**Date:** 20200429

**File:** 566-02-12302

**Citation: 2020 FPSLREB 45**

*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

**MICHAEL MCCARTHY**

Grievor

and

**TREASURY BOARD**
**(Correctional Service of Canada)**

Employer

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

In the matter of an individual grievance referred to adjudication

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

**For the Grievor:** Sheryl Ferguson, Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN

**For the Employer:** Cristina St-Amant-Roy, counsel

Heard at Moncton, New Brunswick,
August 22 and 23, 2019, and March 10 and 11, 2020.

## I. Individual grievance referred to adjudication

[1] On March 14, 2016, Michael McCarthy ("the grievor") referred a grievance to adjudication in which he alleges discrimination on the part of the Correctional Service of Canada (CSC), for which he works as a correctional officer (CX-1). He is part of a bargaining unit represented by the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN ("the bargaining agent"). The bargaining agent and the Treasury Board, the legal employer, signed a collective agreement that expired on May 31, 2018 ("the collective agreement"). The bargaining agent supported the referral to adjudication.

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

[3] The grievor alleges that the CSC failed to properly accommodate his disability. His grievance, filed on November 24, 2015, reads as follows:

> *I believe that I am being discriminated against by the employer based on my disability, supported by relevant case law and legislation, by creating an atmosphere of discrimination, in creating the conditions leading to the disability and in refusing to accommodate my disability in the interim period between the assignments of a permanent restriction and finding a permanent position. The employer has demonstrated that a condition of undue hardship does not exist in their actions of previously accommodating my disability for an indeterminate, long term period.*

[4] The grievor asked for the following corrective measure: "I request that I be provided work in an interim accommodation until such a time that a suitable permanent position is commenced as well as all leave taken between October 20, 2015 to that time be returned in full."

[5] The CSC responded at the second and final levels of the grievance process (the final-level grievance response was provided on June 3, 2016, nearly three months after the grievance had been referred to adjudication).

[6] In essence, the CSC stated that a temporary accommodation had been provided to the grievor until WorkSafe New Brunswick (WSNB), the provincial entity that deals with workplace accidents, deemed permanent his functional limitation of having no contact with inmates. The temporary accommodation had been implemented with a view to a full return to work; since this was no longer possible, the accommodation was ended. The CSC then detailed the efforts it made to find him a proper accommodation. The leave he took would not be reimbursed, since he chose to use leave before he began to receive WSNB benefits. The CSC denied the grievance.

[7] For the reasons that follow, I dismiss the grievance.

## II. Summary of the evidence

[8] The grievor testified at the hearing. The employer called Marla Kavalak, Acting Assistant Warden, Operations (AWO), at the Dorchester Penitentiary ("the institution") during the relevant period; Jennifer Fillmore, Deputy Warden in January 2015, Acting Warden in July 2016, and Warden of the institution starting in September 2016; and Chantal Rioux, Regional Advisor for the Return to Work (RTW) program from 2015 to 2017.

[9] The grievor started working as a correctional officer, classified at the CX-1 group and level, in 2005. He first worked at Atlantic Institution and then moved to the institution in 2008. An incident on February 26, 2011, caused a severe reaction and he was diagnosed as suffering from post-traumatic stress disorder (PTSD).

[10] The grievor was on injury-on-duty leave for several years. He began a gradual RTW in 2013 as a correctional officer. The idea was to gradually expose him to different units, so that he would eventually be able to resume full duties, without limitations. The RTW was developed with the treating psychologist. The grievor would determine the posts he would work at and inform the duty manager. During that time, he received his full salary; his worked hours were paid, and the rest was covered by the injury-on-duty paid leave.

[11] Ms. Rioux, who was responsible for the Regional RTW, kept a log for the grievor's RTW. It shows that he followed a very gradual RTW, with graded exposure. It began at the end of January 2013, with two hours per week. In February 2014, it lengthened to four hours per week. By July 2014, it was four hours, three times per week, increasing to three six-hour shifts in October 2014 and then to three eight-hour shifts in November 2014. He was cleared for a full RTW effective January 2, 2015.

[12] The grievor introduced emails into evidence to show how unsupportive the CSC was of his efforts to RTW. Emails dated July 9, 2014, show that management did not agree with the progressive RTW he had developed with his psychologist. The RTW Advisor wrote as follows:

> *As you are aware, Mr. McCarthy started his graded exposure in January 2013 at 2 hours a week. Since then he has progressed to 4 hours a week and he is now at 4 hours, twice a week.*
>
> *From the employer's perspective, this process has been ongoing for a very long time and we need to know if this employee is able to return to full duties or not, and if so, when. As discussed yesterday, the employer is requesting a GE/GRTW* [graded exposure/gradual return to work] *plan with clear steps and dates for progression for Mr. McCarthy so we can better manage his return to work.*

[13] Sam Johnston, Acting Warden, responded as follows on the same day:

> *We are having difficulty maintaining this type of arrangement with the length of time that is being asked. Management at Dorchester does not believe that this arrangement is reasonable, or positive, for either party, and that we need specific timeframes to bring this employee back on strength in expedient fashion.*

[14] In an email dated August 6, 2014, the grievor's supervisor wrote as follows to the scheduling correctional manager, who was coordinating the grievor's RTW: "M. M. called. Said he can't make it in today. Life is hard."

[15] The grievor discovered the email through an access to information ("ATIP") request. He found it extremely disheartening and a sign that management did not understand at all how hard it is to return to work when suffering from PTSD. He testified to the fact that management resisted his attempts to organize a schedule that worked for him; his psychologist had to intervene.

[16] By the end of January 2015, the grievor was working full-time, 40 hours per week. Then three incidents occurred, which caused him a major setback. He realized

that he would not be able to respond properly should another incident occur. The bargaining agent suggested that he speak to management to determine if he still could work 40 hours per week but not in a security position.

[17] In a letter dated February 2, 2015, a WSNB case manager stated that non-CX duties should be considered for the grievor; however, he would benefit from continued exposure to the correctional facilities. Moreover, his treating professional thought that he should not be forced to take annual leave, as being removed from the correctional environment would be detrimental to his recovery. Management had an issue with the fact that the grievor had too much accumulated vacation leave.

[18] During a meeting to discuss accommodation and where he should work, as well as the necessity for him to use some of his accumulated annual leave, the grievor felt that management simply was not listening and did not care for his well-being. Management suggested that he work outside the institution and that he take some leave. He felt that neither was suited to his condition. He believed that he should be inside the institution, steadily, to overcome his PTSD by desensitization.

[19] The meeting ended abruptly; the grievor slammed the door as he left. The window panel fell out of the door from the impact. He testified that he immediately apologized profusely. The next day, the CSC asked for an independent medical evaluation.

[20] The evaluation was carried out in late February 2015. It confirmed what the treating psychologist had advocated — the grievor should not respond to incidents, but he could work in the institution. The evaluation also confirmed that he could return to full-time work.

[21] The grievor did return to work in mid-March. The CSC understood from the evaluation that he should not be in direct contact with inmates. He was assigned to the training schedule, a task normally done by a CX-2; it was a bilingual position. For the purposes of the assignment, the CSC adjusted the job and waived the bilingualism requirement. The vacation issue was resolved by having the grievor take his excess vacation leave in half-day increments.

[22] The CSC considered imposing discipline for the events of the February meeting, during which the grievor lost his temper with the AWO and broke the window panel on

the door. In the end, management simply let it go. On April 30, 2015, the grievor's supervisor wrote to Ms. Fillmore as follows: "I had a meeting with Mr. McCarthy last week. During that time, he expressed remorse and advised me that it would never happen again. I advised him that the situation is considered resolved."

[23] The grievor carried out his training-schedule duties in a building adjacent to the parking lot, outside the institution. He was not in uniform. He was unhappy with the fact that he was outside the institution, as it did not help him progress in his RTW.

[24] A follow-up assessment was made in August 2015, which the grievor hoped would clear him to returning to work inside the institution. The result was the opposite in that the assessment stated that he had a permanent restriction of no inmate contact.

[25] In a letter dated October 1, 2015, WSNB informed the CSC of the limitation and reminded it of its obligation to accommodate the grievor, as follows:

> …
>
> *It has been determined by WorkSafeNB that he has a work restriction to working any type of work that involves direct contact with inmates therefore preventing a return to pre-accident duties.*
>
> …
>
> *Now that is has been determined that MICHAEL MCCARTHY cannot perform his existing job as it is, the duty to accommodate obligation requires you, as the employer, to seriously and conscientiously engage in a two-step process to:*
>
> *(1) determine if MICHAEL MCCARTHY can perform his existing job in a modified form;*
>
> *(2) if he cannot, then you must determine if he can perform another job in its existing or modified form.*
>
> …

[26] In October 2015, after receiving WSNB's conclusion that the grievor had a permanent limitation, the CSC ended the scheduling assignment. Because the limitation was permanent, the employer stated that it would have to find a permanent position corresponding to the limitation. A vacant position had to be found.

[27] At the hearing, Ms. Kavalak explained that the training-schedule position was unfunded; that is, it was not one of the regularly funded positions with a salary attached. Rather, tasks were taken from the CX-2 position and bundled to offer a

temporary accommodation when needed. The salary came directly from the institution's budget, not the salary budget. Task bundling was done regularly to temporarily accommodate correctional officers who could not work with inmates; for example, because of a pregnancy or surgery. It was considered a short-term solution because from a budgetary point of view, the institution could not justify paying indefinitely for a position that did not truly exist as a funded position.

[28] When the grievor ceased doing the work in October 2015, he was replaced by another correctional officer who needed a temporary accommodation. The position as such was not permanent, which is why, once the limitation was confirmed as permanent, the CSC did not want to continue that accommodation.

[29] At that point, the grievor was offered the option of receiving WSNB benefits or using his accumulated leave credits to receive his full salary while awaiting another accommodation. From October 2015 to mid-January 2016, when he started working in an ATIP position, the grievor received his salary by using his sick leave. The employer also provided him with administrative paid leave for the last two weeks of October 2015.

[30] Ms. Kavalak explained the process that the institution followed to try to find a permanent position for the grievor, taking into account his limitation of no inmate contact. Management concluded that there were no suitable positions and sought work outside the institution to keep the grievor employed. Ms. Kavalak gave as an example an email she sent to managers in the CSC's Atlantic Region on October 22, 2015, seeking an alternate position.

[31] Management contemplated some positions at the end of November 2015 within the institution, namely, at the principal entrance, on the mobile patrol, and in the tower. Information was sought from WSNB as to whether those positions could meet the requirement of no inmate contact. The email requesting WSNB's input explained as follows:

> *Though there is some contact with inmates at these posts, it is definitely not at the same frequency and it's not the same continuous contact as that of a Correctional Officer, or other institutional positions like Parole Officers, Program Officers or even tradespersons who supervise inmates in their daily work.*

[32] Before information was sought from WSNB, Ms. Kavalak expressed doubt in the following terms in an email to management that those positions would be compatible with the grievor's limitation:

> *As discussed please find attached the post orders for post 431 (Principal Entrance) and Post 433 Mobile Patrol as 434 Tower*
>
> *For the Principal entrance post para 27 speaks to the supervision of the inmate cleaner; para 28 talks about the need to verify the offenders entering/leaving the institution, paras 30 the need to search the offenders; and then para 43/44 speaks to the oversight of the minimum offenders coming in. Para 47 refers to the situation management model which is how we gauge the level of response/intervention with offenders in the event of an incident or situation.*
>
> *With respect to Post 433 Mobil – this is a responding post in that if an offender escapes, they have to respond, particularly with the use of a firearm as outlined below*
>
> - *A warning shot may be used to prevent death, grievous bodily harm or escapes…*
> - *A deliberately aimed shot at an individual to prevent death, grievous bodily harm or escapes shall only be used when lesser means are not available…*
> - *A deliberately aimed shot at an individual may be used to prevent destruction of property if there is a reasonable possibility that a life-threatening incident will develop and if lesser means are not available…*
>
> *Again the SMM* [Situation Management Model] *is referred to as this post is seen as a responding post*
>
> *This officer is also responsible for the oversight of offenders on fence clearance if they come outside to take out garbage, etc and may be required to respond*
>
> *Finally with respect to the Tower post again this is a responding post with a firearm in the event of an escape.*
>
> *As discussed on the phone I believe that putting someone in these positions who is to respond to potentially use lethal force on an offender, especially when they have a limitation that says that are not supposed to be interacting with an offender is a liability issue for CSC. While escape are rare, it can happen, particularly since minimum sector is right next door and there is no fence. Again I would suggest that this officer with this limitation is best suited to a position at RHQ where there is no risk for him to intervene with an offender as per his identified limitation*
>
> [*Sic* throughout]

[33] After reviewing the post orders for each position, WSNB stated that the Tower 3 position ("the throw-over post") could be acceptable. Its main duty is to ensure that no

contraband is thrown over the fence and inside the institution's perimeter. However, the post directions include reacting to attempted escapes, including the use of firearms.

[34] As Ms. Rioux explained at the hearing, the tower position was part of a rotation for correctional officers, not a standalone position. Management did not see it as a suitable accommodation because it could involve the use of a firearm, as stated by the post order, and because it would be an intolerable job if done permanently, without respite. Ms. Rioux also stated that other correctional officers might resent not having their turn in that post. It is quiet, provides alone time, and is a welcome break from the institution's stress. At the same time, it is not the ideal post for someone returning from a PTSD work injury.

[35] The key room was also considered as a possibility. The main responsibilities are issuing keys and security equipment to staff. It is also an armed post, and the correctional officer occupying it could be called upon to respond to an incident.

[36] The CSC sought further clarification from WSNB after it stated that the throw-over post might be acceptable. On December 14, 2015, WSNB sent the following note to René Morais, who was replacing Ms. Rioux:

> …
>
> *The present is in follow up to your email of December 11, 2015, where you are requesting written clarification of the permanent work restriction which has been declared in the claim for Mr. Micheal [sic] McCarthy. As previously explained Mr. Micheal [sic] McCarthy is unable to return to work in a position that involves working in direct contact with inmates, this can be further clarified as not being able to work in a position where he would have direct responsibility of inmates with the potential to have to directly intervene or respond.*
>
> …

[37] In November 2015, the institution's warden expressed his frustration with the grievor's situation in an email to the Acting Assistant Deputy Commissioner for the CSC's Atlantic Region. The email reads as follows:

> *… I thought we were done with this guy. With a limitation of no inmate contact/no responding, it really ties our hands. As u know, when we put him in a post such as permanent front door, not the greatest guy to greet the public. Let along getting him to make active offer. We had him scheduling CX for trng. He messed that*

> *up and put us in a bad spot. We're limited. Permanent key room. Then that impacts on the other posts that rotate with that one. There's no ideal place for this guy. No great solution. He's been an ass with Marla and Jenn too as they've been dealing with his situation. I'd much prefer for him to go elsewhere where his limitations can be accommodated. These accommodation cases aren't easy.*
>
> [*Sic* throughout]

[38] This email was sent after the grievor had filed his grievance, but according to him, it reflects the CSC's discriminatory attitude, in that management did not understand his medical condition. He disputed that he had "messed up" the training. He had had one conflict with Ms. Kavalak with respect to the training, but apart from that incident, he had been praised for his work.

[39] The CSC's reluctance to find a position in the institution that would accommodate the grievor is best illustrated in an email that the Acting Assistant Deputy Commissioner for the Atlantic Region sent to Mr. Morais on December 10, 2015. It reads in part as follows:

> *I understand our desire to resolve this case, but in your deliberations it is important that you consider beyond just this case. The direction we take here will set a tone for the region in accommodating CX that cannot have inmate contact. Our past position has always been, when a no contact limitation becomes permanent, our solutions were sought outside the CX ranks. We have been very successful to date maintaining that and if we deviate we will open the flood gates [sic] of going where Ontario and BC are now with huge numbers of CX that cannot do real CX duties burning salary. Let us find a non-CX solution for this gentleman.*

[40] The grievor appealed WSNB's decision on his limitation. In the end, the appeal was not heard, as WSNB reversed its decision after it received new information from the treating psychologist. As early as October 2015, Ms. Kavalak asked Ms. Rioux about the effect of WSNB reversing its decision were the grievor already in another indeterminate position. Ms. Rioux answered as follows: "If he wins an appeal with WSNB clearing him to RTW as CX, yes, we could consider bringing him back as a CX. We'd have to have him assessed to determine if he needs retraining /CTP. We would have to check with Staffing how it could be done."

[41] Ms. Kavalak testified that this is what eventually happened, a year later. The grievor was cleared to return to resume his duties, and he did so, with some retraining.

[42] The ATIP position in which the grievor was placed in January 2016 was at Regional Headquarters and was a temporary assignment. It was scheduled to last until the end of May 2016 but could have been extended, according to Ms. Kavalak. Contrary to the training-schedule position, the ATIP position was funded. However, it was filled; the grievor simply replaced the incumbent during an extended absence.

[43] The grievor applied for unpaid military leave from the beginning of June to the end of August, during which he provided training to the military. At the end of that leave, he was willing to return to work; however, the permanent limitation still applied, and the CSC had nothing to offer. He used his annual vacation leave in September.

[44] In October 2016, with new information from the treating psychologist, WSNB reversed its decision and informed the employer that starting in August 2016, the grievor had been fully fit to resume his correctional officer duties, with no limitation, meaning that contact with inmates was now allowed. The grievor returned to his correctional officer duties, starting with retraining, on October 24, 2016.

## III. Summary of the arguments

### A. For the grievor

[45] The grievor suffered a work accident, and when he was cleared to return to work, albeit with a limitation, the employer had a duty to accommodate him to the point of undue hardship. The employer failed its duty.

[46] The discriminatory statements that several managers made during the grievor's gradual RTW that he was taking too much time showed a complete disregard for his disability. PTSD is not overcome from one day to the next. It takes time, and there are setbacks. When the grievor filed his grievance, he was aware of those statements, and they are part of the discrimination that he alleges.

[47] Starting in October 2015 until he was accommodated in January 2016, the grievor had to use his sick-leave credits. In his grievance, he asked that they be returned to him. They have now been reimbursed, so they are no longer at issue.

[48] What remains at issue is whether from October 2015 to October 2016 the employer fulfilled its duty to accommodate; if not, the grievor is entitled to damages under the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; *CHRA*).

[49] The employer had no sympathy for the grievor's gradual RTW. It showed a profound lack of understanding of PTSD and how it should be treated. This lack of understanding was manifest when the grievor was accommodated outside the institution starting in March 2015 until October 2015. The employer never considered the possibility of having him inside the institution, to pursue the desensitization process. In fact, the employer added a new limitation by keeping him outside the institution.

[50] In October 2015, when WSNB declared that the grievor had a permanent limitation, the employer simply put an end to his accommodation, despite the fact the position continued to be used to accommodate other correctional officers. The fact that the position was used for temporary accommodations and could not continue to be used once the grievor's limitation was judged permanent was discriminatory on its face. No policy or authority justified the employer's position.

[51] The Acting Assistant Deputy Commissioner's position, which was that CX posts could not be altered to allow for the no-contact limitation, was unreasonable and unjustified. Nothing in the limitation precluded working inside the institution, as long as the grievor did not have to respond to incidents involving inmates. The key room and the throw-over posts would have satisfied the requirements, but the CSC refused to consider altering rotations to allow the grievor to work inside.

[52] The grievor was denied the key room and the throw-over posts (which WSNB had approved) without evidence that he could not fulfil any *bona fide* requirement or that the employer had reached the point of undue hardship. He cited several Board decisions in which in similar circumstances, the employer had shown discrimination by failing to accommodate a disabled worker.

[53] In *Ross v. Deputy Head (Correctional Service of Canada)*, 2020 FPSLREB 5, the Board concluded that Ms. Ross had been a victim of discrimination and awarded her compensation under both ss. 53(2)(e) and 53(3) of the *CHRA*.

[54] Ms. Ross, a correctional officer, hurt her back in a workplace accident. On her return to work, she needed a fitted stab-proof vest. While waiting for one, she was assigned clerical duties. In the meantime, there was a great deal of back-and-forth about the vest, and the treating physician added that until she had one, she should have no direct or indirect inmate contact. The employer did not see how Ms. Ross

could be accommodated. At one point, she was escorted out of the institution she worked in, and her further access was denied. She was also forced to take sick leave to cover her salary.

[55] The Board found that Ms. Ross had not been properly accommodated. The vest issue dragged on for months, with no evidence that the employer had searched for suppliers or sought other alternatives to allow her to return to work. Nor did it seek a further explanation from the treating physician who had recommended no contact, direct or indirect, with inmates. Not seeking further information precluded finding a solution, such as clerical work. Escorting her out of the penitentiary added insult to injury; it was unheard of, except in cases of grave misconduct. The Board concluded that there was no reason for not continuing the accommodated position that Ms. Ross had filled for four months before being expelled from the workplace.

[56] In the end, Ms. Ross did return to work. In the meantime, she had suffered humiliation, and the process of returning to work had been needlessly drawn out because the employer did not communicate sufficiently with her and her bargaining agent. She was awarded $10 000 under s. 53(2)(e) of the *CHRA* and another $10 000 under s. 53(3).

[57] In *Kirby v. Treasury Board (Correctional Service of Canada)*, 2015 PSLREB 41, the Board also made a finding of discrimination. Mr. Kirby was an institutional driver at the CSC's Kingston penitentiary. In 2005, he injured his back at work. He was accommodated in his driver position by having him do only escort services as a driver; the job description also included freight and messenger duties, which he could no longer carry out because of his injury. The accommodation lasted from 2006 to 2009, when the CSC ended it despite a Health Canada physician certifying that the accommodation was well-suited to his condition.

[58] Mr. Kirby was sent home. He used all his sick credits and then received disability benefits that ended after two years. As of the hearing in 2014, he had still not returned to work. The adjudicator held that ending his accommodation had been an arbitrary decision, and she awarded $10 000 for pain and suffering under s. 53(2)(e) of the *CHRA*, as well as $2500 for the CSC's reckless behaviour. The award for recklessness was on the lower end of the scale because the CSC had actively sought

other employment for Mr. Kirby. However, in the meantime, it should not have ended the accommodation that he had enjoyed for three years.

[59] In *Duval v. Treasury Board (Correctional Service of Canada)*, 2018 FPSLREB 52, Mr. Duval, had to wait four-and-a-half months to return to work. During this time, although he was fit to work, he did not receive a salary, since he could not return to his home institution, which was the only accommodation the employer had to comply with. The Board found that depriving him of his right to a salary, when he was fit to work, was discriminatory. It ordered his salary paid, as well as $5000 as compensation under s. 53(2)(e) of the *CHRA*, but declined to order special compensation under s. 53(3), since there was no intentional or reckless conduct on the CSC's part, despite the accommodation being somewhat deficient.

[60] The case in *Emard v. Treasury Board (Correctional Service of Canada)*, 2019 FPSLREB 66, was similar in that the Board found that Ms. Emard's return to work had been unduly delayed, which had caused her a great deal of stress. However, the delay was less significant than in Mr. Duval's case, and the Board ordered compensation under s. 53(2)(e) of the *CHRA* in the amount of $3000. Again, it declined to award special compensation under s. 53(3).

[61] In *Hotte v. Treasury Board (Royal Canadian Mounted Police)*, 2016 PSLREB 122, the Board found that Ms. Hotte had been a victim of discrimination as the Treasury Board, the employer, had not made sufficient efforts to find her another position, given that the specified accommodation was that she not return to the Royal Canadian Mounted Police (RCMP), where she had worked until going on extended sick leave. The Board found that the RCMP had not made sufficient efforts to help Ms. Hotte find other employment within the employer's purview. The Board awarded $15 000 for pain and suffering, and $5000 in special compensation. It considered the fact that Ms. Hotte had finally taken early retirement and thus had suffered considerably in her career; the employer, through its indifference, had shown wanton disregard for her situation.

[62] In this case, the employer failed the grievor by not accommodating him in a meaningful CX position. It was clear from the Acting Assistant Deputy Commissioner's email, referring to the floodgates that might open from offering certain posts to CXs with a no-contact limitation that a CX position was simply out of the question. At the hearing, the employer's witnesses spoke of how employee morale would be impacted

by modifying rotations, yet there was no evidence that the issue had ever been discussed with the bargaining agent. The solution of assigning certain posts as accommodation measures had clearly been used in British Columbia and Ontario, yet management in the CSC's Atlantic Region refused that solution; it could not invoke undue hardship.

[63] The grievor suffered the consequences of not being accommodated properly. The ATIP position could not help him reintegrate into his duties within the institution. He had wilfully been kept away from any CX post. Thus, he was entitled to compensation under both ss. 53(2)(e) and 53(3) of the *CHRA*.

**B. For the employer**

[64] Throughout the grievor's work injury, RTW, and accommodation process, the employer sought to take into account the varied information it received.

[65] From March 2011 to January 2013, the grievor was off work, receiving injury-on-duty pay. From January 2013 to January 2015, he made a slow RTW while still receiving injury-on-duty pay except for hours he worked, for which he was paid. In January 2015, after he indicated that he was not ready to respond to incidents, he was assigned accommodated duties. WSNB stated there should be no inmate contact, and the grievor was placed in a temporary position without that contact.

[66] Once WSNB declared a permanent restriction of no inmate contact, the employer had to consider a permanent accommodation. The inclination was to look for non-CX positions, since inmate contact (including response and intervention) is one of the main duties of a correctional officer.

[67] The employer agreed that the disparaging comments about his gradual RTW were highly improper. However, they could not be considered part of the grievance since they were made a year before it, in the context of the grievor's gradual RTW, not the accommodation process. The grievance related to the lack of accommodation after October 2015, when a permanent limitation had been defined.

[68] The employer maintains that the grievor has not established *prima facie* discrimination as he did not suffer any adverse effect in his employment. His salary was maintained throughout the time at issue, and his sick-leave credits have been

reinstated. However, should the Board conclude that there was *prima facie* discrimination, the employer has met the statutory burden of accommodation.

[69] As stated in *Leclair v. Deputy Head (Correctional Service of Canada)*, 2016 PSLREB 97, employees who need accommodation are entitled not to their preferred accommodation but to a reasonable accommodation that meets their needs, as identified by their care providers. The employer is entitled to consider its organizational needs.

[70] In *Magee v. Treasury Board (Correctional Service of Canada)*, 2016 PSLREB 1, the adjudicator considered the extent of the CSC's responsibility to accommodate a correctional officer whose limitation was also no inmate contact. The employer eventually accommodated him in a position at a lower salary rate. Mr. Magee argued that the employer should have accommodated him in a hybrid correctional officer position that would have maintained his salary scale.

[71] The adjudicator concluded that the employer did not have the obligation "… to permanently change the essential or core duties of a position …". He also concluded that the correctional officer position necessarily includes inmate contact or carrying a firearm, or both, and that removing those occupational requirements, thus creating a serious safety concern, would cause undue hardship to the employer.

[72] In this case, contact with inmates was a *bona fide* requirement, as it is one of the main components of the CX work description. The employer's duty to accommodate had to be seen in that light. Would finding a position with no inmate contact cause undue hardship to the employer?

[73] The bundling of tasks that had served to accommodate the grievor from March to October 2015 was not a permanent solution; it was a temporary solution often used for CXs who need a temporary accommodation. Making it into a permanent or long-term solution would have created problems for the employer that would have amounted to undue hardship.

[74] The duty to accommodate is not a duty to modify the essential duties of a position. The employer cited *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 (at paragraph 16), stating that an employer does not have the obligation to

accommodate an employee unable to perform the essential duties of his or her position. Management carefully reviewed all available positions at the institution; they all required inmate contact. The posts that could be considered, which were the key room and the throw-over posts, were rotation positions. Making them into permanent positions, given the institution's organization, would have created an undue hardship. In addition, although they require less inmate contact, those posts still entail the possibility of an intervention or the use of a firearm, which the CSC considered a liability, given the grievor's condition.

[75] The employer fulfilled its duty to accommodate the grievor by making every effort to find suitable employment for him, while taking into account its legitimate concerns for his safety and that of the institution. Discrimination was not established.

### C. The grievor's reply

[76] The only reason that the CSC did not consider the throw-over post, which WSNB had accepted, was that the Acting Assistant Deputy Commissioner would not allow it. No evidence was presented that it would have caused undue hardship or that it entailed a risk to the grievor or to others.

## IV. Confidentiality order

[77] The grievor requested that his WSNB file be sealed. It contains medical and personal information. The employer did not object to his request.

[78] The Board adheres to the open-court principle in its hearings and its decision making. Its files are publicly accessible. However, some situations warrant a confidentiality order. The Board applies the "*Dagenais/Mentuck* test" (see *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 SCR 835, and *R. v. Mentuck*, 2001 SCC 76), which was enunciated best in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41. The test can be summarized as determining whether there is a legitimate interest to be protected by a confidentiality order, and whether the salutary effects of keeping certain information confidential outweigh the deleterious effects of preventing public access to judicial proceedings, which is a right protected under the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, enacted as Schedule B to the *Canada Act 1982*, 1982, c. 11 (U.K.).

[79] In this case, I believe that the salutary effects of protecting the grievor's personal and medical information, a legitimate interest, outweigh any effect of preventing public access to the proceedings. The Board usually grants requests for confidentiality orders to protect medical information, as protecting such information offers a benefit that outweighs any inconvenience stemming from keeping it confidential. Sufficient information is provided in this decision to make it transparent and intelligible. There is no reason to infringe on the grievor's privacy rights. The sealing order is granted. Pages 7 to 42 of Exhibit G-3, WSNB's log for the grievor, will be sealed.

## V. Analysis

[80] Discrimination in employment is prohibited both by the collective agreement and by legislation, under the *CHRA*. The relevant statutory provisions in the *CHRA* read as follows:

> …
>
> ***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, or*
>
> ***(b)*** *in the course of employment, to differentiate adversely in relation to an employee,*
>
> *on a prohibited ground of discrimination.*
>
> …
>
> ***10*** *It is a discriminatory practice for an employer, employee organization or employer organization*
>
> ***(a)*** *to establish or pursue a policy or practice, or*
>
> ***(b)*** *to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment,*
>
> *that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.*
>
> …

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

[81] Clause 37.01 of the collective agreement reads as follows:

> ***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, 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.*

[82] The grievor argues that the employer discriminated against him by not offering him suitable employment for the time he was disabled yet able to work. The employer argues that the grievor has not established that he was discriminated against. The employer's statutory defence under s. 15 of the *CHRA* is also that given a *bona fide*

occupational requirement, accommodating the grievor as he wished to be accommodated would have caused it undue hardship. The employer maintains that it did accommodate him. Thus, the grievor is not entitled to any damages under the *CHRA*, whether for his pain and suffering or for the employer's wilful and reckless behaviour.

[83] The case law on discrimination is well established. A finding of discrimination proceeds in two steps. First, the person making the discrimination allegation must establish *prima facie* discrimination; that is, evidence that in the absence of a response from the person alleged to have discriminated would be sufficient to conclude that discrimination occurred. *Prima facie* discrimination in the context of employment has these three components: 1) the person has a characteristic protected from discrimination 2) the person has suffered an adverse impact in his or her employment, and 3) the protected characteristic is a factor (it need not be the only one) in the adverse impact.

[84] In response to the *prima facie* case, the employer may show that its actions did not amount to discrimination. In this case, as stated earlier, the employer argues that the grievor has not established *prima facie* discrimination as he did not suffer any adverse impact. If the Board does find *prima facie* discrimination, then the employer's argument is that it reasonably accommodated the grievor.

[85] I believe that the grievor has established *prima facie* discrimination. There is no dispute that he suffered a workplace injury, thus creating a disability, which is a prohibited ground of discrimination. He suffered an adverse impact in his employment in that his RTW was not straightforward. From October 2015 to January 2016, the grievor was not permitted to work as a CX or at all. While his salary was maintained during this time and the sick-leave credits he used have been reinstated, this does not address the fact that he was not allowed to work. When he did return to work after that period, it was outside the institution, which delayed the grievor's ability to overcome his disability and to return as a CX. He was again held out of the workplace for a period in September and October 2016. The grievor's difficulty in returning to work was tied to the employer's consideration of his disability.

[86] Thus, the issue is whether the grievor was a victim of discrimination in that the employer failed to establish a *bona fide* occupational requirement and did not

accommodate him to the point of undue hardship (see *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 SCR 3 at para. 54).

[87] The parties offered considerable jurisprudence to support their respective positions, as presented earlier. It is trite to say that every case is particular, and it is important to distinguish them on a factual basis.

[88] In *Ross*, compensation was awarded under the *CHRA* for the humiliation Ms. Ross had suffered by being excluded from the institution without explanation and for how long it had taken to implement the accommodation. In *Kirby*, the adjudicator found that Mr. Kirby had suffered a considerable amount of stress and that the employer had not offered any good reason that the accommodation that had lasted some three years could not be continued. Again, compensation was awarded under the *CHRA*.

[89] The employer successfully applied for the judicial review of *Duval (Attorney General of Canada) v. Duval*, 2019 FCA 290 ("*Duval* (FCA)"). The Federal Court of Appeal ruled that it had been unreasonable for the Board to hold that Mr. Duval was entitled to his salary merely because he was fit to work; the employer had to find him a position before his salary would be paid. Moreover, it was unreasonable for the Board to conclude that the employer's procedure to find a position for Mr. Duval constituted a failure to accommodate. There is no proper procedure as such; whether the employer has accommodated someone to the point of undue hardship is a question of fact.

[90] In *Hotte*, the Board found that the employer had not fulfilled its duty to accommodate Ms. Hotte and that consequently, she had suffered irreparable damage by being forced to take early retirement. This justified an award for pain and suffering in the upper range.

[91] The accommodation process is highly fact-dependent, as the Federal Court of Appeal emphasized in *Duval* (FCA). In this case, the employer had serious misgivings with tailoring a correctional officer position for the grievor, given the restriction prescribed by WSNB, namely, no direct inmate contact, which was clarified to mean not being in a position of authority or having to intervene. This, however, is an integral part of a correctional officer's duties. I cannot blame the employer for being reluctant to change rotations to allow the grievor to be in certain low-risk posts. I can understand the employer's reasoning that those rotations are important for the other

correctional officers too. Moreover, in a penitentiary environment, it is unrealistic to think that there will never be a need for intervention in a correctional officer post. The evidence is that even those posts that were considered, such as the key room and the throw-over posts, are armed; in other words, in those posts, a correctional officer may have to intervene in an incident and defend himself or herself or others. I find that the employer established that the requirement for inmate contact and intervention is justifiably connected to a correctional officer's duties. The Board came to a similar conclusion in *Magee* and *Sioui v. Deputy Head (Correctional Service of Canada)*, 2009 PSLRB 44.

[92] The grievor argued that interacting with inmates was not a *bona fide* requirement of the position, given that it seems (from one email) that correctional officers had been accommodated in other regions by having to carry out only part of their duties, to avoid inmate contact.

[93] I did not receive sufficient information on the situation at other institutions for it to be of any guidance. I had the evidence about the CSC's Atlantic Region, which made it clear that management was reluctant to tailor the correctional officer position to accommodate the no-contact limitation. It seems to me that the employer's reasons were not frivolous or arbitrary but rather grounded in its work organization. In addition, the security concerns were real. If because of his disability the grievor could not intervene in any situation involving inmates, it was not unreasonable to state that he could not be in any position having that potential. I agree that it was undue hardship for the employer to try to cobble together a correctional officer position that did not include an officer's essential duties.

[94] Moreover, and this is what differentiates this case from jurisprudence in which discrimination was found (see *Kirby*, *Hotte*, and *Ross*), the grievor experienced relatively short periods in which he could not work. In addition, the employer made sincere efforts to find him an appropriate position.

[95] At the hearing, the grievor stated that he had been reimbursed all the sick-leave credits that he had had to use to cover the period in which no work was assigned to him.

[96] The grievor had two periods, from October 2015 to mid-January 2016, and again, in September and October 2016, during which he did not work, for lack of an

accommodated position. He used his leave credits during those periods. His sick-leave credits have been reimbursed.

[97] In October 2015, when the employer learned that the grievor's restriction was permanent, it sought a permanent accommodation. The training-schedule position was a temporary accommodation and was used for temporary purposes. I do not find that it was unreasonable for the employer to change the accommodation once new information was received; in this case, it believed that his restriction was permanent. The grievor disagreed with the restriction, but I cannot see how the employer could be held to listen to him rather than WSNB, which is the organization charged with ensuring workers' safety.

[98] The employer made serious attempts to find other work for the grievor, within the limits of his restriction, and in fact, it did find him a position, in January 2016.

[99] Once it was confirmed that he could return to work without restrictions in October 2016, the employer organized his return.

[100] I find that the employer fulfilled its duty of accommodation by seeking positions for the grievor and by providing him with the ATIP assignment. I do not doubt that the grievor went through a stressful period after the employer learned in October 2015 that his restriction of no inmate contact was permanent. He disagreed with it, and it was eventually overturned. However, his stress is not a sufficient reason to find that the employer did not accommodate him. The standard is reasonable accommodation, not perfect accommodation. In these circumstances, I find that the employer reasonably accommodated the grievor.

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

*(The Order appears on the next page)*

## VI. Order

[102] Pages 7 to 47 of Exhibit G-3 are ordered sealed.

[103] The grievance is dismissed.

April 29, 2020.

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