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**Citation: 2014 PSLRB 5**

*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 and Respondent:*** Michel Girard, counsel

Heard at Kingston, Ontario,
October 16, 2013.

## 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 four days 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*, S.C. 2003, c.22, s.2 ("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. 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 as suggested in my March 14, 2011 decision. A second hearing took place on August 10, 2011, and on September 12, 2011, I rendered decision 2011 PSLRB 110 on the remedies. My order read as follows:

. . .

> *[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.*

. . .

[5] Both parties applied to the Federal Court for judicial review of different parts of those two decisions. The grievor challenged my finding that his termination was not a result of discrimination on the basis of disability. He also challenged my decision not to grant a systemic remedy for the employer's failure to accommodate him. The employer challenged my decision to award interest on damages.

[6] In *Stringer v. Canada (Attorney General) and Canada (Attorney General) v. Stringer*, 2013 FC 735, the Federal Court allowed the applications. The grievor has appealed the Federal Court's decision on the issue of awarding interest on damages, which appeal remains outstanding at this time. Consequently, I will not deal with that point in this decision and rather will limit myself to reviewing my findings on whether the grievor's termination was tainted by discrimination on the basis of disability and whether systemic remedies should be granted.

[7] On those two questions, the following extracts of the Federal Court decision summarize its findings:

. . .

*[68] I agree with the grievor that the adjudicator's findings that the employer's financial constraints, no matter how clear, do not provide a complete answer to the charge of a discriminatory termination. Such constraints may be the legitimate rationale for terminations in general, but they are not an explanation for the particular termination of the grievor. The specific decision to give low priority to the grievor must be analyzed for discriminatory intent; otherwise, a legitimate need for terminations could serve as a smokescreen for a particular illegitimate one.*

*[69] In this case, the grievor argued before the adjudicator that his priority within the context of fiscal constraint was determined in part by Mr. Lord and Major Scherr, both of whom had played a role in the failure to accommodate the grievor and who made discriminatory comments. The grievor also argued that while he was terminated, other employees in non-priority positions were given indeterminate status for employment equity considerations, differential treatment that went unexplained by the employer.*

*[70] In the six paragraphs dealing with the allegation of discriminatory termination, the adjudicator addressed neither of these allegations. The adjudicator indicated he believed Lieutenant-Colonel Gould's testimony that the only reason for terminating the grievor was that the grievor's position was not a high priority for CFB Trenton.*

*[71] This ignores the fact that the low priority of the grievor's position was not determined solely by Lieutenant-Colonel Gould. The adjudicator elsewhere described the process as Major Scherr informing Lieutenant-Colonel Gould that the grievor's position was not a high priority and Lieutenant-Colonel Gould agreeing (merits decision at paragraph 40). Therefore, the adjudicator's belief in Lieutenant-Colonel Gould's non-discriminatory intent does not address whether the information he relied on in making that decision was tainted with discrimination by his subordinate, who was complicit in the previous discriminatory treatment of the grievor and who did not testify in this proceeding.*

*[72] I appreciate that the adjudicator was faced with a lengthy record in this matter and that tribunals are not expected to address every argument raised by the parties, but the process leading to the termination of the grievor is the central factual dispute at issue in this portion of the grievance. The failure to analyze the grievor's allegations on this point is an omission that rises to the level of unreasonableness. Even given the appropriate deference, the adjudicator erred by making his decision solely on the basis of the financial constraints and without making any determination on why the grievor in particular fell victim to those constraints.*

. . .

> *[121] …The adjudicator's desired outcome is clearly that the employer makes structural changes to ensure that there are no future failures to accommodate. The adjudicator's reasons also disclose a specific idea of those changes that would lead to this outcome: more support from employment equity experts and other resources for managers to allow them to fulfill their accommodation obligations.*
>
> *[122] Despite this contemplation of systemic issues, the adjudicator declined to order a systemic remedy on the basis that: (1) adherence to policy, not the content of policy, caused the failure to accommodate, and (2) it would not sufficiently avoid the type of discrimination the grievor suffered.*
>
> *[123] On the first reason, the fact that the employer's policies would have prevented discrimination had they been properly adhered to does not preclude a systemic remedy (see* Canada (Attorney General) v Green*, [2000] 4 FC 629, [2000] FCJ No 778, where the CHRT ordered a systemic remedy so that the employer would "learn how to effectively implement their own policies" (at paragraph 135), which was upheld by this Court). Given the adjudicator's findings clearly invoke matters of policy, such as the resources available to the manager, this rationale makes little sense.*
>
> *[124] On the second reason, the adjudicator's holding that a systemic remedy would not have prevented the discrimination against the grievor contradicts the adjudicator's finding at the merits stage. The adjudicator linked the failure to accommodate the grievor to Mr. Lord's ignorance of how to accommodate the grievor and how to use resources towards that goal. I simply cannot understand how the training of managers on their duty to accommodate would not help to prevent managers from being ignorant of their duty to accommodate.*

…

[8] In its decision, neither the Federal Court nor the parties questioned my understanding of the evidence presented by the parties. That evidence was summarized as follows in 2011 PSLRB 33, at paragraphs 6 to 46:

> ***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. Requests for ASL interpreters***

*[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. <u>Other accommodation issues</u>***

*[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.*

## II. Summary of the arguments

### A. For the grievor

[9] The grievor reviewed the evidence adduced at the 2010 hearing and reiterated some of the arguments made at that hearing and at the 2011 hearing on remedies.

[10] The grievor argued that the employer's decision to terminate his employment contract was tainted with discrimination. It was based on a recommendation made by the two managers who directly discriminated against him. The argument brought up by the employer that the decision was due to financial constraints was simply a pretext to terminate the grievor's employment for discriminatory reasons.

[11] The grievor argued that, in most cases, it is very difficult to prove that discrimination caused an employment relationship to end. In this case, there is no direct evidence that the employer's decision to terminate the grievor was discriminatory. However, there is direct evidence that Major D.A. Scherr and Frederick Lord directly discriminated against the grievor and that the decision to terminate him was based on Major Scherr and Mr. Lord's recommendation not to give priority to the grievor's position in the ranking of term employees.

[12] The employer ended the grievor's contract four days before he would have become an indeterminate employee. He was initially hired as a member of an employment equity group. However, the employer did not take employment equity into consideration when it made the decision to terminate his contract.

[13] The grievor performed well in his job. His performance review reports indicated that he met all the requirements of the position that he occupied. In early 2006, the employer began to take issue with certain aspects of his performance, like his lack of facility in the English language and some minor aspects of his work. That coincided with an increase in the grievor's efforts to obtain accommodation measures in the workplace.

[14] The employer told the grievor that he would become a permanent employee and that he did not need to apply to a competition to obtain permanent employment. Rather, he would be rolled over from term employment to permanent employment once he reached three years of continuous employment. In July 2005, although it was aware of its financial constraints, the employer extended the grievor's term contract in such a way that he would reach the three-year mark. Later, the employer shortened the grievor's employment contract by four days and prevented him from becoming a permanent employee. That decision was tainted by discrimination.

[15] The grievor also reminded me of the systemic remedies that he asked to be implemented to prevent such discrimination from taking place in the future and that

accommodation practices be improved at CFB Trenton. These remedies should 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 obligation 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 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; *Milano v. Triple K Transport Ltd.*, 2003 CHRT 30; *Richards v. Canadian National Railway*, 2010 CHRT 24; *Basi v. Canadian National Railway Company*, [1988] C.H.R.D. No. 2; *Canada (Attorney General) v. Brooks,* 2006 FC 1244; *Canada (Canadian Human Rights Commission) v. Canada (Department of National Health and Welfare)* (1998), 146 F.T.R. 106 (T.D.); *Chopra v. Canada (Attorney General)*, 2002 FCT 787; *Grant v. Manitoba Telecom Services Inc.*, 2012 CHRT 10; *Holden v. Canadian National Railway Co.*, [1990] F.C.J. No. 419 (C.A.) (QL); *Khiamal v. Canada (Human Rights Commission)*, 2009 FC 495; *Koeppel v. Canada (Department of National Defence),* [1997] C.H.R.D. No. 5 (QL); *Larente v. Canadian Broadcasting Corporation*, 2002 CHRT 11; *Maillet v. Canada (Attorney General)*, 2005 CHRT 48; *Norrena v. Primary Response Inc.*, 2013 HRTO 1175; *Ontario Human Rights Commission v. Simpsons-Sears*, [1985] 2 S.C.R. 536; *Quebec (Commissions des droits de la personne et des droits de la jeunesse) v. Montreal (City) and Quebec (Commission des droits de la personne et des droits de la*

*jeunesse) v. Boisbriand (City)*, 2000 SCC 27; and *Singh v. Canada (Statistics Canada)*, [1998] C.H.R.D. No. 7 (QL).

**B. For the employer**

[17] The employer also reviewed some of the evidence adduced at the 2010 hearing and the arguments it made at that hearing and at the 2011 hearing on remedies.

[18] The employer argued that there was no discriminatory intent behind its decision to give the grievor's position a lower priority and to end his term employment. It is pure speculation on the grievor's part to argue the opposite. The employer argued that the evidence in front of me does not support the grievor's argument.

[19] The employer was facing serious financial constraints at the relevant time and had to reduce the number of its employees. The evidence shows that the grievor's position was a low priority, and on that basis, the employer decided to terminate his employment. That decision was made by senior management, not by the managers who were found to have discriminated against the grievor. The grievor was never replaced after his departure.

[20] In the alternative, the employer argued that I have no jurisdiction to order the greivor's reinstatement. If I were to find that the employer's decision was tainted with discrimination, I would be limited to ordering the employer to pay four days of wages to the grievor, since his initial employment contract was to end four days after he was terminated. An adjudicator has no authority to appoint an employee to a position or to order the employer to appoint an employee.

[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 providing relief in accordance with paragraph 53(2)(*e*) or subsection 53(3) of the *CHRA*. It is clear that the legislator wanted to limit the powers of adjudicators to those specific remedies. In the alternative, the employer argued that the evidence does not point to it having a systemic problem. According to the employer, in order to satisfy the Federal Court decision, it would be sufficient for the adjudicator to explain in more detail why systemic remedies are not appropriate in this case. Furthermore, it was an isolated case that happened several years ago.

[22] The employer referred me to the following decisions: *Canada (Attorney General) v. Johnstone and Canadian Human Rights Commission*, 2013 FC 113; *Endicott v. Canada (Treasury Board)*, 2005 FC 253; *Canada (Attorney General) v. Cameron and Maheux*, 2009 FC 618; *Spencer v. Attorney General of Canada*, 2008 FC 1395; *Foreman v. Treasury Board (Indian and Northern Affairs Canada),* 2003 PSLRB 73; *Laird v. Treasury Board (Employment and Immigration),* PSSRB File No. 166-02-19981 (19901207); and *Canada (Attorney General) v. Uzoaba and Canadian Human Rights Commission*, [1995] 2 F.C. 569 (T.D.).

## III. Reasons

### A. Was the employer's decision to terminate the grievor tainted by discrimination?

[23] In 2013 FC 735, the Federal Court set aside my decision relating to the grievor's termination and returned it to me for redetermination. The Court stated that the employer's decision to terminate the grievor for financial reasons and to give a low priority to his position must be analyzed for discriminatory intent. The Court found that I did not respond to the grievor's arguments that the recommendation to give a low priority to his position was made by the same persons, Mr. Lord and Major Scherr, who discriminated against him and that other employees in non-priority positions were given indeterminate status for employment equity considerations.

[24] On the second of those two points, with all due respect to the Court, the evidence does not support that employees in non-priority positions were given indeterminate status for employment equity considerations. I have thoroughly reviewed the evidence adduced by the parties at the hearing on the merits of the grievances, and I have not been able to find such evidence. The evidence only supports that two term employees, a CR-04 and an AS-04, were given indeterminate status for employment equity considerations, but it does not support that those positions were non-priority positions or that they were at a lower priority than the grievor's position.

[25] On the first of those two points, the Court noted that I did not consider that the recommendation not to prioritize the grievor's position was made by the managers who discriminated against him. In the next few paragraphs, I will correct that omission.

[26] On July 22, 2005, the grievor's term contract was extended to April 28, 2006. That would have meant that he would have been rolled over as an indeterminate employee on that day, since he would have completed three years of continuous employment. However, on March 21, 2006, Major Scherr wrote to the grievor that due to financial restrictions within the salary budget, his services were no longer required, as of April 24, 2006. That deprived the grievor from becoming an indeterminate employee. Even though that letter was signed by Major Scherr, the evidence shows that the decision not to give the grievor indeterminate status was made by LCol Gould.

[27] In making his decision, LCol Gould heavily relied on recommendations made by Major Scherr and Mr. Lord, who had closer knowledge of the importance of positions within their respective areas of responsibility. Positions were ranked using a points system. No evidence was adduced at the hearing on the precise methodology used to allocate points to positions. The employer produced in evidence a document dated June 6, 2005, showing the points allocation. Total points were the product of multiplying "criteria" by "criticality." There are no explanations as to the meanings of those concepts. Under "criteria," scores range from 15 to 50, and under "criticality," from 5 to 15. The grievor's position received 35 and 10 points respectively for a total of 350 points. The other positions assessed varied from 175 points to 750 points.

[28] That point system is a fairly subjective exercise that could have been influenced by a negative or discriminatory attitude towards the incumbent of a position, in this case, the grievor. However, my analysis of the evidence does not support such a scenario.

[29] According to the evidence, the point allocation was done in early June 2005. At that time, the relationship between the grievor and his superiors was fairly positive. On April 29, 2005, a Mr. Henry and Mr. Lord assessed the grievor's performance very positively. Mr. Lord, as a reviewing officer, then stated that the grievor had worked diligently and conscientiously, that he produced professional work, and that, with added training, he had the potential to accept further responsibilities. Mr. Lord wrote those comments five weeks before the grievor's position was assessed at 350 points.

[30] As reported earlier, the grievor's term was renewed eight times, with no break in service. Of particular interest is that one of the grievor's term contracts was to expire on March 31, 2005. On April 7, 2005, it was extended to June 30, 2005, and then later to July 30, 2005. On July 22, 2005, it was extended to April 28, 2006. Those decisions

to extend the grievor's term were made in the same period as the decision to assess his position at 350 points. I should remind the reader that had the last contract renewal been carried out as planned, the grievor would have become an indeterminate employee. That clearly shows that the employer's intent in the summer of 2005 was to keep the grievor on staff and to give him indeterminate employment; otherwise, his contract would not have been extended to April 28, 2006. In addition, Mr. Lord had told the grievor that he would be rolled over to indeterminate status after three years of employment. He was told the same thing by Major Scherr at a meeting on January 31, 2006.

[31] After January 2006, the situation changed. LCol Gould testified that he did not have enough funds in his budget to keep all term employees on staff. The evidence shows that the positions had already been prioritized in June 2005. It also shows that sometime in February or March 2006, using the June 2005 list, 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 wrote in my March 2011 decision that I believed him. After further analysis of the evidence, I still believe him.

[32] The question remains as to why the grievor was promised indeterminate employment. Note that in July 2005, he was given a contract extension to April 28, 2006, which would have made him an indeterminate employee. That extension was made after the grievor's position was assessed at 350 points on the priority list. Considering that there was no evidence that any term employees with 350 points or less were extended, it might be that the employer's assessment of its financial situation evolved between the summer of 2005 and the late winter of 2006. In other words, the plan in the summer of 2005 could have been to keep term employees with 350 points, but in February 2006, the financial situation made it unviable.

[33] The evidence showed that 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. At the time of the 2010 hearing, the position still had not been filed. The employer argued at this hearing that as of October 2013, the position had not yet been filled. That is some six and one-half years after the grievor's termination. The grievor did not challenge the employer on that point.

[34] The evidence and the chronology of events make me believe that discrimination did not play a role in the employer's decision to terminate the grievor. I believe the employer's explanation that the decision to terminate the grievor's contract was motivated by financial reasons and was not tainted with discrimination. Even though at some points Mr. Lord and Major Scherr discriminated against the grievor by their refusal to provide American Sign Language (ASL) interpretation services or by making or writing inappropriate comments, the evidence does not support that the level of priority that they gave to the grievor's job in June 2005 was influenced or tainted by discrimination. By the same token, LCol Gould's decision to terminate the grievor was not tainted by discrimination

**B. Should specific systemic remedies be ordered?**

[35] In my previous decision on remedies, I concluded that I had jurisdiction to order systemic remedies, but I did not find it useful to order the employer to implement any specific measures to prevent such discrimination from reoccurring. The Federal Court did not agree with my rationale not to order any specific systemic remedies.

[36] At this hearing, the grievor reiterated the requests for remedies that he made at the hearing on remedies. The employer argued that I have no jurisdiction to order any of the remedies he asked for 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*.

[37] In 2011 PSLRB 110, I already dealt with the employer's argument that I have no jurisdiction to order systemic remedies. I rejected that argument. On that point, I wrote the following at paragraphs 42 to 48:

> *[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.*

[38] The employer raised nothing that could convince me to rule differently than I did in 2011. Furthermore, the Federal Court implicitly agreed with my ruling by not commenting on it and by disagreeing with my decision not to order any specific systemic remedy. It would not make sense for the Court to make such a ruling if it thought that I had no jurisdiction to order systemic remedies.

[39] The first systemic remedy that the grievor asked for was that I order the employer to revise its accommodation policies. After reviewing the evidence and the arguments from the parties, I still see no need to make such an order, since there was no evidence that the employer's lack of accommodation or its discrimination resulted from deficiencies in its policies. I maintain that the failure to accommodate the grievor came from Mr. Lord and Major Scherr not fully adhering to that policy.

[40] The grievor also asked me to order the employer to provide training, guidance and assistance to employees and managers at CFB Trenton on the duty to accommodate persons with a disability, including hearing impaired employees. He also

asked that experts be made available to provide training and sensitization on managers' obligations to accommodate. Finally, he asked that these measures be reviewed and approved by him and the bargaining agent, in consultation with the CHRC.

[41] After giving a second look to the evidence and the arguments submitted to me, and in line with the comments made by the Federal Court, I agree in principle with the requests made by the grievor. Ordering that specific measures be put in place would help to prevent further discrimination in the future at that workplace.

[42] More specifically, I order the employer to develop in full consultation with the bargaining agent a training and sensitization program for all managers and for all civilian employees on the duty to accommodate employees with a disability, including hearing impaired employees. I also order the employer to ensure that managers who supervise employees with disabilities are fully informed of the existing resources that they can rely on for assistance on how to accommodate those employees. In my opinion, the existence of such measures would have largely facilitated the accommodation of the grievor's needs and would help current and future employees with disabilities.

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

*(The Order appears on the next page)*

## IV. Order

[44] I order the employer to develop in full consultation with the bargaining agent specialists a training and sensitization program for all managers and employees at CFB Trenton on the duty to accommodate employees with a disability, including hearing-impaired employees.

[45] I order the employer to undertake that consultation within 60 days.

[46] I order the employer to complete that training before the end of 2014.

[47] I order the employer, within 60 days and on an ongoing basis in the future, to ensure that managers who supervise employees with disabilities are fully informed of the existing resources that they can rely on for assistance on how to accommodate those employees.

January 17, 2014.

**Renaud Paquet,**
**adjudicator**