Federal Court of Appeal | Cour d'appel fédérale

Date: 20191122

Docket: A-230-18

Citation: 2019 FCA 290

CORAM: **NADON J.A.**
GLEASON J.A.
RIVOALEN J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

DANY DUVAL

Respondent

Heard at Montréal, Quebec, on September 5, 2019.

Judgment delivered at Ottawa, Ontario, on November 22, 2019.

REASONS FOR JUDGMENT BY: GLEASON J.A.

CONCURRED IN BY: NADON J.A.
RIVOALEN J.A.

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REASONS FOR JUDGMENT

GLEASON J.A.

[1] In this application for judicial review, the applicant seeks to set aside the June 21, 2018 decision of the Federal Public Sector Labour Relations and Employment Board (the FPSLREB or the Board) in *Duval v. Treasury Board (Correctional Service of Canada)*, 2018 FPSLREB 52 (Can. F.P.S.L.R.E.B.) in which the Board found that the Correctional Service of Canada (CSC) failed to accommodate the respondent by reason of the process it followed in returning him to work after an absence due to a work-related injury. The FPSLREB awarded the respondent

damages equivalent to the value of the salary and benefits he would have earned had he been at work between the date he was medically able to return to work and the date of his return plus $5,000.00 for pain and suffering under paragraph 53(2)(*e*) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the CHRA).

[2] The applicant contends that in reaching this decision the FPSLREB fundamentally misapplied the law concerning accommodation as well as the principles governing the calculation of damages in a continuing grievance. I agree and, despite the deference due to the Board, conclude that the decision is unreasonable. I accordingly would set aside the Board's decision and remit the respondent's grievance to the Board for re-determination on the terms outlined below.

I. The Relevant Factual Background

[3] The respondent worked as a correctional officer at CSC, commencing his employment in November 1995. He was a member of a bargaining unit represented by the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN (the Union) and held a bilingual position at La Macaza Institution. In 2006, he was charged with assault of his spouse and was briefly incarcerated.

[4] In 2008, the respondent was attacked by a prisoner, who made death threats against him. As a consequence, the respondent suffered post-traumatic stress disorder and was unable to work. He was provided with paid injury-on-duty leave under article 30.16 of the collective agreement between the Union and CSC, which provided as follows:

[TRANSLATION]

Injury-on-duty leave

30.16 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:

(a) personal injury accidentally received in the performance of his or her duties and not caused by the employee's willful misconduct,

or

(b) an industrial illness or a disease arising out of and in the course of the employee's employment,

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.

[5] The respondent made an unsuccessful attempt to return to work in 2009. In 2010, his treating psychiatrist provided the opinion that the respondent was permanently disabled from working as a correctional officer at any institution. Following receipt by CSC of this opinion, the respondent's injury-on-duty leave ended, in conformity with article 30.16 of the collective agreement. The respondent thereafter received benefits from the Commission de la santé et de la sécurité du travail du Québec (the CSST), as the Commission was then known. Under the auspices of the CSST, the respondent undertook retraining as a heavy equipment operator, but, when his driver's licence was suspended following an impaired driving charge, he ceased retraining and determined that he wished to return to work as a correctional officer at CSC. On January 30, 2012, the respondent's treating psychiatrist authored an updated medical opinion,

indicating that the respondent was fit to return to work at CSC as a correctional officer so long as he was assigned to an Institution other than La Macaza.

[6] CSC did not learn of this amended medical opinion until February 20, 2012, and the CSST did not clear the respondent to return to an alternate CSC correctional officer position until March 13, 2012. Commencing in late February 2012, CSC began a search for an alternate position for the respondent and as part of the job-search process required that the respondent furnish an updated *curriculum vitae* and complete a transfer request, in which the respondent was asked to identify those CSC installations where he wished to work. CSC further required the respondent to complete an updated transfer request at the end of the fiscal year in March 2012. The respondent initially asked to be placed at Cowansville, Donnacona or Drummondville and in his updated request amended his preferences to Ottawa, Cowansville, Donnacona or the Regional Reception Centre.

[7] As many of the positions in the institutions that the respondent identified required incumbents to be bilingual, CSC also required that the respondent update his second language certification, which had expired. In March 2012, the respondent took and failed the written portion of the Federal Public Service language test, which he was required to pass before sitting the oral portion. He successfully re-sat the written evaluation a month later in April 2012 and then passed the oral evaluation in May 2012.

[8] There were no CSC positions available in Ottawa and there was no evidence before the Board to indicate that, at the relevant time, there was a permanent correctional officer position

available in Drummondville, at the Regional Reception Centre, or indeed, anywhere else at CSC, with the exception of bilingual positions at Cowansville and Donnacona. As for Cowansville, CSC determined that it could not place the respondent in a position there as his ex-spouse worked at that institution. CSC concluded that having the two work in the same institution would pose an unwarranted security risk, particularly because many of the inmates incarcerated at Cowansville were serving time for spousal abuse. Likewise, CSC determined that, at least initially, it could not place the respondent in a position at Donnacona as the inmate who had assaulted the respondent was incarcerated there and the local Union at Donnacona objected to the placement. Shortly after that inmate was paroled in May 2012, CSC placed the respondent in a permanent bilingual position in Donnacona on June 19, 2012.

[9] During the period of the job search, the respondent continued to receive benefits from the CSST. CSC did not reinstate the respondent's salary over the period from February to June 19, 2012 and his benefit coverage was not recommenced until he returned to work.

[10] One of the documents in evidence before the FPSLREB was a 2006 CSC Bulletin that the respondent alleges guarantees salary maintenance to someone in his position while a job search is ongoing. The applicant contests this interpretation, taking the position that Bulletin applies only before an employee is found to be totally permanently disabled and thus would not apply to the respondent, who sought to return to work after he partially recovered from a permanent disability. It is, however, common ground between the parties that, regardless of its import, this Bulletin does not form part of the collective agreement. The relevant portion of the Bulletin in question states:

[TRANSLATION]

I-D – INJURY-ON-DUTY LEAVE

(REFERENCE: CLAUSE 30.16)

For the purposes of this provision, CSC will respect the following criteria:

1. For all cases of employees on injury-on-duty leave, the definition of a "reasonable period" is not limited provided that the workers' compensation authority continues to consider the employee unable to work.

[…]

The current Treasury Board injury-on-duty leave policy indicates that in virtually all cases where an employee has been injured at work or experiences a work-related illness that has been confirmed by a provincial workers' compensation board, the employee is entitled to receive his or her usual pay for such reasonable period as is determined by the employer, in this case CSC. Injury-on-duty leave may continue to be authorized for injuries or conditions that are temporary in nature, unless the possibility of returning to work is highly unlikely. In the past, the guideline used to manage this type of leave was to limit it to a period of 130 days, save in exceptional cases, where the department had to conduct a review to determine whether the pay would continue.

As of June 26, 2006, even though the injury-on-duty leave policy and guidelines still remain in effect, the 130-day period no longer applies to injury-on-duty leave for correctional officers, regardless of the dates of the occupational illness or injury.

[…]

For example, when medical practitioners, supported by the WCB, are of the opinion that it is highly unlikely that an employee will return to work and that the employee is no longer eligible for a work reintegration plan with the WCB, or when the medical practitioners have not recommended a medical treatment program, the employee should be transferred over to the WCB's compensation plan.

When the employee's disability level allows for a return to work, the employee will receive injury-on-duty compensation until suitable work is offered by the Public Service of Canada or the WCB informs CSC that the employee is no longer eligible for vocational rehabilitation, in which case there will be a transfer over to the WCB's compensation plan.

[11] The respondent filed a grievance on August 27, 2012, contesting CSC's failure to accommodate him as of the date it received his medical note, or, in the original "dès la réception de mon papier médical".

[12] CSC objected to the timeliness of the grievance at the first level of the grievance procedure but did not mention timeliness in its other replies or in the response to the referral to arbitration. However, as part of its submissions to the FPSLREB, it argued in the alternative that, in accordance with the principles applicable to damages awards in continuing grievances, any compensatory damages the Board might award should only commence to run from 25 days prior to the date the grievance was filed, 25 days being the mandatory time limit for filing a grievance set out in the collective agreement.

II. The Decision of the FPSLREB

[13] With this background in mind, I turn now to review the salient portions of the Board's Reasons for Decision.

[14] After outlining the facts and the parties' respective arguments, the FPSLREB determined that, as the case was one involving an allegation of failure to accommodate and as CSC acknowledged that it had an obligation to accommodate the respondent, the test for a *prima facie* case of discrimination had been made out. The Board expanded on the point by stating that the three parts of the test for a *prima facie* case of discrimination as set out in *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, 64 N.R. 161 (S.C.C.) were met because the respondent was part of a protected group (those suffering from disability), he was

subject to adverse treatment (he was not immediately reinstated when he was fit to return to work) and there was a connection between the failure to return him to work and a protected ground (his disability made it necessary to search for an alternate position).

[15] The FPSLREB then moved to examine the adequacy of the accommodation offered by CSC and accepted that the hurdles CSC faced in returning the respondent to work – namely, his initial failure to qualify for a bilingual position, the presence of his ex-spouse at Cowansville and the presence of the inmate who had assaulted the respondent at Donnacona – were all legitimate and reasonable concerns. The Board also accepted that it was reasonable for CSC to have limited its job search to permanent positions. However, the Board went on to hold that CSC failed to adequately accommodate the respondent because it treated his request to return to work as a transfer request as opposed to recognizing that the respondent had a right to be reinstated. The Board held that the procedure adopted by CSC "deprived [the respondent] of his salary, which he had a right to because he was ready to work" (at paragraph 83 of the Board's Reasons). The FPSLREB underscored this finding a few paragraphs later, at paragraph 87 of its Reasons, where it stated:

> The [respondent] has a right to his salary and his benefits for the period in which he was fit to work. The fact that he cannot work at La Macaza made the transfer necessary as an accommodation measure. However, the transfer should not be a condition for paying the [respondent] his salary. He has the right to it because he is fit to work. The fact that he might not have duties to perform does not depend on his will. Instead, it is related to the employer's duty to offer him an accommodated position.

[16] The Board noted that in reaching this conclusion it was not relying on the CSC Bulletin (which it incorrectly identified as being a Global Agreement between CSC and the Union) as it was not part of the collective agreement.

[17] As concerns CSC's alternate position regarding limiting compensatory damages to 25 days before the grievance was filed, the Board reasoned as follows at paragraph 91 of its award:

> Failing to accommodate is discriminatory. Should this be the case, the discriminatory act qualifies for relief under the Act. The [respondent] filed the grievance once he returned to work. The employer did not raise a failure to comply with a deadline during the reference to adjudication. Therefore, it cannot at this time invoke the deadline based on the reasoning in *Canada (National Film Board) v. Coallier*, [1983] F.C.J. No. 813 (QL).

[18] In result, the Board awarded the respondent damages for salary and benefits for the period from February 1, 2012 to June 18, 2012 plus an additional $5,000.00 for pain and suffering under paragraph 53(2)(*e*) of the CHRA.

III. Analysis

[19] It is common ground between the parties that the Board's decision in the instant case should be reviewed under the reasonableness standard. I agree with the parties' assessment as it is well-established that the reasonableness standard applies to FPSLREB decisions generally (see, e.g. *Canada (Attorney General) v. Bodnar*, 2017 FCA 171 at para. 21, 415 D.L.R. (4th) 459 (F.C.A.) [*Bodnar*]; *Canada (Procureur général) v. Bétournay*, 2018 FCA 230 at paras. 29-30, 48 Admin. L.R. (6th) 71 (F.C.A.); *Jane Doe v. Canada (Attorney General)* 2018 FCA 183 at paras. 9-11, 428 D.L.R. (4th) 374 (F.C.A.) [*Jane Doe*]) and also to fact-suffused inquires in human rights cases decided by human rights tribunals or other types of labour adjudicators, like the FPSLREB (see, e.g. *Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30, [2017] 1 S.C.R. 591 at paras. 19-22 (S.C.C) [*Elk Valley Coal*]; *Québec (Commission des normes, de l'équité, de la santé et de la sécurité du travail) v. Caron*, 2018 SCC 3, [2018] 1 S.C.R. 35 at para. 4 (S.C.C.); *Haghir*

v. University Appeal Board, 2019 SKCA 13 at paras. 77-97, 54 Admin. L.R. (6th) 24 (S.K.C.A.); *Bodnar* at para. 21).

[20] Under the reasonableness standard, the reviewing Court is required to consider both the reasoning process of the administrative decision-maker and the result reached to assess whether the decision is transparent, intelligible, justified and defensible in light of the facts before the decision-maker and the relevant case law (see, e.g. *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 47 (S.C.C.) [*Dunsmuir*]). Where a decision-maker departs from a long and well-established line of authority, its decision will typically be unreasonable, especially where it fails to provide an adequate explanation for the departure, as was noted by the Supreme Court of Canada in *Irving Pulp & Paper Ltd. v. CEP, Local 30*, 2013 SCC 34, [2013] 2 S.C.R. 458 and by this Court in *Bahniuk v. Canada (Attorney General)*, 2016 FCA 127, 484 N.R. 10 and *Jane Doe*.

[21] Here, the Board departed from settled authority governing accommodation in holding that the respondent was entitled to salary and benefits merely because he was able to return to work. The authorities hold precisely the opposite and recognize that the duty to accommodate does not require that an employer pay an employee who is not performing services or create a job assignment as a pure "make-work" project as doing so would cause undue hardship to an employer.

[22] As Justice Deschamps, writing for the Supreme Court of Canada, stated in *Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section 2000 (SCFP-*

FTQ) v. Corbeil, 2008 SCC 43, [2008] 2 S.C.R. 561 [*Hydro-Québec*] at para. 15, "the purpose of the duty to accommodate is not to completely alter the essence of the contract of employment, that is, the employee's duty to perform work in exchange for remuneration". To similar effect, the Canadian Human Rights Tribunal more recently described the bounds of the duty to accommodate in *Croteau v. Canadian National Railway*, 2014 CHRT 16 at para. 44, noting that "[a]n employer does not have a 'make-work' obligation of unproductive work of no value and doesn't have to change the working conditions in a fundamental way. However, it 'does have a duty, if it can do so without undue hardship, to arrange the employee's workplace or duties to enable the employee to do his or her work'" (citing to *Hydro-Québec* at paras. 16-18).

[23] Thus, the FPSLREB's conclusion that the respondent was entitled to salary merely because he was able to return to work is unreasonable.

[24] Indeed, the unreasonableness of this determination is underscored by the date the FPSLREB determined that damages commenced, namely the day after the respondent was deemed fit to return to modified duties by his psychiatrist. However, CSC did not learn of the altered medical opinion until three weeks later and the CSST did not sanction the return to work in an alternate position until mid-March. CSC cannot in any way be faulted for failing to respond to a request for modified duties that had not even been communicated to it. In reasoning as it did, the Board unreasonably conflated the respondent's ability to work with CSC's obligation to compensate and return the respondent to work.

[25] Similarly, the FPSLREB's finding that the procedure adopted by CSC to reinstate the respondent, in and of itself, constituted a failure to accommodate is unreasonable. In *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2014 FCA 131, [2015] 3 F.C.R. 103 (F.C.A.), this Court held that there is no separate procedural right to accommodation that imposes any particular procedure that an employer must follow in seeking to accommodate an employee. Rather, in each case, it will be a question of fact as to whether the employer has established that it accommodated a complainant to the point of undue hardship.

[26] While the foregoing is sufficient to conclude that the Board's reasoning is unreasonable, it is useful to also comment on the Board's treatment of CSC's alternate argument regarding the date for commencement of compensatory damages. Before us, the parties were in agreement that the Board confused two different concepts in its treatment of CSC's alternate argument.

[27] The two concepts are the following. On one hand, timeliness may be raised as an objection to the arbitrability of a grievance where there is a mandatory time limit contained in the grievance procedure and the grievance is not a continuing one. Section 63 of the *Federal Public Sector Labour Relations Regulations*, SOR/2005-79 [the *Regulations*] provides that the time limits in grievance procedures in the federal public sector are mandatory:

A grievance may be rejected for the reason that the time limit prescribed in this Part for the presentation of the grievance at a lower level has not been met, only if the grievance was rejected at the lower level for that reason.	Le grief ne peut être rejeté pour non-respect du délai de présentation à un palier inférieur que s'il a été rejeté au palier inférieur pour cette raison.

[28] By virtue of section 61 of the *Regulations*, the Board or the parties may extend the time limits for taking any step in the grievance procedure, and the FPSLREB has developed criteria governing when it will exercise its discretion to extend time limits.

[29] The arbitral case law of the FPSLREB (and predecessor versions of the Board) as well as that of labour arbitrators in the private sector, has long held that where a party wishes to raise a timeliness objection to the arbitrability of a grievance, it must do so at the first available opportunity or it will be deemed to have waived the objection (see, e.g. Donald J.M. Brown and David M. Beatty, *Canadian Labour Arbitration*, looseleaf, 5th ed. (Toronto: Thomson Reuters, 2019) at 2:3130 (Brown and Beatty); *Re Unifor, Local 506 and Bell Canada* (2018), 296 L.A.C. (4th) 119, 2018 CarswellNat 5213 at paras. 111-127 (*Doucet*); *Cawley v. Treasury Board (Department of Fisheries and Oceans)*, 2013 PSLRB 135 at paras. 46-49; *McMullen v. Canada Revenue Agency*, 2013 PSLRB 64 at para. 118, 232 L.A.C. (4th) 282). Thus, if an employer wants to maintain its entitlement to raise an objection to arbitrability based on timeliness, it cannot process the grievance and issue a reply without raising the objection or it will be deemed to have waived the right to object.

[30] On the other hand, where the grievance is of a continuing nature, involving repetitive successive alleged breaches of the collective agreement, the grievance will always be timely as the alleged breach is ongoing. A classic example of an ongoing grievance involves an employee's claim that he or she is being paid the wrong wage rate: each pay day a new breach occurs so a grievance is always timely. A grievance alleging a failure to accommodate is also a continuing one as the alleged failure re-occurs each day (see, e.g. *C.U.P.W. v. Canada Post*

Corp., 1994 CarswellNat 3246 at paras. 65-66, 37 C.L.A.S. 51 (*Jolliffe*); *Re Canadian Broadcasting Corp. and CUPE*, 1997 CarswellNat 4814, 49 C.L.A.S. 487 (*Thorne*)).

[31] In the case of a continuing grievance, the failure to grieve the first time the breach occurs does not render the grievance inarbitrable. Rather, as this Court held in *National Film Board of Canada v. Coallier*, [1983] F.C.J. No. 813, 25 A.C.W.S. (2d) 104 (Fed. C.A.) [*Coallier*], the time limit in the grievance procedure instead serves to limit the period of time in respect of which damages may be awarded. The applicant cites 41 cases in which this principle has been applied by the FPSLREB and predecessor version of the Board. The most recent of these are: *Enger v. Treasury Board (Correctional Service of Canada)*, 2018 FPSLREB 6; *McKenzie v. Treasury Board (Correctional Service of Canada*), 2017 FPSLREB 15; *Denboer v. Treasury Board (Correctional Service of Canada)*, 2016 PSLREB 58; *Meszaros v. Treasury Board (Department of Justice)*, 2016 PSLREB 29; *Association of Justice Counsel v. Treasury Board*, 2015 PSLREB 23).

[32] Limiting damages in this fashion to the time-period for filing a grievance serves the labour relations purposes of encouraging speedy resolution of workplace disputes and preventing a party from sleeping on its rights to the detriment of the other party to the collective agreement.

[33] In paragraph 91 of its award, the FPSLREB conflated these two types of situations. The concept of waiver is not relevant to the case of a continuing breach where the reasoning in *Coallier* is invoked. Given this confusion, and the well-established nature of the arbitral case law governing these issues, the Board's reasoning on this point is unreasonable.

[34] The respondent contends that, in spite of these three significant flaws in the Board's reasoning, this Court should nonetheless uphold the Board's decision as there are alternate lines of reasoning that could be invoked to support the Board's conclusion. For example, the respondent says that it might well have been open to the Board to find discrimination based on disability and a failure to accommodate the respondent stemming from CSC's failure to apply the salary continuation practice outlined in the CSC Bulletin to the respondent when it affords salary continuance to those who suffer from less serious types of disabilities. Alternatively, the respondent asserts that there might have been a failure to accommodate in limiting the job search only to permanent assignments or in failing to have streamlined the process for the respondent to renew his second language qualifications. As for CSC's alternative damages argument, the respondent says that it might have been open to the Board to extend the time limit for filing the grievance in light of the nature of a failure to accommodate claim, which is ongoing and cumulative.

[35] The problem with each of these suggestions is that they expressly contradict the reasons offered by the FPSLREB. The invitation of the Supreme Court of Canada to seek to explore the reasons that could have been offered in support of the decision before overturning it (see, for example *Dunsmuir* at paras. 47-48; *A.T.A. v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61, [2011] 3 S.C.R. 654 (S.C.C.) at paras. 52-53; *N.L.N.U. v. Newfoundland & Labrador (Treasury Board*), 2011 SCC 62, [2011] 3 S.C.R. 708 (S.C.C.) at para. 12), relied on by the respondent, does not extend to allowing a court to re-write the administrative decision-maker's decision and offer new reasons for it. As Chief Justice McLachlin, writing for the

majority of the Supreme Court of Canada in *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2, [2018] 1 S.C.R. 6 noted at paragraphs 23 and 24 of her reasons:

> 23. Supplementing reasons may be appropriate in cases where the reasons are either non-existent or insufficient. In *Alberta Teachers*, no reasons were provided because the issue had not been raised before the decision maker (para. 51). In *Newfoundland Nurses*, the reasons were alleged to be insufficient (para. 8). These authorities are distinguishable from this case, where the Agency provided detailed reasons that enumerated and then strictly applied a test unsupported by the statutory scheme.
>
> 24. The requirement that respectful attention be paid to the reasons offered, or the reasons that could be offered, does not empower a reviewing court to ignore the reasons altogether and substitute its own: *Newfoundland Nurses*, at para. 12; *Pathmanathan v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 353, 17 Imm. L.R. (4th) 154, at para. 28. I agree with Justice Rothstein in *Alberta Teachers* when he cautioned:
>
> > The direction that courts are to give respectful attention to the reasons "which could be offered in support of a decision" is not a "carte blanche to reformulate a tribunal's decision in a way that casts aside an unreasonable chain of analysis in favour of the court's own rationale for the result" [para. 54, quoting *Petro-Canada v. Workers' Compensation Board (B.C.)*, 2009 BCCA 396, 276 B.C.A.C. 135, at paras. 53 and 56].
>
> In other words, while a reviewing court may supplement the reasons given in support of an administrative decision, it cannot ignore or replace the reasons actually provided. Additional reasons must supplement and not supplant the analysis of the administrative body.

[36] To similar effect, this Court has held that a reviewing court cannot dive into the record and re-shape the administrator's reasons to its liking. Thus, this Court refused to uphold a federal Classification Grievance Committee decision where to do so would have forced the Court to replace the Committee's analysis (*Morrisey v. Canada (Attorney General)*, 2018 FCA 26 at paras. 20-21, 420 D.L.R. (4th) 375); likewise, a decision of the Chair of the Warkworth Institution Disciplinary Court was recently quashed because the deficiencies were so severe that

no reasonableness analysis could be conducted in respect of essential aspects of the Chair's decision (*Sharif v. Canada (Attorney General)*, 2018 FCA 205 at paras. 32-37, 50 C.R. (7^{th}) 1).

[37] It therefore follows that the Board's decision must be set aside.

[38] The applicant requests that, in lieu of remitting the grievance to the FPSLREB for redetermination, this Court should instead take the rather unusual step of deciding the grievance and should dismiss it. While there may well be cases where it is appropriate for a reviewing Court to so decide (see, for example, *Canada (Citizenship and Immigration) v. Tennant*, 2019 FCA 206, 436 D.L.R. (4^{th}) 155 (F.C.A.)), this is not one of them as it is not a foregone conclusion that the grievance must be dismissed.

[39] The FPSLREB heard several days of testimony in this case and, as is the usual course in labour cases, there is no transcript of the evidence. The decision is also quite brief in its comment on the evidence. Given the importance of factual determinations in accommodation cases, this Court is ill-equipped to step into the shoes of the Board and render a decision on the grievance. The better course is to remit the grievance to the FPSLREB for redetermination, preferably by the same adjudicator if she is able to hear the case.

[40] In conducting the redetermination, it is not open to the Board to reconsider the findings made in the initial decision as to the reasonableness of CSC's decision to focus its job search only on permanent assignments or as to the reasonableness of CSC's concerns regarding bilingualism, the presence of the respondent's ex-spouse at Cowansville and the presence of the

inmate who had assaulted the respondent at Donnacona. These matters are finally settled and there is no basis for finding any of these determinations to be unreasonable. The doctrine of issue estoppel would therefore prevent their re-litigation.

[41] In conducting its redetermination, the FPSLREB should be mindful that the case law recognizes that workplace accommodation requires the cooperation of all the workplace parties – employer, employee and, where there is one, the bargaining agent – who are required to reasonably dialogue with one another with a view to finding work a disabled employee is able to do: *Renaud v. Central Okanagan School District No. 23*, [1992] 2 S.C.R. 970 at pp. 989-991, 141 N.R. 185 (S.C.C.) [*Renaud*]. Thus, as the respondent conceded before us, it was perfectly appropriate for CSC to have solicited the respondent's preferences regarding where he wished to work and to have tried to find the respondent a position at one of the institutions he named.

[42] 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.

IV. Proposed Disposition

[43] In light of the foregoing, I would allow this application for judicial review, with costs fixed in the agreed-upon amount of $3,500.00, set aside the decision of the FPSLREB in *Duval v. Treasury Board (Correctional Service of Canada)*, 2018 FPSLREB 52 and remit the respondent's grievance to the FPSLREB for redetermination in accordance with these Reasons.

The grievance should be remitted to the same adjudicator, if she is available, or, if not, to another adjudicator selected by the Chairperson of the Board.

"Mary J.L. Gleason"
J.A.

"I agree.
M. Nadon J.A."

"I agree.
Marianne Rivoalen J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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