Federal Court  Cour fédérale

Date: 20130702

Docket: T-633-11

Citation: 2013 FC 735

Ottawa, Ontario, July 2, 2013

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

JEFFREY STRINGER

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Docket: T-1657-11

AND BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

JEFFREY STRINGER

Respondent

Docket: T-1669-11

AND BETWEEN:

JEFFREY STRINGER

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENTS AND JUDGMENTS

[1] These reasons for judgments and judgments are for three judicial reviews of three components of a single underlying proceeding, a decision of an adjudicator (the adjudicator) of the Public Service Labour Relations Board (PSLRB or the Board). The first judicial review (Court file T-633-11) challenges the arbitrator's finding that Jeffrey Stringer's (the grievor) termination was not a result of discrimination on the basis of disability. The second judicial review (Court file T-1657-11) is brought by the Attorney General of Canada (the AGC) and challenges the adjudicator's awarding of interest on damages as part of the remedy for a failure to accommodate. The third judicial review (Court file T-1669-11) is brought by the grievor challenging the adjudicator's failure to grant a systemic remedy for the failure to accommodate.

[2] In Court file T-633-11 (the merits or termination judicial review), the grievor seeks an order setting aside part of the adjudicator's decision which dismissed the grievance concerning termination and the Court directing that the grievance be sustained. In the alternative, the grievor

asks that the matter be returned to a different adjudicator for redetermination. Both parties seek costs.

[3] In Court file T-1657-11 (the interest judicial review), the AGC seeks an order setting aside the part of the adjudicator's decision ordering the employer to pay interest on the sums awarded. Both parties seek costs.

[4] In Court file T-1669-11 (the systemic remedy judicial review), the grievor seeks an order setting aside the adjudicator's decision and returning the matter to a different adjudicator of the PSLRB for redetermination consistent with the appropriate human rights principles with instructions from this Court. Both parties seek costs.

Background

[5] The grievor, who was born hearing impaired, was hired by the Department of National Defence (the employer), as a term employee. His first language is American Sign Language (ASL) and English is his second language. He is functional in written English but has difficulty understanding English terms that do not exist in ASL.

[6] The grievor has a construction engineering technician diploma and was hired on April 28, 2003, as a draftsperson at Canadian Forces Base Trenton (CFB Trenton). The employer was aware the grievor was deaf, as he was hired under employment equity. His contract was renewed eight times with no breaks in service and was set to expire on April 28, 2006. He was terminated four

days before reaching the three year mark, at which point he would have been entitled to indeterminate status.

[7] The grievor's position was classified at the DD-03 group and level, and his work at CFB Trenton involved conducting on-site inspections, taking measurements of existing buildings and facilities, developing drawings in accordance with planning criteria and design standards to suit project requirements, assisting in site surveying support services, assist 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.

[8] The grievor's daily work was supervised by Evan Hendry, classified at the DD-05 group and level. Mr. Hendry reported to Frederick Lord. Mr. Hendry and Mr. Lord assessed the grievor's performance in two reports. The first report in 2004 indicated the grievor met all the performance related factors but needed to improve his flexibility and adaptability. The second report in 2005 indicated the grievor met all performance related factors but needed to more clearly express ideas and information in writing.

[9] In January 2006, Mr. Lord decided to have the grievor's written English skills evaluated so that he could be provided with proper training. The training never took place because the grievor was terminated on April 24, 2006.

[10] In 2008, the grievor applied for a position at Canadian Forces Base Petawawa. He was not hired in part because of negative employment references from CFB Trenton. Mr. Lord admitted the references were not consistent with the two performance review reports.

[11] The grievor made several requests for ASL interpretation through his time working for the employer. In November 2002, the grievor attended a meeting discussing the formalities of his hiring and was refused an interpreter to help him better understand the documents he was signing. The grievor requested an interpreter for discussions of both performance reviews and both requests were denied.

[12] Interpretation was provided for some meetings and training during 2005 and 2006. It was agreed that interpretation would be provided for monthly meetings with the grievor starting in February 2006. The February meeting took place but those scheduled for March, April, May and June 2006 were cancelled. Shortly after hiring him, the employer asked the grievor to attend monthly safety meetings. In April 2003, the grievor asked for interpretation at these meetings but only received written and video material. On November 28, 2005, there was a safety meeting where the grievor asked for interpretation and left the meeting when he did not receive it.

[13] Mr. Lord testified that he was not aware of the employer's duty to accommodate when the grievor was hired and had not read the employer's policy on accommodation. He did not know how to hire an ASL interpreter or what it involved. No comprehensive discussions took place with the grievor regarding accommodation. The employer provided some ASL training for the grievor's colleagues but it was very basic and they continued to communicate with each other in writing.

[14] In 2003, the employer provided a teletypewriter and a strobe light for fire alarms, as well as an identification card for the grievor to present to other employees when entering a building. In 2005, Mr. Hendry requested that he and the grievor be provided a Blackberry; Mr. Lord testified that text messaging was not available at CFB Trenton at that time, but Blackberries were ultimately provided in 2006. When the grievor asked for an interpreter to help him understand the Blackberry instruction booklet, Mr. Lord refused and told him to "read the damn [Blackberry] manual".

[15] On January 16, 2006, the grievor asked Mr. Lord for a meeting to discuss work related topics, with an interpreter present. The meeting took place on January 31st with the grievor, Mr. Lord, a union representative, an employment equity representative, a human resources advisor and Major D. A. Scherr. Major Scherr stated that English is a requirement for the grievor's position and that the grievor had stated that he had knowledge of the English language when he signed his first employment contract. Major Scherr suggested the grievor take English language training and that the employer would pay for it. When the grievor expressed that he occasionally needed interpretation, the employer agreed to accommodate him but felt that employment equity accommodations "should not be nit-picky". Major Scherr informed the grievor that he would provide interpretation services for a monthly meeting, but that this measure was not meant "to be a crutch" for the grievor instead of improving his English skills.

[16] 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 English skills 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" as he had simply requested an interpreter and he felt that the

employer was "sick of it". When the employer referred to using interpretation as a crutch, the grievor felt that the floor had "dropped beneath" him. The grievor also testified that he felt humiliated or personally diminished when his employer refused to accommodate him during the course of his employment.

[17] The grievor testified that Mr. Lord told him he would gain indeterminate status at the end of his contract on April 28, 2006 and that he did not have to apply for a competition. This was confirmed in the minutes of the January 31, 2006 meeting.

[18] CFB Trenton was experiencing problems in its Salary and Wage Envelope (SWE) budget. Minutes from a December 2005 meeting showed a $1.2 million shortfall for the fiscal year 2005 to 2006 and a $1.6 million shortfall forecast for the fiscal year 2006 to 2007. Lieutenant-Colonel Darwin Gould made the decision to terminate the grievor's employment contract. The employer did not have enough funds to keep all term employees and had to prioritize. Major Scherr informed Lieutenant-Colonel Gould that the grievor's position was not a high priority for CFB Trenton. Lieutenant-Colonel Gould agreed and decided to prematurely end the grievor's contract. He testified that this was the only reason he decided to end the grievor's contract and that nothing else influenced his decision. He acknowledged that the contract was shortened to ensure the grievor did not become an indeterminate employee and that without the fiscal restraint, the grievor would have in fact 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.

[19] The grievor brought evidence that two employees hired under employment equity were made indeterminate employees around the same time as his contract ended; one in an AS-04 position and the other in a CR-04 position.

[20] The employer brought evidence outlining its SWE shortage. Lieutenant-Colonel Gould explained that on June 2, 2005, casual and term positions were given points based on their priority. The positions were ranked from 750 points for the highest priority and 175 for the lowest. The grievor's position was assigned 350 points. No evidence was adduced as to what happened to the incumbents of the positions that were assigned 350 points or less.

[21] The grievor adduced in evidence a list of positions that were vacant in 2006 at CFB Trenton, with the names of employees hired to fill those vacancies and the hiring dates. The list included two DD-04 positions, but does not indicate if those positions were filled or left vacant.

[22] The grievor also adduced in evidence two job advertisement posters from Service Canada for work with Adecco, a placement agency that regularly provided staff to CFB Trenton. The first was for a draftsperson and contained a work description similar to the grievor's position. The second was for two surveying engineers partly comparable to the grievor's position. The closing dates for both posters were in 2007.

[23] The grievor also adduced in evidence a job poster for a Geographic Information Systems (GIS) technologist, classified EG-03, at CFB Trenton. It had no closing date but had been updated on June 9, 2008. There were significant differences from the grievor's job. 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 included a draftsperson, a GIS technician and a Global Positioning System (GPS) technician at CFB Trenton.

[24] During the grievor's employment, the employer hired two extra draftspersons from Adecco to do the same work, one from October 2005 to February 2006 and one from February 2006 to April 2006.

[25] 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 being done before 2006 never disappeared; it simply piled up. When an urgent need arose to update measurements, building plans or drawings, the work was done by other employees with the required skills.

The Merits Decision

[26] The adjudicator's decision, cited as 2011 PSLRB 33 and dated March 14, 2011, began by noting that the grievor's single grievance had been referred twice to an adjudicator under separate provisions of the *Public Service Labour Relations Act*, SC 2003, c 22, s 2 (the PSLRA), first as a violation of the no-discrimination clause of the collective agreement and second as a termination grievance under subparagraph 209(1)(c)(i) of the PSLRA. Both referrals were received by the Board on March 3, 2008. The Canadian Human Rights Commission (the CHRC) had been given notice of the matters but did not make submissions.

[27] The adjudicator summarized the evidence before him, much of which has been repeated in the section above. The adjudicator then summarized the submissions of both parties. The grievor's position was that the employer failed to accommodate him and that discrimination was a factor in his termination. The employer's position was that it had acted in good faith and provided several accommodations to the grievor during his employment and that the termination was due to financial constraints.

[28] The adjudicator identified the two issues to be decided as: (1) whether the employer violated the no-discrimination clause of the collective agreement by discriminating against the grievor; and (2) the legality of the termination.

[29] On the first issue, the employer had argued that adjudicators of the Board did not have jurisdiction over human rights issues from before the PSLRA's coming into force on April 1, 2005. However, the adjudicator found that since the no-discrimination clause had existed in the previous collective agreement that governed the grievor from the day he was hired, the adjudicator had jurisdiction to determine whether it had been violated. The adjudicator also found that although the collective agreement required a grievance to be filed 25 days after the grievor became aware of the impugned action, the *Canadian Human Rights Act*, RSC 1985, c H-6 (the CHRA) had no such time limit and he was required to interpret the CHRA in parallel with the collective agreement.

[30] The adjudicator took judicial notice that hearing impairment is a disability under the CHRA and the collective agreement and that the employer had a duty to take reasonable steps to accommodate such work limitations short of undue hardship. The employer knew the grievor was

hearing impaired and therefore in those instances where the grievor asked for accommodation and the employer refused, the employer had the onus of proving undue hardship.

[31] The adjudicator found that the employer had discriminated against the grievor. The requests for accommodation made were made in advance and were legitimate. The employer did not advance evidence that providing interpretation would have been an undue hardship and the adjudicator had no doubt the employer could have afforded the cost of $40 to $50 an hour. The grievor was prevented from fully participating in work related activities and was not treated with the dignity to which he was entitled.

[32] It was not clear to the adjudicator that the employer's 2006 concerns were truly motivated by the grievor's English skills or what level of English would have been acceptable to the employer. The grievor fully satisfied the requirements of his job but the employer decided to ask more of 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.

[33] The adjudicator found that 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. The adjudicator was almost certain that the grievor was not the first hearing impaired person hired by the employer. The grievor was hired through employment equity. The adjudicator noted that it was not abnormal that Mr. Lord did not know the details of how to accommodate him. However, it

was abnormal that no employer experts from employment equity or human resources were assigned to train, sensitize, educate and help Mr. Lord and Major Scherr with their obligation to accommodate the grievor and with what that obligation involved and meant. That might have made a huge difference.

[34] The adjudicator turned to the issue of whether the employer's decision to terminate the grievor was discriminatory. The adjudicator found that while he had already concluded that the employer discriminated against the grievor during his employment, the evidence adduced at the hearing led him to conclude that the decision to terminate the grievor was based solely on financial motives.

[35] The adjudicator found it was clear that the employer promised the grievor he would be rolled over to indeterminate status and that this promise was not kept. However, while that might be immoral, it is not evidence of discrimination or an illegal action.

[36] The employer knew beginning in 2005 that there was a problem with the SWE budget. In June 2005, the employer assigned points to each position and the grievor's position received 350 points, not a high priority score. The adjudicator recited the timeline of the grievor's termination and Lieutenant-Colonel Gould's testimony regarding his decision. The adjudicator noted that the position was not filled after the grievor's termination. The job posters presented by the grievor were for positions not classified DD-03 and did not encompass 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, but the adjudicator did not hear Mr. Lord say that. Even if he had testified that in July 2010 he was in

the process of replacing the grievor, the adjudicator would not deduce 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.

[37] The adjudicator concluded that the evidence adduced at the hearing led him to believe that the employer did nothing illegal by terminating the grievor's contract. He understood why the grievor would perceive the employer's behaviour as unfair, but did not believe discrimination had played a role in the termination decision.

[38] The adjudicator ordered that the grievance was allowed in part, that the employer had discriminated against the grievor on several occasions and that the parties had 60 days to come to an agreement on the remedy. If the parties did not agree, a hearing would take place. The part of the grievance dealing with termination was rejected.

Issues in the Merits Judicial Review

[39] The grievor, who is the applicant on this judicial review, raises the following issues:

1. What is the appropriate standard of review?

2. Did the adjudicator err in law by failing to apply the proper human rights principles to determine whether the employer terminated Mr. Stringer's employment for discriminatory reasons?

[40] I would rephrase the issues as follows:

1. What is the appropriate standard of review?

2. Was the adjudicator's decision on the termination unreasonable?

Grievor's Written Submissions on the Merits Judicial Review

[41] The grievor argues that the Supreme Court has indicated that the standard of review is first to be determined by reference to existing case law and only by an analysis of relevant factors where the courts have not determined the standard applicable to the question at issue. This Court has held that the legal approach used by the Canadian Human Rights Tribunal (the CHRT) used to determine whether an employer accommodated a complainant's disability is a question of law reviewable for correctness. Although there is a factual context, the legal component is separate. The adjudicator was required to have regard for the relevant principles of human rights law.

[42] The grievor argues that although the PSLRA has a privative clause and the underlying legislative purpose is to efficiently settle workplace disputes, the question of law at issue involves the application of quasi-constitutional human rights legislation and therefore has jurisprudential value beyond the federal labour relations regime. The fact that the PSLRA provides the CHRC with standing, presumes a lack of expertise by the adjudicator and provides public oversight. Adjudicators have only recently been given the authority to interpret and apply human rights legislation and human rights issues are outside their home statute, which deals with labour relations.

[43] The grievor argues the adjudicator failed to apply the applicable human rights principles. Direct evidence of discrimination is rare, so human rights jurisprudence has developed a legal framework for assessing evidence in the entire context.

[44] The complainant first bears the onus of establishing a *prima facie* case of discrimination, where the allegations made are sufficient if believed to justify a verdict in the complainant's favour in the absence of an answer from the employer. The onus then shifts to the employer to provide a reasonable explanation. The final evidentiary burden rests with the complainant to demonstrate that the employer's explanation was pretextual and the employer's action had a discriminatory component.

[45] A tribunal should consider all the circumstances in determining whether there exists the subtle scent of discrimination. Intent is not a necessary element in proving discrimination occurred. A finding of discrimination requires only that a discriminating factor influenced the employer's actions. An employer's stated basis for any particular action, even if supported by the evidence, is never a sufficient reason to deny a discrimination claim. Even though financial reasons were identified as a reason for termination, it is entirely possible that discrimination also influenced the decision. The adjudicator did not question whether there were other reasons for the termination.

[46] Mr. Lord and Major Scherr were both found to have discriminated against the grievor, but the adjudicator did not analyze the extent of their influence on Lieutenant-Colonel Gould's decision to terminate. The fact that Lieutenant-Colonel Gould had identified financial concerns is distinct from the information used to determine whether the grievor's position was a priority. The

adjudicator relied on the financial aspect without ever inquiring into whether the priority decision was influenced by discrimination.

[47] The adjudicator found that Major Scherr made the recommendation to terminate shortly after he had engaged in and condoned discriminatory conduct toward the grievor. There was no attempt to connect these events. The grievor invited the adjudicator to draw an adverse inference from the employer's failure to call Major Scherr as a witness. His advice to Lieutenant-Colonel Gould was the basis for the termination. His testimony would have been crucial to explaining the reasons for terminating and Lieutenant-Colonel Gould could recall few particulars. It was clear that Mr. Lord exhibited intolerant behaviour towards the grievor due to his disability, including negative comments, downgrading performance appraisals and giving an inaccurate reference after the employment ended. The arbitrator improperly only considered Lieutenant-Colonel Gould's decision in isolation.

[48] The grievor argued that the adjudicator had to consider all the evidence to determine whether a pretextual explanation existed in his circumstances. No such analysis was conducted. It should have raised a red flag for the adjudicator that the employer maintained that the grievor had been hired for a specific project but during the hearing only tendered evidence of financial constraint.

[49] The employer promised the grievor indeterminate employment after it was aware of its financial problems. There was every indication he would not be affected by the financial problems. The employer subsequently relied on these concerns, making it a classic example of pretext. The

grievor was initially hired based on employment equity considerations and other persons whose positions were of the same priority were given indeterminate status while the grievor was denied this benefit without justification.

[50] At the January 31, 2006 meeting, it was decided the grievor would have to complete English language training by the end of 2006. This is inconsistent with a cost based reason for terminating the grievor's employment. There was no explanation why management began to take issue with the grievor's performance after eight contract renewals. The adjudicator did not address these issues.

[51] The duties performed by the grievor continued to be necessary and were performed by others after he was terminated. The employer's documents characterize the position as much needed, a fact inconsistent with the low priority rating. In cross-examination, Mr. Lord was reluctant to concede the full scope of the grievor's duties. The adjudicator took note of the job openings, but failed to mention any of the other evidence that these duties continued after termination.

[52] The grievor's submissions maintained that Mr. Lord had testified that the employer was in the process of staffing his position at the time of the hearing. While the AGC has filed an affidavit claiming otherwise, the very manner in which the adjudicator handled this evidentiary dispute illustrates the inappropriate approach to the alleged discrimination. The fact that the adjudicator held that even if the position was being filled in 2010, it did not amount to discrimination shows that the adjudicator was only looking for direct evidence instead of the subtle scent of discrimination. This flawed approach merits this Court's intervention.

Attorney General of Canada's Written Submissions on the Merits Judicial Review

[53] The AGC submits that reasonableness is the appropriate standard of review for two reasons. First, the Supreme Court has made clear that reasonableness is appropriate for dealing with questions of facts and questions dealing with legal issues that cannot be easily separated from the factual issues.

[54] Second, should a standard of review analysis be conducted, the result would be reasonableness. Section 223 of the PSLRA is a privative clause. The purpose of the PSLRA is to facilitate the resolution of labour disputes expeditiously, inexpensively and with relatively little formality. The resolution of public service disputes are by their nature polycentric. A finding of discrimination is a question of mixed fact and law and is not a question of true jurisdiction or of central importance to the legal system and outside the expertise of the Board. The adjudicator's decision was predicated on his finding of fact. Labour relations are a discrete and special administrative regime in which the decision maker has expertise and Parliament has entrusted the act of determining the existence of discrimination to the Board's adjudicators.

[55] A labour arbitration board's interpretation of outside legislation will warrant deference where the external statute is intimately connected with the mandate of the tribunal and is encountered frequently. The CHRA is closely related to the mandate and function conferred to the Board under the PSLRA. The question at issue, discrimination, is one which the adjudicator is intimately familiar with and one that falls within his specialized expertise. The CHRC's standing does not indicate a lack of expertise, as that means that the Public Service Staffing Tribunal would

not have expertise in employment matters given that the Public Service Commission has standing at adjudication.

[56] The AGC argues that the adjudicator considered all the evidence, both direct and indirect. The grievor had not presented persuasive evidence that the explanation for the termination was a mere pretext for discrimination. The adjudicator applied the correct legal test and relevant legal principles correctly, even though he did not agree with the grievor's characterization of the evidence.

[57] Lieutenant-Colonel Gould gave extensive evidence on the financial constraints at CFB Trenton. They had to demonstrate credibility to the higher authority that they were mitigating their deficit. Many other positions than the grievor's were not renewed as a result of mitigation and prioritization. He knew they had to prevent rollovers of term positions to indeterminate status due to the significant deficit. The adjudicator reasonably concluded that the termination decision was not tainted by discrimination.

[58] The grievor's position was not essential. The grievor was not replaced as the position was deleted and no longer exists. The work the grievor had been performing before 2006 was simply allocated to other employees to perform when the need arose. The adjudicator concluded that none of the job postings adduced by the grievor were classified as DD-03 or to perform the grievor's duties. The funds for the Adecco casual positions came from the operating financial account and not the SWE. The adjudicator disagreed with the grievor's assertion that Mr. Lord had been in the

process of replacing the grievor and noted even if this were true, it would not imply the termination was illegal.

[59] The AGC rejects the grievor's argument that the adjudicator did not properly consider other possible explanations that would demonstrate a taint of discrimination. The adjudicator specifically considered the promise of indeterminate status. The grievor made submissions on other possible explanations at the hearing and the fact that the adjudicator did not address them in his written decision does not mean he failed to consider them. When the adjudicator's reasons are read in their entirety, it is clear that he was fully aware of the question in dispute and that he rendered a decision that was within a range of possible acceptable outcomes defensible in respect of the facts and law.

[60] The AGC disagrees with the grievor's suggestion that if judicial review is granted that the matter be submitted to a different adjudicator. There has been no suggestion of bias and there is a presumption of integrity and impartiality in decision makers. It is therefore the AGC's position that if judicial review is granted, the matter should be returned to the same adjudicator.

Analysis of the Merits Judicial Review

[61] **Issue 1**

What is the appropriate standard of review?

Where previous jurisprudence has determined the standard of review applicable to a particular issue before the court, the reviewing court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 57, [2008] 1 SCR 190).

[62] The applicant relies on decisions of this Court and our Court of Appeal suggesting that correctness may be appropriate in reviewing the legal approach used in human rights decisions. I believe that jurisprudence has now been overtaken by the Supreme Court's decision in *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53, [2011] 3 SCR 471 (*Mowat*).

[63] In that decision, Mr. Justice Louis LeBel and Mr. Justice Thomas Cromwell acknowledged that historically, courts had reviewed human rights tribunals' interpretations of law on a correctness standard, as argued by the applicant in this case (at paragraph 19):

> … reviewing courts have not shown deference to human rights tribunals in respect of their decisions on legal questions. In the courts' view, the tribunals' level of comparative expertise remained weak and the regimes that they administered were not particularly complex.

[64] The Court went on to acknowledge the tension between this past approach and its instruction in *Dunsmuir* above, that deference is owed to administrative tribunals, even in respect of many questions of law (at paragraph 21). Ultimately, the court concluded that reasonableness was the appropriate standard of review for analyzing the question of law of whether the CHRT could award costs at paragraphs 24, 25 and 27:

> 24. … In substance, if the issue relates to the interpretation and application of its own statute, is within its expertise and does not raise issues of general legal importance, the standard of reasonableness will generally apply and the Tribunal will be entitled to deference.
>
> 25. The question of costs is one of law located within the core function and expertise of the Tribunal relating to the interpretation and the application of its enabling statute. ... The inquiry of what costs were incurred by the complainant as a result of a discriminatory

> practice is inextricably intertwined with the Tribunal's mandate and expertise to make factual findings relating to discrimination. … It cannot be said that a decision on whether to grant legal costs as an element of that compensation and about their amount would subvert the legal system, even if a reviewing court found it to be in error.
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> …
>
> 27. In summary, the issue of whether legal costs may be included in the Tribunal's compensation order is neither a question of jurisdiction, nor a question of law of central importance to the legal system as a whole and outside the Tribunal's area of expertise within the meaning of *Dunsmuir*. As such, the Tribunal's decision to award legal costs to the successful complainant is reviewable on a standard of reasonableness.

[65] In my view, this analysis applies equally to this case. The question of whether the grievor's termination was discriminatory is an application of human rights law to a particular factual matrix. It is not a true question of jurisdiction, nor a question of law of central importance to the legal system as a whole, nor is it outside the arbitrator's expertise. The standard of review is therefore reasonableness.

[66] The grievor argues that the CHRA is not the arbitrator's home statute as a reason for discrimination lying outside his area of expertise. However, as the grievor emphasizes in his arguments on remedial jurisdiction, below, Parliament has seen fit to task PSLRA adjudicators with applying the CHRA to labour grievances. Discrimination is therefore clearly within their area of expertise. I would also note that the Supreme Court held in *Dunsmuir* above, that "[d]eference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity" (at paragraph 54, emphasis added). The

CHRA is closely connected to the function of the Board's adjudicator as they are empowered to apply it in grievance proceedings.

[67] In reviewing the adjudicator's decision on the standard of reasonableness, the Court should not intervene unless the adjudicator came to a conclusion that is not transparent, justifiable and intelligible and within the range of acceptable outcomes based on the evidence before it (see *Dunsmuir* above, at paragraph 47 and *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59, [2009] 1 SCR 339). As the Supreme Court held in *Khosa* above, it is not up to a reviewing court to substitute its own view of a preferable outcome, nor is it the function of the reviewing court to reweigh the evidence (at paragraph 59).

[68] **Issue 2**

Was the adjudicator's decision on the termination unreasonable?

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.

[73] I would therefore allow the application for judicial review in Court file T-633-11. This is not a case where it is appropriate for the Court to order a particular outcome, given the complicated record and *viva voce* testimony before the adjudicator. I would therefore return the matter of the termination for redetermination. I agree with the AGC there is no reason to require it be redetermined by a different adjudicator. I would also leave the adjudicator's finding on the failure to accommodate intact, as neither party has suggested the adjudicator's decision must stand or fall in one piece.

The Remedy Decision

[74] The adjudicator released a decision on the remedy in this matter on September 9, 2011, cited as 2011 PSLRB 110. The adjudicator explained that the parties had not come to an agreement on the remedy, so an oral hearing had been held on August 10, 2011. The adjudicator summarized his findings in the merits decision.

[75] The adjudicator then summarized the parties' submissions on remedy. The grievor asked for $17,500 in general damages for pain and suffering and $17,500 for special compensation. The grievor asked to be compensated for family counselling expenses incurred, but provided no receipts or other evidence of those expenses. The grievor also asked for a series of systemic remedies to prevent such discrimination from taking place in the future and that the adjudicator remain seized to

ensure implementation of the remedies. The grievor argued the adjudicator had jurisdiction to order systemic remedies pursuant to subsection 226(1) of the PSLRA.

[76] The employer argued that it should pay $6,000 to the grievor. When determining quantum, the adjudicator should consider that the grievor did not produce any medical evidence to support his claim. The employer did not completely refuse to accommodate the grievor, but rather failed on a few occasions. Special compensation is only appropriate if the employer engaged in the discriminatory practice wilfully or recklessly, which is not the case here. The employer repeated its arguments on jurisdiction for events predating the PSLRA coming into force which were dealt with in the merits decision.

[77] The employer argued the adjudicator had no jurisdiction under subsection 226(1) of the PSLRA to order any systemic remedies. Paragraph 226(1)(h) of the PSLRA specifically refers to the CHRA and limits that power to provide relief in accordance with paragraph 53(2)(e) or subsection 53(3) of the CHRA.

[78] The adjudicator's analysis began by rejecting the request for family counselling expenses on the basis of lack of evidence of causation and the lack of receipts. The adjudicator canvassed previous board decisions on damages under paragraph 53(2)(e) and subsection 53(3) of the CHRA. The adjudicator concluded that $10,000 was the appropriate amount to be paid for pain and suffering, given that the adjudicator believed that the grievor felt humiliated and personally diminished by the discriminatory conduct. The adjudicator also concluded that $17,500 was the appropriate amount to be paid for special compensation under subsection 53(3) of the CHRA. The

employer is a large, articulate and sophisticated organization and was aware it had an obligation to accommodate, but systemically ignored accommodation requests from the grievor. The employer's actions were reckless and constituted outright discrimination.

[79] The adjudicator then turned to his jurisdiction to order remedies other than those under paragraph 53(2)(e) and subsection 53(3), such as interest on damages and a systemic remedy. The adjudicator did not agree with the employer's argument that his remedial jurisdiction was limited to those sections, since this would mean that the remedies available for human rights grievances would be more limited than for other labour grievances. It would require complainants to file both a grievance and a complaint under the CHRA to be made whole. It was not the intent of the legislator in drafting paragraph 226(1)(h) of the PSLRA. Rather, that paragraph was included in the PSLRA to specify that human rights issues could be grieved and to outline the new expanded jurisdiction of adjudicators over human rights issues.

[80] Rather, the adjudicator's jurisdiction to deal with grievances and order remedies comes from paragraph 209(1)(a) of the PSLRA. Further to that basic authority, paragraph 226(1)(g) of the PSLRA gives the power to interpret and apply the CHRA without references to any specific provisions of the CHRA, except for the exclusion of pay equity provisions. This interpretation is consistent with Supreme Court rulings holding that in general, labour relations tribunals have jurisdiction to deal with all disputes between the parties arising from a collective agreement. To conclude otherwise would mean that the grievor would have to go to the CHRT for other remedies.

[81] The adjudicator ordered that interest be paid on the damages, as he agreed with past decisions of Board adjudicators and the CHRT ordering interest from the date when the complaint was filed.

[82] The adjudicator declined to order the employer to revise its accommodation policies or train employees and managers at CFB Trenton on the duty to accommodate. No evidence was brought that the lack of accommodation occurred because of a deficiency in policy; rather, the issue was adherence to that policy. Training would not sufficiently avoid the type of discrimination the grievor endured. The employer failed in its obligations by not giving guidance or assistance to its managers at CFB Trenton. That is where the problem lies and that is what the employer needs to address. The adjudicator did not make any specific order on the issue and left it to the employer to ensure that its managers are not left on their own on this issue. Experts and specialists must help those managers choose the best means, methods and tools to accommodate those employees.

Issues of the Interest Judicial Review

[83] The AGC, who is the applicant on this judicial review, raises the following issues:

1. What is the appropriate standard of review?

2. Did the Board commit a reviewable error warranting this Court's intervention by ordering the employer to pay interest in a situation not enumerated at paragraph 226(l)(i) of the PSLRA?

[84] I would rephrase the issues as follows:

1. What is the appropriate standard of review?

2. Was the adjudicator's decision to order the payment of interest unreasonable?

AGC's Written Submissions on the Interest Judicial Review

[85] The AGC argues the standard of review is reasonableness. The Supreme Court and the Federal Court of Appeal have consistently reviewed on a standard of reasonableness, the interpretation by labour boards and adjudicators of provisions of their enabling legislation. The adjudicator was interpreting the provisions of his home statute to determine whether he had the authority to award interest. In the alternative, the AGC repeats the standard of review analysis offered above in his submissions on the merits judicial review.

[86] An examination of the text, context and purpose of the PSLRA provisions reveals that the adjudicator's interpretation that he had the power to award interest was unreasonable. This Court has held that the words of subsection 228(2) of the PSLRA does not give an adjudicator carte blanche to make the order he or she considers appropriate. Understood in their proper statutory context, these provisions do not create a stand alone power to award interest given the limitation in paragraph 226(l)(i).

[87] The PSLRA was proclaimed into force on April 1, 2005. Its predecessor statute had no provision for awarding interest payments. This Court held that the Crown was not required to pay interest in proceedings under that statute given the common law of Crown immunity and the lack of

provision for such payment. This rule was applied consistently by the Board. This rule changed under the new PSLRA, but Parliament clearly restricted the circumstances in which interest could be awarded pursuant to paragraph 226(1)(i).

[88] The Federal Court of Appeal held that Parliament was aware of the state of the law under the old statute and that its waiver of common law immunity can only be construed to apply to those circumstances in the specific cases at paragraph 226(l)(i). Subsection 53(4) of the CHRA allows for the granting of interest and it was specifically omitted from the remedies list in section 226 of the PSLRA. If Parliament had intended to provide an adjudicator the discretion to award interest, it would have included the authority found in subsection 53(4) of the CHRA.

Grievor's Written Submissions on the Interest Judicial Review

[89] The grievor argues the standard is correctness for reasons similar to those put forward above in the merits judicial review. The adjudicator's legal approach is distinct from the application of law to facts. While the adjudicator was interpreting his home statute, he was also required to have regard for relevant human rights principles, which are quasi-constitutional and raise questions outside of the adjudicator's core expertise and which have implications outside of labour relations.

[90] The grievor argues the PSLRA incorporates all of the CHRA. The AGC's position would result in a substantial narrowing of the scope of human rights adjudication under the PSLRA. Paragraph 226(1)(g) of the PSLRA empowers the adjudicator to interpret and apply the CHRA. The Supreme Court, in interpreting virtually identical language, held that the phrase "to interpret and

apply human rights and other employment-related statutes" meant that the decision maker had the power to enforce rights and obligations provided for in human rights statutes. The grievor argues the AGC has failed to point to any legislative language which would detract from the clear statement of Parliament and clear jurisprudence of the Supreme Court. Furthermore, the exclusion of pay equity matters in paragraph 226(1)(g) of the PSLRA shows that Parliament turned its mind to the exclusion of specific provisions of the CHRA but did not exclude the awarding of interest.

[91] The grievor argues the AGC's approach is also fundamentally inconsistent with the quasi-constitutional status of the CHRA and the legal requirement to interpret it and related legislation in a broad and purposive manner. The general trend of labour relations jurisprudence is to provide a one stop shop for adjudication of all matters in the employment environment. Other adjudicators have accepted that they have the authority to make orders outside the limitations identified by the AGC. The CHRC's role in the PSLRA process is relevant given its unique role in ensuring that discrimination ends. The AGC's position would preclude the CHRC from playing this role in PSLRA proceedings and require a separate CHRA process.

[92] The grievor argues the legislative history supports the incorporation of all of the CHRA. Historically, human rights complaints in the federal public service were bifurcated from other labour grievances. This changed with the introduction of the PSLRA. The Hansard of Bill C-25 includes a Senator's statement it would provide employees of the public service the same recourse for human rights matters as those currently enjoyed by the federally regulated private sector under the *Canada Labour Code*. It was noted by a Committee witness that the Bill would allow the Board to provide remedies as if it were a tribunal. Parliament also expressly excluded the CHRA from the

rule that individuals may not pursue grievances under the PSLRA where another administrative process is available. Paragraph 226(1)(g) can only be seen as a response to this legislative history to correct the anomaly of federal public servants not being able to bring human rights complaints as grievance arbitration. There is nothing to suggest a bifurcated approach.

[93] The grievor argues the effect of the AGC's position would be to create a cumbersome, bifurcated and inefficient system. Employees would be required to go to more than one administrative tribunal in order to obtain relief arising out of the same circumstances. The grievor in this case would have had to file a separate complaint, have it investigated by the CHRC and then proceed to a hearing at the CHRT. It would raise questions such as whether the CHRT was bound by the PSLRA adjudication on the merits. The AGC's argument does not apply only to interest, as it would preclude the adjudicator from issuing systemic remedies. It would mean the adjudicator's powers to order remedies would be more limited in human rights grievances than other grievances.

[94] The Federal Court of Appeal decision relied upon by the AGC is of little assistance. The amendment of paragraph 226(1)(i) to expand the areas where interest can be awarded is distinct from other amendments providing authority to interpret and apply the CHRA. It was not necessary for Parliament to incorporate subsection 53(4) of the CHRA into the PSLRA since paragraph 226(1)(g) is extraordinarily broad. The adjudicator did not conclude his authority only flowed from paragraph 209(1)(a) of the PSLRA, but that it also flowed from paragraph 226(1)(g) of the PSLRA.

Analysis on the Interest Judicial Review

[95] **Issue 1**

What is the appropriate standard of review?

The appropriate standard of review is reasonableness, for the same reasons I describe in the merits judicial review above. While the issue of whether awarding interest is within a PSLRA adjudicator's jurisdiction is a pure question of law, it does not fall within those categories of questions of law which the Supreme Court have identified as warranting review on a correctness standard.

[96] The adjudicator is interpreting a statute closely connected to his function, as contemplated in *Dunsmuir* above, at paragraph 54. While I appreciate that it is a question of law very important to those employees bound by the PSLRA, it is not of central importance to the legal system. Just as the Supreme Court held in *Mowat* above, that the awarding of costs was within the CHRT's expertise, I find that the awarding of interest is within the adjudicator's expertise.

[97] **Issue 2**

Was the adjudicator's decision to order the payment of interest unreasonable?

As the Supreme Court held in *Mowat* above, the liberal and purposive interpretation of a statutory provision concerned with human rights must be limited by its text (at paragraph 33, emphasis added):

> The question is one of statutory interpretation and the object is to seek the intent of Parliament by reading the words of the provision in their entire context and according to their grammatical and ordinary sense, harmoniously with the scheme and object of the Act and the

> intention of Parliament (E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87, quoted in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21). In approaching this task in relation to human rights legislation, one must be mindful that it expresses fundamental values and pursues fundamental goals. It must therefore be interpreted liberally and purposively so that the rights enunciated are given their full recognition and effect: see, e.g., R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 497-500. However, what is required is nonetheless an interpretation of the text of the statute which respects the words chosen by Parliament.

[98] In this case, the AGC argues that the Federal Court of Appeal has already interpreted the relevant text in *Canada (Attorney General) v Nantel*, 2008 FCA 351 at paragraphs 6 to 8, [2008] FCJ No 1556:

> 6. It is unnecessary to address this question since, in our opinion, the amendments brought about by the *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 2 (PSLRA), which came into force on April 1, 2005, render the conclusion reached by Justice Pinard unavoidable, regardless of the standard of review applicable to the adjudicator's decision. Indeed, the PSLRA provides at paragraph 226(1)(*i*) that the adjudicator may "award interest in the case of grievances involving termination, demotion, suspension or financial penalty [emphasis added] at a rate and for a period that the adjudicator considers appropriate".
>
> 7. When this amendment is considered in light of the consistent line of case law that Justice Pinard relies on in his reasons, which has interpreted the PSSRA, without exception, in the same way for over 30 years, it demonstrates unequivocally that Parliament was indeed aware of the state of the law under the PSSRA, and that as of April 1, 2005, it chose to waive the benefit of the common law rule in the specific cases provided at paragraph 226(1)(*i*). It therefore follows that the common law rule remains in effect for all other cases. The amendment cannot be construed otherwise.
>
> 8. With this in mind, the adjudicator's conclusion that under the former Act, the PSSRA, Parliament had already, though not expressly, provided a non-exhaustive list of exceptions to the common law rule becomes untenable. We believe it useful to add that the appellant's claim would be no more admissible under the

> new Act, the PSLRA, since none of the four exceptions provided at paragraph 266(1)(*i*) would apply.

[99] The grievor argues that this passage is only concerned with paragraph 226(1)(i) and not with paragraph 226(1)(g), which empowers the adjudicator to apply the CHRA. To accept this argument would require me to conclude that the Court of Appeal, in using such broad language as "all other cases" and "non-exhaustive list", failed to consider other paragraphs of the very subsection it was interpreting. I cannot accept that argument, as it would require too much deviation from the clear words of that Court that the common law immunity of the Crown from payment of interest prevails in any PSLRA proceeding except those specifically identified in paragraph 266(1)(i).

[100] Even if I did not have the benefit of the Court of Appeal's view on subsection 226(1), it seems to me that the most coherent reading of paragraphs 226(1)(g) and (h), is that the exception to application of the CHRA in (g) refers to its substance (by removing pay equity provisions), while (h) provides an exception to its remedies (by omitting the incorporation of CHRA's section 53(4) when 53(2)(e) and (3) are explicitly mentioned). There is little other way to read these paragraphs coherently, given that the specific mention of the CHRA's remedies in (h) would be redundant to allowing the application of the entire CHRA in (g), were it not intended to exclude 53(4) by omission.

[101] I appreciate the seriousness of the policy arguments made by the grievor pertaining to bifurcation of proceedings, but it is not open to me to consider those arguments in light of the unambiguous holding of the Court of Appeal.

[102] For the same reason, the fact that I review the adjudicator's decision on a reasonableness standard cannot save it. Given the binding case law, this is not a case where there are multiple reasonable interpretations of the statute. To render a decision conflicting with clear case law is unreasonable.

[103] I would therefore allow the application for judicial review in Court file T-1657-11 and quash the portion of the adjudicator's remedy decision awarding interest, with costs to the applicant.

Issues of the Systemic Remedy Judicial Review

[104] The grievor, who is the applicant in this judicial review, raises the following issues:

1. What is the appropriate standard of review?

2. Did the adjudicator err in law by failing to apply the proper human rights principles in declining to order a systemic remedy in the present case?

[105] I would rephrase the issues as follows:

1. What is the appropriate standard of review?

2. Was the adjudicator's decision to decline to order a systemic remedy unreasonable?

Grievor's Written Submissions on the Systemic Remedy Judicial Review

[106] The grievor argues that correctness is the appropriate standard of review for the same reasons offered above in both the merits judicial review and the interest judicial review.

[107] The grievor submits that persons with disabilities often face attitudinal and systemic barriers and their history in Canada is largely one of exclusion and marginalization. There is interplay between section 15 of the *Canadian Charter of Rights and Freedoms* and the application of human rights legislation. Discrimination can accrue from the failure to take positive steps to ensure equal treatment of disadvantaged persons. The main purpose of human rights legislation is to identify and eliminate discrimination.

[108] Systemic discrimination in employment arises from the simple operation of an employer's established procedures. Systemic remedies prevent future discrimination. The broad wording of the remedial provisions of the CHRA allowed decision makers considerable breadth in crafting systemic remedies to redress and prevent workplace discrimination. The award need only be reasonably connected to the evidentiary findings. Such remedies typically include an order that the employer create or review existing policies to ensure compliance. Commonly, the CHRC or another party oversees the implementation of an award. There is no requirement that there be evidence of widespread discrimination and it makes no difference if the employer already has a good policy on accommodation in place.

[109] In this case, the adjudicator identified a systemic problem but declined to order a systemic remedy. The adjudicator found several bases upon which to conclude that the employer's practices were flawed. The systemic remedies requested by the grievor were directly connected to the nature of the discrimination he experienced.

[110] The adjudicator's reason for not ordering a systemic remedy was that the employer's deficiency was not in its policy but in failing to fully adhere to that policy. The law is clear that an employer's failure to accommodate in spite of its own internal policies does not preclude a review of that policy to prevent future discrimination. The fact that the policy was not fully adhered to is an indication that the policy is flawed.

[111] The adjudicator declined to award training to employees and managers on the basis that it would not have avoided the type of discrimination endured by the grievor, despite his finding that the employer failed in its duty by not giving guidance or assistance to managers at CFB Trenton on their human rights obligations. There is no doubt that the adjudicator recognized that something had to be done, but left it to the employer. There was no principled basis for declining to order this training which would have remedied the discriminatory conduct at issue.

[112] The adjudicator further noted that experts and specialists must help the employer's managers comply with their human rights obligations, but provided no order to that effect. This is inconsistent with the remedial purpose of human rights legislation.

AGC's Written Submissions on the Systemic Remedy Judicial Review

[113] The AGC argues that the standard of review is reasonableness, for the reasons presented above in the merits judicial review and the interest judicial review.

[114] The AGC argues that the grievor is asking this Court to reweigh the evidence in order to conclude that there was systemic discrimination that warranted systemic remedies. The language of subsection 228(2) gives the adjudicator discretion in crafting a remedial order. The adjudicator was fully aware of the grievor's position on systemic remedy and recognized his authority to award remedies, but was not convinced that ordering a systemic remedy was the appropriate course of action.

[115] The approach of leaving it to the employer to ensure managers are able to facilitate accommodation measures is reasonable, given that the employer is best situated to deal with the deficiencies noted by the adjudicator. The adjudicator's public decision outlining the employer's failure and his proposals for how to remedy said failure, sends a clear and strong message to the employer. It was reasonable to expect that the employer's future actions would be guided by his recommendations and there was no evidence before him to indicate the contrary.

[116] The awarding of compensation for the failure to accommodate was appropriate given that the adjudicator did not have the jurisdiction to accommodate him. No evidence was presented that the lack of accommodation was attributable to deficiencies in those policies. When read in their entirety, the adjudicator's reasons reveal he was fully aware of the question in dispute.

[117] The AGC argues if judicial review is granted, the matter should be returned to the same adjudicator for the reasons argued in the merits judicial review.

Analysis of the Systemic Remedy Judicial Review

[118] **Issue 1**

What is the appropriate standard of review?

The appropriate standard of review is reasonableness, for the same reasons I describe in the merits judicial review above. The issue of what remedy is appropriate after a finding of discrimination is a mixed question of fact and law and well within a PSLRA adjudicator's expertise. There is no reason for this Court to do anything but defer to his decision.

[119] **Issue 2**

Was the adjudicator's decision to decline to order a systemic remedy unreasonable?

I agree with the grievor that the adjudicator's own reasons point towards a systemic component to the failures to accommodate (merits decision at paragraph 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.

[120] But, at the remedy stage, the adjudicator concluded that no systemic remedy was warranted (remedy decision at paragraphs 51 to 53):

> [51] The grievor asked that the employer be ordered to revise its accommodation policies. I will not order that remedy since no evidence was brought to my attention that established that the lack of accommodation came from deficiencies in the employer's policy. Rather, the failure to accommodate the grievor came from not fully adhering to that policy.
>
> [52] The grievor also asked me to order the employer to train employees and managers at CFB Trenton, including the grievor's former managers, on the duty to accommodate. I will not order that remedy since I do not think that it would sufficiently avoid the type of discrimination that the grievor endured.
>
> [53] When the grievor was hired, the employer failed in its obligations by not giving guidance or assistance to its managers at CFB Trenton about what needed to be done to accommodate the grievor, who is hearing impaired. The employer failed by not helping and supporting its managers to fulfill their legal obligations to accommodate the grievor. That is where the problem lies, and that is what the employer needs to address. I will not make any specific order on this issue, and I will leave it to the employer to ensure that its managers are not left on their own when they need to put in place accommodation measures for employees with different needs. Experts and specialists must help those managers choose the best means, methods and tools to accommodate those employees.

[121] It is difficult to see these two passages as concordant or even to read the final paragraph of the second passage as internally coherent. The adjudicator's desired outcome is clearly that the employer make 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.

[125] I am of the view that the issue of a systemic remedy was not properly considered by the adjudicator in the reasons. This is a matter for determination by the adjudicator. I consider the adjudicator's decision on a reasonableness standard. The reasonableness standard brings with it the value of justification (see *Dunsmuir* above, at paragraph 47). A decision where the reasons offered

conflict with the decision's very outcome is in conflict with this value. This decision, which did not offer an outcome justified by the reasons, is therefore unreasonable.

[126] I would therefore grant the judicial review in Court file T-1669-11, with costs to the applicant. I agree with the AGC that there is no reason to require that a different adjudicator deal with this matter on redetermination. Neither party has taken issue with the damages award portion of the remedy decision, so I would limit the redetermination to the question of whether a systemic remedy is appropriate.

JUDGMENTS

THIS COURT'S JUDGMENT on Court file T-633-11 (the merits or termination judicial review) is that the adjudicator's finding relating to failure to accommodate will remain and the part of the decision relating to termination is set aside and that issue is returned to the same adjudicator for redetermination. The applicant shall have his costs of the application.

AND THIS COURT'S JUDGMENT on Court file T-1657-11 (the interest judicial review) is that the application for judicial review is allowed to the extent that the arbitrator's award with respect to the awarding of interest on damages is set aside. The applicant shall have its costs of the application.

AND THIS COURT'S JUDGMENT on Court file T-1669-11 (the systemic remedy judicial review) is that the application for judicial review is allowed, with costs to the applicant, and the matter is referred back to the same adjudicator for redetermination.

"John A. O'Keefe"

Judge

ANNEX

Relevant Statutory Provisions

***Public Service Labour Relations Act*, SC 2003, c 27**

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	209. (1) Après l'avoir porté jusqu'au dernier palier de la procédure applicable sans avoir obtenu satisfaction, le fonctionnaire peut renvoyer à l'arbitrage tout grief individuel portant sur :
(a) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award;	a) soit l'interprétation ou l'application, à son égard, de toute disposition d'une convention collective ou d'une décision arbitrale;
. . .	. . .
226. (1) An adjudicator may, in relation to any matter referred to adjudication,	226. (1) Pour instruire toute affaire dont il est saisi, l'arbitre de grief peut :
(a) summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath in the same manner as a superior court of record;	a) de la même façon et dans la même mesure qu'une cour supérieure d'archives, convoquer des témoins et les contraindre à comparaître et à déposer sous serment, oralement ou par écrit;
(b) order that a hearing or a pre-hearing conference be conducted using a means of telecommunication that permits the parties and the adjudicator to communicate with each other simultaneously;	b) ordonner l'utilisation de moyens de télécommunication permettant aux parties et à l'arbitre de grief de communiquer les uns avec les autres simultanément lors des audiences et des conférences préparatoires;
(c) administer oaths and solemn affirmations;	c) faire prêter serment et recevoir les affirmations solennelles;
(d) accept any evidence, whether admissible in a court of law or not;	d) accepter des éléments de preuve, qu'ils soient admissibles ou non en justice;
(e) compel, at any stage of a proceeding, any person to produce the documents and things that may be relevant;	e) obliger, en tout état de cause, toute personne à produire les documents ou pièces qui peuvent être liés à toute question dont il est saisi;

(f) subject to any limitations that the Governor in Council may establish in the interests of defence or security, enter any premises of the employer where work is being or has been done by employees, inspect and view any work, material, machinery, appliance or article in the premises and require any person in the premises to answer all questions relating to the matter being adjudicated;

f) sous réserve des restrictions que le gouverneur en conseil peut imposer en matière de défense ou de sécurité, pénétrer dans les locaux ou sur les terrains de l'employeur où des fonctionnaires exécutent ou ont exécuté un travail, procéder à l'examen de tout matériau, outillage, appareil ou objet s'y trouvant, ainsi qu'à celui du travail effectué dans ces lieux, et obliger quiconque à répondre aux questions qu'il lui pose relativement à l'affaire dont il est saisi;

(g) interpret and apply the Canadian Human Rights Act and any other Act of Parliament relating to employment matters, other than the provisions of the Canadian Human Rights Act related to the right to equal pay for work of equal value, whether or not there is a conflict between the Act being interpreted and applied and the collective agreement, if any;

g) interpréter et appliquer la Loi canadienne sur les droits de la personne, sauf les dispositions de celle-ci sur le droit à la parité salariale pour l'exécution de fonctions équivalentes, ainsi que toute autre loi fédérale relative à l'emploi, même si la loi en cause entre en conflit avec une convention collective;

(h) give relief in accordance with paragraph 53(2)(e) or subsection 53(3) of the Canadian Human Rights Act;

h) rendre les ordonnances prévues à l'alinéa 53(2)e) et au paragraphe 53(3) de la Loi canadienne sur les droits de la personne;

(i) award interest in the case of grievances involving termination, demotion, suspension or financial penalty at a rate and for a period that the adjudicator considers appropriate; and

i) dans le cas du grief portant sur le licenciement, la rétrogradation, la suspension ou une sanction pécuniaire, adjuger des intérêts au taux et pour la période qu'il estime justifiés;

(j) summarily dismiss grievances that in the opinion of the adjudicator are frivolous or vexatious.

j) rejeter de façon sommaire les griefs qu'il estime frustratoires.

228. (1) If a grievance is referred to adjudication, the adjudicator must give both parties to the grievance an opportunity to be heard.

228. (1) L'arbitre de grief donne à chaque partie au grief l'occasion de se faire entendre.

(2) After considering the grievance, the adjudicator must render a decision and make the order that he or she considers

(2) Après étude du grief, il tranche celui-ci par l'ordonnance qu'il juge indiquée. …

appropriate in the circumstances. …

***Canadian Human Rights Act*, RSC 1985, c H-6**

53. (1) At the conclusion of an inquiry, the member or panel conducting the inquiry shall dismiss the complaint if the member or panel finds that the complaint is not substantiated.	53. (1) À l'issue de l'instruction, le membre instructeur rejette la plainte qu'il juge non fondée.
(2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:	(2) À l'issue de l'instruction, le membre instructeur qui juge la plainte fondée, peut, sous réserve de l'article 54, ordonner, selon les circonstances, à la personne trouvée coupable d'un acte discriminatoire :
(a) that the person cease the discriminatory practice and take measures, in consultation with the Commission on the general purposes of the measures, to redress the practice or to prevent the same or a similar practice from occurring in future, including	a) de mettre fin à l'acte et de prendre, en consultation avec la Commission relativement à leurs objectifs généraux, des mesures de redressement ou des mesures destinées à prévenir des actes semblables, notamment :
(i) the adoption of a special program, plan or arrangement referred to in subsection 16(1), or	(i) d'adopter un programme, un plan ou un arrangement visés au paragraphe 16(1),
(ii) making an application for approval and implementing a plan under section 17;	(ii) de présenter une demande d'approbation et de mettre en oeuvre un programme prévus à l'article 17;
(b) that the person make available to the victim of the discriminatory practice, on the first reasonable occasion, the rights, opportunities or privileges that are being or were denied the victim as a result of the practice;	b) d'accorder à la victime, dès que les circonstances le permettent, les droits, chances ou avantages dont l'acte l'a privée;
(c) that the person compensate the victim for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the	c) d'indemniser la victime de la totalité, ou de la fraction des pertes de salaire et des dépenses entraînées par l'acte;

discriminatory practice;

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

d) d'indemniser la victime de la totalité, ou de la fraction des frais supplémentaires occasionnés par le recours à d'autres biens, services, installations ou moyens d'hébergement, et des dépenses entraînées par l'acte;

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

e) d'indemniser jusqu'à concurrence de 20 000 $ la victime qui a souffert un préjudice moral.

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

(3) Outre les pouvoirs que lui confère le paragraphe (2), le membre instructeur peut ordonner à l'auteur d'un acte discriminatoire de payer à la victime une indemnité maximale de 20 000 $, s'il en vient à la conclusion que l'acte a été délibéré ou inconsidéré.

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

(4) Sous réserve des règles visées à l'article 48.9, le membre instructeur peut accorder des intérêts sur l'indemnité au taux et pour la période qu'il estime justifiés.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-633-11 and T-1669-11
STYLE OF CAUSE:	JEFFREY STRINGER - and - ATTORNEY GENERAL OF CANADA
DOCKET:	T-1657-11
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA - and – JEFFREY STRINGER
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	January 9, 2013
REASONS FOR JUDGMENTS AND JUDGMENTS OF:	O'KEEFE J.
DATED:	July 2, 2013

APPEARANCES:

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