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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

DANNY DUVAL

Grievor

and

TREASURY BOARD
(Correctional Service of Canada)

Employer

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

In the matter of an individual grievance referred to adjudication

Before: Renaud Paquet, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Émilie E. Joly, counsel

For the Employer: Philippe Giguère, counsel

Heard by videoconference,
August 4, 2022.
[FPSLREB Translation]

REASONS FOR DECISION **FPSLREB TRANSLATION**

I. Individual grievance referred to adjudication

[1] On August 1, 2019, Danny Duval ("the grievor") filed a grievance challenging the July 19, 2019, decision of the Correctional Service of Canada ("the employer") to stop paying him under clause 30.15 of the collective agreement then in effect between the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN ("the bargaining agent") and the Treasury Board for the correctional services (CX) group (expiry date: May 31, 2018; "the collective agreement"). The grievor asked that the employer pay him the salary and benefits that it should have paid him, retroactively to July 19, 2019. He also claimed compensation for damages. At the hearing, he specified that in accordance with clause 30.15, he should have been paid until February 5, 2020.

[2] Clause 30.15 of the collective agreement deals with paid injury-on-duty leave and reads as follows:

30.15 *An employee shall be granted injury-on-duty leave with pay for such reasonable period as may be determined by the Employer when a claim has been made pursuant to the* Government Employees' Compensation Act*, and a Workers' Compensation authority has notified the Employer that it has certified that the employee is unable to work because of:*	***30.15*** *L'employé-e bénéficie d'un congé payé pour accident de travail d'une durée fixée raisonnablement par l'Employeur lorsqu'une réclamation a été déposée en vertu de la* Loi sur l'indemnisation des agents de l'État *et qu'une commission des accidents du travail a informé l'Employeur qu'elle a certifié que l'employé-e était incapable d'exercer ses fonctions en raison :*
a. personal injury accidentally received in the performance of his or her duties and not caused by the employee's willful misconduct, *or*	*a. d'une blessure corporelle subie accidentellement dans l'exercice de ses fonctions et ne résultant pas d'un acte délibéré d'inconduite de la part de l'employé-e,* *ou*
b. an industrial illness or a disease arising out of and	*b. d'une maladie ou d'une affection professionnelle*

in the course of the employee's employment,	*résultant de la nature de son emploi et intervenant en cours d'emploi,*
if the employee agrees to remit to the Receiver General for Canada any amount received by him or her in compensation for loss of pay resulting from or in respect of such injury, illness or disease providing, however, that such amount does not stem from a personal disability policy for which the employee or the employee's agent has paid the premium.	*si l'employé-e convient de verser au receveur général du Canada tout montant d'argent qu'il reçoit en règlement de toute perte de rémunération résultant d'une telle blessure, maladie ou affection, à condition toutefois qu'un tel montant ne provienne pas d'une police personnelle d'assurance-invalidité pour laquelle l'employé-e ou son agent a versé la prime.*

[3] The employer denied the grievance at the first and second levels of the grievance process and did not respond to it at the final level. The grievor referred it to adjudication on April 3, 2020, with the bargaining agent's support.

II. Summary of the facts

[4] The facts of the grievance are not in dispute. The parties submitted an agreed statement of facts on July 28, 2022, which was accompanied by a series of documents that they submitted jointly. In the following paragraphs, I will summarize the main points of the statement and, if necessary, the contents of the submitted documents.

[5] The grievor has worked for the employer as a correctional officer at the CX-01 group and level since November 12, 1995. On January 31, 2008, he suffered an injury on duty after death threats and intimidation from an inmate. A diagnosis of post-traumatic stress disorder followed the injury.

[6] On September 26, 2017, a similar incident occurred during the grievor's shift at Cowansville Institution. He left work and went to the emergency department the same day. Then, on October 3, 2017, he went to the Brome-Missisquoi-Perkins hospital, where he saw Dr. Ouimet, who completed a medical report for the Commission des normes, de l'équité, de la santé et de la sécurité du travail (CNESST). In the report, Dr. Ouimet prescribed leave from work until October 16, 2017, inclusively, as well as psychological counselling.

[7] The grievor completed the *Worker's Claim* and *Avis de l'employeur et demande de remboursement* forms. He gave them to the employer, which signed them on October 10, 2017. On October 11, 2017, his file was sent to Employment and Social Development Canada (ESDC). On October 16, 2017, the ESDC sent his claim to the CNESST.

[8] On October 11, 2017, the grievor went to the Groupe de médecine familiale de la Clinique médicale de Bromont, where he saw Dr. Rivest. She prescribed a continuation of the leave and psychotherapy. Dr. Rivest then forecasted a foreseeable 12-week consolidation period. She described the employment injury as stable.

[9] On November 8, 2017, the grievor again saw Dr. Rivest, to discuss his post-traumatic stress disorder. She prescribed psychotherapy and 1 month of leave. She also stated that the foreseeable consolidation period was 12 weeks and described the employment injury as stable.

[10] On November 22, 2017, the CNESST made an eligibility decision on the grievor's claim for relapse, recurrence, or aggravation, accepting it. The CNESST also confirmed a connection between the post-traumatic stress disorder that manifested on September 26, 2017, and the grievor's initial employment injury on January 31, 2008.

[11] After the CNESST's favourable decision, the grievor obtained injury-on-duty leave retroactive to the moment he stopped working, under the provisions of clause 30.15 of the collective agreement.

[12] On December 6, 2017, the grievor saw his family doctor, Dr. Parissier, about his post-traumatic stress disorder. Dr. Parissier prescribed psychological counselling and 1 month of leave. He also stated that the foreseeable consolidation period was 12 weeks and described the employment injury as stable.

[13] On January 5, 2018, the grievor saw Dr. Parissier, who prescribed psychotherapy and another month of leave. He also stated that the foreseeable consolidation period was 12 weeks and described the employment injury as deteriorated.

[14] On February 2, 2018, the grievor saw Dr. Parissier, who prescribed psychotherapy follow-up and leave, this time indeterminate. He also stated that the foreseeable consolidation period was 12 weeks and described the employment injury as stable.

[15] On March 16, 2018, the grievor saw Dr. Parissier, who prescribed psychotherapy follow-up and indeterminate leave. He also stated that the foreseeable consolidation period was 12 weeks and described the employment injury as stable.

[16] On April 27, 2018, the grievor saw Dr. Parissier, who prescribed psychotherapy follow-up and indeterminate leave. He also stated that the foreseeable consolidation period was 12 weeks and described the employment injury as stable.

[17] On May 31, 2018, the grievor saw Dr. Parissier, who prescribed psychotherapy follow-up and one month of leave. He also stated that the foreseeable consolidation period was eight weeks and described the employment injury as stable.

[18] On July 5, 2018, the grievor saw Dr. Parissier, who prescribed continuing the psychotherapy. He also stated that the foreseeable consolidation period was eight weeks and described the employment injury as stable. The medical report also stated that the grievor would be unable to return to work as a correctional officer due to his history and the current issue. A handwritten note from the doctor stated, "[translation] in a penitentiary".

[19] On August 10, 2018, the grievor saw Dr. Parissier, who then prescribed psychotherapy follow-up. He also stated that the foreseeable consolidation period was 16 weeks and described the employment injury as a condition improved. He then wrote, "[translation] given reassignment to potential new employment, improvement in overall condition".

[20] On November 22, 2018, the grievor saw Dr. Parissier, who then completed a medical report on a CNESST form, entitled "[translation] Final Report". Dr. Parissier found that there was a permanent physical or mental impairment, along with functional limitations that had aggravated the earlier functional limitations. Dr. Parissier "[translation] consolidated" the grievor's injury on November 22, 2018, and asked the CNESST to refer the grievor to a psychiatrist to assess his sequelae. Dr. Parissier's diagnosis reads, "[translation] anxiety and chronic post-traumatic stress state exacerbated since the employment events of September 2017".

[21] The employer's "[translation] Labour Relations Bulletin 2018-01 - Injury-on-Duty Leave" ("bulletin 2018-01") states as follows:

[Translation]

…

*The collective agreement and the current Treasury Board of Canada Secretariat (TBS) policy on **injury-on-duty leave** state that in virtually all cases in which an employee is injured from an occupational accident or condition confirmed by a provincial workers' compensation board (WCB), the employee is entitled to **injury-on-duty leave** with full normal pay for a reasonable period determined by the employer, in this case the CSC.*

*In accordance with TBS policy, departments are expected to periodically review such cases to confirm an ongoing disability and the related absence from work to support providing injury-on-duty leave since it should not be granted to any employee who is found fit to work, including modified duties when available, or to an employee who cannot return to work in the foreseeable future. The CSC has established two specific mandatory periods for reviewing **injury-on-duty leave** cases of correctional officers (CX).*

*A) **Review after 130 days:*** *Transferring **injury-on-duty leave** compensation (to the workers' compensation board) should be considered and generally implemented if one of the following criteria is met:*

1. *the treating physicians' prognosis and/or the WCB's opinion on the employee's return to work indicate that the employee will not return to work as a CX in the foreseeable future.*
2. *the employee is no longer eligible for WCB-approved vocational rehabilitation or is no longer participating in WCB rehabilitation objectives.*
3. *there is no treatment program recommended by treating physicians and approved by the WCB.*

*B) **Review after 2 years**. Transferring injury-on-duty leave compensation (to the Workers' Compensation Board) should be considered and generally implemented when no return to work is possible within the next two months, as confirmed by the WCB, unless there is a WCB-approved treatment plan with a defined end date.*

**** Beginning when an injured employee is on leave and throughout the employee's recovery period, his or her case is reviewed on a regular cycle; if any of the established criteria are met, transfer to the WCB compensation system may take place.***

[Emphasis in the original]

[22] On July 16, 2019, the employer decided to end the grievor's injury-on-duty leave and transferred his file and the compensation issue to the CNESST. In a document dated July 16, 2019, the Warden of Cowansville Institution referred to the content of bulletin 2018-01 and then justified his decision as follows:

> [Translation]
>
> …
>
> *In this case, the employee received **469** days of injury-on-duty leave. The Joint Committee conducted several analyses of Mr. Duval's case, including a final one on June 7, 2019. In addition, the medical notes reveal that no return to work will be possible as a guard and in a penitentiary.*
>
> *For these reasons, the CNESST will pay the compensation directly on 2019-07-25. Consequently, Mr. Duval will be on unpaid sick leave from the employer as of that date.*
>
> …
>
> [Emphasis in the original]

[23] On July 19, 2019, the employer informed the grievor that it was ending his paid injury-on-duty leave as of July 25, 2019. From that date on, he was on unpaid sick leave, and his last day paid by the employer was July 24, 2019.

[24] To date, meaning as of August 2022, the grievor has not returned to work for the employer. He is still on unpaid sick leave. His file was transferred to the CNESST, which is directly paying him income-replacement compensation for an injury on duty.

[25] On October 17, 2019, the CNESST called the grievor to a meeting on January 22, 2020, with psychiatrist Jean-Pierre Berthiaume. On February 5, 2020, Dr. Berthiaume produced a medical assessment report that found that the grievor continued to have residual post-traumatic stress disorder symptoms. The psychiatrist's opinion was that the grievor could not return to work as a correctional officer but that he could do other work.

[26] In his February 5, 2020, report, Dr. Berthiaume stated that he had seen the grievor at the request of the CNESST's consulting physician, to determine the existence and degree of permanent mental impairment and the existence and degree of functional limitations resulting from his employment injury.

[27] On August 6, 2021, the CNESST made a decision on the grievor's fitness to work. It found that he was able to hold suitable employment as a receiving clerk elsewhere in the labour market. However, the income from that employment would clearly be less than that of a correctional officer, so he would be entitled to income replacement compensation were he employed in that position.

[28] The employer denied the grievor's grievance at the first and second levels of the grievance process but did not respond to it at the final level. The first-level response includes the following rationale:

> [Translation]
>
> …
>
> *… However, the pay cut was made after the prescribed 130-day period because the cut was made after a total of 474 days; that is, 344 days later than the prescribed limit.*
>
> …

[29] At the second level, the employer justified its denial as follows:

> [Translation]
>
> …
>
> *… In this case, you have been absent since September 27, 2017, due to an injury on duty. You reached the 130th day of paid injury-on-duty leave on March 26, 2018. However, the employer did not agree to transfer your compensation until July 25, 2019, more than a year later, due to your specific situation, particularly related to your compensation. Thus, as provided by the Treasury Board Secretariat's policy and the bulletin mentioned earlier, management has reviewed your situation. Considering that your injury had still not consolidated as of July 25, 2019, and that no return to work was anticipated in the foreseeable future, management decided to transfer your compensation to the CNESST. Consequently, the employer's decision complies with the policies in force.*
>
> …

III. Summary of the arguments

A. For the grievor

[30] According to the grievor, the employer's decision to end his injury-on-duty leave on July 24, 2019, was unreasonable.

[31] Clause 30.15 of the collective agreement states that an employee shall be granted paid injury-on-duty leave once a labour relations board has certified that the employee is unable to perform his or her duties following an injury on duty or an illness resulting from performing his or her duties. It is clear that the grievor met the criteria.

[32] Bulletin 2018-01, which provides clarification, complements clause 30.15 of the collective agreement. According to bulletin 2018-01, the general rule is that the injured worker is compensated based on clause 30.15. Then, at certain intervals, the employer reviews the employee's situation and transfers responsibility for compensation to the workers' compensation board in cases in which, among other things, no return to work is in the foreseeable future.

[33] According to the grievor, the employer must have a clear medical opinion that the employee cannot return to work in the foreseeable future before it can make such a conclusion and transfer responsibility for compensation to the workers' compensation board.

[34] On July 16, 2019, the employer did not have a clear medical opinion certifying that the grievor was unable to return to work in the foreseeable future. Instead, it based its decision on the fact that he had been on injury-on-duty leave for 469 days and on an unclear medical report that was several months old. On that basis, the employer could not reasonably have concluded that a return to work was not possible in the foreseeable future.

[35] On February 5, 2020, a clear medical opinion confirmed that the grievor could no longer return to work in a CX position. Therefore, it was the date on which the employer could have ended the paid injury-on-duty leave and transferred responsibility for compensation to the CNESST — not as of July 24, 2019.

[36] The grievor referred me to the following decisions: *Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN v. Treasury Board (Correctional Service of Canada)*, 2017 FPSLREB 6; *Labadie v. Treasury Board (Correctional Service of Canada)*, 2006 PSLRB 90; and *Bouchard v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2002 PSSRB 81. He also referred me to certain provisions of the *Act respecting industrial accidents and occupational diseases*, CQLR c A-3.001.

B. For the employer

[37] The employer acknowledged that the grievor met the prerequisite conditions for applying clause 30.15 of the collective agreement. However, it pointed out that it has

some discretion with respect to determining the period of injury-on-duty leave. Clause 30.15 specifies that the period is "… as may be determined by the Employer …".

[38] The employer used its discretion reasonably. It ended the leave after 469 days as the medical reports contained no clear and specific statement about a return to work in the foreseeable future.

[39] The employer pointed out that bulletin 2018-01 is not part of the collective agreement and therefore creates no legal obligation on it.

[40] The issue is not whether the provisions of bulletin 2018-01 were correctly applied but whether the employer reasonably exercised the discretion conferred on it by clause 30.15 of the collective agreement. On that point, the burden of proof was with the grievor, who had to prove that the employer exercised its discretion unreasonably.

[41] The employer referred me to the following decisions: *EPAR Horticulture v. Simard*, 2018 QCTAT 6101; *Vaughan v. Canadian Food Inspection Agency*, 2010 PSLRB 74; *King v. Canadian Food Inspection Agency*, 2006 PSLRB 37; *Labadie*; *Bouchard*; *Levesque v. Treasury Board (Solicitor General of Canada)*, PSSRB File No. 166-02-15114 (19851217); *Colyer v. Treasury Board (National Defence)*, PSSRB File No. 166-02-16309 (19871216); and *Delios v. Canada (Attorney General)*, 2015 FCA 117.

IV. Reasons

[42] The parties agree that the grievor was entitled to paid injury-on-duty leave retroactively to September 26, 2017, because he met the eligibility conditions in clause 30.15 of the collective agreement. In fact, a claim was filed with the CNESST, which certified that he was unable to perform his duties due to a work-related injury or illness.

[43] Instead, the dispute is about the length of the injury-on-duty leave, specifically, the date on which it should have ended. The employer decided that it would end on July 24, 2019, while the grievor claimed that it should have ended on February 5, 2020.

[44] Therefore, the issue is whether the employer was unreasonable when it ended the leave on July 24, 2019. Recall that the grievor had the burden of proving on a

balance of probabilities that the employer was unreasonable in its determination of the length of the leave; that is, by ending it on July 24, 2019.

[45] I fully agree with the employer that bulletin 2018-01 is not part of the collective agreement. And the grievor did not claim otherwise. However, the employer cannot separate itself from bulletin 2018-01 and argue that the bulletin creates no obligation on it. In fact, it can hardly ignore the bulletin and at the same time claim that it determined a reasonable period for the leave granted to the grievor. Bulletin 2018-01 is a labour relations bulletin that the employer wrote. It is about the employer's understanding and its instructions for applying clause 30.15 of the collective agreement.

[46] In other words, once the eligibility conditions are met, clause 30.15 of the collective agreement requires the employer to grant paid injury-on-duty leave for a reasonable time, which it determines. Bulletin 2018-01 provides a framework or objectivity to the notion of a reasonable time. It helps qualify the reasonable nature of the employer's decision.

[47] My analysis is perfectly consistent with those of the adjudicators in *Levesque* and *Colyer*. In *Levesque*, the adjudicator found that guidelines do not have the legal effect that a collective agreement would, while in *Colyer*, the adjudicator determined that a bulletin can be useful when assessing an employer's use of discretionary power.

[48] I reviewed the decisions that the grievor submitted to support his arguments. The 2017 FPSLREB 6 decision involved the same parties. On one hand, the Board found that it had no jurisdiction over a policy grievance about the employer's changes to its injury-on-duty-leave policy. On the other hand, it found that the changes at issue altered the terms and conditions of employment after notice to bargain had been provided, which the *Act* does not allow. In *Labadie*, the grievor contested the length of the injury-on-duty leave. The adjudicator reviewed the evidence that the employer had in hand to make its decision and found that the employer's decision was not unreasonable. As in *Labadie*, the Board Member in *Bouchard* found that the employer's decision as to the leave period was not unreasonable. The *Labadie* and *Bouchard* decisions support the employer's claim more than the union's. In *Labadie*, the adjudicator found that a six-week period was reasonable and found nothing unreasonable in the fact that the employer relied on a medical opinion to end the

leave. In *Bouchard*, the adjudicator found that three months of leave based on a medical certificate was reasonable.

[49] The employer based its July 16, 2019, decision to end the injury-on-duty leave on July 24, 2019, on the fact that the grievor had been on that leave for 469 days and that the medical notes stated that no return to work as a CX would be possible (see paragraph 22). Then, on September 4, 2019, it denied the grievor's grievance at the first level on the basis that the end of the leave exceeded the prescribed 130-day limit. Finally, at the second level, the employer returned to the 130-day issue and added that on July 25, the grievor's employment injury had not yet consolidated and that no return to work was anticipated in the foreseeable future (see paragraph 29).

[50] I note some inconsistency in the employer's explanations for why it ended the injury-on-duty leave. That said, I will keep to the reasons it relied on to end the leave, namely, those cited in paragraph 22, which are the 469 days of leave and the inability to return to work as a CX.

[51] When making its decision, the employer had in hand a series of medical reports that were not all consistent with each other. The December 6, 2017, report established the foreseeable consolidation period as 12 weeks and described the employment injury as stable. The one from January 5, 2018, established the foreseeable consolidation period as 12 weeks and described the employment injury as deteriorated. The February 2, 2018, March 16, 2018, and April 27, 2018, reports established the foreseeable consolidation period as 12 weeks and described the employment injury as stable. The May 31, 2018, report established the foreseeable consolidation period as 8 weeks and described the employment injury as stable. Then, on July 5, 2018, the medical report established the foreseeable consolidation period as 8 weeks and described the employment injury as stable. The report also stated that the grievor could not return to work as a correctional officer, given his history and the current issue. Finally, on August 10, 2018, the medical report established the foreseeable consolidation period as 16 weeks and described the employment injury as a condition improved. The physician then wrote, "[translation] given reassignment to potential new employment, improvement in overall condition". Unlike the other reports, the August 10, 2018, report bears the words "[translation] Final Report" and indicates consolidation on November 22, 2018.

[52] It should be mentioned that in the practice of managing employment injuries and occupational illnesses, a specific meaning is given to the term "consolidation" and by extension to the term "to consolidate" in the definitions section of the *Act respecting industrial accidents and occupational diseases* ("the *AIAOD*"). The definition reads as follows: "**'consolidation'** means the healing or stabilization of an employment injury following which no improvement of the state of health of the injured worker is foreseeable" [emphasis in the original].

[53] It can be seen in the medical report history that the consolidation date changed constantly. However, starting July 5, 2018, the medical reports' contents were no longer the same. Of course, on July 5, the doctor forecasted a forthcoming period of consolidation, but at the same time, he stated that the grievor would be unable to return to work as a correctional officer. Nothing in the evidence suggests that the grievor questioned the July 5, 2018, medical report. The employer could reasonably have ended the injury-on-duty leave then, in accordance with its bulletin 2018-01, but it did not. Instead, it waited a year. The grievor certainly cannot blame it for that. Then, on August 10, 2018, the medical report established the consolidation period as 16 weeks in a report that it described as final and in which it established the consolidation as of November 22, 2018. That means that according to the physician, based on the *AIAOD* definition, as of that date, the grievor would be healed, or his employment injury would have no foreseeable improvement.

[54] Based on the documents adduced into evidence, I find that the grievor did not demonstrate to me on a balance of probabilities that the employer's decision to end his injury-on-duty leave was unreasonable.

[55] With the information the employer had in hand in July 2019, and considering clause 30.15 of the collective agreement and bulletin 2018-01, the employer did not act unreasonably when it ended the grievor's injury-on-duty leave on July 24, 2019.

[56] The grievor stated that only on February 5, 2020, did the CNESST consolidate his injury and establish that he could no longer work as a CX. I agree with that statement, but that is not the issue. According to bulletin 2018-01, which sets out the reasonableness of the employer's decisions, the date of consolidation must not be accounted for when analyzing the reasonable or unreasonable nature of the employer's

decision; instead, it is the medical opinion on a return to work in the foreseeable future.

[57] I would add that the employer's response at the first level of the grievance process is questionable. The 130 days referred to in bulletin 2018-01 do not constitute a prescribed time limit. Instead, they are a time frame during which the employer considers the injured worker's situation and may decide to end an injury-on-duty leave in the case of, among other things, no return to work as a CX in the foreseeable future.

[58] For all of the above reasons, I deny the grievor's grievance.

(The Order appears on the next page)

V. Order

[59] The grievance is denied.

August 18, 2022.

FPSLREB Translation

Renaud Paquet,
a panel of the Federal Public Sector
Labour Relations and Employment Board