

**CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES DROITS DE LA  
PERSONNE**

**DETRA BERBERI**

**Complainant**

**- and -**

**CANADIAN HUMAN RIGHTS COMMISSION**

**Commission**

**- and -**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

**DECISION**

MEMBER: J. Grant Sinclair 2009 CHRT 21  
2009/07/27

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**I. INTRODUCTION**

[1] Detra BerberI is the complainant in this matter. She has worked as a civil servant with the federal government continuously for the past 23 years. She currently works as a CR-04 finance/administrative clerk with Human Resources Development Canada at its regional office located at 4900 Yonge Street, Toronto.

[2] In the late 1990's, Ms. BerberI was involved in two car accidents, one in 1998 and the second in 1999. As a result of these two accidents, Ms. BerberI sustained neck injuries, lower back pain and fibromyalgia. She also suffered from depression since 1998 as a result of the accident. Ms. BerberI was not hospitalized for either of the accidents but worked on and off since 1999.

[3] She returned to work full time for HRDC in October 2004 and was temporarily located for three months at the HRDC Regional office at 4900 Yonge Street, Toronto.

[4] Since the car accidents, Ms. BerberI has become very anxious about driving on major highways which would be necessary if she were to drive from her home in Mississauga to her work place at 4900 Yonge Street. Instead, she takes the GO bus which involves a daily commute there and back of more than three hours.

[5] In December 2004, Ms. BerberI applied for a deployment as a CR-04 finance/administrative clerk with the RCMP detachment office in Milton, Ontario. She applied for this position because she believed that it offered her stable employment at a location close to her home. This would allow her to avoid the long daily commute or driving on a major highway.

[6] While awaiting a response from the RCMP, a temporary position became available with the Department of Justice at its Bramalea office. Ms. BerberI obtained this job and worked there from January 2005 to March 2006. The Brampton location was very close to her home.

[7] In March 2005, she received an email from Corporal Mark duPuy of the RCMP asking her to attend for an interview. She did so and shortly after she was advised that she had ranked number one and was the successful candidate. She was asked by Corporal duPuy to complete the documentation for top secret security clearance that was required for the

position. She completed these forms, submitted photos and attended at the RCMP office for finger printing.

[8] In May 2005, Corporal duPuy emailed Ms. Berberi telling her that a new staff sergeant, Staff Sergeant Mabee, had been transferred into this office and wanted to meet with her. When she met with him later in May, he indicated that he had concerns about her suitability and reliability for the position because of the time that she had been absent from work following her car accidents. He was concerned that her medical problems would cause her again to be absent from work for considerable periods of time.

[9] After that meeting, Ms. Berberi heard nothing from the RCMP until, in response to her request for information concerning her application, she received an email on December 1, 2005 from Diane Mallett, RCMP Central Region Service Staffing Officer, attaching a letter dated August 10, 2005.

[10] In this letter, Ms. Mallett advised Ms. Berberi that her application had not been given any further consideration because other "affected" employees had been identified and therefore been given priority consideration. No explanation was provided as to why she did not receive the letter earlier.

[11] Ms. Berberi testified that when she received this letter she was devastated and was very depressed. She felt that she had overcome all of the obstacles to returning to work on a full time basis and was looking to rebuild her working career with the RCMP at a location close to her home.

[12] Ms. Berberi did not seek any medical treatment for the depression that she said she had experienced. After she received this letter, she continued to work at the Department of Justice until March 2006. She took very little, if any, sick time during that period.

[13] In March 2006, her position at the Department of Justice ended and she returned to the HRDC Dundas Street office. In the summer, Ms. Berberi learned that there were some changes taking place within the organization. Under the Labour Market Development Agreement between Canada and Ontario, Ms. Berberi's position would be transferred either to the Ontario office or to the HRDC at 4900 Yonge Street office as of January 2, 2007. These two offices were about five minutes apart and having to work at one or the other of these offices meant a daily commute time of over three hours for Ms. Berberi.

[14] Ms. Berberi became very concerned and anxious both about the long daily commute and possibly a change in her salary and pension benefits if she went to work for Ontario.

[15] While this was going on, Ms. Berberi filed a human rights complaint with the Canadian Human Rights Commission on August 7, 2006 against the RCMP. In her complaint, she alleged that she was denied the CR-04 position with the RCMP because of her disability and past absenteeism, contrary to s. 7 of the *Canadian Human Rights Act (CHRA)*.

[16] On December 11, 2006, Ms. Berberi consulted with her family doctor, Dr. Min K. Yang. He provided her with a letter of that date addressed "To Whom it may Concern." In his letter, Dr. Yang stated:

"Ms. Berberi was seen recently for symptoms of anxiety, insomnia and emotional stress over her upcoming employment transfer to North York because of the required long daily commute across the city. She has a history of motor vehicle accident induced chronic pain disorder and fibromyalgia dating back to 1998 and continued on and off till 2004. She has only been back at work with Human Resources and Skills Development Canada in October of 2004. Although her chronic pain disorder has much improved over the last few years, she remains anxious and nervous when driving on the highway. It would not be beneficial to her current health if she has to engage in long daily commutes to work. It may even trigger another relapse of her conditions. Please give special consideration to any re-assignment of her work position and location."

[17] Ms. Berberi said that the purpose of the letter was to advise HRDC that she was suffering from anxiety and other medical problems and to support her desire to be assigned to an office closer to home.

[18] On December 29, 2006, Ms Berberi was working at the HRDC Dundas Street office when she had an anxiety and panic attack and fainted. She was taken to the hospital and was released very shortly thereafter.

[19] Ms. Berberi went on sick leave on December 29, 2006. She consulted with Dr. Yang on January 2, 2007 who provided a note stating that Ms. Berberi "is unable to return to work due to anxiety and depression until further notice."

[20] On June 21, 2007, Dr. Yang again wrote a note that Ms. Berberi "continues to suffer from chronic depression. She's awaiting psychiatric consult. Return to work date unknown." Ms. Berberi testified that the purpose for these notes was to give HRDC notice that she was not able to work and the reasons for this.

[21] When she went off work, Ms. Berberi applied to Sun Life for long term disability coverage. Throughout 2007, she received bi-monthly payments by direct deposit into her bank account. She believed that these were her Sun Life long term disability benefits. But in February 2008 she received a T4 Statement of Remuneration from Ontario for 2007 in the amount of \$41,474.83.

[22] Ms. Berberi had earlier emailed Ontario to advise that she would not be reporting to work on January 2, 2007. It was only when she received her T4 that she learned that she was being paid by Ontario and not by Sun Life. Ontario stopped these payments early in February 2008 and Sun Life then started her disability payments, retroactive to February 2008.

[23] The next piece of medical evidence is a letter from Dr. Zofia Aleksiejuk dated November 13, 2008. Dr. Aleksiejuk is Ms. Berberi's psychiatrist whom she first consulted in October 2007. This letter was addressed "To Whom It May Concern" and confirmed that Ms. Berberi would be ready to return to work as of December 15, 2008 on a graduated return to work basis.

[24] She was to start with four mornings per week and increase by one half day every one or two weeks if tolerated. She also recommended that Ms. Berberi not travel any more than a maximum of 45 minutes to and from work. Ms. Berberi returned to work on April 14, 2009 at the HRDC office at 4900 Yonge Street.

[25] At the hearing, Ms. Berberi submitted a letter from Dr. Aleksiejuk, dated May 28, 2009. The Tribunal admitted this letter as evidence subject to the weight to be given to it. In her letter, Dr. Aleksiejuk states that Ms. Berberi has been her patient since October 4, 2007 and that she suffers from panic disorder and major depressive disorder.

[26] Dr. Aleksiejuk's letter indicated that Ms. Berberi had previously worked at 4900 Yonge Street for a three month assignment and she could not cope with the long commute. The main reason that Ms. Berberi applied for a deployment with the RCMP was that the RCMP office location was ten minutes away from her home and she would not lose any seniority or pensionable service as it was basically a transfer from one federal organization to another.

[27] Dr. Aleksiejuk noted that on December 29, 2006, she became anxious and suffered a panic attack at work. Dr. Aleksiejuk wrote that the thought of losing her opportunity to be hired by the RCMP because of a discriminatory act and the fact that as of January 2, 2007, she was to start her new job at the provincial government with a daily commute of over three hours was too much for Ms. Berberi to cope with.

[28] Ms. Berberi reported that this caused her to suffer emotionally and socially. Her sleeping pattern and her ability to concentrate were disrupted. Not getting the job with the RCMP has affected her confidence to apply for other jobs and she has not done so.

[29] Dr. Aleksiejuk goes on to state that Ms. Berberi feels that had she been hired by the RCMP in the spring of 2005, she would not have to deal with the complaint with the RCMP

nor have to be transferred to the provincial government. She would have had a career with the RCMP and possibly advanced by now.

## II. DECISION

[30] On May 25, 2009, counsel for the RCMP wrote to Ms. Berberi and to the Tribunal admitting that the RCMP's decision not to employ her was based in part on a perceived disability. Counsel then suggested that the hearing into her complaint could proceed on the issue of remedy alone.

[31] Ms. Berberi requested that she be given a permanent position with the RCMP and she provided three preferred locations, namely, Explorer Drive in Mississauga, Milton or the airport.

[32] At the hearing, the RCMP offered Ms. Berberi an indeterminate CR-04 finance/administrative position at the RCMP detachment in Milton, which is one of her preferred locations. The only condition was that Ms. Berberi obtain a top secret security clearance. The RCMP also offered to conduct a functional ability assessment and provide the necessary accommodations to ensure that she succeeds in this position.

[33] Ms. Berberi accepted this offer and agreed that this satisfied her remedy request for a permanent position with the RCMP. The parties agreed that no order from the Tribunal was necessary.

[34] Ms. Berberi contends that had she got the RCMP position, she would have been earning \$44,946. She seeks lost wages for 2007, 2008 and part of 2009. For 2007, she claims \$3,000, which she said represents the difference between the RCMP salary and the \$41,474 that she was paid by Ontario.

[35] For 2008, she claims \$14,000, being the difference between the RCMP salary and the \$30,000 received from Sun Life. She claims between \$4,000-\$5,000 for part of 2009 for the same reason. Ms. Berberi also claims compensation to be applied to pension, CPP and EI contributions that she otherwise would have made.

[36] Ms. Berberi argues that the precipitating event that underlies her claim for lost wages for the years 2007, 2008 and part of 2009 was her anxiety and panic attack on December 29, 2006, the consequences of which caused her to go off work from that date to April 14, 2009. She attributes this to the failure of the RCMP to award her the deployment, which failure was based on a discriminatory act.

[37] In my opinion, this assertion is just not plausible for a number of reasons. First, the panic attack occurred more than one year after Ms. Berberi learned that she would not get the RCMP job. Second, the panic attack happened just four days before she was to start work with the Ontario government at a location that again would involve a three hour daily commute.

[38] Third, Ms. Berberi did not seek any medical attention after she learned that she would not be getting the RCMP job even though she said that she was devastated and became depressed. In fact, she was content to continue working after December 1, 2005 for the Department of Justice until March 2006 and thereafter at HRDC, both at offices that were conveniently located to her home.

[39] Fourth, she does not claim any wage loss for the year 2006. Fifth, she did not file her human rights complaint until August 2006, almost nine months after she received the rejection letter from the RCMP.

[40] In my opinion, Ms. Berberi's overriding concern was the soon to be re-introduction of the long daily commute. It was only after she learned of her impending transfer that she began to get anxious which peaked on December 29, 2006, merely days before this was to occur.

[41] This is clearly demonstrated from the medical evidence. In his December 11, 2006 letter, Dr. Yang wrote that Ms. Berberi "suffers from symptoms of anxiety, insomnia and emotional

stress over her upcoming employment transfer to North York because of the required long daily commute across the city". He asked that special consideration be given to her work assignment and location. There was no reference to any effects or consequences that Ms. Berberi may have suffered after receiving the December 1, 2005 rejection letter.

[42] Dr. Aleksiejuk's November 13, 2008 letter makes no mention of Ms. Berberi's panic attack in December 29, 2006. It was written to advise of Ms. Berberi's return to work date and to support a graduated return to work schedule and a transfer to a location within 45 minutes of her home.

[43] As to Dr. Aleksiejuk's May 28, 2009 letter, I give it very little if any weight. It was written just a few days before the Tribunal hearing was to start and in my opinion, was written to bolster Ms. Berberi's case rather than providing an objective medical opinion.

[44] The only medical reference that Dr. Aleksiejuk offers is that Ms. Berberi suffers from panic disorder and major depressive disorder. Otherwise Dr. Aleksiejuk just recites what Ms. Berberi has reported to her. The main reason Ms. Berberi applied for the RCMP job was that the office was ten minutes from her home. That the fact that she was to start a new job at the provincial government which involved a daily commute was too much for her to cope with. That had she been hired by the RCMP she would not have to deal with her human rights complaint nor the transfer to Ontario. That if she were to obtain a position at one of three RCMP offices closer to her home, she would be able to work full time and not have to deal with an excessive commute.

[45] In my opinion, it was the transfer to the province and her anxiety and concern over the three hour commute that was the cause of Ms. Berberi going off work on December 29, 2006 for an extended period of time. It was not the failure of the RCMP to offer the deployment she had applied for. Accordingly, her claim for wage loss and collateral claims loss are denied.

[46] Ms. Berberi asks for compensation in the amount of \$12,000-\$15,000 for the pain and suffering that she alleges she experienced as a consequence of the discriminatory act. This is clearly in the upper range of the maximum amount for pain and suffering. Historically the Tribunal has only awarded damages in this amount for the most egregious discriminatory acts.

[47] As a measure for determining an appropriate award for pain and suffering, the RCMP referred to two Tribunal decisions, *Richard Warman v. Kyburz* 2003 CHRT 18; and *Woiden et al v. Dan Lynn*, (2002), 43 C.H.R.R. D/296.

[48] In *Warman*, the complainant alleged that the respondent had caused to be communicated "hate" messages on his website. The Tribunal found that the respondent had contravened s. 13 of the *CHRA* and awarded the complainant \$15,000 for pain and suffering. In doing so, the Tribunal referenced the facts that the respondent repeatedly described Mr. Warman in the most negative terms, attempted to interfere with Mr. Warman's employment by seeking to have him fired from his job, and even more worrisome, made threats to the complainant's life.

[49] It was clear from his testimony that the complainant was shaken by these experiences. He described the fear that he felt for his own safety as well as for the safety of those close to him and the impact on his daily life. The complainant was also awarded \$15,000 as special compensation for the wilful and reckless conduct of the respondent.

[50] The *Woiden* case involved sexual harassment of four employees by their supervisor. The respondent was the most senior manager in the workplace who made a number of sexual advances and verbally abused them using the most degrading and foul language. He would also make negative comments on their appearance and made frequent attempts to look up the women's clothing. He grabbed his genitals on one occasion and partially unzipped his pants. His conduct caused three of the complainants to leave the workplace.

[51] The Tribunal awarded three of the complainants \$8,000 and the fourth, \$6,000 on account of pain and suffering. However, the complainants had already settled with their employer for a certain amount for pain and suffering. The Tribunal took that into account to avoid an award greater than the maximum allowable under the *CHRA*.

[52] The Tribunal also awarded each of the complainants in *Woiden* the sum of \$10,000 as special compensation for the wilful and reckless conduct of the respondent.

[53] Ms. Berberi's evidence is that she was devastated and depressed when she received the December 1, 2005 letter rejecting her application for the deployment. She has not made any argument or referred to any other facts that would support her claim for \$12,000-\$15,000,

[54] No doubt the rejection of her application came as a shock to Ms. Berberi, coming so late as it did in December 2005 after she was told that she had placed first in the competition and the only thing she needed to do was to process her top secret security clearance application.

[55] Using the *Warman* and *Woiden* cases as a measure, this is certainly not a case for an award in the upper limit for pain and suffering. It calls for an award in the lower range. Taking into account her evidence of the impact of the refusal of the RCMP to offer her the deployment, and the fact that Ms. Berberi continued to work at the Brampton location after December 1, 2005 until March 2006 within her acceptable commuting distance from her home, I award her the amount of \$4,000 for pain and suffering.

[56] Ms. Berberi also claims that, in denying her application, the RCMP engaged in the discriminatory practise wilfully or recklessly. She claims damages of \$12,000-\$15,000. It is true that Staff Sergeant Mabee had concerns about her previous work absenteeism and that her back problems could result in further significant absenteeism. This evidence, however, goes to the issue of liability which the RCMP has conceded. It is not enough to show wilful or reckless conduct.

[57] Ms. Berberi disputed that the deployment position should have been awarded to an "affected" employee who had been identified and given priority consideration (as indicated in Diane Mallett's letter). Whether this is right or wrong, I do not see how this amounts to wilful or reckless conduct by the RCMP. The evidence is lacking to support this claim and it is denied.

[58] Ms Berberi also asked to be reimbursed for out of pocket expenses which she estimated to be around \$1,000. She mentioned photocopying expenses and charges for doctors' letters. She did not provide any supporting receipts for any of her expenses. There can be no award for this claim.

[59] Turning now to the question of legal expenses, Ms. Berberi submitted a letter from the law firm of Rueter Scargall Bennett dated November 11, 2008, referencing "RCMP Human Rights Complaint" and requesting payment of an account for \$614.25. There are no details as to the nature of the legal services or when they were provided. In the absence of such information, I cannot order the RCMP to reimburse Ms. Berberi for this account.

[60] Ms Berberi's counsel, Robert Kostyniuk, submitted a computer printout dated June 1, 2009 showing a description of and the docketed time for the legal work that his law firm performed on her behalf for the period from May 8, 2009 to June 2, 2009.

[61] Mr. Kostyniuk's docketed time was 13 hours for preparation and attendance at the hearing and a junior lawyer in his office docketed 9.1 hours for preparation time. He noted that he has limited familiarity with the *CHRA*, and as he explained, some of his time involved learning and getting up to speed with respect to the *Act*.

[62] Mr. Kostyniuk was called to the Bar in 1968. His hourly rate is \$450 per hour. The hourly rate of his junior lawyer, a 2008 call to the Bar, is \$175 per hour. Mr. Kostyniuk indicated that if legal costs are awarded on a substantial and full indemnity, his legal fees including GST totaled \$9,232.13.

[63] If legal costs are awarded on a partial indemnity basis, his hourly rate is \$275 per hour and that of his junior lawyer \$125 per hour, for a total of \$5,814 including GST.

[64] In determining an appropriate amount for legal costs, I have considered the following factors. Mr. Kostnykuik conceded that he did not have much experience dealing with complaints under the *CHRA* and it was a learning experience for him. He had to spend some time to become familiar with the *CHRA* and jurisprudence.

[65] The RCMP admitted liability for the discriminatory act thereby considerably shortening the scheduled hearing time. In terms of the remedy that she was seeking, Ms. Berberi had limited success. At the hearing, the RCMP agreed to provide Ms. Berberi with a CR-04 position at Milton, one of her preferred locations. Other than that, of all the compensation she was seeking, the only compensation that the Tribunal awarded her was \$4,000 for pain and suffering, an amount considerably less than the \$12,000-\$15,000 she asked for.

[66] On the other hand, I agree with Mr. Kostyniuk that the hearing was more efficient and focused than probably would have been the case if Ms. Berberi had appeared unrepresented. Taking all these factors into account, I award Ms. Berberi the sum of \$5,814 for legal expenses.

[67] In the result, the RCMP is to pay Ms. Berberi the amount of \$4,000 for pain and suffering plus interest calculated in accordance with the Rule 9(12) of the *Canadian Human Rights Tribunal Rules of Procedure* and \$5,814 for legal expenses.

[68] Finally, at the request of the RCMP, I order the style of cause of this complaint to be amended to substitute Attorney General of Canada for Royal Canadian Mounted Police.

"Signed by"

J. Grant Sinclair

OTTAWA, Ontario  
July 27, 2009

#### PARTIES OF RECORD

TRIBUNAL FILE:	T1311/4108
STYLE OF CAUSE:	Detra Berberi v. Attorney General of Canada
DATE AND PLACE OF HEARING:	June 1-2, 2009 Toronto, Ontario
DECISION OF THE TRIBUNAL DATED:	July 27, 2009
APPEARANCES:	
Robert Kostyniuk	For the Complainant
No one appearing	For the Canadian Human Rights Commission
Shelley C. Quinn	For the Respondent