Date: 20220623

Files: 566-02-11197, 11198, 11205 and 11206

Citation: 2022 FPSLREB 53

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

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

BETWEEN

SUSAN CHIN

Grievor

and

TREASURY BOARD
(Canada Border Services Agency)

Employer

Indexed as
Chin v. Treasury Board (Canada Border Services Agency)

In the matter of individual grievances referred to adjudication

Before: James R. Knopp, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Sandra Gaballa, grievance and adjudication officer, Public Service Alliance of Canada

For the Employer: Philippe Giguere, legal counsel

Heard by videoconference,
January 25 and 26, 2022.

REASONS FOR DECISION

I. Overview and summary

[1] In 2012, Susan Chin ("the grievor") was employed as a border services officer (BSO) at Pearson Airport near Toronto, Ontario, with the Canada Border Services Agency ("the employer" or CBSA). She was on maternity leave from January 2011 to January 2012. While she was away, she communicated with the employer about shift scheduling, to coordinate the care for her child when she returned to work. It involved working around the full-time schedules of the grievor, her husband, and her mother, all of whom were the child's caregivers.

[2] In October 2011, while she was still on maternity leave, the grievor requested six shift changes that would be necessary, given all the caregivers' overlapping full-time work schedules. Having received no reply, she repeated this request upon her return in January 2012. On January 23, 2012, the employer refused her request, without an explanation. It stated that further details would follow, but details did not follow.

[3] The first two grievances (files 566-02-11205 and 11206), one filed pursuant to article 19 (the "No Discrimination" article) of the collective agreement between the Treasury Board and the Public Service Alliance of Canada for the border services group, which expired on June 20, 2011 ("the collective agreement") and one filed under the CBSA's policy on the duty to accommodate, both pertain to the January 23, 2012, decision of the employer, which was discriminatory on the prohibited ground of family status. These two grievances are upheld, and damages are to be assessed against the employer.

[4] The other two grievances (files 566-02-11197 and 11198), similarly filed under that article and policy, pertain to events surrounding the grievor taking sick leave on November 25, 2012. A few days earlier, on November 22, 2012, her husband was called in to work for November 25. The grievor initially requested three hours of vacation leave toward the end of her shift on Sunday, November 25, 2012. That leave request was denied for operational reasons.

[5] It was Grey Cup Sunday, and many employees had already requested the day off. No further leave could be granted because a minimum number of border service officers had to be on duty at any given time. Following an email to her supervisor, the

grievor resubmitted the leave request on November 23, 2012, adding the text, “Family Status Issue”. The request was once again denied, for the same operational reasons.

[6] On November 25, 2012, the grievor attended work on her scheduled shift. She was visibly upset about it. Her supervisor sent her home for the final three hours of her shift, which were eventually recorded as uncertified sick leave. The grievances in files 566-02-11197 and 11198 pertain to the employer’s decision to deny the leave requested. These grievances are dismissed.

[7] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365; *PSLREBA*) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board (PSLREB) to replace the former Public Service Labour Relations Board as well as the former Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in ss. 366 to 466 of the *Economic Action Plan 2013 Act, No. 2* (S.C. 2013, c. 40) also came into force (SI/2014-84). Pursuant to section 393 of the *Economic Action Plan 2013 Act, No. 2*, a proceeding commenced under the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; *PSLRA*) before November 1, 2014, is to be taken up and continue under and in conformity with the *PSLRA* as it is amended by sections 365 to 470 of the *Economic Action Plan 2013 Act, No. 2*.

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

[9] The grievances were properly referred to adjudication and were heard in a videoconference setting on January 25 and 26, 2022.

II. Summary of the evidence

A. Agreed statement of facts

[10] In advance of the hearing, the parties provided the Board with an agreed statement of facts, which reads as follows:

The parties agree to the following facts:

1. *At all material times, the Grievor was employed by the Canada Border Services Agency (CBSA) as a Border Services Officer (FB-3) at Toronto Pearson International Airport.*

2. *Her mother was employed by the CBSA as an Immigration Clerk at Toronto Pearson International Airport and worked a 5/4. Meanwhile, her husband Mr. Allan Chin was employed as a Police Constable with the Peel Regional Police.*

3. *Since 2008, the Grievor worked as a shift worker, working day shifts at Corporate Services. The Grievor reported to Mr. Larry Hoffberg.*

4. *In 2010, the Grievor was pregnant with her first child and took maternity leave between January 2011 and January 2012.*

5. *Prior to her return to the workplace, the Grievor emailed the Employer in July 2011 requesting to work on Crew 9 with opposite shifts to her mother (who was also employed by CBSA). She explained that the reason for the request was so that could fulfill her caregiving responsibilities to her young child.*

Joint Book of Documents, Tab #38

6. *The request was granted by CBSA management on December 9, 2011.*

7. *In October 2011, the Employer provided possible shift schedules to the Grievor, of which she selected a 5 a.m. or 6 a.m. start time. The Grievor advised that her husband was a shift worker and requested six shift changes from January to June of the following year in order to fulfill her caregiving responsibilities herself to her young child while her husband was working.*

Joint Book of Documents, Tab #38

8. *In January 2012, the Grievor advised that she was now requesting five shift changes and provided details of her husband's shift schedule.*

Joint Book of Documents, Tab #38

9. On January 23, 2012, Ms. Liane Lebrun advised that the Accommodations Committee had rejected the Grievor's accommodation request. Ms. Lebrun also conveyed what the Employer believed were reasonable alternatives: to change shifts with a colleague, to take time off, and/or to investigate alternate care for her young child.

Joint Book of Documents, Tab #38

10.On February 9, 2012, the Grievor responded to Ms. Lebrun indicating that allegedly daycare was not an option for her young child, since the four (4) daycares she identified require a Monday to Friday enrolment and were unavailable for one day per month at a 5:00 a.m. drop off time. She explained that the cost for full time enrollment at these daycares was allegedly too much for her family. The Grievor expressed that the situation was causing her stress and requested that the Employer provide an explanation of the undue hardship it would experience in granting the requested accommodation. The Employer did not respond to that request.

Joint Book of Documents, Tab #39

11.The Grievor filed two grievances on February 12, 2012 contesting the Accommodations Committee decision which denied her accommodation request for the shift changes.

Joint Book of Documents, Tabs #2 and3

12.On May 28, 2012 the Employer issued its response to the Grievor's two grievances.

Joint Book of Documents, Tab #6

13. On November 22, 2012, the Grievor requested vacation leave for 3.00 hours on November 25, 2012. The request was denied for operational reasons.

Joint Book of Documents, Tab #44

14.On November 23, 2012, the Grievor had an email exchange about the matter with then Chief of Operations, Laurelle Doxey.

Joint Book of Documents, Tab #45

15.On the same day, the Grievor resubmitted her vacation leave request, this time indicating "Family Status Issue" in capital letters on the form. This request was again denied for operational reasons.

Joint Book of Documents, Tab #46

16.On November 25, 2012, the Grievor reported to work and, in or around late morning, she met with Mr. Kevin Philips, Superintendent, to discuss the leave request. The parties disagree on what was said in this meeting.

17.Ultimately, the Grievor put in a request for sick leave and went home for the remainder of her shift. She did not work the 3.00 hours that she had initially requested off as vacation leave.

18.On November 26, 2012, the Grievor filed two grievances concerning the denial of vacation leave for November 25, 2012.

Joint Book of Documents, Tabs #9 and 10

19.An email exchange ensued between Superintendent Philips and the Grievor concerning her request for sick leave and Management's request for a medical note.

Joint Book of Documents, Tab #50

20.Ultimately, the Grievor did not provide the requested medical note. She was not disciplined for this. Subsequently, the Employer approved the 3.00 hours from November 25, 2012, as uncertified sick leave. This was because the grievor went on a second maternity leave in January 2013 and the issue of the November 25, 2012, leave remained outstanding, which was preventing Compensation from reconciling her pay file before taking her off strength.

21.The four grievances were referred to adjudication before the Federal Public Sector Labour Relations and Employment Board ("FPLSREB"). The matter is scheduled to be heard before the FPLSREB on January 25 and 26, 2012.

Joint Book of Documents, Tab #15

[Emphasis in the original]

[*Sic* throughout]

B. The testimonies of the witnesses, and the documentary evidence

1. Files 566-02-11205 and 11206

[11] At the time of the events that gave rise to these grievances, Liane Lebrun was a superintendent in the CBSA's Accommodations Unit. She testified to many interactions with the grievor and to being well aware of her family status. Ms. Lebrun worked with Ruby Singh, helping employees with their accommodation requests. This involved, among other things, modifying duties, shift scheduling, shifts, and hours of work.

[12] The grievor made it known to her employer that three caregivers could tend to the child, namely, her, her husband, and her mother. At the time, her husband was a constable with the Peel Regional Police Service. He had specialized training and technical skills that qualified him for inclusion on the Tactical Squad, which meant he would be called to duty with little to no notice. He was also a reservist with the Canadian Armed Forces and underwent related training twice per week. The grievor testified to the attendant complications of his busy and often unpredictable schedule when it came to arranging childcare. At the employer's request, she provided a letter from her husband's employer, which spelled out his duty-related obligations. Her mother was also a CBSA employee; she was an immigration clerk.

[13] On July 22, 2011, while she was still on maternity leave, and approximately six months before her return to work, the grievor wrote to Ms. Singh, stating, "Hi Ruby, I know its [*sic*] early but I was wondering if you could let me know if upon my return in January I could go opposite crew line to my mom for child care? Also, does my current medical for day shift suffice?"

[14] With respect to the last sentence, the grievor testified to a medical accommodation already in place prohibiting her from working past 4:00 p.m., which meant early start times for her shifts.

[15] The grievor's request to work shifts opposite to her mother's, for childcare purposes, was ultimately granted on December 9, 2011.

[16] Ms. Singh, who did not testify at the hearing, replied to the grievor on July 25, 2011, copying Superintendent Lebrun and stating, "Let me look into both questions for you and I'll get back to you."

[17] On October 3, 2011, Superintendent Lebrun replied to the grievor with this:

> *Hi Sue,*
>
> *It was good talking to you this morning and I hope the little one starts sleeping through the night soon. The attached document lists the various start times available under each VSSA* [Variable Shift Schedule Arrangement] *option. If you have any questions, please let us know.*
>
> …

[18] On October 11, 2011, the grievor replied as follows:

> *Hi Liane,*
>
> *I have reviewed the start times and would like either the 5am or 6am start on crew 9 at whichever Terminal and time suits management; I will have my new medical into you by November as requested.*
>
> *I have done my best to return to work without requesting family accommodation by working opposite my mom. As my husband is also a shift worker this suits us for the most part. I have looked ahead at the six months of January to June 2012 and provided I can be placed on crew 9 there are six conflicting days (1 per month) which always fall on a Tuesday or Wednesday that all three of us are working. I would like to know if I can be rescheduled for this one day a month? The days I have worked out to replace the Tuesday or Wednesday are either a Friday or Sunday. As of now I have called a few home daycares and they will not take Kai for just one day a month because of the amount of children they are allowed they would obviously want the spot filled with someone permanent and thus more money for them?! I have also contacted Peekaboo daycare but they also will not do one day. I am still looking though.*
>
> *The days that I would need switched are below and the days I would like to replace them with are beside; just for your reference.*
>
> *Wed Jan 25----Sunday Feb 5*
>
> *Tues Feb 21-----Friday Feb 24*
>
> *Wed Mar 28----Sunday Mar 4*
>
> *Tues Apr 24---Fri Apr 27*
>
> *Wed May 30----Sun May 6*
>
> *Tues Jun 26---Fri Jun 29*
>
> …

[19] The grievor modified this request somewhat on January 16, 2012, advising Superintendent Lebrun as follows:

> …

> *The January and February dates there are not necessary as January was already worked out and February 21st I am in Vancouver for court.*
>
> *The other days I would still request to be changed and an additional day for February. Please review and let me know what the committee decides or if they need more info.*
>
> *Wed Feb 8th-----Tuesday Feb 14*
>
> *Wed Mar 28----Sunday Mar 4*
>
> *Tues Apr 24---Fri Apr 27*
>
> *Wed May 30----Sun May 6*
>
> *Tues Jun 26---Fri Jun 29*
>
> …

[20] Superintendent Lebrun testified that the function of her team was to implement accommodation requirements. Where changes to shift schedules are required as part of the accommodation process, her team would make those changes.

[21] She also testified about the process for approving requests related to the employer's duty to accommodate. First, a request is brought before an Accommodations Committee for consideration, which then analyzes it and makes a recommendation to the senior management team. Once senior management makes its decision, it is disclosed to all interested stakeholders. The request for accommodation is either granted or denied. If it is granted, Superintendent Lebrun's team makes the necessary arrangements (for example, shift changes). Superintendent Lebrun followed this procedure when she received the grievor's request for shift changes. Since, as will be seen, accommodation was denied, Superintendent Lebrun did not change any shifts for the grievor.

[22] As of January 23, 2012, the grievor had not yet heard anything, so she wrote, "Tomorrow is my last day until February 8th which I have asked to be switched. Have you heard anything?"

[23] On January 23, 2012, Superintendent Lebrun emailed the following to the grievor:

> *Hi Susan,*
>
> *Regrettably, the Committee members did not approve your request for a Y107* [how the employer takes the necessary steps to alter a shift schedule] *on the one (1) day a month you would require. I*

> *will have further details tomorrow but I can at least advise you that it is the Committee's position that you can opt to do shift changes with other BSO's, book leave or investigate alternative care.*
>
> …

[24] The grievor testified to finding alternate childcare arrangements for her February 8, 2012, shift, and she went to work that day. While at work, she sent the following message to Superintendent Lebrun: "Hi Liane, Could you please forward me the 'further details' as provided by the committee."

[25] On February 9, 2012, the grievor followed up with another message, as follows:

> *Liane,*
>
> *Firstly, as I am on a medical accommodation my pool of employees to shift change with is limited. Also, a shift change is not guaranteed every month.*
>
> *Second, I am requesting the day off for childcare needs. This day is not a vacation.*
>
> *Lastly, after continuing to investigate alternate care no daycare will take my child for one day a month and I can not find a daycare open for a 0500 drop off. Infant programs which are for children under 18 months require full time Monday to Friday enrollment to [sic] which I can not afford. The cost is way too much for my family.*
>
> *Under the Duty to Accommodate Policy please advise in detail the department's undue hardship to meet my needs for a Y107 (shift change) for one day a month which myself, my husband and my mother are all working a day shift, for any day which is mutually agreed upon by Management and myself.*
>
> *Respectfully,*
>
> *Susan*

[26] On February 16, 2012, Superintendent Lebrun wrote to the grievor, "My apologies for not being able to send out the written response with the reasons for the denial as yet. I will forward your most current proposal to the Accommodations Committee and will advise you accordingly once a determination has been made".

[27] The grievances in files 566-02-11205 and 11206, which pertain to the January 23, 2012, decision, were filed on February 12, 2012.

[28] With respect to the shift change she had requested for February 21, 2012, the grievor ultimately did not need it because she was required to testify in court in Vancouver, British Columbia, and her family accompanied her to Vancouver. No shift change was necessary on that date.

[29] For the shift scheduled for March 28, 2012, the grievor requested leave without pay, which was denied. She used 9.58 hours of her vacation leave to take the day off and to care for her child.

[30] On April 24, 2012, the grievor attended work as scheduled but took two hours off at the end of the day to go home and care for her child.

[31] In May 2012, the grievor explored the possibility of an assignment to a different location, to facilitate her childcare responsibilities. On May 11, 2012, she received the following response: “Hard to say what movement will be available with the deficit reductions in effect. There may be opportunities but I just can’t say for certain. I can do some queries to see what is available.”

[32] The grievor testified to not receiving any further information on the possibility of this particular assignment.

[33] With respect to the shift that was scheduled for May 30, 2012, the grievor testified to making extensive efforts to find a BSO with whom she could trade shifts but to no avail. She testified to a limited pool of potential BSOs with whom she could trade shifts, given her accommodation requirement of not working past 4:00 p.m.

[34] She was extremely upset at not being able to arrange this shift-schedule change and took her concerns to Chief Mailet, who understood her situation. He intervened and arranged a shift change for the grievor for May 30, 2012.

[35] With respect to the shift scheduled for June 26, 2012, the grievor used 9.58 hours of her vacation leave to take the day off and to care for her child.

[36] The grievor testified to repeated requests for an explanation of the January 23, 2012, decision denying the family-status-related requests. No explanation has ever been provided. At this hearing, Superintendent Lebrun was asked to provide an explanation and she could not.

2. Files 566-02-11197 and 11198

[37] The grievor testified to receiving word from her husband on November 22, 2012, informing her that he had been called to duty and that he would be unavailable to provide care for their child on Sunday, November 25, 2012, while she was at work.

[38] The grievor needed three hours' leave, from 1:00 p.m. to the end of her shift on Sunday, November 25, 2012, to attend to her childcare needs because her mother was not available, either. She submitted a leave application for those three hours, which was denied, for operational reasons.

[39] The grievor emailed Chief of Operations Laurelle Doxey, asking about the nature of the operational reasons and why her leave application had been denied.

[40] Chief Doxey testified to emailing the following to the grievor in response to her questions: "There have been several last minute leave requests for Sunday that have been denied as significant leave has already been granted." Chief Doxey testified that the operational requirement was the minimum number of BSOs required for duty at any given time. Since Sunday, November 25, 2012, was Grey Cup Sunday, many leave requests had already been granted. The CBSA found itself at the minimum number of officers for that day, and further leave was not being authorized. In fact, testified Chief Doxey, several leave applications, filed after leave granting was closed, had to be denied as well. The grievor was not alone in this regard.

[41] Upon receipt of Chief Doxey's message, the grievor resubmitted her leave application, but this time, she wrote "Family Status Issue" on the bottom of it. Her application was once again denied, for the same operational reasons.

[42] The grievor attended work as scheduled on Sunday, November 25, 2012, but was extremely upset at not having found a solution to her problem. From 1:00 p.m. onward, there would be no one at home to look after her child.

[43] While at work, the grievor spoke to Superintendent Phillips about her predicament. She testified to being very upset, which she said he obviously understood. According to the grievor, Superintendent Phillips gave her a couple of options. If she left work at 1:00 p.m., she could be considered absent without leave (AWOL) and subject to disciplinary action. She testified that he acknowledged how

upset she was, and he suggested she avail herself of sick leave. She did not think she had to provide a doctor's note.

[44] Superintendent Phillips, who did not testify at the hearing, emailed the following summary of the day's events to Chief Doxey and others:

> …
>
> … [The grievor] *called me in the secondary Supt office and asked to speak to me privately and I said she could come down to the secondary Supt Office. When she arrived she mentioned to me about her leave being denied and I told her I was aware of this, as we had to deny leave for others today due to operational requirements and overtime was brought in today due to low staffing levels. She wanted to explain to me that she was feeling stressed about the whole situation and she wanted to know what her options were if she wasn't feeling good. I asked her what she meant and she said that she needed to go home at 1300hrs for family status reasons. I explained to her if she wasn't feeling well and needed to leave sick, then I would be requesting a doctor's note from her for the time. I also asked her if she had enough sick time and she did confirm she had enough sick credits. She then asked me if she didn't put in a leave slip for sick time and she just went home for family status reasons and I said she would be considered AWOL and it would go down the path of discipline.*
>
> *She was quite upset and visibly shaken during our conversation and said she would need to think about her options and if she would be going home. She left the office and thanked me taking the time to speak with her.*
>
> …
>
> [*Sic* throughout]

[45] The grievances in files 566-02-11197 and 11198, which pertain to the denial of leave on November 25, 2012, were filed the next day, on November 26, 2012.

[46] The employer repeated its request for a doctor's note in an email dated December 3, 2012. The grievor responded the same day, stating, "As per the contract … I don't believe that this practise [*sic*] was followed completely for all employees who were sick on or during the day shift on November 25, 2012. Please advise in writing why I am obligated to bring a Doctor's note?"

[47] The grievor received the following reply from Superintendent Phillips within two hours on the same day:

…

> *To follow up on our conversation from November 25th and this morning, you were advised to bring in a medical note for your absence from the work location when you left at 13:00hrs on November 25th, 2012.*
>
> *As per the below section from the collective agreement, management can request that an employee provide a medical certificate supporting the leave request in order to be satisfied. In this particular case you were advised on the day of absence that a medical certificate would be required to support the absence given the circumstances. The onus is on you as the employee to satisfy management that the leave was indeed related to sick leave.*
>
> ***35.02***
>
> *An employee shall be granted sick leave with pay when he or she is unable to perform his or her duties because of illness or injury provided that:*
>
> *a. he or she satisfies the Employer of this condition in such manner and at such time as may be determined by the Employer; and*
>
> *b. he or she has the necessary sick leave credits.*
>
> ***35.03** Unless otherwise informed by the Employer, a statement signed by the employee stating that, because of illness or injury, he or she was unable to perform his or her duties, shall, when delivered to the Employer, be considered as meeting the requirements of paragraph 35.02(a).*
>
> …
>
> [Emphasis in the original]

[48] On the following day, December 4, 2012, the grievor wrote:

> *Hi Kevin,*
>
> *In an effort to comply with your request, I was able to make an appointment late yesterday afternoon for today, Tuesday December 4, 2012, at 2pm.*
>
> *I would respectfully request that I be granted paid leave for other reasons, 6900, as per the Collective Agreement in order to obtain the documents you have requested from me or any other paid leave by management that is agreeable to you.*
>
> *Also, please advise will management be compensating for the note and if not, where in the Collective Agreement it states that the employee is responsible to incur fees at management's request.*
>
> …

[49] Superintendent Phillips sent the final item of correspondence entered into evidence on this issue to the grievor on December 4, 2012, at 9:11 a.m. It states, "Hi

Susan, As per 35.02(a), the onus is on the employee to satisfy management that the absence was because of illness. Therefore, neither 'other paid leave' nor reimbursement will be forthcoming."

[50] Ultimately, the grievor did not provide a doctor's note. Eventually, the employer classified the three hours taken on November 25, 2012, as uncertified sick leave.

C. The grievor's testimony

[51] The grievor testified to her efforts to secure alternate childcare. She sought the services of a daycare centre, but since she began work at 6:00 a.m., she would have had to drop her child off approximately an hour before that time, and no daycare facility was prepared to receive a child at that hour.

[52] She explored the possibility of engaging a daycare centre for only those days on which scheduling conflicts would arise, but the centres she spoke to would not operate on anything less than full-time. It did not make economic sense, testified the grievor, to pay for an entire month and use the daycare service for only one or two days. In any case, the four centres she spoke to would not entertain such a plan.

[53] The grievor testified to her efforts to change work locations to facilitate childcare arrangements, but the employer was unable to make such a change. She conceded that her medical accommodation, namely, being unable to work past 4:00 p.m., was likely a factor.

[54] The grievor testified to briefly contemplating switching to part-time work in an effort to facilitate childcare arrangements, but she decided that she did not want to forego the benefits associated with full-time work, including the potential for career advancement.

[55] The grievor also testified to anecdotal evidence she received from a colleague, who described similar family-status-related shift-scheduling challenges, which were accommodated. The grievor wondered why she did not receive the same treatment.

[56] The grievor testified to being in a near-constant state of anxiety at work because of the continuing drama surrounding shift-change requests due to her family status. Therefore, she considers these grievances as being of a continuing nature and not limited to the specific periods described in them.

[57] The stress she experienced impacted her health and well-being very negatively. She testified in particular to two separate events, both pertaining to pregnancy and childbirth and involving negative outcomes, which she felt were attributable to the family-status-based discrimination she faced, and continues to face, at the hands of the employer.

[58] The grievor described in some detail the negative outcomes. To protect her privacy, I have not included those details in this decision. I will discuss this further when I address the issue of remedy.

[59] The grievor seeks a significant award of damages under the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; *CHRA*).

III. Summary of the arguments

A. For the grievor

[60] The grievances are of an ongoing nature, argued the grievor, and they should not be limited to narrowly defined periods. The employer engaged in a continuous program of discrimination, which is why exceptional damages are being sought.

[61] The grievor submitted *Dunlop v. Overwaitea*, 2007 BCHRT 254, on the issue of a continuing grievance. At paragraph 51, it refers to the definition of a "continuing contravention" in the following manner:

> *[51] … In* Lynch v. B.C. Human Rights Commission, *2000 BCSC 1419, the Court adopted the following statement from the Manitoba Court of Appeal in* Re the Queen in Right of Manitoba and Manitoba Human Rights Commission et al *(1983), 2 D.L.R. (4th) 759:*
>
> > *To be a "continuing contravention", there must be present acts of discrimination which could be considered as separate contraventions of the Act, and not merely one act of discrimination which may have continuing effects or consequences.…*
>
> …

[62] *Dunlop* expands on this definition as follows at paragraph 53:

> *[53] In* Dove v. GVRD and others (No. 3), *2006 BCHRT 374, the Tribunal identified some different scenarios which may give rise to a continuing contravention, the first of which includes the kind of case in which there are allegations of repeated harassment or*

> *discrimination. In such cases, provided that the allegations are sufficiently similar in character and occur with sufficient frequency, a continuing contravention may be established: at para. 17.*

[63] The grievor submitted that the employer's refusal on January 23, 2012, to accommodate her requests for shift-schedule changes for reasons having to do with her family status resulted in a series of refusals. She attempted to address each shift that she needed changed. Each refusal should constitute a separate violation of the duty to accommodate, she argued. Then, in late November 2012, the employer refused once again to accommodate her request for a shift-schedule change for reasons having to do with her family status. As per *Dunlop*, at para. 56, "[t]hese are allegations of acts of discrimination which could be considered as separate contraventions of the *Code* and therefore constitute a continuing contravention."

[64] The grievor submitted *Moore v. British Columbia (Education)*, [2012] 3 S.C.R. 360, which states this on the establishment of a *prima facie* case of discrimination:

> *[33] As the Tribunal properly recognized, to demonstrate* prima facie *discrimination, complainants are required to show that they have a characteristic protected from discrimination under the* Code*; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact. Once a* prima facie *case has been established, the burden shifts to the respondent to justify the conduct or practice, within the framework of the exemptions available under human rights statutes. If it cannot be justified, discrimination will be found to occur.*

[65] The grievor submitted the Federal Court of Appeal's (FCA) case of *Canada (Attorney General) v. Johnstone*, 2014 FCA 110, and drew attention to the many similarities to this case. The FCA, summarizing the history of *Johnstone*, stated the following at paragraphs 24 to 28:

> *[24] The Tribunal further held that the CBSA had not established a defence based on a* bona fide *occupational requirement that would justify its refusal of the work schedule accommodation sought by Ms. Johnstone, nor had it developed a sufficient undue hardship argument to discharge it from its duty of accommodation. The Tribunal noted, at paragraphs 359 and 362 of its decision, that the position advanced on behalf of the CBSA throughout the proceedings was that it had no legal duty to accommodate Ms. Johnstone, rather than whether such an accommodation would lead to undue hardship.*

> *[25] The Tribunal, therefore, ordered the CBSA to cease its discriminatory practice against employees who seek accommodation on the basis of family status for purposes of childcare responsibilities, and to consult with the Canadian Human Rights Commission to develop a plan to prevent further incidents of discrimination based on family status in the future: Tribunal's decision at para. 366. It further ordered the CBSA to establish written policies satisfactory to Ms. Johnstone and the Canadian Human Rights Commission that would implement a mechanism where family status accommodation requests would be addressed within 6 months, and include a process for individualized assessments of those making such requests: Tribunal's decision at para. 367.*
>
> *[26] The Tribunal also ordered the CBSA to compensate Ms. Johnstone for her lost wages and benefits from January 4, 2004, when she first commenced part-time employment, until the date of its decision. It awarded Ms. Johnstone $15,000 for pain and suffering pursuant to paragraph 53(2)(*e*) of the* Canadian Human Rights Act.
>
> *[27] The Tribunal further awarded the maximum amount of $20,000 for special compensation pursuant to subsection 53(3) of the* Canadian Human Rights Act*, as a result of its finding that the CBSA had engaged in the discriminatory practice wilfully and recklessly. This award was largely based on the Tribunal's conclusion that the CBSA had failed to follow* Brown v. Canada (Department of National Revenue)*, (1993) CanLII 683 (CHRT)* (Brown*), a prior decision of the Tribunal dealing with the issue of discrimination based on sex (pregnancy) and family status.*
>
> *[28] In* Brown*, the Tribunal had "ordered the Respondent to prevent similar events from recurring through recognition and policies that would acknowledge family status to be interpreted as involving 'a parent's rights and duty to strike a balance [between work obligations and child rearing] coupled with a clear duty on the part of any employer to facilitate and accommodate that balance'": Tribunal's decision at para. 57. In the Tribunal's view, this prior order had been ignored by the CBSA, thus justifying in this case an award of special compensation under subsection 53(3): Tribunal's decision at paras. 381 and 382.*

[66] The grievor argued that for many years before the events giving rise to these grievances, the CBSA had been on notice about its practice with respect to the duty to accommodate when family status is concerned. Thus, special compensation must be considered, as the employer continues to disregard its obligations.

[67] *Johnstone* is helpful in addressing family-status accommodations, submitted the grievor. At paragraph 74, the FCA states: "… the ground of family status in the *Canadian Human Rights Act* includes parental obligations which engage the parent's

legal responsibility for the child, such as childcare obligations, as opposed to personal choices." At paragraphs 88 and 89:

> *[88] Normally, parents have various options available to meet their parental obligations. Therefore, it cannot be said that a childcare obligation has resulted in an employee being unable to meet his or her work obligations unless no reasonable childcare alternative is reasonably available to the employee. It is only if the employee has sought out reasonable alternative childcare arrangements unsuccessfully, and remains unable to fulfill his or her parental obligations, that a* prima facie *case of discrimination will be made out.*
>
> *[89] This principle has been recognized in numerous labour arbitration cases dealing with the issue. As noted in* Alberta (Solicitor General) v. Alberta Union of Provincial Employees (Jungwirth Grievance)*, [2010] A.G.A.A. No. 5 (QL) at para. 64, "[i]n order to work, all parents must take some steps on their own to ensure that they can fulfill both their parental obligations and their work commitments. Part of any examination of whether a* prima facie *case has been established for family status discrimination must therefore include an analysis of the steps taken by the employee him [sic] or herself to balance their family life and workplace responsibilities."*

[68] The grievor argued that she made considerable efforts to arrange childcare. She secured the assistance of her husband and her mother and sought the employer's assistance coordinating shifts (her mother is also a CBSA employee). She sought the services of daycare centres, only to learn that they were unavailable because she needed a very early drop-off time, which was not practical because only on rare occasions, when she could not make arrangements with her husband and her mother, would a daycare even have been necessary.

[69] The grievor needed only one day or so per month. The employer made her choose between providing childcare or going to work. Thus, she argued, the *prima facie* case has been made out.

[70] The grievor also submitted *Smolik v. Seaspan Marine Corporation*, 2021 CHRT 11, for more context on the issue of personal choice. It states as follows at paragraphs 68 to 73:

> *[68] The Respondent disputed this second element of the* Johnson *test. The Respondent submitted that Mr. Smolik's legal obligation to provide childcare for his children did not mean that he was the only one who could provide it.*

> *[69] The Respondent relied on a number of cases to support its position. In* Flatt v. Treasury Board (Department of Industry)*, the grievor was unsuccessful in arguing that her employer had a duty to accommodate her in allowing to [sic] work from home so that she could continue to breastfeed her child. The Board in applying* Johnstone*, made a legal distinction saying while it was her legal obligation to provide nourishment to her child, it was her personal choice on how to provide that nourishment.*
>
> *[70] I would distinguish* Flatt *on the basis that in* Flatt*, the parent's desire to breastfeed during office hours is factually far different from Mr. Smolik's legal obligation as the only parent to provide childcare to his children when his employment options were to be away from home for weeks at a time or be called to work on short notice at irregular hours.*
>
> *[71] The Respondent also cited* Canadian National Railway Co. v. Unifor Council 4000*, where the grievor had her previous position abolished. The arbitrator did not find that the grievor established a prima facie discrimination on the basis of family status saying the grievor's childcare requirements (medical knowledge and English fluency) were not based on legal requirements but rather based on personal preference.*
>
> *[72] This case is distinguishable in that Mr. Smolik's children were young, and they were mentally and emotionally affected by their mother's death. Mr. Smolik was not seeking any specific type of childcare based on his personal preference. As their father and sole parent, he made an assessment was that he was their only suitable caregiver at the time he was ready to return to work. Seaspan did not challenge Mr. Smolik's initial assessment nor ask for medical evidence to support it or his childcare arrangements when they tried to accommodate his return to work.*
>
> *[73] The Federal Court in* Canadian National Railway v. Seeley *said that in a claim for discrimination under family status, the Complainant needed to provide some evidence but did not create a high standard of proof.*

[71] At paragraph 84 of *Smolik*, the Canadian Human Rights Tribunal pays deference to the complainant as follows:

> *[84] The Tribunal should give some deference to a Complainant who is presumed to have the best knowledge of his children. I accept Mr. Smolik's belief that his childcare obligations were best met by him at the time he first indicated he was ready to return to work.*

[72] On the issue of operational requirements, the grievor submitted an arbitration and dispute resolution case, *Canadian Pacific Railway Company v. Teamsters Canada Rail Conference*, 2017 CanLII 81911 (CA LA). Page 18 of that decision states, "The

Company could not simply assert that operational requirements made it impossible to extend the Grievor's unpaid leave of absence, it had to prove it to the point of undue hardship."

[73] In this case, argued the grievor, there is no proof of undue hardship. Thus, these grievances should be granted and considered to be continuing grievances, with significant awards granted to her under the *CHRA*.

B. For the employer

[74] The scope of these grievances is clear, the employer submitted. They are time- and date-specific and involve specific leave- and shift-change requests. The grievor could not expand their scope to include other incidents that the employer was not prepared to answer to.

[75] The parties agreed that the framework for analyzing family-status discrimination cases is laid out as follows in *Johnstone*, at para. 93:

> *[93] …* [I]*n order to make out a* prima facie *case where workplace discrimination on the prohibited ground of family status resulting from childcare obligations is alleged, the individual advancing the claim must show (i) that a child is under his or her care and supervision; (ii) that the childcare obligation at issue engages the individual's legal responsibility for that child, as opposed to a personal choice; (iii) that he or she has made reasonable efforts to meet those childcare obligations through reasonable alternative solutions, and that no such alternative solution is reasonably accessible, and (iv) that the impugned workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfillment of the childcare obligation.*

[76] Other cases submitted reinforce *Johnstone* as the definitive articulation of this test.

[77] The employer conceded the first and second criteria. The grievor had a child under her care and supervision, and the childcare obligation engaged her legal responsibility for that child, as opposed to a personal choice.

[78] With respect to the fourth criterion, the employer argued that in this case, the childcare obligation was not seriously interfered with. The circumstances in *Johnstone* involved the need for extensive rescheduling in the neighbourhood of six to seven times per month. This was found, in *Johnstone*, "… more than trivial or insubstantial

[interference] with the fulfillment of the childcare obligation." The present matter does not reveal anything near the same degree of interference, argued the employer. The few shifts in the spring and early summer that created a childcare gap did not amount to serious interference.

[79] The employer's case was centred on the third criterion. The grievor did not want to consider any option other than care at the hands of herself, her husband, or her mother. The employer argued that she could have done more to secure the services of a caregiver and that her inflexible approach was not reasonable.

[80] The combined incomes of the grievor and her husband were more than sufficient to pay for childcare, argued the employer, but this was not done. The grievor testified to investigating four different daycare centres. This was not sufficient to discharge her obligation to show that all reasonable childcare alternatives were explored.

[81] For example, argued the employer, the grievor testified that parents (other than the grievor's mother) were not available as caregivers, but there was no evidence that other family members or friends were contacted. This, argued the employer, would have been a reasonable approach, but it was not done.

[82] The employer argued that it is difficult to believe that private-sector childcare options were not available to the grievor in Toronto. They most certainly were available, but the grievor did not want them. It was her personal choice to leave childcare solely in her hands and those of her husband and mother. This, argued the employer, was not reasonable.

[83] *Leclair v. Deputy Head (Correctional Service of Canada)*, 2016 PSLREB 97, stands for the proposition that the person seeking accommodation must be open to different options. It states this at paragraph 134:

> *[134] Many employees, like the grievor, think that finding an accommodation is carte blanche to be given the position of their choice because of the employer's duty to accommodate them to the point of undue hardship. This is a misconception; employees are not entitled to their preferred accommodations. They are entitled to reasonable accommodations that meet their identified needs. The employer in this case made the effort to find a reasonable accommodation based on the medical information it had been*

> *provided. The grievor was not willing to consider the options being put forward, and he delayed the process.*

[84] The grievor did not demonstrate reasonable attempts to secure alternate childcare arrangements, submitted the employer. In *Havard v. Treasury Board (Correctional Service of Canada)*, 2019 FPSLREB 36 at para. 119, the Board stated this:

> *[119] … The grievor's case is built on the assumption that her accommodation needs could be met only through what I consider perpetual shift exchanges because in her estimation, doing so had no cost implication for the employer. She was not prepared to consider in any meaningful way any other options, particularly the 250-day post offered by the employer or any changes to her husband's shift schedule, both of which in my opinion would have been reasonable options in the circumstances.…*

[85] Similarly, *Board of Education of Regina School Division No. 4 of Saskatchewan v. Canadian Union of Public Employees, Local 3766*, 2018 CanLII 122658 (SK LA), states as follows at paragraphs 104 to 106:

> *104. One of a parent's legal responsibilities is to provide care for his or her child. How a parent fulfills that responsibility is a question of choice. Remaining at home with the children is one such choice, but it is not the only one. Sometimes the range of choices may narrow to one – for example when the medical needs of the child dictate that the child's care can only be provided in the home and by the parent. In such circumstances, the choice is no longer a choice; it is a legal responsibility. However, in the Grievor's circumstances, there was insufficient evidence to suggest that the Grievor's choices were so restricted. The Grievor presented her subjective assessment of what is best for Hudson,* i.e. *home care provided by the Grievor. Beyond that, the Grievor offered a medical note indicating that "Hudson does not fair [sic] well in a social setting in a daycare etc." Such evidence goes no further than to establish the Grievor's preference to care for Hudson herself in her own home; it does not establish that this choice amounted to a legal responsibility.*
>
> *105. Under the third* Johnstone *factor, the Grievor has not demonstrated that reasonable efforts have been expended to meet her childcare obligations through reasonable alternative solutions, and that no such alternative solution is reasonably accessible. In other words, the Grievor has not demonstrated that she is facing a* bona fide *childcare problem. The Grievor remained steadfast in her original request for a home-based accommodation and did not make a reasonable effort to find a viable solution.*
>
> *106. Prior to the Grievor going on maternity leave for her second child, the Employer notified the Grievor that her position was to be*

> *relocated to the Division Office. The Grievor did not raise any concerns at that time. In the final month of her maternity leave, the Grievor requested a home-based accommodation on the basis of family status. It was only at this point, and at the request of the Employer, that the Grievor reached out to five childcare providers between August 22, 2016, and September 1, 2016. Additionally, the Grievor did not consider the option of a home-based nanny.*

[86] The grievor in this case did not even consider the last option (a nanny).

[87] Similarly, *Flatt v. Treasury Board (Department of Industry)*, 2014 PSLREB 2 at para. 187, states as follows:

> ***187*** *… The employer did discuss other possible accommodations with the grievor, but she ultimately refused to yield from her original request. Both parties have a role to play in the accommodation process, and the grievor did not explain why she needed a year (or a year and a half) of telework, or why (other than the cost) she could not use a daycare closer to work.*

[88] The failure to accept a reasonable offer of accommodation can be taken into account. The employer cited the FCA's case in *Attorney General of Canada v. Duval*, 2019 FCA 290 at para. 42, which stated, "The FPSLREB should also be mindful that what is required is reasonable but not perfect accommodation as the Supreme Court of Canada has underscored both in *Renaud* at pp 994-995 and in *Elk Valley Coal* at para. 56."

[89] Thus, argued the employer, the grievor did not make out a *prima facie* case of discrimination per the third *Johnstone* criterion. These grievances should be dismissed.

[90] If, in the alternative, it is found that a *prima facie* case was made out, the employer's position is that she was offered reasonable accommodation. In the fall of 2011, before the grievor returned to work from maternity leave, the employer granted her request to place her mother (another CBSA employee) on opposite shifts, to facilitate her childcare requirements.

[91] In every one of the five shifts she sought to be changed in January of 2012, the grievor was able to either arrange a shift change or take the day off. On one occasion, her shift was changed for her.

[92] For the November 25, 2012, absence, the accommodation offered was reasonable; the three hours of sick leave were ultimately coded as uncertified. She received what she had wanted: she was able to go home and care for her child.

[93] Also, with respect to remedy, should the grievances be allowed, the employer pointed to a lack of medical evidence to support the grievor's claims related to her pregnancy and her child's birth. With respect to the stress that she suffered, the employer submitted that any return to work following maternity leave will be stressful and that arranging childcare is just one of the many sources of stress that must be expected.

IV. Decision and reasons

[94] The grievor alleged that the employer discriminated against her based on her family status, in violation of clause 19.01 of the collective agreement, which reads as follows:

Article 19	***Article 19***
NO DISCRIMINATION	***ÉLIMINATION DE LA DISCRIMINATION***
19.01 *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 or ethnic origin, religious affiliation, sex, sexual orientation, family status, mental or physical disability, membership or activity in the Alliance, marital status or a conviction for which a pardon has been granted.*	***19.01*** *Il n'y aura aucune discrimination, ingérence, restriction, coercition, harcèlement, intimidation, ni aucune mesure disciplinaire exercée ou appliquée à l'égard d'un employé-e du fait de son âge, sa race, ses croyances, sa couleur, son origine nationale ou ethnique, sa confession religieuse, son sexe, son orientation sexuelle, sa situation familiale, son incapacité mentale ou physique, son adhésion à l'Alliance ou son activité dans celle-ci, son état matrimonial ou une condamnation pour laquelle l'employé-e a été gracié.*

[95] Section 226(2) of the Act provides that the Board may interpret and apply the *CHRA*. Section 7 of the *CHRA*, which was incorporated into article 19, provides that it is a discriminatory practice, in the course of employment, to differentiate adversely in

relation to an employee on a prohibited ground. To establish that the employer engaged in a discriminatory practice, a grievor must first establish a *prima facie* case of discrimination.

[96] I agree with the parties that *Johnstone* sets out the proper framework for analyzing the type of family-status-discrimination grievances that were the subject of the hearing. *Johnstone* remains a cornerstone of this area of the law and is frequently cited. In response to a *prima facie* case, an employer can present evidence to refute the allegation of *prima facie* discrimination, put forward a defence justifying the discrimination, or do both (see *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39, at para. 64).

[97] The parties submitted many cases on the issues raised at the hearing. I read and considered each one carefully. I will refer only to those that serve to illuminate the reasoning behind my decisions.

A. The grievor's argument that these are continuing grievances

[98] I must first dispense with the grievor's argument that these are continuing grievances.

[99] The grievances in files 566-02-11197 and 11198 are both dated November 26, 2012, and are both articulated by the grievor, in what I assume is her handwriting, as follows: "Duty to accommodate policy … denied accommodation on Nov 25, 2012 for 3 hrs leave".

[100] The grievor articulated as follows the issue that is the subject of the grievance in file 566-02-11205, dated February 12, 2012: "Management has violated my rights under section 19 of the Collective Agreement. By refusing my request for a shift change accommodation, management has shown discrimination towards me due to my family status."

[101] This same issue is articulated a little more expansively as follows in the grievance in file 566-02-11206, likewise dated February 12, 2012:

> *Management has not adhered to their own Duty to Accommodate Policy. Management has rejected my request for accommodation on the basis of family status without showing undue hardship,*

> *failing to respond in a timely manner, failing to take an active role in exploring and considering options / alternative approaches and solutions to accommodate the employee. Finally, management did not provide details in writing to justify its decision for requested accommodation being denied.*

[102] I agree with the employer that the issues are clearly articulated in the grievance forms that the grievor supplied. The grievances in files 566-02-11205 and 11206 obviously pertain to Superintendent Lebrun's email of January 23, 2012, denying the grievor the shift changes she requested for reasons having to do with her family status. The grievances in files 566-02-11197 and 11198 obviously pertain to the November 25, 2012, decision to deny the grievor a three-hour period of leave requested pursuant to a family-status obligation.

[103] At the hearing, I received an objection from the employer on the scope of the grievances in general, specifically about characterizing these events as continuing grievances. It quite rightly pointed out that it was unprepared to address workplace incidents not pertaining to the events of January 23, 2012, and November 25, 2012. Doing so would have been unfair to the employer. One example was the grievor's testimony about prenatal medical appointments, where leave was either granted or denied. She mentioned other events in her testimony that the employer was not prepared to address because they were outside the scope of the grievances.

[104] It is important to understand some of the context in which grievances can arise. But there is a difference between (a) receiving evidence for the sake of context, and (b) expanding the scope of a grievance to include events not specified in it.

[105] At the hearing, it was important for me to understand, in general terms, some of the challenges the grievor faced at work when it came to resolving conflicts between her work schedule and her family-status-related needs. The additional context helped me understand her frustration at the inconsistency she claims to have experienced. All too often, she says that she would receive a different answer depending on the individual making the decision at the time. Sometimes, things seemed to have gone well for her, and sometimes, they did not.

[106] I am not prepared to expand the scope of the grievances to include events not specified in them. I am not swayed by the arguments and case law that the grievor supplied to support her contention that these grievances should be considered

continuing and ongoing. I do accept that managing her work and childcare obligations gave rise to continuing anxiety, but as I will explain in further detail below, I find the incidents at issue are separate events.

[107] Paragraph 53 of *Dunlop* is instructive. My finding that the two grievances are separate and discrete incidents do not make this:

> *… the kind of case in which there are allegations of repeated harassment or discrimination. In such cases, provided that the allegations are sufficiently similar in character and occur with sufficient frequency, a continuing contravention may be established ….*

[108] To be clear, for the reasons which follow, while I find the grievor has established a *prima facie* case of discrimination with respect to the refusal to change her shifts, however, I do not find that she established such a case pertaining to the leave denial.

A. Decision with respect to the grievances in files 566-02-11205 and 11206, pertaining to the January 23, 2012, refusal to change shifts

[109] As mentioned previously, the employer conceded the first and second criteria of the *Johnstone* test. There is no dispute that the grievor had a child under her care and supervision, and that her childcare obligation engaged her legal responsibility for that child.

[110] With respect to the third criterion, I find that the grievor established that she was faced with a true childcare problem. The questions posed by the third criterion are, did the grievor make reasonable efforts to meet her childcare obligations through reasonable alternative solutions? Was no such alternative solution reasonably accessible?

[111] In my view, the context in which the grievor requested to change the shifts is an important starting point. The grievor was responding to the employer's offer to implement a variable shift schedule arrangement to coordinate the care and supervision of her child. As part of that exchange, it was reasonable for her to explore whether the shifts she identified as conflicting with the implementation of that arrangement could also be switched, before exploring other childcare alternatives.

[112] In this regard, the commentary at paragraph 84 of *Smolik* resonates with me: "The Tribunal should give some deference to a Complainant who is presumed to have the best knowledge of his children."

[113] Despite the employer's arguments, I have no reason to second-guess the grievor's decision to place childcare duties in the hands of the three people she knew were best able to provide it. Doing so was not taking the easy way out; on the contrary, this childcare choice entailed a great deal of work. She had to liaise with her employer, as well as her husband's, to put the plan in place. She had to request a letter from the Peel Regional Police Service about her husband's duties, to justify the childcare plan to her employer.

[114] This plan required the grievor's constant attention, and she made it work. She received her scheduling well in advance, she did the necessary cross-referencing with the other caregivers' schedules to identify the dates on which gaps would occur and she approached the employer to find a solution.

[115] While the variable shift schedule arrangement was granted on December 9, 2011, the employer did not provide a response to the other shifts that she needed rescheduled. As of January 23, 2012, she had still not yet received a response from the employer. After following up, the employer denied the grievor's request indicating that she could opt to do shift changes with other BSO's, book leave or investigate alternative care. In this regard, the employer argues that, ultimately, for every one of the five shifts the grievor sought to change she was able to either arrange a shift change or to take the day off.

[116] I do not accept the employer's argument that the grievor failed to establish a *bona fide* childcare problem. The evidence showed that the option of shift changes with other BSO's was not viable given the limited pool of employees to switch with. She expressed this concern to Superintendent Lebrun to no avail. She later took her concerns to Chief Mailet, who ultimately arranged a shift change for the grievor for one of her shifts, on May 30, 2012.

[117] In terms of finding alternative care, the grievor explained to Superintendent Lebrun that finding such alternative care was difficult for one day a month. In this regard, I find the grievor's explanation about daycare centres reasonable. The evidence was that the daycares she contacted would not accept her child for only one day per

month. At the same time, I accept that it is not a reasonable solution to pay for full time daycare enrollment when the childcare need is only for one day per month. Similarly, I do not find that the grievor failed in her obligations to make reasonable efforts to meet her childcare obligations by not hiring a permanent caregiver (referred to somewhat archaically as a "nanny" in one of the decisions) for one day a month. The grievor was, in fact, able to find alternative care for her shift on February 8, 2012.

[118] This leaves the three shifts for which she had to take leave on March 28, April 24, and June 26, 2012. Again, the context for the grievor's request to switch these shifts was that she wanted to work them and approached the employer to find a solution to do so. In my view, in that circumstance and considering the steps taken by the grievor to balance her family life and workplace responsibilities, requiring her to take leave was not a reasonable solution. In those situations, having to take leave proves that the grievor was unable to meet her work obligations and fulfill her parental obligations.

[119] With respect to the fourth of the *Johnstone* criteria, the grievor submitted that the five shift changes requested, which were denied on January 23, 2012, were more than trivial or insubstantial and were part of a regularly recurring pattern.

[120] The way the shift schedules of the three caregivers played out, the grievor foresaw, months in advance, the specific days (usually a Tuesday or a Wednesday, according to the grievor) on which all three would be at work and no one would be available to watch the child. It did not happen often, usually once but maybe twice per month.

[121] I agree with the grievor that the fourth *Johnstone* criteria does not require "serious" interference; the applicable threshold is "more than trivial or insubstantial" interference with the fulfillment of the childcare obligation. It is not helpful to arbitrarily draw a line at the number of shifts that were requested to be rescheduled. A principled approach is to examine the underlying interests that are in conflict. In the context of this case, the five shifts identified by the grievor were in response to the employer's offer to implement a variable shift schedule arrangement to coordinate the care and supervision of her child. In my view, the complainant established that her shifts on March 28, April 24, and June 26, 2012, interfered in a manner that was more than trivial or insubstantial with the fulfillment of the grievor's care and supervision of

her child. She could not change or work those shifts, nor find alternative care on those days. Her only option, as provided by the employer, was to take leave.

[122] In this sense, I do not find the grievor's decision to take leave for childcare to fall into the realm of "personal choice" as described by the Federal Court of Appeal in *Johnstone.* I find, based on the criteria in *Johnstone*, that the grievor has made out a *prima facie* case of discrimination on the prohibited ground of family status resulting from childcare obligations.

[123] The employer's evidence was that Superintendent Lebrun and Ms. Singh were part of a team tasked with rescheduling shifts for accommodation purposes. Why they did not do it in January of 2012 or in response to the grievor's subsequent communications is anyone's guess. No explanation was ever provided to the grievor. Nor was an explanation provided to me at the hearing. Otherwise, the employer did not raise a *bona fide* occupational requirement argument pursuant to s. 15(1)(a) of the *CHRA*.

[124] Superintendent Lebrun's testimony makes it clear that the employer accepts its obligation to change shifts when a need for accommodation arises. The primary function of her unit was to address employees' accommodation needs.

[125] In this regard, the grievor led hearsay evidence, unchallenged, in the form of an email from a colleague dated February 14 (I assume the year was 2012; the email does not contain the year, but the text obviously refers to the January 23, 2012, shift-changes refusal). The grievor's colleague wrote, in part, as follows:

> *… Since my husband works shifts as well, when I wrote my proposal to [sic] the shifts I wanted to work, I put right in the proposal that anytime our shifts overlapped, or both fell on a weekend when we do not have babysitter* [*sic*]*, one of our shifts will need to be changed that day or week. I even clearly wrote out approximately how many times a month this may happen. Anyway, my accommodation was approved with this as part of it. Now anytime our shifts do not work for daycare, etc, we email Marc or Steve R (scheduling supers) and they make changes. I emailed them today with about 15 days in March I need changed and it was done in less than 30 minutes. Most of the changes were from me working an afternoon shift to a day shift, and this was done without question.…*

[126] There is handwriting on this exhibit, which I presume is the grievor's, stating that "her husband is a Supt, approved accommodation right away". Again, this obvious form of hearsay evidence was not challenged.

[127] My concerns about hearsay evidence aside, I am left with an uneasy feeling. The grievor testified to taking her predicament about her May 30, 2012, shift to a different superintendent, who seems to have pulled the right strings to arrange a shift change. The source of my unease is that it all seems to come down to the individual who makes the accommodation decision on any given day, which suggests inconsistent and differential treatment.

[128] Family-status accommodation issues are not new to the CBSA. It chose to ignore its own policy, which was entered into evidence. Under the appendix entitled, "Process for Duty to Accommodate Requests", paragraph 10 reads as follows: "The manager will provide details in writing to justify a decision where an accommodation has been denied." Despite many requests for an explanation, none was ever given for the January 23, 2012, refusal, nor was one provided to the subsequent concerns raised by the grievor in response to the employer's proposed alternatives to rescheduling the shifts.

[129] Weighing all the evidence on a balance of probabilities, I find that he grievor established that she suffered an adverse impact as a result of the decision to not reschedule her shifts on March 28, April 24 and June 26, 2012, and that her family status was a factor in that adverse impact. The employer's approach to the request to reschedule the shifts and its lack of a response to the subsequent concerns raised by the grievor in this regard caused her a great deal of stress. It was not her choice to take leave and, in my view, she should not have had to do this where she established a *bona fide* childcare need and the evidence indicates that rescheduling for purposes of accommodation was accessible and would have enabled the grievor to work those shifts. As such, I find that the grievor established that there was discrimination and I allow the grievances.

[130] The Board must make an order that it considers appropriate in the circumstances (see s. 228(2) of the Act). First, given my finding that it was not the grievor's choice to take leave for her shifts on March 28, April 24, and June 26, 2012, and that those shifts should have been rescheduled, it is appropriate that that leave be

credited to her. The evidence shows that she used 9.58 hours of her annual leave bank on March 28, 2012, 2 hours on April 24, 2012, and 9.58 hours on June 26, 2012.

[131] Pursuant to s. 226(2) of the Act, the Board may also give relief in accordance with sections 53(2)(e) or 53(3) of the *CHRA*. Section 53(2)(e) of the *CHRA* provides:

53(2) *If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:*	***53(2)*** *À l'issue de l'instruction, le membre instructeur qui juge la plainte fondée, peut, sous réserve de l'article 54, ordonner, selon les circonstances, à la personne trouvée coupable d'un acte discriminatoire:*
(e) *that the person compensate the victim, by an amount not exceeding twenty thousand dollars, for any pain and suffering that the victim experienced as a result of the discriminatory practice.*	***e)*** *d'indemniser jusqu'à concurrence de 20 000 $ la victime qui a souffert un préjudice moral.*

[132] The aim of a remedial order under s. 53(2)(e) is not to punish the employer but to eliminate, to the extent possible, the effects of the discriminatory practice. Given that $20 000 is the maximum that may be awarded, this amount is generally reserved for only the most serious cases (see *R.L. v. Canadian National Railway Company*, 2021 CHRT 33, at paras 205-206).

[133] Earlier in this decision, mention was made of the grievor's testimony about certain adverse medical effects she experienced during a later pregnancy and childbirth that she attributed to the stress arising from family-status-related issues at work. There was no additional evidence to support such a serious claim. Further, given my finding that the grievances at issue were separate events and that the complainant did not establish a continuing pattern of discrimination, I do not find there to be a link to her misfortune (the details of which are deliberately omitted to protect her privacy)

and the employer's actions in these grievances. I cannot accept this aspect of the grievor's submissions with respect to remedy.

[134] I accept, however, that the denial of the shift changes, the employer's lack of an explanation for the denial and its lack of a response to the subsequent concerns raised by the grievor in this regard did cause the grievor a certain amount of anguish, above and beyond what the employer argued was the normal stress of arranging childcare following a maternity leave. While the grievor was able to arrange childcare for two of the shifts at issue, she ultimately was not able to do so for the three other shifts.

[135] I also take into account the relatively short span of time (February to late June) over which the grievor was subject to the discriminatory effects of the January 23, 2012, denial of her request for shift changes.

[136] The cases provided did not prove to be very helpful in terms of remedy. Of note, *Johnstone,* although it involved similar issues with the same agency, described a much more serious situation, including evidence of injury to Ms. Johnstone's person, her personal and professional confidence, and her reputation. An amount of $15 000 was awarded in that case. Comparatively, and in light of the evidence in this case, I find an award of $3000 for pain and suffering is appropriate in the circumstances.

[137] Section 53(3) of the *CHRA* provides:

53(3) *In addition to any order under subsection (2), the member or panel may order the person to pay such compensation not exceeding twenty thousand dollars to the victim as the member or panel may determine if the member or panel finds that the person is engaging or has engaged in the discriminatory practice wilfully or recklessly*	***53(3)*** *Outre les pouvoirs que lui confère le paragraphe (2), le membre instructeur peut ordonner à l'auteur d'un acte discriminatoire de payer à la victime une indemnité maximale de 20 000 $, s'il en vient à la conclusion que l'acte a été délibéré ou inconsidéré.*

[138] The Federal Court in *Canada (Attorney General) v. Johnstone*, 2013 FC 113, at paragraph 155, indicated that s. 53(3) of the *CHRA* "…is a punitive provision intended to provide a deterrent and discourage those who deliberately discriminate". It further indicated that "[a] finding of wilfulness requires the discriminatory act and the

infringement of the person's rights under the *Act* is intentional". While a finding of recklessness "…usually denotes acts that disregard or show indifference for the consequences such that the conduct is done wantonly or heedlessly". Again, s. 53(3) of the *CHRA* provides for an award ranging up to $20 000.

[139] The employer did not follow its own policy with respect to the "Process for Duty to Accommodate Requests". Pursuant to that policy, it was supposed to provide details in writing to justify a decision where an accommodation has been denied. The grievor requested such a decision and, despite indicating it would provide one, no explanation has ever been provided by the accommodations committee for its decision to refuse the grievor's request for the shift changes. To me, this indicates that the employer neglected to fully understand and appreciate the grievor's situation.

[140] I do not find, based on the evidence and the circumstances of the case, that the employer's actions were intentional or willful. However, I do find that it acted recklessly, in that its conduct showed disregard or indifference for the grievor's situation. The conduct was not so egregious as to warrant an award of special compensation at the high end of the range.

[141] There are important differences between this case and the facts of *Johnstone*, including that the tribunal in that case found that the CBSA ignored efforts both externally and internally to bring about change with respect to its family status policies of accommodation and that the CBSA denied that a duty to accommodate exists on grounds of family status arising for childcare responsibilities. The amount awarded in that case was $20 000. I believe that the remedy must be adjusted downward accordingly in this case. I find an award in the amount of $3000 under s. 53(3) of the *CHRA* is appropriate in the circumstances of this case.

[142] These remedies apply globally to the grievances in files 566-02-11205 and 11206 because they both pertain to the same set of facts.

B. Decision with respect to the grievances in files 566-02-11197 and 11198, pertaining to the leave denial on November 25, 2012

[143] The grievor learned that her husband had been called to duty by the Peel Regional Police Service on November 22, 2012, three days in advance of her shift on November 25, 2012. She testified that as a member of a specialized team, he frequently gets called out to effect arrest warrants, on little to no notice. This was such an

occasion. The grievor testified that on this occasion, her mother was unavailable as well. She chose to use some of her annual leave balance. Her leave application was refused on November 22, 2012, for operational reasons.

[144] The grievor resubmitted her application on November 23, 2012, specifying in handwriting that the requested leave was related to her family status. The leave request was again denied. The problem was that it was Grey Cup Sunday, and many employees had already been granted the day off. Chief Doxey explained, "There have been several last minute leave requests for Sunday that have been denied as significant leave has already been granted."

[145] On November 25, the grievor argues that she was forced to go to work, with the prospect of her child being left without care from 13:00 onward. I find that the grievor did not establish this claim or that she was faced with a *bona fide* childcare problem that day, as per the third of the *Johnstone* criteria. Aside from the grievor's assertions about the unavailability of her husband and mother that day, no further evidence was provided. Unlike the context of the first set of grievances, where the need for the variable shift schedule and the subsequent shift changes was supported by various information about the caregivers' schedules, no such details have been provided about the situation between November 22 and 25, 2012.

[146] Similarly, no evidence was advanced in terms of efforts made by the grievor to meet her childcare obligations through reasonable alternative solutions. Without more, I cannot accept that under the circumstances, no alternative solution was reasonably accessible to her following the leave denial on November 23 such that she was forced to go to work with the prospect of her child being left without care. Without addressing these elements, I find that the grievor has not substantiated her claim of discrimination.

[147] Along the same lines, aside from an email to Chief Doxey on November 23, 2012, indicating that her husband worked at 15:00 on November 25, 2012, and that she would need to be home for childcare, and then subsequently resubmitting a vacation leave request form indicating "family status issue", no other information was provided to the employer until the day in question. In his summary of the events of November 25, 2012, Superintendent Phillips includes his observation, as follows:

> *… She wanted to explain to me that she was feeling stressed about the whole situation and she wanted to know what her options were if she wasn't feeling good. I asked her what she meant and she said that she needed to go home at 1300hrs for family status reasons. I explained to her if she wasn't feeling well and needed to leave sick, then I would be requesting a doctor's note from her for the time….*

[148] This summary, and the grievor's testimony about her interaction with Superintendent Phillips at work on November 25, 2012, does not shed any additional light on any childcare problem that day. Observing that she was not feeling well, he offered her the opportunity to go home on sick leave at 1:00 p.m. but to obtain a doctor's note to justify it. The subsequent dispute over the doctor's note also does not address the childcare issue on November 25, 2012. Ultimately, it is for the grievor to establish a *prima facie* case of discrimination. Superintendent Phillips' approach to the situation that day does not advance the grievor's claim regarding discrimination.

[149] For these reasons, I find that the grievor did not establish that the employer discriminated against her on the basis of family status on November 25, 2012. As such, I dismiss the grievances in files 566-02-11197 and 11198.

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

(The Order appears on the next page)

V. Order

[151] The grievances in files 566-02-11197 and 11198 are dismissed.

[152] The grievances in files 566-02-11205 and 11206 are allowed.

[153] The employer will credit the leave that the grievor used on March 28, 2012 (9.58 hours), April 24, 2021 (2 hours), and June 26, 2012 (9.58 hours).

[154] The employer will pay the grievor $3000 in compensation for pain and suffering under s. 53(2)(e) of the *Canadian Human Rights Act*.

[155] The employer will pay the grievor $3000 for recklessly engaging in a discriminatory practice under s. 53(3) of the *Canadian Human Rights Act*.

June 23, 2022.

James R. Knopp,
a panel of the Federal Public Sector
Labour Relations and Employment Board