Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Between:

Micheline Montreuil

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Canadian Forces Grievance Board

Respondent

Decision

Member: Michel Doucet
Date: November 20, 2007
Citation: 2007 CHRT 53

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I. Introduction

[1] On August 23, 2004, Micheline Montreuil filed a complaint in accordance with the *Canadian Human Rights Act*, R.S. 1985, c. H-6 (the *CHRA*), against the Canadian Forces Grievance Board (the Board). The complainant alleges that the Board discriminated against her on the basis of sex (transgender) and ethnic origin (language) contrary to sections 3 and 7 of the *Act*.

[2] During a pre-hearing teleconference held on April 7, 2006, with the case manager of this matter, the Tribunal Vice-Chairperson, Athanasios D. Hadjis, the complainant stated that the complaint would involve only discrimination on the basis of sex and that she would not pursue her complaint of discrimination on the basis of ethnic origin. According to the minutes of this teleconference, the complainant undertook to provide a letter to the Tribunal confirming this undertaking. This letter was never provided.

[3] There is no doubt that the complainant, who is also counsel, made an undertaking. There is no reason to believe that she would now want to withdraw it. Indeed, throughout the hearing she insisted on pointing out that the argument based on language only served to support her complaint based on sex. She alleged, in fact, that the language ground had only been a pretext for not giving her the desired position based on her "sex". Under these circumstances, this decision will address only the discrimination complaint based on sex. However, the complainant's arguments are such that I will have no choice but to address in my reasons the aspect of her argument based on language.

A. The Parties

(i) The complainant

[4] Micheline Montreuil is a lawyer by profession. In addition to her law degree, she has university degrees in industrial relations and in administration. She also recently obtained a bachelor's degree in education and is studying for her master's degree in ethics. She has been a

member of the Quebec Bar since 1976. Since her admission to the Bar, she practised law and also taught at two colleges in Québec, namely Limoilou College and François-Xavier-Garneau College. She also gave courses at the Université Laval, and at the Université du Québec in Chicoutimi and in Rimouski.

[5] When she talks about discrimination on the basis of sex, Ms. Montreuil refers to certain characteristics tied to gender identity or appearance which are such that she does not find herself, in her own words, in a situation [Translation] "that could be described as ordinary". Between what she describes as [Translation] "a normal man or woman" there is the transsexual or transgendered realm. Within that realm, she identifies three large groups. There are transvestites, who are individuals who dress completely or partially in accessories or clothing of the other sex. However, she states that this choice is only temporary and that the transvestite returns to the clothing of his or her sex after a certain period of time. At the other end of the spectrum is the transsexual group. The choice of individuals in this group is to completely change their sex through surgical operations. Between the transvestites and the transsexuals, Ms. Montreuil identifies the transgendered, i.e. individuals who, like her, choose to live in the clothing of the other sex all of the time. Persons from this group may also opt for certain minor surgical operations to change certain aspects of their appearance, but they will not undergo a complete surgical transformation.

[6] From the outset, the Board's counsel conceded that Ms. Montreuil's [Translation] "particular condition" was not at issue and that she could therefore allege that she had been discriminated against on the basis of "sex" under section 3 of the *Act* because of this "particular condition".

[7] At the time of the hearing, Ms. Montreuil was working as a part-time lecturer in the bachelor of nursing sciences program at the Université du Québec in Rimouski, where she gave courses in ethics and legal liability. She also worked as a legal researcher at the Conseil de la justice administrative du Québec, in Québec. Her employment at the Conseil de la justice

administrative was supposed to end on April 27, 2007. She also adds that she continues to practise law.

(ii) The Canadian Forces Grievance Board

[8] The Canadian Forces Grievance Board has at this time about 50 employees. It also has six members, including the Chairperson and Vice-Chairperson who both work full-time. The other four members are part-time.

[9] The Board was established during the military justice reform initiated when in 1995 the Doshen report (*A Report on the Study of Mechanisms of Voice/Complaint Resolution in the Canadian Armed Forces*) was filed regarding the resolution of grievances within the armed forces. In 1997, two events reinforced this idea for reform. First, the Minister of Defence filed a report on leadership and management of the Canadian Forces (*Report to the Prime Minister on Leadership and Management of the Canadian Forces*) and then the findings of the Somalia Inquiry Report were published reiterating the need to change the military justice system.

[10] Further to these different reports, the federal government decided that the *National Defence Act* should be amended to modernize and reinforce the military justice system, which included simplifying the grievance process in the Canadian Forces. The Board, an independent administrative tribunal, was created on March 1, 2002.

[11] The Grievance Board is responsible for examining military grievances filed by members of the Canadian Forces, in accordance with section 29 of the *National Defence Act*. *Inter alia*, it examines grievances sent to it by the Chief of Defence Staff. To be more precise, the Chief of Staff send the Board grievances related to the "… administrative action resulting in the forfeiture of, or deductions from, pay and allowances, reversion to a lower rank or release from the Canadian Forces" of a member, whether it be for medical or behavioural reasons. The Board also examines grievances regarding "the application or interpretation of Canadian Forces policies relating to expression of personal opinions … conflict of interest and post-employment

compliance measures, harassment or racist conduct." (See – Chapter 7.12 of the *Queen's Regulations and Orders for the Canadian Forces*.)

[12] After the grievances have been considered, the Board submits impartial and fair recommendations to the Chief of Staff and to the complainant.

[13] In order to assist it in fulfilling its mandate, the Board created grievance officer positions. The main duties of a grievance officer are reviewing the records, investigating and taking part in the drafting of the findings and recommendations of the Board to the Chief of Defence Staff. The grievance officer also acts as a specialist with the personnel and Board members.

B. Legal Framework

[14] Section 7 of the *CHRA* provides that it is a discriminatory practice, directly or indirectly, to refuse to employ an individual on a prohibited ground of discrimination, including *inter alia* sex or national or ethnic origin. (See also sections 3 and 15 of the *CHRA*.)

[15] The burden of proof in a matter like this one is first on the complainant, who must establish a *prima facie* case of discrimination. (See: *Canadian Human Rights Commission and Public Service Commission* (1983), 4 C.H.R.R. D/1616, at 1618; *Basi v. Canadian National Railway Company* (1988), 9 C.H.R.R. D/5029; and *Premakumar v. Air Canada*, T.D. 03/02, 2002/02/04).

[16] A *prima facie* case is one which covers the allegations made and which, if believed, is complete and sufficient to justify a finding in the complainant's favour in the absence of a response from the respondent. (*Ontario (Ontario Human Rights Commission) v. Etobicoke (Borough)*, [1982] 1 S.C.R. 202, at page 208; *Ontario Human Rights Commission and O'Malley v. Simpson-Sears Ltd.*, [1985] 2 S.C.R. 536, at paragraph 28).

[17] The issue is therefore whether there is evidence establishing on a balance of probabilities that the complainant had been discriminated against. In this case, we need not dwell on whether

Ms. Montreuil has a distinguishing trait or traits of a group against which discrimination is prohibited under the *CHRA* on the basis of sex since the respondent has not contested it and admits that discrimination based on transgender is deemed to be on the basis of sex.

[18] In the employment context, a *prima facie* case is described as requiring evidence of the following elements:

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.

(See: *Shakes v. Rex Pak Ltd.* (1982), 3 C.H.R.R. D/1001, at paragraph 8918.)

[19] This approach was changed in order to accommodate situations where the complainant is not hired and where the respondent continues to look for a suitable candidate. In that case, the following factors must be present to establish a *prima facie* case:

a) The complainant belongs to one of the designated groups under the *Act*;
b) The complainant applied and was qualified for a job that the employer wished to fill;
c) Although qualified, the complainant was rejected;
d) Thereafter, the employer continued to seek applicants with the complainant's qualifications.

(See: *Israeli v. Canadian Human Rights Commission and Public Service Commission* (1983), 4 C.H.R.R. D/1616, at page 1618.)

[20] In *Montreuil v. National Bank of Canada*, 2004 CHRT 7, at paragraph 44, the Tribunal considered the differences between these two approaches. It determined that the approach in *Shakes* applies to cases where the complainant is competing with other candidates for a specific position. The Tribunal adds that it does not appear that it can apply to ongoing recruitment

situations, given that "irrespective of whether the persons hired at a given moment lack the "distinguishing feature" of the complainant, other employment positions into which the complainant could potentially be hired continue to remain available." However, it explains that the *Israeli* approach, given its fourth factor, applies to situations where the employer continues to search for applicants.

[21] In this case, the evidence is not as clear as it was in *Montreuil v. National Bank*. Ms. Montreuil applied for a specific position. We could therefore be led to determine that the approach in *Shakes* ought to be applied. However, the respondent will respond that it did not reject the application because it kept the complainant on an eligibility list for a unilingual French grievance officer position for a period well beyond the one established to fill the position for which Ms. Montreuil had applied. Moreover, given the almost continuous turnover of Board personnel, it continued to seek applicants for grievance officer positions and kept the complainant on an active eligibility list. It is clear that neither one of the approaches in *Shakes* or *Israeli* specifically addresses the dilemma before us. However, I do not think it necessary to choose between these two approaches.

[22] In *Premakumar v. Air Canada*, T.D. 03/02, 2002/02/04, the Tribunal stated that the tests in *Shakes* and *Israeli* are useful guides, but that neither test should be automatically applied in a rigid or arbitrary fashion. 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? We will therefore apply this flexible approach to this case by combining the two approaches if necessary and by reformulating the tests to apply if the need arises.

[23] Once this *prima facie* case is established, the burden shifts to the respondent, who must provide a reasonable explanation of the alleged conduct.

[24] The case law recognizes the difficulty of proving allegations of discrimination by direct evidence. The discrimination is frequently practised in a very subtle manner. Overt discrimination is rare. (See *Basi*, *supra*, paragraph D/5038.) Rather, it is the Tribunal's task to consider all of the circumstances to determine if there is what is described in the *Basi* case as the "subtle scent of discrimination." (*Premakumar*, paragraph 79.)

[25] 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*, paragraph 81.) However, discriminatory considerations need not be the sole reason for the practices at issue for a complaint to succeed. It is sufficient if these considerations are factors in the decision not to hire. (*Premakumar*, paragraph 82, *Holden v. Canadian National Railway* (1990), 14 C.H.R.R. D/12 at paragraph D/15.)

[26] In fact, evidence of discrimination has inherent problems. The most significant is, without question, the fact that similar circumstances may be interpreted differently. If the discrimination is based on differentiation, the problem is that this differentiation does not exist independently of the parties' actions. It must be inferred. It follows that the Tribunal member called to decide the issue must use his or her judgment in assessing the circumstances giving rise to the allegations of discrimination.

C. Analysis

(i) The *prima facie* case

(a) Does the complainant have the skills or qualifications necessary to fill the position?

[27] The role of a senior grievance officer is, *inter alia*, to provide opinions and legal advice to the members of the Board regarding the grievances referred to them by the Chief of Defence

Staff. To fill the grievance officer positions, the Board first held an internal competition in February 2002.

[28] In April 2002, a second competition was launched which was open to the general public. The Board at that time advertised 10 grievance officer positions of a determinate term of twelve months or more. According to the advertisement, applicants had to have a university degree in human resources, law or industrial or labour relations. The advertisement also set out a series of required skills and provided that the majority of positions were bilingual imperative "CCC", but that [Translation] "some are unilingual English or French".

[29] On May 6, 2002, Ms. Montreuil applied for one of the positions advertised in the competition of April 2002. She also sent her Public Service Commission of Canada English language exam results, which she had written on February 9, 2000. Her proficiency level was "E" (Exempt), with a score of 63 of 65 in written comprehension, and in written expression her proficiency level was "B", with a score of 43. A score of 44 is required for a proficiency level of "C". In oral interaction, the complainant had a proficiency level of "C". Linguistically, the complainant was therefore evaluated "ECB". On November 26, 2002, Ms. Montreuil rewrote the English Second Language "written expression" exam in order to improve her standing in that category. In fact, there was nothing to prevent Ms. Montreuil from continuing to improve her skills in written expression in English and to redo the Public Service language proficiency exams as often as she wished. Following this new exam, the complainant's proficiency level in English written comprehension remained unchanged at "B".

[30] On August 20, 2002, Ms. Montreuil 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 [Translation] "soon called to an interview by the Selection Board."

[31] On November 15, 2002, the complainant was interviewed in Ottawa by Diane Laurin, Mireille Royer, then Human Resources Advisor, and Gary Wetzel, the Board's in-house counsel.

Diane Laurin was at that time the Board's Vice-Chairperson. She became Chairperson in February 2004.

[32] According to a letter dated July 14, 2005, written by Jacques Shore, from the law firm Gowling Lafleur Henderson, the respondent's counsel at that time, it would appear that Ms. Laurin took notes during Ms. Montreuil's interview. We can presume that the other members of the Board also took notes during the interview. These notes were not produced at the hearing. These notes are often indicative of the state of mind of the interview participants as indicated in the decisions of this Tribunal in *Kasongo v. Farm Credit Canada*, 2005 CHRT 24 and *Montreuil v. National Bank*, *supra*. Unfortunately, we will not have the benefits of the notes in this case.

[33] According to Ms. Laurin's testimony, the interview with Ms. Montreuil went well. She added that the atmosphere was comparable to the atmosphere of the interviews with the other applicants. During this interview, Ms. Laurin met Ms. Montreuil for the first time, but she knew who she was because she had heard about her in the media. She was aware that she was transgendered and that she had [Translation] "struggled" before several courts of justice to assert her rights. Ms. Laurin pointed out that Ms. Royer had also been aware of the fact that the candidate was transgendered. It is possible, in her opinion, that Mr. Wetzel had not been aware of this and she therefore thought it best to tell him before the interview began. She added that the Selection Board had discussed this candidate beforehand as it had done with respect to all the other candidates. Ms. Laurin stated that the Selection Board found Ms. Montreuil's curriculum vitae [Translation] "interesting". She added that the interview results indicate that the complainant [Translation] "did very well". Indeed, according to the interview results, the complainant placed third of the four candidates. On cross-examination, Ms. Laurin added that the three other candidates, unilingual Anglophones, had all been hired by the Board.

[34] Ms. Laurin explained that at the interview the candidates were evaluated according to certain criteria i.e.: knowledge, ability, competencies and personal attributes. Knowledge was established by a series of predetermined questions addressed to all of the candidates. Ability and

competencies were assessed based on the individual's curriculum vitae. Finally, personal attributes were examined at the interview and based on the references provided by the candidate. The candidate's language capabilities or abilities were not evaluated or considered at the interview. Ms. Laurin added that if a candidate wanted to qualify for a bilingual position, the candidate must then comply with the language requirements of the Public Service Commission.

[35] On December 30, 2002, Ms. Montreuil received a letter from Mireille Royer, human resources consultant for the Board, who informed her that the members of the Selection Board had completed the evaluation of the candidates and that she had qualified in the competition.

[36] Considering these facts, I find that Ms. Montreuil had the necessary competencies or qualifications to work as a grievance officer. According to Mireille Royer's letter, which we referred to above, she was qualified for the position in the context of the competition.

(b) Was the complainant's application rejected?

[37] Ms. Royer's letter, referred to above, also states that Ms. Montreuil, being qualified for the competition, then had her name place on an eligibility list which had to be used to staff positions that became vacant between then and March 30, 2003. The letter refers to [Translation] "attached eligibility lists", yet these lists were not filed at the hearing.

[38] In the months after this letter was received, Ms. Montreuil contacted the Board several times to find out when it would be hiring grievance officers. She was told that the Board was waiting for its budget to be increased before proceeding to hire new employees. Ms. Montreuil did not at all question the truthfulness of this statement since, as she admitted at the hearing, the other candidates also had to wait for the budget to be confirmed before they were offered employment.

[39] Ms. Montreuil then had a series of conversations with an individual by the name of Pierre Lacasse, an employee of the Board, who provided her with certain information about the processing of her application for the grievance officer position. Mr. Lacasse was not called to

testify. Throughout the hearing, Ms. Montreuil referred to the information that she received from Mr. Lacasse or from the interview that he had with the investigator from the Human Rights Commission. This evidence is hearsay and the issue was promptly raised regarding its admissibility.

[40] The courts have generally refused to adopt a single, exhaustive definition of the hearsay rule. They fear that such a definition will not cover all of the cases where an out-of-court statement will involve one or more of the traditional hearsay dangers, i.e. the absence of sworn testimony, the lack of an opportunity for the opposing party to cross-examine the witness and the lack of opportunity for the tribunal to assess the witness' credibility. In this case, there are several, if not all, of these dangers. Even though the Tribunal is, as a general rule, flexible enough in its treatment of hearsay evidence (see, for example, paragraph 50(3)(*c*) of the *CHRA*), the fact remains that in this case there is no valid reason to explain Mr. Lacasse's absence, other than the complainant's undertaking not to call him as a witness. In these circumstances it would be inconsistent with the principles of natural justice, codified in subsections 48.9(1) and 50(1) of the *CHRA*, and unfair to admit this evidence. I will therefore not consider it in my decision.

[41] In September 2003, the Board, at the request of the Minister of National Defence, developed an operational plan in order to clear a backlog of about 349 grievances by December 2004. Of these, 70 (20%) were in French. In order to achieve this mandate, the Board was given additional resources.

[42] At the end of October 2003, almost one year after the interview, Ms. Montreuil again contacted the Board to ask whether it had proceeded to hire new grievance officers. She was told that the Board had hired three unilingual English grievance officers, two of whom had already assumed their positions and a third who was to begin the following week. The complainant then asked whether the respondent would be hiring other individuals in the near future. She was told it would not.

[43] On November 10, 2003, Ms. Montreuil wrote to Ms. Laurin requesting certain particulars about the hiring of grievance officers. She wanted to know, *inter alia*, how many Anglophone, Francophone and bilingual grievance officers had been hired by the Board. She also asked how many files the Board had to process. The letter was never answered.

[44] On December 12, 2003, she once again asked Ms. Laurin to reply to her letter dated November 10. On December 18, 2003, Muriel Korngold-Wexler, Director of the Board's Grievance Analysis and Operations division, responded to Ms. Montreuil. Ms. Korngold-Wexler explained that in September 2003, following an agreement with the Department of Defence, the Board implemented an operational plan in order to clear the backlog of grievances before December 31, 2004. She added that the Board had, in this context, examined its operational needs in depth. She stated that, given the number of grievances in English, the Board had offered positions to candidates who were place on the "English only" eligibility list, as well as those on the "bilingual" eligibility list.

[45] She informed Ms. Montreuil that the Board did not have any operational need for unilingual French grievance officers. She pointed out however that the Board had extended the eligibility list for grievance officer positions to March 2004 and she assured Ms. Montreuil that she would call on her services if the Board should need a unilingual French grievance officer. Indeed, I am wondering why the Board decided to extend this eligibility list when it seemed clear, according to Ms. Korngold-Wexler's explanations, that the Board would never need a unilingual French grievance officer since there were enough bilingual officers to handle this task.

[46] On January 18, 2004, Ms. Montreuil asked Ms. Korngold-Wexler to provide her with more details about the linguistic distribution of the bilingual grievance officers. In response to this request, Ms. Korngold-Wexler pointed out that between September 1 and December 18, 2003, the Board hired a total of nine (9) grievance officers distributed as follows: one unilingual English grievance officer for an indeterminate term, three unilingual English grievance officers in specified term positions, one unilingual English officer in the Exchanges Canada program, two unilingual grievance officers in temporary employment and two bilingual grievance officers

in secondment. On December 18, 2003, the Board had fifteen (15) grievance officers working for it, six of whom were bilingual at the "CCC" level and nine unilingual English. Finally, Ms. Korngold-Wexler stated, once again, that if there were an increase in files to be processed in French and the Board saw the need to hire a unilingual French grievance officer, then they would use the "unilingual French" eligibility list on which Ms. Montreuil was the only candidate. She also stated that the Board had extended this eligibility list to December 2004.

[47] From this information, the complainant drew certain conclusions. She contended that the Board could hire a unilingual Anglophone, but that the only unilingual Francophone applicant will not be hired. She added that the only characteristic differentiating the unilingual Francophone applicant in this case is that she is transgendered. In her opinion, language was not the cause of the discrimination that she alleged to have suffered but rather the pretext for hiding the discrimination. She argued that the discrimination was based on sex and that the language was just a [Translation] "cover."

[48] Later in the summer of 2004, the complainant asked Ms. Korngold-Wexler to give her details about the linguistic distribution of the grievance officers still working and the validity of the eligibility list.

[49] On July 20, 2004, she received the following information. She was informed that on June 6, 2004, the respondent had 13 grievance officers, seven of whom were unilingual English and six bilingual at the "CCC" level. It was also added that the respondent went from 15 grievance officers in December 2003 to 13 grievance officers in June 2004 and that, accordingly, an internal Public Service competition was in progress in order to establish the admissibility lists for staffing the respondent's needs for the coming two years. With respect to the eligibility list for unilingual French candidates, the complainant was still the only one on that list. The letter stated that this list would be used [Translation] "in the event that the volume of files to be processed in French were to increase **considerably** and that there were not enough bilingual agents to handle *inter alia* these files." [Emphasis added.] Ms. Korngold–Wexler did not explain what she understands to be a "considerable" increase of files to process in French.

[50] In light of this evidence, we can find that Ms. Montreuil's application was never rejected. In fact, the respondent's witnesses all stated that she had been placed on an eligibility list, which was extended twice and which finally expired in December 2004. Further, she was told that if the number of French files were to increase "considerably", the Board would not hesitate to call on her services. Yet, this was infeasible because based on the admissions of the respondent's own witnesses, there were not enough French files at the Board for a "unilingual Francophone" position and that in any event the bilingual grievance officers could handle those files.

[51] Hence, by placing Ms. Montreuil on an eligibility list for which there was never any need, the Board in effect rejected her application because it was imposing a condition that was impossible to fulfil, i.e. that there be such an increase in files to process in French that there would no longer be enough bilingual agents to get the work done. Yet, even if the number of French files were to increase, the Board could always increase the number of bilingual officers, making it useless to hire a unilingual French grievance officer.

(c) Were the candidates hired in response to the competition and thereafter more qualified than the complainant?

[52] The only evidence regarding the competence of the other candidates was the interview indicating that Ms. Montreuil was ranked third of the four candidates. The three other candidates, unilingual Anglophones, were all hired. There is nothing to suggest that the candidates hired were more qualified than Ms. Montreuil to work as grievance officers.

(d) Was there a prima facie case?

[53] I find from the preceding evidence that the complainant has established a *prima facie* case of discrimination. The burden is now on the Board to provide a reasonable explanation for the alleged conduct.

(ii) The respondent's explanation

[54] The explanation given by the Board for refusing Ms. Montreuil's application was that it did not have any operational need for a unilingual French grievance officer and that in any event, its bilingual grievance officers could handle the processing of the French language files. Yet, as we already stated, the advertisement for the competition for which Ms. Montreuil applied indicated that the majority of the positions were bilingual imperative "CCC" but that "some **are unilingual English** or **French**." [Emphasis added.] Why then advertise that certain positions would be "unilingual French" if the Board was of the opinion that there were not enough French language files to warrant hiring a grievance officer with this profile? I am not persuaded or satisfied by the responses to this question provided by the Board's witnesses.

[55] We should note that in her letter dated December 18, 2003, which we referred to earlier, Ms. Korngold-Wexler states: [Translation] "The Board cannot predict the number of grievances that it will have to address in 2004. However, according to our data from the last two years, of the 226 files completed in 2002 and 2003 to date, 89% were in English and 11% were in French." She adds [Translation] "the Board addresses on average 100 to 126 grievances per year" and that it has in place [Translation] "five bilingual grievance officers at the CCC level (whose mother tongue is French) who also handle the French files. It is indeed in anticipation of these needs that we have hired a certain number of bilingual officers, who will be called on to work in both languages." I do not see how this explanation justifies the Board's decision.

[56] For the purposes of the hearing, Ms. Korngold-Wexler prepared a table indicating the number of grievances handled by the Board between 2000 and 2007. According to this table, for the years 2002 (205 grievances) and 2003 (146 grievances), the Board received a total of 351 grievances, 287 (81%) of them in English, and 64 (18%) in French. I note that these figures do not correspond with those provided in her letter dated December 1, 2003. In any event, the explanation given by Ms. Korngold-Wexler to explain why the Board does not need bilingual grievance officers is far from convincing. Taken to the extreme, this logic could also be interpreted to mean that unilingual English grievance officers need not be hired since by increasing the number of bilingual grievance officers, they could deal with all of the English and

French files. And yet, the Board did not hesitate to hire unilingual Anglophone grievance officers.

[57] I also note that no evidence was filed to explain what number of files in French would be necessary for there to be an "operational need" to justify hiring a unilingual Francophone grievance officer, apart from the fact that hiring a French grievance officer cannot be justified when 18% of the files are in French.

[58] According to Ms. Korngold-Wexler's table, in 2002 the Board received 205 grievances, of which 173 (84.4%) were in English and 32 (15.6%) were in French. In 2003, it received 146 grievances, of which 114 (78.1%) were in English and 32 (21.9%) were in French. In 2004, the Board received 102 grievances, of which 82 (80.4%) were in English and 20 (19.6%) were in French. In 2005, the Board received 80 grievances of which 52 (65%) were in English and 28 (35%) were in French. In 2006, there were 63 grievances, of which 51 (81%) were in English and 12 (19%) were in French.

[59] Even at 35%, the Board considered that it did not have the "operational need" for a unilingual French grievance officer. Based on this evidence, I must find that the Board will never need a "unilingual French" grievance officer, unless there is an exceptional change in the linguistic composition of the files. But then why place Ms. Montreuil on an eligibility list that will never be required?

[60] To justify 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 the language requirements of the position at the time of appointment can be accepted. (See: Treasury Board of Canada Secretariat, *Policy on the Staffing of Bilingual Positions – Archived version of 2001*.) Even though this Policy explains why Ms. Montreuil could not get one of the bilingual positions, it does not explain why the Board decided not to create a "unilingual Francophone" position.

[61] I must point out however that this decision does not involve determining whether the Board refused to hire Ms. Montreuil because she was Francophone, but rather whether the Board refused to hire her because she was transgendered, using her language profile as a pretext. I am aware that it is not the Tribunal's mandate to determine whether a federal institution considered the official language requirements necessary when staffing a position. In fact, according to section 91 of the *Official Languages Act*, R.S.C. 1985, c. 31(4th Supp.), nothing in Part IV or V of this *Act* authorizes the application of official language requirements to a particular staffing action unless those requirements are objectively required to perform the functions for which the staffing action is undertaken. The official language requirements cannot therefore be imposed frivolously or arbitrarily (See: *Canada (A.G.) v. Viola*, [1991] 1 F.C. 373 (C.A.)), but only based on each situation. (*Professional Institute of the Public Service v. Canada*, [1993] 2 F.C. 90.) Under section 91, the government is not necessarily justified in requiring that candidates be bilingual for a given position. This is the case in particular when the employer has not relied on the objective requirements determined by the Treasury Board and when the staffing file has no reason to justify such a requirement. (*Rogers v. Canada (Correctional Service)*, [2001] 2 F.C. 586 (T.D.); See also R. Leckey and E. Didier, "Le droit linguistique privé" in *Les droits linguistiques au Canada* (2ième éd.), under the direction of Michel Bastarache, Éditions Yvon Blais, page 537.)

[62] Even though there are specific remedies provided under Part X of the *Official Languages Act*, in order to determine whether the institution in its staffing action breached its obligations under this *Act*, this does not in any way strip the Tribunal of its authority to determine whether a language requirement, even if objectively justified, is simultaneously discriminatory. The Tribunal is not exceeding its mandate when it asks whether a language requirement for staffing, as is the case here, is only a pretext for discrimination within the meaning of the *CHRA*. The fact that an activity is subject to sectorial oversight and regulation, in this case the *Official Languages Act*, does not preclude the application of the *CHRA*. (See *inter alia* subsection 82(2) of the *Official Languages Act*, which specifically states that it does not prevail over the *CHRA*.)

[63] Therefore, in *Vlug v. Canadian Broadcasting Corporation* (2000), 38 C.H.R.R. 404, at paragraphs 30 to 32, the Tribunal determined that the decisions issued by the CRTC regarding closed captioning were not determinative in regard to the obligation to close-caption under the *CHRA.* In the Tribunal's opinion, these two legal criteria are different.

[64] Similarly, Mr. Justice Rothstein (as he then was) writes in *Canada (Attorney General) v. Uzoaba*, [1995] 2 F.C. 569:

> Counsel for the Attorney General argues that the *Public Service Employment Act*, R.S.C., 1985, c. P-33, establishes a scheme whereby promotions are to be based on merit. He says the scheme for promotion is elaborately set forth in the *Public Service Employment Act* and that this cannot be overruled by a Human Rights Tribunal. He says the jurisdiction of the Tribunal is limited to referring the matter back to Correctional Service Canada, in order for it to request an exclusion under section 41 of the *Public Service Employment Act*, making a declaration that Dr. Uzoaba was entitled to a WP-5 position or perhaps ordering that Dr. Uzoaba be entitled to compete for a WP-5 position.
>
> …
>
> I think the principle of paramountcy must apply in this case to enable a Human Rights Tribunal to order a promotion which it has found has been denied for reasons of discrimination, contrary to the *Act*. In other words, the jurisdiction of the Public Service Commission and the process respecting promotions within the Public Service must give way in those rare exceptions where promotions have been denied based on discriminatory reasons and where a Tribunal, acting within its jurisdiction under the *Act*, orders a promotion in order to remedy the results of discriminatory action taken by the employer. In this respect, I adopt the approach of Dickson J., as he then was, in *Kelso v. The Queen*, [1981] 1 S.C.R. 199 where he stated at page 207:
>
> > No one is challenging the general right of the Government to allocate resources and manpower as it sees fit. But this right is not unlimited. It must be exercised according to law. The government's right to allocate resources cannot override a statute such as the *Canadian Human Rights Act*, S.C. 1976-77, c. 33, or a regulation such as the Exclusion Order.

[65] The same principles apply in this case. 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.

[66] I would also point out that the intention to discriminate is not a prerequisite condition to a finding of discrimination. In *Ontario Human Rights Commission and Theresa O'Malley v. Simpson-Sears Ltd*, [1985] 2 S.C.R. 536, Mr. Justice McIntyre states at pages 549-550:

> . . . [to] hold that intent is a required element of discrimination under the Code [*Ontario Human Rights Code*] would seem to me to place a virtually insuperable barrier in the way of a complainant seeking a remedy. . . It is my view that the courts below were in error in finding an intent to discriminate to be a necessary element of proof.

[67] Therefore, it is not necessary to demonstrate that the Board members intended to discriminate against Ms. Montreuil. Indeed, discrimination is often invisible. Individuals who discriminate often are not aware of what they are doing. This does not mean, however, that others are not aware of it. Hence, taking into account all of the circumstances, is it possible that there is a "subtle scent of discrimination" in this case, as described in *Basi*, *supra*?

[68] To arrive at my finding, I reviewed the entire situation by proceeding with a careful, in-depth review of the evidence filed by both parties. I objectively considered Ms. Montreuil's arguments and those of the Board. The evidence and the arguments submitted to me by the Board did not persuade me that there was not a "subtle scent of discrimination" in the decision not to offer a grievance officer position to Ms. Montreuil.

[69] Even though the Board's witnesses claimed that Ms. Montreuil's transgenderism did not have any effect on the decision not to hire her, the evidence and the explanations that they gave to support their arguments did not persuade me. Was it reasonable to say that there was not enough work in French at the Board to occupy even a single unilingual Francophone grievance officer when the French workload was almost 18%? Throughout the hearing, there was no satisfactory response to this question. Simply saying that bilingual officers could handle the

French files if needed is not a satisfactory answer. As I already stated, the same logic could be applied to justify having fewer unilingual Anglophone officers.

[70] Similarly, there is no evidence to support the argument that the bilingual officers were all Francophone and that designating a unilingual French position would restrict their right to work in French.

[71] Finally, one fact stands out when we look at the evidence as a whole. Ms. Montreuil had one characteristic that the other grievance officers did not have: she was transgendered. As I already stated, the standard of proof in discrimination cases is the ordinary civil standard of the balance of probabilities. According to this standard, I have to find that there is evidence that the Board discriminated. I have to find that the evidence renders this conclusion more probable than any other possible conclusion or hypothesis. Even though it is possible that the discriminatory reasons were not the only reasons for the decision not to hire Ms. Montreuil, that is not enough when discriminatory considerations are also factors in the decision not to hire.

[72] The Board was not able to provide a reasonable explanation justifying its decision not to hire Ms. Montreuil for a grievance officer position and for these reasons, I find that there is a "subtle scent of discrimination". I therefore find that the Board discriminated against Ms. Montreuil on the basis of sex (transgender) contrary to sections 3 and 7 of the *CHRA*.

D. The Remedies Sought by Micheline Montreuil

[73] Having determined that the Board discriminated against Ms. Montreuil, I must now address the issue of remedies. As remedies, Ms. Montreuil is claiming:

(i) an order pursuant to paragraph 53(2)(*c*) of the *CHRA* for loss of salary;

(ii) an order for compensation for pain and suffering pursuant to paragraph 53(2)(*e*) of the *CHRA*;

(iii) an order pursuant to subsection 53(3) of the *CHRA;*

(iv) interest pursuant to subsection 53(4) of the *CHRA*.

(i) Claim for loss of salary

[74] Ms. Montreuil is seeking an order from the Tribunal pursuant to paragraph 53(2)(*c*) of the *CHRA* for the Board to pay her salary and benefits that she would have received had she been hired November 1, 2003, until February 28, 2006. She is also seeking an amount for future damages for the period between March 1, 2006 and December 31, 2006.

[75] First, I would point out that no evidence was filed with the Tribunal to support the claim for future damages and that this claim is therefore dismissed.

[76] According to the advertisement of the competition, the position for which Ms. Montreuil applied was for a term of 12 months or more, which was to end on December 31, 2004. The salary scale was between $59,817 and $64,670. There was no evidence filed to determine where on the scale Ms. Montreuil would have been had she been hired. I therefore infer that initially she would have found herself at the bottom of the scale i.e. at $59,817. Even though the Board hired three grievance officers in September 2003, I accept Ms. Montreuil's claims that the date of her hiring be set at November 1, 2003.

[77] From November 1, 2003 to November 1, 2004, Ms. Montreuil's salary would have been $59,817 had she been working for the Board. Since the position was to end on December 31, 2004, I am adding $10,000 to this amount for loss of salary for the months of November and December 2004. Therefore, had she been hired by the Board as of November 1, 2003 until December 31, 2004, Ms. Montreuil would have received a salary of $69,817.

[78] From this amount we must deduct Ms. Montreuil's revenue for these two years respectively. In her income tax returns for 2003 and 2004, Ms. Montreuil claimed professional losses as well as rental income in regard to 2004. As these losses were not explained at the hearing, I see no reason why the Board should be held responsible for them in calculating the loss of salary. I will therefore not take them into account in this calculation.

[79] According to Ms. Montreuil's income tax returns for 2003, her employment income was $46,741 and for 2004 it was $22,853. For the period from November 1, 2003 to December 31, 2004, I will deduct $30,643 from the amount of $69,817. I therefore establish Ms. Montreuil's loss of salary for this period at $39,174. I consider that this amount should not be reduced for failure to mitigate the losses because the complainant successfully established that she did what was necessary to minimize her losses by various attempts to secure other employment.

[80] As regards the loss of salary, I order that Ms. Montreuil be given compensation in the amount of $39,174.

(ii) Order for compensation of pain and suffering

[81] The complainant is also seeking $20,000 in damages for pain and suffering pursuant to paragraph 53(2)(*e*) of the *CHRA*. Once again, there was no evidence filed at the hearing to support this claim. It is not enough that a party allege pain and suffering, this claim must also be supported with certain evidence, however modest, to show what effect the discriminatory practice had on her.

[82] In view of the lack of evidence that the Board's decision caused pain and suffering to the complainant, I do not believe that the order sought should be issued.

(iii) An order pursuant to subsection 53(3) of the *CHRA*

[83] The complainant is seeking $20,000 pursuant to subsection 53(3) of the *CHRA* since she submits that the Board engaged in the practices wilfully and recklessly.

[84] In regard to the wilful nature of the Board's practices, there is no evidence supporting the claim that the Board acted deliberately. In my decision, I simply determined that it was reasonable on a balance of probabilities to determine that certain aspects of the Board's practices could be perceived as being discriminatory. I never found – and there was no evidence filed that

would support a finding – that the Board wilfully engaged in the practice against the complainant.

[85] Did the Board act recklessly? According to *Black's Law Dictionary*, a reckless act is committed with indifference to the consequences. The word "recklessly" is translated as "inconsidéré" in the French version, which seems to contemplate a thoughtless practice ("qui témoigne d'un manque de réflexion; qui n'a pas été considéré, pesé" ["which betrays a lack of reflection; which is not considered, weighed"]: *Le petit Robert de la langue française* - 2006).

[86] In my opinion, in one language or the other, the term can be ascribed to the Board's discriminatory practice in this case. Given the nature of the Board's mandate, we are entitled to expect that it be more sensitive to the consequences of its practices. In this sense, we can say that it betrayed a lack of reflection and that it did not adequately weigh the consequences of its practices. I therefore find that the Board engaged in the practice recklessly.

[87] Subsection 53(3) states that compensation not exceeding $20,000 can be awarded. Considering all of the circumstances of this case, *inter alia* the fact that the discriminatory practices were not really "deliberate" or malicious, I order that the Board pay Ms. Montreuil the amount of $5,000 as special compensation in accordance with subsection 53(3).

(iv) Interest

[88] Interest is payable for all of the compensation awarded in this decision (subsection 53(4) of the *Act*). The interest shall be calculated in accordance with subsection 9(12) of the *Canadian Human Rights Tribunal Rules of Procedure (03-05-04)* i.e. simple interest calculated on a yearly basis at the Bank Rate established by the Bank of Canada. Interest shall accrue from the date of the complaint, until the date of payment of the compensation.

E. Conclusion

[89] For the above-mentioned reasons, I find that the complaint of discrimination on the basis of sex (transgender) contrary to section 3 and 7 of the *CHRA* filed by the complainant Micheline Montreuil against the respondent, the Canadian Forces Grievance Board, is substantiated and I order the respondent to pay to the complainant:

a) compensation in the amount of $39,174 for loss of salary;

b) special compensation in the amount of $5,000; and

c) simple interest on the compensation calculated on a yearly basis at the Bank Rate established by the Bank of Canada, accruing from the date of the complaint, until the date of payment of the compensation.

Signed by

Michel Doucet
Tribunal Member

Ottawa, Ontario
November 20, 2007

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1108/8905

Style of Cause: Micheline Montreuil v. Canadian Forces Grievance Board

Decision of the Tribunal Dated: November 20, 2007

Date and Place of Hearing: April 16 to 20, 2007
April 23, 2007

Quebec, Quebec

Appearances:

Micheline Montreuil, for herself

No one appearing, for the Canadian Human Rights Commission

Guy Lamb and Nadine Dupuis, for the Respondent