**Date:** 20220222

**Files:** 566-02-11458 and 11459

**Citation: 2022 FPSLREB 10**

*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

**DANIELLE MILLER**

Grievor

and

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

Employer

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

In the matter of individual grievances referred to adjudication

**Before:** John G. Jaworski, a panel of the Federal Public Sector Labour Relations and Employment Board

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

**For the Employer:** Karl Chemsi, counsel

Heard via videoconference,
April 27 to 30 and June 3 and 4, 2021.

**REASONS FOR DECISION**

## I. Individual grievances referred to adjudication

[1] Danielle Miller ("the grievor") was, at all times relevant to the facts in this decision, employed by the Treasury Board (TB or "the employer") and working for the Correctional Service of Canada (CSC) as a correctional officer classified at the correctional officer 1 (CX-01) group and level at Springhill Institution ("Springhill" or "the institution"), a medium-security institution for men located south of the town of Springhill, Nova Scotia.

[2] At the relevant time, her terms and conditions of employment were partially governed by a collective agreement between the TB and the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN (UCCO-SACC-CSN or "the union") for the Correctional Services Group that was signed on November 5, 2013, and that expired on May 31, 2014 ("the collective agreement").

[3] On May 8, 2015, the grievor filed two grievances that have become Board file nos. 566-02-11458 and 11459 respectively and that state as follows:

> [566-02-11458:]
>
> …
>
> *DETAILS OF GRIEVANCE …*
>
> *I requested to be accommodated for the duration of my pregnancy. I provided medical certification to support this request. The employer refused to accept my certification and I was required to provide a new one as requested by the employer. While waiting for this new certificate, I was initially denied LWP as per article 45.07 of my CLA. I have been treated differently and harassed as a result of my pregnancy and request for accommodation at this time. I have been discriminated against based on my gender contrary to my Collective Labour Agreement, specifically Article 37.1 which states* [omitted recitation of portion of Article 37.01]. *According to the Canadian Human Rights Act, "individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, color, religion, age, sex, sexual orientation, marital status, family status, disability or an offense for which a pardon has been granted".*
>
> *CORRECTIVE ACTION REQUESTED …*

*I request to be accommodated as indicated in my documentation.*

*I request $20,000.00 for violation of my Human Rights.*

*I request $20,000.00 in exemplary damages (pain and suffering).*

*I request any lost of wages, time or benefits since the time when I requested accommodation.*

***and all other rights that I have under the collective agreement, as well as all real, moral or exemplary damages, to be applied retroactively with legal interest without prejudice to other acquired rights.***

[566-02-11459:]

…

*DETAILS OF GRIEVANCE …*

*I requested to be accommodated for childcare/custody purposes. This was approved in November 2014. Since I have requested further accommodation due to pregnancy and a medical condition, the agreed upon accommodation for family status reasons has been consistently questioned and I have been harassed and discriminated against in relation to this accommodation. I have been discriminated against contrary to my Collective Labour Agreement, specifically Article 37.1 which states* [omitted recitation of portion of Article 37.01]. *According to the Canadian Human Rights Act, "individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, color, religion, age, sex, sexual orientation, marital status, family status, disability or an offense for which a pardon has been granted".*

*CORRECTIVE ACTION REQUESTED …*

*I request to be accommodated as indicated in my documentation.*

*I request $20,000.00 for violation of my Human Rights.*

*I request $20,000.00 in exemplary damages (pain and suffering).*

*I request any lost of wages, time or benefits since the time when I requested accommodation.*

***and all other rights that I have under the collective agreement, as well as all real, moral or exemplary damages, to be applied retroactively with legal interest without prejudice to other acquired rights.***

…

[*Sic* throughout]

[Emphasis in the original]

[4] The grievances were not signed by the grievor but on her behalf, by Amy Logan.

[5] As of the events that are relevant to these grievances, Amy Doucet was known as Amy Logan, was a CX-02 at Springhill, was the vice president of the Springhill union local, and was both the Springhill and the Atlantic union regional representative for the status of women and the union's Springhill representative who dealt with return to work matters. She testified that as of the events that are relevant to these grievances, she had about 10 years of experience as a representative. She left her work at Springhill in May of 2018.

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

[7] Introduced at the hearing by the employer was a schematic diagram or layout of the institution. Its purpose was to assist in showing the physical layout of the institutional grounds, including which buildings were located where and whether or not they were within the fenced area of the institution proper and if so, if they were in an area in which the inmates lived, worked, and spent their recreation time. The employer requested that it be sealed. As explained later in this decision, that request is granted.

[8] With respect to the grievances, I find that the grievor has not established a violation of the collective agreement or that she was discriminated against by the employer based on her sex or family status. As such, the grievances are dismissed for the reasons that follow.

## II. Summary of the evidence

### A. The collective agreement

[9] Article 37 of the collective agreement is entitled, "No Discrimination", and clause 37.01 states as follows:

> ***37.01*** *There shall be no discrimination, interference, restriction, coercion, harassment, intimidation, or any disciplinary action exercised or practiced with respect to an employee by reason of age, race, creed, colour, national origin, religious affiliation, sex, sexual orientation, family status, mental or physical disability, membership or activity in the Union, marital status or a conviction for which a pardon has been granted.*

[10] Article 45 of the collective agreement is entitled, "Maternity-Related Reassignment or Leave", and the clauses of it relevant to this matter state as follows:

> ***45.01*** *An employee who is pregnant or nursing may, during the period from the beginning of pregnancy to the end of the twenty-fourth (24th) week following the birth, request the Employer to modify her job functions or reassign her to another job if, by reason of the pregnancy or nursing, continuing any of her current functions may pose a risk to her health or that of the foetus or child.*
>
> ***45.02*** *An employee's request under clause 45.01 must be accompanied or followed as soon as possible by a medical certificate indicating the expected duration of the potential risk and the activities or conditions to avoid in order to eliminate the risk. Dependent upon the particular circumstances of the request, the Employer may obtain an independent medical opinion.*
>
> ***45.03*** *An employee who has made a request under clause 45.01 is entitled to continue in her current job while the Employer examines her request, but, if the risk posed by continuing any of her job functions so requires, she is entitled to be immediately assigned alternative duties until such time as the Employer:*
>
> *(a) modifies her job functions or reassigns her,*
>
> *Or*
>
> *(b) informs her in writing that it is not reasonably practicable to modify her job functions or reassign her.*
>
> ***45.04*** *Where reasonably practicable, the Employer shall modify the employee's job functions or reassign her.*
>
> ***45.05*** *Where the Employer concludes that a modification of job functions or a reassignment that would avoid the activities or conditions indicated in the medical certificate is not reasonably practicable, the Employer shall so inform the employee in writing and shall grant leave of absence without pay to the employee for*

> *the duration of the risk as indicated in the medical certificate. However, such leave shall end no later than twenty-four (24) weeks after the birth.*
>
> …

**B. Background**

[11] As of the events that are relevant to these grievances, and at the time of the hearing, Justin Simons was the correctional manager (CM) responsible for scheduling and deployment at Springhill. He testified that there were 16 CMs at the institution. Other than him, 9 were duty CMs, who were responsible for the day-to-day operations of the institution, 5 were unit CMs, and 1 was responsible for dealing with the detector dogs and security equipment.

[12] As of the events that are relevant to these grievances, Allister MacLellan was a CM at Springhill, and between the period of May 22 and July 3, 2015, he was the acting assistant warden of operations (AWO). At the time of testifying before me, he was the acting deputy warden (DW) of Springhill, his substantive position being the AWO.

[13] As of the events that are relevant to these grievances, James Wallace was a CM at Springhill. At the time of testifying before me, he was a CM with the CSC however at the Nova Institution for Women, also in Nova Scotia.

[14] As of the events that are relevant to these grievances, James Earle was the warden of Springhill, and Sandy Ward was the DW at Springhill. Neither of them testified.

[15] Entered into evidence was a copy of the CX-01 job description. The key activities set out in it are as follows:

> …
>
> **Client Service Results** …
>
> *Correctional operations related to the safety and protection of the public, staff, inmates and the institution and the functional supervision of activities for the Correctional Service of Canada (CSC).*
>
> **Key Activities** …
>
> *Supervises, controls and monitors inmate movement and activities within and outside the institution; conducts counts and patrols.*

*Performs security checks and searches of living units, the physical plant, buildings, vehicles, inmates, other persons and their personal property, and other areas for contraband.*

*Monitors the movement and activity of visitors and civilian contractors as well as social activities and events in the institution and on the penitentiary reserve.*

*Participates as a member of the unit correctional team and contributes input toward the development and implementation of unit programs.*

*Provides on-the-job mentoring and coaching to entry-level correctional officers and practicum students.*

*Demonstrates professionalism in the performance of security duties to present a positive behavioural example to inmates and facilitate an environment conducive to the development of life skills.*

*In the course of duties, encourages inmates to take part in reintegration programs.*

*Records observations of inmate movement and behaviour on specific activity records in order to keep supervisors informed.*

*Participates in escorts and inmate transfers outside the institution.*

*Seizes and records unauthorized items and contraband for security purposes.*

*Administers cardiopulmonary resuscitation (CPR) in response to medical emergencies and lends immediate support and assistance, once the area is secure, to injured parties as required. There may also be a requirement to use the self-contained breathing apparatus to effect rescue of individuals in smoke-filled environments.*

*The incumbent of this position has Peace Officer status.*

…

**Effort** …

…

***(4) Physical Effort***

*Physical effort is required to:*

*Remain seated or standing for long periods when on assigned posts.*

*Walk to security posts and conduct rounds or security checks. It may be necessary to walk on different types of terrain when patrolling institutional grounds.*

*Respond to alarms and run varying distances to apprehend inmates or defuse violence through the use of the safest and most reasonable intervention, in accordance with the approved crisis management model, and the use of security equipment, which entails the exertion of considerable effort. It may also be necessary*

*to remove injured parties from a scene (e.g. lift inmates in stretchers)*

*Search inmates, residential units and other sectors (work, recreation) to detect prohibited objects. To this end, the incumbent must bend and stretch and lift objects.*

*Go up and down several flights of stairs.*

*Carry and use security material as part of his or her duties.*

**Responsibility** …

…

***(2) Well-Being of Individuals***

*Escorts inmates outside the institution, taking appropriate security measures to ensure the safety of the public, staff and inmates.*

*Ensures the safety and security of the public, staff and inmates by conducting searches for unauthorized items, monitoring physical security (e.g. checking tools, equipment and locks), monitoring inmates' activities and evaluating the behaviour and attitude of specific inmates or groups of inmates. This includes prevention of or active intervention in disputes between inmates, staff or the public, which may involve tactics aimed at intimidating staff.*

*Intervenes when necessary to reduce the likelihood of muscling, intimidation or possible harm as a result of inmates' behaviour and actions.*

*Intervenes to prevent or defuse violence and protect the public, staff and inmates. Employs the safest and most reasonable intervention possible, in accordance with the approved crisis management model, to subdue, restrain and control inmates acting in a violent or threatening manner.*

*When necessary, administers first aid/CPR or uses a self-contained breathing apparatus to effect rescue of individuals in smoke-filled environments.*

…

***(6) Ensuring Compliance***

*Performs security duties to enforce compliance with all applicable acts, regulations and policies.*

*In accordance with the requirements of the Peace Officer designation, ensures inmates comply with CSC rules and regulations … Employs the safest and most reasonable intervention to prevent/counteract, in accordance with the approved crisis management model, inmate assaults, riots or escape attempts.*

**Working Conditions** …

***(1) Work Environment***

*PSYCHOLOGICAL WORK ENVIRONMENT*

*In the conduct of security, there is direct, daily exposure to inmates who may be agitated, unpredictable or uncooperative or who may attempt to intimidate or resort to violence. There is minimal control over the frequency or duration of difficult situations. Threats may be made against the incumbent, the incumbent's family, other staff, visitors or other inmates as a diversionary or intimidation tactic.*

*There is a requirement to intervene in threatening or violent situations to protect the safety of members of the public, staff, inmates and the institution (e.g. assaults, riots or hostage-takings), where the use of force may be necessary. There is potential for inmates to verbally abuse or physically assault the incumbent, who is authorized to take all necessary measures of self-defence (inmate may have deadly intent). Severe anxiety and potential injury may occur, during and following violent incidents, which may result in the temporary or permanent impairment or death of the incumbent, members of the public, other staff or inmates. There is no control over the frequency or duration of individual incidents, which may take place within the institution or during the course of escorts.*

*Contact with known offenders on conditional release or ex-offenders in the community may occur, which may present a risk to both personal and family safety.*

*Working a rotating shift schedule (including weekends) disrupts the incumbent's personal life, routine and social/family support networks. Shift work may also involve working in isolation for varying periods (e.g. night shift).*

*PHYSICAL WORK ENVIRONMENT*

*The work is carried out in a controlled-access institution with multiple barriers and security controls, and involves the provision of security in inmate living quarters. There is exposure to unpleasant sights, sounds and odours on a daily basis.*

*When searching or restraining inmates, there is potential for exposure to bodily fluids and bio-hazardous material that may harbour communicable diseases (e.g. feces, urine, spittle, saliva or blood). Protective clothing is worn when contact with inmates is imminent in order to minimize risk. Some instances (e.g. when the incumbent is required to forcibly restrain inmates) may not afford this opportunity.*

…

*Working rotating shifts may lead to sleep disturbances and disrupt eating habits.*

*The incumbent may be called upon to work for a number of consecutive hours in exceptional or emergency situations.*

***(2) Risk to Health***

> *There is a risk of verbal or physical assault and/or psychological trauma due to the daily performance of security duties in direct contact with potentially volatile inmates who may have low-level cognitive skills and alternate social values/attitudes. The incumbent is required to closely monitor inmates throughout the shift and may be asked to disseminate unfavourable information.*
>
> *There is a requirement to intervene in threatening or violent situations to protect members of the public, staff and inmates, including incidents when the use of force may be necessary. There is potential for inmates to verbally abuse or physically assault the incumbent, which involves a risk of severe injury and/or death. There is also a risk of Post Traumatic Stress Syndrome following traumatic incidents to which the incumbent is subjected (e.g. the permanent impairment or death of members of the public, staff or inmates) and the necessity for the incumbent to use force which may be lethal.*
>
> *The requirement to conduct personal searches of inmates, conduct security checks, administer first aid or CPR and to restrain inmates in the case of threats/incidents may expose the incumbent to bodily fluids that may harbour communicable diseases (e.g. tuberculosis, hepatitis, HIV, viruses).*
>
> *There is a risk of elevated stress levels and serious injury when escorting offenders off institutional grounds. The incumbent may be targeted in the course of incidents (e.g. escape attempts or hostage-taking scenarios).*
>
> *Occasional interaction with inmates under the influence of various substances or in fragile psychological condition can result in increased/unpredictable risk.*
>
> *The requirement to lift and move heavy objects and use security material can lead to injury.*
>
> *The requirement to work a shift schedule can lead to physical and psychological exhaustion and disrupt the incumbent's personal life and social/family support networks.*
>
> …

[16] "Keeper" is a reference in CSC circles to the historical position that has evolved into that of the CM who is in charge of the institution in the off-business hours in the absence of the warden and DW, who was and still is at times referred to as the Keeper. It refers to he or she who keeps the keys to and those within the institution. "Keeper's office" is a reference to the office of the CM in charge of the institution.

[17] As inmates live in a secure, closed, and highly regulated environment, Springhill, like other CSC institutions, operates 24 hours a day, 7 days a week, every day of the year ("24/7"). The CXs provide the security services for the institutions, and there are

CXs working at all times, all day, every day, as that is the nature of the work. On the other hand, certain other services that are required to keep the institution running, such as administrative services, are not required on a 24/7 basis and are largely carried out on a regular 5-day-per-week (Monday through Friday) 7.5- or 8-hour workday (37.5- or 40-hour workweek).

[18] Mr. Simons testified that at the time relevant to the facts that gave rise to the grievances, he was the CM at Springhill responsible for the scheduling and deployment of CXs, of which there were, at the time, between 181 and 205. Scheduling is carried out through a computerized system called the Scheduling and Deployment System, which is commonly referred to as the "SDS". Without getting into the intricate details of scheduling, the institution had a variety of security-related posts that had to be filled by CXs, many on a 24/7 basis. The manning of the posts is dependent on a number of different factors. He said that the SDS allows him to not only schedule but also to track movements and manage leave. He stated it is also an archive for leave usage and leave patterns.

[19] He said that there are 13 separate shift schedules for the institution, of which there are mostly 2 types, one of which is "day-day", and another is "night-night". Each is a 12-hour shift; one covers the morning and daytime, and the other covers the evening and nighttime. They operate on a 4-days-on and 5-days-off rotation. Some posts are for CX-01s, and others are for CX-02s. There are also shifts that are purely 8-hour daytime shifts, usually between the hours of 08:00 to 16:00. As part of his duties doing the scheduling, Mr. Simons has to ensure not only that there are sufficient staff to work but also that any situations that involve special circumstances, such as accommodations, are integrated into the schedules.

[20] Mr. Simons said that once an issue arises that requires an accommodation, it goes through him. This is because depending on the requirements of the accommodation, a CX may or may not be able to work at a particular post or carry out a particular task or set of tasks; however, the CX may be fine to do other tasks. He said that he generally works with the responsible CMs, as the information is provided to them by the CXs who require the accommodation, and they come to him because he has a complete overview of the schedules for everywhere in the institution, and he can coordinate with the other different departments within the institution.

[21] He said that when an accommodation request comes to his attention, he immediately starts to canvass all the different departments that operate within the institution; in short, he quarterbacks the needs for the CXs. He said that he is familiar with and that he follows CSC and TB policies with respect to the duty to accommodate; however, he said that he is not an expert in the duty to accommodate, so he consults the CSC's Labour Relations (LR) section when necessary. The evidence disclosed that the CSC used, at least at Springhill, a template form to enter return-to-work or accommodation plans with employees.

[22] Entered into evidence was a copy of such a document, with respect to the grievor, entitled "Return to Work Plan – Accommodation Plan", which is signed and dated November 17 and 21, 2014 ("the custody plan"). This was with respect to a request by the grievor to work a specific shift schedule or rotation of four 12.75-hour day shifts (between 06:00 and 18:45) followed by 5 consecutive days off ("the 4/5 schedule"). This was implemented, and the duration of the agreement was from November 17, 2014, until March 30, 2015. According to the evidence, the request was made to address a custody dispute, or arrangement, the grievor had with her spouse, or former spouse, with respect to their daughter. The custody plan was signed by a management representative and a union representative but not by the grievor; however, there is no dispute that the grievor agreed with the arrangement and that the plan was put into place.

[23] There was no other evidence about the custody arrangement that the grievor had with her former spouse with respect to their daughter or how it worked. When she was asked if she ever provided a copy of the custody agreement to the employer, she stated that she did not recall giving it a copy.

[24] Mr. Simons testified that he was familiar with the custody plan as he was involved with the request for the change. He said that he saw no documentation with respect to the actual arrangement or court order and said that all that had transpired was a request by the grievor that was granted by the employer. He said that her supervising CM, senior management, and LR would have been involved in the process, but his recollection was that the request was made and accepted and that he put it into the SDS. He said that he made the changes in the SDS manually as they could not be made automatically.

[25] By email dated March 24, 2015, the grievor identified to Mr. MacLellan that she was pregnant. Her email stated as follows: "I'm pregnant and need out of uniform soon. I'm not sure what the process is for this. Any info would be appreciated." Mr. MacLellan responded 12 minutes later, telling the grievor to speak to her CM so that an accommodation plan could be worked out. Entered into evidence was a second email dated March 24, 2015, from the grievor to Mr. Wallace. She advised him that she was pregnant and that she needed to be out of uniform soon.

[26] The grievor testified that she spoke to Mr. Wallace, who told her that she had to be out of uniform immediately. She said that she told him that she thought that it was up to her discretion. Entered into evidence was a second document entitled, "Return to Work Plan – Accommodation Plan"; however, this one is signed and is dated March 25, 2015 ("the pregnancy plan"). It is signed by Mr. Wallace, on behalf of the employer, by the grievor, and by Ms. Logan on behalf of the UCCO-SACC-CSN.

[27] The pregnancy plan shows that it was in place for the period between March 26 and October 30, 2015. In the box marked "Suitable Employment Description", it stated, "Non security related duties. Should be administrative like work." The evidence disclosed that the grievor continued working on the 4/5 schedule; however, she no longer attended work in her CX uniform and was no longer carrying out CX duties.

[28] The grievor testified about the different administrative tasks she started to do while not in uniform. The work was non-security related. Entered into evidence was an email dated April 13, 2015 from the Acting Chief of Administrative Services to the grievor that stated as follows:

> …
>
> *The AWMS has approved that you may assist our department in the preparation of the Inmate PIN cards, effective immediately upon your completion of the mandatory online courses,* ***Records Keeping for Public Servants*** *and* ***Security Awareness.*** *If you have not already completed these courses, can you please do so today? My recollection is that you can do both in a couple of hours. Andy is available tomorrow to provide you with some training on the ITS system. Can you please send me a copy of your work schedule for the next couple weeks so we can make the necessary arrangements?*
>
> …
>
> [Emphasis in the original]

[29] Mr. Simons stated that if a CX is moved off security duties to administrative duties, the normal process is to move the CX to administrative shifts, which are from Monday to Friday, 08:00 to 16:00, as the officer is no longer doing CX duties and is no longer required on the CX shifts. He stated that because of the custody plan, the grievor was not moved from the 4-days-on, 5-days-off, 12-hour-shifts schedule.

[30] Entered into evidence was an email exchange between the grievor and a close friend of hers on April 21, 2015, which stated as follows:

> [The grievor's friend to the grievor at 08:26:]
>
> *What's going on today …*
>
> [The grievor to the grievor's friend at 09:04:]
>
> *Only been here an hour and I started to cry and im* [indiscreet language] *ready to leave already*
>
> [The grievor's friend to the grievor at 09:07:]
>
> *Oh lovely!!! Hormones are bad today. What time did you go to work? …*
>
> [The grievor to the grievor's friend at 09:11:]
>
> *No not hormones. I was late because I went for bloodwork. They are trying to change my schedule again. Which means I'd have to go back to court. I* [indiscreet language] *near lost it. I had a huge file folder on my lap full of papers, and I just wanted to biff it and walk out. They've been riding me for days about not having enough work to fill my schedule, yet I have work from a dozen different people coming out my ears. Im ready to get a* [indiscreet language] *doctors note. I feel harassed.*
>
> [*Sic* throughout]

[31] On May 1, 2015, the grievor saw her family doctor for what she described as a regular appointment. Entered into evidence was a note dated May 1, 2015, and authored by Dr. O.O. Fashoranti ("the May 1 note"), which states as follows: "It will be highly appreciated if Ms. Danielle Miller is allowed to work from home because of medical reasons. She carries a high risk pregnancy."

[32] The grievor testified as follows: "[The doctor] felt I was upset and stressed out at things at work" and added, "he said I could go off work completely". She said as

follows: "I told him I wasn't ready to go off work". She said that he and she came to a compromise when she told him that telework was available in the collective agreement. The grievor admitted in cross-examination that she did not show her doctor the collective agreement.

[33] Entered into evidence was an email dated May 1, 2015, from the grievor to Ralph Polches, who was identified to me as an "instructor on training", whom the grievor described as someone she knew she could reach out to. His position at the CSC was not identified to me; nor was what if any position he held with the union, and if so in what capacity, although she did state that she would have worked with him in the Keeper's office, although she did not specify in what capacity. The email stated as follows:

> *Got a doctors note today for telework. Justin will not accept it, and if I want to go home I have to use leave. If management then decides to accept my note, they will credit the leave back. But according to Justin these notes are becoming a "trend", and "no offense to you, you're just the last one to use it". I'm going to* [indiscreet language] *loose my mind.*
>
> [*Sic* throughout]

[34] There is no evidence that Mr. Polches replied to the grievor. He did not testify.

[35] Entered into evidence was another email dated May 1, 2015, sent by the grievor to her husband, which stated as follows: "I might be at work til the end of my shift today. They don't want to accept my doctors note. I have a union rep fighting it right now" [*sic* throughout].

[36] Entered into evidence was an email chain; the first email was dated May 1, 2015, at 14:23, and was from Mr. Simons to Messrs. Earle and McMillan and Ms. Ward. Later participants in the email chain included human resources (HR) advisors. The relevant portions of the email chain are as follows:

> [May 1, from Mr. Simons to Messrs. Earle and McMillan and Ms. Ward:]
>
> …
>
> *Here is a Dr note requesting that Danielle Miller be permitted to work from home? After I spoke with the Deputy Warden earlier this week we questioned the fact that the Dr's notes received to date in these cases did not state limitations only that they be permitted to work from home. In a previous case we did not have*

*any work to assign so the officer was allowed to be home with pay and no work until she formally went on Maternity leave. In this case we do not have any work to assign her as well.*

*How do we wish to proceed? She wanted to go home today however I suggested that she stay or take leave to cover her absence until a decision is rendered.*

…

[May 1, from Mr. Earle to Messrs. Simons and McMillan, Ms. Ward, and some HR representatives:]

*So I gather this is a maternity leave. I would like LR input but I believe your caution is warranted Justin. We need to go back to the Dr for limitations.*

…

[May 4, from an HR representative to Messrs. Simons, Earle, and McMillan, Ms. Ward, and other HR representatives:]

*I have reviewed the doctor note you provided on Friday and the note does not indicate the limitations and restrictions. From DTA perspective, we should ask the doctor to provide further information regarding employee's limitation and restriction. Please let me know if you have a generic clarification letter or do you want me to sent one for your reference?*

…

[May 4, from an HR representative to Messrs. Simons, Earle, Carr and McMillan, Ms. Ward, and other HR representatives:]

…

*Please find attached generic clarification letter for your reference. Please adjust the letter accordingly. If you prefer, I can review the letter once its completed.*

*In terms of if the employee should be at work or not, that need to be determine based on the limitation and restriction. As current doctor note talks about recommendation, not the limitation or restriction. Therefore, it would be best to start a conversation with the employee and let the employee know that we do need the limitation and restriction from her doctor as soon as possible in order to determine appropriate accommodation. Based on the limitation and restriction, management has to determine if there is any appropriate accommodation employer can arrange at the institutional level or even other sites which includes RHQ.*

…

[May 12, from Mr. Earle to Messrs. Simons, McMillan, and Carr, Ms. Ward, and HR representatives:]

*Where are we with this case?*

*BF May 18th*

…

> [May 12, from Mr. Carr to Messrs. Simons, McMillan, and Earle, Ms. Ward, and HR representatives:]
>
> *Jeff, her Union Rep (Amy) was provided 2 letters, one for Danielle and the other her Doctor that contained questions regarding her limitations. This update from Doctor is to be completed by this Friday the 15th.*
>
> …
>
> [May 12, from Mr. Earle to Messrs. Simons, McMillan, and Carr, Ms. Ward, and HR representatives:]
>
> *So is she currently on sick leave?*
>
> …
>
> [May 12, from Mr. Carr to Messrs. Simons, McMillan, and Earle, Ms. Ward, and HR representatives:]
>
> *No, 699 other paid leave as she provided a Doctor's note but we requested an update as per clause 45.07.*
>
> …
>
> [May 12, from Mr. Earle to Messrs. Simons, McMillan, and Carr, Ms. Ward, and HR representatives:]
>
> *Really. If she cannot work isn't it sick leave?*
>
> *Sorry you have likely already addressed but this is not consistent with my understanding.*
>
> *Anyway pls brief me folks.*
>
> …
>
> [May 12, from an HR representative to Messrs. Simons, McMillan, and Carr, Ms. Ward, and other HR representatives:]
>
> *It initially appeared that Danielle would be expected to use sick leave until her doctor confirmed restrictions and limitations; however, upon further review by* [an HR representative]*, it was determined that* ***Section 132*** *of the Canada Labour Code prescribes paid leave until a medical practitioner confirms the risks.*
>
> …
>
> [*Sic* throughout]
>
> [Emphasis in the original]

[37] Entered into evidence was an email from Ms. Logan dated May 6, 2015, at 00:40, to Assistant Warden of Interventions Ian Carr. It and its attachment state as follows:

> …
>
> *Please see the documents below in regards to the refusal to grant paid leave to Danielle Miller, while she awaits a decision on her request for an accommodation for the duration of her pregnancy,*

*and while she obtains, further information at the employers request to render a decision, which she will comply with as soon as reasonably practicable. Please note the underlined sections. By continuing to force her to take her own leave or LWOP in order to avoid risking the health and safety of Danielle and that of her foetus according to her doctors recommendations, we are not in compliance with law, TB policy and our own CA. Please share with those who declared she would not be granted paid leave. Continued refusal to allow paid leave will support discrimination and harassment in her case.…*

*Canada Labour Code*

**Maternity-related Reassignment and Leave**

***Marginal note:Reassignment and job modification***

***204.*** *(1) An employee who is pregnant or nursing may, during the period from the beginning of the pregnancy to the end of the twenty-fourth week following the birth, request the employer to modify her job functions or reassign her to another job if, by reason of the pregnancy or nursing, continuing any of her current job functions may pose a risk to her health or to that of the foetus or child.*

***Marginal note:Medical certificate***

*(2) An employee's request under subsection (1) must be accompanied by a certificate of a qualified medical practitioner of the employee's choice indicating the expected duration of the potential risk and the activities or conditions to avoid in order to eliminate the risk.*

…

***Marginal note:Employer's obligations***

***205.*** *(1) An employer to whom a request has been made under subsection 204(1) shall examine the request in consultation with the employee and, where reasonably practicable, shall modify the employee's job functions or reassign her.*

***Marginal note:Rights of employee***

*(2) An employee who has made a request under subsection 204(1) is entitled to continue in her current job* ***while the employer examines her request, but, if the risk posed by continuing any of her job functions so requires, she is entitled to and shall be granted a leave of absence with pay at her regular rate of wages until the employer***

***(a) modifies her job functions or reassigns her, or***

***(b) informs her in writing that it is not reasonably practicable to modify her job functions or reassign her,***

***and that pay shall for all purposes be deemed to be wages.***

*(3) The onus is on the employer to show that a modification of job functions or a reassignment that would avoid the activities or*

> *conditions indicated in the medical certificate is not reasonably practicable.*
>
> …
>
> **TB policy**
>
> *Pregnant or nursing employees who are concerned about performing certain duties during the period of pregnancy or nursing, may request a temporary change of duties and/or work site. This can be accomplished by means of a modification of job functions, an assignment, a deployment or a transfer. In the case of deployments and transfers, the employing department must have another position available and must comply with the staffing requirements of the Public Service Commission.*
>
> ***Medical certification***
>
> *A pregnant employee's request for job modification, reassignment, deployment or transfer must be followed as soon as possible by a certificate of a qualified medical practitioner indicating the expected duration of the risk to the pregnant woman and/or her fetus, and the activities or conditions to avoid in order to eliminate the risk.*
>
> …
>
> ***Status of employee***
>
> *An employee making such a request is to be immediately assigned alternative duties until such time as the manager modifies her job functions, reassigns her, or* ***informs her in writing that it is not reasonably practicable to do so.*** *The employee will continue to* ***receive her regular pay and benefits pending a decision*** *and for the duration of her job modification, reassignment, deployment or transfer.*
>
> [*Sic* throughout]
>
> [Emphasis in the original]

[38] Sections 204 and 205 of the *Canada Labour Code* (R.S.C, 1985, c. L-2), do not apply to government departments, such as the CSC (see s. 167 of the *Canada Labour Code*).

[39] Entered into evidence was an email chain between Ms. Logan and Messrs. Carr and Simons and Bruce Megeney (whose position was not identified to me) dated May 9, 2015 ("the May 9 exchange"). The email chain is as follows:

> [At 06:12, from Ms. Logan:]
>
> …
>
> *Could u please advise the DCMs above that Danielle miller is approved for paid leave under 699 for the duration of this week*

> *while she awaits a doc appt and certification for her accommodation? She is on the roster for today, as it was not entered as per your instruction that you advised me of last week. I do not want her to be receiving calls where she is or receiving LWOP.*
>
> …
>
> [At 05:43 from Mr. Megeney to Ms. Logan and others:]
>
> *I posted her off in SDS for the set May 8-12 on 699 under Warden's approval. If this is not right I will make corrections as directed.*
>
> …
>
> [At 07:03 from Mr. Carr to Mr. Megeney:]
>
> *Thanks Bruce.*
>
> …
>
> [At 07:04 from Ms. Logan to Mr. Carr and copied to Messrs. Megeney and Simons and others:]
>
> *Thank you!*
>
> [*Sic* throughout]

[40] In her examination-in-chief, the grievor was asked if she had seen the May 9 exchange before she prepared for the hearing. She said that she had not. Ms. Logan was asked no questions about the May 9 exchange.

[41] Entered into evidence were copies of the grievor's work schedules for the period of March 30, 2015, through March 31, 2016, as recorded in the SDS, the relevant entries showing as follows:

- April 29: the grievor was scheduled for a 12.75-hour workday on her 4/5 schedule;
- April 30: the grievor is shown on vacation leave for 12.75 hours on her 4/5 schedule;
- May 1: the grievor is shown as scheduled and took 4.0 hours of leave;
- May 2: the grievor is shown as scheduled and is on other paid leave (code 699) for 12.75 hours;
- May 3 to 7: the grievor was on the 5 days of rest on her 4/5 schedule;
- May 8 to 11: the grievor was on the four 12.75-hour workdays of her 4/5 schedule and on other paid leave (code 699) for 12.75 hours;
- May 12 to 16: the grievor was on the 5 days of rest of her 4/5 schedule; and
- May 17: the grievor was scheduled for a 12.75 workday on her 4/5 schedule and on other paid leave (code 699) for 12.75 hours;

[42] After that, the grievor's work schedules from May 18, 2015, until August 2, 2015, show that she was on leave with pay (code 699) from Mondays through Fridays for 8.0 hours per day and show the Saturdays and Sundays as days of rest.

[43] Entered into evidence was a copy of the grievor's leave for the period of April 3, 2015, through October 10, 2015, as recorded in the SDS. The relevant entries are as follows:

| | | |
|---|---|---|
| April 22, 2015 | Vacation | 2.75 hours |
| April 22, 2015 | Unauthorized leave | 9.75 hours |
| April 23, 2015 | Leave for medical appointment | 3.5 hours |
| April 30, 2015 | Vacation | 12.75 hours |
| May 1, 2015 | Leave for medical appointment | 4.0 hours |
| May 2, 2015 | Other paid leave (code 699) | 12.75 hours |
| May 8, 2015 | Other paid leave (code 699) | 12.75 hours |
| May 9 to 12, 2015 | Other paid leave (code 699) | 38.00 hours |
| May 17, 2015 | Other paid leave (code 699) | 12.75 hours |
| May 19 to June 1, 2015 | Other paid leave (code 699) | 80.00 hours |
| June 2, 2015 | Other paid leave (code 699) | 8.00 hours |
| June 3, 2015 | Other paid leave (code 699) | 8.00 hours |
| June 4, 2015 | Other paid leave (code 699) | 8.00 hours |
| June 5 to 30, 2015 | Other paid leave (code 699) | 144.00 hours |
| July 2 to 31, 2015 | Other paid leave (code 699) | 176.00 hours |

[44] Entered into evidence was a copy of an undated letter addressed to Dr. Fashoranti, which Mr. Wallace stated he had developed in conjunction with LR. The letter stated as follows:

> …
>
> *The purpose of this letter is to seek clarification regarding the functional limitations and restrictions associated with Ms. Miller's pregnancy. As you are aware, Ms. Miller is a Correctional Officer at Springhill Institution. "I am in receipt of a medical note from your office dated 2015-05-01, which states: it is highly appreciated if Ms. Danielle Miller is allowed to work from home because of medical reasons. She carries a high risk pregnancy".*
>
> …

> *Given CSC's obligations to ensure that the appropriate accommodation is provided to Ms. Miller during her pregnancy, we must assess possible options that will enable the employee to remain at work while taking into account organizational needs. Therefore, I am requesting the following information:*
>
> - *What are the functional limitations and restrictions that would apply to completing tasks of a Correctional Officer I position? We are seeking the limitations only and not details of her medical Condition.*
> - *Is Ms. Miller able to perform certain duties of a Correctional Officer if modified/adapted to her functional limitations and/or restrictions? (e.g. monitor/control inmate activities via camera, work in a secured control post, etc., please see attached job description)*
> - *Do the functional limitations and restrictions apply to the entire duration of Ms. Miller [sic] pregnancy or only to a certain period of her pregnancy?*
> - *What can CSC reasonably do to assist Ms. Miller?*
>
> *… A response by 2015-05-22 would be greatly appreciated.*
>
> …

[45] Entered into evidence was an email dated May 13, 2015, at 13:54, from Ms. Logan to Mr. Carr, which stated as follows:

> …
>
> *Danielle saw her doctor today to get her new doctors [sic] certificate as you requested. Her doctor is very concerned about the first question and wants clarification as to what you are requesting. He feels as though answering it as is would breach confidentiality. He needs to know that you are only requiring limitations and not a diagnosis that 'led to' the restrictions, which is how he is interpreting it.*
>
> *He will need this question to be amended so that he may answer it to his ability without breaching patient confidentiality. Also there was no job description attached as stated and he would like to have that to review.*
>
> *I will be in tomorrow and Friday and can get another copy of the letter to give to Danielle. This will mean that her date of May 15 will need to be extended due to the circumstances. I would request that you ensure her leave is entered this time to avoid conflicts with the roster and any LWOP pay action for her, as could have occurred last time.*
>
> …

[46] Entered into evidence was an email dated May 22, 2015, at 17:58, from Mr. Wallace to an LR or HR representative, which states as follows:

> …
>
> *I called Danielle via phone on this date at approximately 1400hrs in regards to her, the employee, complying with the employers request to have medical documentation submitted by today's date as per the letter presented to UCCO rep A. Logan on May 15, 2015, and also the invitation to participate in a Formal Grievance Hearing.*
>
> *During the conversation Danielle had claimed to have only received the Employer letter #2 of medical doc request on the previous day from Union rep Amy Logan. Danielle also explained that she wanted to meet with her Obstetrician Dr prior to seeing her family Doctor and thus also the delay in meeting the employers request. She also passed along information that she had been hospitalized on the previous weekend due to her pregnancy as well. I asked her if everything was ok in which she replied "at this time…yes".*
>
> *I explained that the employer is willing to extend a proposed deadline date of May 29th, 2015, to the employee, as she continues to be on Leave with Pay, as to provide her with ample time to seek medical documentation for the proposed Accommodation Plan. Danielle suggested to me that she "should" be able to meet with her Doctor this week and have something for us by Friday, the 29th. I, in turn, informed Danielle that if no medical documentation was provided within the proposed time frame, that she may have to use another form of 'Leave'..ie vacation, or sick leave. I suggested that if she had no leave balance available, that the employer would be looking at placing her on Leave without pay(LWOP) where in which she may then have to look at EI sick benefits.*
>
> …
>
> [*Sic* throughout]

[47] The grievor was asked about the May 22, 2015, email that Mr. Wallace sent. She stated she had driven her daughter to school and that she had seen the institution's telephone number, so she pulled over to take the call.

[48] Entered into evidence was a letter dated June 4, 2015, from Mr. MacLellan to the grievor, which states as follows:

> …
>
> *As a follow-up to the telephone conversation you had with Correctional Manager, J. Wallace on May 22, 2015, I have outlined*

> *below the next steps in addressing your situation and have also included options for your consideration.*
>
> *First, we wish to reiterate our willingness to continue to work with you to determine appropriate accommodation for your current health condition. On May 1, 2015, you provided us with a medical note in which your doctor requested that you be allowed to work from home; however, until such time as clarification regarding your restrictions and limitations is received, we are unable to proceed with developing an accommodation plan with you. As an employee, you have an obligation to cooperate with the accommodation process and the requirement that you produce additional information regarding your limitations and restrictions.*
>
> *To date, we have issued two separate letters for you to provide to your doctor requesting clarification of your restrictions and limitations – the first on May 5, 2015 and the second on May 15, 2015. During the telephone conversation with CM, J. Wallace, on May 22, 2015, you were granted a third extension, until May 29, 2015, to provide the requested medical clarification from your doctor. On May 29, 2015 your Union Representative, Amy Logan, informed CM. J. Wallace that additional information from your doctor was forthcoming: however, it would not be provided before the agreed upon date. As of today, we have not received the requested information from your current treating medical practitioner.*
>
> *This is to inform you that, if we have not received clarification of your restrictions and limitations by June 17'\2015, we will proceed with seeking an independent medical assessment in order to acquire relevant information for the purposes of finding suitable accommodations. It is therefore important that you follow-up with your doctor regarding this matter in order to ensure that the requested information is provided on or before this date.*
>
> …

[49] Entered into evidence was a note dated June 16, 2015, and authored by Dr. Fashoranti ("the June 16 letter"), which states as follows:

> …
>
> *Thank you very kindly for asking me to write a report on the functional limitations and restrictions that would apply to completing tasks of a Correctional Officer 1 position.*
>
> *To begin with, I am most grateful that you finally sent a "Work Description Pamphlet" and moreover, you clarified your statement in your previous letter that you did not want details of her medical position. The delay in replying your letter has to do with the issue of medical confidentiality.*
>
> *I have reviewed the "Work Description Pamphlet" and there are so many limitations that I can gather from the pamphlet.*

> *With reference to my previous letter, I have indicated that this is a high-risk pregnancy (reasons not discussed because of confidentiality). The following limitations apply to her;*
>
> *i. No inmate contact*
>
> *ii. Frequent breaks, frequent period of rest/lying down*
>
> *iii. Low stress environment*
>
> *iv. No contact with scenes of violence*
>
> *v. No contact with noxious substance*
>
> *vi. No lifting*
>
> *vii. No weapons*
>
> *viii. Decrease physical activity*
>
> *ix. Cannot wear vest or duty belt*
>
> *x. No physical effort – remaining seated or standing for* ***long period*** *when on assigned posts*
>
> *xi. Risks of verbal or physical assault and/or psychological trauma due to the daily performance of security duties.*
>
> *In my opinion, the risk of premature delivery or fetus loss is very high and I do not think she should be working in the environment at present because this is a high-risk pregnancy. Current [sic] she tells me she is only doing administrative duties but there is still a high index of risk to fetus and mother. Long periods of standing and sitting, environmental stress, lifting of files and inmate contact expose fetus and mother to high risk. I strongly recommend that she continue the administrative work from home.*
>
> …
>
> [Emphasis in the original]

[50] Entered into evidence was a letter dated July 2, 2015, from Mr. MacLellan to the grievor, which states as follows:

> …
>
> *This is to confirm receipt of your doctor's letter dated June 16, 2015. Based on the information relayed in the letter, we have proceeded with exploring reasonable work options which can best accommodate your specified medical limitations and restrictions.*
>
> *At this time, Springhill does not have sufficient work that can be completed by you from home; however, we are able to assign you administrative duties which can be completed from Springhill Institution's A-1 Building. You will work in a private office, which will contain a sofa. We feel that this work arrangement meets all of the specified limitations and restrictions as outlined by your physician. In this accommodated role:*

*i. You will have no direct or regular contact with inmates*

*ii. You will be able to take breaks, rest and lay down as required and appropriate*

*iii. You will be in a low stress environment* – Although it is impossible to eliminate all stress in any environment, we believe that the office area, especially with the door closed is quiet and should have little in the way of traffic. The manager will also consider requests in terms of work load and type of work assigned in order to minimize stress.

*iv. You will have no contact with scenes of violence*

*v. You will have no contact with noxious substance (ie: oc spray)*

*vi. You will not be required to lift* - Assistance will be provided as required and upon request.

*vii. You will not be required to use weapons*

*viii. You will have decreased physical activity* – You will be able to take breaks, rest and lay down as required and appropriate

*ix. You will not be required to wear a vest or duty belt*

*x. You will not be required to remaining seated or standing for long period when on assigned posts (No physical effort).* You will be able to take breaks, rest and lay down as required and appropriate.

*xi. You will not have risk of verbal or physical assault and/or psychological trauma due to the daily performance of security duties.*

*In summary, we are able to accommodate the stated medical limitations and restrictions and we consider this accommodation offer to be reasonable. As such, it is expected that you report to work at Springhill Institution's A-1 Building on Monday, July6th 2015 at 0800hrs. This being your regular 1st day back on the pre existing 12hr shift 'accommodation plan' roster. On this date, management will meet with you to discuss the details regarding the work that will be assigned to you as part of the accommodation plan. You may bring union representation with you to this meeting. It is important to note that your absence from work beyond the above-noted date will be considered as leave without pay unless you request another form of leave (such as annual leave).*

…

[*Sic* throughout]

[51] Building A-1, while located on the property of the CSC, is outside the perimeter fence of the institution. All inmates are housed inside the perimeter of the institution. Building A-1 can be approached by anyone, including members of the public.

[52] Entered into evidence was an email dated July 2, 2015, from Ms. Logan to Mr. Wallace, which stated as follows:

> *I have serious concerns with this as first of all you did not develop the plan with input from Danielle or myself nor consider any other options. Secondly, I'm not sure how its [sic] possible that you have nothing for her to do at home but yet have administrative work for her to do from A1. What is it that she can do from the office she can't do from home? I believe this warrants more discussion, especially since her doctor recommends she should work from home.*
>
> …

[53] Entered into evidence was a letter dated July 3, 2015, from Mr. MacLellan to the grievor, which states as follows:

> …
>
> *After further consultation we are prepared to postpone the meeting scheduled for Springhill Institution A-1 building July 6, 2015 08:00hrs.*
>
> *The meeting has been tentatively re-scheduled [sic] for July 14, 2015 08:00hrs at Springhill Institution A-1. Your current status will be maintained until that time. Confirmation and further information will be relayed before this meeting.*
>
> …

[54] What transpired after this was a series of exchanges between management and the union with respect to the grievor returning to work and how she would return to work. The grievor did not return to physically work at the institution. Steps were taken for her to do administrative work at her home.

[55] The evidence disclosed that at no time did the grievor actually lose any pay. What the evidence did disclose is that at times, the grievor's work status might have been coded into the SDS improperly; however, these were identified as and when noted and were corrected.

### C. Miscellaneous

[56] At the end of her examination-in-chief, the grievor was asked what prompted her to file the grievance with respect to the allegation that she was being discriminated against with respect to her sex. She said the following:

> *Right from the time I told the employer I was pregnant I felt I was targeted. I felt I was harassed. A number of girls were pregnant, one in the same building. One girl had twenty minutes of work a day and was never checked on. I had weeks of work. I was checked on. I had an assistant warden check on me. I was told my doctor's note was not accepted.*

[57] The grievor was also asked about what changed with respect to her family status after she filed her grievance with respect to family status. She said the following: "The need did not change."

[58] The grievor also testified about an unscheduled meeting she had with DW Ward, which occurred sometime in either late March or April of 2015. She could not recall the exact date but recalled that Ms. Ward arrived and asked her if she was afraid or scared, given the building she was in closed at 16:00. She said that the encounter felt unusual, in that senior management appeared unannounced, and that she should have had a representative or a witness.

## III. Summary of the arguments

### A. For the grievor

[59] The grievor submitted that the grievances should be allowed and that she should be awarded damages under the *Act*.

[60] The grievor referred me to the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6), *Marois v. Treasury Board (Correctional Service of Canada)*, 2004 PSSRB 150, *Spooner v. Treasury Board (Correctional Service of Canada)*, 2009 PSLRB 60, *Turmel v. Treasury Board (Correctional Service of Canada)*, 2009 PSLRB 122, *Cyr v. Treasury Board (Department of Human Resources and Skills Development)*, 2011 PSLRB 35, *Nadeau v. Deputy Head (Correctional Service of Canada)*, 2014 PSLRB 82, *Ross v. Treasury Board (Correctional Service of Canada)*, 2020 FPSLREB 5, *Douglas v. Treasury Board (Correctional Service of Canada)*, 2020 FPSLREB 51, and *Canada (Attorney General) v. Johnstone*, 2014 FCA 110.

### B. For the employer

[61] The employer submitted that the grievances should be dismissed.

[62] The employer also referred me to *Johnstone*, *Douglas*, *Turmel*, *Spooner*, and *Marois*, and in addition to addressing the grievor's arguments and jurisprudence, referred me to *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union*, [1999] 3 SCR 3, *Bzdel v. Treasury Board (Canada Border Services Agency)*, 2020 FPSLREB 27, *Callan v. Suncor Inc.*, 2006 ABCA 15, *Canada (Attorney General) v. Douglas*, 2021 FCA 89, *Canada (Attorney General) v. Duval*, 2019 FCA 290, *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 SCR 970 ("*Central Okanagan*"), *Cie miniére Québec Cartier v. Quebec (Grievances arbitrator)*, [1995] 2 SCR 1095, *Desjardins v. Deputy Head (Shared Services Canada)*, 2020 FPSLREB 43, *Havard v. Treasury Board (Correctional Service of Canada)*, 2019 FPSLREB 36, *Hydro Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43, *Kingston (City) v. Canadian Union of Public Employees, Local 109*, [2016] O.L.A.A. No. 439 (QL), *Leclair v. Deputy Head (Correctional Service of Canada)*, 2016 PSLREB 97, *St-Denis v. Deputy Head (Department of Public Works and Government Services)*, 2019 FPSLREB 46, *Mark v. Canadian Food Inspection Agency*, 2007 PSLRB 34, *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4, *McMullin v. Treasury Board (Correctional Service of Canada)*, 2021 FPSLREB 55, *Moore v. British Columbia (Education)*, 2012 SCC 61, *Ontario Human Rights Commission v. Simpsons-Sears*, [1985] 2 SCR 536 ("*O'Malley*"), *Panacci v. Treasury Board (Canada Border Services Agency)*, 2011 PSLRB 2, *Poddubneac v. Alberta Health Services*, 2021 AHRC 2, and *Taticek v. Treasury Board (Canada Border Services Agency)*, 2015 PSLREB 12.

## IV. Reasons

### A. Sealing order

[63] The employer asked that the diagram or layout of the institutional grounds, which was introduced to help show the physical layout of the buildings and where things were in relation to the fencing perimeter and inmate locations, be sealed. The grievor did not object.

[64] In *Basic v. Canadian Association of Professional Employees*, 2012 PSLRB 120 at paras. 9 to 11, the Public Service Labour Relations Board stated as follows:

> ***9*** *The sealing of documents and records filed in judicial and quasi-judicial hearings is inconsistent with the fundamental principle enshrined in our system of justice that hearings are public and accessible. The Supreme Court of Canada has ruled that public access to exhibits and other documents filed in legal proceedings is a constitutionally protected right under the "freedom of expression" provisions of the* Canadian Charter of Rights and Freedoms*; for example, see* Canadian Broadcasting Corp. v. New Brunswick (Attorney General), *[1996] 3 S.C.R. 480;* Dagenais v. Canadian Broadcasting Corp., *[1994] 3 S.C.R. 835;* R. v. Mentuck, *2001 SCC 76,* Sierra Club of Canada v. Canada (Minister of Finance), *2002 SCC 41 (CanLII).*
>
> ***10*** *However, occasions arise where freedom of expression and the principle of open and public access to judicial and quasi-judicial hearings must be balanced against other important rights, including the right to a fair hearing. While courts and administrative tribunals have the discretion to grant requests for confidentiality orders, publication bans and the sealing of exhibits, it is circumscribed by the requirement to balance these competing rights and interests. The Supreme Court of Canada articulated the sum of the considerations that should come into play when considering requests to limit accessibility to judicial proceedings or to the documents filed in such proceedings, in decisions such as* Dagenais *and* Mentuck. *These decisions gave rise to what is now known as the* Dagenais/Mentuck *test.*
>
> ***11*** *The* Dagenais/Mentuck *test was developed in the context of requests for publication bans in criminal proceedings. In* Sierra Club of Canada*, the Supreme Court of Canada refined the test in response to a request for a confidentiality order in the context of a civil proceeding. As adapted, the test is as follows:*
>
> …
>
> *(a) 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*
>
> *(b) the salutary effects of the confidentiality 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.*
>
> …

[65] The issue of granting a sealing order with respect to the layout, a diagram, or a schematic of a federal penitentiary was recently addressed in *Douglas*, as follows:

…

> *[64] The Board adheres to the open-court principle in its hearings and decision making. Its files are publicly accessible. However, some situations warrant a confidentiality order. The Board applies the "*Dagenais/Mentuck*" test (see* Dagenais v. Canadian Broadcasting Corp, *[1994] 3 SCR 835, and* R. v. Mentuck, *2001 SCC 76), which was enunciated best in* Sierra Club of Canada v. Canada (Minister of Finance), *2002 SCC 41. The test can be summarized as whether the salutary effects of keeping certain information confidential outweigh the deleterious effects of preventing public access to judicial proceedings, which is a right protected under the* Canadian Charter of Rights and Freedoms, *Part 1 of the* Constitution Act, 1982, *enacted as Schedule B to the* Canada Act 1982, *1982, c.11 (U.K.).*
>
> *[65] Preserving the security of a penitentiary is a valid concern that outweighs the public's interest in the proceedings. The reasons for this decision can be understood without the need for detailed pictures or floor plans. Making those public could create a risk for NI. The pictures and floorplan constitute Exhibit E-2, and that exhibit shall be sealed.*

…

[66] I agree with the Board's reasoning as stated at paragraphs 64 and 65 of *Douglas* and adopt it as it applies equally to the Springhill Institution and the document that was introduced and marked as Exhibit E-2, Tab 10. Tab 10 shall be removed from the book of documents that is Exhibit E-2 and sealed.

**B. The merits of the grievances**

[67] For the reasons that follow, the grievances are dismissed.

[68] The grievor alleged that she was discriminated against by the employer based on sex and family status. In *Diks v. Treasury Board (Correctional Service of Canada)*, 2019 FPSLREB 3, the Board stated that the test in workplace discrimination cases is as follows:

…

> ***76*** *In order to demonstrate that an employer engaged in a discriminatory practice, a grievor must first establish a* prima facie *case of discrimination. A* prima facie *case is one that covers the allegations made and which, if the allegations are believed, would be complete and sufficient to justify a finding in the grievor's favour in the absence of an answer from the respondent (*Ontario Human Rights Commission v. Simpsons-Sears, *[1985] 2 S.C.R. 536 at para. 28 ("*O'Malley*")).*

> ***77*** *An employer faced with a* prima facie *case can avoid an adverse finding by calling evidence to provide a reasonable explanation that shows its actions were in fact not discriminatory; or, by establishing a statutory defence that justifies the discrimination (*A.B. v. Eazy Express Inc.*, 2014 CHRT 35 at para. 13).*
>
> …

[69] Generally, to make out a *prima facie* case of discrimination, a grievor is required to show that they have a characteristic protected from discrimination, that they experienced an adverse impact, and that the protected characteristic was a factor in the adverse impact (see *Moore*, at para. 33). With respect to workplace discrimination on the prohibited ground of family status resulting from childcare obligations, the Federal Court of Appeal in *Johnstone* has also outlined factors to consider in determining whether a grievor has established a *prima facie* case of discrimination in those circumstances.

**C. File No. 566-02-11458 - The claim of discrimination with respect to sex**

[70] Both article 37.01 of the collective agreement and s. 3(1) of the *Canadian Human Rights Act* provide that sex is a prohibited ground of discrimination. Pursuant to s. 3(2) of the *Canadian Human Rights Act*, pregnancy or child-birth is included under the ground of sex. There was no dispute in this case that the grievor's sex and pregnancy were characteristics protected from discrimination. However, I find that the grievor did not establish that she experienced any adverse impacts related to her sex or pregnancy.

[71] Article 45 of the collective agreement is entitled, "Maternity-Related Reassignment or Leave". It provides that an employee who is pregnant or nursing may, during the period from the beginning of the pregnancy to the end of the 24th week after birth, request the employer to modify her job functions or reassign her to another job if, by reason of the pregnancy or nursing, continuing any of her current functions may pose a risk to her health or that of the foetus or child.

[72] On March 24, 2015, the grievor advised her supervisor that she was pregnant and would "…need out of uniform soon.". Pregnancy is a condition that depending on the individual, could require accommodation. Each person and each pregnancy is different, as is the work that the person does. As such, each case has to be assessed individually based on the particulars of the person, the pregnancy, and the work.

[73] Once the grievor identified her pregnancy, she was advised that she would be out of uniform for her next shift, which is what happened. No note was provided from a healthcare professional; nor was any asked for. Indeed, the grievor's own evidence suggested that when she identified her pregnancy, she was not seeking an accommodation to be out of uniform, or to have her job duties changed, as she said she thought that it was at her discretion to decide when she would come out of uniform. That said, no issue was raised with respect to the employer's initial approach to accommodating the grievor's pregnancy. The written accommodation plan was put into effect the next day and was signed by the grievor; her union representative, Ms. Logan; and Mr. Wallace, on behalf of the employer. The duration of the plan was what appeared to be the duration of the pregnancy, from March 26, 2015, to October 30, 2015. In the box entitled, "Suitable Employment Description", it stated simply, "Non Security related duties" and, "Should be administrative like work."

[74] In fact, this is what happened. The evidence disclosed that the grievor was no longer working as a CX-01 doing CX-01 duties. Managers were canvassed to find administrative tasks that the grievor could carry out, which is the work that she was tasked with doing. The grievor described the variety of different tasks that were found for her to do and that she was doing, which were not CX-01 or security related.

[75] What appeared to cause the difficulty in this matter was adjusting the carrying out of the administrative work to the shift schedule the grievor was working. When the grievor identified her pregnancy and was taken off CX-01 duties, she was working 12-hour day shifts that went for 4 days on and 5 days off, starting at 06:30 and ending at 19:15. This meant that the grievor would work Saturdays, Sundays, and statutory holidays.

[76] On the other hand, the evidence disclosed that the administrative work in support of the running of the institution carried out by non-CX administrative staff largely took place during what would be considered "normal business hours" on either a 7.5-hour or an 8.0-hour workday, Monday through Friday, sometime between 07:00 and 18:00. The administrative workdays and hours, as well as personnel, therefore would not necessarily have coincided with the grievor's 4-days-on, 5-days-off, 12-hour-shifts schedule (the 4/5 schedule) that ran from 06:30 to 19:15.

[77] The change of the grievor to non-CX administrative duties meant that the people who would be providing her with work, supervising her work, possibly instructing her with respect to her work, assisting her with work, or working with her would be working Monday through Friday largely somewhere between 07:00 and 18:00. This could have been a bit of a problem had the grievor remained on the custody plan (day shifts from 06:30 to 19:15, 4 days on and 5 days off), as the people she would be working for and with would not be around when her shift started or ended on Mondays through Fridays; nor would they be present at all when she worked Saturdays, Sundays, or holidays.

[78] The grievor took offence to the attempts the employer made at having a discussion to suggest that she alter the custody plan to coincide with the administrative-type hours. This is what she and a friend exchanged some brief emails about on April 21, 2015. It is clear from the tone of the emails that the grievor was upset and felt overwhelmed with her workload. She mentions discussions about changing her schedule and a belief by management that she did not have enough work, while she believed that she was overwhelmed by the work she had. This also appears to be the subject matter of a discussion she had with DW Ward in or about the same period, as Ms. Ward spoke to her one day about her working in the administrative offices, which would be vacant after 16:00.

[79] The grievor testified that on May 1, she went to see her family doctor, Dr. Fashoranti, for what appeared to be a regularly scheduled appointment. She conveyed to the hearing the discussion she had with her doctor at that time, in which she said the following:

- she told Dr. Fashoranti that she was upset and stressed out about things at work;
- Dr. Fashoranti told her that she could go off work completely;
- she told Dr. Fashoranti that she was not ready to stop working:
- she told Dr. Fashoranti that telework was available in her collective agreement; and
- she said that she and Dr. Fashoranti came to a compromise when she told him about being able to telework.

[80] Dr. Fashoranti did not testify; nor were any of his clinical records entered into evidence. There was no evidence that the grievor disclosed to Dr. Fashoranti the specifics of the type of work she was doing at this time. On May 1, 2015, Dr. Fashoranti wrote the vague May 1 note that states that it would be “appreciated” if the grievor

could work from home for medical reasons. I heard no evidence as to what these medical reasons were or why he thought that the grievor should work at home. I heard no evidence as to what if any the risks the grievor faced that flowed from doing her administrative tasks at this time. Nothing in the note indicates restrictions or limitations.

[81] At the time she visited Dr. Fashoranti, on or about May 1, 2015, the accommodation plan was in effect. She was not doing the duties of a CX-01 and hence was not doing security duties. The evidence disclosed that she was doing purely administrative tasks, which were being cobbled together from different departments within the institution. Her complaints when she saw Dr. Fashoranti, as set out in her testimony and the emails she exchanged with a friend, were about the employer changing her schedule and her perception that she might have to go to court with respect to custody and access.

[82] When she was asked why she filed this grievance, she said that she felt targeted and gave examples of what she believed were the ways other people who were pregnant suggested that they had it easier: "One girl had twenty minutes of work a day".

[83] When the grievor presented the May 1 note to her supervisors, they wanted more information. The fact that they requested additional information is not, in itself, *prima facie* evidence of discrimination.

[84] Healthcare professionals are just that, professionals, who work in some designated area of healthcare. This does not somehow render them experts in the peculiarities and specifics of the employer-employee relationship and each and every workplace that a patient they may treat works in. As I set out as follows at paragraph 304 of *McNeil v. Treasury Board (Department of Fisheries and Oceans)*, 2021 FPSLREB 89:

> *[304] An employer is entitled to know what, if any, work an employee can carry out in a safe manner in the workplace. Specifics with respect to restrictions and limitations are important as they could impair an employee's ability to carry out the tasks related to the employee's job, which could in turn put him or her at risk of further injury or put other employees at risk. They are also needed due to the respective obligations of the parties as set out in*

> Central Okanagan School District No. 23 v. Renaud, *[1992] 2 S.C.R 970.*

[85] What occurred after the May 1 note was provided to the employer was that the grievor determined that she would not return to the workplace, and she filed the grievances on May 8, 2015. It is clear to me that the facts at that time had nothing to do with the grievor's limitations or restrictions in the workplace and had everything to do with what she saw was a potential problem involving her schedule and her perception of her workload.

[86] When the grievor was away from work after the May 1 note, she was on leave. While there was some initial discussion as to the leave she would be on, it is clear that as of May 12, 2015, the grievor was on other paid leave (coded as 699). The evidence of this were the leave records entered into evidence as well as the email of May 12, 2015, from Mr. Carr to Messrs. Simons, McMillan, and Earle, Ms. Ward, and some HR representatives, in which he replies to a question from Warden Earle, as to whether she was on sick leave.

[87] When the grievor obtained the May 1 note, she was on the third day of her 4 days of working on the 4/5 schedule. She was at work on May 1 and took leave on May 2, 2015. She was then on her 5 days off, which encompassed May 3 through 7, 2015. Her first day due back at work would have been May 8, 2015, at 06:00. She did not attend work that day, and instead, two grievances were filed, both signed by Ms. Logan, one of which has become Board file no. 566-02-11458, claiming discrimination on the basis of sex.

[88] What she wrote in her grievance was as follows: "I requested to be accommodated for the duration of my pregnancy. I provided medical certification to support this request." What actually happened was that she presented the May 1 note of Dr. Fashoranti, which merely stated, "It will be highly appreciated if Ms. Danielle Miller is allowed to work from home because of medical reasons. She carries a high risk pregnancy." What the grievor really did was get a note from her doctor that asked that she be allowed to telework.

[89] However, there were no references to any limitations or restrictions in the May 1 note. I noted in *Herbert v. Deputy Head (Parole Board of Canada)*, 2018 FPSLREB 76 at

para. 393, what was said by one of the healthcare professionals who appeared before me in that matter, which was as follows:

> ***[393]*** *In his testimony before me, Dr. Suddaby stated that most psychiatrists and psychologists make accommodation recommendations that are not appropriate because they do not know enough about the workplace or the job at issue. He stated that when all the stakeholders involved communicate effectively with the appropriate level of disclosure, it is likely that the employee will be in a better position. The input of all stakeholders is important but highly unusual in our healthcare system.…*

[90] The grievance and the grievor's actions suggest that by not being provided with telework that she was not accommodated and that the employer was discriminating against her due to her high-risk pregnancy. However, what Dr. Fashoranti meant by "high risk" was certainly not set out in the May 1 note. Indeed, it was not explained to me either. It cannot be assumed that this meant that telework was the only option and that the grievor was adversely impacted by not being immediately provided with this option. Without anything further, I can assume only that a high-risk pregnancy means that there is a higher than normal risk that the pregnancy will terminate before birth. This could be due to a number of factors. In this regard, the grievor did not establish that she was adversely impacted by the employer's request for additional information with respect to her limitations or restrictions or by not initially being provided with telework.

[91] The grievor determined that she would stay at home. While there was some initial discussion over the exact nature of the manner in which the pregnancy plan would be altered on the day she presented the May 1 note (on May 1, 2015), it is clear that this was cleared up by May 9, 2015, the day after her grievance was filed. In fact, Ms. Logan was clearly advised on this matter, as evidenced by the May 9 exchange, in which it was made clear that the grievor was on other paid leave.

[92] The grievor remained at home and was paid her normal salary, without any loss.

[93] The employer was entitled to know what limitations and restrictions existed as caused by the pregnancy. In this respect, correspondence was forwarded to Dr. Fashoranti requesting clarification. During the process of seeking clarification, the employer forwarded a copy of the CX-01 work description.

[94] In her grievance, she also stated as follows: "I [was] treated differently and harassed as a result of my pregnancy and request for accommodation …". The only evidence of the grievor being treated differently is that the grievor believed that she was treated differently due to what she believed occurred with respect to other pregnancy-related accommodations. However, without more details about these other alleged accommodations, the grievor's perception alone is not convincing of this alleged differential or adverse treatment.

[95] Her claim of alleged harassment appears to be related to the fact that on one occasion, while she was working in an administrative capacity while on the pregnancy plan and before the delivery of the May 1 note, DW Ward attended her location and spoke with her. This hardly amounts to harassment, which generally connotes actions or conduct than can reasonably be expected to cause offence or harm (see for example s. 122(1) of the *Canada Labour Code*, definition of "*harassment and violence*"; and, *Spooner*). The grievor did not explain why this interaction was offensive or harmful so as to constitute harassment. The only other discussions that occurred were with respect to the altering of her hours from the 4/5 schedule to a Monday to Friday 40-hour workweek such that the work that she was doing would coincide with that of the people she was working for and with.

[96] Both the grievor and Ms. Logan stated that a cease-and-desist letter was provided to the employer. No copy of it was produced into evidence. I heard some limited testimony about the employer's representatives speaking with the grievor in attempts to obtain a more detailed letter from Dr. Fashoranti; however, this was well after the grievance was filed and was quite limited.

[97] Dr. Fashoranti's June 16 letter provided a series of recommendations. The employer did not dismiss the recommendations in Dr. Fashoranti's June 16 letter; in fact, not only did it assess it and come up with a plan that largely followed it but also, many of the recommendations it contained were already in place, as the grievor was not in uniform or carrying out security duties, as this had stopped on March 25, 2015, when she advised her supervisor that she was pregnant. The employer forwarded a letter to the grievor on July 2, 2015, outlining how it believed it could comply with Dr. Fashoranti's recommendations.

[98] The issue then was that the employer believed that the grievor could carry out the administrative functions she had been carrying out before the May 1 note on the Springhill grounds in a building that was completely outside the fenced institution. The grievor believed that Dr. Fashoranti's letter meant that she should be teleworking.

[99] The Supreme Court of Canada stated in *Central Okanagan*, at pages 994 and 995, as follows:

> *The search for accommodation is a multi-party inquiry. Along with the employer and the union, there is also a duty on the complainant to assist in securing an appropriate accommodation. The inclusion of the complainant in the search for accommodation was recognized by this Court in* O'Malley. *At page 555, McIntyre J, stated:*
>
> > *Where such reasonable steps, however, do not fully reach the desired end, the complainant, in the absence of some accommodating steps on his own part such as an acceptance in this case of part-time work, must either sacrifice his religious principles or his employment.*
>
> *To facilitate the search for an accommodation, the complainant must do his or her part as well. Concomitant with a search for reasonable accommodation is a duty to facilitate the search for such an accommodation. Thus in determining whether the duty of accommodation has been fulfilled the conduct of the complainant must be considered.*
>
> *This does not mean that, in addition to bringing to the attention of the employer the facts relating to discrimination, the complainant has a duty to originate a solution. While the complainant may be in a position to make suggestions, the employer is in the best position to determine how the complainant can be accommodated without undue interference in the operation of the employer's business. When an employer has initiated a proposal that is reasonable and would, if implemented, fulfil the duty to accommodate, the complainant has a duty to facilitate the implementation of the proposal. If failure to take reasonable steps on the part of the complainant causes the proposal to founder, the complaint will be dismissed. The other aspect of this duty is the obligation to accept reasonable accommodation. This is the aspect referred to by McIntyre J. in* O'Malley. *The complainant cannot expect a perfect solution. If a proposal that would be reasonable in all the circumstances is turned down, the employer's duty is discharged.*

[100] The evidence disclosed that the grievor was invited to return to the workplace on Monday, July 6, 2015, at 08:00. She did not. On July 3, 2015, the date and time were changed to July 14, 2015, at 08:00, and she was advised that her current status, which was that she was on other paid leave, would be maintained until that time.

[101] The grievor and her representative objected to the employer's plan of having her attend and work in Building A-1. The stated basis for this was that Building A-1 was unsafe as there might have been an inmate cleaning in the building, and a part of it was used to refill the OC (pepper) spray canisters. No meeting took place. The employer's position on this was simply that arrangements could be made to ensure that cleaning the building would not be an issue, and neither would the OC spray canisters.

[102] The grievor submitted that the employer failed to engage in the process as contemplated by the Supreme Court of Canada in *Central Okanagan* by ordering the grievor to return to work without negotiating the accommodation. I disagree.

[103] What the Supreme Court stated in *Central Okanagan* was that the process should involve all three parties — the employer, employee, and union. However, this does not always have to happen; nor will it always happen. An accommodation measure may be required for any number of reasons covering any number of potential sets of circumstances. An employee may require an accommodation, and the employer may implement a plan that fully accommodates the situation, without any necessity for even a meeting. While it can be that simple, often it is not.

[104] However, *Central Okanagan* does not state that the parties must, or require them to, agree to the accommodation. It is clear to me that the employer followed the process and that it attempted to facilitate the recommendations suggested by the grievor's doctor. The fact that the employer's response to Dr. Fashoranti's June 16 letter did not meet with the approval of the grievor or her union does not somehow make the employer's actions during the process discriminatory or a failure to accommodate. Indeed, although she remained off work, the grievor lost no pay whatsoever during this process. Overall, having considered the totality of her evidence and argument, I find that the grievor did not establish that she suffered an adverse impact in the context of her employment or, otherwise, in relation to her sex or pregnancy. As such, her grievance in this regard is dismissed.

**D. File no. 566-02-11459 - the claim of discrimination with respect to family status**

[105] *Johnstone* is the definitive case with respect to discrimination on the basis of family status resulting from childcare obligations, at the federal level. At paragraph 93, it sets out the four-part analysis that a court or tribunal must consider to make a

determination of whether a *prima facie* case of workplace discrimination on the prohibited ground of family status resulting from childcare obligations is established. To establish that *prima facie* case, the grievor had to show the following:

1) that a child or children were under her care and supervision;
2) that the childcare obligation at issue engaged her legal responsibility for the children, as opposed to a personal choice;
3) that she had made reasonable efforts to meet those childcare obligations through reasonable alternative solutions, and no such alternative solution was reasonably accessible; and
4) that the impugned workplace rule interfered in a manner that was more than trivial or insubstantial with fulfilling the childcare obligation.

[106] Each part of the four-part analysis is further defined at paragraphs 94 through 97 of *Johnstone*.

[107] The first factor requires a claimant to show that the child or children are actually under the claimant's care and supervision. This required the grievor to demonstrate that she stood in such a relationship to the child or children at issue and that her failure to meet the needs of the child or children engaged her legal responsibility. In the case of a parent, this will normally flow from that person's status as a parent.

[108] The second factor is closely linked to the first. The grievor has to demonstrate that the childcare needs at issue flow from the legal obligation to the children. Again, in the case of a parent, this normally will flow from their status as a parent. However, depending on the circumstances, it can be a bit of a fluid factor, depending on the situation. A legal obligation to an infant, a toddler, or an elementary-school child is usually, although not always, different from one that may exist for a teenager or a high-school-aged child or children.

[109] The third factor requires the grievor to demonstrate that reasonable efforts have been expended to meet those childcare obligations through reasonable alternative solutions and that no such alternative solution is reasonably accessible. Under this factor, a grievor will be called upon to show that they cannot meet their enforceable childcare obligations while continuing to work and that an available childcare service or alternative arrangement is not reasonably accessible to them to meet their work needs. In other words, the grievor must demonstrate that she is facing a bona fide

childcare problem. This is highly fact specific, and each case will be reviewed on an individual basis, accounting for all the circumstances.

[110] The fourth and final factor requires that the impugned workplace rule interferes in a manner that is more than trivial or insubstantial with fulfilling the childcare obligation. The underlying context of each case in which childcare needs conflict with a work schedule must be examined to ascertain whether the interference is more than trivial or insubstantial. Factor four also considers the workplace rule creating the problem in the first place. Without the problematic rule or workplace situation, all the other factors become redundant.

[111] For the reasons that follow, I find that the grievor did not establish a *prima facie* case of discrimination, and as such, with respect to the allegation of discrimination on family status, her grievance is denied.

[112] There is no dispute that the grievor is the mother of a child that has been identified in this matter and that at least part of the time, the child, as of the grievance and the facts that gave rise to it, was living with her and her new husband or partner in the home she shared with him. However, the details and exact nature of the custody and care arrangement are not clear. This will be examined further later, when I discuss the third factor.

[113] The evidence also disclosed that childcare needs will flow from the legal obligation to the child; this is obvious from the fact that the child was six or seven years of age at the time at issue. However, again, those needs, like those in the first factor, would be best addressed in conjunction with the third factor of the analysis.

[114] The third factor requires the grievor to demonstrate that reasonable efforts have been expended to meet those childcare obligations through reasonable alternative solutions and that no such alternative solution is reasonably accessible. She had to show that she could not meet the enforceable childcare obligations while continuing to work and that an available childcare service or alternative arrangement was not reasonably accessible to her to meet her work needs.

[115] I heard and saw little evidence with respect to the first three factors outlined in *Johnstone*. I have made the assumption that there were childcare needs, based on the fact that there would be childcare needs when a child is the age that the grievor's child

was at the time; however, I was provided with almost no evidence about the situation. What I was provided with was the grievor's oral testimony that the child's father had taken her to court and that a custody agreement existed that provided that the child would be with her only when the grievor had no shifts.

[116] The custody agreement was not entered into evidence. No evidence of the court proceedings was produced. What was produced was an agreement signed by the grievor and the employer in mid-November of 2014 in which the employer agreed to allow the grievor to work only day shifts on the 4/5 schedule. The agreement was to end March 30, 2015. In addition, entered into evidence was the grievor's email dated November 13, 2014, which simply states that the grievor is in a custody fight with the child's father and that the father has custody (at that time). It further indicates that the custody arrangement states that she picks up her daughter after her last shift and keeps her daughter on the grievor's rest days. She then states that her schedule allows her to have her daughter 4 nights in a row while the father has her for 5 nights. It appears that it was on the basis of this request by her that the employer instituted that she be on the 4/5 schedule for days (no nights).

[117] According to the November 13, 2014, email the grievor stated that custody was with the father. The request for only the day shift was so that she could maximize her time with her daughter. What the November 13, 2014, email is stating is that by giving the grievor the day shifts in a row, which was done, she would have more time with her daughter. Without more detail about what exactly the custody agreement or court order said, it is difficult to determine what, if any, legal obligation flowed or how the employer allegedly interfered with that obligation. It is the responsibility of the grievor to provide the requisite evidence such that the Board can assess it and apply it in light of the test.

[118] While the grievor said that that was the arrangement, it does not flow that this is a legal obligation. From what I can gather, the grievor had legal obligations and care responsibilities for her daughter only when she had access to her; this was only when she was not on shift. The agreement with the employer, although it might have used the term "accommodation agreement", is not necessarily dispositive proof of a protected right under the collective agreement or legislation or that the alleged failure to abide by that agreement was dispositive of discrimination. From what I can gather from the evidence of the custody arrangement, she did not have her daughter when

she was on shift, and custody was actually with the father. When she had her daughter, she was not on shift.

[119] What the evidence disclosed was that when the grievor identified to her employer that she was pregnant, she was moved from her regular CX duties and given alternative duties. The alternative duties were non-uniform, non-CX, and non-security administrative duties. She was not moved from her custody plan shifts, which were day-only shifts of 12 hours, 4 days on and 5 days off (the 4/5 schedule).

[120] What the evidence also disclosed was that the administrative-support personnel who worked at the institution largely worked fixed eight-hour workdays, Monday to Friday, during normal daytime working hours (of non-shift hours) between 07:00 and 18:00. Given that the grievor was not working these hours and that the work that she was being given to do was administrative in nature and would coincide with the employees who worked in this area, it made practical sense that the employer would seek to try to coordinate the grievor's schedule with all these other people. There was no evidence that that attempt alone adversely impacted her or interfered with any childcare obligations that she may have had.

[121] In her grievance, the grievor indicated that following her pregnancy and move to administrative duties "…the agreed upon accommodation for family status reasons has been consistently questioned and I have been harassed and discriminated against in relation to this accommodation." Again, harassment generally connotes actions or conduct than can reasonably be expected to cause offence or harm. The grievor did not explain or establish how any questioning by the employer with respect to the accommodation agreement related to the custody plan caused her offence, harm or otherwise adversely impacted her. As stated with respect to the first grievance, discussing potential accommodations or exploring altering them generally falls within the parties' obligations under the duty to accommodate. Without more, I do not accept that these discussions, on their own, constituted harassment or adverse treatment in relation to the grievor's family status.

[122] In the end, the evidence disclosed that while it was contemplated and discussed, the grievor's shift was never actually altered. Indeed, the evidence disclosed that as of May 1, 2015, the grievor did not return to the workplace and was on other paid leave until she began working from home, which continued until the birth of her second

child. I heard no evidence as to what the custody or access situation was after the grievor remained at home starting in May of 2015 or when she worked from home starting in the late summer of 2015, which continued until she gave birth.

[123] Again, having considered the totality of the grievor's evidence and argument, I find that she did not establish that she suffered an adverse impact in the context of her employment or, otherwise, in relation to her family status, As such, her second grievance is also dismissed

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

*(The Order appears on the next page)*

## V. Order

[125] The grievances are denied.

[126] Tab 10 of the book of documents that is Exhibit E-2 shall be removed from the book of documents and is ordered sealed.

February 22, 2022.

**John G. Jaworski,**
**a panel of the Federal Public Sector**
**Labour Relations and Employment Board**