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Citation: 2020 FPSLREB 5

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

VALÉRIE ROSS

Grievor

and

TREASURY BOARD
(Correctional Service of Canada)

Employer

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

In the matter of an individual grievance referred to adjudication

Before: Chantal Homier-Nehmé, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Olivier Rousseau, UCCO-SACC-CSN

For the Employer: Marc Séguin, counsel

Heard at Quebec, Quebec, April 4 to 6, 2018
and at Montreal, Quebec, October 3 and 4, 2018.
(FPSLREB Translation)

REASONS FOR DECISION **FPSLREB TRANSLATION**

I. Individual grievance referred to adjudication

[1] Valérie Ross ("the grievor"), a correctional officer (CX-01) at Port-Cartier Institution in Quebec, filed a grievance against the employer on the grounds that she was not accommodated for a physical disability after a workplace accident, contrary to article 37 of the collective agreement and the provisions of the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6).

[2] On November 26, 2010, while leaving a mandatory employee training session, the grievor fell on her back on the snow-covered stairs of a site trailer. Consequently, she suffered a lumbar sprain that caused her intolerable pain. She had to miss work for a time to recover. On her return to work, she notified her employer that she needed a fitted and adjusted stab-proof vest and that she could not have inmate contact. Later, she added that she had to avoid direct and indirect inmate contact. She alleged that the employer did not implement her doctor's recommended accommodation measures.

[3] As corrective measures, the grievor seeks the reimbursement of sick leave credits that she had to use when she was off work. She also seeks damages of $10000 for pain and suffering under s. 53(2)(e) of the *Canadian Human Rights Act* (*CHRA*) and $10 000 in special compensation under s. 53(3) of the *CHRA*.

[4] The employer argued that the grievor was not discriminated against as she was reasonably accommodated. It asked that the grievance be dismissed.

[5] For the following reasons, I allow Ms. Ross's grievance and find that the employer failed its duty to accommodate, thus breaching the collective agreement.

[6] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365; *PSLREBA*) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board (PSLREB) to replace the former Public Service Labour Relations Board (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-2*) also came into force (SI/2014-84). Under s. 393 of the *EAP-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 continued under and in conformity with the *PSLRA* as amended by ss. 365 to 470 of the *EAP-2*.

[7] 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*, the *PSLRA*, and the *Public Service Labour Relations Regulations* to, respectively, the Federal Public Sector Labour Relations and Employment Board ("the Board"), the *Federal Public Sector Labour Relations and Employment Board Act*, the *Federal Public Sector Labour Relations Act* ("the *Act*"), and the *Federal Public Sector Labour Relations Regulations* ("the *Regulations*").

II. Preliminary issue - confidentiality order

[8] At the hearing, the employer asked that the medical certificates of pregnant employees be sealed. The bargaining agent did not object. The three medical certificates identified as Exhibit G-23 are sealed.

[9] The same approach was taken for the grievor's medical notes and report as they contain the same type of information. I order the following exhibits also be sealed: Exhibits G-2, G-5, G-8, G-11, and G-17, tab 1 of the employer's book of documents, and Exhibit E-2 and tab 22 of the employer's book of documents.

[10] All the grievor's personal information shall also be redacted.

[11] In exceptional circumstances, the Board may deviate from the open court principle and allow requests to protect the confidentiality of certain evidence when the requests conform to recognized legal principles. In *Pajic v. Statistical Survey Operations*, 2012 PSLRB 70, an adjudicator had to consider a similar sealing request. He summarized the applicable principles as follows, at paragraphs 9 and 10:

> *… In dealing with such a request, I must act within the parameters developed into what is known as the "*Dagenais/Mentuck*" test. The rule is that Court and quasi-judicial tribunal proceedings are public and documents that are on the record of those proceedings, such as exhibits, are also public. However, a Court or a quasi-judicial tribunal may impose limits on the accessibility to their proceedings or record in certain circumstances, where in its view the principle of open justice should give way to a greater need to protect another important right. In* Sierra Club of Canada v.

> Canada (Minister of Finance), *2002 SCC 41, the Supreme Court of Canada reformulated the* Dagenais/Mentuck *test as follows:*
>
> …
>
> 1. such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
>
> 2. the salutary effects of the … order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.
>
> …

[12] In *Vancouver Sun (Re)*, 2004 SCC 43, the Supreme Court of Canada decided that the *Dagenais/Mentuck* test applies to all discretionary decisions that limit the right to information during judicial proceedings. In *Canadian Broadcasting Corp. v. The Queen*, 2011 SCC 3 at para. 13, the Supreme Court of Canada confirmed that "[t]he analytical approach developed in *Dagenais and Mentuck* applies to all discretionary decisions that affect the openness of proceedings." In addition, as in this case I heard no arguments in support of the public's interest in the openness of these proceedings, I must evaluate that interest without argument (see *R. v. Mentuck*, 2001 SCC 76 at para. 38; and *Vancouver Sun (Re)* at para. 48).

[13] I find that sealing the exhibits with personal information about the grievor and pregnant employees is necessary to prevent a serious risk to their interests in terms of protecting privacy. The salutary effects of this order on the efficacy of the administration of justice also outweigh its deleterious effects on the right to free expression, including the public interest in open and accessible court proceedings. Additionally, not sealing them would be of no benefit to the merits of this decision and could violate the privacy rights of the employees in question. Accordingly, the exhibits have been sealed.

III. Summary of the evidence

[14] The grievor testified on her own behalf. She also called Jimmy Blainville and Mylène Dupuis to testify. At the time of the events that led to the filing of the grievance, Mr. Blainville was a correctional officer (CX-02) and a union representative. In 2013, he was a health and safety representative. Ms. Dupuis is a correctional officer (CX-02) and is active in the union, particularly with respect to the status of women.

[15] The employer called Josée Turgeon, Christine Lévesque, Suzanne Robitaille and Diane Ouellette to testify. Ms. Turgeon was a correctional manager on an acting basis (CX-04) who was responsible for managing the grievor's return to work. Ms. Lévesque was the correctional manager (CX-04) at Port-Cartier's operational office and Ms. Ross's supervisor. As for the events that led to the filing of the grievance, Ms. Robitaille had been the regional advisor responsible for return-to-work plans (RWPs) from May 2011 to August 2013. She offered advice and guidance to managers to facilitate employees' returns to work. Ms. Ouellette is an assistant warden for the Assistant Warden, Interventions (AWI). For about 12 years, the AWI supervised the chaplaincy and psychology intervention department responsible for the crisis response team, stress management, and the Employee Assistance Program.. Ms. Ouellette was responsible for RWPs from 2007 to about 2013. The institution's warden was her spouse.

[16] Port-Cartier is a maximum-security institution for men. According to the grievor, CX-01s are responsible for ensuring inmates are alive, breathing and not scuffling with each other. They must also ensure the smooth operation of the special unit that houses inmates who cannot be in contact with other inmates. Correctional officers must often conduct physical interventions.

[17] When she is at work, her equipment consists of a uniform, a belt, a mask, handcuffs, keys, a stab-proof vest, and steel-toe boots. The stab-proof vest must be worn over the uniform at all times, regardless of the workplace.

[18] On November 26, 2010, during annual shooting training, the grievor fell on her back on steps as she left the employer's site trailer. She felt pain immediately and she heard a crack. She took a few minutes to move and her colleagues helped her up. She said that she was able to continue the training and to tolerate the pain. The next day, she went to a hospital and learned that she had a lumbar sprain.

[19] Since her fall, Ms. Ross has experienced intolerable pain. ome weeks she showed improvement, while in others, she could not function. On December 6, 2010, she was put on leave from work. After follow-ups with several doctors, the leave was extended.

[20] Ms. Ross returned to work between November 4 and 9, 2011. However, she had a medical note indicating that she could not wear her stab-proof vest. As a result, she was assigned to personal effects, where her duties consisted of indexing inmates' personal effects and where she had no inmate contact. She did not need to wear her

stab-proof vest or her belt. According to Ms. Ross, Richard Poulin, a manager, told her that she was not allowed to be there and that she had to wear her stab-proof vest because inmates could be there. She explained to him that she had a medical note indicating that she could not wear her stab-proof vest. Mr. Poulin told her to see the correctional manager, Ms. Lévesque, to be assigned other work.

[21] Ms. Lévesque was able to find the grievor work filing documents as a security intelligence officer. Once the documents were filed, the grievor was to update the table of inmates, which required that she climb onto a desk to obtain the documents and access the table. After a while, she could no longer do this, and she asked if there was another way to obtain the documents. In response, she was offered a step ladder, but that solution was not suitable either as she had to climb and stretch.

[22] The grievor contacted Ms. Ouellette's assistant and asked that she call her at home, but she never received a call from Ms. Ouellette. On November 9, 2011, the doctor issued her a medical note indicating that she had to be off work once again.

[23] Ms. Ouellette's work consisted of helping managers handle RWP positions by providing advice and guidance. She had organized joint training with the union so that employees would be familiar with RWPs. She managed RWPs but was not an RWP specialist. She always referred to Ms. Robitaille.

[24] Ms. Ouellette was involved in Ms. Ross's case. She organized a meeting with Ms. Turgeon and the union representative to see if the grievor could hold a correctional officer position with functional limitations. The CSST resource person explained each definition to them and together they looked at all the limitations that allowed the grievor to hold a correctional officer position. She also had a discussion with Regional Headquarters in Ottawa about the stab-proof vest issue.

[25] Several medical notes stated that the grievor needed a fitted stab-proof vest. No pressure was to be placed on her spine. Once the vest was received, the grievor had to return to the doctor to show him so that he could determine whether it was appropriate for her physical condition. She also could not have any inmate contact without risking deterioration. She no longer had the same strength as before.

[26] On September 26, 2012, the grievor submitted her medical note indicating that she needed a fitted stab-proof vest fitted to her chest. At that point, Ms. Ouellette

began taking steps with Headquarters. She indicated that Port-Cartier recognized the need for the fitted and adjusted stab-proof vest. According to her, it already existed and Port-Cartier had provided it.

[27] Mr. Cowell and Ms. Ouellette tried to find a solution. They spoke many times and consulted the stab-proof vest standards for correctional officers. According to her understanding, the correctional officer vest is not made of the same material as a police officer's bulletproof vest. Therefore, a police vest was insufficient. She could not remember if they discussed other suppliers.

[28] A medical report dated November 1, 2012 and prepared at the CSST's request, identified the grievor's functional limitations as follows:

> [Translation]
>
> ***[] Avoid repetitive or frequent activities involving:***
>
> *· lifting, carrying, pushing or pulling loads in excess of 15 to 25 kg;*
>
> *· working in a crouched position;*
>
> *· crawling or climbing;*
>
> *· movements with extreme bending, extending or twisting of the lumbar spine; and*
>
> *· subjection to low-frequency vibrations or blows to the spine (e.g., arising from unsuspended rolling stock).*
>
> …
>
> [Emphasis in the original]

[29] That report also consolidated the grievor's file as of September 11, 2012. She indicated that the doctor who had carried out the medical examination did not ask any questions about the equipment she needed to wear. The employer acknowledged that accommodation was needed even though her file was consolidated and that the CSST doctor did not assess the accommodation with respect to tools.

[30] Around November 18, 2012, the grievor, the employer and the CSST discussed her return to work. Ms. Robitaille explained that there is a difference between "[translation] avoiding" and "[translation] not doing". According to her, the grievor could have worked in an adapted position, based on the CSST's conclusion after assessing the position.

[31] Ms. Dupuis was assigned to the RWP committee as a union representative. It is a joint union-management committee comprising union representatives, Ms. Ouellette and all of management. It reviews the cases of employees who return to work after being injured and it provides guidance.

[32] Ms. Dupuis explained that she had requested that the RWP committee be created and that she had asked that the managers be trained for that purpose. At a labour-management RWP training session, the managers mocked the injuries that officers had suffered in the past. They were insensitive; they laughed and took it all much too lightly.

[33] Ms. Dupuis indicated that the employer is responsible for proposing an RWP based on an employee's functional limitations. The union is there for the employee, but the employer is responsible for taking the appropriate steps to develop a suitable RWP based on the functional limitations identified by a doctor. She also specified that an RWP is revised with each doctor's note.

[34] Thus, the grievor's file was managed locally, as it was the manager's responsibility. The local institution was responsible for finding the accommodation. The grievor simply advised management and provided it with recommendations. Ms. Ouellette was the RWP resource person; she liaised with Regional Headquarters.

[35] Since Port-Cartier is a maximum-security institution, Ms. Robitaille explained that there were challenges in terms of accommodation options. As a result, it had more RWP files than other institutions.

[36] On January 30, 2013, Ms. Turgeon, Ms. Ouellette, Ms. Ross, Ms. Dupuis and the CSST representative discussed the position assessments that had been done. After that meeting, the grievor returned to work doing clerical duties. She had not been trained and was not up to date due to her absence, so she could not occupy a correctional officer position. Her doctor had confirmed to the CSST that she could occupy all standard CX positions. As of then, Ms. Turgeon still had not ordered the vest.

[37] On February 12, 2013, the CSST informed the grievor that her benefit payments had ended on February 6, 2013 as she was able to perform her work at the CSC.

[38] According to medical notes dated February 5 and 13, 2013, the grievor could return to work part-time but not to a position of authority. She had to have limited inmate contact, respect limitations and wear the fitted and adjusted stab-proof vest.

[39] As indicated in the [translation] *Return to Work Plan and Accommodation Plan* dated February 19, 2013, the grievor was carrying out work that was not that of a CX (i.e., clerical work), while waiting for her fitted and adjusted stab-proof vest. She was also assigned to inmate complaints and grievances.

[40] Ms. Dupuis indicated that all the vests were the same — there was a seam in the middle of the chest, which was not ideal because it put uncomfortable pressure on the chest. There was also pressure on the lower back.

[41] Ms. Robitaille had a discussion with Aly Alexandre, who was the national RWP advisor and her functional supervisor. On February 21, 2013, Ms. Robitaille emailed Mr. Alexandre to have him look into the problem with the grievor's file. He was to let her know if steps should be taken so that Ms. Ross could obtain the adjusted stab-proof vest. No mention was made of a fitted vest. Ms. Robitaille did not know why she omitted the word "[translation] fitted" in her email, but an attached medical certificate mentioned it. According to her, Mr. Aly took steps with Headquarters after receiving her email.

[42] Ms. Ouellette explained that she had to reactivate the grievor's file in Ottawa. Consequently in March, the employer took the grievor's measurements for her stab-proof vest.

[43] A second *Return to Work Plan and Accommodation Plan*, dated April 18, 2013, specified that the grievor could carry out office work, take part in correctional officer training, and occupy the position as the officer in charge of the postern and service entrance while awaiting her fitted and adjusted stab-proof vest.

[44] Ms. Lévesque was aware that the grievor was waiting for the stab-proof vest in accordance with the limitations identified by the doctor. During cross-examination, she confirmed that the RWP dated April 13, 2013 indicated "[translation] waiting for the new stab-proof vest", despite knowing that no such vest existed.

[45] Ms. Robitaille explained that Ms. Turgeon had said that the grievor could have held several positions without needing a vest. However, her role was not to assess the

positions. When the grievor received her new vest in July 2013, it did not meet the requirements in the medical note. She recommended that management look at all options to keep the grievor at work.

[46] The RWP dated April 18, 2013 operated until July, while the grievor waited for her vest. She worked on complaints and grievances and placed orders for inmates. Management found duties for her. According to her, everything was going fine.

[47] The grievor explained that one morning, she went to fetch a pile of completed documents at the personal effects office on the first floor next to the manager's office. According to her, there were never any inmates in that area. If she was to go to the personal effects room, she called in advance to find out if any inmates were present. If so, she would wait until they left before going there. If an inmate arrived while she was there, which happened two or three times, she went into the room at the back and locked the door until he left. On one occasion, Mr. Poulin saw her, told her that she had to put on her stab-proof vest and said that she had no business being there.

[48] She asked Ms. Lévesque for an exemption from wearing the vest in certain areas of the institution but her request was denied. In 2012, at Port-Cartier, if an officer had no inmate contact, he or she was not required to wear a vest. An agreement on that point had been reached with management. However, Ms. Lévesque required that the vest be worn and the grievor could not be authorized to not wear it.

[49] Ms. Turgeon explained that at the time (November 2011 to November? 2013), managers were not required to wear a stab-proof vest. She took no steps to obtain a fitted and adjusted stab-proof vest. That was the responsibility of Guy Pelletier, the Assistant Warden, Operations (AWO) and Ms. Ouellette. They carried out research to obtain the vest for the grievor. Ms. Turgeon said that she had never seen a fitted stab-proof vest and that vest manufacturers could not make the fitted stab-proof vest according to the doctor's requirements. She had not asked Ms. Ouellette any questions or followed up. She was aware that the grievor's measurements had been taken by the same company.

[50] She explained that about 15 correctional officer positions can be occupied without the requirement to wear a stab-proof vest, such as a control officer, or those located in the armed walkway, in the tower, on motorized patrols, at control posts, at the postern service entry, at unit control posts, and at the hub control post.

[51] As for teleworking, Ms. Lévesque indicated that managing inmates' files is assigned to workers in positions classified at the AC-02 group and level.AC-01s do not have access to files. She could not remember discussing teleworking with the grievor.

[52] According to Ms. Robitaille, the teleworking option was explored but there had to be a need for the work and not all duties were suited to teleworking. It was assessed case by case.

[53] When the grievor received her new vest, it did not fit her. She showed it to her doctor as had been agreed. He concluded that the vest was not fitted, as he had recommended. Thus, again on July 12, 2013, he indicated that the grievor was not to have inmate contact and that she could not wear the stab-proof vest because it was not suited to her physical condition due to problems related to movement and extending her back. The vest was heavy; it pressed on her chest, which made her back arch. So, she refused to wear it.

[54] Mr. Blainville has 23 years of occupational health and safety experience. Thus, he is very familiar with what constitutes suitable employment and accommodation. He indicated that the grievor's medical condition required that she wear a fitted vest that is adapted to her situation. However, she never received one. He had seen the form with the measurements for the stab-proof vest that was similar for all employees. All officers have an adjusted vest, which is not the same as a fitted vest. He said that there were specific cases. According to him, the vests were standard for male and female personnel.

[55] Ms. Dupuis indicated that the vests are similar to all other vests. The vest leaves a large empty area at the bottom and, therefore, women's chests are not visible. The vest puts pressure on the chest, which is uncomfortable due to the resulting pressure on the lower back. Female police officers wear a bulletproof vest that is adjusted and fitted to their chests. Management had said that she could not have a vest other than the one supplied to correctional officers. Ms. Dupuis found that response incomprehensible, as other professions have fitted vests. For female police officers, the chest is covered. The grievor had a four-inch space under her vest due to her chest.

[56] When the grievor advised Ms. Turgeon that her new vest was not fitted, Ms. Turgeon did not agree with her. Mr. Cowell took care of obtaining the stab-proof vest for the grievor. She told him that it did not fit her because it did not correspond

to the medical restrictions. Ms. Lévesque explained that they had a contractual agreement with the equipment suppliers. When she inquired with Mr. Cowell to obtain a fitted vest, he said that they did not exist.

[57] According to Ms. Turgeon, the supplier did not make fitted stab-proof vests. The supplier told her to take the measurements again to have the vest remade. She described the vest as heavy, rigid, and thick and held by Velcro straps at the shoulders and waist. When the person sits, the vest rises up if it is not made to measure. It takes between six and eight weeks to receive a vest. She also confirmed that ergonomic purchases were made elsewhere, not from the supplier.

[58] Ms. Lévesque said that had the grievor received special permission to not wear the stab-proof vest, other employees would have gossiped about it. According to her, management pushed that all correctional officers be treated the same to maintain a relationship of trust. There could be no favouritism, just as there could be no favouritism in terms of inmate treatment.

[59] Between the months of January and July 2013, the employer did not require any clarification of the medical notes. However, management sought to understand why the vest did not meet the grievor's needs. Only after considering the options with Mr. Alexandre was a clarification letter sent to the grievor's doctor in July 2013 seeking options as to the appropriate accommodation. However, neither the grievor nor the doctor was advised that the vest could not be fitted and adjusted.

[60] On July 16, 2013, Ms. Lévesque sent a letter to the grievor's doctor seeking more clarification on the vest. She asked him the following questions:

> [Translation]
>
> *… What are Ms. Ross's limitations that result in her being unable to wear the stab-proof vest?*
>
> *- What criteria does the vest need to meet to be suitable for her?*
>
> *- Is the functional limitation temporary or permanent?*
>
> *- If the limitation is temporary, how long will it last and/or when will it be reassessed?*
>
> …

[61] The goal of the July 16, 2013 letter to the grievor's doctor was to obtain information to determine how to reinstate her to her duties. Ms. Robitaille wanted clarification as to why the grievor could not wear the vest. According to her, wearing a

corset under the vest could have been an alternative, which Ms. Lévesque felt was excessive.

[62] Ms. Ouellette was of the view that the purpose of the July 2013 letter to the grievor's doctor was to clarify the restriction on the vest (i.e., whether it was temporary or permanent).

[63] The RWP was amended on July 18, 2013 as the grievor had completed her weapons training, which made it possible for her to be assigned to other duties while awaiting her fitted stab-proof vest in accordance with her restrictions, such as positions with no inmate contact that did not require wearing the stab-proof vest for example, on motorized patrols and at armed control posts and walkways.

[64] During cross-examination, the grievor's representative stated that in March 2013, Ms. Turgeon and Ms. Lévesque knew that the vest was not fitted and that Ms. Robitaille, Ms. Ouellette and Mr. Cowell knew from the start that it could not be fitted. A police vest is fitted and adjusted but Mr. Cowell told Ms. Robitaille that a police vest did not meet CSC safety requirements. He did not know why. Mr. Alexandre had also told him that the vest could not be fitted to the chest. According to Ms. Robitaille, Mr. Alexandre was not a specialist in vests or safety equipment.

[65] On July 21, 2013, the doctor replied to the employer and pointed out the additional limitation of avoiding indirect inmate contact. The employer's response reads in part as follows:

> [Translation]
>
> *… A request was made to use a **fitted** and **adjusted** stab-proof vest that does not place extensive pressure on the bust and the dorso-lumbar region.*
>
> *Since that request has not yet been satisfied, Ms. Ross cannot use a conventional stab-proof vest in her work.*
>
> *In the meantime, she must:*
>
> *- Avoid direct or indirect inmate contact; and*
>
> *- Avoid positions at work in which she is in a position of authority over inmates.*
>
> …
>
> [Emphasis in the original]

[66] After becoming aware of the doctor's July 21, 2013 reply, the new limitation was added that the grievor had to avoid indirect inmate contact. According to Ms. Ouellette and Ms. Lévesque, they did not see how the grievor could return to the institution. The additional limitations were not clear. According to Ms. Lévesque, avoiding indirect inmate contact was problematic as they were everywhere. She indicated that there was no direct contact in an office work unit but that there was still indirect contact because inmates could be seen through the windows. In addition, the files were about the inmates. Management (AWO Poulin and Marie Cossette) had concluded that it was impossible to accommodate "[translation] indirect contact".

[67] Ms. Ouellette did not know if management had communicated with the grievor's doctor to find out why the stab-proof vest needed to be fitted. As she remembered it, on July 24, 2013, Mr. Alexandre would have said that he did not have a fitted vest.

[68] Thus, the most difficult restriction was the one requiring no direct or indirect inmate contact. According to Ms. Ouellette, all the files involve inmates. Everyone has indirect inmate contact, either through calls to spouses, inmates located at the postern or the personal effects administration gate, or those working on inmate files. Her view was that "[translation] no contact" and "[translation] no direct or indirect contact" mean the same thing. Only teleworking was possible and none was available at that time. Some correctional officers teleworked but none had that restriction. According to her, teleworking also involved indirect inmate contact. She said that management did not understand the restriction requiring no direct or indirect inmate contact and the stab-proof vest. Thus, she could not accommodate the grievor.

[69] As for the restriction to avoid positions in which she would be in a position of authority over inmates, Ms. Lévesque explained that not only are correctional officers in a position of authority all workers are, including clerks, cooks and employees who often have inmates working with them. Thus, to ensure the grievor's safety and to respect the functional limitations, the decision was made to send her home while waiting to see what could be done for her. Ms. Lévesque could not remember discussing direct or indirect contact with the grievor.

[70] Ms. Dupuis explained that once an officer is in uniform, she or he is in a position of authority. In addition, when an officer is responsible for a cell block or is in charge of a department or of work, the officer is in a position of authority.

[71] According to Ms. Robitaille, not wearing the vest means that she cannot be in a position of authority over an inmate. In her view, correctional officers are always in a position of authority over inmates. However, she clarified that pregnant employees do not have direct inmate contact. They can work in certain places, such as the training sector. They mostly work outside the institution's perimeter.

[72] Ms. Ouellette explained that a protocol had been developed with the union for pregnant employees. They could be assigned to specific positions that have no inmate contact. When a medical certificate is given to management, the pregnant employee may immediately begin in that position. The protocol is different from that of RWPs. According to her, medical notes submitted by pregnant employees set out only that there was to be no inmate contact. There was no mention of "[translation] direct or indirect". Thus, they could then be assigned to other duties that involve indirect inmate contact. Ms. Ross's file was similar to that of a pregnant employee, which is why it was assigned to her.

[73] Ms. Robitaille described the process of accommodating the grievor. She explained that a list was prepared of all possible options. In 2013 at Port-Cartier, slow-rotation positions were not considered as an accommodation option as the union did not agree. However, she clarified that the union did not refuse to cooperate and that there was no resistance. When an employee cannot be accommodated in his or her substantive position, one option is to look at other institutions. The risk that an employee may take is assessed at another stage. At Port-Cartier, In some positions without inmate contact, it was acceptable for an employee to not wear a stab-proof vest. However, there were risks to manage. She admitted that no one, including her, approached the grievor to see if she would accept that risk.

[74] Slow-rotation positions do not involve any inmate contact but require union agreement. According to her, such a position would not have been consistent with the medical note as there was indirect contact, including visual. Management did not understand the context of that limitation; it did not know what the doctor meant. Management wondered if the doctor meant that the grievor could not even see inmates.

[75] Ms. Turgeon was familiar with the grievor's permanent injuries. All correctional officer (CX-01) positions in the institution were assessed, and no position was suitable

for the grievor's limitations. However, she indicated that at Port-Cartier, the grievor could have done the work of a correctional officer (CX-01) despite her permanent functional limitations. She did not assess the personal-effects position;it was not one that the grievor could occupy as the people in those positions are permanent. However, with an agreement, an arrangement could have been made.

[76] During cross-examination, she indicated that a position could be adapted based on functional limitations. The employer is required to follow Guidelines 254-2 of the *Return to Work Program* to accommodate an individual. However, she confirmed that the threshold of undue hardship in this case was indirect inmate contact. There may always be indirect contact, as it is possible to see inmates. According to her, the restriction meant that the grievor was not allowed to see inmates with her own eyes.

[77] In August 2013, Mr. Blainville was called to a meeting with management where he was informed that the grievor would no longer be allowed to come to the institution without notice. No discussion was held with her. He indicated that a few times in the past, access to the institution had been prohibited, such as in the case of a female officer who had had a romantic relationship with an inmate.

[78] According to the employer, it decided to prohibit the grievor's access to the institution after her doctor's letter of July 21, 2013. Thus, on August 8, 2013, the employer gave her a letter signed by Ms. Lévesque, indicating that it was required to withdraw her access to the institution to protect her while respecting her limitations as follows:

> [Translation]
>
> …
>
> *On 2013-08-07, I became aware of the letter from your doctor … dated 2013-07-21.*
>
> *Given the limitations indicated by your doctor, i.e., avoiding direct or indirect inmate contact and avoiding work posts at which you are in a position of authority over inmates, we have no choice but to remove access to the institution to protect you while respecting your limitations.*
>
> …
>
> *Be assured that if your state of health or your limitations change, we will be pleased to discuss possible accommodations with you and your representative.*
>
> …

[79] According to Ms. Robitaille, in August 2013, a manager told her that he had seen the grievor arrive at work on a motorcycle. When the grievor's representative cross-examined Ms. Robitaille as to whether the motorcycle incident played a role in the decision to remove the grievor's access to the institution, she replied that the grievor had physical limitations and that there appeared to be an inconsistency between using the motorcycle and her limitations. Management questioned whether being on a motorcycle affected her physical condition. However, she admitted that this question was never asked of the grievor's doctor.

[80] Ms. Ouellette did not know why management waited until August 8 to prohibit access to the institution. She said that there was no link to the fact that the grievor had arrived on a motorcycle. Everyone at the institution knew that she drove one. Her accommodation was unaffected.

[81] According to Ms. Robitaille, all options were considered. Steps were taken to obtain the vest and when it proved insufficient, steps were then taken with the doctor to obtain clarification, which led to a new medical note with the restriction of no direct or indirect inmate contact. Management could not understand what was going on.

[82] The grievor explained that she was escorted out of the institution and that she felt crushed during the escort; she cried. She saw several people before being brought outside. She had been humiliated and ashamed.

[83] Mr. Blainville confirmed that the grievor's escort out of the institution did not go well. She cried the entire way. He believed that she was treated cavalierly. He strongly questioned why she could no longer have access to the institution. The next day, her photo was at the postern. He explained that photos of officers who no longer have access to the institution for disciplinary reasons are placed at the postern. Ms. Turgeon indicated that she did not know that the grievor's photo was placed at the postern.

[84] In addition, management did not inform officers in briefings at the beginning of shifts why the grievor had been escorted out of the institution. There was silence on the matter. The briefing is an important part of the start of a shift that is used to provide an update on what happened during the previous shift. This failure led to rumours as if the grievor were a criminal, and at the end of the week, management had to intervene to stop the rumours.

[85] Mr. Blainville explained that correctional officers have access to the institution even if they have functional limitations and no inmate contact.

[86] Ms. Ouellette could not remember discussing with Mr. Blainville the grievor's escort out of the institution. Indeed, she could not remember the grievor being escorted outside the institution but she remembered that the grievor had cried. She also could not remember the grievor's photo being posted at the postern. She believed that it was a security procedure of which she was not aware..

[87] According to Ms. Dupuis, none of the other 42 people who were on leave had their access to the institution withdrawn because of their physical limitations. As for pregnant employees, they have no direct or indirect inmate contact. They carry out only office work. A pregnant employee has never been prohibited from working at the institution. Ms. Dupuis described the procedure for pregnant employees who walk around the institution as follows: the pregnant employee goes to the postern and a correctional officer comes to get her to her position of work. The procedure is the same for breaks. The correctional officer (CX-02) calls control post B to ensure that no inmates are in the area and lets her through. Other employees who could not have inmate contact worked only at the postern. She said that everyone had always been accommodated. Only the grievor was prohibited from accessing the institution.

[88] After this incident, the grievor had a discussion with Marie Cossette, Acting Warden, to find out why she was escorted out of the institution and why she was not offered teleworking. She did not understand the employer's decision as she had been carrying out office work for months. Suddenly, she was escorted out of the institution as though she had committed misconduct. That treatment was reserved for correctional officers who, for example, slept with an inmate, brought drugs into the institution, etc. According to the grievor, she was removed as though she was "[translation] a no-good", which was completely inappropriate in the context of an accommodation request.

[89] During the discussion, Ms. Cossette showed the grievor the policy. They discussed the vest. The grievor indicated that she simply wanted to obtain a vest adapted to her needs so that she could be a productive employee. According to her, she always received politicized responses. She was told that maybe she should

consider working at a minimum-security institution, in Montreal, for example. There was no question of adapting or fitting a vest.

[90] The grievor noted that that meeting took place in Ms. Cossette's office at the institution. She was not escorted to the office for the meeting nor when she left. Ms. Lévesque also indicated that there were no other cases in which access to the institution had been prohibited for medical reasons. She could not remember whether medical notes for pregnant employees mentioned "[translation] no direct or indirect inmate contact". Pregnant employees worked at the postern or in the visits area, in less-stressful positions. There is a control post in the visits area so there is some inmate contact.

[91] On August 14, 2013, Ms. Lévesque wrote a letter to the grievor in which she stated that "[translation] we are currently continuing efforts to find an accommodation suitable to your limitations". The letter also stated that all reasonable efforts were being made to facilitate her return to work.

[92] On August 23, 2013, Ms. Robitaille had a discussion with J.F. Davidson, Regional RWP Coordinator, Quebec Region, as he was on the regional union-management committee, to see what could be done to accommodate the grievor.

[93] Ms. Dupuis informed management that the union was trying to get the grievor back to work by finding her an appropriate RWP that met her doctor's approval.

[94] The grievor explained that she had told her doctor that at that point she was no longer capable and that she could no longer fight because she was exhausted from going through all of this and that it had to stop. Thus, Ms. Dupuis prepared an RWP suggesting that the grievor work at night, as that shift had little inmate contact. Her doctor agreed with that approach and signed the RWP on August 26, 2013. However, he stated that the stab-proof vest had to be worn occasionally.

[95] The employer accepted that solution. Her regular schedule was to work nights, Monday to Friday, which seriously affected her family life. She also wore her vest occasionally. She could take it off when she was in the locked control post. According to her, the employer offered nothing to accommodate her.

[96] Ms. Lévesque could not remember whether the two letters about the grievor's expulsion from the institution were removed from her file once she returned to work.

IV. Summary of the arguments

A. For the grievor

[97] The grievor performed all her duties and her competencies were not questioned. In November 2010, she was injured at work. Her return to work did not go well as Mr. Poulin ignored the accommodation by insisting that she wear her stab-proof vest. Therefore, her first return-to-work attempt lasted only a few days.

[98] Her second return-to-work attempt was in February 2012. She was assigned to complaints and grievances and to inmate purchases. She did a good job. Despite this, the situation with Mr. Poulin, Ms. Lévesque and Ms. Turgeon was still unpleasant.

[99] Ms. Ouellette tried to contact the grievor because she was responsible for the RWP, but she could not remember the grievor's duties nor the difficulties during the second return. In September 2012, the grievor learned that she needed a specific vest, but Ms. Ouellette expected an updated standard vest. All other witnesses indicated that the grievor needed a fitted and adjusted stab-proof vest.

[100] Ms. Robitaille indicated that there was no link to the workplace accident. The grievor's representative argued that Ms. Robitaille should have had an advisory role at Port-Cartier. It is recognized that regardless of the source of a limitation, whether a workplace accident or a personal limitation, the duty to accommodate is the same.

[101] Ms. Lévesque had a key role in implementing the accommodations. She indicated that the vest is unpleasant for everyone in that it is heavy, hot, thick and too long when the person wearing it sits down. She explained that the response to the duty to accommodate was based on a tacit agreement at Port-Cartier that if the person had no inmate contact, they were permitted to not wear the vest, which was the grievor's case in 2013. At the end of her testimony, Ms. Lévesque explained that the employer did not offer the accommodation of obtaining the fitted and adjusted vest. Several witnesses testified that it took some time to implement the grievor's measures as of September 2012 and Ms. Ouellette's testimony indicated that the file was reactivated in March 2013; thus, the CSC had dragged its feet.

[102] In addition, Ms. Robitaille had left out the term "[translation] fitted" twice in those communications. A huge communication problem existed between the employer's stakeholders. The outcome of the accommodation process was based on

hearsay as Ms. Robitaille heard from Mr. Alexandre who had heard from Mr. Cowell that it was not possible to obtain a fitted and adjusted stab-proof vest. Ms. Ouellette and Ms. Robitaille were unable to explain the reason. The employer did not provide an expert witness to explain why it was not possible to obtain a fitted and adjusted stab-proof vest and why it constituted undue hardship.

[103] Ms. Ouellette shared the information internally that a fitted and adjusted stab-proof vest did not meet the national standard. The accommodation request was unusual. Was it too expensive? Did such a vest exist? The employer's neglect constituted a failure of its duty to accommodate.

[104] The employer's only tangible effort was obtaining a vest with a seam. However, Ms. Lévesque knew that it was not enough because the vest was not fitted. In spring 2013, she said that there were no fitted vests and that based on the CSC's scale, such a vest did not exist. However, this information was not provided to the grievor's doctor. When she learned that the vest did not meet the grievor's limitations, she made no effort to find out how it was insufficient or how it could be modified.

[105] In a medical note, the doctor refuted the vest; Ms. Ouellette did not even look at the note. Ms. Ouellette's carelessness was another failure of the duty to accommodate. Ms. Robitaille and the region favoured her due to her relationship with management but she affirmed that it had not been her responsibility, that she did not check the work of managers and that she had no authority over them. She is the spouse of the institution's warden and he assigned the RWP mandate to her.

[106] The employer proposed obtaining clarification from the grievor's doctor without providing him with any details to make an informed decision. After several months, Port-Cartier received the vest from the same supplier but it was better adjusted. Ms. Dupuis and Ms. Lévesque indicated that the only change to the vest, compared to the other vest, was cosmetic — it was better adjusted.

[107] The employer was negligent because it shifted the onus to the grievor. Its evidence is based on the clarification request of July 16, 2013 to the doctor. No question aimed at understanding the meaning of "[translation] no indirect contact". The doctor replied to that letter and referred the employer to its duty to accommodate.

[108] Ms. Ouellette justified the August 7, 2013 letter prohibiting the grievor from accessing the institution by the lack of response from the doctor, even though nothing indicated that the doctor had to do anything. The grievor's representative pointed out that the preponderance of the evidence was about the fact that a manager had seen the grievor on a motorcycle. Thus, the employer used the July 21, 2013 note against her. Therefore, being escorted out of the institution was punishment for her inflexibility for her whims. That punishment was unfounded and was highly objectionable as it is usually reserved for fallen officers.

[109] No witness could say what steps were taken in August 2013. Indeed, it was the union's efforts after this letter that led to an imperfect accommodation being found and that helped the employer meet its duty to accommodate.

[110] Ms. Dupuis indicated that other officers worked without any direct inmate contact and entered and exited the institution. However, Ms. Ouellette stated the contrary. It is up to the Board to assess the credibility.

[111] According to the employer's logic, the prohibition on direct or indirect inmate contact was independent of the stab-proof vest, while the doctor indicated that it was necessary until the grievor received the vest. He suggested that it was temporary. At the employer's request, the doctor provided clarification; that is, the vest had to not put pressure on the chest and the dorso-lumbar region. The employer could have carried out more research and sought more clarification. However, it failed its duty to provide the appropriate equipment. It could have examined the option of teleworking, but according to the employer, it was not possible.

[112] All the documents established the need for a fitted and adjusted vest. The accommodation was clearly medical and based on a disability as recognized in the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; the "*CHRA*"). The employer had to accommodate the grievor to the threshold of undue hardship (*Ontario Human Rights Commission v. Simpsons-Sears*, [1985] 2 SCR 536 ("*O'Malley*")). It did not demonstrate undue hardship — it never pursued its efforts to the end. Mses. Lévesque, Turgeon, Ouellette, and Robitaille knew that the efforts would be unsuccessful and made no additional ones. Several times, the employer said that it was waiting for the fitted and adjusted vest.

[113] The failure to accommodate impacted the grievor. She had to take 16 days of sick leave (August 9 to 30). As a result, she seeks the reimbursement of her sick leave and $10 000 in damages for pain and suffering due to the difficulties in the accommodations process. She suffered a loss of self-esteem, sadness and insomnia for months right up to the hearing.

[114] She also seeks $10 000 in punitive damages due to the employer's negligence and bad faith. The grievor's representative explained that the employer was negligent from September 2012 to August 2013. Its decision to no longer offer an accommodation from August 7 to 30, even though one had been possible before, also constitutes negligence. The grievor's reputation was flagrantly damaged when her access to the institution was withdrawn and she was escorted out of the institution. The workplace accident resulted from the employer not clearing snow from the steps. The requirement of a fitted and adjusted stab-proof vest was not a whim but a need recognized by the grievor's doctor in the RWP form. She cannot be blamed for anything. She cooperated with the accommodations process.

[115] Ms. Ouellette acknowledged somewhat late that the employer did not respect the requests set out in the form. She blamed the grievor's doctor. Although these acts are limited in time, the impact will last until the decision is rendered. For all these reasons, the $10 000 in damages is required to ensure that this does not happen again.

[116] The grievor also asked that any reference in her file to the prohibition on access to the institution be removed. The employer cannot discharge its duty to accommodate on the pretext that the union is responsible because it refused the slow-rotation position for the grievor. She asked that the grievance be allowed.

B. For the employer

[117] In September 2012, the doctor indicated that a fitted and adjusted stab-proof vest was required. In February 2012, the CSST had consolidated the file with limitations. Thus, the grievor returned to work but only for a few days as she could not carry out regular CX-01 work. Therefore, it was impossible to take her measurements because she was not at work. The measurements were made in March 2013. She was then assigned clerical duties and a new vest was provided to her in June 2013. As demonstrated by the evidence, a fitted and adjusted stab-proof vest is not standard and less common for officers. While waiting for the vest, she returned to work and,

therefore, was accommodated. Only the leave from August 9 to 26, 2013 (i.e., the time to find reasonable accommodation) constitutes a loss for her.

[118] Mr. Alexandre and Mr. Cowell researched the vest and certain options were discussed. The grievor was accommodated until she was removed from the institution. On August 28, 2013, her file was resolved because she returned to work in late November 2013, working night shifts, in which she had little inmate contact and could wear her vest occasionally.

[119] The employer argued that the grievor's grievance did not arise from her not having a fitted and adjusted stab-proof vest as she was accommodated for that. The trigger was the note from her doctor on July 21, 2013, which led to her being removed from the institution. It was difficult to accommodate the limitation of no direct or indirect inmate contact.

[120] To allow her grievance, the grievor had to show that she had a disability, that there was a negative impact on her work and that the disability was a factor in the negative impact she suffered. This case involves a period of 3 weeks (i.e., 16 days of sick leave). This is a tripartite accommodation (*Central Okanagan School District No. 23 v. Renaud*, [1992] 2 SCR 970) involving the union, the employer and the grievor. Ms. Dupuis and Ms. Davidson found a solution.

[121] The employer made efforts during those three weeks. Ms. Ouellette spoke of slow-rotation positions, which were not an option for the union. She also spoke of the grievor's mobility. Ms. Ouellette stated that continued efforts were made to try to find an accommodation during that short period.

[122] It cannot be said that the employer was unreasonable. There was no discrimination against the grievor. Therefore, the grievance must be dismissed.

C. The grievor's rebuttal

[123] The employer argued that it was impossible to take steps to accommodate the grievor with respect to a new vest in February 2013, which is not true because Ms. Ross could have gone to the institution to take measurements. However, management never contacted her to take those steps before she returned to work. The employer could have checked with other suppliers for a fitted vest.

[124] Note that management never asked any questions about the indirect inmate contact restriction. Since the employer believed that the vest issue was resolved, the indirect contact issue was no longer relevant.

[125] The discrimination occurred on August 7, 2013 when Ms. Ross was escorted out of the institution. This troubling incident warrants an apology with respect to the accommodation received. Ms. Ross never received a fitted and adjusted stab-proof vest, so she had to fend for herself.

V. Reasons

[126] This grievance arose from the refusal to accommodate the grievor after her request to return to work following her workplace accident. She alleged that that constituted discrimination, in violation of article 37 of the collective agreement and the provisions of the *CHRA*.

[127] Here is a brief chronology of the salient facts:

- **November 26, 2010:** The grievor fell at work and suffered a lumbar sprain.
- **December 6, 2010 to November 3, 2011:** The grievor was off work.
- **November 4 to 9, 2011:** The grievor returned to work but was unable to wear her stab-proof vest. She carried out office work without direct inmate contact.
- **November 9, 2011:** The grievor left work again.
- **June 4, 2012:** A medical note was submitted indicating that the grievor required a fitted and adjusted stab-proof vest.
- **September 26, 2012:** The grievor's medical note indicated that she needed a fitted and adjusted stab-proof vest. Thus, Ms. Ouellette began taking steps with Headquarters.
- **November 1, 2012:** A medical report prepared at the CSST's request identified the grievor's functional limitations. That report also consolidated her file as of **September 11, 2012**.
- **November 18, 2012:** The grievor, the employer and the CSST discussed her return to work.
- **December 10, 2012:** A medical note was submitted indicating that the grievor could have no inmate contact.

- **January 30, 2013:** Mses. Turgeon, Ouellette, Ross and Dupuis, and the CSST representative discussed the assessment of the positions that had been done. After the meeting, the grievor returned to work.

- **February 12, 2013:** The CSST informed the grievor that her benefit payments had ended on February 6, 2013 as she was able to perform her work at the CSC.

- **February 5 and February 13, 2013:** Medical notes indicated that the grievor could return to work part-time but not in a position of authority. She required limited inmate contact in accordance with the limitations and she had to wear the fitted and adjusted stab-proof vest.

- **February 2013:** The grievor received her stab-proof vest but it did not meet the doctor's requirements.

- **February 19, 2013:** According to the *Return to Work Plan and Accommodation Plan*, the grievor could carry out work that was not that of a CX, such as office work, while waiting for her fitted and adjusted stab-proof vest. She was also assigned to manage inmate complaints and grievances.

- **February 21, 2013:** Ms. Robitaille contacted Mr. Alexandre so that he could inquire about obtaining the adjusted stab-proof vest for the grievor.

- **March 2013:** The grievor's measurements were taken for her stab-proof vest.

- **April 18, 2013:** The *Return to Work Plan and Accommodation Plan* stated that the grievor could carry out office work, take part in correctional officer training, or hold a position as an officer in charge of the postern and service entrance while waiting for her fitted and adjusted stab-proof vest.

- **June 2013:** The grievor received her new stab-proof vest but it was not fitted.

- **July 12, 2013:** A medical note was received indicating that the grievor could have no inmate contact and that she could not wear the stab-proof vest because it was not suitable for her physical condition.

- **July 16, 2013:** The employer sent a letter to the doctor seeking clarification about the vest but the fact that the vest was not fitted was not communicated.

- **July 18, 2013:** The grievor's RWP was amended as she had completed her weapons training. However, it indicated that she had to have a fitted and adjusted stab-proof vest.

- **July 21, 2013:** The doctor responded to the July 16, 2013 letter. He indicated that while waiting for the fitted and adjusted stab-proof vest, the grievor had to avoid direct or indirect inmate contact and positions where she would have authority over inmates.

- **August 7, 2013:** The grievor was escorted out of the institution because her access had been withdrawn.

- **August 8, 2013:** The employer sent a letter to the grievor indicating that her access to the institution was withdrawn.

- **August 9 to 26, 2013:** The employer imposed sick leave on the grievor.

- **August 14, 2013:** Ms. Lévesque wrote to the grievor, clarifying that management was continuing its efforts to find an accommodation that was suitable to her limitations.

- **August 23, 2013:** Ms. Robitaille and Mr. Davidson discussed the grievor's accommodation.

- **August 26, 2013:** The union proposed a new RWP to allow the grievor to return to work, which the doctor and management accepted (working nights and wearing the vest occasionally).

- **August 28, 2013:** Ms. Ross's file was resolved.

- **End of November 2013:** The grievor returned to work in accordance with the RWP.

[128] Disability is one of the prohibited grounds set out in s. 3 of the *CHRA*. To establish that discrimination occurred, a grievor must first present a *prima facie* case of the discrimination.

[129] In *O'Malley*, the Supreme Court of Canada set out the criteria, as follows:

> …
>
> *… A* prima facie *case in this context is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer.*
>
> …

[130] As noted, the grievor had the burden of presenting sufficient proof of discrimination until proven otherwise. She had to simply demonstrate that the alleged

discrimination was one of the factors, not the only factor or even the main factor, to meet the test of sufficient evidence until proven otherwise (see *Holden v. Canadian National Railway Co.* (1990), 14 C.H.R.R. D/12 at para. 7 (C.A.)). The burden of proof in discrimination cases is that of the balance of probabilities.

[131] The Board cannot consider the employer's response before determining if a *prima facie* case of discrimination has been made out (see *Lincoln v. Bay Ferries Ltd.,* (2004) FCA 204 at para. 22). If the grievor establishes sufficient proof of discrimination until proven otherwise, then the respondent must provide a reasonable explanation for its actions. Under s. 15 of the *CHRA*, an employer can respond to a *prima facie* case of discrimination by indicating that its measure stemmed from a bona fide occupational requirement. This analysis includes a review of a reasonable accommodation to the point of undue hardship.

[132] In light of the facts, I am of the view that the three elements of the *prima facie* test are present: (1) the grievor is a member of a group whose characteristic (disability) is a prohibited ground of discrimination, and it was not disputed that she had functional limitations related to her back that required accommodation in her work tools, specifically a fitted and adjusted stab-proof vest; (2) she suffered differential treatment when her access to the facility was withdrawn, even though she was able to carry out clerical work; and (3) there is a link between these two facts as her disability made it necessary to find work and equipment, including her stab-proof vest, which met her functional limitations. Her disability and her need for accommodation, which was the fitted and adjusted stab-proof vest, were why she was removed from the institution (see *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39).

[133] In *Toronto (City) v. Canada Union of Public Employees, Local 79*, [2001] O.L.A.A. No. 668 at para. 70 (QL), the arbitrator set out certain criteria for assessing whether an accommodation was reasonable, as follows:

> · *… the nature of the job being performed by the grievor before the onset of her disability;*
> · *the nature of the disability;*
> · *the availability of information concerning work restrictions;*
> · *the cooperativeness of the injured worker;*
> · *the nature of the [employer's] business [and] its size;*

- *the sophistication of the Employer in dealing with accommodation issues;*
- *the availability of suitable accommodation; and*
- *the number of accommodations required.*

[134] The employer explained that after carrying out research, it concluded that it was not possible to obtain a fitted and adjusted stab-proof vest. In addition, when it received the doctor's response of July 21, 2013 indicating that the grievor could not have any direct or indirect inmate contact, it did not understand what was going on and, therefore, could not accommodate her. Its reaction was to withdraw Ms. Ross's access to the institution on the pretext of the need to protect her.

[135] The grievor had a medical note dated June 4, 2012 indicating that she needed a fitted and adjusted stab-proof vest. Therefore, the employer was aware from June 2012 that such a vest was required. However, it did not begin taking steps with Headquarters until Ms. Ouellette received the medical note dated September 26, 2012. But the grievor's first vest was not fitted and adjusted as recommended by the doctor. More measurements were taken. Still, the second vest did not comply with the grievor's medical restrictions.

[136] Thus, between September 2012 and August 2013, the employer's efforts to obtain such a vest were futile. According to the employer, a fitted and adjusted stab-proof vest did not exist. The evidence demonstrated that management consulted only one supplier and no witness could clearly explain why it was not possible to deal with another supplier and how a correctional officer's vest differed from vests for other professions such as the police. No evidence was presented as to why a bulletproof vest, like those used by the police, was not suitable for a correctional setting like Port-Cartier. Ms. Robitaille referred to the fact that a police vest did not meet CSC standards but no evidence or details were provided to support that statement.

[137] It is very clear that management knew from March 2013 that a fitted and adjusted stab-proof vest could not be obtained. However, all the grievor's RWPs indicated that she was waiting for a fitted and adjusted stab-proof vest. Why did management not notify her and her union? And it is incomprehensible that management did not so notify the doctor in its July 16, 2013 letter. That omission led the grievor, the union and the grievor's doctor to believe that one was possible as the restrictions on inmate contact were temporary until the vest was obtained.

[138] The employer could have researched other suppliers to obtain a vest. If one was unavailable, it was up to the employer to inform the grievor as soon as possible to find other accommodations. This failure simply delayed her reinstatement to work and deliberately hindered the accommodations process.

[139] The restriction that seems to have posed the greatest challenge to the employer was the issue of no indirect inmate contact. According to Ms. Turgeon, it constituted undue hardship as seeing or dealing with inmates was always possible, particularly when dealing with their files. According to her, the restriction meant that the grievor was not allowed to see inmates with her own eyes or even to deal with an inmate's file. Ms. Lévesque confirmed that there was indirect inmate contact in the office work unit as there were windows through which inmates could be seen. Ms. Ouellette explained that as all files are related to inmates, there is always indirect contact.

[140] That reasoning is extreme and in my view shows bad faith. Management never asked the grievor or her doctor for an explanation of that new restriction. She and her union were involved and cooperated throughout the reinstatement process. It would have been easy to contact them or the grievor's doctor for clarification on the new limitation. Unfortunately, this step was not taken and management simply decided to expel the grievor from the institution. She was not notified in advance but Mr. Blainville of the union was. He said that he asked management why she could no longer have access to the institution. Each witness confirmed that no one had lost access to the institution due to functional limitations and that that treatment was instead reserved for officers guilty of misconduct. That incident humiliated the grievor and damaged her reputation. The CSC allowed rumours to spread in the workplace as to why she had been expelled from the penitentiary.

[141] The evidence demonstrated that pregnant employees may continue to work in the institution without inmate contact and without wearing their stab-proof vests. They are assigned to office work or to positions with little or no inmate contact such as the postern. The grievor's situation could be compared to that of a pregnant employee. Indeed, Ms. Ouellette had been assigned the grievor's file because it resembled one of a pregnant employee.

[142] In fact, the grievor worked from April 2013 to July 2013 on inmate complaints and grievances and on placing orders for inmates while waiting for her fitted and

adjusted stab-proof vest. According to Ms. Robitaille, management found her that work, and no problems arose. So, why not continue with that accommodation?

[143] I find that the employer committed a discriminatory act by withdrawing the grievor's access to Port-Cartier Institution and by forcing her to take sick leave. In addition to the withdrawal of her access, she was escorted outside, in front of all her colleagues, as though she were guilty of misconduct. The situation was not explained to the officers until a week had passed to end the rumours. I find that the grievor was humiliated and that her dignity was affected.

[144] In addition, the August 8, 2013 letter did not suggest that the employer was seeking an accommodation, as it made the grievor responsible contacting the employer if her state of health or limitations changed. Only on August 14, 2013 did the employer correct things and specify that it was continuing its efforts to find her a suitable accommodation. However, no witness could explain the efforts that were made. I conclude that the employer had no intention of finding an accommodation for her. I agree with her allegation that the real reason for removing her from the institution was that she had arrived there on a motorcycle. In her testimony, Ms. Turgeon clearly indicated an inconsistency between the grievor's functional limitations and her arrival by motorcycle. If an inconsistency arose, Ms. Turgeon simply had to request clarification from the treating doctor. However, she preferred expelling the grievor from the institution eight days after receiving the medical certificate indicating there should be no direct or indirect inmate contact.

[145] As established in *Renaud*, a reasonable accommodation is a concern not only for the employer but also for the employee and his or her bargaining agent, as applicable. The employer and the employee, with the bargaining agent, have a role to play in ensuring a reasonable accommodation; the employer by offering an accommodation and the employee by providing the necessary information and cooperating in the search for reasonable solutions. The bargaining agent also has a role in finding reasonable solutions. Therefore, the duty to accommodate is a tripartite duty in a unionized workplace.

[146] In this case, the employer failed its duty as it did not communicate that a fitted stab-proof vest did not exist, and it decided to withdraw the grievor's access without clarification. There was no cooperation with the grievor or the union on those

important points. And the fact that it wanted to avoid favouritism was not a reasonable explanation in this case. The duty to accommodate is not favouritism but rather a legal obligation. The union was aware of the need for the fitted and adjusted stab-proof vest and did not seem to think that it would result in favouritism or offend other employees. One reason for including the bargaining agent in the accommodation process is to ensure that accommodations are acceptable to all its members.

[147] It is important to consider all the facts in this case. The doctor temporarily imposed the restriction of no direct or indirect inmate contact while waiting for the grievor to receive her fitted and adjusted stab-proof vest. Once it arrived, the restriction would have been removed. The receipt of the fitted and adjusted stab-proof vest was directly related to that restriction. In my view, the employer's explanation that it had no idea where the new restriction on indirect contact, came from is not credible. From 2012, the grievor had demanded a fitted and adjusted stab-proof vest to address her physical functional limitations. No psychological functional limitation was ever mentioned. No event in the workplace or in her personal life could have led the employer to believe that indirect inmate contact was a new limitation. Had any doubts or questions arisen, it simply could have met with the grievor and her union and asked her the questions, which would have avoided the circus of sending letters and expelling the grievor from the institution.

[148] Therefore, I cannot accept the employer's argument that the duty to accommodate was triggered when the grievor's access to the institution was withdrawn. It had had more than three weeks; it had several months. It abruptly ended its efforts when it withdrew the grievor's access to the institution without seeking clarification about the restrictions. It acted cavalierly toward the grievor and demonstrated bad faith.

[149] Consequently, the employer's explanation is not reasonable. It failed to demonstrate that it had reached the threshold of undue hardship.

A. Corrective measures

[150] The grievor seeks the reimbursement of the sick leave credits she had to use to be off work after she was expelled from the institution (August 9 to 26, 2013). She also seeks $10 000 in damages for pain and suffering under s. 53(2)(e) of the *CHRA* and $10 000 in special compensation under s. 53(3).

[151] The Board's power to order corrective measures is set out in s. 226(2)(b) of the *Act*. It includes the orders set out in ss. 53(2)(e) and 53(3) of the *CHRA*.

[152] Under s. 53(2)(e), the Board may order the party found to have engaged in discrimination to compensate the victim up to $20 000 for pain and suffering endured from the discriminatory act. Section 53(3) provides for further compensation for the victim of up to $20 000 if the Board concludes that the act was wilful or reckless.

[153] Although s. 53(2)(e) of the *CHRA* gives the Board discretion to grant such relief when a grievance is allowed, discretion must be exercised judiciously and in light of all the evidence before it. See *Canadian Human Rights Commission v. Dumont*, 2002 FCT 1280 (CanLII) at para. 14.

[154] Consequently, I find that the grievor demonstrated that she was humiliated when she was escorted out of the institution. The employer took a week before intervening and explaining why she had been escorted out of the institution. No explanation was provided as to why her photo was posted at the postern. The rumors that arose from that incident impacted her and her reputation. Such treatment in an accommodation situation is deplorable. In addition, the process that reinstated her into her correctional officer duties was long and difficult because the employer failed to advise her that a fitted and adjusted stab-proof vest did not exist. She suffered a loss of self-esteem, insomnia and sadness. The grievor wanted to return to work and be productive.

[155] I find that it is warranted that she receive $10 000 in compensation for pain and suffering (s. 53(2)(e)) and $10 000 in compensation for the employer's wilful and reckless act (s. 53(3)).

[156] In addition, any reference to prohibited access to the institution in the grievor's file shall be deleted and sick leave credits for August 9 to August 26, 2013 shall be restored to her bank of sick leave credits.

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

(The Order appears on the next page)

VI. Order

[158] The grievance is allowed.

[159] The employer shall pay the grievor compensation of $10 000 for pain and suffering (s. 53(2)(e)) and $10 000 for the employer's wilful and reckless act (s. 53(3)).

[160] Any reference to prohibited access to the institution in the grievor's file shall be deleted.

[161] The sick leave credits for August 9 to August 26, 2013 shall be restored in her bank of sick leave credits.

[162] I order the following exhibits be sealed: Exhibits G-2, G-5, G-8, G-11 and G-17, tab 1 of the employer's book of documents, and Exhibit E-2 and tab 22 of the employer's book of documents.

[163] I order that personal information about the grievor, such as her address, her social insurance number and her personal record identifier be redacted.

[164] This shall all be done within 90 days of the date of this decision.

January 21, 2020.

FPSLREB Translation

Chantal Homier-Nehmé,
a panel of the Federal Public Sector
Labour Relations and Employment Board