IN THE MATTER OF AN ARBITRATION

BETWEEN:

GOVERNMENT OF THE NORTHWEST TERRITORIES

("Employer")

AND:

THE UNION OF NORTHERN WORKERS,
A COMPONENT OF THE PUBLIC SERVICE ALLIANCE OF CANADA

("Union")

(Jeremy Stannard – Grievance #21-E-02753)

ARBITRATOR:	Amanda Rogers
COUNSEL:	Trisha Paradis and Julia Paillé for the Employer Michael Penner for the Union
HEARING VIA VIDEO CONFERENCE:	September 7, 2022
AWARD:	September 13, 2022

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This matter pertains to a grievance filed by the Union on behalf of the grievor, Jeremy Stannard, challenging his termination from employment.

The grievor – who the Employer asserts was on probation at the time of his dismissal – was dismissed from his position as a Relief Correctional Officer on April 9, 2020 for "medical reasons". There is no dispute the grievor was physically unable to perform the duties of the Correctional Officer position and that this was the reason his employment was terminated.

The Union's April 28, 2021 final level grievance letter summarizes the basis for the grievance as follows:

> The Union alleges that the employer is in violation of Article 5 of the Collective Agreement and contends that the employer has discriminated against Mr. Stannard based on a medical condition/disability by failing to provide him with a workplace accommodation.
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> Mr. Stannard was medically terminated on or around April 9th, 2021 due to a medical condition that permanently prevented him from returning to his home position as a Relief Correctional Officer at the North Salve Correctional Facility (NSCC). The employer would not seek accommodation outside of his home position and took the stance that because Mr. Stannard was on probation it is "less onerous on the employer is to provide permanent alternate employment for medical reasons if the employee cannot perform the functions of the position for which they are hired and accommodations in that position cannot be made."
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> The Union contends that the employer has opted out of its Duty to Accommodate responsibilities by refusing to entertain an accommodation measure outside of Mr. Stannards home position by seeking another position within the Department of Justice and or GNWT. The Union assets that the employer did not exhaust all its options up to a point of undue hardship to find an Alternate worksite placement or modified hours/duties as an accommodation. The Union does not believe that the grievor status as a probationary employee allows the employer to contract out of human rights.

BACKGROUND

The background facts are not in dispute.

The grievor was hired as a Relief Correctional Officer in May 2019. In June 2020, the grievor provided the Employer with medical documentation setting out restrictions and limitations on his ability to perform physical activity such as sitting longer than 30 minutes or climbing more than 10 stairs due to a medical condition. As this medical documentation had been completed in respect of the grievor's employment with a different employer, the Employer requested the grievor's doctor answer specific questions it set out in a letter to the grievor dated October 14, 2020.

The grievor returned the completed form to the Employer on November 11, 2020. In it, the grievor's doctor confirmed the grievor was restricted from performing the full job duties of a Correctional Officer. In terms of accommodation, the doctor wrote that a "standing desk would be good" and added that the grievor should "avoid situations where head injury possible". The doctor indicated these accommodations would be required "life long" but that the Employer should follow up in one to two years to see whether there had been any change in the grievor's condition.

In or around December 2020, the grievor was informed by the Employer that his restrictions and limitations could not be accommodated in the Corrections Officer position and an accommodation process was commenced. In an accommodation meeting held in January 2021, the grievor expressed his surprise with the limitation imposed restricting his ability to risk head injury, speculating the doctor's concern was related to blood thinners he was taking. The grievor explained he plays sports and "live[s] day to day without any concerns". He elaborated that numerous Corrections Officers take this medication and are able to carry out their duties.

During the meeting, the Employer took the position that the probationary period for Relief employees is calculated on hours worked and not a calendar year, thus the grievor was still considered as probationary because he had not yet worked 1950 hours. For reference, probationary employee is defined in Article 2 of the Collective Agreement as:

> 2.01
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> …
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> (y) "Probation" means a period of six (6) months from the day upon which an employee is first appointed to, transferred or promoted within the Public Service of the Northwest Territories except that for an employee first appointed to a position at Pay Level 13 or higher, it shall be a period of one (1) year. An employee who is appointed to a position which has the same duties, as **the employee's** previous position shall not serve an additional probationary period. If an employee does not successfully complete **their** probationary period on transfer or promotion the Employer will make every reasonable effort to appoint **the employee** to a position comparable to the one from which **the employee** was transferred or promoted.
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> (emphasis in original)

The Employer explained to the grievor during this meeting that it would be recommending "medical termination" of his employment because he was unable to fulfil his employment contract due to his medical limitations. The Employer advised the authority to make this decision rests with the Deputy Head, and that the Deputy Minister would be reviewing this recommendation, and he would be provided the opportunity to make a submission within fifteen days highlighting any concerns about the recommendation his employment be terminated.

In a letter dated March 4, 2021, the grievor was advised by the Deputy Minister that she had considered the recommendation to terminate his employment and formally provided him the opportunity to make a submission. The letter explains "If the prognosis currently on file is

not accurate, please have this job description reviewed by your physician, and request he/she provide us with a current prognosis on your ability to perform the duties of the position and the likelihood of your returning to work". It is undisputed that no response was provided by the grievor. In a letter dated April 9, 2021, the grievor was advised that the recommendation to terminate his employment was accepted and that he was no longer an employee of the Employer effective the date of the letter. The grievance was filed shortly afterward.

At the hearing, the parties indicated they are seeking a general decision on the scope of the duty to accommodate probationary employees and whether this duty requires the parties to look at accommodation options outside of the probationary employee's home position when that position cannot be modified to meet the employee's limitations and/or restrictions without the Employer enduring undue hardship.

The Union does not take issue with the Employer's determination in this case that the grievor could not be accommodated in his Correctional Officer position, nor is it at this time asking for a determination in respect of whether the grievor was or was not a probationary employee at the time of his dismissal. Rather, the Union objects to the Employer's contention that the accommodation process for probationary employees ends once it is determined they cannot perform the essential duties of their position and seeks a declaration that the Employer is required to look at accommodation options outside of a probationary employee's home position.

The parties agree that, should I determine the Employer is required to consider positions outside of a probationary employee's home position as part of the duty to accommodate, I will refer the matter of remedy back to them and remain seized in the event they are unable to reach agreement.

POSITIONS OF THE PARTIES

In the Union' s submission, it is "capricious and arbitrary" to stop the duty to accommodate analysis for probationary employees once it is determined that the nature of their disability is incongruent with the duties of their position. According to the Union, such an approach "presupposes that the point of undue hardship" at that point, rather than considering the unique facts of each case. For instance, it comments, if there were 20 vacant positions into which a probationary employee could be accommodated outside of their own position, and these positions were not considered as part of the accommodation process, the Union states it would consider this a breach of the Collective Agreement. While the Union does not object to the concept of medical termination generally, it takes the position that the Employer is required for all employees to consider whether accommodation is possible outside of the employee's own position once it has been determined their home position cannot be sufficiently modified.

The Union notes the term probationary employee is defined in both Article 2 of the Collective Agreement and section 20 of the *Public Service Act* (the "*Act*"), and that the Minister is empowered under the *Act* to extend an employee's probationary period in certain circumstances. The Union rejects the Employer's suggestion that accommodating probationary employees into other positions would somehow give them an unfair route to a permanent position, noting the Minister has the authority to accommodate an employee by moving them into another position and extending their probation period so that there is an appropriate assessment period in the new position.

The Union relies on the following authorities: *GNWT v. UNW – Grievance Re. L.H.* (#20-E-02695) (unreported); *GNW v. UNW – Grievance Re Meadus, Roland* (#18-E-02221) (unreported); *Sioui v. Deputy Head (Correctional Service of Canada)*, [2009] C.P.S.L.R.B. No. 44; *British Columbia (Ministry of Public Safety and Solicitor General) v. British Columbia*

Government and Service Employees' Union (Pearson Grievance), [2013] B.C.C.A.A.A. No. 116; *Canada Post Corp. and Canadian Union of Postal Workers (Reniak Grievance)*, [1998] C.L.A.D. No. 376; *McCarthy v. Treasury Board (Correctional Service of Canada)*, [2020] LNFPSLREB 42; and *Dekoning and Treasury Board (Employment and Immigration Canada)* 33 L.A.C. (4th) 203.

The Employer agrees the accommodation process was triggered in this case but argues the scope of its duty to accommodate probationary employees is limited to determining whether the position for which they were hired can be modified to meet their restrictions and limitations without the Employer suffering undue hardship. According to the Employer, once it is determined that sufficient modification of that position is not possible, the Employer has met its obligation to accommodate the probationary employee, and the Employer may terminate their employment on the basis that they are unable to fulfill the essential duties of their job.

The Employer stresses the importance of the probationary period as a period to assess the suitability of an individual and their compatibility with the workplace and asserts the human rights case law involving probationary employees recognizes the distinction between probationary employees and regular employees. In its submission, the jurisprudence supports its position that the duty to accommodate is more limited in respect of employees still serving their probationary period. In sum, the Employer's position is that it is not required to provide a permanent accommodation to an employee on probation. It accordingly requests that the grievance be denied.

The Employer relies on the following authorities: *Yuille and Nova Scotia Health Authority, Re*, 2017 CarswellNS 615, 2017 C.L.L.C. 230-024, 85 C.H.R.R. D/264; *TWU v. Telus Communications Inc*., 2014 ABCA 154 aff'g 2013 ABQB 298; *TWU v. Telus Communications Inc*., 2013 ABQB 298; *Cruden and Canadian International Development Agency, Re*, 2014 CAF 131, 2014 FCA 131; *Dominion Castings Ltd. v. U.S.W.A., Local 9393,* [1996] O.L.A.A. No. 958, 46 C.L.A.S. 237; *Worobetz v. Canada Post Corp.*, 1995 CarswellNat 2698, [1995] C.H.R.D. No. 1, [1995] D.C.D.P.; *Bonner v. Ontario (Ministry of Health)* (1992), 16 C.H.R.R. D/485, 1992

CarswellOnt 6684; *British Columbia (Public Service Employee Relations Commission) v. B.C.G.E.U.,* [1999] 3 S.C.R. 3, [1999] S.C.J. No. 46 (S.C.C.); and *Lethbridge Regional Police Service v. LPA*, 2013 ABCA 47, 2013 CarswellAlta 197.

DECISION

As noted at the outset, the parties do not dispute the grievor in this case was permanently unable to perform the *bona fide* occupational requirements of the Corrections Officer position. Although the Union has indicated it disagrees with the Employer's contention that the grievor was a probationary employee at the time of his dismissal, it is not pursuing that position at this time.

The only question to be determined at this point, therefore, is whether the Employer had an obligation to look beyond the Corrections Officer position to fulfil its statutory duty to accommodate the grievor.

In considering this question, I accept that the purpose behind the accommodation process is to provide disabled individuals with equal access to work opportunities, but not to provide *preferential* access. This point was made clear by the Ontario Human Rights Tribunal in *Formosa v. Toronto Transit Commission*, 2009 HRTO 54 (CanLII), in which the Tribunal considered whether the duty to accommodate required an employer to consider an alternate position for a job applicant unable to pass a bus driver training program due at least in part to a disability. In holding that job applicants are not entitled to claim alternative positions as a form of accommodation, the adjudicator in that case wrote:

> [69] Accommodating a job applicant with a disability does not mean giving them another job if they are not capable (after considering accommodation, short of undue hardship) of doing the job they applied for. That would afford persons with disabilities preferential access to job vacancies, not equal opportunity to apply for job openings. In this situation the applicant was a "job applicant" for the position of bus operator, conditional upon successfully completing the job

> training program. I have already concluded that the applicant is not capable of successfully completing the bus training program and performing the essential duties of a bus operator position, even with accommodations. The TTC is not obliged to accommodate the applicant by searching out other positions in its organizations which the applicant might be capable of doing, with or without accommodation.

These comments make sense in the context of job applicants. I agree it would be unfair that a person could simply *apply* to a job they were incapable of doing and, without actually being hired to do that job, have a right to be placed into another job for which they did not apply. That truly would be giving preference to a disabled applicant over another applicant to require that they be considered in advance of other applicants for different positions or that they be placed into another position simply because of their disability.

However, those are not the facts of the present case, wherein the grievor was, at least for the purposes of this decision, a probationary employee who had worked for the Employer since 2019. The Employer thus places great reliance on the case *TWU v. Telus Communications Inc*., *supra*. In that case, the Alberta Court of Appeal dismissed an appeal of the union's judicial review application of a labour arbitrator's decision in which he dismissed its grievance alleging the employer had discriminated against the grievor on the basis of mental disability when it terminated his employment. The grievor in that case was a probationary employee at a Telus call centre providing front-line technical support to customers over the phone. He struggled with this work because he is on the autism spectrum – a fact which the arbitrator found the grievor did not sufficiently bring to the employer's attention at the time he was hired or subsequently.

I will go into great detail on the facts giving rise to the *Telus* decisions because they differ so greatly from the facts of the present case. Similar to this case, the union in *Telus, supra,* argued that the grievor's disability played a role in his performance issues and thus in his dismissal, and that Telus failed to reasonably accommodate the grievor's condition. Telus, however, argued that the grievor did not have a disability, and that even if he did, he was not

dismissed because of it. The employer further argued the grievor did not advise that he needed accommodation, but that accommodation was impossible in the circumstances in any event.

The Arbitrator accepted the Employer's arguments, concluding that "the Grievor [did not provide] TELUS with the information necessary for it to assess the issue of accommodation" and that his affirmative answer on a Diversity Form was insufficient by itself to trigger a duty on Telus to inquire into whether the grievor's performance problems were related to his disability. In sum, the Arbitrator held that "the duty to accommodate was not triggered" and that the grievor had not made out a *prima facie* case of discrimination (*Telus -and- Telecommunications Workers Union,* June 11, 2012 decision of an arbitrator, P.A. Smith, (unreported). The Arbitrator further commented that, even if the duty was triggered, Telus did not breach its human rights obligations because "the Grievor was unable to meet the performance standards for the position" and there was "no accommodation that could be made which would allow him to meet those standards." Within this context, the Arbitrator held that Telus did not have an obligation to find the grievor another job within the Telus network because he was only a probationary employee. In so finding, the Arbitrator adopted the analysis from the 1995 case *Bonner v. Ontario (Ministry of Health)*, 16 CHRR 52, wherein an Ontario Board of Inquiry held that an employer only has to accommodate a probationary employee within the role for which the employee was hired. The Arbitrator also cited with approval the decision *Re Dominion Castings and U.S.W.A., Local 9393,* [1996] O.L.A.A. No. 958 (QL) (para 36). There the *Bonner* decision was similarly cited with approval for the proposition that probationary status is *relevant* to the question of accommodation:

> The Code does not distinguish between seniority and a probationary employee but the question, of course, remains as to whether probationary status is **relevant** to the issue of accommodation to the point of undue hardship. Certainly the case of *Bonner v. Ontario (Ministry of Health)*, supra, (which also dealt with a probationary employee) would indicate that it is. There, the issue of the accommodation of the employee's handicap was clearly confined to his particular job and there was no suggestion whatsoever of any obligation on the employer to consider alternative modified or light work within the probationary employee's capabilities or restrictions. In that regard, it is noteworthy that the

> Board of Inquiry in the *Bonner* case expressly considered the character or purpose of probation being to assess the performance of the employee in meeting the requirements of his position. Given that basic purpose of the probationary period in a workplace, it seems eminently reasonable to address the duty to accommodate a handicap in terms of the particular work for which a new employee was hired, as the Board did in the Bonner case.
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> [emphasis added]

The Arbitrator was also influenced by *Worobetz v. Canada Post Corporation*, [1995] CHRD No. 1 (QL) in which the Canadian Human Rights Tribunal held that Canada Post did not have to consider reassigning an on-call, casual employee to a new position when that employee was failing to meet performance standards as a result of significant cognitive impairments arising from a brain injury.

The judicial review of the arbitration decision in *Telus* was sought on five bases:

1. The Arbitrator erred in law in her statement and application of the legal test for *prima facie* discrimination.

2. The Arbitrator's conclusion that Telus did not have knowledge or imputed knowledge of the grievor's disability was unreasonable.

3. The Arbitrator's conclusion that the duty to accommodate did not require Telus to follow-up on the information they had about the grievor's disability was unreasonable.

4. The Arbitrator erred in law by placing the burden of proof on the Union to demonstrate that the grievor could have been accommodated without undue hardship.

5. The Arbitrator erred in law in concluding that the duty to accommodate could never require an employer to look outside the position for which a probationary employee was hired in the search for accommodation.

It is the final grounds upon which judicial review was sought that is relevant to the present case. On that question, the judge held that the Arbitrator reasonably decided that Telus had no duty to accommodate the grievor by finding a different position for him outside of the call centre in all of the circumstances. Those circumstances, I note, included that the Telus was reasonably found not to have actual or imputed knowledge of the grievor's condition and that it was reasonable for the Arbitrator to conclude the grievor's performance difficulties would not have led Telus to suspect that his problems were related to a disability.

The appeal of the judicial review decision was brought by the union in *Telus* on only two bases:

1. The Arbitrator and judge incorrectly stated the test for *prima facie* discrimination by adding "knowledge" as a fourth element; and

2. The Arbitrator failed to correctly state or apply the legal test to justify a discriminatory standard as a *bona fide* occupational requirement, which error caused her decision to be unreasonable, and the judge erred in her review of those errors.

In other words, the question of whether or not Telus was required to accommodate the employee by looking for alternate work outside the position for which he had been hired was not live before the Court of Appeal. In fact, the Court explicitly declined to consider whether the Arbitrator's decision that an employer's duty to accommodate a probationary employee is lesser than that of a regular employee was reasonable, holding:

> [46] … As the Arbitrator pointed out, the appellant has not cited any authority where it has been held that reassigning a probationary employee is a reasonable accommodation when that employee cannot be accommodated within their existing position. <u>We need not decide that question of whether probationary status changes the tests. The Arbitrator found that substantive accommodation (even in another Telus job) was not possible.</u>
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> [47] The appellant argues that Telus' failure to even consider alternative positions for the grievor means that Telus cannot make out a justification

> defence. At the arbitration it was the grievor who presented evidence about other jobs with Telus that might have been suitable. The evidence suggested those positions would not have been suitable.
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> [emphasis added]

As noted, in my view, the facts of Telus, *supra*, are quite readily distinguishable from the facts of the present case. The employer in this case knew about the grievor's disability and there has been no evidence tendered at this point that suitable alternate work could not have been found for the grievor if such a search had been undertaken. The fact is no such search was undertaken on the notion that an employer is not required to accommodate a probationary employee outside their home position.

I do not think the authorities can be interpreted as supporting such a blanket approach to accommodation involving probationary employees. Indeed, the case law is clear that accommodation is an individualized process. Put another way, what is reasonably required will depend on the facts of each and every individual case (see *Syndicat des Employés de l'Hôpital Général de Montréal v. Centre Universitaire de Santé McGill* (2007), 159 L.A.C. (4th) 1 (S.C.C.), at paras. 15 and 22,).

While I accept that an employee's probationary status may be relevant to the question of how far an employer must go to provide a reasonable accommodation, the extent of the duty to accommodate is still a question of mixed fact and law to be determined on the unique facts of each case. In other words, just because it was found that reasonable accommodation did not require an employer to look outside the position for which an employee was hired or to which they had applied in some cases does not mean that such an accommodation will *never* be required in all cases. To take such a bright line approach to the accommodation process is both arbitrary and contrary the individualized approach required in the jurisprudence.

In the result, I find the Employer's position that it is never required to consider accommodation outside of a probationary employee's home position is incorrect in law. The

extent of the Employer's duty to accommodate probationary employees, and what will constitute a reasonable accommodation, must be assessed in each case based on all of the relevant factors. As already indicated, precisely when the point of undue hardship is reached in an accommodation involving a probationary employee will vary on the unique facts of each and every case and it is the employer that bears the burden of proving when this threshold has been met. Some factors considered by adjudicators when assessing whether an employer has accommodated an employee up to the point of undue hardship are:

- the extent of disruption or variance from the provisions of any applicable collective agreement resulting from the accommodation
- the interchangeability of the workforce and facilities
- the effect of the accommodation on the rights or morale of other employees
- the size of an employer's operation
- the safety of the employee and other employees
- the cost of accommodation

(See, for example, *AirBC Ltd*. (1995), 50 L.A.C. (4th) 93 for a list of factors to be considered).

These considerations apply equally in the context of accommodating a probationary employee and need to be weighed appropriately in that context along with any other relevant factors when assessing whether a reasonable accommodation has been offered. For instance, it may be that accommodating a probationary employee into a position that would otherwise have been awarded to a much more senior employee may have a more significant negative impact on the rights and morale of other employees than it would if the position was granted as an accommodation to an employee only slightly lower in seniority. As indicated, I accept that an employee's probationary status is relevant to the assessment of whether a particular accommodation would result in undue hardship and that a reasonable accommodation for a permanent employee may be different than a reasonable accommodation for a probationary employee. While an employer may not be required to offer alternate work to a probationary employee in all cases, it must show that such an accommodation would result in undue hardship in all cases where such accommodation is not offered.

I note that concern about preferential rather than equal access being given to accommodated probationary employees by placing them in alternate positions can be largely mitigated by extending an employee's probationary status to align with their time in the accommodated position. Put another way, placing a probationary employee into an alternate position wherein they will serve the same probationary period would not put them into an advantaged position from a job security perspective. Such a scenario would merely allow a disabled employee the opportunity to continue their employment in a position within their restrictions and limitations and to be assessed for suitability during their probation period as they would have been in the normal course.

Without evidence about what, if any, alternative work could have been made available to the grievor at the time his employment was terminated, I cannot determine whether he could have been reasonably accommodated into another position. In other words, I make no finding in respect of whether the grievor could have been substantively accommodated had the Employer extended its search for work for the grievor beyond his Corrections Officer position. My finding in this decision is limited to the general question of whether the Employer was required to consider whether the grievor could be accommodated in another position without the Employer enduring undue hardship. It was. As requested, I refer the issue of remedy back to the parties and remain seized to determine any issues arising in respect of an appropriate remedy for the grievor in this case.

The grievance is allowed in part.

Dated at the City of Vancouver in the Province of British Columbia this 13th day of September, 2022.

Amanda Rogers, Arbitrator