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File: 566-02-8083

Citation: 2020 FPSLREB 53

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

DANY DUVAL

Grievor

and

TREASURY BOARD
(Correctional Service of Canada)

Respondent

Indexed as
Duval 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: François Ouellette, Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN

For the Respondent: Sean F. Kelly and Julie Chung, counsel

Decided on the basis of written submissions, filed February 17, March 17, and April 8, 2020.
(FPSLREB Translation)

I. Introduction

[1] In *Canada (Attorney General) v. Duval*, 2019 FCA 290, the Federal Court of Appeal ("the Court") set aside the Federal Public Sector Labour Relations and Employment Board's ("the Board") decision in *Duval v. Treasury Board (Correctional Service of Canada)*, 2018 FPSLREB 52. However, the Court referred back to the Board for redetermination the grievance filed by Dany Duval ("the grievor") on August 27, 2012, against the Correctional Service of Canada (CSC) for a failure to accommodate, "… as it is not a foregone conclusion that the grievance must be dismissed" (at paragraph 38).

[2] The Court ordered the Board to redetermine the grievance in accordance with its reasons. The Board asked the parties to provide written submissions on the grievance, based on the Court's decision.

[3] For ease of reading, in this decision, the term "employer" is used to designate, depending on the context, both the Treasury Board, which is the grievor's legal employer, and the CSC, to which the employer's authority has been delegated.

II. Summary of the facts

[4] The grievor began working as a correctional officer at the CSC in 1995. He went on leave following a workplace accident that occurred on January 31, 2008, which led to post-traumatic stress disorder. The first return-to-work attempt in 2009 failed, and in February 2010, a medical opinion stated that the grievor could never work in an institutional environment. The CSC had been paying his salary until that point under its agreement ("the global agreement") reached on June 26, 2006, with the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN, which is the bargaining agent representing the grievor. However, the global agreement is not part of the collective agreement, and according to its terms, it cannot serve as the basis for a grievance.

[5] When the grievor's disability became permanent, he received compensation from the Commission de la santé et de la sécurité du travail du Québec (CSST). Under the global agreement's terms, he ceased receiving his salary.

[6] The grievor went through many treatment processes to overcome his disability. In the end, the CSST confirmed that he was fit to work. Based on the medical opinion, the only restriction was that he not return to work at the La Macaza Institution, where the workplace accident took place. Otherwise, he was deemed fit to resume all his correctional officer duties in any other institution.

[7] On January 30, 2012, the grievor's doctor wrote a letter to the CSST, confirming the grievor's fitness to work, with the only restriction being the La Macaza Institution.

[8] The evidence is not clear as to when the CSC considered the grievor fit to return to work. On one hand, Suzanne Robitaille, the regional return-to-work program advisor at the time, was informed of his fitness to work only on February 20, 2012, when he called her to ask when he could return. On the other hand, in its documents prepared for regional return-to-work meetings, the CSC stated that he was fit from February 1, 2012. Ms. Robitaille testified that on February 29, 2012, she received verbal confirmation from the CSST of the grievor's fitness to work and that she received written confirmation from it on March 13, 2012.

[9] The grievor finally resumed his duties on June 19, 2012. Until then, he continued to receive CSST benefits, despite repeated requests to receive his salary, since he was fit to work.

[10] As part of its efforts to reintegrate the grievor, the CSC searched for a permanent position. Its efforts consisted of asking him to submit a transfer request, since he could no longer work at the La Macaza Institution, which was his home institution. The transfer encountered some obstacles. Available positions had a bilingualism requirement, his former partner (with whom he had had some difficulties) worked in one of his chosen institutions, and the inmate who had caused the workplace accident was in another of them. Finally, there appeared to be some union resistance to receiving him at that same institution.

[11] During that period, in April 2012, the Leclerc Institution closed, and the CSC was able to reassign the approximately 200 correctional officers who worked there. However, the CSC did not reinstate the grievor until June 19.

III. The decisions

A. The Board's decision (2018 FPSLREB 52)

[12] The Board determined that the only issue in this file was the adequacy of the accommodation. The Board deemed it inadequate because the CSC did not take all the steps it could have taken in the accommodation process. By considering the grievor's situation as a case of a transfer, the CSC did nothing to expedite his return to work. Above all, it deprived him of the salary he should have received, since he was fit to work.

[13] The employer argued that if the Board allowed the grievance, it could not grant a remedy that went back more than 25 days before it was filed since, according to the employer, it was a continuing grievance that the grievor filed long after the beginning of the alleged infringement of his rights.

[14] The Board deemed that the reasoning in *Canada (National Film Board) v. Coallier*, [1983] F.C.J. No. 813 (QL), on which the employer based its argument, did not apply since the grievance had been filed after the return to work; it was implied that the concept of a continuing grievance did not apply.

[15] Because the CSC treated the grievor's case not as an accommodation but as a simple transfer, the Board deemed that the employer had erred, and it awarded $5000 in compensation under the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; *CHRA*), as well as the grievor's salary as of February 1, 2012, the date on which he was fit to return to work.

B. The Court's decision (2019 FCA 290)

[16] The Court deemed that the Board's decision was unreasonable in three ways: the grievor was not entitled to his salary and benefits simply because he was fit to return to work, the procedure that the CSC adopted to reinstate him could not in itself constitute a breach of its duty to accommodate, and the reasoning with respect to applying *Coallier* was deficient, since it was a continuing breach.

[17] That said, the Court stated that it was not a foregone conclusion that the grievance must be dismissed and referred the matter to the same panel of the Board, with the following specific instructions:

…

> *[40] In conducting the redetermination, it is not open to the Board to reconsider the findings made in the initial decision as to the reasonableness of CSC's decision to focus its job search only on permanent assignments or as to the reasonableness of CSC's concerns regarding bilingualism, the presence of the respondent's ex-spouse at Cowansville and the presence of the inmate who had assaulted the respondent at Donnacona. These matters are finally settled and there is no basis for finding any of these determinations to be unreasonable. The doctrine of issue estoppel would therefore prevent their re-litigation [sic].*
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> *[41] In conducting its redetermination, the FPSLREB should be mindful that the case law recognizes that workplace accommodation requires the cooperation of all the workplace parties — employer, employee and, where there is one, the bargaining agent — who are required to reasonably dialogue with one another with a view to finding work a disabled employee is able to do:* Renaud v. Central Okanagan School District No. 23*, [1992] 2 S.C.R. 970 at pp. 989-991, 141 N.R. 185 (S.C.C.) [*Renaud*]. Thus, as the respondent conceded before us, it was perfectly appropriate for CSC to have solicited the respondent's preferences regarding where he wished to work and to have tried to find the respondent a position at one of the institutions he named.*
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> *[42] The FPSLREB should also be mindful that what is required is reasonable but not perfect accommodation as the Supreme Court of Canada has underscored both in* Renaud *at pp. 994-995 and in* Elk Valley Coal *at para. 56.*

…

IV. Summary of the arguments

A. For the grievor

[18] According to the grievor, the Board's findings expressed in 2018 FPSLREB 52 were not unreasonable but lacked sufficient grounds. Therefore, he suggests that the Board substantiate its reasons, without contradicting the factual findings expressed in 2018 FPSLREB 52. He returns to the Court's following findings: the payment of the salary, the accommodation procedure adopted, and the retroactive scope of the remedy.

[19] With respect to the payment of the salary, the employer did not demonstrate how applying Bulletin 2006-05 (which implemented the global agreement), which provided for paying the grievor's salary when he was fit to work, constituted undue hardship. In fact, the bulletin provides for paying salary when a correctional officer

becomes fit to work again, in anticipation of finding the officer a position. If other correctional officers were entitled to it, then it was discriminatory of the employer not to apply it to the grievor.

[20] With respect to the adequacy of the accommodation, the grievor stressed that in no way did the employer show undue hardship that prevented it from reinstating him more quickly. It did not consider any possibilities other than the requested transfers, while the grievor was prepared to work even at Port-Cartier and while other correctional officers who had lost their positions at the Leclerc Institution were quickly reassigned to other Quebec institutions.

[21] The fact that in 2018 FPSLREB 52, the Board deemed the employer's concerns legitimate did not absolve the employer of its obligations. It considered bilingualism essential to the grievor's transfer, and it considered the presence of the former partner and the inmate involved in the workplace accident in the institutions he chose factors that it had to account for. That was not contradicted, but it was not enough to constitute an undue hardship hindering the grievor's reinstatement. The 2018 FPSLREB 52 decision suggests that despite its concerns, nonetheless, the employer had a duty to consider other options; for example, temporarily suspending the bilingualism requirement or checking with the grievor's former partner as to whether in reality she had any objections.

[22] The procedure that the employer chose, even if it was not unreasonable, was nonetheless deficient; "[translation] … the employer's choice of procedure for reinstating the employee in itself is not problematic; rather, it is the employer's lack of initiative, support, and cooperation throughout the chosen procedure that constitutes a breach of its duty to accommodate" (at paragraph 55 of the grievor's submissions).

[23] As for the retroactive scope of the remedy, the issue was raised only at the end of the employer's submissions. No evidence was adduced in that respect. Ms. Robitaille's notes show that several times between February and June 2012, the grievor asked to receive his salary while awaiting his reinstatement.

[24] No evidence was presented at the hearing about the date on which the grievor was informed of the CSC's intention not to pay him his salary as of February 2012. Nevertheless, he stated that he was informed of it only in August 2012. Therefore, the grievance was not late. Because the employer adduced no evidence in that respect and

never objected to the filing of the grievance, its argument about the retroactive scope of the remedy should be dismissed.

[25] The Board should uphold the decision in 2018 FPSLREB 52 while substantiating its reasons.

B. For the employer

[26] The employer's view is that the grievance should be dismissed. The accommodation was reasonable, and the grievor cannot claim an entitlement to instant reinstatement. In fact, the transfer was the only measure that satisfied the requirements of the situation.

[27] As part of this redetermination, the grievor cannot raise arguments that the Court has already excluded. Thus, he cannot invoke Bulletin 2006-05, which the Board expressly excluded in its decision. In addition, the Board has already accepted the reasonableness of searching for a permanent reassignment and taking account of certain constraints, including bilingualism. It cannot change that in its redetermination.

[28] Once again, the issue is to determine whether the accommodation was reasonable in the circumstances. The employer did not invoke undue hardship because it believed that it had offered a reasonable accommodation.

[29] *Coallier* applies because this is a continuing grievance. It is dated August 22 and asks for a remedy to cover February to June 2012. It is obvious that no remedy is possible because the dates extend well beyond the framework of 25 days provided for in the collective agreement.

[30] It is important to note that the grievor failed to show that there was a position for him during the period in question.

[31] Therefore, the employer asks that the grievance be dismissed.

V. Analysis

[32] The Court raised several points that highlight the unreasonable nature of the decision in 2018 FPSLREB 52. The employer argues that as a result, the grievance should be dismissed. The grievor asserts that the Board must elaborate its reasoning.

[33] The Court ordered the Board to review the grievance in light of the reasons it provided in 2019 FCA 290. It also stated that it is not a foregone conclusion that the grievance should be dismissed. I gather from that statement that in the evidence and based on factual findings that I cannot call into question, there are grounds for finding that the grievance may be allowed, at least partially.

[34] There are two issues to be decided. Did the employer take reasonable steps to accommodate the grievor? If not, to what remedy is the grievor entitled?

[35] The decision in 2018 FPSLREB 52, at paragraphs 71, 72, and 78, contains the following findings of fact:

> *71 I am not prepared to impute motives to Ms. Robitaille. I believe that she took the steps she considered necessary to successfully reinstate the grievor to the CSC. The bilingualism requirement for positions at Cowansville, the charge of spousal abuse while the grievor's ex-wife was at Cowansville, and the CSC's concerns about the objections of the union local at Donnacona Institution and the presence of the inmate involved in the accident at work — none of these facts are excuses; rather, they are legitimate concerns.*
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> *72 The grievor noted the absence of attempts to find a temporary assignment while waiting for a permanent position. Again, I recognize that the employer's reasoning was valid. In a CX-02 position, it is preferable to carry out a successful and long-term reinstatement.*
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> …
>
> *78 This is not a matter of accommodation measures being needed to facilitate carrying out tasks. Only one measure was required, namely, finding a position at a different institution. The CSC made the grievor responsible for finding another position. He had to apply for a transfer, which he then had to renew after two months. It was implied that his transfer was complex, given the number of employees moving from Leclerc Institution, the staffing specific to institutions, budget questions, and so on. His return to work was not dealt with as an accommodation issue but as a transfer issue, which Ms. Robitaille and Mr. Lanoie confirmed.*

[36] I cannot revisit the transfer procedure itself, the constraints surrounding the grievor's transfer to the Cowansville and Donnacona institutions, or the employer's decision to find him a permanent assignment.

[37] The Court stressed that "… there is no separate procedural right to accommodation that imposes any particular procedure that an employer must follow in seeking to accommodate an employee" (at paragraph 25).

[38] However, the steps that the employer took in this matter were insufficient to discharge its duty to accommodate the grievor.

[39] For three months, the employer limited its search for an assignment to the institutions that the grievor identified in the transfer request, while the transfer form it had developed limited to three the number of institutions that could be identified. In the accommodation context, in which the goal is to respect the grievor's limitations to facilitate his return to work, such a limitation could not be considered reasonable, since the employer could have considered many more institutions in its search for an assignment for him. In addition, the evidence establishes that he was prepared to consider an assignment to Port-Cartier or Ottawa. Had the employer expanded its assignment search to all available workplaces, it is quite possible that it could have reinstated him well before June 19, 2012, or at least at the end of his convalescence on May 24, 2012.

[40] Although the Court found that the employer's choice to proceed with a transfer was not unreasonable in itself, nevertheless, the way it limited the transfer opportunities impeded the grievor's reinstatement.

[41] On one hand, the CSST and his doctor told him that he was fit to work, and he was prepared to work. On the other hand, the employer created all the barriers to his reinstatement. I saw nothing in the employer's communications and heard nothing in the testimonies of Ms. Robitaille, Marc Lanoie (the warden of Donnacona Institution at the time), or Alessandria Page (the deputy warden of Cowansville Institution at the time) that showed a concern for facilitating the reinstatement of a correctional officer suffering from functional limitations.

[42] In fact, the employers' witnesses returned several times to the fact that the grievor's salary could not be paid because he was unable to return to his position in his home institution. In addition, the fact that the employer made his reinstatement subject to the discretion of the institutional heads confirms that it was more concerned with organizational considerations than its duty to respect the grievor's limitations, to facilitate his reinstatement.

[43] Had the grievor been able to return to his home institution, its management would have reinstated him immediately, since he was fit to carry out all his duties. In his arguments, he highlighted the employer's practice, which is codified in the global

agreement and Bulletin 2006-05. The practice is that a correctional officer who is fit to work but cannot be reinstated immediately is entitled to his or her salary. I cannot invoke the global agreement to support my reasoning because the parties agreed that it could not serve as the basis for a grievance. That said, this employer practice seems to reflect a reasonable accommodation solution that furthermore, the parties agreed to.

[44] Therefore, I find that the accommodation was inadequate. In addition, I note the affront to the grievor's dignity and his suffering caused by the employer, which did not seem to understand its duty to respect his limitations, to facilitate his reinstatement. By limiting its assignment search to only the three institutions that the grievor identified in the transfer application, the employer unduly minimized the importance of its duty to facilitate his reinstatement.

[45] From February to June 2012, the grievor had to inquire several times about the progress. The warden of the home institution did not appear anywhere, neither in the evidence nor in the testimony, and was not present at the hearing. I did not receive any evidence that the grievor's situation had to be considered as a search for an accommodation measure, with the urgency that implies. The transfer was an acceptable procedure in itself, but it should have been acknowledged that it did not originate from a simple desire of the grievor (as with someone who wished to move) but from a workplace injury.

[46] I am convinced that had the search for a position been viewed through the lens of a medical accommodation, the grievor would have been treated differently. Therefore, my view remains that the accommodation was deficient in the treatment imposed on him during that period. As a result, he was a victim of discrimination. It is not that a transfer was not a reasonable solution but rather that at no time was he reassured that a reasonable accommodation was being sought, given his medical situation. On the contrary, not only did barriers of a personal nature appear to his information requests (bilingualism and the presences of the former partner and the inmate) but also systemic barriers appeared (for example, the budget and the number of positions in the region).

[47] The Court asked me to take account of the principles in *Renaud*. It seems to me that according to that decision, everyone's cooperation is vital, which would have

occurred had the employer met with the grievor and the bargaining agent on March 13, 2012, to report on the situation and talk about solutions for reassigning the grievor. It did not. Under the circumstances, the employer's limited cooperation is problematic.

[48] The Supreme Court of Canada has often said that discrimination is a question not of intention but of discriminatory effects (see *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39 at para. 49). I think that this case is a good example of it.

[49] Given the Court's decision, I do not see how I can uphold my decision that the grievor receive his salary for February 1 to June 19, 2012. However, because of his suffering and the failure to accommodate, I would uphold the compensation awarded under the *CHRA*.

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

(The Order appears on the next page)

VI. Order

[51] The grievance is allowed in part.

[52] I order the employer to pay the grievor $5000 in compensation under s. 53(2)(e) of the *CHRA*.

[53] The amount due under paragraph 52 must be paid within 60 days of this decision.

May 15, 2020.

FPSLREB Translation

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