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Citation: 2011 PSLRB 110

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

JEFFREY STRINGER

Grievor

and

TREASURY BOARD
(Department of National Defence)

Employer

and

DEPUTY HEAD
(Department of National Defence)

Respondent

Indexed as
Stringer v. Treasury Board (Department of National Defence) and Deputy Head (Department of National Defence)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Renaud Paquet, adjudicator

For the Grievor: David Yazbeck, counsel

For the Employer: Martin Charron, counsel

Heard at Kingston, Ontario,
August 10, 2011.

REASONS FOR DECISION

I. Issues before the adjudicator

[1] Jeffrey Stringer ("the grievor") was employed at the Department of National Defence ("the employer") from April 28, 2003 to April 24, 2006 as a draftsperson at Canadian Forces Base (CFB) Trenton, Ontario.

[2] The employer terminated the grievor's term employment before he reached three years of continuous employment. The grievor grieved that decision. He also grieved that the employer discriminated against him and that it failed to accommodate him. The grievor filed only one grievance, but the Public Service Alliance of Canada ("the bargaining agent") referred it twice to adjudication, under two separate provisions of the *Public Service Labour Relations Act* ("the *Act*"). First, the grievance was referred to adjudication as a violation of the no-discrimination clause of the collective agreement between the bargaining agent and the Treasury Board for the Technical Services Group; expiry date June 21, 2007 ("the collective agreement"). Second, the grievance was referred to adjudication as a termination grievance under subparagraph 209(1)(*c*)(i) of the *Act*. The grievor gave notice to the Canadian Human Rights Commission (CHRC) that he was raising an issue involving the application of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 ("the *CHRA*"), within the context of a request for the adjudication of a grievance.

[3] On March 14, 2011, I rendered decision 2011 PSLRB 33, which allowed the grievance in part. My order read as follows:

. . .

> *[94] The grievance is allowed in part.*
>
> *[95] The employer discriminated against the grievor on several occasions.*
>
> *[96] The parties have 60 days to come to an agreement on the remedy.*
>
> *[97] If the parties do not agree on a remedy within 60 days of this decision, a hearing will take place to hear their submissions.*
>
> *[98] The employer's decision to terminate the grievor was not tainted with discrimination. Consequently, the part of the grievance dealing with the termination of the grievor's employment is rejected.*

[4] The parties did not come to an agreement on the remedy, and an oral hearing was scheduled for August 10, 2011 to hear their submissions on the appropriate remedy to be ordered. Before reporting on those submissions, I will provide some background on the grievor and summarize the issues on which I concluded that the employer discriminated against him. More details can be found in 2011 PSLRB 33.

II. My findings in 2011 PSLRB 33

[5] The grievor was born hearing impaired. He is also speech impaired. American Sign Language (ASL) is his first language. English, which he learned in school, is his second language. Even though the grievor is functional in written English, he has difficulties understanding some English terms that do not exist in ASL. It is a visual language that has its own grammar and syntax (word order), that is distinct from spoken language. The Canadian Hearing Society (CHS) suggests that, when interacting with a hearing impaired employee whose language is ASL, an employer should use a qualified ASL interpreter for interviews, meetings, training sessions, disciplinary actions and performance appraisals. A qualified ASL interpreter can interpret the intent and spirit of everything signed and spoken. Finger spelling, real-time captioning and written notes are handy in many situations. However, according to the CHS, abbreviated written messages can result in incomplete communications.

[6] The employer knew that the grievor had a disability which met the definition of disability as per subsection 3(1) of the *CHRA* and clause 19.01 of the collective agreement. Consequently, the employer could not, pursuant to section 7 of the *CHRA* or clause 19.01 of the collective agreement, directly or indirectly adversely differentiate the grievor because he was disabled. In *Ontario Human Rights Commission v. Simpsons-Sears*, [1985] 2 S.C.R. 536, the Supreme Court established that employers have a duty to take reasonable steps to accommodate an employee's work limitations, short of undue hardship. In the instances in which the grievor asked to be accommodated, and the employer refused, the employer had the onus of proving undue hardship.

[7] The employer refused to provide the grievor with ASL interpretation on several occasions. The first incident occurred in November 2002, when the employer met with the grievor to discuss hiring formalities. The grievor asked for ASL interpretation to better understand the documents and to be able to easily ask questions. The employer denied his request and told the grievor to get used to writing. The grievor was also

refused ASL interpretation in May 2004 and again in April 2005, when he was presented with his performance appraisal. The lack of ASL interpretation prevented him from fully understanding and discussing his appraisal. The grievor was also refused ASL interpretation for the monthly 15-minute safety meetings. Fourteen of those meetings were held in 2003 and 2004. The employer gave the grievor access to the written and video material, but because of his disability, the grievor was not able to fully benefit from what was said at those meetings. The grievor was also refused ASL interpretation at a meeting for all employees in November 2005. The meeting was to discuss a survey on employee morale, and the grievor wanted to make sure that he understood what was said. In addition, the grievor asked for an ASL interpreter to help him understand the instruction manual of the Blackberry that he was provided in March 2006. That request was refused by his manager, who wrote the following to the grievor: "Read the damn manual."

[8] All those requests from the grievor were made in advance and were legitimate. By refusing to provide ASL interpretation on those occasions, the employer failed in its duty to accommodate the grievor's disability, and it discriminated against him. On every one of those occasions, the grievor was prevented from fully understanding or participating in work-related activities, as all other employees would have been able to do. The grievor was entitled to be treated with dignity, but he was not.

[9] The grievor did not write English perfectly, and he had difficulty understanding some words that do not exist in ASL. Those difficulties did not negatively affect his work performance. In his April 2005 performance review report, the employer wrote: "Although hearing impaired, he has the ability to interact with peers, supervisors and clients efficiently . . . Jeff is aware he requires written English training, however this has not affected his work performance in any way." At a meeting in January 2006, the employer stated that English was a requirement for the job and suggested that the grievor seek English language training. The employer said that it agreed to accommodate the grievor but felt that employment equity accommodations "should not be nit-picky." The employer then informed the grievor that it would provide ASL interpretation for a meeting once a month but that it was not meant "to be a crutch" for the grievor instead of improving his English skills.

[10] By acting as it did with respect to the grievor's English skills, the employer discriminated against him. It seems that the employer wanted the grievor to become

proficient enough in written English that he would no longer request ASL interpretation. The grievor fully satisfied the requirements of his job, but the employer decided to ask more from him, so that he would be less of a burden to accommodate. That was wrong. Furthermore, the use of expressions like "should not be nit-picky" or not meant "to be a crutch" is completely unacceptable when referring to an accommodation request from the grievor. Those comments were humiliating, and they discriminated against the grievor.

[11] The employer also failed in its duty to accommodate by not providing any training, guidance or assistance to its managers at CFB Trenton about what needed to be done, how to do it and where to get assistance to accommodate the grievor. The grievor was hired through an employment equity program, and his manager did not know how to accommodate him and where to get the resources to assist him. No employer experts from employment equity or human resources were assigned to train, sensitize, educate and help the employer's representatives with their obligation to accommodate the grievor and with what that obligation involved and meant.

[12] It is also relevant to this decision to mention that, at the July 2010 hearing, the grievor testified that he felt hurt, insulted and discriminated against by some of the comments made by the employer's representative at the January 2006 meeting. His skills in the English language had never negatively affected his work, and suddenly, it was becoming an issue for the employer. The grievor believed that he was not "nit-picky." He simply requested an ASL interpreter, and he felt that the employer was "sick of it." When the employer referred to using ASL interpretation as a crutch, the grievor felt that the floor had "dropped beneath him." The grievor also testified that he felt humiliated or personally diminished several times during the course of his employment when the employer refused to accommodate him, mostly when it refused ASL interpretation when he required it.

III. Summary of the arguments

A. For the grievor

[13] The grievor asks for an order requiring the employer to pay him $17 500 in general damages for pain and suffering, pursuant to paragraph 53(2)(*e*) of the *CHRA*. The grievor also asks that the employer be ordered to pay him $17 500 for special compensation, pursuant to paragraph 53(3) of the *CHRA*. On those points, the grievor

referred me to the evidence presented at the July 2010 hearing and to the facts of the case as reported in 2011 PSLRB 33. The grievor also compared that evidence and those facts to those of several cases cited later in this decision and the damages granted by the tribunals or the courts in those cases.

[14] The grievor also asks to be compensated for family counselling expenses that he incurred as a result of the employer's discrimination against him. However, no receipts or any other form of evidence of those expenses was adduced at the July 2010 hearing or at this hearing.

[15] The grievor also asks that a series of systemic remedies be implemented to prevent such discrimination from taking place in the future and that accommodation practices be improved at CFB Trenton. The grievor asks that my order be posted across the workplace and that I remain seized pending the outcome of the employer's efforts to implement the remedies. The systemic remedies include the following:

- that the employer be ordered to revise its accommodation policies both generally and as they pertain to hearing impaired persons;

- that the employer establish mechanisms to ensure that all its employees and managers at CFB Trenton are provided training, guidance and assistance to accommodate all persons with disabilities, particularity hearing impaired persons;

- that experts be available to train, sensitize and educate the grievor's former managers, their successors and other managers about their obligations to accommodate;

- that these measures be subject to review and approval by the grievor and the bargaining agent and that they be developed in consultation with the CHRC; and

- that these measures be implemented within six months.

[16] The grievor argued that I have full jurisdiction to order any systemic remedies pursuant to subsection 226(1) of the *Act* and that my jurisdiction is not limited to giving relief in accordance with paragraph 53(2)(*e*) or subsection 53(3) of the *CHRA*. The remedies that he requests are intended to address the findings of discrimination in 2011 PSLRB 33.

[17] The grievor referred me to *Audet v. Canadian National Railway*, 2006 CHRT 25; *Canadian Association of the Deaf et al. v. Canada*, 2006 FC 971; *Canadian National Railway v. Canada (Human Rights Commission)*, [1987] 1 S.C.R. 1114; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *Hughes v. Elections Canada*, 2010 CHRT 4; *Johnstone v. Canada Border Services*, 2010 CHRT 20; *Milano v. Triple K Transport Ltd.*, 2003 CHRT 30; *National Capital Alliance on Race Relations v. Canada (Health and Welfare)*, [1997] C.H.R.D. No. 3 (QL); and *Richards v. Canadian National Railway*, 2010 CHRT 24. The grievor also referred me to several public policies or educational documents produced by the Ontario Human Rights Commission, the Canadian Hearing Society, the National Association of the Deaf, the Rehabilitation Engineering Research Center on Workplace Accommodations, and the Treasury Board.

B. <u>For the employer</u>

[18] In light of my decision in 2011 PSLRB 33 and of past decisions of the Board, the employer disagrees with the grievor's request that he be awarded $17 500 for pain and suffering. Instead, the employer should be ordered to pay $6000 to the grievor. When determining the amount to be ordered, the adjudicator must consider that the grievor did not produce any medical evidence to support his claim. Furthermore, the employer did not completely refuse to accommodate him but rather failed in that respect on a few occasions.

[19] The employer also disagrees with the grievor's request to pay him $17 500 for special compensation pursuant to subsection 53(3) of the *CHRA*. Such compensation is paid only if the adjudicator concludes that the employer engaged in the discriminatory practice wilfully or recklessly. In this case, the employer did not act wilfully or recklessly. Consequently, the adjudicator should not award any special compensation to the grievor.

[20] As it did in its arguments in 2011 PSLRB 33, the employer argued that the alleged failures to accommodate the grievor occurred before the *Act* came into force on April 1, 2005. Consequently, I have no jurisdiction on incidents or events that happened before April 1, 2005. Also, the employer raised that, as it did in its arguments in 2011 PSLRB 33, the grievor had already been accommodated when he grieved in April 2006 and that most of the alleged failures to accommodate him happened more than 25 days before the grievance was filed.

[21] The employer argued that I have no jurisdiction under subsection 226(1) of the *Act* to order any of the systemic remedies asked for by the grievor. Paragraph 226(1)(*h*) of the *Act* specifically refers to the adjudicator's power in reference to the *CHRA* and it limits that power to provide relief in accordance with paragraph 53(2)(*e*) or subsection 53(3) of the *CHRA*. It is clear that the legislator, by referring in paragraph 226(1)(*h*) of the *Act* to specific remedies under the *CHRA*, wanted to limit the powers of adjudicators to those specific remedies.

[22] The employer referred me to the following decisions: *Canada (Attorney General) v. Tipple*, 2011 FC 762; *Attorney General of Canada v. Cameron and Maheux*, 2009 FC 618; *Cyr v. Treasury Board (Department of Human Resources and Skills Development)*, 2011 PSLRB 35; *McNeil v. Treasury Board (Department of National Defence)*, 2009 PSLRB 84; *Lloyd v. Canada Revenue Agency*, 2009 PSLRB 15; *Pepper v. Treasury Board (Department of National Defence)*, 2008 PSLRB 8; *Pepper v. Deputy Head (Department of National Defence)*, 2008 PSLRB 71; *Lafrance v. Treasury Board (Statistics Canada)*, 2006 PSLRB 56; and *Brown v. Royal Canadian Mounted Police*, 2004 CHRT 24. The employer also referred me to paragraph 2:1410 of the 2011 edition of Brown and Beatty, *Canadian Labour Arbitration*.

IV. Reasons

[23] The grievor asks for compensation for pain and suffering pursuant to paragraph 53(2)(*e*) of the *CHRA* and for special compensation pursuant to subsection 53(3) of the *CHRA*. He also asks that I order the employer to reimburse his counselling expenses. I will first deal with the above-identified remedies, then deal with the employer's objection to my jurisdiction to order the other remedies requested by the grievor and outlined in paragraph 15 and finally with the merits of imposing other remedies on the employer.

[24] The employer argued that the failures to accommodate the grievor occurred before the *Act* came into force on April 1, 2005, and that, at that time, I had no jurisdiction over human rights issues. The employer also raised the points that the grievor had already been accommodated when he grieved in April 2006 and that most of the alleged failures to accommodate him happened more than 25 days before the grievance was filed. I have already ruled on those two points, which were previously raised by the employer, and I rejected them in 2011 PSRLB 33. That decision still

stands, and there is no need for me to revisit those two points, which have already been settled.

A. <u>Compensation for expenses, pain and suffering, and special compensation</u>

[25] The grievor asked to be compensated for family counselling expenses. However, he did not adduce any evidence that the employer's failure to accommodate him caused him to use family counselling services. Furthermore, no receipt from paying for such services was adduced at the July 2010 hearing or at this hearing. Consequently, I will not order the employer to reimburse the grievor for family counselling expenses.

[26] There is no disagreement between the parties on my jurisdiction to give the grievor relief under paragraph 53(2)(*e*) and subsection 53(3) of the *CHRA*. Each of those provisions refer to a maximum payment of $20 000. The grievor believes that he should receive $17 500 under each provision of the *CHRA*. According to the employer, I should order a payment of $6000 under paragraph 53(2)(*e*) and no compensation under subsection 53(3) of the *CHRA*. I will first review the decisions referred to by the parties and then cover the relevant facts of this case to determine what I should order the employer to pay to the grievor.

[27] In *Pepper* (2008 PSLRB 71), the adjudicator reviewed a great number of precedents in which the Canadian Human Rights Tribunal ("CHRT" or "the Tribunal") had awarded damages. That decision was the first in which a Board adjudicator awarded damages because of a violation of the *CHRA*. The adjudicator ordered the employer to pay the employee $9000 for pain and suffering and $8000 under subsection 53(3) of the *CHRA*. The adjudicator based her decision on the fact that the employer had discriminated against Mr. Pepper by unfairly terminating his employment while he was ill, by acting recklessly toward him and by breaching the confidentiality of the mediation process.

[28] In *Lloyd*, the adjudicator concluded that the employer had discriminated against the grievor by putting in place an accommodation plan not suited to her physical disability and because it had delayed helping her. The adjudicator ordered the employer to pay the grievor $6000 for pain and suffering. However, he did not order special compensation under subsection 53(3) of the *CHRA* because the grievor did not establish that the employer had engaged in a discriminatory practice wilfully or recklessly.

[29] After comparing the facts with those in *Pepper* and in *Lloyd*, the adjudicator in *Cyr* concluded that the employer's attitude had caused the grievor a great deal of stress, made her anxious and contributed to the deterioration of her state of health. The situation also negatively affected the grievor's family life. Even though Ms. Cyr did not suffer objective consequences as serious as those in *Pepper*, the subjective consequences of the employer's actions were no less serious. The adjudicator also found that Ms. Cyr's pain and suffering were much greater than what was reported in *Lloyd*. He ordered the employer to pay $8000 for pain and suffering to Ms. Cyr. The adjudicator also ordered the employer to pay $10 000 for special compensation because reckless comments and written communications had accumulated over time. The adjudicator considered that conduct a serious violation of the duties of the employer and of its representatives who, in addition, stated that they knew the accommodation laws, policies and obligations.

[30] In *Johnstone*, the CHRT ordered the employer to pay $15 000 for pain and suffering and $20 000 in special compensation under subsection 53(3) of the *CHRA*. The CHRT determined that, by refusing to accommodate the employee's family situation, her employer had caused her significant pain and suffering and had undermined her personal and professional confidence and reputation. The CHRT also found that the employer had acted wilfully and recklessly and that it had not respected the employee's family situation.

[31] In *Brown*, the CHRT ordered the respondent to pay $10 000 to the complainant for pain and suffering. The Tribunal concluded that the complainant had suffered emotionally and that she had started to question her self-esteem as a result of the discrimination. However, the Tribunal also stated that the complainant was not entirely reasonable in her positions and that she had a pre-existing psychological condition. The Tribunal did not grant the complainant any special compensation under subsection 53(3) of the *CHRA*. It felt that the respondent had conducted itself in a measured and professional way. Additionally, the respondent had not known that the complainant had been in a precarious psychological state.

[32] In *Audet*, the CHRT ordered the respondent to pay $10 000 to the complainant for pain and suffering and $10 000 because its conduct had been reckless. The complainant testified that the respondent's conduct had had an important emotional impact on him. The complainant had suffered self-esteem problems and had been

made to feel like a "nobody." The Tribunal also stated that the respondent had acted recklessly. It was familiar with its duty to accommodate and had set out procedures to be followed with respect to accommodation, but the persons responsible for managing the complainant had ignored those policies and had waited months before making any efforts to accommodate him.

[33] In *Milano*, the CHRT ordered the respondent to pay $10 000 to the complainant for pain and suffering and $5000 for special compensation. The complainant testified that he had been shattered by the actions of the respondent, which had devastating consequences to his self-esteem and psychological well-being. The Tribunal did not find that the respondent had acted recklessly. It also considered that the respondent was not a large organization and that an award of $5000 for special compensation would be sufficient.

[34] In *Richards*, the CHRT ordered the respondent to pay $15 000 to the complainant for pain and suffering and $20 000 for special compensation. The Tribunal concluded that the respondent's conduct and nonchalant attitude had disturbed the complainant. Because the respondent had a clear policy on accommodation and senior managers had ignored it and had not tried to understand the complainant's situation, the Tribunal concluded that the respondent had acted recklessly.

[35] I do not find *Hughes* very useful in determining the amounts that I should order the employer to pay to the grievor because it does not deal with an employment relationship but rather with denying access to a polling location during a federal election and by-election.

[36] When analyzing the eight decisions referred to by the parties (disregarding *Hughes*), it became apparent that most of them do not include a detailed analysis of the rational used by the Tribunal or the adjudicator to arrive at the specific amount ordered for pain and suffering and for special compensation, if applicable. However, it is clear that the seriousness of the psychological impacts that discrimination or the failure to accommodate had on the complainants or the grievors is the main factor that justified each decision. It is also clear that recklessness rather than wilfulness was the principal ground used to grant special compensation to the grievors or the complainants.

[37] I set at $10 000 the amount to be paid to the grievor for pain and suffering pursuant to paragraph 53(2)(*e*) of the *CHRA*. The grievor testified that he felt hurt, insulted and discriminated against by comments made by the employer's representatives. The grievor felt that the employer was sick of him asking for accommodation. When the employer referred to using ASL interpretation as a crutch, the grievor felt that the floor had "dropped beneath him." The grievor testified that he felt humiliated or personally diminished several times during the course of his employment when the employer refused to accommodate him. I believe him. The grievor had to endure the failure to accommodate for close to three years. I find that what the grievor suffered, and the impact of the employer's failure to accommodate him to be comparable to what is reported in *Brown*, *Audet* and *Milano,* in each of which the CHRT granted $10 000, or in *Pepper*, in which the adjudicator granted $8000 in damages for pain and suffering.

[38] I accept the request made by the grievor to set at $17 500 the special compensation to be paid to him under subsection 53(3) of the *CHRA*. The grievor's case is comparable to *Johnstone* and *Richards*, in which the CHRT ordered compensation of $20 000. In this case, the employer acted recklessly over a period of three years from the time that the grievor was hired almost to the time that he was terminated. The Department of National Defence and the Treasury Board are among the largest, most articulate and sophisticated employers in Canada. The employer knows that it has an obligation to accommodate; it has detailed policies on that topic, it runs an employment equity program and it employs employment equity specialists. Nevertheless, time and again, it systematically ignored accommodation requests from the grievor. That was reckless. It was also reckless to qualify accommodation requests from the grievor as "nit-picky" or as "crutches" and to rudely suggest to the grievor that he "[r]ead the damn manual" rather than accommodate him. It was also particularly reckless to formally admit that the grievor is sufficiently competent in English to do his work but at the same time to blame him for his limited abilities in English and to urge him to get trained simply to reduce the employer's needs for accommodation. That is outright discrimination.

B. Jurisdiction

[39] The employer argued that I have no jurisdiction to order any of the other remedies asked for by the grievor because my powers under the *Act* are limited to

ordering damages and compensation pursuant to paragraph 53(2)(*e*) and subsection 53(3) of the *CHRA*. Those other remedies include the payment of interest on the damages and the special compensation ordered pursuant to paragraph 53(2)(*e*) and subsection 53(3) of the *CHRA*. They also include a series of systemic remedies proposed by the grievor.

[40] To decide that objection, I shall review the following provisions of the *Act*:

. . .

> ***226.*** *(1) An adjudicator may, in relation to any matter referred to adjudication,*
>
> . . .
>
> *(*g*) interpret and apply the* Canadian Human Rights Act *and any other Act of Parliament relating to employment matters, other than the provisions of the* Canadian Human Rights Act *related to the right to equal pay for work of equal value, whether or not there is a conflict between the Act being interpreted and applied and the collective agreement, if any;*
>
> *(*h*) give relief in accordance with paragraph 53(2)(*e*) or subsection 53(3) of the* Canadian Human Rights Act*;*
>
> *(*i*) award interest in the case of grievances involving termination, demotion, suspension or financial penalty at a rate and for a period that the adjudicator considers appropriate; and . . . .*
>
> . . .
>
> ***228.*** *(2) After considering the grievance, the adjudicator must render a decision and make the order that he or she considers appropriate in the circumstances. . . .*

. . .

[41] I shall also examine the following sections of the *CHRA*:

. . .

> ***53.*** *(1) At the conclusion of an inquiry, the member or panel conducting the inquiry shall dismiss the complaint if the member or panel finds that the complaint is not substantiated.*

(2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:

(a) that the person cease the discriminatory practice and take measures, in consultation with the Commission on the general purposes of the measures, to redress the practice or to prevent the same or a similar practice from occurring in future, including

(i) the adoption of a special program, plan or arrangement referred to in subsection 16(1), or

(ii) making an application for approval and implementing a plan under section 17;

(b) that the person make available to the victim of the discriminatory practice, on the first reasonable occasion, the rights, opportunities or privileges that are being or were denied the victim as a result of the practice;

(c) that the person compensate the victim for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice;

(d) that the person compensate the victim for any or all additional costs of obtaining alternative goods, services, facilities or accommodation and for any expenses incurred by the victim as a result of the discriminatory practice; and

(e) that the person compensate the victim, by an amount not exceeding twenty thousand dollars, for any pain and suffering that the victim experienced as a result of the discriminatory practice.

(3) In addition to any order under subsection (2), the member or panel may order the person to pay such compensation not exceeding twenty thousand dollars to the victim as the member or panel may determine if the member or panel finds that the person is engaging or has engaged in the discriminatory practice wilfully or recklessly.

(4) Subject to the rules made under section 48.9, an order to pay compensation under this section may include an award of interest at a rate and for a period that the member or panel considers appropriate.

. . .

[42] I do not agree with the employer's argument that, in this case, my powers are limited to ordering damages and compensation pursuant to paragraph 53(2)(*e*) and subsection 53(3) of the *CHRA*. To accept that argument would mean that an adjudicator's powers to order remedies would be more limited for grievances involving human rights issues than for other grievances. That would also mean that employees would have to file and pursue both a grievance and a complaint under the *CHRA* to be made whole. I do not believe that that was the intent of the legislator when paragraph 226(1)(*h*) of the *Act* was drafted.

[43] Rather, it seems to me that paragraph 226(1)(*h*) of the *Act*, like paragraph 226(1)(*g)* and subsection 208(2), were included in the *Act* to specify that human rights issues could be grieved and to outline the new expanded jurisdiction of adjudicators over human rights issues, which did not exist before the enactment of the *Act* in April 2005. Subsection 208(2) reads as follows:

> ***208.*** *(2) An employee may not present an individual grievance in respect of which an administrative procedure for redress is provided under any Act of Parliament, other than the* Canadian Human Rights Act.

[44] In his grievance, the grievor alleged that the employer violated the no-discrimination clause of the collective agreement. That clause reads in part as follows:

> ***19.01*** *There shall be no discrimination, interference, restriction, coercion, harassment, intimidation, or any disciplinary action exercised or practiced with respect to an employee by reason of age, race, creed, colour, national or ethnic origin, religious affiliation, sex, sexual orientation, family status, mental or physical disability, membership or activity in the Alliance, marital status or a conviction for which a pardon has been granted.*

. . .

[45] My jurisdiction to deal with this grievance and to order remedies, if allowed, comes first from paragraph 209(1)(*a*) of the *Act,* considering that this grievance involves the interpretation or application of the collective agreement. That provision of the *Act* reads as follows:

> ***209.*** *(1) An employee may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to*
>
> *(*a*) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award . . .*

[46] After hearing such a grievance at adjudication, my task is first to make a decision about the grievance, i.e., to allow it, to allow it in part or to reject it. That power does not come from subsection 226(1) of the *Act* or any of its paragraphs, but rather from subsection 228(2), which states that I must render a decision and make the order that I consider appropriate in the circumstances.

[47] In addition to that basic authority to decide a grievance and to order an appropriate remedy, paragraph 226(1)(*g*) of the *Act* gives me the power to interpret and to apply the *CHRA* and any other Act of Parliament related to employment matters. Paragraph 226(1)(*g*) does not refer to any specific provisions of the *CHRA* but rather to the *CHRA* as a whole, with the exception of the pay equity provisions. If the legislator wanted to exclude from my jurisdiction other provisions of the *CHRA*, it would have mentioned them as it did the pay equity provisions.

[48] My interpretation is consistent with past rulings from the Supreme Court of Canada in *St. Anne Nackawic Pulp & Paper Co. v. Canadian Paper Workers Union, Local 219*, [1986] 1 S.C.R. 704; *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929; *Parry Sound (District) Social Services Administration Board v. OPSEU, Local 324*, 2003 SCC 42; and *Dunsmuir v. New Brunswick*, 2008 SCC 9. In those decisions, the Supreme Court ruled that, in general, labour tribunals have jurisdiction to deal with all disputes between the parties arising from the collective agreement or with disputes for which their essential character arises from the collective agreement. Those decisions fully apply to the facts of this case and support the argument that my jurisdiction is not limited, as the employer suggested, to giving relief in accordance with paragraph 53(2)(*e*) and subsection 53(3) of the *CHRA*. To conclude otherwise would mean that the grievor would have to go to the CHRT for other relief or remedies.

[49] Most of the decisions submitted by the parties are not very helpful in deciding the employer's objection because they were issued by the CHRT or are court decisions reviewing CHRT decisions. However, adjudicators of this Board have awarded other

remedies in the past as in *Pepper* and in *Lloyd,* even though the issue of the adjudicator's jurisdiction over other remedies is not discussed in either decision. In *Pepper*, the adjudicator ordered the payment of interest on the amounts that she awarded for pain and suffering and for special compensation. In *Lloyd*, the adjudicator ordered that the employer, in consultation with the bargaining agent, organize training in the area of accommodation for two of its managers. By ordering those remedies, those two adjudicators implicitly determined that they had the power to go beyond the remedies specified at paragraph 53(2)(*e*) and subsection 53(3) of the *CHRA*.

C. <u>Other remedies</u>

[50] The grievor asked for interest on the amounts that I would order the employer to pay him for pain and suffering and for special compensation. With the exception of the *Cyr* and *Lloyd* decisions, the adjudicator or the CHRT in *Pepper*, *Audet*, *Hughes*, *Johnstone* and *Milano* all ordered that, pursuant to subsection 53(4) of the *CHRA*, interest be paid, most of the time from the date on which the complaint was filed. I agree with those decisions, and I will order that the employer pay interest on the amount of $27 500 that I am ordering it to pay pursuant to paragraph 53(2)(*e*) and subsection 53(3) of the *CHRA*. The interest will be calculated from April 16, 2006, the date on which the grievor filed his grievance, in the form of simple interest at the average Canada Savings Bond rate between April 2006 and September 2011.

[51] The grievor asked that the employer be ordered to revise its accommodation policies. I will not order that remedy since no evidence was brought to my attention that established that the lack of accommodation came from deficiencies in the employer's policy. Rather, the failure to accommodate the grievor came from not fully adhering to that policy.

[52] The grievor also asked me to order the employer to train employees and managers at CFB Trenton, including the grievor's former managers, on the duty to accommodate. I will not order that remedy since I do not think that it would sufficiently avoid the type of discrimination that the grievor endured.

[53] When the grievor was hired, the employer failed in its obligations by not giving guidance or assistance to its managers at CFB Trenton about what needed to be done to accommodate the grievor, who is hearing impaired. The employer failed by not helping and supporting its managers to fulfill their legal obligations to accommodate

the grievor. That is where the problem lies, and that is what the employer needs to address. I will not make any specific order on this issue, and I will leave it to the employer to ensure that its managers are not left on their own when they need to put in place accommodation measures for employees with different needs. Experts and specialists must help those managers choose the best means, methods and tools to accommodate those employees.

[54] For all of the above reasons, I make the following order:

(The Order appears on the next page)

V. <u>Order</u>

[55] The employer must pay the grievor, within 60 days, $10 000 for pain and suffering under paragraph 53(2)(*e*) of the *CHRA*.

[56] The employer must pay the grievor, within 60 days, $17 500 for special compensation under subsection 53(3) of the *CHRA*.

[57] The employer must pay interest on those two amounts in the form of simple interest at the average Canada Savings Bond rate for the period between April 2006 and September 2011.

[58] I will remain seized for 60 days to resolve any issues related to the implementation of my decision.

September 12, 2011.

Renaud Paquet,
adjudicator