Federal Court  Cour fédérale

Date: 20090123

Docket: T-2181-07

Citation: 2009 FC 60

Ottawa, Ontario, January 23, 2009

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

ATTORNEY GENERAL OF CANADA

(Canadian Forces Grievance Board)

Applicant

and

MICHELINE ANNE MONTREUIL

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision by Michel Doucet, a member of the Canadian Human Rights Tribunal (the Tribunal), dated November 20, 2007, allowing the complaint alleging discrimination on the basis of sex of Micheline Anne Montreuil (the respondent) pursuant to section 7 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the Act).

[2] The application for judicial review is dismissed for the following reasons.

Factual Background

[3] The respondent identifies herself as being transgendered. It has been held by both the Tribunal and this Court that this “particular condition” (paragraph 6 of the Tribunal's decision) could form the basis for a claim of discrimination on the grounds of “sex” as provided in section 3 of the Act.

[4] The Board is an independent civilian body of the Canadian Forces which, in accordance with section 29 of the *National Defence Act*, R.S.C. 1985, c. N-5, is responsible for examining military grievances filed by members of the Canadian Forces, making findings and recommendations to the Chief of Defence Staff for final decision. The Board was created in 2000, as part of a reform of military justice that resulted from inquiry reports pointing to the need for an independent grievance process for the members of the Canadian Forces.

[5] The Board created grievance officer positions; the main duties of the holders thereof are reviewing the files, investigating, and taking part in the drafting of the findings and recommendations of the Board. Grievance officers also act as specialists with personnel and Board members.

[6] When it was established, the Board had no exact knowledge of the number, nature and complexity of the grievances submitted to it by the Canadian Forces. But there is no dispute that there was a significant backlog of grievances. A number of grievances dated back several years. The Board’s human resources needs were filled through secondments or transfers.

[7] In April 2002, the Board held its first external competition in order to establish a pool of candidates for grievance officer term positions. A variety of linguistic profiles were announced, and the Board was to select candidates from the pool depending on potential future needs. The first internal competition had been held in February 2002.

[8] When she applied on May 6, 2002, the respondent sent, among other things, the results of the Public Service Commission of Canada English language exam, which she had written on February 9, 2000. Her language rating was “ECB”. On November 26, 2002, she wrote another English-language written expression exam. Despite this attempt, she did not achieve a “CCC” rating to be considered bilingual. She did not pursue her training in order to improve her language proficiency.

[9] On August 30, 2002, she was asked to report to Valcartier military base to take a written exam. On October 31, 2002, she was told that she had passed her exam and that she would be invited to an interview by a selection board.

[10] The interview took place in Ottawa on November 15, 2002. On December 30 of the same year, she received confirmation that she had qualified and that her name had been placed on an eligibility list as a unilingual Francophone candidate. She was ranked third of the four candidates placed on the list. The three others were included as unilingual Anglophone candidates.

[11] In the light of its operational needs, the Board had concluded that the best way of abiding by the spirit and the letter of the *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.), (the OLA) was to staff unilingual English or bilingual grievance officer positions to meet the needs at that time.

[12] All the unilingual English candidates who had been placed on the eligibility list as a result of the April 2002 competition were hired by the Board between September 1 and December 18, 2003. During the same period, the Board hired bilingual and unilingual English officers (paragraph 46 of the decision).

[13] The eligibility list was valid until March 31, 2003, and there was an extension until December 29, 2004. No candidate with the respondent's linguistic profile was hired as a result of the competition or has been so since the Board's creation in 2000.

[14] On August 27, 2004, the respondent filed a complaint with the Commissioner of Official Languages alleging that she had suffered discrimination on the basis of her language, based on the same facts as those set out in her complaint to the Canadian Human Rights Commission (the Commission).

[15] On June 16, 2005, the Commission referred the respondent's complaint to the Tribunal.

[16] On July 27, 2005, the Commissioner of Official Languages dismissed the respondent's complaint.

[17] The hearings were held before the Tribunal from April 16 to 20 and on April 23, 2007. On November 20, 2007, the Tribunal held in favour of the respondent, ruling that the complaint of discrimination on the basis of sex (transgendered) was substantiated, and ordered the Board to pay her $44,174 plus interest.

Impugned Decision

[18] Section 7 of the Act provides that it is a discriminatory practice, directly or indirectly, to refuse to employ an individual on a prohibited ground of discrimination, including sex or national or ethnic origin. The burden of proof is first on the complainant, who must establish a *prima facie* case of discrimination (*Israeli v. C.H.R.C. and Public Service Commission* (1983), 4 C.H.R.R. D/1616; *Premakumar v. Air Canada*, [2002] C.H.R.D. No. 3 (QL)). The evidence must substantiate allegations that must be complete and sufficient to warrant a finding in the complainant's favour if they are believed, in the absence of a response from the opposing party (*Ontario (Human Rights Commission) v. Etobicoke (Borough)*, [1982] 1 S.C.R. 202 at page 8; *Ontario (Human Rights Commission) v. Simpsons Sears Ltd.*, [1985] 2 S.C.R. 536 (hereafter *O'Malley*)).

[19] In the context of employment, *prima facie* evidence comprises the following:

a) The complainant was qualified for the employment at issue;
b) The complainant was not hired;
c) Someone no better qualified but lacking the distinguishing feature, which is the gravamen of the human rights complaint, subsequently obtained the position.

[20] This approach in *Shakes v. Rex Pak Ltd.* (1982), 3 C.H.R.R. D/1001 at paragraph 8918, has been adapted to situations in which the complainant was not selected and the employer continued to look for another candidate. In a similar case discussed in *Israeli*, above at page D/1618, the establishment of a *prima facie* case requires the following factors:

a) The complainant belongs to one of the designated groups under the Act;
b) The complainant applied for a job for which he or she was qualified;
c) Although qualified, the complainant was rejected;
d) Thereafter, the employer continued to seek applicants with the complainant's qualifications.

[21] In the case at bar, the Tribunal decided that neither of the approaches specifically resolves the dilemma at hand. The Tribunal used what it called a “flexible” approach by combining the two approaches and by rephrasing, where necessary, the criteria to be applied according to the facts that it had to analyse.

[22] According to the Tribunal, once the *prima facie* case is made out, the burden shifts to the respondent, who has to provide a reasonable explanation for the alleged conduct. The standard of proof in discrimination cases is the ordinary civil standard of the balance of probabilities. According to this standard, discrimination may be inferred where the evidence offered in support of the discrimination renders such an inference more probable than the other possible inferences or hypotheses (*Premakumar*, above, at paragraph 81). It is consequently the Tribunal's task to consider all of the circumstances to determine if there is what has been described as the “subtle scent of discrimination” (*Premakumar*, above, at paragraph 79).

[23] The Tribunal noted that the respondent insisted on pointing out that the argument based on language only served to support her complaint based on sex. She alleged that the language ground had only been a pretext for not giving her the desired position because of her “sex”. The Tribunal therefore addressed only the discrimination complaint based on sex. However, it noted that it had to address the language aspect of the complainant’s argument in its reasons.

[24] Firstly, following an analysis of the facts, the Tribunal found that the respondent had the necessary competencies or qualifications to work as a grievance officer.

[25] Secondly, the Tribunal determined that the respondent’s application had been rejected. The Tribunal explained that the letter dated December 30, 2002, said that the respondent had qualified for the competition and that her name would be placed on an eligibility list that would be effective until March 30, 2003.

[26] In response to two requests for information, the respondent received a letter on December 18, 2003, informing her that the Board did not have an operational need for unilingual French grievance officers at the time. The letter pointed out, however, that the Board was extending the validity of the eligibility list for unilingual French grievance officer positions (the respondent being the only unilingual French candidate on the list) until March 2004 and assured the respondent that the Board would call on her services should it need a unilingual French grievance officer. The Tribunal then raised the following question (paragraph 45 of the decision):

> . . . Indeed, I am wondering why the Board decided to extend this eligibility list when it seemed clear . . . that the Board would never need a unilingual French grievance officer since there were enough bilingual officers to handle this task.

[27] The Tribunal eventually found that the respondent's application had been rejected on the ground that the Board had placed her on an eligibility list for which there was never any need. The Board had thus imposed a condition that was impossible to fulfill; hence she would never be hired by the Board. There would have to be such an increase in files to process in French that there would no longer be enough bilingual officers to get the work done; only then would the respondent have to be hired. The Board could simply increase the number of bilingual officers, making it unnecessary to hire a unilingual French grievance officer.

[28] The Tribunal then noted that the respondent was ranked third of the four candidates that qualified for the eligibility list. The three other candidates, unilingual Anglophones, were all hired. Nothing in the evidence suggests that the hired candidates were more qualified to work as grievance officers than the respondent. The Tribunal accepted the respondent's argument that the only difference between her and the other candidates was that she was transgendered. Language was not the cause of the discrimination but rather a pretext for concealing it.

[29] The Tribunal therefore determined that the respondent had established a *prima facie* case of discrimination. The burden was now on the Board to provide a reasonable explanation for the alleged conduct.

[30] The Board's explanation for not hiring the respondent was that there was no operational need for a unilingual French grievance officer. There were enough bilingual grievance officers to handle the processing of the French-language files. The Tribunal noted, however, that the advertisement for the competition indicated that the majority of the positions were bilingual imperative "CCC" but that "some [were] unilingual English or French" (page 1379, Volume VI, Applicant's Record). If the Board had been of the opinion that there were not enough French language files to warrant hiring a grievance officer with this profile, it would not have advertised that some positions were "unilingual French".

[31] The Tribunal noted that no evidence was offered to explain how many French-language files would suffice for there to be an operational need to justify hiring a unilingual Francophone grievance officer. Even with 35% of files being French in 2005, the Board considered that it did not have the operational need for a unilingual French grievance officer. Based on that evidence, the Tribunal found that the Board would never need a "unilingual French" grievance officer, unless there was an exceptional change in the linguistic composition of the files.

[32] In support of its decision, the Board also relied on the *Policy on the Staffing of Bilingual Positions* issued by the Treasury Board of Canada Secretariat, which provides for imperative staffing of specified term positions, meaning that only those candidates who meet all the language requirements of the position at the time of appointment can be accepted. Even though this policy explains why the respondent could not get one of the bilingual positions, it does not explain why the

Board did not create a “unilingual Francophone” position, given the job application and the competition notice (pages 1378 and 1379, Volume VI, Applicant’s Record).

[33] The Tribunal pointed out that it was not concerned with determining whether the Board refused to hire the respondent because she was Francophone, but rather whether the Board refused to hire her because she was transgendered, using her language profile as a pretext. It recognized that it was not within the Tribunal’s jurisdiction to determine whether a federal institution had considered OLA requirements when staffing a position. It was also not within its jurisdiction to determine whether a language requirement was simultaneously discriminatory. It did, however, assume jurisdiction to verify whether a language requirement for staffing was only a pretext for discrimination within the meaning of the Act, so the Tribunal did not exceed its mandate. The fact that an activity is subject to the OLA does not preclude the application of the Act (see subsection 82(2) of the OLA and *Canada (Attorney General) v. Uzoaba*, [1995] 2 F.C. 569 (T.D.). Even though the OLA may provide a remedy, this does not strip the Tribunal of its jurisdiction to address the issue of discrimination.

[34] The Tribunal also pointed out that intent is not a precedent condition to a finding of discrimination (*O’Malley*). It is therefore not necessary to demonstrate that the Board members intended to discriminate against the respondent. The Tribunal was of the opinion that simply saying that bilingual officers could handle the French-language files if needed was not a satisfactory answer.

[35] The Tribunal therefore found that, on a balance of probabilities, the Board had discriminated against the respondent on the basis of sex (transgendered), in violation of sections 3 and 7 of the Act.

[36] After having analysed the respondent's claims, the Tribunal ordered that the respondent be compensated in the amount of $39,174 for lost wages and that she be awarded an additional $5,000 as special compensation, as provided for under subsection 53(3) of the Act, plus interest.

Issues

1. Did the Tribunal properly define and apply the correct legal test with regard to the *prima facie* burden of proof?
2. Was the Tribunal's decision reasonable in this case, given the evidence on which the Board based its findings?
3. Did the Tribunal encroach upon both the Commissioner's jurisdiction under the *Official Languages Act* and the employer's management rights?

Relevant legislation

[37] The relevant legislation in this case appears in Schedule A, at the end of this document.

Analysis

Standard of review

[38] In *International Longshore & Warehouse Union (Maritime Section), Local 400 v. Oster*, [2002] 2 F.C. 430, 2001 FCT 1115, the Court held that the Tribunal has superior expertise relating to fact-finding in a human rights context.

[39] In this case, the first issue relates to the definition of the test for *prima facie* evidence and its application to the facts. The standard of review that applies to the definition is that of correctness. When it comes to applying this definition, as this is a question of mixed fact and law, the standard is that of reasonableness (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190).

[40] The second issue is whether the decision was reasonable. As this is a question of mixed fact and law, the standard of reasonableness applies (*Dunsmuir*, above).

[41] The third issue concerns the Tribunal's role in relation to the Commissioner of Official Languages' jurisdiction and the Board's management rights. On questions of jurisdiction, the applicable standard of review is that of correctness (*Dunsmuir*, above, at paragraph 57).

1. Did the Tribunal properly define and apply the correct legal test with regard to the *prima facie* burden of proof?

[42] Section 7 of the Act provides that it is discriminatory to refuse to employ a person on a prohibited ground of discrimination. The respondent argues that she was discriminated against because of her sex, in violation of subsection 3(1).

[43] The Tribunal identified and described the two court-recognized approaches to the *prima facie* evidence requirement in such matters recognized by the case law. It ;ade the following comments in this respect:

> . . . Rather, the circumstances of each case should be considered to determine if the application of either of the tests, in whole or in part, is appropriate. Ultimately, the question will be whether the complainant has satisfied the O'Malley test, that is: if believed, is the evidence before the Tribunal complete and sufficient to justify a finding in the complainant's favour, in the absence of an answer from the respondent? . . . (paragraph 22 of the decision)

[44] According to the applicant, the essential structural basis of the case is lacking because the Tribunal had to identify the requirements of the particular analytical approach it was applying. The Tribunal imposed an ambiguous *prima facie* burden of proof on the respondent and an unrealistic burden of justification on the applicant.

[45] Firstly, the applicant is of the opinion that it was unreasonable for the Tribunal to find that the respondent was qualified for the grievance officer position the term of which was to end on December 31, 2004, irrespective of the language requirements of the positions to be filled.

[46] Secondly, the applicant challenges the Tribunal's inference that if the number of French-language files grew, the Board would increase the number of bilingual officers rather than employ

the respondent. This assertion is not based on any evidence other than the respondent's testimony. The Tribunal drew an adverse inference from the three extensions of the validity of the eligibility list of unilingual French candidates without clarifying the meaning or scope of that inference. The applicant argues that the Tribunal failed to consider that the list of unilingual French candidates was extended on the basis of the Board's potential future needs.

[47] The Tribunal did not refer to any evidence relating the respondent's complaint to the alleged ground of discrimination, namely sex (transgendered).

[48] Thirdly, the Tribunal should have addressed the question whether a person who was not transgendered and who was no more qualified than the respondent had obtained the position and not whether the hired candidates had been more qualified than she was. By raising the wrong question, the Tribunal made an error that affects the very basis of its decision.

[49] According to the applicant, the Tribunal should have considered the language requirements of the grievance officer positions to be filled and found that the respondent did not meet those requirements. If it had taken the language requirements into account, the Tribunal would have found that the hired candidates were more qualified than the respondent and would have been compelled to hold that the respondent had not made out a *prima facie* case of discrimination.

[50] The respondent argues that the Board attempted to circumvent the provisions of the Act by claiming operational language needs. In her opinion, the applicant is evading the question, which is discrimination based on sex.

[51] The respondent cites *Gendron v. Supply and Services Union of the Public Service Alliance of Canada, Local 50057*, [1990] 1 S.C.R. 1298, and *Richard v. Sulconam Inc.*, [1986] R.D.J. 597, 2 A.C.W.S. (3d) 76, to point out that there is a non-interference rule for superior courts and that this rule of prudence should be respected in this case.

[52] She also relies on *Blanchard v. Control Data Canada Ltd.*, [1984] 2 S.C.R. 476; *Canadian Association of Industrial, Mechanical and Allied Workers, Local 14 v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983; *Miriam Home v. Canadian Union of Public Employees (Local 2115)*, [1985] 1 S.C.R. 137, for the definition of the unreasonableness of a decision.

[53] In my opinion, the Tribunal stated the law correctly in its analysis of the principles recognized by the case law concerning the *prima facie* burden that complainants who claim that they have been discriminated against must meet (paragraphs 15 to 26 of the decision). The Tribunal properly identified the relevant factors that characterize *prima facie* evidence.

[54] What about the application of these principles to the case at bar? The Tribunal first asked itself the following question: “Does the complainant have the skills or qualifications necessary to fill the position?”

[55] The applicant argues that the respondent was not qualified because she did not meet the language requirements of the positions (paragraphs 54 to 59, Respondent's Memorandum of Fact and Law).

[56] However, the Tribunal took the competition notice (April 2002) into account, in terms of both the résumé and the level of experience required for being placed on the eligibility list. It then noted that the respondent had passed the written exam and the interview, ranking third of the four candidates to be placed on the list.

[57] The December 30, 2002 letter (page 1112, Applicant's Record), signed by Mireille Royer on behalf of the Board and sent to the respondent, persuaded the Tribunal that the respondent had qualified. The first paragraph of the letter stated, [TRANSLATION] "This is to inform you that the members of the selection board have completed the evaluation of the candidates and that you have qualified in the abovementioned competition".

[58] In my opinion, this letter is sufficient in itself to support the Tribunal in its finding that the respondent had the necessary competencies or qualifications to work as a grievance officer.

[59] Then the Tribunal determined that the respondent's application had been rejected. This finding was the result of a detailed analysis of the files to be processed and the number of positions filled until December 2004. Even though, technically, the Board did not officially reject the

respondent's application, the Tribunal, after hearing the applicant's witnesses, found that the Board would never hire a unilingual French grievance officer.

[60] The testimonies of Ms. Laurin and Ms. Korngold-Wexler (applicant's witnesses) support the Tribunal's finding. In my opinion, the Court's intervention is not warranted. The same is true of the Tribunal's finding that the unilingual Anglophone candidates, all of whom were hired, were not more qualified than the respondent.

2. Was the Tribunal's decision reasonable in this case, given the evidence on which the Board based its findings?

[61] According to the applicant, the Tribunal never challenged the credibility of the witnesses who were asked to support the allegations. A number of relevant facts were omitted or forgotten. For example, according to the Tribunal, the Board did not explain why it had advertised different linguistic profiles and why it had decided to create an eligibility list of qualified unilingual Francophone candidates and to extend the validity thereof although it later found that it did not have a need for an applicant that matched that profile. This conclusion is confusing and blends two distinct elements, namely, transgenderism and insufficient language proficiency, as if they were inseparable. To find that the respondent was not hired because she is unilingual Francophone does not mean that she was not hired because she is transgendered.

[62] The applicant correctly states that the Tribunal did not rule on the credibility of its witnesses. However, the Tribunal stated that it was not persuaded by the grounds invoked by the Board's witnesses for not hiring the respondent. The Tribunal found that there was a “subtle scent of

discrimination” (paragraph 68 of the decision). It relied, among other things, on the witnesses who testified in support of the applicant that there were a sufficient number of French-language files to hire a unilingual Francophone grievance officer.

[63] After having verified Ms. Laurin's testimony (page 767, Applicant’s Record), I note that this assertion is supported by the evidence.

[64] Moreover, the Tribunal observed an inconsistency between the statistics shown in a table submitted by Ms. Korngold-Wexler and her letter dated December 18, 2003, concerning the French- and English-language grievances the Board had processed. Once again, if one compares the two documents (table: page 1453 and letter dated December 18, 2003, page 1115, Applicant’s Record), it is clear that the figures do not match. The Tribunal was correct, in my opinion, not to be persuaded by the Board's explanation for not hiring the respondent.

[65] The Tribunal inferred that the Board had not offered a grievance officer position to the respondent because she was transgendered (paragraphs 68 to 72 of the decision).

[66] The reasons supporting this conclusion are backed up by evidence: the documents and testimonies that the Tribunal had to analyse, interpret and review. I am of the opinion that the Tribunal' solution was rational and acceptable according to the *Dunsmuir* criteria (herein above at paragraph 47).

3. Did the Tribunal encroach upon the Commissioner's jurisdiction under the *Official Languages Act* as well as the employer's management rights?

[67] The applicant argues that, according to the case law, it is exclusively for the Commissioner of Official Languages to analyze the merits of language requirements (*Canada (Attorney General) v. Asselin* (1995), 100 F.T.R. 309, 57 A.C.W.S. (3d) 956 (F.C.T.D.), at paragraphs 11 and 12). The Board rightly determined that its operational needs did not warrant the hiring of a unilingual Francophone candidate and that this was why the respondent was not employed. The Tribunal erred in ruling on the merits of the language requirements imposed for the staffing of positions, thus encroaching upon a jurisdiction conferred solely on the Commissioner by the OLA.

[68] The Tribunal exceeded its jurisdiction. It should have presumed the correctness of the language requirements determined by the Board and should have dismissed the complaint.

[69] The applicant cites *Gosselin (Tutor of) v. Quebec (Attorney General)*, [2005] 1 S.C.R. 238, at paragraph 21, which refers to *Mahe v. Alberta*, [1990] 1 S.C.R. 342, in support of his position that the Board's decisions on the linguistic profiles of the grievance officer positions were licit under the OLA. Consequently, the Tribunal’s argument that language was a pretext for concealing the discrimination against the respondent is not reasonable.

[70] The applicant adds that the Commissioner of Official Languages dismissed the respondent's complaint on July 27, 2005. The respondent could have sought the remedy provided for under

section 77 of the OLA (see *Forum des maires de la Péninsule acadienne v. Canada (Canadian Food Inspection Agency)*, 2004 FCA 263, [2004] 4 F.C. 276); she failed to do so.

[71] She cannot now use language characteristics to support the alleged discrimination.

[72] Lastly, the applicant submits that the Board's operational needs did not warrant the hiring of a unilingual Francophone candidate. By substituting its own assessment for that of the Board, the Tribunal interfered with the management power of the employer, which has the duty to determine its needs and, as provided for under subsections 7(1) and 11(2) of the *Financial Administration Act*, R.S.C. 1985, c. F-11, take the appropriate measures to organize and manage its human resources.

[73] In reference to paragraphs 60 to 65 of the Tribunal's decision, I note that the Tribunal took pains to discuss the OLA and an employer's management rights. With deference for those who hold a different view, I am not of the view that the Tribunal encroached upon a power that it did not have. Indeed, the Tribunal's conclusion in paragraph 65—"Even though there may be recourse under the *Official Languages Act*, this does not strip the Tribunal of its jurisdiction to address the issue of discrimination if need be"—is not unreasonable in the light of its foregoing analysis.

JUDGMENT

THE COURT ORDERS that the application for judicial review be dismissed. Costs in the form of a $3,000 lump sum are awarded to the respondent.

"Michel Beaudry"
Judge

Certified true translation
François Brunet, Reviser

Schedule A

Canadian Human Rights Act, R.S.C. 1985, c. H-6:

3. (1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted.	**3.** (1) Pour l'application de la présente loi, les motifs de distinction illicite sont ceux qui sont fondés sur la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge, le sexe, l'orientation sexuelle, l'état matrimonial, la situation de famille, l'état de personne graciée ou la déficience.
7. It is a discriminatory practice, directly or indirectly,	**7.** Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, par des moyens directs ou indirects :
(a) to refuse to employ or continue to employ any individual, or	a) de refuser d'employer ou de continuer d'employer un individu;
(b) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination.	b) de le défavoriser en cours d'emploi.
53. (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	**53.** (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 :

include in the order any of the following terms that the member or panel considers appropriate:

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

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 discriminatory practice;

c) d’indemniser la victime de la totalité, ou de la fraction des pertes de salaire et des dépenses entraînées par l’acte;

(d) that the person compensate the victim for any or all

d) d’indemniser la victime de la totalité, ou de la fraction des

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

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.

53. (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.

53. (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.

53. (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.

53. (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.

National Defence Act, R.S.C. 1985, c. N-5:

29. (1) An officer or non-commissioned member who has

29. (1) Tout officier ou militaire du rang qui s'estime lésé par

been aggrieved by any decision, act or omission in the administration of the affairs of the Canadian Forces for which no other process for redress is provided under this Act is entitled to submit a grievance.	une décision, un acte ou une omission dans les affaires des Forces canadiennes a le droit de déposer un grief dans le cas où aucun autre recours de réparation ne lui est ouvert sous le régime de la présente loi.

Official Languages Act, R.S.C. 1985, c. 31 (4th Supp.):

35. (1) Every federal institution has the duty to ensure that	**35.** (1) Il incombe aux institutions fédérales de veiller à ce que :
(a) within the National Capital Region and in any part or region of Canada, or in any place outside Canada, that is prescribed, work environments of the institution are conducive to the effective use of both official languages and accommodate the use of either official language by its officers and employees; and	a) dans la région de la capitale nationale et dans les régions ou secteurs du Canada ou lieux à l'étranger désignés, leur milieu de travail soit propice à l'usage effectif des deux langues officielles tout en permettant à leur personnel d'utiliser l'une ou l'autre;
36. (1) Every federal institution has the duty, within the National Capital Region and in any part or region of Canada, or in any place outside Canada, that is prescribed for the purpose of paragraph 35(1)(a), to	**36.** (1) Il incombe aux institutions fédérales, dans la région de la capitale nationale et dans les régions, secteurs ou lieux désignés au titre de l'alinéa 35(1)a) :
(c) ensure that,	c) de veiller à ce que, là où il est indiqué de le faire pour que le milieu de travail soit propice à l'usage effectif des deux langues officielles, les supérieurs soient aptes à communiquer avec leurs
(i) where it is appropriate or necessary in order to create a work environment that is conducive to the effective use of both official languages,	

supervisors are able to communicate in both official languages with officers and employees of the institution in carrying out their supervisory responsibility, and

(ii) any management group that is responsible for the general direction of the institution as a whole has the capacity to function in both official languages.

subordonnés dans celles-ci et à ce que la haute direction soit en mesure de fonctionner dans ces deux langues.

39. (1) The Government of Canada is committed to ensuring that

(a) English-speaking Canadians and French-speaking Canadians, without regard to their ethnic origin or first language learned, have equal opportunities to obtain employment and advancement in federal institutions; and

(b) the composition of the work-force of federal institutions tends to reflect the presence of both the official language communities of Canada, taking into account the characteristics of individual institutions, including their mandates, the public they serve and their location.

39. (1) Le gouvernement fédéral s'engage à veiller à ce que :

a) les Canadiens d'expression française et d'expression anglaise, sans distinction d'origine ethnique ni égard à la première langue apprise, aient des chances égales d'emploi et d'avancement dans les institutions fédérales;

b) les effectifs des institutions fédérales tendent à refléter la présence au Canada des deux collectivités de langue officielle, compte tenu de la nature de chacune d'elles et notamment de leur mandat, de leur public et de l'emplacement de leurs bureaux.

56. (1) It is the duty of the Commissioner to take all actions and measures within the authority of the Commissioner

56. (1) Il incombe au commissaire de prendre, dans le cadre de sa compétence, toutes les mesures visant à assurer la

with a view to ensuring recognition of the status of each of the official languages and compliance with the spirit and intent of this Act in the administration of the affairs of federal institutions, including any of their activities relating to the advancement of English and French in Canadian society.

reconnaissance du statut de chacune des langues officielles et à faire respecter l'esprit de la présente loi et l'intention du législateur en ce qui touche l'administration des affaires des institutions fédérales, et notamment la promotion du français et de l'anglais dans la société canadienne.

58. (1) Subject to this Act, the Commissioner shall investigate any complaint made to the Commissioner arising from any act or omission to the effect that, in any particular instance or case,

(a) the status of an official language was not or is not being recognized,

(b) any provision of any Act of Parliament or regulation relating to the status or use of the official languages was not or is not being complied with, or

(c) the spirit and intent of this Act was not or is not being complied with
in the administration of the affairs of any federal institution.

58. (1) Sous réserve des autres dispositions de la présente loi, le commissaire instruit toute plainte reçue — sur un acte ou une omission — et faisant état, dans l'administration d'une institution fédérale, d'un cas précis de non-reconnaissance du statut d'une langue officielle, de manquement à une loi ou un règlement fédéraux sur le statut ou l'usage des deux langues officielles ou encore à l'esprit de la présente loi et à l'intention du législateur.

77. (1) Any person who has made a complaint to the Commissioner in respect of a right or duty under sections 4 to 7, sections 10 to 13 or Part IV, V or VII, or in respect of

77. (1) Quiconque a saisi le commissaire d'une plainte visant une obligation ou un droit prévus aux articles 4 à 7 et 10 à 13 ou aux parties IV, V, ou VII, ou fondée sur l'article 91,

section 91, may apply to the Court for a remedy under this Part.	peut former un recours devant le tribunal sous le régime de la présente partie.
82. (1) In the event of any inconsistency between the following Parts and any other Act of Parliament or regulation thereunder, the following Parts prevail to the extent of the inconsistency:	**82.** (1) Les dispositions des parties qui suivent l'emportent sur les dispositions incompatibles de toute autre loi ou de tout règlement fédéraux :
(a) Part I (Proceedings of Parliament);	a) partie I (Débats et travaux parlementaires);
(b) Part II (Legislative and other Instruments);	b) partie II (Actes législatifs et autres);
(c) Part III (Administration of Justice);	c) partie III (Administration de la justice);
(d) Part IV (Communications with and Services to the Public); and	d) partie IV (Communications avec le public et prestation des services);
(e) Part V (Language of Work).	e) partie V (Langue de travail).
(2) Subsection (1) does not apply to the Canadian Human Rights Act or any regulation made thereunder.	(2) Le paragraphe (1) ne s'applique pas à la Loi canadienne sur les droits de la personne ni à ses règlements.

Financial Administration Act, R.S.C. 1985, c. F-11:

7. (1) The Treasury Board may act for the Queen's Privy Council for Canada on all matters relating to	**7.** (1) Le Conseil du Trésor peut agir au nom du Conseil privé de la Reine pour le Canada à l'égard des questions suivantes :
(a) general administrative policy in the federal public	a) les grandes orientations applicables à l'administration

administration;

publique fédérale;

(b) the organization of the federal public administration or any portion thereof, and the determination and control of establishments therein;

b) l'organisation de l'administration publique fédérale ou de tel de ses secteurs ainsi que la détermination et le contrôle des établissements qui en font partie;

(c) financial management, including estimates, expenditures, financial commitments, accounts, fees or charges for the provision of services or the use of facilities, rentals, licences, leases, revenues from the disposition of property, and procedures by which departments manage, record and account for revenues received or receivable from any source whatever;

c) la gestion financière, notamment les prévisions budgétaires, les dépenses, les engagements financiers, les comptes, le prix de fourniture de services ou d'usage d'installations, les locations, les permis ou licences, les baux, le produit de la cession de biens, ainsi que les méthodes employées par les ministères pour gérer, inscrire et comptabiliser leurs recettes ou leurs créances;

(d) the review of annual and longer term expenditure plans and programs of departments, and the determination of priorities with respect thereto;

d) l'examen des plans et programmes des dépenses annuels ou à plus long terme des ministères et la fixation de leur ordre de priorité;

(d.1) the management and development by departments of lands, other than Canada Lands as defined in subsection 24(1) of the Canada Lands Surveys Act;

d.1) la gestion et l'exploitation des terres par les ministères, à l'exclusion des terres du Canada au sens du paragraphe 24(1) de la Loi sur l'arpentage des terres du Canada;

(e) human resources management in the federal public administration, including the determination of the terms and conditions of employment of persons employed in it;

e) la gestion des ressources humaines de l'administration publique fédérale, notamment la détermination des conditions d'emploi;

(e.1) the terms and conditions of employment of persons appointed by the Governor in Council that have not been established under this or any other Act of Parliament or order in council or by any other means; and

e.1) les conditions d'emploi des personnes nommées par le gouverneur en conseil qui ne sont pas prévues par la présente loi, toute autre loi fédérale, un décret ou tout autre moyen;

(e.2) internal audit in the federal public administration;

e.2) la vérification interne au sein de l'administration publique fédérale;

(f) such other matters as may be referred to it by the Governor in Council.

f) les autres questions que le gouverneur en conseil peut lui renvoyer.

11. (2) The Governor in Council may designate any position to be the position of deputy head in respect of

11. (2) Le gouverneur en conseil peut désigner tout poste comme poste d'administrateur général :

(a) any portion of the federal public administration named in Schedule IV or V for which there is no chief executive officer; and

a) pour chacun des secteurs de l'administration publique fédérale figurant aux annexes IV ou V sans premier dirigeant;

(b) each portion of the federal public administration designated for the purpose of paragraph (d) of the definition "public service" in subsection (1) for which there is no chief executive officer.

b) pour chacun des secteurs de l'administration publique fédérale sans premier dirigeant désigné pour l'application de l'alinéa d) de la définition de «fonction publique » au paragraphe (1).

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2181-07
STYLE OF CAUSE:	**ATTORNEY GENERAL OF CANADA (Canadian Forces Grievance Board) and MICHELINE MONTREUIL**
PLACE OF HEARING:	Québec, Quebec
DATE OF HEARING:	January 14, 2009
REASONS FOR JUDGMENT AND JUDGMENT BY:	Beaudry J.
DATED:	January 23, 2009

APPEARANCES:

Yannick Landry	FOR THE APPLICANT
Micheline Anne Montreuil	FOR THE RESPONDENT

SOLICITORS OF RECORD:

John H. Sims, Q.C. Deputy Attorney General of Canada Montréal, Quebec	FOR THE APPLICANT
Micheline Anne Montreuil Québec, Quebec	FOR THE RESPONDENT