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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)

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 and Ottawa, Ontario,
July 20 to 23 and December 1, 2010.
Written submissions filed August 9, 16 and 25, and December 13, 2010.

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] Jeffrey Stringer ("the grievor") was employed in a term position at the Department of National Defence ("the employer") from April 28, 2003 to April 24, 2006 as a draftsperson classified at the DD-03 group and level at Canadian Forces Base (CFB) Trenton, Ontario.

[2] The employer terminated the grievor's employment four days before he would have reached three years of continuous employment. At that point, he could have been "rolled-over" to an indeterminate status. The grievor grieved the employer's decision to terminate him. He also grieved that the employer discriminated against him and that it failed to accommodate him. He asked in his grievance to be reinstated with full pay and benefits at the DD-03 group and level. He asked for $10 000 in damages for pain and suffering and the reimbursement of his legal fees.

[3] The employer claims that it did not discriminate against the grievor and that it ended his term contract because of the financial difficulties at CFB Trenton at that time. There was no long-term need for the type of work performed by the grievor, and the employer decided to discontinue his position.

[4] On April 16, 2006, 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*. Both referrals to adjudication were received at the Public Service Labour Relations Board ("the Board") on March 3, 2008.

[5] On February 2, 2008, 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. On March 7, 2008, the CHRC informed the Board that it did not intend to make submissions on the matter.

II. Summary of the evidence

[6] The parties adduced 48 documents in evidence. The grievor testified at the hearing. The employer called Frederick Lord and Lieutenant-Colonel Darwin Gould as witnesses. Mr. Lord hired the grievor and was his manager when he worked at CFB Trenton. From 2004 to 2006, LCol Gould was one of the commanding officers at CFB Trenton. There were 800 military and civil employees reporting to him, directly or indirectly. The section in which the grievor worked ultimately reported to LCol Gould, who made the decision to terminate his employment.

[7] Most of the evidence adduced by the parties was not contradicted even though they might have drawn different conclusions from it. I will summarize the evidence thematically, focusing mostly on events and issues relevant to accommodation and discrimination and to the employer's decision to terminate the grievor.

A. Background

[8] 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.

[9] According to the Canadian Hearing Society (CHS), professional ASL interpreters, knowledgeable in the language and culture of both hearing impaired and hearing people, are the bridge between ASL users and English speakers. The 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.

[10] The grievor received a construction engineering technician diploma from Loyalist College in 1997. From 1998 to 2002, he occupied several positions in

Newfoundland in the private and public sectors. On April 28, 2003, the grievor was hired as an employment equity employee on a term contract to work as a draftsperson at CFB Trenton. At that time, the employer did not meet its ratio of employment equity employees and had full knowledge that the grievor was hearing and speech impaired.

[11] Most of the time, communications between the grievor and his clients were done via email. Clients would email their requests directly or indirectly to the grievor. He would ask for specifics, if necessary, by email, do the work and inform clients by email when it was completed.

[12] After his first term contract ended, the grievor's term was renewed eight times with no breaks in service. The last contract was supposed to end on April 28, 2006, but the grievor was advised on March 21, 2006 that his contract would end on April 24, 2006, depriving him of reaching the three-year continuous-employment mark.

[13] As a draftsperson classified at the DD-03 group and level, the grievor's work at CFB Trenton involved conducting on-site inspections, taking measurements of existing building and facilities, developing drawings in accordance with planning criteria and design standards to suit project requirements, assisting in site surveying support services, assisting staff with computer-aided design and drafting (CADD) software applications, producing sets of drawings required by clients, producing blueprints and copies on large-format printers and copiers, and updating existing electronic manual drawings using CADD applications.

[14] When the grievor started working at CFB Trenton, no discussion ever took place about his accommodation needs. It was clear to Mr. Lord that the grievor was hearing impaired, and the grievor knew that Mr. Lord was aware of it. Mr. Lord received no briefing and was not sensitized by the employer's employment equity or human resources specialists to the special needs of a hearing impaired employee.

B. <u>The grievor's performance</u>

[15] The grievor's daily work was supervised by Evan Hendry, who was classified at the DD-05 group and level. Mr. Hendry reported to Mr. Lord. The first performance review report was completed on May 5, 2004, and the second on April 29, 2005.

[16] Mr. Hendry and Mr. Lord assessed the grievor's work performance in May 2004 for his first year of employment. The grievor met all the performance-related factors

but needed to improve his flexibility and adaptability. The narrative part of the performance review report includes the following:

> *Mr. Stringer has greatly increased his skills in the area of ADT CAD drafting. He makes the effort required to produce accurate, organized and complete drawings. His skills as an instrument person require some improvement; however this is mostly due to insufficient training to date. Mr. Stringer can be relied upon to help customers with their needs; whatever they may be and he is continuing to develop his knowledge of our large-format printing and copying devices.*
>
> . . .
>
> *Mr Stringer continues to improve his knowledge and skills utilizing ADT and various other CAD techniques. He is meticulous and thorough when updating drawings. He is providing added attributes to drawings including occupants, area use, room numbers and individual measurements which allow Realty Manager to keep RAIS data accurate. He is very polite and courteous and provides relevant information to internal and external clients, as is shown by a letter of appreciation from 8 AMS staff. Although he is hearing impaired, he strives to ensure communications both ways are clear concise and accurate. Mr Stringer needs to improve on adjustments required due to ever changing priorities. The position requires a high degree of flexibility and adaptation. The changing demands are required to be handled professionally and efficiently. Mr Stringer must advance his self confidence by not getting upset when comments are made that should not be directed at him or have no relevance to his responsibilities. He needs to differentiate between constructive criticism and comments by people who are unaware of the position's duties and chain of command.*
>
> [*Sic* throughout]

[17] Mr. Hendry and Mr. Lord assessed the grievor's work performance in April 2005 for his second year of employment. The grievor met all the performance-related factors but needed to more clearly express ideas and information in writing. The narrative part of the performance review report includes the following:

> *Mr. Stringer has worked diligently and conscientiously over the reporting period. He strives to ensure accuracy and produce professional work. Although hearing impaired, he has the ability to interact with peers, supervisors and clients efficiently. He has a personable attitude and gets along well with all those he comes into contact with. He continues to advance his learning of the various disciplines of the position*

> *and with added training, he has the potential to accept further responsibilities.*
>
> . . .
>
> *Jeff is cognizant to restrict how much he interrupts people in their work place when measuring a building. His drawings are organized, accurate and complete representing excellent CAD work.*
>
> *His abilities as an instrument operator have improved significantly this year. Anticipated addition of text messaging technology will remove the communication barrier which current hampers this task.*
>
> *Jeff always presents a friendly, courteous and helpful manner when dealing with clients. His subject knowledge is increasing and he is able to satisfy most client needs.*
>
> . . .
>
> *Jeff is aware he requires written English training, however this has not affected his work performance in any way.*
>
> [*Sic* throughout]

[18] Mr. Lord testified that he was not aware of the grievor's limitation in writing English when he was hired. From November 2002 to April 2003, many emails were exchanged between the grievor and the employer's representatives about the hiring process and the grievor's starting date. In those emails, the grievor did not show weaknesses in written English. However, the grievor's spouse edited most of his emails.

[19] In January 2006, Mr. Lord decided to have the grievor's written English skills evaluated by Loyalist College so that he could be provided with proper training. Mr. Lord discussed his decision at a meeting with the grievor on January 31, 2006. That training was supposed to take place later in 2006. It never took place because the grievor was terminated on April 24, 2006.

[20] In 2008, the grievor applied for a draftsperson position at CFB Petawawa, Ontario. He was not hired in part because of negative employment references from CFB Trenton. On March 4, 2009, Edna Yutronkie, a civil human resources officer from CFB Petawawa, wrote an email to the grievor explaining why he did not get the position. The following abstracts from Ms. Yutronkie's email specifically refer to references from CFB Trenton, which is also called "8 Wing" ("P" means "poor"):

. . .

> *Effective Interpersonal Relationships – P – Reference check at 8 Wing indicated he has difficulty interacting and working with other colleagues – Reference check at DFO indicated he was very friendly and he had no problem dealing with others…*
>
> . . .
>
> *Dependability – P – Reference check at 8 Wing indicated he leaves work early from work and did personal work during work without permission – Reference check at DFO indicated he was punctual… Reference check at 8 Wing indicated that he had difficulty dealing with stress.*
>
> . . .
>
> *Judgment – P – Reference check at 8 Wing indicated that he is unable to think for himself – Reference check at DFO indicated he is capable of identifying and evaluation available options…*
>
> . . .
>
> [*Sic* throughout]

[21] Mr. Lord gave those references for CFB Trenton. He admitted that the references were not coherent with the two performance review reports. He testified that the grievor's weaknesses became more evident in his last year of employment. He remembered that the grievor had once asked him what building to do next and that he could have figured it out for himself. According to Mr. Lord, it could have been that the grievor wanted to know what building to prioritize. Mr. Lord also remembered that, even though he never discussed the issue of work hours with the grievor, he sent him an email reminding him of it. After that, the situation regarding work hours improved.

C. <u>Requests for ASL interpreters</u>

[22] When ASL interpretation services were required, the employer was able to contact the Translation Bureau. The Translation Bureau provided ASL interpreters, but the employer had to pay travel expenses. The employer was also able to hire local ASL interpreters directly. The hourly cost for ASL interpreters varied from $40 to $50. There were available skilled ASL interpreters in the Trenton area.

[23] In November 2002, the grievor attended a meeting at CFB Trenton at which the formalities of his hiring were discussed. Mr. Lord was present. The grievor requested

an ASL interpreter to better understand some of the documents that were presented to him and to be able to easily ask questions. Mr. Lord refused the request and told the grievor that he had better get used to writing. According to the grievor, most of the documents had to do with employment equity. The absence of an ASL interpreter created difficulties for the grievor, who had to sign documents without a full and complete understanding of their contents.

[24] The grievor requested an ASL interpreter so that he would be able to fully discuss the content of his May 2004 performance appraisal report. His request was denied without explanation. The grievor did not want to rock the boat about the refusal. He did not want to lose his job. The grievor also requested an ASL interpreter to discuss the April 2005 performance appraisal report, and his request was again refused. Citing from that appraisal, the grievor testified that words such as "diligently", "conscientiously", "strives", "efficiently", "concise", "contribution" and "potential" do not exist in ASL. He needed explanations of the meanings of those words.

[25] Evidence was adduced at the hearing that the employer provided ASL interpreters on the following occasions:

- Back safety training: May 24, 2005, duration of 1 hour and 45 minutes
- Fire fighting training and the Canadian Military Engineer Birthday BBQ: May 25, 2005, duration of 1 hour and 45 minutes
- Software seminar in Toronto: May 31, 2005, duration of 4 hours and 30 minutes
- Ethics awareness training: June 30, 2005, duration of 3 hours
- Harassment training: September 28, 2005, duration of 2 hours and 30 minutes
- Presentation of long service awards: December 15, 2005, duration of 15 minutes
- Meeting with the grievor: January 31, 2006, duration of 2 hours
- February monthly session: February 22, 2006, duration of 3 hours
- Meeting with the grievor: March 22, 2006, unspecified duration
- Meeting with a pay advisor: April 6, 2006, duration of 6 hours

[26] It was agreed that ASL interpretation would be provided for a monthly meeting with the grievor starting in February 2006. Those meetings were to discuss the grievor's and the employer's concerns and to clarify work requirements. They also

sometimes included a five-minute safety presentation or other useful briefings or discussions. The February meeting took place, but the others, scheduled for March 15, April 19, May 17 and June 21, 2006, were cancelled.

[27] Shortly after hiring him, the employer asked the grievor to attend monthly safety meetings. Those meetings lasted about 15 minutes and provided employees with safety information and training. In April 2003, the grievor asked to have ASL interpretation at those meetings. The employer refused but gave the grievor access to the written and video material. According to the grievor, 14 of those meetings took place in 2003 and 2004. The employer never once provided ASL interpretation.

[28] On November 16, 2005, Mr. Lord informed the grievor and the other employees that, on November 28, 2005, they would have to attend a meeting about a survey on employee morale. The grievor asked Mr. Lord for ASL interpretation services to make sure that he understood what would be said at the meeting. The grievor went to the meeting. When he saw that there were no ASL interpretation services, he left the room and went back to his workstation. The grievor testified that he quietly left the room. Mr. Lord testified that the grievor was "red like a beet" and that he stomped out of the room.

D. Other accommodation issues

[29] Mr. Lord testified that he was not aware of the employer's duty to accommodate and its meaning when the grievor was hired. He had never read the employer's policy on accommodation. Mr. Lord did not know either how to hire an ASL interpreter or what hiring one involved. He testified that no comprehensive discussions or communications took place with the grievor in his early months of employment on his accommodation needs, which Mr. Lord admitted could have helped.

[30] On June 4, 2003, Mr. Lord emailed employees who would potentially have had to communicate with the grievor and asked them to express their interest in ASL training. Mr. Lord stated that the grievor was hearing impaired, that he did not lip read and that, to communicate with him, note writing and a minimal amount of sign language were required. In summer and fall 2003, 8 to 10 of the grievor's work colleagues attended the ASL training sessions, which lasted for 17 weeks. The sessions were scheduled once a week for two hours. Even though the grievor never asked for those courses, he appreciated the gesture. The training was very basic. It was not sufficient for daily

communications with the grievor. After the training sessions ended, the grievor, Mr. Lord and the grievor's work colleagues continued to communicate with each other in writing, using emails or paper.

[31] In April or May 2003, the employer provided a teletypewriter to the grievor. It helped the grievor's phone communication with his work colleagues and clients.

[32] In April or May 2003, the employer installed a strobe light near the grievor's office to make sure that he would be aware if a fire alarm sounded in the building where he worked. A note was also displayed to inform the grievor's colleagues that he was hearing impaired and that he needed help if a fire alarm were activated.

[33] The employer provided an identification card to the grievor that he could present to other employees when entering a building to measure it as part of his duties. The card provided information about the grievor's disability and about his function at CFB Trenton.

[34] In late 2005, Mr. Hendry requested that he and the grievor each be provided a Blackberry to facilitate their communications by text messaging. Mr. Lord testified that text messaging was not available at CFB Trenton at that time. Changes were made by the telecommunication provider, and Blackberries were provided in March 2006. The grievor also received an instruction booklet on how to operate the Blackberry. He asked for an ASL interpreter to help him understand the instructions. Mr. Lord refused his request and wrote the following to him: "Read the damn manual."

[35] On January 16, 2006, the grievor asked Mr. Lord for a meeting to discuss work-related topics. He specified that the meeting could last between one and two hours and that an ASL interpreter should be present. On January 20, 2006, Mr. Lord asked the grievor to provide him, in advance of that meeting, a detailed list of his concerns, which would help Mr. Lord address them. The grievor provided that list to Mr. Lord. The meeting took place on January 31, 2006, with the grievor, Mr. Lord, a bargaining agent representative, an employment equity representative, a human resources advisor and Major D.A. Scherr attending. Mr. Lord wrote the minutes of that meeting, which were adduced in evidence at the hearing. Maj. Scherr stated that English is a requirement for the grievor's position and that, when the grievor signed his first employment contract, he stated that he had knowledge of the English language. Maj. Scherr suggested to the grievor that he take English language training

and that the employer would reimburse the cost of it. The grievor expressed that he occasionally needed ASL interpretation services. He needed an ASL interpreter to communicate in depth. The employer agreed to accommodate him but felt that employment equity accommodations "should not be nit-picky." Maj. Scherr informed the grievor that he would provide ASL interpretation services for a monthly meeting, which could be used for more in-depth communications with the grievor. Maj. Scherr stated that this measure was not meant "to be a crutch" for the grievor instead of improving his English skills.

[36] The grievor testified that he felt hurt, insulted and discriminated against by what the employer's representative said at the January 31, 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."

[37] 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.

E. <u>The rollover to indeterminate status</u>

[38] The grievor testified that Mr. Lord told him that he would become indeterminate at the end of his contract on April 28, 2006. He said that he was also told that he did not have to apply for a competition and that it would be better for him to simply wait to be rolled over to obtain indeterminate status. Mr. Lord testified that he might have made those comments to the grievor. Mr. Lord also wrote the minutes of the January 31, 2006 meeting. Mr. Lord wrote the following at item 20 of those minutes:

> *20. Mr. Stringer was concerned that when his contract expires on 28 April that he would not be kept on. Maj Scherr advised that the contract is not an issue and that he would be subject to a three year rollover and would have an indeterminate appointment. Mr. Birney advised that there is no period of probation on rollover, and that this is not [a] probation-related issue.*

[39] Several documents adduced at the hearing showed that the employer at CFB Trenton was experiencing problems with its Salary and Wage Envelope (SWE) budget.

The December 6, 2005 minutes of the Labour Management Relations Committee meeting state that there was a shortfall of $1.6 million in the SWE budget for fiscal year 2005-2006 and that a shortfall of $1.2 million was forecast for fiscal year 2006-2007.

[40] LCol Gould made the decision to end the grievor's employment contract. The employer did not have enough funds in its budget to keep all term employees, and it had to prioritize. Maj. Scherr informed LCol Gould that the grievor's position was not a high priority for CFB Trenton. LCol Gould agreed with Maj. Scherr and decided to prematurely end the grievor's contract. LCol Gould testified that that was the only reason he decided to end the grievor's contract. He testified that nothing else influenced his decision. In cross-examination, LCol Gould stated that the grievor's contract was shortened by a few days to ensure that he would not become an indeterminate employee. He also stated that, without the fiscal restraint, the grievor would have become an indeterminate employee. After the employer made the decision that the grievor's position was not a priority, it did not try to find him another position.

[41] The grievor adduced evidence that two employees, hired under employment equity, were made indeterminate employees around the same time as his contract was ended. One of those employees occupied an AS-04 position, and the other, a CR-04 position.

[42] The employer adduced in evidence a submission made by CFB Trenton to Department of National Defence (DND) Headquarters, outlining its shortage of the SWE. LCol Gould briefly explained the submission. On June 2, 2005, casual and term positions were given a certain number of points based on their priority. The positions were ranked from 750 points for the highest priority to 175 points for the lowest. The grievor's position was assigned 350 points. The parties did not adduce any evidence about what happened to the incumbents of the positions that were assigned 350 points or less.

[43] The grievor adduced in evidence a list of positions that were vacant in 2006 at CFB Trenton. The list indicates the name of the employees hired to fill those vacancies and the hiring dates. The list includes two DD-04 positions. However, the list does not indicate if those positions were filled or were left vacant. The grievor adduced in evidence a second list, similar to the first, but color coded. The grievor used the color

codes to identify the positions for which he had some documentation and the positions that reported to the CFB Trenton commander.

[44] The grievor adduced in evidence two job advertisement posters from Service Canada. Both posters were work with Addeco, a placement agency that regularly provided staff to CFB Trenton. The first poster was for a draftsperson. It contained a summary of a work description that was very similar to what the grievor did at CFB Trenton. The closing date to apply was July 18, 2007. The second poster was for two surveying engineers. The summary work description was partly comparable to what the grievor did at CFB Trenton. The closing date to apply was October 25, 2007. The grievor also adduced in evidence a job poster for a GIS (Geographic Information Systems) technologist, classified EG-03. The opening was at CFB Trenton. Even though the document adduced at the hearing did not contain a closing date, it is noted that the document was updated on June 9, 2008. There are a few similarities between that job and what the grievor did at CFB Trenton, but there are also significant differences. The grievor also adduced a list of positions in civil engineering that were advertised or listed between 2001 and 2009 at the Schools of Architecture and Building Sciences of Loyalist College. The list includes a draftsperson, a GIS technician and a GPS (Global Positioning System) technician position at CFB Trenton.

[45] While the grievor was working as a draftsperson at CFB Trenton, the employer decided to hire two extra draftspersons from Addeco to do the same work. The documentary evidence adduced at the hearing led me to believe that the first employee worked from October 2005 to February 2006 and that the second employee worked from February 2006 to early April 2006.

[46] Mr. Lord testified that nobody was hired to replace the grievor after he was terminated in April 2006. The position was left vacant. The work that was done by the grievor before 2006 never disappeared. It simply piled up. When an urgent need arises to update measurements, building plans or drawings, the work is done by other employees with the required skills.

III. Summary of the arguments

A. For the grievor

[47] The grievor's initial submissions comprised 63 pages. His rebuttal to the employer's submissions comprised 23 pages. I have carefully reviewed those submissions, I do not find it useful to summarize them in detail in this decision. Instead, I will focus on his main arguments.

[48] The employer failed to accommodate the grievor's disability. It also terminated him four days before he would have obtained indeterminate status, pursuant to the Treasury Board policy on term employees. To understand all the circumstances that led to the termination of the grievor's employment, it is imperative to view the decision to terminate him in light of the lack of proper accommodation and the related discrimination and harassment. The decision to terminate the grievor's employment cannot be separated from the attitude adopted towards him, particularly by Mr. Lord and Maj. Scherr. Those key players, who recommended terminating the grievor, had also engaged in discriminatory conduct, either directly or indirectly, by a failure to accommodate the grievor. The decision to terminate the grievor was tainted by discrimination.

[49] The law is clear that it is not necessary to prove that discrimination was the basis for the treatment and termination of the grievor. As long as discrimination was a factor (which was present in some way, however minor) in the decision to terminate, that is sufficient for a finding of discrimination with respect to the termination and for granting a remedy. Moreover, it is not necessary to prove that a person intended to discriminate — the discriminatory effect of the person's actions is crucial.

[50] The evidence demonstrates that several persons in circumstances similar to the grievor's were rolled over to indeterminate status (from term or casual) via employment equity considerations. The employer failed to explain this differential treatment of the grievor. Clearly, the decision to end the grievor's term four days early was deliberate and was intended to deprive him of that rollover right. Moreover, the evidence is uncontradicted that the work performed by the grievor continued and that his position currently remains open and is to be staffed. Although cost has been relied on as an excuse, no reasonable explanation has been provided as to why the grievor was singled out over other persons who received the benefit of a rollover or who

otherwise continued to be employed. It is no defence for the employer to maintain that financial considerations were behind the decision to terminate the grievor's employment. Clearly, discrimination was a factor, which is sufficient in law to support the grievance.

[51] On the issue of accommodation, there is no doubt that the employer failed to properly accommodate the grievor. As an example, in spite of the important nature of certain meetings that were directly related to the grievor's hiring or, later, to his safety, insufficient attempts or none at all were made to obtain an ASL interpreter. Nothing can justify the substantial delay accommodating the grievor. Also, in spite of the fact that his lack of ability in English did not affect the grievor's performance, the employer began to take issue with the quality of his second language, English. Significantly, that change coincided with increases in the grievor's efforts to obtain accommodation. The employer provider no explanation as to why it became interested in the grievor's English abilities.

[52] Mr. Lord was clearly impatient with the grievor and was often quick to dismiss his requests for accommodation. He was simply uninterested in fully accommodating the grievor. For example, Mr. Lord wrote to the grievor that he should "[r]ead the damn manual" when the grievor asked for an ASL interpreter to help with the Blackberry booklet. He also wrote to the grievor and told him to fill out the "damn paper," referring to the morale survey.

[53] The evidence established that the duties performed by the grievor continued to exist after his termination. Mr. Lord testified that the grievor's position was not filled but that the employer was in the process of staffing it. The evidence showed that the work never disappeared but that, at best, it declined in priority. The evidence also established that the employer informed the grievor that he would be rolled over at the end of the three-year period of continuous employment. The employer provided that information to the grievor when it was aware of its funding restraints.

[54] The employer delayed implementing proper accommodation measures in early 2006. The employer provided no explanation as to why it took so long to implement those measures.

[55] The employer made no effort to find the grievor alternative employment. In fact, Mr. Lord provided a misleading reference, which caused the grievor to lose an

employment opportunity. Even after being fired, the discrimination against the grievor continued.

[56] An adjudicator has jurisdiction to deal with a grievance involving a layoff if the layoff was done in bad faith. Also, section 209 and paragraphs 226(1)(*g*) and (*h*) of the *Act* give full authority to an adjudicator to interpret and apply the *CHRA*, including all its remedial provisions, set out in section 53. Generally speaking, in a human rights context, it is open to an adjudicator to question the purported rationale for any termination of employment. In this case, the employer cited "budget cutbacks" to justify its decision, which in reality was motivated by discrimination. The evidence showed that the grievor's work continued after he was terminated and that his position is still available. Thus, reinstatement is absolutely necessary.

[57] The jurisprudence established the "mere but serious possibility" test because it is rare to find direct evidence of discrimination. Accordingly, an inference of discrimination may be drawn if the evidence adduced renders it more probable than other possible inferences or hypotheses. The intent to discriminate is not a factor when construing human rights legislation aimed at eliminating discrimination. Rather, the result or effect of the alleged discriminatory action is significant.

[58] The adjudicator must look for the subtle scent of discrimination. In this case, the evidence is overwhelming that the grievor performed well, he was qualified, all relevant parties believed that he would be rolled over into an indeterminate position, his work continued, and his position is still available. No rational explanation has been given for why his term was deliberately not renewed when others were rolled over to indeterminate status under employment equity considerations. In contrast, the non-renewal of his term contract was clearly influenced by concerns of accommodation and of the nature of his disability.

[59] As remedy, the grievor requested an order declaring that the employer has discriminated against him on the basis of disability, that the employer's decision to terminate him was discriminatory, and that the employer be required, in consultation with the CHRC, to review and revise its accommodation practices to ensure that those actions do not recur. The grievor asked to be reinstated to a position at the DD-03 group and level and to be compensated for all lost wages and benefits. The grievor also asked for special compensation for pain and suffering pursuant to section 226(1)(*h*) of the *Act* in the amount of $15 000.00 under paragraph 53(2)(*e*) of the *CHRA* and

$15 000.00 under subsection 53(3) of the *CHRA*. The grievor requests compound interest on any and all amounts awarded by the adjudicator.

[60] The grievor referred me to the following decisions: *Basi v. Canadian National Railway*, 1988 CanLII 108 (C.H.R.T.); *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 *(Meiorin)*; *Canada (Attorney General) v. Brooks*, 2006 FC 1244*; CN v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114; *Canada (Attorney General) v. Uzoaba*, [1995] 2 F.C. 569 (T.D.); *Chopra v. Canada (Attorney General)*, 2007 FCA 268; *Larente v. Canadian Broadcasting Corp.*, [2002] C.H.R.D. No. 11 (QL); *Longpré v. Treasury Board (National Defence)*, 2004 PSSRB 81; *Canadian Human Rights Commission v. Canada (Attorney General) (Morris)*, 2005 FCA 154; *Ontario Human Rights Commission v. Simpsons-Sears*, [1985] 2 S.C.R. 536; *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City)*; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)*, 2000 SCC 27; *Stevenson v. Canada Revenue Agency*, 2007 PSLRB 43; and *Wong v. Deputy Head (Canadian Security Intelligence Service)*, 2010 PSLRB 18.

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

[61] The grievor was hired as a term employee. On each renewal of his term contract, a letter was given to him, indicating that the renewal was not to be construed as an offer of indeterminate employment in the public service. The last contract was supposed to expire on April 28, 2006. However, due to financial restraints, the employer advised the grievor on March 22, 2006 that his contract would end earlier than originally expected, on April 24, 2006. Nothing else outside financial restraints and a prioritization exercise of positions influenced the employer's decision to end the grievor's term earlier than indicated in his last contract. Since the grievor's departure, the employer has not hired anyone to do his work.

[62] If the adjudicator allows the grievance, he does not have the power to order the grievor's reinstatement since he was a term employee. Paragraph 226(1)(*g*) of the *Act* allows an adjudicator to interpret and apply the *CHRA*. Paragraph 226(1)(*h*) of the *Act* gives an adjudicator the power to provide relief to a grievor in accordance with paragraph 53(2)(*e*) or subsection 53(3) of the *CHRA*. That means that the adjudicator can only award damages for pain and suffering under paragraph 53(2)(*e*) or special

compensation under subsection 53(3) of the CHRA if a person engaged in a discriminatory practice wilfully or recklessly. No other types of damages can be ordered by an adjudicator when discrimination is alleged.

[63] The adjudicator should dismiss the grievor's allegation of discrimination. The employer acted in good faith and provided several accommodations to the grievor during his employment, as supported by the evidence adduced at the hearing.

[64] The grievor claimed that he was not accommodated several times, all of which were before April 2005. The *Act* came into force on April 1, 2005. The employer submitted that an adjudicator has no jurisdiction to hear human rights issues from before that date in the absence of a request to the Board under section 41 or 44 of the *CHRA*.

[65] When the grievance was filed, the employer had already provided the grievor with the requested accommodation. The employer had agreed to go beyond one of the grievor's requests by reserving an ASL interpreter not only for the safety meetings, but also for any other meetings or issues for which the grievor would need an ASL interpreter (e.g., assistance with the Blackberry manual or any other meeting, such as the one for the morale survey). This clearly satisfied the grievor's request. Therefore, the employer submits that the accommodation issue is moot. There is no more live controversy between the parties on that point. Moreover, the employer provided the majority of the accommodations requested by the grievor several months before the grievance was filed. Furthermore, since the monthly "catch-all" sessions with an ASL interpreter provided in 2006 was proposed for any concerns of the grievor, the employer submitted that it could not become an issue for the future.

[66] The employer submitted that the grievor was not straightforward with it with respect to his difficulty reading English. Therefore, the employer did not have all the information it needed to accommodate the grievor. The grievor failed to explain to the employer the extent of his English abilities. That fact has fundamental impact on how the employer's duty to accommodate should be assessed.

[67] Finally, the employer argued that nothing in the evidence adduced by the grievor supports his allegation of harassment. At no time during his employment did the grievor raise an issue of harassment or avail himself of the internal harassment policy available to him.

[68] The employer referred me to the following decisions: *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43; *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4; *British Columbia (Public Service Employee Relations Commission, Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970; *Dansereau v. National Film Board and Pierre-André Lachapelle*, [1979] 1 F.C. 100; *Spencer v. Canada (Attorney General)*, 2010 FC 33; *Spencer v. Canada (Attorney General)*, 2008 FC 1395; *Canada (Attorney General) v. Lâm*, 2008 FC 874; *Ryan v. Canada (Attorney General)*, 2005 FC 65; *Endicott v. Canada (Treasury Board)*, 2005 FC 253; *Zaytoun v. Canadian Food Inspection Agency*, 2010 PSLRB 35; *Jensen v. Deputy Head (Department of the Environment)*, 2009 PSLRB 153; *Matear v. Treasury Board (Department of Indian and Northern Affairs)*, 2009 PSLRB 97; *Spooner v. Treasury Board (Correctional Service of Canada)*, 2009 PSLRB 60; *Lloyd v. Canada Revenue Agency*, 2009 PSLRB 15; *Pepper v. Deputy Head (Department of National Defence)*, 2008 PSLRB 71; *Zhou v. National Research Council of Canada*, 2008 PSLRB 51; *Cyr v. Parks Canada Agency*, 2008 PSLRB 35; *Pepper v. Treasury Board (Department of National Defence)*, 2008 PSLRB 8; *Keuleman v. Canada Revenue Agency*, 2006 PSLRB 40; *Monteiro v. Treasury Board (Canadian Space Agency)*, 2005 PSSRB 27; *Foreman v. Treasury Board (Indian and Northern Affairs Canada)*, 2003 PSSRB 73; *Pieters v. Treasury Board (Federal Court of Canada)*, 2001 PSSRB 100; *Joss v. Treasury Board (Agriculture and Agri-Food Canada)*, 2001 PSSRB 27; *Hanna v. Treasury Board (Citizenship and Immigration Canada)*, PSSRB File No. 166-02-26983 (19960624); *Laird v. Treasury Board (Employment and Immigration)*, PSSRB File No. 166-02-19981 (19901207); *Day v. Canada Post Corporation*, 2007 CHRT 43; and *Brown v. Canada (Royal Canadian Mounted Police)*, 2004 CHRT 24.

IV. Reasons

[69] The grievor grieved the employer's decision to terminate his employment four days before he would have reached three years of continuous employment and could have been rolled over as an indeterminate employee. He also grieved that the employer discriminated against him and that it failed to accommodate him. He made it clear in his argument that those two issues were interrelated and that the employer's discriminatory attitude toward him led to the termination. In other words, had the employer not discriminated against the grievor, he might not have been terminated. The grievance was referred to adjudication twice under two separate provisions of the

Act. First, the grievance was referred to adjudication as a violation of the no-discrimination clause of the collective agreement. Second, the grievance was referred to adjudication as a termination grievance. I will first determine if the no-discrimination clause has been violated and will then examine the legality of the termination of employment.

A. Did the employer discriminate against the grievor?

[70] In addition to his grievance alleging that the employer contravened the no-discrimination clause of the collective agreement, the grievor also gave notice to the CHRC that he was raising an issue involving the application of the *CHRA* within the context of a request for the adjudication of a grievance. Specifically, the grievor stated that the employer failed to accommodate his hearing impairment by failing to provide him with ASL interpretation when requested, by failing to address other requests related to daily communications in the workplace and by raising the issue of the grievor's proficiency in English after more than two years of employment. The grievor also stated in his notice to the CHRC that the employer ended his contract four days before he would have had three years of continuous employment.

[71] The employer argued that, in April 2006, when the grievance was filed, it had already accommodated the grievor. Besides the termination of employment, no live issue existed between the parties, and the issue is moot. The employer also argued that adjudicators of the Board did not have jurisdiction over human rights issues before the coming into force of the *Act* on April 1, 2005. Therefore, according to the employer, I should not consider the instances for which the grievor claimed that he was not accommodated that occurred before April 1, 2005.

[72] The no-discrimination clause of the collective agreement 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.*

. . .

[73] The employer is correct in arguing that adjudicators did not have jurisdiction over human rights issues before the coming into force of the *Act*. However, that does not prevent an adjudicator from determining if clause 19.01 of the collective agreement, which existed in the previous collective agreement with essentially the same wording, was violated. In other words, independent of the coming into force of the *Act*, the no-discrimination clause of the collective agreement applied to the grievor and to the employer from the day on which the grievor was hired until the day on which he was terminated.

[74] To better understand the nature of the grievance, I find it useful to reproduce as follows most of what appears under "grievance details" on the grievance form:

…

> *Employer evaluated Jeff Stringer positively annually after his start date… English was not noted to be a concern…He was notified, for reasons in contravention of the collective agreement and in contravention law, of his layoff to take effect April 24, 2006….*
>
> *Employer discriminated against Jeff because of his deafness, refusing on numerous and important occasions related to his requirements to adequately perform his job to hire sign language interpreter where needed… Employer impaired Jeff's dignity by harassing him and treating him as a lesser employee because of his deafness. Contravened clause 19.01 of the collective agreement.*

…

[75] The grievor also refers in the notice given to the CHRC to the employer's concern with his proficiency in English, its refusals to provide ASL interpreters and its ending of his employment contract. Basically, the grievor feels that he was discriminated against by the employer, in violation of the collective agreement and the *CHRA*.

[76] I do not agree with the employer that, besides the termination of employment, there are no more live issues between the parties. The wording of the grievance and of the notice to the CHRC, and the evidence adduced at the hearing, make it clear that the grievor is still concerned that he was discriminated against in the course of his

employment at CFB Trenton. He chose to grieve when he was informed that he would be terminated, but in his grievance, he also referred to discrimination that had occurred before the termination.

[77] According to clause 18.10 of the collective agreement, an employee may present a grievance no later than 25 days after the date on which he or she became aware of the action or circumstances giving rise to the grievance. The grievance was filed within 25 days after the grievor was informed that he would be terminated. For him, it was the last incident of alleged discrimination. Even if most of the incidents of alleged discrimination occurred before those 25 days, those incidents can be examined because the alleged discrimination could be considered continuous. The concept of a continuous grievance applies. Otherwise, it would be equivalent to say to the grievor that he should have grieved every incident of alleged discrimination within 25 days of its occurrence. What matters is that the grievor grieved within 25 days of the last incident in which he felt discriminated against.

[78] That interpretation is coherent with the *CHRA*, which I have to interpret in parallel with the collective agreement. The *CHRA* does not provide clear periods in which to file a complaint. However, under paragraph 41(1)(*e*), the CHRC can refuse a complaint filed more than one year after the last violation of the *CHRA*. The wording of that paragraph also implies that complaints are considered continuous and that they may include several incidents that occurred over time. Paragraph 41(1)(*e*) reads as follows:

> ***41****. (1) Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that compliant it appears to the Commission that*
>
> *…*
>
> *(*e*) the complaint is based on acts or omissions the last of which occurred more than one year, or such longer period of time as the Commission considers appropriate in the circumstances, before receipt of the complaint.*

[79] Using the evidence adduced at the hearing, I will examine whether the employer discriminated against the grievor or failed to accommodate him when required. Before reviewing the evidence, I will briefly review the law on discrimination and accommodation.

[80] The grievor was hearing impaired, which the employer was aware of from the time he applied for the job. I take judicial notice that hearing impairment is a disability as per subsection 3(1) of the *CHRA* and clause 19.02 of the collective agreement. Consequently, the employer could not, pursuant to section 7 of the *CHRA* or clause 19.02 of the collective agreement, directly or indirectly adversely differentiate the grievor because he was hearing impaired. In *Simpsons-Sears*, the Supreme Court established employers have a duty to take reasonable steps to accommodate an employee's work limitations, short of undue hardship. In this case, it is known that the grievor is hearing impaired. In the instances in which the grievor asked to be accommodated, and the employer refused, the employer had the onus of proving undue hardship.

[81] The grievor testified that the employer refused to provide him 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 the grievor 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. Also, 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 Mr. Lord, who wrote the following to the grievor: "Read the damn manual."

[82] All those requests from the grievor were made in advance and were legitimate. The employer did not provide any evidence that it would have endured undue hardship had it provided ASL interpretation on those occasions. The cost was $40 to $50 an hour. There is no doubt in my mind that the employer could have afforded that cost. 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.

[83] The grievor's first language is ASL. He also learned how to read and write English. The evidence showed that the grievor did not write English perfectly and that he had difficulty understanding some words that do not exist in ASL. The evidence also showed that those difficulties did not negatively affect the grievor's work performance. In the May 2004 performance review report, no mention was made of the grievor's difficulties with written English. On the contrary, the employer wrote the following: "*Although he is hearing impaired, he strives to ensure communications both ways are clear and concise and accurate.*" In the 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.*"

[84] The issue of the grievor's ability in English surfaced again at the January 31, 2006 meeting. Maj. Scherr stated that English was a requirement for the job, and he 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.

[85] In acting as it did with respect to the grievor's English skills, I find that the employer discriminated against him. It is not clear to me what the real issue was and what level of English would have been acceptable to the employer. The employer admitted that the grievor's English skills were sufficient for him to do his job. It seems to me that the employer wanted the grievor to become proficient enough in written English that he would no longer request ASL interpretation. In other words, the grievor fully satisfied the requirement of his job but the employer decided to ask more from him, so that he would be less of a burden to accommodate. This is basically 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.

[86] Generally speaking, 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. I am almost certain that the grievor was not the first hearing impaired person hired by the employer. He was hired through employment equity. It is not abnormal that, when the grievor was hired, Mr. Lord did not know in detail how to accommodate him and where to get the resources to assist him. What is abnormal is that no employer experts from employment equity or human resources were assigned to train, sensitize, educate and help Mr. Lord and Maj. Scherr with their obligation to accommodate the grievor and with what that obligation involved and meant. It might have made a huge difference.

B. Was the employer's decision to terminate the grievor discriminatory?

[87] The grievor argued that the employer's decision to terminate him was discriminatory or that discrimination played a role in it. The employer argued that its decision was simply based on financial restraints. Even though I have already concluded that the employer discriminated against the grievor on several occasions during his employment at CFB Trenton, the evidence adduced at the hearing leads me to conclude that the decision to terminate the grievor was based solely on financial motives.

[88] The grievor was a term employee, and the employer did not have any obligation to make him an indeterminate employee. However, it is clear that the employer promised the grievor that he would be rolled over to indeterminate status after three years of employment. Mr. Lord told the grievor that he would be rolled over after three years of employment. He was told the same thing by Maj. Scherr at the January 31, 2006 meeting. Obviously, the employer did not keep its promises and decided to terminate the grievor a few weeks later. That might be immoral but is not evidence of discrimination or of an illegal action. Rather, it demonstrates a short-sighted and poorly informed management of human resources.

[89] The employer knew beginning in 2005 that there was a serious problem with the CFB Trenton SWE budget. In June 2005, the employer assigned points to its term

positions to prioritize them. The grievor's position was assigned 350 points, which was not a high priority score. On January 31, 2006, Maj. Scherr told the grievor that he would be rolled over to indeterminate on April 28, 2006. After January 31, 2006, but before March 21, 2006, Maj. Scherr recommended to LCol Gould that the grievor's position be abolished and that the grievor be terminated. LCol Gould accepted that recommendation, and the grievor was informed on March 21, 2006 that his contract would end on April 24, 2006.

[90] LCol Gould testified that he did not have enough funds in his budget to keep all term employees and that he had to prioritize their positions. It was decided that the grievor's position was not a high priority for CFB Trenton. LCol Gould testified that that was the only reason he ended the grievor's contract and that nothing else influenced his decision. I believe him. LCol Gould admitted that the grievor's contract was shortened by a few days to ensure that he would not become an indeterminate employee. He had the right to make that decision, even if the grievor was promised more than once that he would be rolled over.

[91] After the grievor was terminated, his position was not filled. The work that he performed simply piled up or was done by other employees when needs for revised building plans arose. The grievor adduced in evidence several job posters and the names of employees who were hired or were made indeterminate at CFB Trenton. None of them was classified DD-03 or was hired to perform the grievor's duties. The grievor alleged in his argument that Mr. Lord testified that he had been in the process of replacing the grievor. I did not hear Mr. Lord say that. Even had Mr. Lord testified in July 2010 that he was in the process of replacing the grievor, who was terminated in April 2006, I would not deduct from that that the grievor's termination was illegal. The employer's needs and its SWE budget could have evolved over a four-year period.

[92] In conclusion, the evidence adduced at the hearing led me to believe that the employer did nothing illegal by terminating the grievor's contract. I believe that discrimination did not play a role in the employer's decision to terminate the grievor. Having said that, I can understand why the grievor would perceive the employer's behaviour as unfair. The employer promised him a permanent job, led him to believe that he should not worry about it, wrote it in a document and then made the decision to terminate him a few weeks later.

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

(The Order appears on the next page)

V. Order

[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.

March 14, 2011.

Renaud Paquet,
adjudicator