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

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

BETWEEN

Khristina Douglas and Malinda Sill

Grievors

and

TREASURY BOARD
(Correctional Service of Canada)

Employer

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

In the matter of individual grievances referred to adjudication

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

For the Grievors: Andrew Lequyer, counsel

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

Heard at Moncton, New Brunswick,
March 12 and 13, 2020.
(Written arguments filed March 20, 27, and 30, 2020.)

REASONS FOR DECISION

I. Individual grievances referred to adjudication

[1] Malinda Sill and Khristina Douglas ("the grievors") each filed a grievance (Ms. Sill on January 3, 2013, and Ms. Douglas on January 6, 2013) against the Correctional Service of Canada (CSC), where they work as primary care workers, because the CSC did not accommodate them during their pregnancies. Both grievances were referred to the former Public Service Labour Relations Board (PSLRB) on April 29, 2013.

[2] The grievors are part of a bargaining unit represented by the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN ("the bargaining agent"), which signed a collective agreement with the employer, the Treasury Board ("the collective agreement"). For the purposes of this decision, the term "employer" refers to the CSC, to which the Treasury Board has delegated its authority.

[3] 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 PSLRB 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; *EAP No. 2*) also came into force (SI/2014-84). Pursuant to s. 393 of the *EAP 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 *EAP No. 2*.

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

[5] Ms. Sill and Ms. Douglas testified at the hearing. The employer called Adele MacInnis, who at the relevant time was the warden of the Nova Institution for Women (NI), where both grievors were employed as primary workers.

[6] Ms. MacInnis explained at the hearing that the NI is one of the regional institutions that replaced the CSC's Prison for Women in Kingston, Ontario, when it closed. A deliberate effort was made to emphasize helping the women inmates at the NI. One way is establishing a strong and trusting relationship between staff and inmates. There are no correctional officers at the NI. Rather, staff members classified at the CX-02 group and level are called primary workers and are expected to closely follow a few women as their role models and general support workers. There are no employees classified at the CX-01 group and level at the NI.

A. Ms. Sill

[7] Ms. Sill was a primary worker at the NI from 2007 to 2015. For the last four years, she has been a correctional manager there. She has had three pregnancies. During her second pregnancy, in 2006, she was working in a provincial correctional facility. She was assaulted during that time by a kick to the stomach.

[8] Her third pregnancy was confirmed in September 2012. She immediately asked for accommodation, on her doctor's strong recommendation. Her doctor considered the pregnancy high risk, notably because of her age (she was 38 at the time). The recommendations were that she should have no inmate contact, she should have immediate access to a washroom, and the stress should be kept to a minimum.

[9] Accommodation to Ms. Sill's satisfaction was not provided immediately. She used her sick leave credits while awaiting what she thought would be a proper accommodation. She finally returned to work on December 18, 2012. The employer had offered relocation into a back office, behind the reception area, where there was no inmate access.

[10] Ms. Sill thought the accommodation deficient in several aspects. The only exit from the office was into the reception area. When the accommodation was first offered, in October 2012, there was no fridge to store the insulin that she required. In December 2012, the employer did place a fridge and microwave in a room adjoining

the washroom. Access to the single washroom was problematic, as others used it. It could and did happen that Ms. Sill did not have immediate access to it, which caused her severe discomfort. Finally, the chance of some inmate contact remained, such as when one was processed in the reception area adjoining the office or when she would encounter one in the parking lot.

[11] Ms. Sill had hoped that she could telework, which would have ensured that all the conditions of the accommodation recommended by her doctor would be met. She had seen others be accommodated through telework, and she thought that the employer could find her sufficient work to do at home.

[12] Ms. Sill and Ms. Douglas were in the back office. They each had access to a computer. They were both frustrated by the shared washroom and the chance of inmate contact. The fact that the office had no other exit except the reception area was another source of stress.

[13] On January 3, 2013, Ms. Sill filed her grievance. Ten days later, the employer offered her telework four days per week; on the fifth day, she had to come in to work at the NI. She worked under this arrangement until March 3, 2013, when her maternity leave began.

B. Ms. Douglas

[14] Ms. Douglas has been a primary worker at the NI since 2001. The grievance concerns her third pregnancy. During the first one, in 2009, she had little work assigned and no definite work location. During her second pregnancy, she was very anxious about the accommodation. Telework was approved, but unfortunately, the pregnancy ended with a miscarriage.

[15] She discussed working conditions with the employer after the miscarriage, as she feared that her stress level might endanger future pregnancies. She stated that at that time, the employer agreed teleworking would be a viable option to ensure less stress.

[16] Her third pregnancy was confirmed on October 9, 2012. She informed the employer and proposed a telework plan of drafting a manual for new employees, and she suggested several tasks that she could carry out to help different sections of the NI from home. The employer answered that there was not enough work to support her

teleworking. She presented a note from her physician dated November 29, 2012, specifying the recommended medical restrictions.

[17] She went on sick leave, then returned to work in the same back office as Ms. Sill on December 18, 2012. In addition to the concerns mentioned by Ms. Sill, there was an added stress for Ms. Douglas. A primary worker with whom she had had a conflict in the past was sometimes the single person working the reception desk. Given the configuration of the back office, adjoining the reception area, Ms. Douglas found the proximity to that other primary worker extremely stressful.

[18] Ms. Douglas further explained that inmates could easily be seen from the doorway of the office where she worked, although doors separated the inmates from the reception area.

[19] Starting in mid-January 2013, Ms. Douglas did telework. She was not on the same schedule as Ms. Sill, who had a regular Monday-to-Friday position. Ms. Douglas worked shifts. Her telework agreement was set up the same as Ms. Sill's — four telework shifts and one shift at the NI. She worked until May 3, 2013, when her doctor ordered her to bed rest in anticipation of the birth expected in early June.

[20] Ms. Douglas testified that she actively sought assignments to stay busy.

C. Ms. MacInnis

[21] Ms. MacInnis was the warden of the NI from 2007 to 2015. She was made aware of both grievors' accommodation needs and agreed to meet with them on December 7, 2012, to better understand their accommodation requirements. Management had already provided what it believed was suitable accommodation; that is, clerical work in the back office behind the reception desk. But both grievors were still on sick leave and had refused to return to work.

[22] On December 14, 2012, she issued a letter to each grievor to answer their concerns. At the meeting, both grievors had asked for telework. In the December 14 letters, Ms. MacInnis explained that there was insufficient work to justify them teleworking. The letters explain in detail management's efforts to meet each grievor's accommodation requirements, and Ms. MacInnis' testimony at the hearing essentially repeated the points in the letters. For that reason, I think it is worthwhile to reproduce in full both letters.

[23] The letter addressed to Ms. Douglas read as follows:

> *This letter is to address your position that the accommodations we offered do not meet your limitations as defined by your doctor, I have determined that the accommodation being offered does meet your limitation and the offer is reasonable.*
>
> *The limitations listed on your doctor note included:*
>
> *·No contact with offenders, physical or visual*
>
> *·No contact with chemical agents*
>
> *·No contact with scene of violence*
>
> *·Should not be in any confined space*
>
> *·Should be in areas of no stress*
>
> *You have been offered to work in the front entrance office which I believe addresses the first four limitations. I have reviewed all the information available regarding inmate access to the area in the past four weeks. I believe it is important to state that when there is not a staff member being accommodated with the limitation of no inmate contact than it is completely acceptable that inmates are processed in the area. In addition, access to the area is granted by the posted primary worker. I trust that the PW in control of who enters the area would enforce no inmate presence in the area. In one of the occurrence noted during the meeting on Friday December 7, 2012, a CM was returning with an inmate from a work release. Knowing that a PW was not being accommodated in the area she chose to process the inmate through the principal entrance. As you would be on shift work rather than staff checking if you or another staff member is being accommodated in the area for the time you are being accommodated, we would implement a process whereby no inmate would be processed through the PE. I am confident that inmate movement/presence in the area would be completely eliminated.*
>
> *During the meeting you openly spoke of the negative impact any stress could have on your pregnancy. I have also read your letter which provides details in relation to a certain colleague. Your doctor's note speaks to the fact that you need to be in areas of no stress. Firstly, as stated in the meeting it would be impossible in any job to completely remove all stress, and as you rightly indicated stress is different for each person and is subjective. Recently you brought forward that working with a certain colleague produced stress for you. We offered to arrange for mediation; however you did not wish to partake. We offered to change your shift rotation so that you would rarely if ever work with her. You did not accept that offer. It was noted that there was no further conflicts so it appears the manager's intervention was successful.*

> *Should you accept the accommodation offered, we are committed to working with you on the particular situations and or work task you identify as inducing stress.*
>
> *During the meeting you asked for telework as an accommodation. As explained and remains the case at this time, Nova does not have sufficient work at this time that can be completed by yourself at home.*
>
> *I did hear your argument in relation to any work that could be done in the office could be done at home. At this time, with you in the office we will be able to hold various meetings in that space for which you will be able to complete minutes. As you develop different capacities we will be able to assign daily tasks from the CM desk including but not limited to OMS bed assignments and completion of court documentation.*
>
> *As there is virtually no inmate presence in the main building between the hours of 9:00 pm and &:00 am and you are working shift work which includes these hours, there is work in the file room that I can arrange for you to complete that would be of great value to the Institution.*
>
> *Both telework and accommodation do not call for the organization to create work. In the case of telework, at this time the compilation of packages of work for you to do at home would consume as much or more time than simply having the work completed by others on site.*
>
> *In summary, I am of the belief we can accommodate your limitations and I am not approving leave with pay.*
>
> …
>
> [*Sic* throughout]

[24] The letter addressed to Ms. Sill read as follows:

> *The following letter is intended to provide a decision related to the information and presentation delivered during our meeting on Friday December 7, 2012. Essentially you requested a determination that the accommodation we have been prepared to provide did not meet the limitations outlined by your doctor and that I either grant leave with pay or approve telework. In making the decision, I have considered information presented during the meeting, your doctor's notes, the letter that was provided on December 12 and the information I was able to gather on the statement by UCCO that mistakes had transpired in the recent past in relation to inmates being in the principle entrance area.*
>
> *I am confirming that we are able to meet the limitations as outlined by your physician by having you work in the principle entrance area and will reconfirm our rationale by limitation.*
>
> ***Doctor's note Oct 1, 2012***

1. ***No contact at any time with inmates or OC spray****. As it is necessary for a primary worker to allow access to the principle entrance both from the parking lot and from the interior of the institution the chances of an error are minimal. When we had accommodated a primary worker in this exact location in the recent past no errors were brought to my attention. I have collected information regarding the reported presence of inmates in the principle entrance in the past 4 weeks and was able to determine that a CM who had picked up a work release, chose to take the inmate through the principle entrance for entry which is acceptable practise when a primary worker is not being accommodated in the area. I am confident with a reminder that staff will not process inmates in the principle entrance area. With no inmates in the area the use of OC spray would never be required.*
2. ***Should not be in an area that puts her at risk of contagion (i.e. TB, HIV, Hepatitis)- contagion should also be considered with childhood diseases when encountering visitors and their children****. As the accommodation post does not require close contact with visitors or their children this limitation is met. Our staff and official visitors are not known to have any higher rates of contagious diseases than the general public or any work site.*
3. ***Be reassigned to 8 hour dayshifts and work no more than 5 days in a row****. You have been offered an 8 hour shift Monday to Friday*
4. ***Should have immediate access to bathroom facilities at all times****. There is a washroom in the immediate area.*
5. ***Should not be in any confined areas****. The office is large with huge windows.*
6. ***Should be in areas of low stress, having no visual contact with scenes of violence****. As discussed at the meeting it is impossible to eliminate all stress in any environment and it is believed that the office area especially with the door closed is quiet and should have little in the way of traffic. The manager will ensure to consider requests in terms of work load and type of work assigned in order to minimize stress.*

Conditions in Doctor's note dated Oct. 30th

1. ***She be able to elevate her feet when necessary****. This condition can be met by ensuring there is an extra chair. Additionally, should a different piece of furniture be required or desirable we would be able to provide.*
2. ***Assigned to a day shift that does not exceed an eight hour day, five days a week (this includes breaks, lunches, etc.)*** *this condition has been meet with the offered Mon-Friday dayshift.*
3. ***Driving be limited to what is required, with all necessary precautions taken (i.e. Not driving in inclement weather etc)*** *Driving will not be assigned as a work task. Travelling to and*

> *from work is the employees responsibility. As with all employees should you not feel safe, comfortable driving you merely need to phone the manager to inform the person you are not coming to work and what leave (vacation, leave without pay, or in exceptional case 699) you are applying for.*
>
> ***Additional considerations discussed***
>
> 1. ***Need for a fridge and microwave****. While not listed as a limitation there was discussion related to your need for a fridge and microwave in the area. There is no general health and safety requirement for a staff kitchen to be provided, however we should be able to secure one or both for the time you are being accommodated.*
> 2. ***Telework*** *As explained and remains the case at this time, Nova does not have sufficient work at this time that can be completed by yourself at home. I did hear your argument in relation to any work that could be done in the office could be done at home. At this time, with you in the office we will be able to hold various meetings in that space for which you will be able to complete minutes. As you develop different capacities we will be able to assign daily tasks from the CM desk including but not limited to OMS bed assignments, completion of court documentation and review of rounds analysis. In addition there is inmate filing that can de delivered to the principal entrance. Both telework and accommodation do not call for the organization to create work. In the case of telework, at this time the compilation of packages of work for you to do at home would consume as much or more time than simply having the work completed by others on site.*
>
> *In summary we are able to accommodate the stated limitation. I am not approving leave with pay.*
>
> …
>
> [Emphasis in the original]
>
> [*Sic* throughout]

[25] By mid-January, management had decided that there was sufficient telework to keep the grievors busy. However, they needed to report to work once per week, to pick up and bring back work. The one day in the office could also be used for tasks more easily performed at the NI, such as participating in meetings.

[26] The grievances were filed just before the telework was granted and were heard at the first and second levels. Some matters were not resolved to the grievors' satisfaction. In addition to telework not being fully granted, several issues remained, including visual contact with inmates, working in a confined space, workplace stress, washroom access, and the doctor's recommendation to elevate feet.

[27] In the note from Ms. Douglas's doctor specifying restrictions at work, he indicated, "No contact with offenders physical or visual". Ms. MacInnis explained that it is impossible in a penitentiary to never see an inmate. Management understood this restriction in terms of distance. She explained that if any inmate was processed through the reception area, which management tried to avoid when the grievors were in the back office, the inmate was under the responsibility of another primary care worker, and the grievors could close the door to the office. She also explained that inmates could be seen at a distance, through one or two doors, when they visited with family. Such visual contact was unavoidable, but again, in her estimation, distance made it acceptable.

[28] For both grievors, the medical recommendation was that they should not work in a confined space. Both thought that the office behind the reception desk, with its only exit being the door to the reception area, constituted a confined pace.

[29] At the hearing, I was provided with a floor plan as well as pictures of the reception area and the office in which the two grievors worked during the accommodation period. I was told that two correctional managers now use that office.

[30] The office dimensions are approximately 12 feet by 12 feet, with very large windows facing outside. There is space for two desks, a couch (now in the picture, although apparently, it was not there at the relevant time), and chairs. The grievors considered it a confined space, as it had only one entrance-exit door.

[31] Ms. MacInnis took an entirely different view of what is meant by "confined space". She referred in her testimony to the *Canada Occupational Health and Safety Regulations* (SOR/86-304; *COHSR*), which in Part XI define "confined space" as follows:

> *… an enclosed or partially enclosed space that*
>
> ***(a)*** *is not designed or intended for human occupancy except for the purpose of performing work,*
>
> ***(b)*** *has restricted means of access and egress, and*
>
> ***(c)*** *may become hazardous to any person entering it owing to*
>
> ***(i)*** *its design, construction, location or atmosphere,*
>
> ***(ii)*** *the materials or substances in it, or*
>
> ***(iii)*** *any other conditions relating to it ….*

[32] In other words, she took the definition of "confined space" to be a physical location where movement is restricted and where entry is made strictly to perform a task. The rest of Part XI the *COHSR* would seem to confirm this view, by defining strict rules that must be applied whenever someone is working in a confined space, such as a duct or manhole.

[33] The recommendation for Ms. Douglas was that she have "no stress", and for Ms. Sill, it was that she should be in "low stress" areas. Ms. MacInnis stated that some stress is unavoidable in life and that it was not realistic for the employer to guarantee that there would be no stress. She also added that stress can be positive, as some stress is involved in all events in life, both positive and negative.

[34] The grievors thought their access to the washroom was inadequate as it was not reserved for their exclusive use. Ms. MacInnis explained that only a few people used it, but that had access become problematic, it would have been possible to reserve it exclusively for the grievors, as other washrooms were available nearby.

[35] Ms. Sill's doctor recommended that she be able to elevate her feet. The employer provided a chair for that purpose. At the hearing, she stated that the office environment was not an ideal place to elevate one's feet, as it projected a rather negative image. Ms. MacInnis stated that she did not think so, if it stemmed from a medical need.

[36] In the December 14 letters that followed the meeting with the grievors, Ms. MacInnis suggested file work. In the case of Ms. Douglas, it was suggested that she could access the file room at night, when the inmates were not about. Ms. Douglas testified that although she worked shifts, she never worked nights during the accommodation period. In the letter addressed to Ms. Sill, file work was suggested, and the files were to be brought to the office occupied by the grievors. Inmate files would not lend themselves to telework, as they have to remain on the premises.

[37] In cross-examination, Ms. MacInnis was asked what had changed from December 2012 to January 2013 to suddenly allow the grievors to telework four days (or shifts) out of five, when the reason given in December was that there was not enough work to be done by telework. Ms. MacInnis answered that work had to be found and that some training had to be done. However, both grievors said that they had to look for work and that it was not offered to them.

III. Summary of the arguments

A. For the grievors

[38] The grievors submit that the employer failed to meet its duty to accommodate, thus violating both the collective agreement and the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; *CHRA*). The employer did the minimum and refused to consider the grievors' points of view.

[39] The employer has the duty to accommodate to the point of undue hardship. It was unclear how telework constituted undue hardship in December but not in January. Ms. Douglas testified that the work she carried out, which was mainly working on the manual, had been available in December.

[40] The grievors argue that under clause 45.07 of the collective agreement, the employer should have granted them leave with pay if telework was not available. Clause 45.07 reads as follows:

> ***45.07*** *Notwithstanding 45.05, for an officer working in an institution where she is in direct and regular contact with offenders, if the Employer concludes that a modification of job functions or a reassignment that would avoid the activities or conditions indicated in the medical certificate is not reasonably practicable, the Employer shall so inform the officer in writing and shall grant leave of absence with pay to the officer for the duration of the risk as indicated in the medical certificate. However, such leave shall end no later than at the time the officer proceeds on Maternity Leave Without Pay or the termination date of the pregnancy, whichever comes first.*

[41] The employer was unable to ensure that Ms. Douglas had no visual contact with inmates, yet it dismissed the concern instead of providing her with leave with pay under clause 45.07.

[42] The employer was equally dismissive of Ms. Sill's very real need for immediate access to a washroom, as stated by her doctor. Her concern that the single washroom she was supposed to use might be occupied and was in fact occupied on occasions when she needed it, was completely ignored.

[43] Both grievors had to file a grievance to have the employer change its mind about telework. Yet, the work had been just as readily available in December as in January.

[44] The grievors cite *Marois v. Treasury Board (Correctional Service of Canada)*, 2004 PSSRB 150, in which the adjudicator found that the grievors in that case were entitled to paid leave under clause 45.07 since the employer had not been able to meet the doctors' accommodation requirements.

[45] In *Turmel v. Treasury Board (Correctional Service of Canada)*, 2009 PSLRB 122, remuneration was paid to Ms. Turmel since the accommodation conditions had not been respected. This was also so in this case, since Ms. Douglas had been exposed to visual inmate contact, and Ms. Sill had not had unimpeded access to a washroom.

[46] Both grievors needed to avoid stress, according to their doctors, yet the employer's actions caused them undue stress. Ms. MacInnis testified that she relied on the doctors' notes to determine the necessary accommodation. However, for both grievors, accommodation had to be considered in the context of their realities, fears, and concerns. Ms. Sill had been assaulted during her second pregnancy, and long before her third pregnancy, Ms. Douglas had sought to avoid the distressing repeat of her work situation during her first pregnancy.

[47] The employer did not consider their individual situations and ignored their concerns. For this reason, they should be awarded the maximum compensation under the *CHRA* both for pain and suffering (under s. 53(2)(e)) and reckless and wilful behaviour on the part of the employer (under s. 53(3)).

[48] In the second-level reply to Ms. Douglas's grievance, the employer stated that if the accommodation was not sufficient, she should take sick leave or leave without pay. That response was inappropriate and discriminatory.

[49] The grievors requested a sealing order for the doctors' medical notes that were presented to the employer and that detail the necessary accommodations for their pregnancies.

B. For the employer

[50] The employer offered proper accommodation by providing a quiet and safe space to the grievors to accommodate them during their respective pregnancies. It sought to meet all the requirements specified by their physicians. They used sick leave and vacation leave not because no accommodation was offered to them but because it was not their preferred accommodation. From the start, they both wished to telework

and sought it as the only viable option. If telework was not available, then they should have received paid leave, according to them.

[51] The Board must determine the following three issues:

- whether the grievors met their *prima facie* burden of proof relating to the presence of discrimination based on sex (pregnancy); if so,
- whether the employer's efforts to accommodate the grievors met the duty to accommodate; and
- whether the grievors were entitled to perform full-time telework from home.

[52] The employer contends that the grievors have not made out a case of *prima facie* discrimination as they suffered no adverse effect linked to their pregnancies. First, they were denied telework; then, it was offered for most of their shifts. However, the telework situation was unrelated to their pregnancies.

[53] If the Board determines that the grievors have established *prima facie* discrimination, then the employer submits that it fulfilled its duty to accommodate. It relies on the statutory defence provided in s. 15(2) of the *CHRA*, which provides that it is not discriminatory for the employer to impose *bona fide* occupational requirements, provided it offered accommodation to the point of undue hardship.

[54] In the grievors' case, the *bona fide* requirement was inmate contact, as it is a core function of their job. The medical requirement was that they avoid inmate contact. The employer offered accommodation in the form of a secluded workspace, far from inmates, and eventually, a majority of time teleworking. It could not have done more in the context of the reality of a penitentiary.

[55] The employer is in the best position to determine a suitable accommodation; see *Georgoulas v. Attorney General of Canada*, 2018 FC 652. It must follow a doctor's recommendations, but it remains responsible for the accommodation; see *Leclair v. Deputy Head (Correctional Service of Canada)*, 2016 PSLREB 97.

[56] When employees cannot perform the essential duties of their positions, as was the case for the grievors, the employer has limited options for accommodation: see *Magee v. Treasury Board (Correctional Service of Canada)*, 2016 PSLREB 1. Mr. Magee was a correctional officer who was injured in the course of duty. After a period of rehabilitation, he returned to work with the restriction that he have no inmate contact.

He was eventually accommodated in another position at a lower classification. He grieved that he should have been accommodated in a different, higher-level position or given modified correctional officer duties but still avoiding inmate contact.

[57] The adjudicator dismissed the grievance, stating that reasonable accommodation did not mean the employee's preferred accommodation.

[58] Their doctors did not recommend that the grievors be withdrawn from their workplace, as was the case in *Turmel*.

[59] The employer cited *Spooner v. Treasury Board (Correctional Service of Canada)*, 2009 PSLRB 60, as an example of clause 45.07 being properly applied. In that case, unfortunately, the pregnancy ended in a miscarriage. However, the employer had corrected a situation of deficient accommodation by granting paid leave for a month before devising a suitable accommodation for Ms. Spooner. It also provided leave with pay after the pregnancy ended, to resolve an alleged harassment situation.

[60] The employer argues that the grievors did not fully cooperate in the accommodation efforts, as was their obligation; it cites *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 SCR 970.

[61] The grievors had no entitlement to telework. As stated in *Georgoulas*, the employee cannot dictate the terms of the accommodation. The NI had to find meaningful work to offer them telework.

[62] The employer submits that the grievors are not entitled to any damages or compensatory payment as there was no discrimination. Moreover, they are not entitled to reimbursement of the leave they used as at all times, the employer offered them accommodation to allow them to continue to work.

IV. Sealing order

[63] The employer asked that the pictures and floor plan of the NI be sealed. They were introduced at the hearing to help show the physical setup for the grievors during the accommodation. It invoked security reasons for the sealing order.

[64] The Board adheres to the open-court principle in its hearings and 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 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.).

[65] Preserving the security of a penitentiary is a valid concern that outweighs the public's interest in the proceedings. The reasons for this decision can be understood without the need for detailed pictures or floor plans. Making those public could create a risk for NI. The pictures and floorplan constitute Exhibit E-2, and that exhibit shall be sealed.

[66] The grievors also asked for a sealing order for the medical notes detailing their accommodation requirements. The employer did not object to the request.

[67] The medical notes have been discussed in full in the course of this decision. I cannot see the interest that would be protected by sealing them. This is unlike a request to seal medical records to protect a privacy interest. Medical records usually contain a great deal of information that is of little relevance to the issue to be decided. On the contrary, in this case, the medical notes are at the core of this decision. I have to decide if the employer fulfilled its accommodation duty by respecting the conditions set by the grievors' physicians. The notes contain only accommodation recommendations, and except for the comment on Ms. Sill's high-risk pregnancy, to which she testified, the notes contain no medical information. I was provided no authority to support sealing a medical recommendation about workplace accommodation.

[68] The medical notes will not be sealed.

V. Analysis

[69] The only issue to be decided in this case is whether the grievors suffered discrimination based on the prohibited ground of sex, as the situation they found discriminatory was brought about by their pregnancies. To decide that issue, I must

consider whether the employer infringed the terms of the collective agreement by denying them paid leave under clause 45.07.

[70] Discrimination is prohibited in the employment context by both the collective agreement and the *CHRA*. The relevant collective agreement clause 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, 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.*

[71] The relevant statutory provisions of 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.*
>
> ***(2)*** *Where the ground of discrimination is pregnancy or child-birth, the discrimination shall be deemed to be on the ground of sex.*
>
> …
>
> ***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.*

[72] Determining whether discrimination has occurred is a two-step process. First, the grievors must establish *prima facie* discrimination: evidence that, in the absence of an answer from the employer, establishes that a characteristic protected from discrimination was a factor in an adverse impact that they experienced (see *Ontario Human Rights Commission v. Simpsons-Sears*, [1985] 2 SCR 536; and, *Moore v. British Columbia (Education)*, 2012 SCC 61).Second, the employer can avoid an adverse finding by calling evidence to provide a reasonable explanation that shows that its actions were in fact not discriminatory and, in the employment context, it can also show that as stated in s. 15 of the *CHRA*, it had a *bona fide* requirement and that it sought to accommodate the person claiming discrimination, to the point of undue hardship (see *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3

SCR 3). If the grievors establish a *prima facie* case, but the employer succeeds with its response, then there was no discrimination, and thus, there is no entitlement to compensation under the *CHRA*.

[73] In this case, I believe that *prima facie* discrimination has been established. Both grievors were pregnant, thus meaning that they had a characteristic protected from discrimination under the ground of sex. Both suffered an adverse impact, since they were placed in an employment situation, they found constraining. I accept on a *prima face* basis that Ms. Douglas continued to have visual contact with inmates and experienced stress and Ms. Sill explained how instances where she did not have immediate access to a washroom caused her severe discomfort. This unpleasant situation was directly linked to their pregnancies.

[74] The employer claims that working with inmates is a *bona fide* requirement and that it met its duty to accommodate under s. 15(2) of the *CHRA*, to the point of undue hardship.

[75] In this case, determining whether the employer properly accommodated the grievors must be seen through the lens of the relevant collective agreement article. The bargaining agent and the Treasury Board negotiated terms as to how pregnant employees would be accommodated into other duties or be provided with paid leave during their pregnancies, following their physicians' recommendations.

[76] Article 45 is entitled "Maternity-Related Reassignment or Leave". The provisions of it relevant to this case read as follows:

> ***45.01*** *An employee who is pregnant or nursing may, during the period from the beginning of pregnancy to the end of the twenty-fourth (24th) week following the birth, request the Employer to modify her job functions or reassign her to another job if, by reason of the pregnancy or nursing, continuing any of her current functions may pose a risk to her health or that of the foetus or child.*
>
> ***45.02*** *An employee's request under clause 45.01 must be accompanied or followed as soon as possible by a medical certificate indicating the expected duration of the potential risk and the activities or conditions to avoid in order to eliminate the risk. Dependent upon the particular circumstances of the request, the Employer may obtain an independent medical opinion.*
>
> …

> ***45.04*** *Where reasonably practicable, the Employer shall modify the employee's job functions or reassign her.*
>
> …
>
> ***45.07*** *Notwithstanding clause 45.05, for an officer working in an institution where she is in direct and regular contact with offenders, if the Employer concludes that a modification of job functions or a reassignment that would avoid the activities or conditions indicated in the medical certificate is not reasonably practicable, the Employer shall so inform the officer in writing and shall grant leave of absence with pay to the officer for the duration of the risk as indicated in the medical certificate.…*

[77] Therefore, the issue is whether the employer reasonably accommodated the grievors. If there was no "reasonably practicable" way to accommodate the grievors then clause 45.07 indicates that they were entitled to paid leave.

[78] The only medical information entered as evidence at the hearing was the medical notes from the grievors' physicians. The employer did not seek an independent medical opinion (clause 45.02); nor did it seek more precise instructions from the grievors' physicians. The grievors argue that clause 45.07 should have applied as the employer was not able to provide proper accommodation, and they should have been granted leave with pay starting in October 2012 (for Ms. Sill) and November 2012 (Ms. Douglas), when they respectively informed the employer of their pregnancies and provided the necessary medical documentation.

[79] The employer argues that a reasonable accommodation is not necessarily the preferred accommodation and cites in this respect *Magee* and *Leclair*, which deal with situations in which an employee had a permanent disability that the employer had to accommodate. The employer also referred to *Georgoulas*, a return-to-work case, which stands for the proposition that accommodation is a two-way street in that it is a process in which both sides must participate.

[80] The grievors referred me to two decisions, *Marois* and *Turmel*, which deal specifically with the collective agreement provision applicable to this case. In both decisions, the adjudicators found that the employer had not met the requirements of a medical certificate, and consequently, those grievors were entitled to paid leave.

[81] In *Marois*, two pregnant correctional officers, Ms. Marois and Ms. Hubert, had first been assigned clerical work in a building outside the institution at issue in that

case, to which the inmates did not have access. According to Ms. Marois and Ms. Hubert, it satisfied the medical requirement of no inmate contact.

[82] The employer decided to move them to an administration building within the institution's perimeter, where two inmates worked — a financial clerk and a cleaner, both of whom had been cleared as low security risks. Ms. Hubert and Ms. Marois opposed the move, as their medical certificates stipulated no inmate contact, and they asked for leave with pay since the employer could not meet their medical requirements. The employer sought Health Canada's opinion to support its point of view that the clerical positions in the administration building posed no danger to the women or their unborn children.

[83] The adjudicator held that Health Canada's opinion was not an "independent medical opinion" under the terms of clause 45.02 (then differently numbered). According to the adjudicator in that case, the employer failed to meet the requirements of the accommodation prescribed by the treating physicians by exposing the women to the presence of inmates.

[84] Similarly, the adjudicator in *Turmel* concluded that the employer had not respected the restrictions in Ms. Turmel's certificate by allowing her to be exposed a number of times to an inmate who was a cleaner. Finally, Ms. Turmel was placed on leave without pay before her maternity leave began. The adjudicator ruled that she was entitled to leave with pay under the terms of clause 45.07 of the collective agreement. However, she could have acted to avoid to some degree contact with the inmate cleaner. Consequently, the adjudicator awarded part, but not all, of the paid leave.

[85] The employer cited *Spooner* as a decision dealing with article 45 of the collective agreement. In that decision, the adjudicator defined the employer's duty to accommodate to the point of undue hardship in the following manner:

> *[139] … The conclusion that can be drawn from these statements* [i.e., statements of the Supreme Court of Canada on the concept of undue hardship] *is that the obligation resting on an employer is serious and requires that it make diligent and vigorous efforts to identify options that will permit the employee to continue to work, taking into account whatever limitations exist. However, that does not place on the employer an unlimited obligation to accommodate the employee.*

[86] The adjudicator went on to state that the employer is entitled to consider its organizational needs and does not have to create work. The employee also must contribute to the accommodation efforts and present the necessary medical information to support her or his accommodation request. In *Spooner*, the employer made reasonable efforts to accommodate the grievor, which included at one point granting her paid leave. Deficiencies in the accommodation were more attributable to the paucity of medical information than to any deficiency on the employer's side.

[87] I will analyze each grievor's situation in turn.

A. Ms. Sill

[88] Ms. Sill presented two medical notes to support her accommodation request during her pregnancy. The first note, dated October 1, 2012, specified the following conditions:

> 1) that she have no contact at any time with inmates or OC (pepper) spray;
> 2) that she not be in an area that puts her at risk of contagion, including of childhood diseases when encountering visitors and their children;
> 3) that she work eight-hour day shifts, no more than five days in a row;
> 4) that she have immediate access to washroom facilities at all times;
> 5) that she not be in a confined area; and
> 6) that she be in an area of low stress with no visual contact of scenes of violence.

[89] The second note, dated October 30, 2012, added the two conditions of the ability to elevate her feet when necessary and limited driving, including not in inclement weather.

[90] In her testimony, Ms. Sill did not indicate that the first three conditions and the last one in the first note had not been met. She did testify that it had happened that she did not have immediate access to a washroom, as it was occupied a few times when she tried to use it. She also considered that the office behind the front desk where she was being accommodated was a confined space, as there was only one exit.

[91] As for the other two conditions, Ms. Sill thought that it would be awkward to put up her feet at work, which is why she preferred a teleworking arrangement. From her testimony, the limited driving seemed linked to the fact that the employer had suggested that she could drive home for lunch if she wanted to access a fridge and microwave.

[92] It was clear that from the start, Ms. Sill would have preferred to telework. She used sick leave to stay away from work and reluctantly returned on December 18 once the employer gave her access to a fridge and microwave. As the employer emphasized at the hearing, the fridge and stove were not requirements specified by her physician. She stated that she needed the fridge for her insulin and that she needed the microwave to ensure that she ate in a healthy manner. That may well be, but they were not terms specified by her medical certificate in relation to her pregnancy and, ultimately, they were provided.

[93] Access to the washroom might have been problematic, but this could have been discussed further and solved, as Ms. MacInnis indicated in her testimony. Other people could have used the other nearby washrooms, and the washroom could have been reserved exclusively for the grievors. From the evidence, they never made such a request for exclusive use nor did Ms. Sill otherwise bring to the attention of the employer the issues she was having with use of the washroom. The search for accommodation is a multi-party inquiry and there is a duty on the complainant to assist in securing an appropriate accommodation. The employer's washroom accommodation was reasonable, and no issues were raised with it prior to or during its implementation. Once Ms. Sill became aware that access to the washroom was problematic, she should have brought those facts forward to facilitate further accommodation (see *Central Okanagan School District No. 23 v. Renaud,* [1992] 2 SCR 970 at pp 994-995).

[94] Clearly, the grievors' and management's definition of "confined space" did not match. As in *Spooner*, in this case, the medical requirement was rather vague and difficult to understand. Nothing in Ms. Sill's work description would call for working in a confined space, as understood by the *OHSR*. There is insufficient evidence to support the grievors' allegations that the office was a confined space, that it violated their medical restrictions or that they otherwise suffered an adverse impact in this regard. As it is, having seen the floor plan and the pictures of the office, I cannot find that it was a confined space. True, there was only one exit door, but that is true of most offices.

[95] If Ms. Sill felt the need to elevate her feet, I cannot see how that would have been frowned upon, since it was a medical requirement. She did not like the image it

projected, but nothing prevented her from working on something while elevating her feet.

[96] In the end, starting in mid-January, Ms. Sill teleworked four days per week and worked one day per week in the office. Ms. MacInnis explained the need to have the grievors come in one day in the office to report, collect work, and carry out whatever tasks the employer would assign. When offering accommodation, the employer is entitled to consider its operational needs.

[97] The accommodation in the back office was acceptable, and so I find that the accommodation provided was reasonable. Therefore, clause 45.07 does not apply, since the conditions indicated in the medical certificate were reasonably met.

B. Ms. Douglas

[98] The medical conditions to accommodate Ms. Douglas during her pregnancy were specified in the note dated November 29, 2012. They were the following:

1) that she have no contact with inmates, either physical or visual;
2) that she have no contact with chemical agents;
3) that she have no contact with scenes of violence;
4) that she should not be in any confined space; and
5) that she should be in area of no stress.

[99] Chemical agents and scenes of violence were not an issue in the back office. I have already dealt with the confined space issue. However, the two remaining conditions are somewhat problematic: no physical or visual contact with inmates, and no stress.

[100] Physical contact with inmates was also a non-issue. Ms. Douglas, like Ms. Sill, was relieved of her primary worker duties of dealing with inmates and responding to any situation. Visual inmate contact remained, and Ms. MacInnis did not deny it.

[101] In the second-level response to Ms. Douglas's grievance, after she had presented a list of some 35 occurrences of seeing inmates between December 18, 2012, and February 4, 2013, management's response was as follows:

> *… It is apparent that being in a position to view inmates in the V&C or A&D area causes you concern. I believe our commitment to ensure that you do not have direct or regular contact with inmates, as per your collective agreement, has been successful. I will provide a letter for you to share with your Doctor to request*

> *clarification on this specific issue. Should being in a situation where you do not have direct or regular contact with inmates but can see an inmate through a security door or window present medical concerns, I believe that* [*sic*] *sick leave or leave without pay to be the appropriate options.*

[102] That response was inadequate. At the hearing, Ms. MacInnis confirmed that the employer never sought an explanation from the physician about visual inmate contact. When she testified, she was dismissive of the grievor's concerns. She said that it would be impossible in an institution to avoid all visual contact with inmates.

[103] It seems to me that that is precisely why Ms. Douglas insisted on telework. It is also the reason behind clause 45.07, where it states that "… if the Employer concludes that a modification of job functions or a reassignment that would avoid the activities or conditions indicated in the medical certificate is not reasonably practicable …", then the correctional officer is entitled to leave with pay for the duration of the risk or until her maternity leave begins.

[104] The employer could have sought more information from the physician to confirm its position that visual inmate contact from 30 metres away, through one or two safety barriers, respected the condition in the medical note. It did not. It could have sought independent medical advice on the issue. It did not. Therefore, as in *Marois*, it is bound by the conditions as stated. Seeing inmates is visual contact. Additional parameters of distance were not part of the note, and the employer did not request them. I find that the employer did not respect that aspect of Ms. Douglas's medical conditions.

[105] Ms. MacInnis was also rather dismissive of the "no stress" condition indicated in the medical note. I agree with her that a complete absence of stress is impossible to achieve in any situation. Even working at home would entail some stress. However, determining what was acceptable stress for Ms. Douglas was not management's prerogative, without further medical information.

[106] Ms. Douglas stated that two major sources of stress for her included seeing inmates, as already discussed, and having to deal with a certain primary worker who was sometimes posted at the front desk, behind which was the grievors' office.

[107] The employer offered to change the grievor's schedule so that she could avoid meeting the primary worker at issue. I received no evidence on how this could have

been done. The only evidence I heard was from Ms. Douglas, who said that it would have been impossible to draw up day-shift schedules that would entirely have precluded her from coming in contact with the primary worker. The employer also offered conflict resolution, which the grievor declined. The employer was of the view it had done its best and that the grievor was not cooperating.

[108] Again, some evidence is missing for me to judge whether the grievor could have done more. The "no stress" direction from the physician can be interpreted as meaning "as little stress as possible". If meeting the other primary worker was truly a source of stress, offering mediation was maybe not a solution. It seems that the employer dismissed the entire issue.

[109] I return now to the terms of clause 45.07: if the employer cannot offer proper accommodation conditions, it must offer paid leave. The grievor was willing to work but from home.

[110] The employer argued that employees cannot choose their preferred accommodation, and I generally agree with that proposition. However, in the case of Ms. Douglas, her preferred option seemed to be the only one that fulfilled all the conditions of her medical note. Again, the employer could have sought more details from her physician or obtained an independent opinion. It did neither; it must live with the note as it was written.

[111] That said, Ms. Douglas was largely accommodated by the telework arrangement that began in mid-January. I have found that for Ms. Sill, given her stated medical conditions, checking in at the NI one day per week was still a reasonable accommodation. I do not think it was for Ms. Douglas, given the fact that the accommodation in the office did not meet her stated conditions. Other arrangements could have been considered for her to pick up work or bring it back, if indeed that was necessary. Given the work she was doing, it might have been possible to do it all by telework.

VI. Remedy

[112] I find that the accommodation offered to Ms. Sill, although not perfect, was reasonable in that it met her stated conditions. The employer did not discriminate against her, and I find that there is no remedy to award in her case.

[113] In the case of Ms. Douglas, she asked for the maximum compensation under the *CHRA* as well as a reimbursement of the sick leave credits she used while waiting for an accommodation.

[114] I have concluded that given her medical note, Ms. Douglas should have been accommodated either through telework or by being placed on paid leave, as the employer could not meet the conditions stated by her physician. I think it fitting that she be reimbursed the sick leave she used during the period when she was not accommodated according to her medical note.

[115] The employer did provide the telework option starting in mid-January, thus offering accommodation for four shifts out of five in which she could work at home. However, it failed to provide a reasonable accommodation for the fifth shift, and consequently, it continued to discriminate against Ms. Douglas.

[116] Establishing a proper compensation amount under the *CHRA* is always an exercise in approximation. I have no precedent for this specific situation from the Board jurisprudence. In coming to a decision as to the amount of compensation to award under ss. 53(2)(e) and 53(3), I have considered the following factors.

[117] The employer sought to accommodate Ms. Douglas. Ms. MacInnis met with her in December to try to understand her needs. Finally, in mid-January, the employer offered her teleworking for four shifts out of five. I cannot conclude that the employer completely disregarded Ms. Douglas's accommodation needs.

[118] However, the employer neglected to fully understand the functional limitations in order to offer proper accommodation. It did not seek further information from Ms. Douglas's physician about visual inmate contact, despite stating that it would. It decided unilaterally what "visual contact" and "stress" meant for Ms. Douglas, without taking her point of view into account. In so doing, it caused her pain and suffering and acted recklessly. Consequently, I award compensation under both provisions of the *CHRA*.

[119] Since the telework solution, although imperfect, largely met Ms. Douglas's medical condition, I would award at the lower end of the range. The maximum under both provisions is $20 000. I would award $5000 under each one.

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

(The Order appears on the next page)

VII. Order

[121] Exhibit E-2 is sealed.

[122] Ms. Sill's grievance, file 566-02-08488, is dismissed.

[123] Ms. Douglas's grievance, file 566-02-08487 is allowed.

[124] The employer will reimburse the sick leave credits that Ms. Douglas used from November 29, 2012, to January 14, 2013.

[125] The employer will pay Ms. Douglas $5000 in compensation for pain and suffering under s. 53(2)(e) of the *Canadian Human Rights Act*.

[126] The employer will pay Ms. Douglas $5000 for recklessly engaging in a discriminatory practice under s. 53(3) of the *Canadian Human Rights Act*.

May 13, 2020.

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