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File: 566-02-10075

Citation: 2019 FPSLREB 36

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

RUBY HAVARD

Grievor

and

TREASURY BOARD
(Correctional Service of Canada)

Employer

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

In the matter of an individual grievance referred to adjudication

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

For the Grievor: Andrea Tait, Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN (UCCO-SACC-CSN)

For the Employer: Rebecca Sewell, counsel

Heard at Abbotsford, British Columbia,
July 17 to 19, 2018.

I. Individual grievance referred to adjudication

[1] The grievor, Ruby Havard, alleged that she was discriminated against by the employer, the Correctional Service of Canada (CSC), on the basis of family status. She alleged that it denied her the opportunity to trade her night shifts for day shifts, which would have allowed her to be at home at night to take care of her children. This discrimination violated the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; *CHRA*) and the collective agreement between the Treasury Board and the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN ("the union"), which expired on May 31, 2014 ("the collective agreement"). The grievance was referred to adjudication on October 8, 2014.

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

[3] 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 names of the PSLREB, the *PSLREBA*, and the *PSLRA* 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*.

II. Summary of the evidence

A. For the grievor

[4] The grievor is a correctional officer (classified CX-01) at Matsqui Institution in Abbotsford, British Columbia ("the institution"). She is married to a fellow CX, who also works there. They have two children, who at the time of the grievance were

aged 3 and 5. She was their primary caregiver.

[5] In 2014, the employer told the grievor that she was no longer permitted to trade all her graveyard shifts and work only day shifts. She requested a formal accommodation based on family status, specifically her childcare needs and her desire for a balance between her work and her life outside work (work-life balance) that would allow her to see her husband and for them to spend time together as a family. The employer could have approved her request at no cost and with no undue hardship.

[6] The grievor sought many alternatives to trading her shifts in terms of her childcare and advised the employer of her failed efforts. Ultimately, the employer denied her request, which left her in the difficult situation of addressing her childcare concerns and fulfilling her work obligations. Left with no alternative, she used her leave credits to take time to care for her children when she could not find alternative childcare.

[7] The grievor testified that she worked 12.75-hour shifts in the form of 2 day shifts followed by 2 graveyard shifts. She then had 5 days off. Starting with the birth of her first child in 2009, she traded her graveyard shifts for day shifts so that the schedule that she worked, despite what was on paper, was 4 day shifts followed by 5 days off. This continued after the birth of her second child in 2011 and through to the spring of 2014.

[8] In the spring of 2014, the assistant warden of operations, Mark Bussey, emailed all the CXs at the institution (Exhibit 2, tab 14), notifying them that permanent shift trades would no longer be permitted. Shift trades were to be managed case by case by the correctional manager, scheduling and deployment, who would approve them if they were appropriate and consistent with the employer's policy.

[9] This caused the grievor great concern. She could not work graveyard shifts. Her oldest child had night terrors and had suffered from febrile seizures. She was afraid to leave her children with her mother, who suffered from a disability, as she was not confident that her mother would respond at night if her children cried out because of the medication she was taking.

[10] The grievor's husband also worked shifts as a CX. She approached the union for help and the correctional manager, scheduling and deployment, Andrea Duval, about

the options that were open to her. Ms. Duval told her that it was not her decision and that the grievor had to speak to Mr. Bussey. On February 27, 2014, the grievor emailed him her formal accommodation request (Exhibit 2, tab 5).

[11] Mr. Bussey suggested that the grievor move to what was known as a 250-day post, which would mean that she would no longer work 12.75-hour shifts but from 07:00 to 15:00, Monday to Friday. She lived in Surrey, a community approximately 50 km from Abbotsford. To get to work on time, she testified that she would have had to leave her home at 06:00 and that it was difficult to find childcare at that time of day.

[12] Working 7.5-hour shifts also meant that she would work 80 to 90 more days per year. She could foresee that she would go weeks without seeing her husband, based on his schedule. This meant that she would have no work-life balance. She would not be able to participate in dropping off and picking up the children or in any preschool event.

[13] When the grievor explained this to Mr. Bussey, he responded that the accommodation being offered was the 250-day post, which met her need to work days. He added that just because she wanted something, it did not mean she needed it. She needed a day shift, which is what the employer offered her. She received the employer's response on March 27, 2014 (Exhibit 2, tab 6).

[14] The 250-day post did not work for the grievor or her family. She approached her family and friends for help with her graveyard shifts. She contacted daycares to see if one would accept earlier drop-offs. If one would accept children at 06:00, the grievor would have had to leave home by 05:45 at the latest to be at work on time for the start of her shift. She was unable to find anyone to take her children that early. She could not rely on her mother, and her mother-in-law and friends had jobs.

[15] Initially, the grievor's shift trades in May and June were not approved (Exhibit 2, tab 7). Her husband submitted additional information in support of her accommodation request on April 4 (Exhibit 2, tab 8). As a result, Mr. Bussey granted her an extension to the end of August 2014 (Exhibit 2, tab 9). In the event that at the end of August she still required the accommodation of only day shifts, the result would have been the 250-day post.

[16] The grievor accepted the extension but still disagreed that the 250-day post met

her needs, which she informed the employer of verbally and in writing. She spoke to Ms. Duval about the effect of it on her family and was told that she "chose to have children". When she spoke to Mr. Bussey again, he told her that she was being accommodated via the 250-day post. If she did not like it, she could grieve it.

[17] Management's responses made the grievor angry. It did not care anything about her work-life balance. The employer offered no accommodation alternative to the 250-day shift.

[18] The grievor's request was for a temporary accommodation until 2016, when her children would both be in school. Since she declined the offer of the 250-day post, she remained on her regular rotation and hoped that her manager would allow shift trades. When that turned out to not be possible, she took the shift off and used her accumulated leave. On the days she had to work her graveyard shifts, her nephew stayed with her children if her husband was also working. Their schedules overlapped twice in a cycle, once for a night shift and once for a day shift.

[19] Had the grievor accepted the 250-day post, the couple would have overlapped only on her husband's day shifts. By contrast, had she remained on a 12.75-hour day shift, they would have required childcare once every 9 days and then would have had 4 days off together. With the 250-day post, the maximum time the couple would have had off together would have been 2 days, if any.

[20] There was a financial consequence on the grievor for having to work her graveyard shifts. She paid her nephew approximately $350 per month to take care of her children. She paid him in cash and did not receive any receipts from him. When the Board member asked her if she actually paid her nephew, she admitted that she had not; she had never paid him.

[21] The grievor remained on her rotation. For some unexplained reason, in 2016, things changed, and she was again allowed to trade shifts. She testified that she had not worked a graveyard shift in the 18 months before the hearing.

[22] In cross-examination, the grievor was led through her personal schedules (Exhibit 2, tab 13). In the course of this exercise were identified shift exchanges on days when the grievor's husband was on a rest day, shift exchanges from days to rest when her husband was on vacation on a Friday and on a rest day on a Saturday,

shift exchanges to a rest day when her husband was on a rest day , and other shift changes which did not align themselves with the grievor's stated purpose for wanting shift changes that is to provide for day care for her children. Other shift exchanges were made to allow her to work on the same day as her husband. It also became clear that shift exchanges were allowed even after August 2014.

[23] The exercise went on to examine the grievor's use of vacation leave. It showed that she used it more often to take the day off when her husband was on a rest day than to make her schedule work. In fact, the only leave she took after Mr. Bussey's email was for days on which her husband was on a rest day.

[24] In cross-examination, the grievor admitted that the 250-day post was not the only accommodation that the employer offered her. It also offered to put her on a shift schedule opposite her husband's. She testified she refused that because it did not work with her work-life balance. She also denied that the employer ever offered to allow her to start her 250-day post at 08:00, instead of at 07:00, by posting her to the service entrance. She also admitted that at no time did she or her husband consider requesting a change to his shift to accommodate the family's childcare needs. She admitted that the employer did offer to change her husband's shift rotation to help with the couple's daycare issues, but she dismissed it immediately, without consulting him.

[25] According to the grievor, if she were to accept the 250-day post, she would no longer qualify for weekend or holiday premiums. She would lose her lieu hours. She would have weekends and statutory holidays off, and that would be it. No premiums attach to the 250-day post, while the graveyard shift provides a shift premium.

[26] The grievor could not provide the employer with any convincing reason that her start time was an impairment to obtaining daycare. She was asked at the hearing why, if her nephew stayed with the children at night, could he not take them to daycare; she did not respond. She was asked why, if her regular start time was 07:00 for the 12-hour day shift, which both she and her husband worked and for which daycare was not an issue, would it be an issue if she were to work an 8-hour day shift. She provided no cogent response. Finally, when she was asked if an 08:00 start would have addressed her daycare problems, she simply denied that it was ever offered. When she was asked what would resolve her situation, her response was to be allowed to continue doing as she had done before the employer changed the shift-exchange rules.

[27] Amarjot (Rick) Ghuman testified on behalf of the grievor. He has been a member of the local union executive since 2010, has been a member of the joint scheduling committee, and has been dealing with CXs requiring accommodation since early 2014. The most difficult accommodation requests have been based on family status. The employer rarely provides any rationale for denying a CX's request on that basis. When it does agree to one, it puts conditions on it.

[28] Mr. Ghuman testified that the scheduling committee meets when new schedules are to be created. The proposed schedule is submitted to the union members to vote on, and if they approve it, it is submitted to the regional then the national level for approval.

[29] Somewhere between 2013 and 2015, Mr. Bussey requested the creation of a 12-hour day shift. Mr. Ghuman told him that things did not work that way; if a 12-hour day shift were created, then a 12-hour night shift had to be created to mirror it. If a CX were to work only graveyard shifts, then he or she would have no meaningful interaction with the inmates. Mr. Bussey's proposal never went to the union members.

[30] At the time of the grievance, the institution was overstaffed. There were 108 lines on the schedule and 121 CXs on staff. Staffing levels remained surplus until early 2017, according to Mr. Ghuman.

[31] In support of the grievor's request to trade all her graveyard shifts as a block, Mr. Ghuman emailed the CSC's commissioner. His rationale was that the *Labour Relations Bulletin*, which accompanies *Human Resources Management Bulletin #2013-03* ("the bulletin"), states at page two that block shift trades may form part of an accommodation plan (Exhibit 2, tab 20, page 2). Clause 21.03 of the collective agreement sets out the rules for shift exchanges. That agreement has priority over a Human Resources bulletin. Shift exchanges never stopped at the institution.

[32] When the grievor requested accommodation, extra officers were available who could have taken her shifts; yet, the employer did not allow the exchanges. She was given two options: work graveyard shifts, or take the 250-day post. There was no reason for the block trades to end, in Mr. Ghuman's opinion. Clause 21.03 does not mention the block exchanges of shifts; it mentions only that shift exchanges require the employer's approval.

[33] As management changed over the years since the decision to end block

shift 3xchanges was made, things went back to normal, and Mr. Bussey's email is no longer followed, according to Mr. Ghuman's testimony.

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

[34] Mr. Bussey testified that as the assistant warden, operations, at the institution, he is responsible for, among other things, scheduling CXs. As head of the department, he is a member of the accommodation committee.

[35] Between 2014 and 2016, CXs at the institution worked one of the following schedules: a 250-day post, 12.75 hours on 2 days and 2 nights and then 5 days of rest, or a 9-hour so-called "side schedule". All schedules were recommended for approval at the different levels by the Institutional Scheduling Committee, which was a joint labour-management committee. They were developed from the master schedule, which at the institution had 97 lines. Appendix K of the collective agreement sets out the guidelines for scheduling. One party cannot unilaterally create a new schedule. Changing one requires the consent of the other party.

[36] The CX-01 job description (Exhibit 3, tab 11) requires CXs to have knowledge of all the posts in an institution, which is gained by rotating through them all on all shifts. Post rotation is an essential skill of CXs; they must be flexible enough to assume any role at any time.

[37] A number of benefits accrue to CXs who work variable shifts. Shift premiums apply to hours worked outside 07:00 to 1500 or 08:00 to 16:00. CXs working shifts receive 93 lieu hours per year, to compensate for missed statutory holidays. They are to be used as time off or cashed out, at the CX's discretion. CXs working day posts receive all statutory holidays off, with pay.

[38] Shift exchanges are allowed pursuant to clause 21.05 with sufficient advance notice, with employer approval, and as long as the exchange does not incur any extra costs for the employer. They cannot be open-ended; they cannot go beyond the life of the current schedule and must comply with the bulletin (Exhibit 2, tab 20). They are intended to provide staff with the opportunity to meet their short-term needs and are not intended to create a new or personalized schedule. It would be rare for Mr. Bussey to be involved in a shift-exchange request; his role is to monitor compliance with the employer's policies.

[39] Accommodation requests in the form of shift trades go through the Institutional Personnel Committee if they are intended for the long term. When one is received, Mr. Bussey meets with the correctional manager, scheduling and deployment, to look at options. The correctional manager then discusses these options with the CX. Once the options are identified, they are brought before that committee for approval.

[40] When developing the options, Mr. Bussey and the correctional manager, scheduling and deployment, examine the nature of the request, the CX's limitations, if any, the duration of the accommodation (temporary or permanent), how many others in the institution are already being accommodated, and the jobs available outside the CX ranks that meet the employee's needs. If it is not possible to accommodate the CX within the institution, Mr. Bussey will look outside it but within the CSC.

[41] The employee's role when seeking an accommodation is to be fully engaged, explore all options, be flexible, and cooperate with the accommodation process. The employee's needs may be identified in doctor's notes or through the union. The employer must balance the employee's needs with those of the institution.

[42] Mr. Bussey testified that his email (Exhibit 2, tab 14) did not eliminate shift trades. His intention was to bring them into line with how they were intended to be used. After a periodic review, the Correctional Manager, Scheduling and Deployment, brought to his attention how much work was involved with how shift exchanges were being used. Hundreds of shift trades took place per month; all were processed by the correctional manager's office. As part of managing the workload involved managing shift trades within the terms of the policy that had come out six months earlier, Mr. Bussey sent the email. Approximately one month later, the grievor raised her issue with him.

[43] The grievor emailed Mr. Bussey, requesting an accommodation. She was one of the CXs using shift exchanges to manage their personal schedules. She had a partner that she exchanged shifts with to work 12.75 hours only on days; the partner worked only 12.75-hour graveyard shifts. The two had been doing this for some time before Mr. Bussey received her accommodation request. She wanted to continue this arrangement for another 2.5 years, even though shift exchanges were intended to be used only for the short term. She continued making shift exchanges while Mr. Bussey looked for accommodation options.

[44] According to Mr. Bussey all CXs work 2087 hours in one year, regardless of

shift. On the 250-day post, the grievor would be in the workplace more frequently but would not work more hours. She would work shorter shifts. There would be no financial penalty. She would be paid for her statutory holidays but not required to work them.

[45] As a suitable accommodation, the grievor proposed that the employer create a new shift for her, which was not possible without the union's consent. Therefore, Mr. Bussey needed to look at other options. The grievor's letters (the one she wrote and the one her husband wrote that she submitted) made statements but did not provide any proof to support her assertions that nothing other than shift exchanges would meet her family obligations.

[46] The Institutional Personnel Committee reviewed the grievor's accommodation request. It determined that the only accommodation that would meet her demonstrated need to work only day shifts was the 250-day post. This was determined on the basis of answering the question of how to accommodate her within the existing schedule structure, knowing that indefinite shift exchanges would not be approved. The 250-day post met her core needs.

[47] The employer did explore the option of creating a 12.75-hour day shift for religious accommodations. It would have been a schedule of 6 lines for days and 6 lines for nights. The local union president at the time and Mr. Ghuman refused to consider it because of the impact it would have had on the other officers, according to Mr. Bussey.

[48] Allowing indefinite shift exchanges does not assure the employer that the CXs involved in them will be exposed to all posts and routines, particularly the CX who strictly works the graveyard shift. If the grievor were to work the 250-day post, the employer could build in this assurance and meet this operational need. The employer considered her concerns about the 07:00 start for the day shift and offered to allow her to work from 08:00 to 16:00 instead of from 07:00 to 15:00, to satisfy her daycare needs.

[49] In discussions with the grievor and her husband, Mr. Bussey testified that he determined that one of their main concerns was that she would no longer be entitled to lieu hours and the flexibility for time off that those hours bring.

[50] Mr. Bussey could not understand why the grievor could not start a 250-day post

at 07:00 when all the 12-hour shifts she worked started at that time. When he asked her this question, she did not respond. There were 250-day posts that did not require her to start at 07:00, such as escort duty or the service entrance. While he did not offer her the possibility of an 08:00 start, the Deputy Warden told him that she had done so during the grievance process.

[51] After Mr. Bussey received the letter from the grievor's husband (Exhibit 2, tab 8), he looked again at the options available to accommodate her. He increased the flexibility of his approach and amended the accommodation. She was allowed to continue to exchange her graveyard shifts until the end of August 2014, to give her time to explore daycare options or develop new arguments. After that, if she still required accommodation, the employer was prepared to offer her a 250-day shift, which met the needs identified in her request. All this was confirmed in an email to her on April 7, 2014 (Exhibit 2, tab 9).

[52] The next time Mr. Bussey heard from the grievor was in the form of this grievance. After he had heard nothing further from her by September 2014, he considered the matter closed; either she had found a solution to her daycare needs or she had accepted the 250-day post.

[53] There is a perception in the institution that family status accommodation is harder to obtain from the employer. Both parties have to be engaged in finding the solution. In this case, the grievor was not willing to consider anything other than shift exchanges. She had to demonstrate that she had exhausted all options before requesting an accommodation. Any accommodation offered to her may not necessarily be what she requested, as long as it meets the needs identified.

[54] Mr. Bussey is aware of his obligation as a manager under the CSC's *Guidelines on Workplace Accommodations* (Exhibit 2, tab 21). He is also aware that each case must be evaluated on its merits and may require changes to work schedules to meet the needs of the person seeking the accommodation. Block trading might have been used by some institutions in the past to manage accommodations (Exhibit 2, tab 17, page 2). The onus is on the employer to prove undue hardship.

[55] According to Mr. Bussey, the grievor did not provide sufficient information, of the required depth and breadth, for the employer to make an informed decision. He had two meetings with her and one with her husband. The only solution they would consider was making shift exchanges on her current rotation.

[56] When she was offered the 250-day post, the 07:00 start became the issue that Mr. Bussey could not understand, since all the 12-hour day shifts started at 07:00. Since some of the grievor's 12-hour day shifts fell on weekends, Mr. Bussey proposed aligning the couple's schedule, to allow for daycare arrangements. The grievor refused this option, without any consideration.

[57] Theresa MacNeill testified that she was the deputy warden at the institution at the time of this grievance. When she presided over the grievance hearing, she was the acting warden. In her deputy warden role, she presided over the meetings at which all accommodation requests were reviewed and discussed.

[58] The grievor's request was brought to committee in March or April of 2014. The main issue with it was that even though she had requested accommodation based on family status, she was really asking to be exempted from the prohibition on shift trades and to be allowed to trade all her graveyard shifts, for 18 months. The committee reviewing the request was made up of middle and senior managers at the institution. It looked at whether the request could be managed within the existing scheduling rules and whether it could be managed for 18 months. The committee requested additional information, which her husband provided.

[59] It appeared that the grievor's main concern with working a 250-day shift was the opening hours of the daycares and not the shift's start time. The information that she and her husband provided was still not specific enough; Ms. MacNeill was looking for more detail. She asked about the start time of the 250-day shift again at the second-level grievance meeting. She also proposed other means of addressing the grievor's concerns with the daycares' operating hours, such as offsetting the shifts of the grievor's husband so that they did not start and end at the same time. The grievor indicated that that was also not feasible, although her focus remained on the fact that she would not be able to start a 250-day shift at 07:00.

[60] Ms. MacNeill testified that the grievor did not agree with any options proposed to her that the employer felt met her needs. The only thing she would accept as an accommodation was the right to exchange all her 12.75-hour graveyard shifts. In other words, she wanted to continue doing what she had been all along. But that did not account for the employer's needs and the fact that she would not carry out the full range of shift patterns or the full gamut of CX duties. It also would have meant that other officers would have had to pick up extra duties on shifts the grievor should have worked.

[61] According to the bulletin (Exhibit 3, tab 8), shift exchanges are not intended to be permanent or a means of accommodating an employee on a long-term basis. The grievor's request was not for a temporary arrangement. She was given a four-month window during which she could continue to exchange shifts so that she could find alternate childcare arrangements before the 250-day shift option became the employer's solution.

[62] The bulletin is clear that shift exchanges were not to be used to create new shift schedules, which was what the grievor essentially proposed. Creating new shift schedules requires consulting with the union at the local, regional, and national levels before they may be implemented. When the employer tried to do that to create a schedule for religious accommodations, the union local refused to consider it.

[63] Ms. MacNeill confirmed to the grievor's union representatives that the employer was willing to offer her the 250-day post (Exhibit 2, tab 19). The union's president responded, alleging that the employer was creating day posts to accommodate workers, which was not the case. The positions considered for the grievor were all pre-existing and fully funded.

[64] The grievor was unable to express or articulate why a 250-day post did not meet her needs, even when she was offered a day post with an 08:00 start time if the 07:00 start time proved difficult. She and her husband declined any offer to move him to a new rotation pattern. All she was interested in was continuing with the shift trades as she had done before the bulletin putting an end to them came out. Her main priority was maintaining her current schedule through shift exchanges.

III. Summary of the arguments

A. For the grievor

[65] The grievor sought to meet her childcare obligations and to maintain her work-life balance. To do it, both parents needed to be present, particularly since more than one child was involved. The grievor's request was possible at no cost to the employer, which establishes that there was no undue hardship. She sought many different alternatives and kept the employer informed of her efforts. On the other hand, the employer made no real effort to accommodate her. The offer it made did not meet her needs.

[66] The grievor proposed a reasonable solution to meet her childcare needs,

which the employer did not consider before denying it. This left her in a difficult situation. She could meet her childcare obligations, or she could be present at work, as required. She was left with no alternative but to use leave credits to take the time to care for her children on those occasions when it was difficult or impossible to secure childcare.

[67] Article 37 of the collective agreement makes it clear that there is to be no discrimination on the basis of family status.

[68] Early in 2014, the employer notified the CXs that they were no longer allowed to do block shift exchanges. The grievor made a request to be allowed to continue doing so until the fall of 2016, when both of her children would be of school age. The employer denied it, thus discriminating against her, contrary to article 37 of the collective agreement, and failing its duty to accommodate.

[69] The *CHRA* provides protection against discrimination with respect to the choice to have children. The duty to accommodate this choice is very broadly based. The employer was obligated to work with the grievor to create a workable solution that balanced her parental obligations with her work opportunities, short of undue hardship (see *Johnstone v. Canada Border Services Agency*, 2010 CHRT 20 at paras. 231 to 233).

[70] In this case, the employer did grant the grievor time, until August 2014, to find a solution. It is acknowledged that it offered her a 250-day post with an 07:00 start. The problem with that offer was that she lacked access to childcare that early in the morning, five days per week. She provided the employer with a list of the daycares in her area and their opening hours. She explained the impact that the employer's denial of shift exchanges had on her family. Still, the only offer was the 250-day shift, which was not enough, according to paragraph 233 of *Johnstone.*

[71] The grievor fulfilled her obligations to work with the employer in the accommodation process by considering the options it proposed. It did not meet with her to discuss its decision to assign her to the 250-day post. It was not flexible. It insisted on its way, and nothing else. This was not a true accommodation process. The employer refused to work with her to find a solution that worked for both parties. Her solution was proven in that it worked for years until the employer's arbitrary

decision on a random day seriously impacted her childcare arrangements.

[72] The employer has procedures for the accommodation process, which Mr. Bussey did not use. As the decision maker, he was responsible for making sure that all steps were followed. He did not understand why the grievor did not want to work the 250-day shift; she explained to him in the second request that on her current schedule, she needed only 2.5 days of daycare per week, so she had arranged for that, and no more. Her mother had health problems, which made it difficult for her to provide daycare in the long term. The employer needed to work harder to find a solution to meet the grievor's needs and not propose a solution that meant more days at work, which created more of a need for daycare.

[73] Simply providing an extension of time during which shift exchanges were allowed so that the grievor could resolve her daycare issues was not a reasonable accommodation (see *Canadian National Railway Company v. Seeley*, 2014 FCA 111 at paras. 58 and 59). The decision-making process must be examined, as well as the final decision, to determine whether the employer met its duty to accommodate (see *Whyte v. Canadian National Railway*, 2010 CHRT 22). In this case, the employer provided no rationale to the grievor as to why she was no longer able to do block shift exchanges. Its policy allowed for temporary accommodations through shift exchanges.

[74] The grievor explained why she needed to be accommodated until September 2016. That was when her children would both be in school. Mr. Ghuman testified that it was easier to have accommodations granted for reasons other than family status, as others had experienced. For some reason, requests for family status accommodation received more scrutiny. The employer clearly saw having children as a personal choice, which brought with it changes to the grievor's life style that she was required to accommodate, not the employer. She was told to grieve if she did not like the accommodation that was offered.

[75] The test for a *prima facie* case of workplace discrimination on the prohibited ground of family status was set out as follows in *Attorney General of Canada v. Johnstone*, 2014 FCA 110 at para. 93 ("*Johnstone*-FCA"):

> *[93] … the individual advancing the claim must show (i) that a child is under his or her care and supervision; (ii) that the childcare obligation at issue engages the individual's legal*

> *responsibility for that child, as opposed to a personal choice; (iii) that he or she has made reasonable efforts to meet those childcare obligations through reasonable alternative solutions, and that no such alternative solution is reasonably accessible; and (iv) that the impugned workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfillment of the childcare obligation.*
>
> …

[76] It is uncontested that the grievor had two young children in her care and that she had a legal obligation for their welfare, which meets the first two criteria. As for the third, she made reasonable efforts to meet her childcare obligations when it became apparent that her request would not be approved. She sought daycare information, specifically when the daycares opened.

[77] The employer's response was that she provided it with insufficient or any information about the availability of daycare spots, yet there is no proof that it requested any information about daycare vacancies. What difference would it have made had there been vacancies at a daycare, if it did not open in time for the grievor to get to work?

[78] The third criterion requires the grievor to demonstrate that she made reasonable efforts to meet her daycare obligations through reasonable alternative solutions and that no such solution was reasonably accessible (see *Johnstone*-FCA, at para. 96). She must show that neither she nor her husband could meet their childcare obligations while continuing to work. Her husband worked the same 12-hour shift as she did, at the same institution. He could not provide the daycare.

[79] The grievor's mother helped out, but her disability prevented her from helping overnight. The grievor exchanged her overnight shifts so she could provide childcare at night, after the birth of her first child. She and a colleague combined their schedules; she worked all the day shifts, while the colleague worked all the night shifts. When comparing the grievor's schedule to her husband's, it could appear that the shift exchanges were not made for childcare purposes. Even if they were not directly related to childcare, they might have been incidentally related to it. She might have spent time off on those days with her husband and children.

[80] The situation before this Board is similar to that in the case of *Richards v. Canadian National Railway*, 2010 CHRT 24. In that case, the employer made no efforts to understand the employee's situation. It ignored her letters and

decided to treat her case as a childcare issue. Without speaking to the employee, it felt that it knew what was better for her and what she needed. According to the Canadian Human Rights Tribunal, that behaviour was reckless (at para. 27).

[81] Mr. Bussey did not follow employer policy. He had better knowledge of what the grievor needed than she did, without speaking to her. His conduct was reckless. His persistence in insisting on the 250-day post, despite being told consistently that it did not meet her needs and how it did not meet them, was irresponsible. He never explained to her why she was suddenly no longer able to carry out block shift exchanges. Then suddenly in late 2016, she was able to carry them out again. The employer arbitrarily applied it for the period in which she sought accommodation. Its policy recognized that block shift trades were a possibility for meeting accommodation needs.

[82] If she worked the 250-day shift, the grievor required more daycare. When she worked her 12.75-hour day-day-night-night rotation, she required daycare for 2.5 days, every 9 days. Working only days meant she required daycare 5 out of every 7 days. Her challenge was finding consistent daycare for the next 2 years, particularly a daycare that opened in time for her to get to work.

[83] The bulletin is not part of the collective agreement, which is clear about the requirements for a shift exchange. Those are that there must be advance notice, the employer must agree, and there must be no extra cost to the employer. The only way for the employer could not agree to exchanges was to make them impossible. The change in the application of the collective agreement had an adverse effect on the grievor's ability to provide childcare. She was denied the right to exchange shifts between August 2014 and September 2016. The employer suggested changing her husband's shift, but that still would have caused travel and daycare issues.

[84] The employer's unilateral decision to enforce the bulletin removed the grievor's ability to meet her childcare needs. As of the hearing, she was still able to do block shift exchanges, which clearly demonstrates the arbitrariness of the employer's decision in 2014. As a result of its arbitrary actions, she was left having to deal with last-minute childcare issues since she could no longer plan in advance.

[85] The employer claimed that it offered the grievor the option of starting at 08:00,

but there is no proof that it did, other than Ms. MacNeill's testimony. Even if it did, it happened only as the grievance was being moved outside the institution to the final level of the grievance process. Neither the grievor nor her union representatives remember it ever being proposed. It is not mentioned in any of the correspondence. Had it been offered, the grievor would have accepted it, as she had made it clear in her correspondence about the daycares' opening hours that she could not start before 08:00.

[86] The grievor questioned whether the employer ever seriously considered creating a new schedule for religious or family accommodation and following the process set out in Appendix K of the collective agreement. That process is very involved, and in her opinion, it is unlikely that the employer would have been interested in embarking upon it.

[87] The grievor's concern over the loss of her lieu hours is legitimate. They are banked hours that she can use at her discretion for time off, or they can be paid out. They gave her additional days off and helped her be absent from the workplace. There is no relevance to the shift premium argument since she would not have worked the shift on which it would have applied.

[88] Block shift exchanges worked for the grievor and the employer. She found someone to trade with. All the employer had to do was approve the exchange. She found her replacement at no extra cost to the employer. What hardship was there for the employer to approve a shift exchange? Its only obligation would not have changed had the situation been formalized as an accommodation.

[89] Once a *prima facie* case of discrimination has been established by a grievor, the burden shifts to the employer to show that the *prima facie* discriminatory standard is a *bona fide* occupational requirement and that the grievor has been accommodated to the point of undue hardship (see *Patterson v. Canada Revenue Agency*, 2011 FC 1398 at para. 48). The employer has the burden to prove that it accommodated the grievor to the point of undue hardship (see *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 SCR 3).

[90] The employer adopted a policy that it believed was legitimate, which allowed for the exception of block trades for temporary accommodation purposes. Clearly, what

the grievor sought was not an undue hardship and was not impossible. The employer rejected her proposal, which was simple, bore no cost, and was already being used. The employer's unilateral decision to apply the bulletin as it did caused the discrimination, but ironically, the bulletin included the solution.

[91] The grievor seeks as a remedy damages for discrimination and real, moral, and exemplary damages. She seeks the return of any leave she might have used between August 2014 and September 2016 to cover night shifts, the $350 per month cost of her childcare for the same period, totalling $8400, and $8000 in damages pursuant to s. 53(2)(e) of the *CHRA* for the wilful and reckless application of the employer's policy when it allowed for shift exchanges for accommodation and for refusing to consider the grievor's proposal as a possible solution to her accommodation request.

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

[92] The grievor has not established a *prima facie* case of discrimination on the prohibited ground of family status. She has a stated preference to work a 12-hour day-only shift, which she managed to acquire through shift exchanges. This was a matter of personal preference and not a matter of her childcare obligations.

[93] The *Johnstone* test at paragraph 93 of the Federal Court of Appeal decision requires the grievor to meet four criteria to make out a *prima facie* case of workplace discrimination on the ground of family status resulting from childcare obligations. The employer does not dispute that she meets the first two criteria.

[94] This case is about the third criterion, which is whether the grievor made reasonable efforts to meet her childcare obligations through reasonable alternatives. She had to show that neither she nor her spouse could meet their enforceable childcare obligations while continuing to work and that an available childcare service or an alternative arrangement was not reasonably accessible to them, to meet their work needs.

[95] In essence, the grievor had to demonstrate that she and her husband faced a *bona fide* childcare problem (see *Johnstone*-FCA, at para. 96). She provided no evidence about her husband's ability to meet their joint childcare obligations. Paragraph 88 of *Johnstone*-FCA requires evaluating the steps taken by both parents to meet their parental obligations. The only evidence the grievor provided was that a different schedule for her husband or a 250-day post with a flexible start time would not work.

[96] This is not sufficient to establish that she made reasonable efforts to meet her childcare obligations through reasonable alternatives and that no alternative solution was reasonably accessible as identified in the third criterion. Each of the four factors set out in *Johnstone*-FCA acts as a stepping stone to the next, which means that when claiming discrimination based on family status, the grievor must meet each and every factor, starting with the first. If in the course of the analysis, she fails to meet one, then she cannot establish a *prima facie* case of discrimination (see *Fleming v. Treasury Board (Canada Border Services Agency)*, 2016 PSLREB 96 at para. 121).

[97] The grievor has no free-standing right to accommodation in the workplace based on the employer's application of the policy on shift exchanges. The right to an accommodation could have arisen only had she been able to establish a *prima facie* case of discrimination (see *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4 at para. 11).

[98] Having failed to establish one, the grievor has no right to the accommodation she seeks. Even if she was entitled to be accommodated, the employer's position is that she was in fact offered a suitable accommodation, which she refused. She has not established that the employer failed its duty to accommodate.

[99] Furthermore, the grievor is entitled to seek accommodation only with respect to enforceable or legal obligations related to her family status, which do not include work-life balance (see *Moore v. British Columbia (Education)*, 2012 SCC 61; *Flatt v. Canada (Attorney General)*, 2015 FCA 250; and *Johnstone*-FCA). All these decisions require that the grievor possess a characteristic protected under the *CHRA*, that she prove that she suffered some adverse impact as a result of the employer's actions, and that there is a nexus between the protected characteristic and that impact.

[100] The crux of this case is whether the grievor suffered an adverse impact as a result of her family status, which does not include her desire to maintain work-life balance. The facts of this case are almost the polar opposite of those in *Johnstone*-FCA. The grievor was offered a static day post Mondays to Fridays, when daycare would have been readily available. She submitted that the contentious point was her start time, but she provided no evidence of having canvassed daycares for their availability. Her efforts did not meet the level of "significant" efforts, required under the reasons in *Johnstone*-FCA.

[101] There is insufficient evidence that both the grievor and her spouse were unable

to meet their childcare obligations or that the employer's proposals were unreasonable. A certainty is that they managed daycare 2.5 days per week, that their neighbourhood was crowded, that daycares opened at 07:00, that the grievor had a 45-minute to 1-hour commute, and that she used shift exchanges to manage her childcare obligations. The only evidence adduced was the two request letters submitted to the employer, which does not meet the bar set out in *Johnstone*-FCA.

[102] The employer granted the grievor's accommodation request when it allowed her to continue to make shift exchanges for four months, to give her time to find alternative childcare arrangements. This was not an acknowledgement by the employer that she had established a *prima facie* case of discrimination or that it had any duty to accommodate (see *Flatt*, at para. 99). It proposed a reasonable alternative to the grievor's request to be allowed to continue using shift exchanges.

[103] Ms. McNeill was a reasonable and credible witness. She was clear and specific that she offered the grievor an 08:00 start at the grievance meeting that she presided over. The fact that the grievor and her representative testified that they did not remember her doing so does not mean that it did not happen. Ms. McNeill testified that she did not include it in the grievance response letter because the grievor had rejected it outright and without consideration.

[104] Similarly, just because the 08:00 start time was not in Mr. Bussey's email response to the accommodation request (Exhibit 2, tab 9) does not mean that it was not brought up. According to Ms. McNeill, it was suggested in response to the second accommodation request (Exhibit 2, tab 8). When the employer said that the proposed accommodation met all the grievor's needs, knowing that the 07:00 start time was an issue, it had to be referring to a 250-day shift with an 08:00 start time; otherwise, it would have made no sense.

[105] The grievor dismissed outright the possibility of working shifts alternate to her husband; she said that it would not provide them with sufficient time together. She provided no evidence about a daycare's availability or any explanation as to why a 250-day shift would not work with an 08:00 start. Her allegation that she used shift exchanges to meet her childcare obligations is contradicted when her schedule is compared side-by-side with that of her husband. She primarily used shift exchanges to be off on days when he was off. She provided no explanation as to how they managed their daycare obligations on days when her day shifts fell on Mondays to Fridays. She stayed on her scheduled day shifts, reported to work at 07:00, and managed her

daycare obligations.

[106] The 250-day shift posed no financial penalty. Lieu hours go with shift work, as do shift premiums. If the grievor does not work shifts to which they attach, she is not entitled to them. Shift work is considered disadvantageous when considering a family status accommodation; day shifts are preferable, for the purposes of securing daycare (see *Johnstone* v. Canada, 2007 FC 36 at para. 33). There is no evidence of an adverse impact on the grievor from working some of her graveyard shifts. In August 2014, she worked one midnight shift. There is insufficient evidence to demonstrate any impact from working that single shift. Using shift exchanges and leave to be off on the days on which her husband did not work does not support her claim that she was required to use those methods to ensure that she met her childcare obligations. Her testimony that she paid her nephew $350 per month to stay with her children at night when she worked one night shift per month is just not credible.

[107] Proof of adversity is essential for a *prima facie* case of discrimination (see *Bodnar v. Canada (Attorney General)*, 2017 FCA 171 at para. 26). The grievor's legal obligation must have been compromised by the employer's actions (see *Chênevert v. Treasury Board (Department of Agriculture and Agri-Food)*, 2015 PSLREB 52 at para. 143). The Board cannot consider the employer's answer before determining whether a *prima facie* case of discrimination has been established (see *Bassett v. Treasury Board (Correctional Service of Canada)*, 2017 PSLREB 60 at para. 56).

[108] The employer has shown the undue hardship that allowing the grievor to continue to exchange her graveyard shifts indefinitely would cause it. It has shown the increased workload it causes on the correctional manager, scheduling and deployment, who must manage such requests and ensure proper coverage throughout the institution. It has also been demonstrated that to meet the grievor's demands, a new schedule would have had to be created, which was out of the employer's hands, since it could not be done without the union's support. The grievor was given a four-month window in which to bring forward new information to support her request, which she refused to do.

[109] Under ss. 7 and 11.1 of the *Financial Administration Act* (R.S.C. 1985, c. F-11), the employer has the authority to implement rules and polices. The employer did so with respect to shift exchanges at the institution. The rules were not directed at the grievor personally. They were necessary to effectively manage and staff the institution and to manage the workload of the correctional manager, scheduling and deployment.

IV. Reasons

[110] The grievor alleged that the employer discriminated against her based on her family status, in violation of clause 37.01 of the collective agreement, which provides that there shall be no discrimination exercised or practiced with respect to an employee by reason of family status, among other grounds, as follows:

> ***ARTICLE 37***
>
> ***NO DISCRIMINATION***
>
> ***37.01*** *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 origin, religious affiliation, sex, sexual orientation, family status, mental or physical disability, membership or activity in the Union, marital status or a conviction for which a pardon has been granted.*
>
> …

[111] Section 7 of the *CHRA*, which has been incorporated into clause 37.01, provides that it is a discriminatory practice, in the course of employment, to differentiate adversely in relation to an employee on a prohibited ground (see *Taticek v. Treasury Board (Canada Border Services Agency)*, 2015 PSLREB 12 at para. 102). To establish that the employer engaged in a discriminatory practice, the grievor must first establish a *prima facie* case of discrimination, which covers the allegations made, and that if believed, would be complete and sufficient to justify a finding in the grievor's favour in the absence of an answer from the employer (see *Taticek*, at para. 103).

[112] To establish a *prima facie* case of discrimination, the grievor had the burden of demonstrating that she met one of the prohibited grounds of discrimination, in this case family status, that she experienced an adverse impact with respect to her employment, and that her family status was a factor in that adverse impact (see *McLaughlin v. Canada Revenue Agency*, 2015 PSLREB 83 at paras. 153 and 154; and *Chênevert*, at para. 137).

[113] It is trite law to say that to demonstrate that an employer engaged in a discriminatory practice, a grievor must first establish a *prima facie* case of discrimination.

[114] An employer faced with a *prima facie* case can avoid an adverse finding by calling evidence to provide a reasonable explanation that shows that its actions were in fact not discriminatory or by establishing a statutory defence that justifies the discrimination (see *A.B. v. Eazy Express Inc.*, 2014 CHRT 35 at para. 13).

[115] To establish a *prima facie* case of discrimination based on family status, a grievor must show that a family member is under his or her care and supervision, that the family obligation at issue engages his or her legal responsibility for that person (as opposed to being a personal choice), that the grievor has made reasonable efforts to meet those family obligations through reasonable alternative solutions that have proved not reasonably accessible, and that the impugned workplace rule interferes in a manner that is more than trivial or insubstantial with fulfilling those obligations (see *Johnstone*-FCA, at para. 93; and *Flatt*, at para. 177).

[116] The grievor and her husband are both employed as CXs at the same correctional facility. At the time the accommodation request was made, their children were both of preschool age and required either daycare or at-home care while their parents were at work. Therefore consistent with *Johnstone*-FCA (at paras. 95 and 102), the grievor has met the first two criteria of the *prima facie* case.

[117] According to the grievor's evidence, the only way her childcare obligations could be accomplished was through long-term shift exchanges in which she managed to construct for herself a 12-hour day shift that started at 07:00 and that followed a 4-on, 4-off rotation. Her actual rotation was 2-days, 2-nights, as was her husband's. The two rotations were offset by one day.

[118] However, the evidence showed that on close examination of the shift schedules, which included the days the grievor took as shift exchanges and leave, more often than not, she used shift exchanges or leave to be home at the same time as her husband. That being said, no daycare should have been necessary, and the true use would have been to meet her claimed desire of achieving a work-life balance and spending time with her husband, which is not a relevant factor in assessing whether the grievor can meet her childcare obligations through reasonable alternative solutions.

[119] For these reasons, I find that the grievor has not established a *prima facie* case of discrimination since she failed to establish the third ground enumerated in *Johnstone*-FCA, that the grievor has made reasonable efforts to meet her childcare obligations through reasonable alternative solutions, and that no such alternative

solution is reasonably accessible. The grievor's case is built on the assumption that her accommodation needs could be met only through what I consider perpetual shift exchanges because in her estimation, doing so had no cost implication for the employer. She was not prepared to consider in any meaningful way any other options, particularly the 250-day post offered by the employer or any changes to her husband's shift schedule, both of which in my opinion would have been reasonable options in the circumstances. The grievor relied heavily on *Johnstone* at the Canadian Human Rights Tribunal and Federal Court of Appeal levels to support her argument. The situation in this case and the fact situation in *Johnstone* are diametrically opposed. I agree with counsel for the employer that the grievor provided no concrete evidence that both she and her spouse could not meet their enforceable childcare obligations while continuing to work and that an available childcare service or an alternative arrangement was not reasonably accessible to them that would have met their work needs.

[120] The grievor's testimony on payments to her nephew for providing daycare was not credible. While she initially testified that she paid him $350 per month to stay with her children when she worked the night shift, she clarified that he stayed only one night per month. When she was asked how she paid him, she claimed to have done so in cash, but on further questioning, she admitted that she actually never had paid him at all. It is offensive that she sought to reclaim disbursements that by her own admission she never paid, and it serves only to cast further doubt on the legitimacy of her claim against the employer.

[121] The grievor could not provide the Board with any convincing reason that her start time was an impairment to obtaining daycare. As noted in paragraph 26 above, she provided no cogent reason why her nephew could not take her children to daycare. She provided no cogent reason why if an 0700 start time was not an issue for a 12-hour shift it became an issue for an 8-hour day shift. Finally, when she was asked if an 08:00 start would have addressed her daycare problems, she simply denied that such a shift was ever offered. When she was asked what would resolve her situation, her response was to be allowed to continue doing as she had done before the employer changed the shift-exchange rules, in effect allowing her to create a personalized shift schedule.

[122] I found that Ms. McNeill was a credible witness, and I believe that she did offer the grievor the option of starting a 250-day shift at 08:00 as a means of accommodating her childcare needs. I also believe that Mr. Bussey explored options,

including creating a new shift for accommodation purposes, not specifically for the grievor. His options were unsuccessful. Since it had already been unsuccessful, there was no likelihood it would have succeeded in this situation, which was corroborated by Mr. Ghuman's testimony. Mr. Bussey testified that his understanding was that the real issue was that if the grievor moved to a 250-day post, she would lose her entitlement to lieu days, and I tend to agree with him.

[123] Mr. Bussey described the grievor's behaviour when she was offered accommodation options. She would not consider any option other than a shift-exchange.

[124] In *Johnstone*-FCA, the Court stated that only if the employee has sought reasonable alternative childcare arrangements unsuccessfully and remains unable to fulfil his or her obligations will a *prima facie* case of discrimination be made out. Furthermore, *Johnstone*-FCA, at para. 96, states as follows:

> *A complainant will, therefore, be called upon to show that* ***neither*** *they nor their spouse can meet their enforceable childcare obligations while continuing to work, and that an available childcare service or* ***an alternative arrangement*** *is not reasonably accessible to them so as to meet their work needs. In essence, the complainant must demonstrate that he or she is facing a bona fide childcare problem.*
>
> [Emphasis added]

[125] This is highly specific and fact based and must be reviewed on a case-by-case basis. On the facts of this case, the employer has shown that alternate arrangements were available; the grievor was just not interested in them. It was also proven to me on clear, cogent, and compelling evidence that the grievor dismissed without any consideration all proposed accommodations, including any option that would have involved her husband.

[126] Consequently, in my assessment, the grievor failed to establish the third enumerated criterion of making reasonable efforts to meet her childcare obligations through reasonable alternative solutions, and no such alternative solution was reasonably accessible. The grievor has not demonstrated that she is facing a *bona fide* childcare problem.

[127] The grievor's representative argued that I must examine the employer's

decision-making process as part of my determination. As was stated in *Bassett*, the Board cannot consider the employer's answer before determining whether a *prima facie* case of discrimination has been established. In this case, the grievor has not established a *prima facie* case of discrimination. The grievor rejected reasonable alternative solutions as she sought not to protect her rights, but rather her personal interests in securing a schedule that was not otherwise available. When no *prima facie* case of discrimination exists, an examination of the employer's decision-making process is moot.

[128] The parties provided me with numerous cases to support their arguments, many of which were common to all three parties involved. While I have read each one, I have referred only to those of primary significance.

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

(The Order appears on the next page)

V. Order

[130] The grievance is dismissed.

March 15, 2019.

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