Date: 20210520

File: 566-02-14395

Citation: 2021 FPSLREB 55

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

LYNDSEY MCMULLIN

Grievor

and

TREASURY BOARD
(Correctional Service of Canada)

Employer

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

In the matter of an individual grievance referred to adjudication

Before: Augustus Richardson, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Quentin Phaneuf, counsel

For the Employer: Chris Hutchison, counsel

Heard via videoconference,
December 3, 4, and 10, 2020.

REASONS FOR DECISION

I. Introduction

[1] The grievance before me involves a request for accommodation on the grounds of family status made by the grievor, Lyndsey McMullin, in November 2016. She was a correctional officer (classified CX-02) working at the Nova Institution for Women ("Nova") in Truro, Nova Scotia. At the time of her request, she was working 12-hour day or night shifts rotating on a "2-3-3-2" roster (work two days, rest three days, work three days, rest two days). Her spouse, an aircraft maintenance engineer employed by WestJet, also worked 12-hour shifts, but on a "5-4-4-5" shift roster. Both schedules included day or night shifts during the week and on weekends.

[2] The grievor had been on maternity leave for a year after the birth of her daughter in September 2013. She returned to work in September 2014 on a part-time schedule of 20 (and then 30) hours per week under an agreement pursuant to clause 45.08 of the collective agreement between the Treasury Board ("the employer") and the Union of Canadian Correctional Officers—Syndicat des agents correctionnels du Canada – CSN (the Union) for the Correctional Services Group (all employees), that expired on May 31, 2018 ("the collective agreement"). The part-time agreement ended, and she returned to her full-time schedule in August 2016. She found it difficult to find childcare for the days or nights when under her shift schedule and that of her husband, they both worked. She requested an accommodation. She offered the employer two options that would accommodate her needs. It offered two different options, neither of which she accepted. Hence, she filed this grievance, on February 10, 2017, alleging the employer harassed and discriminated against her on the basis of her family status, in violation of Article 37.01 of the collective agreement.

[3] The issues to be decided include whether the grievor has established a *prima facie* case of discrimination; if so, whether the employer has refuted the allegation of discrimination. In this case, that will require a determination of whether the employer offered reasonable accommodation, in light of all of the circumstances.

II. The hearing and the evidence

[4] At the hearing, I heard the grievor's testimony. The parties entered an agreed joint book of documents (Exhibit JB). A few additional documents were also entered as exhibits during the course of the hearing.

[5] On behalf of the employer, I heard the testimony of Sean Cole, a 25-year employee who has worked at Nova for 20 of those years. As of the hearing, he was a corrections manager on the Operations Desk. His responsibilities included managing staff on shift rosters, reviewing accommodation and return-to-work files, and ensuring that all shifts were covered. He had no role with respect to the grievor's accommodation request or the employer's accommodation offers. His testimony focussed on the shift-roster system in place at Nova.

III. The facts

[6] Before proceeding, it is necessary to say something about the shift-roster system used by the employer, at least as it applied to those employees working 12-hour shifts. Each employee submitted a proposed schedule, which was reviewed by his or her supervisor and, if approved, input into the employer's automated "Scheduling and Deployment System" (SDS). The SDS then populated shift schedules for the employees in relation to their seniority and shift preference or choice. The rotation of work and rest days (that is, how many days of work were followed by how many days of rest) was set for each institution operated by the employer. So, for example, during the material time, Nova was on a 2-3-3-2 rotation. The Springhill Institution in nearby Amherst, Nova Scotia, operated on a 5-4-4-5 allocation. Any particular rotation had to be approved by the employer's head office. Apparently, Nova had once applied to be placed on a 5-4-4-5 rotation, but that application had been denied.

[7] Mr. Cole testified that there were currently 108 correctional officers working at Nova, with 79 reporting. Most worked 12-hour shifts. Once the SDS generated a shift roster, shifts could be reassigned, but care had to be taken to ensure that rest days were not being changed, that notice of the change was given, and that moving an employee would not create a vacancy in the department or division to which the employee had been assigned. The normal start time was 07:00. One or two positions in the administrative or discharge divisions had work hours of 08:00-16:00. The difficulty with those positions, given the normal 07:00 start time, was the uncovered hour in the morning. But some employees worked those hours. The other divisions, such as security, where the grievor worked, had regular start times of 06:45.

[8] Turning to the grievor, in the period following her return to work in September 2014, she split a shift with a co-worker. Working part-time meant that she was paid as a part-time employee pursuant to the provisions of the collective agreement. That in

turn meant that she received reduced pay and that her pensionable time took a hit. However, it also meant that she could move her assigned roster shifts when they conflicted with her childcare schedule. To do this, she would go to Kenny Goulet, who was then the assistant warden of operations, who would try to move her shift to fill any spots that had opened up. The grievor testified that the ability to move her into a different shift on these occasions was a benefit to the employer, because it could avoid paying overtime to a replacement employee. At some point, she increased her part-time hours to 30 from 20.

[9] During this time, the grievor's husband, an aircraft maintenance engineer, worked for Air Transat. His shift schedule was irregular and often took him out of the province for periods. Although the grievor's testimony was a bit fuzzy on this point, it also appears that she used the services of a local childcare provider, Andrea Gaudet, to provide childcare for three to five days per week, from Monday through Friday. She also had some help from her parents, who lived about two hours' drive away.

[10] On June 27, 2016, the grievor was notified that her reduced workweek schedule for April 9, 2015, to September 5, 2018, was being "terminated due to operational reasons." She was required to return to her full-time hours of 40 hours per week as of August 1, 2016 (Exhibit JB, tab 6).

[11] The return to a full-time 2-3-3-2 shift roster posed problems for the grievor. As already noted, her husband's schedule was erratic, which meant that it was difficult for them to plan which parent should be available to look after their daughter. For a time, the grievor and her husband cobbled together childcare by using leave or holiday time or, by relying on her parents or her husband's family (who might fly in from Newfoundland). I am also satisfied with respect to the grievor's testimony that during this time (and indeed perhaps even when she was working part-time), she used Ms. Gaudet's services to provide childcare 3 to 5 days per week from 07:30 to 17:00. A year or so earlier, the grievor had enquired of another childcare provider ("Sharleen") as to whether she could provide 12-hour coverage. Sharleen replied that she could not because 12 hours was too long, especially given that she had her own children to look after (Exhibit JB, tab 1, page 1).

[12] By early November 2016, the grievor determined that it was no longer possible for her to balance her desire to be a good worker on 12-hour shifts with her

responsibility to ensure the safety of her daughter. On November 8, 2016, she emailed Mr. Goulet, copying Sherry MacKinnon, then the correctional manager scheduling and deployment. (The grievor testified that by then, Mr. Goulet was spending significant time away from Nova on training and essentially was on his way to a new position, elsewhere.) In her email, the grievor stated that the recent changes in shift scheduling had left her with no choice but to request an accommodation due to family status. She explained that her husband was also a shift worker, that his roster did not match hers, and that as a result, they were left with roughly 7 or 8 shifts per month for which they were both scheduled to work. As a result, they were unable to find childcare for 12-hour days and nights (Exhibit JB, tab 18).

[13] Ms. MacKinnon responded the same day. She asked whether the grievor was looking at part-time hours as part of the requested accommodation. The grievor responded that day, stating that she would not request "reduced hours and [that she] want[s] to work [her] full 40 hrs [*sic*] per week" (Exhibit JB, tab 18).

[14] The grievor then emailed Ms. MacKinnon on November 9, 2016, to request a list of documents and information that the employer required to assess a request for family status accommodation (Exhibit JB, tab 8). Ms. MacKinnon responded a few hours later. She advised that to establish a duty to accommodate on the grounds of family status, the grievor had to provide supporting documentation, as follows:

> …
>
> - **A lawful parental obligation**: Legal custody of a child *(Proof of your children's ages (ie copy of birth certificate)*
> - **A legal obligation**: The employee's childcare obligation must engage his or her legal responsibilities to the child, rather than being merely a personal family choice. *Schedule of your partner or Ex-partner – if not provided confirmation of the hours of work (M-F 8 hrs, Variable hours etc.) & copy of court orders/custody agreement(s) if applicable.*
> - **Reasonable efforts:** The employee must show that he or she has made reasonable efforts to meet and balance childcare and workplace obligations through reasonable alternative solutions, including childcare providers, family and other possible sources of assistance, and must be able to demonstrate that no such solution was readily accessible *2 letters from child care providers and you must demonstrate that family (both sides of family) and other possible sources were not readily accessible*

> - **Real interference**: The workplace rule (in this case the work schedule) in question must be shown to interfere with the employee's fulfillment of his or her childcare obligations in a manner that is more than trivial or insubstantial.
>
> …
>
> [Emphasis in the original]
>
> [*Sic* throughout]

A. The grievor's formal request for accommodation on November 11, 2016

[15] The grievor filed her official request and supporting documentation for accommodation on the grounds of family status on November 11, 2016. She advised as follows: "Specifically, I am unable to find childcare to cover the hours I am currently required to work" (Exhibit JB, tab 9). In its format, the request followed the structure set out in Ms. MacKinnon's email.

[16] First, she (and her spouse) had legal custody of their three-year-old child.

[17] Second, she and her husband worked shifts that were not always complementary, meaning that they were left with approximately seven 12-hour shifts per month on which they were both expected to be at work.

[18] Third, she had made efforts since her pregnancy to find reasonable daycare but had found that locally, no one was prepared to look after her child on evenings, nights, or weekends. She attached two letters from local daycare providers "refusing [her] request to accommodate [her and her husband's] variable schedules." The employer had turned down her request to job share. She had explored hiring a nanny (domestic or international), but neither approach had proved suitable. Her parents lived a two-hour drive away and were not able to provide full-time childcare. Her husband's family lived in Newfoundland and had on occasion come to help, but it was not a consistent or reliable option for the long term.

[19] Fourth, and referring to the requirement that there be a "[r]eal interference," she explained that her current shift roster left her with seven or more shifts per month, during which she mentioned the following applied: "… where I am unable to fulfil my legal obligation to properly care for my child" (Exhibit JB, tab 9).

[20] She concluded her formal request by stating that she was looking forward to discussing her options and that she would be happy to provide any further documentation that might be requested.

[21] The documentation that the grievor forwarded with her request appears to have included only three items. The first was her daughter's birth certificate. The second was an undated note from Ms. Gaudet, who stated, in part (Exhibit JB, tab 4), "Lindsey [*sic*] Thorne has asked me to accommodate her with childcare for 13 & 16 hour shift [*sic*]. I am not able to accommodate these hours. I have a family myself and my hours are 7:30 am to 5:00 pm Monday to Friday."

[22] The third appears to be a text message chain between the grievor and Sharleen. The last text is dated November 9 (which, given the evidence, I take was in 2016) and reads as follows (Exhibit JB, tab 1, page 2):

> *Hey Sharleen! We are still trying to figure out childcare issues with our work schedules. I need proof that I asked around about local daycares taking* [her daughter] *for 13 hr shifts. You don't do this still, do you?*
>
> *Ummm nope ....13 HR shifts are way too long for me. Sorry.*

[23] A little over a week later, on November 21, the grievor forwarded a copy of her husband's WestJet shift roster starting in January 2017. She advised that she had meant to include it with her formal request of November 11. She added that his schedule was "something like a 5-4-4-5 roster" (Exhibit JB, tab 10).

[24] I note that the grievor's husband had changed employers and had begun working for WestJet. In November 2016, he was away for training, but as of January 2017, he was to work at the Halifax, Nova Scotia, airport on 12-hour shifts on a 5-4-4-5 shift roster. WestJet's shift roster was automatically generated and was fixed and certain long into the future. Going forward, the grievor and her husband would be able to identify those shifts on which both of them were expected to work, which meant that they could identify in advance the days or nights on which some form of childcare would be required. Had Nova been on a 5-4-4-5 shift roster, then the grievor and her husband might have been able to arrange for alternating shifts so that on any given day or shift, one of them would have been available to care for their daughter. However, the difficulty was that his 5-4-4-5 shift schedule did not match the 2-3-3-2

schedule at Nova, which meant that on 6 to 8 days per month, they might both have had to work. Hence, it created a need for someone else to provide childcare.

B. The employer's response: the meeting of December 24

[25] On December 24, 2016, the grievor and Tammy Wile, who at the time was the assistant warden, operations, on an acting basis, had a meeting to discuss the grievor's accommodation request. There are two versions of what was discussed. One was recorded by Ms. Wile in an email dated December 24 and, in a memo, dated January 25, 2017 (Exhibit JB, tabs 11 and 12). The other was recorded by the grievor in a memorandum dated February 7, 2017 (Exhibit JB, tab 13), to which she testified at the hearing.

[26] In her testimony, the grievor challenged as inaccurate or misleading some of what Ms. Wile recorded about what was said at the meeting. However, it is clear in both versions that the following happened.

[27] First, Ms. Wile had some questions for the grievor about her search for suitable childcare to meet her needs as a 12-hour shift worker. She also questioned the extent of the grievor's search for nannies, suggesting that it had been inadequate and that nannies were available.

[28] Second, they discussed the grievor's two proposals as to how the employer could accommodate her childcare needs, given her 12-hour shift roster.

[29] The first proposal called for the employer to place the grievor on a 5-4-4-5 shift roster similar to that already in use at Springhill Institution and to align that roster to the fixed and certain 5-4-4-5 shift roster of her husband. That would ensure that one parent would always be available to provide childcare for their daughter. It also meant that the grievor could continue to work her 12-hours per day, 40-hours per week schedule, including backshifts and weekends.

[30] The second proposal called for the employer to leave the grievor on Nova's 2-3-3-2 schedule but to permit her to rearrange the 6 to 8 shifts per month on which her shift schedule and that of her husband had them both working. Again, this would enable the grievor to work a schedule that included backshifts and weekends. She argued that the benefit to the employer would be that she would work at straight time instead of at the premium rates that would otherwise be payable on such shifts.

[31] I note that in her memorandum of February 7, 2017, the grievor wrote that in fact, she had made both proposals to the employer on November 23 (Exhibit JB, tab 13, page 26).

[32] At the December 24 meeting, Ms. Wile told the grievor that she had prepared a list of local childcare providers that she had found online and on the classified-ad website Kijiji, as well as a list of nanny services. She advised that she had found at least one that would provide childcare until 19:15. upon request and that if the grievor's request were accepted, she might have to consider working Monday to Friday.

[33] On December 29, Ms. Wile emailed the grievor the list of childcare providers and nanny services that she had found (Exhibit JB, tab 2, page 3). Ms. Wile noted that one, Near to Me Daycare, "[s]tays open until 1915 upon request (opens at 0615)".
The grievor testified that after receiving the list, she called the childcare providers on it. Her notes with respect to Near to Me were as follows:

> *day shifts only ➔ 1 family, 4 nights per week.*
> *06:15 - 5:30 ➔ 06:15 - 7:15*
> *no holidays*

[34] The grievor testified that Near to Me's normal hours for childcare were from 07:00 to 17:30. but that three slots were available for an earlier drop off and a later pick up. One was already being held for four nights per week, but the two other slots were open at the time. She added that Near to Me wanted to know as soon as possible whether she wanted one of them.

C. The accommodation meeting of January 12, 2017

[35] Ms. Wile, the grievor, Ms. MacKinnon, Ashley Rowe (the union local's grievance coordinator), and Amy Logan (the union's "Regional Status of Women" representative) met on January 12, 2017, to discuss the grievor's accommodation request. Again, there are two versions of what was discussed. Ms. Wile's is in her memorandum of January 25, 2017 (Exhibit JB, tab 12, pages 24 and 25). The other is the grievor's, found in her memorandum of February 7, 2017, and in her testimony (Exhibit JB, tab 13). And again, while the grievor felt that some of Ms. Wile's version contained misstatements, there remains a substantial overlap in the two versions.

[36] On that evidence, I am satisfied that the grievor again presented her two options as to how the employer could accommodate her childcare needs as a 12-hour shift worker on a regular shift roster (that is, one that included backshifts and weekends). Also discussed were the services provided by local childcare agencies and nanny services and whether they could safely satisfy the needs of 12-hour shift workers on Nova's regular shift roster.

[37] I should state that I am satisfied that during the meeting, the grievor did state that she had contacted Near to Me and that she was aware that it could provide childcare up to 19:15. I reached this conclusion because in Ms. Wile's memorandum of January 25, 2017, she stated that the grievor had confirmed that she had contacted a daycare that "…they do provide childcare services until 1915 hours" (Exhibit JB, tab 12, page 24). The grievor did not challenge that statement in her February 7, 2017, memo, although she did challenge in detail 16 other statements in Ms. Wile's memo.

D. The employer's offer of accommodation of January 25, 2017

[38] On January 25, 2017, Ms. Wile sent the grievor the employer's accommodation proposal. It consisted of a three-page, single-spaced, memorandum. The bulk of it (roughly two-and-a-half pages) set out Ms. Wile's version of the accommodation the grievor had requested, the grievor's reasons for the request, and the history of correspondence and meetings between the two of them about how the grievor's accommodation needs might be met. Ms. Wile explained that the grievor's accommodation request had been granted, as follows:

…

> *Your request for accommodation has been approved on a temporary basis for a duration of four months. As a result, you will work Monday to Friday from 0645-1445 hours in order to fulfill your caregiver and work obligations. Please be advised that your schedule may change to include any hours between 0645-1900 Monday thru Friday, which is when there is guaranteed licensed available childcare within the local area, with 14 days [sic] notice so please plan accordingly.*

…

[39] Ms. Wile went on to explain as follows how this proposed accommodation had been arrived at:

…

> *This has been determined to be the "best fit" accommodation given your circumstances and concerns you have brought forth during the assessment process. You acknowledge in your original documentation that you can no longer work your variable hours schedule, you acknowledge several available resources for childcare but have determined they are either unreliable or unsuitable, and you have expressed concern over your child being in an environment that has not been determined to be a safe place for a child to be. You expressed concern with daycare not being a suitable option if you were to remain on shift work because they do not operate on holidays and you may have no available childcare.*
>
> …
>
> *A Monday to Friday schedule in which your work hours occur during times that a licensed childcare facility provides services alleviates all of the above concerns and issues. The provincial government has determined that these facilities are a safe place for a child to be. Childcare is always reliable and available (e.g. if an employee is sick then childcare is still available). The issue of holidays is resolved because you will be available to fulfil your legal obligations to care for your child. In the event that your spouse's schedule continues to change as it currently has, your legal requirement related childcare will not be impacted.*
>
> …

[40] Ms. Wile did not clearly address the grievor's first proposed accommodation, which was working opposite her husband's shift schedule. However, her comments in the proposal suggest that she understood that the husband's schedule was not fixed and that in any event, he was working or would, or could work outside the province from time to time (Exhibit JB, tab 12, page 25). As far as the second option was concerned, Ms. Wile simply commented that the grievor could "… opt to explore a deployment to Springhill Institution" (Exhibit JB, tab 12, page 25).

[41] Ms. Wile concluded with the following cautionary note (Exhibit JB, tab 12):

> …
>
> *It is important to note that you will be expected to continue to explore all viable options in order for you to return to a regular roster/schedule. At the review of your accommodation in four months, you will be required to provide information on the issue and steps you have taken, and plan on taking, to resolve the issue.*
>
> …
>
> *You have until February 1, 2017 to respond as to whether or not you will accept his offer of accommodation. If you do not respond*

> *or you choose to decline the offer, you will remain on your current schedule.*
>
> …

[42] It is important to note that the employer's proposal fit within the confines of the services said to have been available at Near to Me.

E. The grievor's response and rejection of the employer's offer on February 7, 2017

[43] The grievor responded to the offer on February 7 in a seven-and-a-half-page, single-spaced, email addressed "[t]o whom it may concern".

[44] The first two pages set out her version of the history of her discussions and communications with Ms. Wile with respect to the accommodation request. She referred to Ms. Wile's assessment and proposal of January 25. She described it as follows: "… based on various assumptions made by the author who presented this information as fact, supporting her apparent desire to host me on a schedule other than what I had requested." She challenged what she said was Ms. Wile's suggestion that the grievor wanted to avoid the cost of childcare or that she was being too picky about who could be used for it. She cited *Miraka v. A.C.D. Wholesale Meats Ltd.*, 2016 HRTO 41, to the effect that it was unreasonable to expect an employee to find childcare on the Internet using a site such as Kijiji. She then conducted a minute critical interpretation of Ms. Wile's proposal, identifying "… no less that sixteen sentences that were untrue or misrepresented" (Exhibit JB, tab 13).

[45] All this underlies the grievor's decision to refuse the offered accommodation. Her explanation is worth citing in detail, as follows (Exhibits U2 and JB, tab 13):

> …
>
> *Recent case law surrounding the issue of Family Status accommodations dictates that, should the employee prove a legitimate need for an accommodation, the employer should respond in good faith. In addition, when refusing an accommodation request, there should exist a bona fide work requirement that prevents the employer from approving the accommodation and undue hardship must be proven. The employer is expected to bear some hardship; the employee is not. The very point of an accommodation is to remove barriers that may exist to employees who fall under any of the areas prohibited within the Charter of Human Rights. Forcing employees to suffer*

> *financial penalties, schedule changes and differential treatment have all been addressed in recent Human Rights Tribunals.*
>
> *Ms. Wile provided no explanation as to why the two options I requested were denied. There was no undue hardship defined in her three page report. Her determination of the "best fit", which is based on her personal assumptions and preconceived notions, forces me to take a financial penalty as I will no longer be eligible for overtime, lieu or holiday pay, or shift differential. This may amount annually to $8 000 without excessive overtime. Furthermore, the hardship placed on my three year old daughter is measurable in that she will have to change daycares, and her regular, consistent hours of sleep from 7pm – 7am will be in jeopardy at the discretion of the employer. There are numerous studies done on the negative effects of children who suffer inconsistent sleep patterns, or sleep deprivation.*
>
> …

[46] In her testimony, the grievor explained that the employer's proposed accommodation of working Monday to Friday would not have worked for her. The hours being proposed were not stable but could change. Moreover, they did not line up with the daycare hours available to her. As well, she was concerned about signs of stress that she said she saw in her daughter. She said that her daughter was reluctant to leave her side and that she suffered from separation anxiety. Her family physician apparently had recommended that her daughter remain in the existing daycare with Ms. Gaudet. However, in her testimony, the grievor confirmed that the fundamental reason the employer's proposal was not acceptable was that she could not find daycare that would match the variable hours set out in it.

[47] The grievor also complained that the employer failed to explain why her two suggested options — working on the Springhill Institution's 5-4-4-5 rotation or continuing the practice of reassigning shifts when she and her husband were on the same shift — were not acceptable as accommodations.

[48] I note the complaint in the grievor's February 7 response that the employer's proposal would mean that she would no longer be eligible for overtime, shift differential, or weekend work, which could amount to a loss for her in the range of $8000.00 per year. She added that she had "… requested to work a roster opposite of [her] husband's so that [she] was still available to work Holidays, overtime, backshifts and weekends" (Exhibit JB, tab 13, page 33). However, when she was questioned about this position during cross-examination, she maintained that in fact she had not really

been concerned about the money. Rather, what she and the union had wanted to know was the rationale for the employer's offer and why in particular it did not accept her proposal, particularly when (in the view of her and the union) a proposal that included her working shifts would be a benefit to the employer. She stated: "For me, it was how come this is the offer, and why was there no explanation as to why my options were not feasible."

[49] The grievor acknowledged in cross-examination and in response to questions from me that the employer's modified offer would have fit within the time constraints of the special slots that had been on offer from Near to Me in November 2016. She testified that when she called the daycare at some point after receiving the employer's first response, she learned that those slots had been filled and were no longer available. In cross-examination, she added that by then, she had become so frustrated with the process that she did not advise the employer that the slots were no longer available. She stated: "When I was refused, I just couldn't continue anymore."

F. The grievance of February 10, 2017

[50] The grievor filed the grievance before me on February 10, 2017. In it, she complained that she was being harassed (an allegation that she subsequently abandoned in September 2017 (Exhibit JB, tab 19)) and discriminated against on the basis of family status (Exhibit JB, grievance documentation, tab 1).

[51] The grievor testified that she filed the grievance because she felt that her integrity had been questioned because the information she had provided had been overlooked or misrepresented. She felt that she was being forced to choose between her pride in being a good worker and her duty and pride in being a good mother. She doubted Ms. Wile's objectivity and wanted someone else to review her accommodation request.

G. The employer's modified offer of accommodation on February 24, 2017

[52] On February 24, 2017, Ms. Wile offered a modification to the January 25 proposal, as follows (Exhibit JB, tab 14):

…

> *… You have stated that the offer in its current form leaves your hours up to the discretion of the Employer, as it was stated that the schedule would involve hours of work anywhere between 0645-*

> *1900 with proper notice for schedule changes. Based on your feedback, it's acknowledged that this may create some hardship for you so we would like to present you with a more stable schedule for planning purposes and stability. If you choose, we would like to offer Monday to Friday from 0645-1445 or 700-1500 hours. Please know that management did consider the scheduling options that you presented but at this time a Monday to Friday schedule best fits the operational needs of the institution and fits within the parameters of your childcare needs. After the offer was made, you disclosed that your daughter is already in daycare several days per week so this option creates minimal changes in your childcare situation.*
>
> *You have also mentioned that it will impact your ability to work overtime. Your specific circumstance only speaks to hours in which you are scheduled to be at the workplace for childcare purposes. Outside of that there are no limitations regarding overtime so you can sign up for overtime freely.*
>
> …

[53] The grievor replied on apparently the same day, thanking Ms. Wile for the modification and advising that she would respond by March 9. She also requested the following: "… a justification as to why the two options I had requested were denied, for information purposes" (Exhibit JB, tab 14).

[54] The grievor elaborated on her reply as follows a few days later, on February 28 (Exhibit JB, tab 14):

> …
>
> *Could I please be provided with a rationale as to why the two options I requested are not suitable at this time?*
>
> *I am beginning a week away tomorrow but will inquire about a full time spot in daycare for my daughter. I will provide a response by March 14, 2017.*
>
> *Also, does the four month time limit apply to this offer as well?*
>
> *The financial penalization I referenced was not limited to overtime, but spoke more to the loss of shifts differential and lieu.*
>
> …

[55] On March 3, Ms. Wile asked the grievor and her bargaining agent to place the grievance in abeyance until March 31, to permit her to consult with the employer's labour relations staff and to provide the grievor time to consider its modified proposal of February 24 (Exhibit JB, tab 16). The grievor granted the request, although she wanted it noted that her "… inability to manage [her] childcare situation because of

[her] work schedule is becoming increasingly problematic …", and she wanted to avoid any further delays (Exhibit JB, tab 16).

[56] On March 14, the grievor answered the employer's modified proposal in a one-line email to Ms. Wile, as follows: "I am not able to accept the modified offer outlined below [i.e., the February 24 email]" (Exhibit JB, tab 15).

[57] There followed some efforts during the latter part of March 2017 to set up a meeting (Exhibit JB, tab 17). The grievor testified that in the end, the meeting never took place.

[58] The grievance then proceeded through the steps in the process, reaching the third level by March 15, 2019. At the hearing, the grievor was asked how she had handled her childcare needs since February 2017. She testified that it was by "mix and match". She and her husband would take turns calling in sick when their shifts coincided, arranging shift changes with other workers, or leaving their daughter with her mother. As a result, the grievor said that she was "significantly in the hole" with respect to sick leave and that she had less lieu time than she might otherwise have had. (She did not provide a breakdown of the sick days she took because she was actually sick and those she took because of childcare commitments.) As of the hearing, her daughter was aged seven and was attending school.

IV. Summary of the submissions

A. For the union

[59] The union submitted that the employer had been able to accommodate the grievor with part-time employment on her return to work following her maternity leave. She had worked part-time for first 20 and then 30 hours per week. That had worked well, and she had been able to fulfil her dual roles of good employee and good mother. But that part-time assignment was terminated as of August 1, 2016, without explanation.

[60] Once the grievor was returned to full-time, 12-hour shifts, she was back to square one insofar as childcare was concerned. In the period from August to November 2016, she had tried to manage by cobbling together a mixture of personal leave, lieu and vacation time, help from family members, and private childcare. But it proved too onerous. The mismatch between her and her husband's shift schedules meant that six

or seven times per month, no one was available to care for her daughter. That posed a serious and substantial interference with her moral and legal obligations to care for her daughter.

[61] The grievor made a formal request for accommodation. She met with Ms. Wile and proposed two options that would have accommodated her need to ensure that someone (either she or her husband or private daycare) would be available to look after her daughter. The employer failed to accept either, failed to explain why they were not suitable, and instead offered her two that did not meet her needs.

[62] The union pointed out that Mr. Cole had acknowledged that at Nova, there was an 08:00 to 16:00 shift, Monday to Friday. But it was never offered to the grievor. The union submitted that Ms. Wile's insistence that the grievor use Kijiji to find childcare providers was inappropriate; see *Miraka*, at para. 54. It also submitted that Ms. Wile's handling of the grievor's request was dismissive in tone and approach. She misunderstood or misrepresented the information provided by the grievor and used it to provide unacceptable solutions. It submitted that I could use Ms. Wile's actions as evidence of the employer's failure to respond to the grievor's request in good faith; see *City of Yellowknife v. A.B.*, 2018 NWTSC 50 at paras. 76 to 80; and *Miraka*.

[63] In support of these submissions, the union relied upon *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 SCR 970; *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 SCR 3; *Canada (Attorney General) v. Johnstone*, 2014 FCA 110; *Yellowknife*; *Simpson v. Pranajen Group Ltd. o/a Nimigon Retirement Home*, 2019 HRTO 10; *Douglas v. Treasury Board (Correctional Service of Canada)*, 2020 FPSLREB 51; and *Fraser v. Canada (Attorney General)*, 2020 SCC 28.

[64] Accordingly, the union submitted that the employer failed to accommodate the grievor. By way of remedy, it sought an order that the employer conduct a fair assessment of the grievor's accommodation needs, along with monetary damages.

B. For the employer

[65] The employer submitted that an accommodation need not be perfect; it need only be reasonable. Nor was it required to explain why the grievor's proposals were not suitable or what it meant by "operational requirements". It also submitted that truly at issue was the grievor's desire to maintain her access to shift differentials, overtime, or

weekend work. It submitted that she did not accept its proposal because the proposal denied her the pay bumps such work brought with it.

[66] The employer submitted that there were inconsistencies in the grievor's evidence. On one hand, she complained in her response that its proposal would deny her weekend work. But on the other hand, in December 2016, she had indicated that she could not find childcare for weekends. Moreover, her suggestion that she work the Springhill Institution roster was unreasonable because that roster was not in place at Nova, and moreover, it would have involved significant inefficiencies in the employer's operations. Her other suggestion — that she switch six to eight shifts per month — meant that roughly half the shifts automatically assigned to her by the SDS system would have had to be manually reassigned.

[67] The employer placed especial emphasis on the grievor's failure to advise it that the slot at the Near to Me daycare, which would have fit its second proposal, had become unavailable. It submitted that the grievance had a few additional problem areas. First, there was nothing in the documentary record to support the grievor's testimony that she had told Ms. Wile that in fact, she was using childcare (via Ms. Gaudet) or the associated hours. Second, while the grievor testified that she wanted a collaborative approach to her accommodation need, in her correspondence with the employer, she had always responded defensively and in the end had simply stopped making an effort.

[68] The employer submitted that in fact, the grievor had not satisfied the test at paragraph 93 of *Johnstone* ("the *Johnstone* test"); hence, the duty to accommodate had never been triggered. It agreed that had the grievor been unable to find a reasonable solution to her childcare needs, then its legal obligation to accommodate her on the basis of family status would have been engaged. But the grievor never provided it with a clear picture of her situation or of what she needed and why those needs could not be satisfied.

[69] The employer submitted that if the duty had been triggered, then it made a reasonable accommodation offer. The grievor had simply rejected it and had failed after that to cooperate in the accommodation process. The employer further submitted that any offer it made did not have to approach the line of demarcation represented by undue hardship. It had only to be a reasonable accommodation of the grievor's needs.

[70] In making these submissions, the employer relied upon *Canada (Attorney General) v. Duval*, 2019 FCA 290; *Johnstone*; *Bzdel v. Treasury Board (Canada Border Services Agency)*, 2020 FPSLREB 27; *Havard v. Treasury Board (Correctional Service of Canada)*, 2019 FPSLREB 36; *Leclair v. Deputy Head (Correctional Service of Canada)*, 2016 PSLREB 97; *Fleming v. Treasury Board (Canada Border Services Agency)*, 2016 PSLREB 96; *Flatt v. Treasury Board (Department of Industry)*, 2014 PSLREB 2; *Flatt v. Canada (Attorney General)*, 2015 FCA 250 (leave to appeal to the Supreme Court of Canada (SCC) refused in SCC File No. 36800 (20160505)); *Spooner v. Treasury Board (Correctional Service of Canada)*, 2009 PSLRB 60; *Ottawa-Carleton Public Employees' Union, Local 503 v. City of Ottawa*, 2010 CarswellOnt 6714; *McCarthy v. Treasury Board (Correctional Service of Canada)*, 2020 FPSLREB 45; and *Campbell v. Treasury Board (Correctional Service of Canada)*, 2012 PSLRB 57.

[71] The employer asked that the grievance be dismissed.

C. The union's reply

[72] The union submitted that the grievor did not respond to the employer's second offer because the three slots that would have been suitable and that had been offered by Near to Me were no longer available. Moreover, it was clear that the employer was not listening in any event, so nothing could turn on the grievor's failure to advise that the slots were no longer available. And finally, her grievance was itself part of her attempt to cooperate.

V. Analysis and decision

[73] I commence with a number of observations as to the jurisprudence in this area.

[74] First, I must determine whether the grievor has established a *prima facie* case of discrimination. The legal test for finding a *prima facie* case of discrimination on the ground of family status has been set out in Johnstone, at para. 93. The onus is on the grievor to satisfy each of the following conditions:

1) that a child is under his or her care and supervision;
2) that the childcare obligation at issue engages the individual's legal responsibility for that child, as opposed to a personal choice;
3) that he or she has made reasonable efforts to meet those childcare obligations through reasonable alternative solutions and that no such alternative solution is reasonably accessible; and
4) that the impugned workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfillment of the childcare obligation.

[75] If that onus is met, then a *prima facie* case of discrimination is made out, to which the employer is required to respond. If not, the claim fails; see *Fleming*, at paras. 120 to 122.

[76] Next, if the *Johnstone* test is satisfied, the employer may refute the allegation of discrimination, by demonstrating that it has reasonably — not perfectly — accommodated the employee's needs; see *McCarthy*, at para. 100 and *Duval*, at para.42, or that accommodating the employee's needs would impose undue hardship on the employer (s.15(2) CHRA).

[77] Finally I would note that, in the search for accommodation, the Federal Court of Appeal in *Duval* reiterated the principle 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' (see para. 43). Failure to accept a reasonable offer may be taken into account when determining whether the employer has satisfied its duty to accommodate; see *Fleming*, at para. 135; and *Renaud*, at 994 and 995. As noted in *Renaud*, at page 995, "If a proposal that would be reasonable in all the circumstances is turned down, the employer's duty is discharged."

A. The questions at issue

[78] With these observations in mind, I turn to the questions before me, which I take to be the following:

1) Has the grievor made out a *prima facie* case of discrimination on the basis of family status?
2) If so, did the employer lead evidence to avoid an adverse finding – specifically in this case, did the employer establish that it offered reasonable accommodation?
3) If not, what remedy ought to be granted?

1. Has the grievor made out a *prima facie* case of discrimination on the basis of family status?

[79] I think it is fair to say that the grievor clearly made out the first two conditions of the *Johnstone* test. She (and her husband) had a very young child who could not be left unattended. Their legal responsibility to provide such care and supervision was engaged.

[80] Turning to the third and fourth conditions, I think it is also fair on the evidence before me that they were satisfied as well. If the employer required the grievor to work 12-hour shifts on a schedule that included night and weekend work, then it was reasonably clear in her case that there would be a substantial impact on her legal obligations. Her husband also worked 12-hour shifts throughout the week. There would be weekends or nights when both would be required to work. I am satisfied that the grievor made reasonable efforts to meet her childcare obligations which arose as a result of the overlapping 12-hour shift schedules, however no such alternative was reasonably accessible. Most if not all childcare providers did not provide weekend services or 12-hour care. And her parents and those of her spouse were not in a position to provide backup care.

[81] That being the case, I am satisfied that the grievor made out a *prima facie* case of discrimination on the grounds of family status. Hence, the burden shifts to the employer to refute the allegation of discrimination..

2. Did the employer lead evidence to avoid an adverse finding – in this case, did the employer establish it offered reasonable accommodation?

[82] In my view, this is the central issue in the grievance.

[83] The employer made two accommodation offers, both of which involved placing the grievor on day shifts from Monday to Friday. In the first, it could shift her hours of work on notice between a shift of 06:45-14:45 and one of 06:45-19:00. In the second, the shift hours were to be fixed, at her choice, at either 06:45-14:45 or 07:00-15:00. Each offered the grievor 8 hours of work over 5 days for a total of 40 hours per week. In other words, each offered the standard number of hours available to employees under the collective agreement.

[84] Were they reasonable accommodation offers? On the face of it, both, particularly the second, appear reasonable. Each put the grievor on a Monday-to-Friday daytime work schedule, which was most likely to fall within the schedule of regular childcare providers, whether licensed or unlicensed, public or private. Moreover, the second offer fell precisely within the slots offered by Near to Me. At the hearing, the grievor acknowledged that the hours of work set out in the employer's second offer would have matched those slots.

[85] However, the grievor's position in response was that her failure to accept the employer's proposals was reasonable.

[86] First, she testified that by the time the employer made the second offer, the slot was no longer available. I had some difficulty with this testimony. If that happened, I would have expected the grievor to tell the employer that the slot that had been available was now gone. But accepting that it happened, the question remains: Why did she not tell the employer of it? She had a duty to cooperate in the accommodation process. Hence, she was obligated to advise it that the information it clearly relied upon — information that she had earlier confirmed to it — was no longer accurate. Her failure to provide the employer with such important information deprived it of the opportunity to come up with a third proposal. There was no evidence to support a conclusion that had it been so advised, it would have done nothing. After all, it had already made two proposals that were responsive to the hours and days offered by local childcare services. The grievor offered no evidence to suggest that it would not have done so a third time, had it had the information.

[87] Second, I could not escape the feeling that the real reason that the grievor rejected the employer's accommodation offers was her desire to avoid losing the opportunity for pay premiums associated with working backshifts, weekends, or overtime. I reached this conclusion because of her insistence that the employer consider and act on **her** proposals rather than its own and because she had linked her refusal to consider the employer's proposals to a financial "penalty" associated with the loss of access to such premiums. In a sense, she insisted not so much that the employer accommodate her childcare needs as it preserve her 12-hour shift roster and, in particular, whatever financial benefits she might gain by working such a schedule.

[88] I was not persuaded that the loss of any pay increments associated with working backshifts, weekends, or holidays rendered unreasonable the employer's offer to provide the grievor with a Monday-to-Friday daytime shift schedule. I was not pointed to any provision in the collective agreement that entitled her to work the 12-hour shift rotation she was working. It was not suggested that her income under the employer's proposal would have been anything other than what she would have been entitled to under the collective agreement. The employer's proposal did not single her out in some invidious manner, not the least because in fact some employees worked "normal" daytime shifts, Monday to Friday.

[89] In my view, from the beginning, the grievor's position misread the nature of the accommodation process. To say that an employer must accommodate an employee is to say that the employer must modify **its** work structure (whether physical or operational) in such a way as to enable the employee to work productively, despite the disability in question. The employer had most if not all of its correctional officers working on a 12-hour shift roster that was generated automatically. Its duty to accommodate the grievor meant that it had to modify that structure to accommodate her legal obligations to her child. And that is what it did when it made its offers.

[90] It may well be that the employer **could** have accommodated the grievor in the way she proposed. But an employer's decision is not to be second-guessed as to what best fits its operational needs when it comes to accommodation. The question, in other words, is not whether there were other reasonable forms of accommodation that the employee might have preferred but instead whether the accommodation that was offered was reasonable in the circumstances. If so, then the enquiry stops. The employee must accept it. Otherwise, the employer's duty is discharged; see, e.g., *Leclair v. Deputy Head (Correctional Service of Canada)*, 2016 PSLREB 97 at paras. 112 and 113; and *Kirby v. Treasury Board (Correctional Service of Canada)*, 2015 PSLREB 41 at para. 119.

[91] I acknowledge that on reading Ms. Wile's comments, one has the sense from the first formal response that she was not particularly supportive of the accommodation request. And I agree that her suggestion that the grievor pursue the use of a live-in nanny was, in the circumstances, unreasonable and uncalled for. However, it remains that the employer (that is, Ms. Wile) did make reasonable efforts to come up with an accommodation. That is what matters from the standpoint of the duty. The real failure in what happened was not with the employer's offer but with the grievor's response to it; see, e.g., *Ahmad v. Canada Revenue Agency*, 2013 PSLRB 60 at para. 141.

[92] For all of these reasons, I conclude as follows:

1) the grievor did make out a *prima facie* case of discrimination on the basis of family status;

2) but the employer did make a reasonable offer of accommodation that was refused by the grievor;

3) and the grievor terminated the accommodation process when she failed to cooperate in it;

4) accordingly, the grievance fails.

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

(The Order appears on the next page)

VI. Order

[94] The grievance is dismissed.

May 20, 2021.

Augustus Richardson,
a panel of the Federal Public Sector
Labour Relations and Employment Board