As a precaution, Ms. Binette did not reinstate her to chair work in September. She waited until October 22, to ensure that the grievor's medication took effect, contrary to what the grievor told Dr. Simard when she saw him again in 2014.

**176** On the other hand, the grievor contended that she could have continued in her duties as a floating assistant. For more than two years, from March to September 2012 and from February 2013 to June 2015, the employer offered her an accommodation while awaiting a final medical evaluation. When it became obvious that she would not be able to fulfil all her chair duties, short of implementing Dr. Simard's recommendations, the employer ended her employment.

**177** What was the employer's duty? According to the jurisprudence, it must allow an employee to work and make the necessary adjustments, up to the threshold of undue hardship. As the Supreme Court stated in *Hydro-Québec*, the employer is entitled to expect that work will be done and that it will not interfere with the proper operation of its business:

...

*[18] ... If the characteristics of an illness are such that the proper operation of the business is hampered excessively or if an employee with such an illness remains unable to work for the reasonably foreseeable future even though the employer has tried to accommodate him or her, the employer will have satisfied the test. In these circumstances, the impact of the standard will be legitimate and the dismissal will be deemed to be non-discriminatory. I adopt the words of Thibault J.A. in the judgment quoted by the Court of Appeal, Québec (Procureur général) v. Syndicat de professionnelles et professionnels du gouvernement du Québec (SPGQ), [2005] R.J.Q. 944, 2005 QCCA 311: [TRANSLATION] "[In such cases,] it is less the employee's handicap that forms the basis of the dismissal than his or her inability to fulfill [sic] the fundamental obligations arising from the employment relationship" (para. 76).*



*[19] The duty to accommodate is therefore perfectly compatible with general labour law rules, including both the rule that employers must respect employees' fundamental rights and the rule that employees must do their work. The employer's duty to accommodate ends where the employee is no longer able to fulfill [sic] the basic obligations associated with the employment relationship for the foreseeable future.*

...

[Emphasis added]

**178** In Lieutenant-Colonel Ouellet's December 2014 report, the employer demonstrated that the dental assistants' chair duties are inconsistent with Dr. Simard's accommodation recommendations to ensure the grievor's success at work. Furthermore, he stated that he was not prepared to pay a dental assistant for performing her colleagues' ancillary duties; it would waste public funds.

**179** The employer is not bound to create a position to accommodate an employee (*Kerr-Alich*). In this case, it could not continue to employ the grievor as a dental assistant because she could not perform her duties. It was not required to create a tailor-made position that did not correspond to its needs or its budget.

**180** As for the employer's efforts to help her find another position, it was complicated by the fact that the grievor was a specialized employee who could not fulfil her duties to the employer's satisfaction. It was not easy to find her another position since she was qualified for a specific position, which was as a dental assistant. HR helped her update her CV and sent announcements and notices to find a position that might suit her, but she had few qualifications for another position. She criticized HR for communicating her functional limitations, as described by Dr. Simard, to the other offices of the department, where she could perhaps have obtained an administrative job. Mr. Jacques stated that this information was necessary because the next job would have to have accounted for her limitations. I think that in its correspondence, HR communicated the grievor's qualities, and it cannot be criticized for also indicating the Doctor's limitations.

**181** Furthermore, I did not see that the grievor made any effort to find another

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job with the public service. She was slow to update her CV, and I received no evidence of her efforts to find another job. According to the evidence and her testimony, it seems clear to me that she wanted to remain in her dental assistant position. She criticized the employer for pointing out her computer weaknesses, which she seems to deny. Yet, after many years at the clinic, she still asked for help with and training on the dental care software. I find that as for the search for other employment with the department, one was carried out, but that the grievor hindered it; it was difficult to find her a position, and she preferred to keep her dental assistant position.

**182** The Board has already stated that the employer is required to seek employment for an employee in a department other than the home department if the employee can no longer work there (see *Hotte v. Treasury Board (Royal Canadian Mounted Police)*, 2016 PSLREB 122). However, in this case, I do not believe that the same considerations applied, again because of the grievor's specialized position. In any case, the facts are different.

**183** In *Hotte*, an office employee could not return to her home department because her doctor's limitation had prescribed as much. The department had failed to help her with her CV and to provide her with concrete assistance to find a position in another department; it had been content to register her on a priority list. She held an AS-2 position, which is a general classification in the public service. In the grievor's case, an active offer was made to help her with her CV. It is true that the search was limited to the department, but contrary to the situation in *Hotte*, neither the grievor nor her bargaining agent ever raised the possibility of her working in another department. On the contrary, it is clear that she wanted to stay in the dental environment, which is essentially connected to the Department of Defence.

**184** According to the testimony, there is no doubt that the grievor had good intentions and that she positively contributed to the clinic team's work. However, I must find that that contribution was below what the employer expected to keep her in her position. It did not make a hasty analysis, and during the entire period that it questioned the future of the employment relationship with her, it kept her in a position at the clinic, with her full salary. However, it had to face the fact that she could not fulfil the dental

assistant duties to its satisfaction.

**185** The Family Doctor and Dr. Simard both stated that the grievor was able to perform all her duties. On this point, I prefer the testimony of the dentists who testified at the hearing. The importance of the work of the assistant who assists the dentist cannot be downplayed. She must offer patients first-class care. The employer could not simply sweep aside the mistakes highlighted by the dentists who supervised the grievor. For that reason, Lieutenant-Colonel Ouellet's thorough analysis was justified. That position does not have the flexibility that other jobs may have.

**186** In *Kirby*, the existing escort driver position had not been seriously considered and analyzed. In the case of Dr. Kelly, accommodations had not been contemplated that would have maintained the quality of Dr. Kelly's work. In this case, the floating assistant position did not exist as such. Furthermore, Lieutenant-Colonel Ouellet's analysis showed that the desired accommodations seriously risked lowering the quality of the care offered to the patients. The employer had the right to see this as undue hardship.

**187** As the Supreme Court of Canada pointed out in *Hydro-Québec* (paragraph 21), the accommodation effort must be considered as a whole, not only at the time of the termination. The grievor pointed out that the employer received a doctor's note dated April 28, 2015, declaring her fit to work (with limitations) and that Lieutenant-Colonel Ouellet had signed a termination recommendation notice on April 30, 2015. However, the employer had already provided the grievor with adapted duties for two years, waiting to see whether she could one day resume all her duties.

**188** Lieutenant-Colonel Ouellet's analysis of December 2014, done to determine whether it was possible to accommodate the grievor indefinitely, appears to me serious and thorough. It is not realistic to ask a dentist to follow the dental assistant's pace. It is also not realistic to silence comments when a mistake is made during chair work, because the patient is entitled to the best care possible.

**189** It appears to me that the record as a whole shows the grievor's incapacity to adapt to the pace and requirements of the work at the Valcartier Base dental clinic.

The employer certainly has a duty to provide reasonable accommodation, which it offered during the entire time she was a floating assistant. That said, I do not believe that this duty is indefinite or that the employer has the duty to create a permanent position that does not exist. The grievor was hired as a dental assistant. She could not perform the duties of that position without causing undue hardship to the employer by requiring conditions contrary to the very nature of dental care, in which the treating professional and the nature of the treatment dictate the pace and in which mistakes may have serious consequences for patients. For that reason, I find that the employer established that the grievor's termination was not discriminatory.

**190** I will briefly address the other grievances. The grievor's first grievance was about the fact that the employer did not implement Dr. Simard's recommendations when she returned to chair work in October 2012. Yet, she, herself, submitted the second doctor's note, which authorized the return to work with no limitations. The Doctor stated that the problem would be resolved pharmacologically. The employer cannot be blamed for responding to the note.

**191** The other grievances were related to either the grievor's exaggerated evaluation or the termination recommendations. The first grievances led to a medical certificate being filed in April 2013, which suspended the termination procedure, while the employer considered its duty to accommodate. In conclusion, I consider that the employer fulfilled its duty to accommodate and that it dealt with the grievor respectfully by maintaining her employment until a final decision was made. Therefore, I consider the other grievances moot.

## **V. Conclusion**

**192** The threshold for undue hardship is reached when the necessary accommodation measures prevent the employee from fulfilling the majority of his or her duties and when the employer can offer him or her no other position. The grievor wanted to stay at the dental clinic and did not make any effort to move elsewhere in the federal public service. The employer certainly has an obligation to help find an accommodation, but when the accommodation is in the form of another position, the

employee must at least show an interest in the procedure (on this matter, see *Kelly v. Treasury Board (Department of Transport)*, 2010 PSLRB 80).

**193** For all of the above reasons, the Board makes the following order:

## **VI. Order**

**194**           The grievances are dismissed.

January 4, 2019.

FPSLRB Translation

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