



# Symposium GRH

## UQTR 2018

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# Labour arbitration case



## GRIEVANCE

On January 2018, the union filed the following grievance on behalf of the grievor, Annette Gagnon:

Nature: The company has violated the collective agreement and all other legislation of public order by refusing to promote me to the position of forklift driver even though my seniority at the company makes me eligible.

Settlement demand: I am seeking the position of forklift driver and demand that the discrimination due to my handicap cease. I am also seeking punitive and moral damages and any other associated amounts.

### Content of the rejection letter

Dear Annette Gagnon,

We regret to inform you that we are unable to offer you the position of forklift driver for reasons related to your handicap: deafness.

The Promotion Committee determined that allowing you to drive a forklift would be a hazard to your health and safety, as well as that of the other warehouse staff.

Your skills and the quality of your current work were not factors in this decision.

The letter was signed by the Director of Human Resources, Clarence Dufour, on December 22, 2017.



## Admissions

The parties acknowledged that the grievance was filed according to the process set out in the current collection agreement and within the required timeline, and that the grievance is properly before the tribunal.

## Context

Ms. Gagnon is deaf but not considered mute and works in a warehouse in the Quebec City area. She has been in charge of preparing orders for over twelve years. In December 2017, she applied for the position of forklift driver.

The position sought by Ms. Gagnon does not come with a higher salary and is therefore considered a lateral promotion. However, working as a forklift driver is less physically demanding than most of the warehouse positions. Staff members also tend to attach a certain level of status to this position, which is why employees need a sufficient number of years of service before being offered the position. Ms. Gagnon was in fact the most senior employee to apply. This is essentially why she applied—she sees it as the only other position that would allow her to grow professionally. However, the employer refused to offer her the position for occupational health and safety reasons related to her handicap.

Pursuant to sections 6.1 and 6.2 of the collective agreement, the grievance was submitted to arbitration.

The parties presented their evidence in October, and you are here today to present your argument.



## Employer evidence (a summary of pertinent facts and witnesses)

### *Clarence Dufour*


Clarence Dufour has been the Director of Human Resources at the company for 16 months now. He confirmed during his testimony that after receiving Ms. Gagnon's application form for the position of forklift driver, he immediately questioned whether Ms. Gagnon was fit for the position, considering how inherently dangerous this job would be for a deaf person. Ms. Gagnon would not be able to hear if someone called out for an emergency or other type of stop.

Mr. Dufour then decided to consult the collective agreement and invited Antoine Harvey, Director of Health and Safety, and Jean-Paul Robichaud, Head Warehouse Supervisor. They met twice to analyze the situation.

During the second meeting, after long discussions and some research done by Mr. Harvey, Mr. Dufour stated that the committee agreed in good faith that it would be irresponsible and dangerous to grant the position of forklift driver to Ms. Gagnon.

He therefore notified the people concerned and sent a letter to Ms. Gagnon on December 22, a copy of which was also sent to the union. The letter informed her that it would not be possible to offer her the position given her handicap and the danger it would represent to her and her colleagues.

During his testimony, Mr. Dufour justified his decision based on the possibility provided in section 10.17 of the collective agreement to not consider seniority when the employee has a functional disability and on the fact that Ms. Gagnon had never held other positions for this reason.



When asked about the topics of discussion, Mr. Dufour summarized the essentials: the condition of deafness that would prevent Ms. Gagnon from hearing an irregular sound or scream that might in turn put the driver or other people in danger. He also brought up the fact that the committee was unable to find circumstances or ways to compensate for Ms. Gagnon's handicap. This last element is the essential reason behind the committee's refusal to grant Ms. Gagnon the forklift driver position.


When the union attorney asked Mr. Dufour about what was presently in place to accommodate Ms. Gagnon's condition, he admitted he did not think there were any specific measures in place. He suggested that the attorney ask Mr. Harvey and Mr. Robichaud the same question, since they are much more familiar with the occupational health and safety file, including the identification of risks and the equipment required to mitigate these risks.

### *Antoine Harvey*

Antoine Harvey has been the Director of Health and Safety for the employer's various warehouses for 15 years now. He also represents the company on the Warehouse Health and Safety Committee for the Québec City area.

During his testimony, he confirmed that Mr. Dufour, the new Director of Human Resources, first notified him of Ms. Gagnon's case in December. Ms. Gagnon had a spotless occupational health and safety record and had never had any disciplinary or administrative measures taken against her. He had therefore never heard any mention of her or of measures implemented to compensate for her handicap.

However, he agreed during his testimony that the situation experienced by Ms. Gagnon was troubling and that the employer should address it. He wants to submit



a risk prevention and identification program to the Health and Safety Committee in the coming months. But in the short-term, he agrees with the fact that Ms. Gagnon cannot be granted the forklift driver position because of her handicap.


The union attorney asked him the following question: “Why would it be more dangerous for Ms. Gagnon to drive a forklift than to walk around preparing orders in a plant that is neither cordoned off nor protected by guards?” Mr. Harvey simply reiterated that they will soon be going through a new risk identification process and reviewing the lists of personal protective equipment required by staff. He also confirmed that he approved of the Mr. Dufour’s proposal to not grant the position to Ms. Gagnon as a preventive measure, having no other alternative to propose, especially since it was a lateral move.

During his testimony Mr. Harvey mentioned a few governmental and private firm websites he consulted about training when conducting his research. He indicated that it was on one of these sites that he obtained confirmation that Ms. Gagnon’s deafness could create risks in operator positions.

### *Jean-Paul Robichaud*

Jean-Paul Robichaud has been the Senior Warehouse Supervisor in the Québec City area for 25 years now. He represents the employer on the Health and Safety Committee as well as the Grievance Committee.

During his testimony, he confirmed that Ms. Gagnon is an excellent employee who has a spotless record and is always on task, responsible and appreciated. He was surprised by Mr. Dufour’s request because he had never considered the issue from this perspective. However, he acknowledged that the situation required special




attention and that the risk was real: “Just because nothing has ever happened before doesn’t mean we don’t have to deal with the situation seriously.”

He also confirmed that he is working with Mr. Harvey to develop a risk prevention and training program.

Now that he is aware of the danger, Mr. Robichaud believes that letting Ms. Gagnon drive a forklift would be an unnecessary risk to her safety and the safety of others, at least until measures could be established to secure different areas of the warehouse.

Series of questions directed at Mr. Robichaud:

- What would be the most dangerous for Ms. Gagnon if she became a forklift driver? “She could injure someone when reversing since she wouldn’t hear the person scream.”
- Has anyone at the warehouse ever been injured in this way? “No, I don’t think so; I don’t believe so.”
- Does a forklift driver often have to reverse in pathways that are not cordoned off? “In theory, no. But the warehouse doesn’t have this kind of measure in place.”
- Could Ms. Gagnon get hit by a forklift while working her current job? “Yes, but because everyone knows her and her problem, the risks are minimal.”
- Why did you refuse the lateral promotion of Ms. Gagnon? “As a preventive measure.”
- Have you developed other accommodation measures? “We tried to look at what’s being done elsewhere, but we didn’t find anything.”
- Did you know that Ms. Gagnon has a class 5 driver’s licence? “Yes, but what’s that got to do with the situation?” The union attorney said, “The government



authorizes Ms. Gagnon to drive a car on public roads, and you would like to prevent her from driving a forklift!" Mr. Robichaud firmly believes that these are two different situations: "Seriously? That's not what this is about!"

### Union evidence (a summary of pertinent facts and witnesses)


#### *Annette Gagnon*

The first witness to testify for the union was Ms. Gagnon. She explained in a credible and confident way how and why she felt discriminated against by the employer's refusal to grant her the forklift driver position because of her handicap. In doing so, the employer is denying her the right to grow professionally and is restricting her to her handicap: deafness.

The forklift position is the only other position that interests her, and she was waiting her turn patiently. The employer has therefore crushed her dreams. She is very relieved that the union is claiming punitive and moral damages in the grievance settlement, because her pride, self esteem and professional growth have been sorely affected. Furthermore, being reduced to nothing but her handicap and receiving little recognition for her hard work have contributed in a major way to her losing confidence in the employer.

She believes that employers are not very aware of the issues related to reasonable accommodations and that they use the pretext of health and safety to justify the unjustifiable in her case. Why, after twelve years of good and loyal service, without any incident or accident and without any measure adapted to her condition, would her driving a forklift suddenly increase the risk of an accident? If the employer is serious in its treatment of health and safety, she believes that adding a simple additional rear-view mirror would widen her field of vision. She confirms that she





has been driving an automobile for 20 years and that she also bicycles with a completely clean accident record.

She also testified that the employer has never implemented special security measures to protect her, or even protect the other employees, and that they have never addressed her about her handicap or the specific constraints at work that could be related to it. Furthermore, the union has also never had the slightest worry or concern related to her deafness. This is why she agreed with the wording of the grievance that the union proposed to her and that was submitted.


### *Pierre Gingras*

Pierre Gingras has been Chair of the union for 8 years now. He has worked at the warehouse for 15 years. He has held various positions, including the one he currently holds: forklift driver. As chair, he sits on both union/management committees and he confirms Ms. Gagnon's testimony. Ms. Gagnon's file has never been brought before either of these committees in his time as a member. He also acknowledges that Ms. Gagnon is a good employee who is reserved, devoted and respectful.

He confirmed that during the last committee meeting in September, Mr. Harvey mentioned that the risk prevention and identification measures needed to be reviewed. Concerning this subject, he proposed that Caroline Vézina take charge of the file.

### *Caroline Vézina*

Caroline Vézina has been the union representative on the Health and Safety Committee since its inception. In her testimony, Ms. Vézina confirmed that no specific measures were in place to protect warehouse staff, for Ms. Gagnon nor for the others. Like all the union workers involved in health and safety, she does not




understand the employer's decision to refuse the position of forklift driver to Ms. Gagnon because, in her opinion, the risk of injury is not higher than it is in the position that she currently holds, since she moves around on foot in many areas of the warehouse that are not cordoned off or protected.

She also confirmed that during the last committee meeting in September, Mr. Harvey mentioned that the risk prevention and identification measures needed to be reviewed. She accepted the president's request to take responsibility of this file because it is an important file. Even though the accident rate remains low, the statistics show an increase in incidents and near misses.

At the request of Serge Desbiens, she began research in January to properly support Ms. Gagnon's arbitration file. During her testimony, she highlighted the fact that some measures, such as guards, cordoned off pathways, mirrors installed in strategic locations, and brief training sessions for all new employees, should be implemented for the safety of everyone. It may also be necessary to review the personal protective equipment made available to warehouse staff. She confirms that she proposed inviting an occupational therapist or a specialized firm to complete the exercise, but that she had not yet received a response from the employer.

### *Serge Desbiens*

Serge Desbiens is the vice-chair of the union and, as such, also chair of the Grievance Committee. He therefore sits on the Grievance Committee. As an employee who has worked at the warehouse for over 30 years and has been involved in the union since the very beginning, Mr. Desbiens knows the company and the collective agreement very well. He confirmed that he attempted to explain the discriminatory nature of



the decision concerning Ms. Gagnon to all employer authorities, but that he hit a wall when it came to discussing health and safety.

This is why he has been working with Ms. Vézina and Mr. Gingras since January to prove the absurdity of the situation. He insisted that Ms. Gagnon ask for moral and punitive damages so that the employer is fully aware of the major impacts that discriminatory measures and what is essentially organizational harassment can have on the victim's life.

As the last to testify in this case, he confirmed everything that was put forth by the union.

## **A FEW LEGAL POINTS**

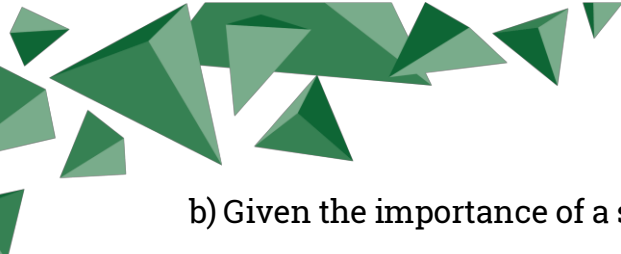
### Collective agreement

#### *Section 2 – NO DISCRIMINATION*

2.1 The employer and the union agree that there will be no discrimination exercised or practised with respect to an employee based on race, language, creed, colour, sex, ethnic origin, political convictions, physical disability or membership or activity in the union, or for any other reason, unless such discrimination occurs in accordance with the provisions of this collective agreement.

#### *Section 6 – GRIEVANCE PROCEDURE*

6.1 a) The word grievance refers to a disagreement concerning the interpretation or application of the collective agreement involving one or more, or all of the employees or the union.



b) Given the importance of a solid explanation between the employee involved, their immediate superior and the union steward, these people should have a discussion during working hours as a means to attempt to resolve the complaints and problems on the spot.

c) It is agreed that the union can bring up grievances in all cases of disagreement concerning the interpretation, the application or any claimed general violation of this collective agreement. In the event of individual grievances, the grievance must be signed by the employee who is submitting the claim.

#### 6.2 First step: Written statement to Human Resources management


If the grievance is not resolved using the method set out in section 6.1, the grievance can be submitted in writing to the Human Resources Coordinator within twenty (20) working days of the event or of when the employee became aware of the event. The Human Resources Coordinator must provide a decision in writing within fifteen (15) working day of the grievor's presentation of the grievance.

6.3 Discussions with the employer concerning the grievances are to be done during working hours without loss of pay for the employees involved.

6.4 Any agreement between the employer and the Grievance Committee is final and binding for the employer, the union and the employees involved.

### *Article 7 – ARBITRATION*

7.2 a) The arbitrator does not have the right to alter or modify any of the provisions of this agreement, add any new provisions or make any decisions that might conflict with their terms and provisions.



b) In all cases of dismissal or disciplinary measures, the arbitrator can confirm, modify or reverse the employer's decision. They can, if necessary, replace it with a decision that seems fair and reasonable given all the circumstances and order the employer to reimburse the employee for the sum of money that was withheld from them because of the dismissal or a disciplinary measure. The arbitrator cannot, however, issue a decision that is more severe than the one given by the employer.

7.4 Any decision made by the arbitrator in compliance with the provisions of this collective agreement is final and binding for all parties.

7.5 Each of the parties pays half of the arbitrator's fees and expenses.

7.6 Every one of the deadlines and steps mentioned in the grievance procedure and the arbitration are required or the right being claimed will be forfeited.


### *Section 10 – STAFF MOVEMENT*

10.1 The parties acknowledge that seniority is the determining factor between employees who are qualified for promotion, laid off or called back to work after being laid off, pursuant to the specific provisions of the agreement, provided that they have the qualifications and can effectively meet the demands of the position within maximum ten (10) working days.

#### 10.10 VACANT POSITIONS

The warehouse positions are as follows:


- Stock clerk
- Appointment coordinator

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- Relief worker
  - Waybill preparation clerk
  - Shipping associate
  - Returns associate
  - Parts and claims associate
  - Upper mezzanine associate
  - Lower mezzanine associate (conveyer)
  - Janitorial associate
  - Order distribution associate
  - Pallet truck operator / order preparation clerk
  - Forklift operator
  - Internal delivery associate
  - Order picker

10.11 Employees who want to be assigned to one of these positions submit their application by signing a form prepared by the employer. Employees can withdraw their application by sending written notice to the employer.

All of these forms make up a permanent list that is updated by the employer and sent to the union. The forms indicate whether the employee is applying for a permanent position and/or a temporary assignment.

10.12 A vacancy for a permanent or newly created position is granted to the candidate with the most number of years of service who meets the requirements of section 10.01 subject to section 10.13.



10.13 If, after training and a probation period of maximum ten (10) working days, the employee does not qualify or decides they no longer want the position, they will return or be returned to their former position with all their rights and privileges.

10.16 a) During a working day, an employee can be assigned to any task outside of their main position that is still within their classification. To do this, the employer voluntarily offers the transfer based on seniority or, in the absence of seniority, assigns employees by inverse order of seniority among those working in the selected position.

b) An employee who arrives late or who benefits from an individual schedule arrangement can still be assigned to any task within their classification until the break and return to their regular position following the break.

#### 10.17 EXEMPTIONS FROM SENIORITY PROVISIONS

Employees who are unable to accomplish their work because of a work accident, their age or a functional disability can be exempted from the seniority provisions upon mutual agreement between the employer and the union.

### *Section 20 – OCCUPATIONAL HEALTH AND SAFETY*

20.1 a) The employer agrees that it is responsible for respecting and complying with the current and future laws and regulations of the Government of Quebec concerning occupational health and safety and taking adequate provisions to protect the health, safety, hygiene and physical integrity of its employees at work.

b) The employer and the union agree to combine their efforts in the application of paragraph a).



## 20.2 The Health and Safety Committee

- a) The parties agree to form an occupational health and safety committee.
- b) The committee is made up for four (4) members, including two (2) appointed by the employer and two (2) appointed by the union. Both parties will have the option of bringing observers or guests to committee meetings.
- c) The committee will meet on the last Thursday of every month. If either of the two parties needs to reschedule, that party must notify the other party as early as possible and at least 24 hours in advance barring an emergency beyond their control. If a meeting is postponed, it is rescheduled immediately. The committee meets for the amount of time necessary to accomplish its duties. The employer takes the minutes of each meeting and provides a copy to the union within two (2) weeks following the meeting.
- d) Employees who participate in the committee are deemed to be at work. They must notify their immediate supervisor when they are required to carry out their committee duties.
- e) The duties of the committee are those set out in section 78 in the *Act respecting occupational health and safety*.

## 20.3 Information

The employer will provide the committee with all information necessary to identify and assess risks in the workplace and identify contaminants and dangerous substances.





#### 20.4 Health service

The employer will provide and maintain first-aid kits that comply with regulations.

#### 20.5 Equipment – Personal protection

The employer will provide employees with all individual means of protection or safety equipment chosen by the committee, for free, in accordance with the Act.

#### 20.6 Right to refuse dangerous work

The right to refuse dangerous work, the allowances applicable in the event of an industrial accident and the costs of transportation are governed by the *Workers' Compensation Act* and the *Act respecting occupational health and safety*.

### Appendix A (of the collective agreement)

#### Salaries and classifications

##### Two classifications

Warehouse classification: As of January 1, 2018, the maximum salary (10 years of service or 18,270 hours worked) will be \$18.73/hour.

Driver classification: As of January 1, 2018, the maximum salary (10 years of service or 18,270 hours worked) will be \$19.58/hour.



## PERTINENT SECTIONS FROM LAWS (not an exhaustive list)

### Charter of human rights and freedoms

#### *Section 10*

Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, gender identity or expression, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap.

Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such right.

1975, c. 6, s. 10; 1977, c. 6, s. 1; 1978, c. 7, s. 112; 1980, c. 11, s. 34; 1982, c. 61, s. 3; 2016, c. 19, s. 11.

#### *Section 10.1*

No one may harass a person on the basis of any ground mentioned in section 10.

1982, c. 61, s. 4.

#### *Section 16*

No one may practise discrimination in respect of the hiring, apprenticeship, duration of the probationary period, vocational training, promotion, transfer, displacement, laying-off, suspension, dismissal or conditions of employment of a person or in the establishment of categories or classes of employment.

1975, c. 6, s. 16.



## *Section 20*

A distinction, exclusion or preference based on the aptitudes or qualifications required for an employment, or justified by the charitable, philanthropic, religious, political or educational nature of a non-profit institution or of an institution devoted exclusively to the well-being of an ethnic group, is deemed non-discriminatory.

1975, c. 6, s. 20; 1982, c. 61, s. 6; 1996, c. 10, s. 1.

## Act respecting labour standards

### *Section 81.18*

For the purposes of this Act, “psychological harassment” means any vexatious behaviour in the form of repeated and hostile or unwanted conduct, verbal comments, actions or gestures, that affects an employee’s dignity or psychological or physical integrity and that results in a harmful work environment for the employee.

A single serious incidence of such behaviour that has a lasting harmful effect on an employee may also constitute psychological harassment.

2002, c. 80, s. 47.

### *Section 81.19*

Every employee has a right to a work environment free from psychological harassment.

Employers must take reasonable action to prevent psychological harassment and, whenever they become aware of such behaviour, to put a stop to it.

2002, c. 80, s. 47.



### *Section 81.20*

The provisions of sections 81.18, 81.19, 123.7, 123.15 and 123.16, with the necessary modifications, are deemed to be an integral part of every collective agreement. An employee covered by such an agreement must exercise the recourses provided for in the agreement, insofar as any such recourse is available to employees under the agreement.

At any time before the case is taken under advisement, a joint application may be made by the parties to such an agreement to the Minister for the appointment of a person to act as a mediator.

The provisions referred to in the first paragraph are deemed to form part of the conditions of employment of every employee appointed under the Public Service Act (chapter F-3.1.1) who is not governed by a collective agreement. Such an employee must exercise the applicable recourse before the Commission de la fonction publique according to the rules of procedure established pursuant to that Act. The Commission de la fonction publique exercises for that purpose the powers provided for in sections 123.15 and 123.16 of this Act.

The third paragraph also applies to the members and officers of bodies.

2002, c. 80, s. 47.

### *Section 123.7*

Any complaint concerning psychological harassment must be filed within 90 days of the last incidence of the offending behaviour.

2002, c. 80, s. 68.



### *Section 123.15*

If the Administrative Labour Tribunal considers that the employee has been the victim of psychological harassment and that the employer has failed to fulfil the obligations imposed on employers under section 81.19, it may render any decision it believes fair and reasonable, taking into account all the circumstances of the matter, including

- (1) ordering the employer to reinstate the employee;
- (2) ordering the employer to pay the employee an indemnity up to a maximum equivalent to wages lost;
- (3) ordering the employer to take reasonable action to put a stop to the harassment;
- (4) ordering the employer to pay punitive and moral damages to the employee;
- (5) ordering the employer to pay the employee an indemnity for loss of employment;
- (6) ordering the employer to pay for the psychological support needed by the employee for a reasonable period of time determined by the Tribunal;
- (7) ordering the modification of the disciplinary record of the employee.

2002, c. 80, s. 68; 2015, c. 15, s. 237.