Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Between:

Michel Knight

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Société de transport de l'Outaouais

Respondent

Decision

Member: Michel Doucet
Date: May 2, 2007
Citation: 2007 CHRT 15

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I. Introduction

[1] On January 25, 2005, Michel Knight (the "complainant") filed a complaint with the Canadian Human Rights Commission (the "Commission") against the Société de transport de l'Outaouais (the "respondent"). The complainant alleged that the respondent discriminated against him because of a disability in relation to employment, contrary to section 7 of the *Canadian Human Rights Act*, R.S. 1985, c. H-6 (the "*Act*").

[2] The respondent is a public transit authority serving the communities of Gatineau and surrounding areas, in the province of Quebec. From a constitutional point of view, it is under federal jurisdiction because of its inter-provincial transit activities. In fact, its buses transport passengers from the Quebec side of the Ottawa River to Ottawa, Ontario, on a daily basis. The respondent employs about 750 employees, 108 of whom are maintenance employees.

A. The Factual Background Of Mr. Knight's Complaint

[3] The complainant is currently self-employed as a groundskeeper and landscaper. On May 5, 1998, when he was working as a meat cutter, at Market Fresh in Gatineau, he was involved in a work-related accident. Specifically, his right hand was injured when he accidentally put his hand in a meat grinder. According to the medical assessment report, he sustained a very serious injury to the soft tissue and bones of the right index finger, requiring amputation. He also sustained multiple lacerations and damage to the sensory nerve fiber of his right middle finger.

[4] Following his accident, he was treated by Dr. Christopher Carter, an orthopaedic surgeon, who proceeded to amputate the index finger of his right hand. Dr. Carter assessed the injury on August 4, 1998, and determined that the complainant had permanent functional limitations, including:

- Unable to grip the right hand as firmly as the left hand,
- Prehensile strength diminished by about 50%,

- Unable to perform activities requiring manual dexterity,
- Unable to grasp or handle small objects,
- Entire right hand intolerant to cold.

[5] Following this accident, the complainant received income replacement indemnities from the Commission de la Santé et de la Sécurité au Travail (CSST), from the province of Quebec. He then received 90 percent of the net salary that he had earned as a meat cutter. He received these indemnities until about June 2001. The complainant's functional limitations also entitled him to a lump sum indemnity for anatomicophysiological deficits. This indemnity was $10,812.52. The letter from the CSST advising the complainant of this decision stated that Dr. Carter had calculated his permanent injury at 12.55%, to which the CSST had added 2.50% for pain and loss of enjoyment of life. The complainant never challenged this decision by the CSST.

[6] The CSST also requested an orientation report from the complainant in order to identify his skills and aspirations through psychometric tests and interviews. Following this report, a career plan was established taking into account the complainant's functional limitations. Considering the permanent and definitive nature of the functional limitations identified, the complainant was entitled to a professional transition program financed by the CSST. The CSST records indicate that the complainant, after meeting with the guidance counsellor, decided to register for the following courses:

- Elevator mechanic course (1st choice)
- Police technology (2nd choice)
- Mechanical engineering technology – tool-making (3rd choice)

[7] According to the record, the complainant had been refused admission to the elevator mechanics course because it was full. He was however accepted into the police technology course. However, following a discussion between the CSST case officer and the supervisor of the police technology program, the supervisor, when informed of the complainant's functional

limitations, confirmed that he could not work as a police officer. It was therefore decided that this profession was not consistent with the complainant's functional status.

[8] Also according to the CSST's record, the case officer then called the supervisor of the mechanical engineering technology – tool-making program to discuss the complainant's functional status with him. The supervisor said that he did not see why the complainant would not be able to successfully complete this training. He added that the duties of a tool-making technician did not require manual dexterity or working in the cold. The CSST therefore determined that the most appropriate rehabilitation measure for the complainant was training in mechanical engineering – tool-making.

[9] From September to December 1998, the complainant registered in an adult education centre in Gatineau in order to complete his secondary studies. On January 16, 1999, the Ministère de l'Éducation du Québec issued his high school diploma. Then, for his professional transition program, the complainant registered in the fall of 1999 in a mechanical engineering technology– tool-making program, at the Cité Collégiale, in Ottawa. On June 8, 2001, he received his diploma. The tuition fees for this course, amounting to $8,000, were paid by the CSST. The CSST also paid for certain fees relating to this training program, including one tank of gas per week as well as parking fees so that the complainant could travel to Cité Collégiale.

[10] After receiving his diploma in mechanical engineering technology, the complainant worked for a while at a business named Concert Airline, in Gatineau, as an operating engineer. In 2002, he decided to leave this job to take a course in heavy highway vehicle mechanics.

[11] For this course, the complainant registered at the Centre professionnel de l'Outaouais, in Gatineau. The evidence established that the complainant had begun this training well before he did the mechanical engineering technology program at Cité Collégiale. In fact, in the CSST record, the complainant's case officer wrote a note on July 28, 1999, stating:

> [Translation]
>
> At his own initiative, the worker registered in and began training in Heavy highway vehicle mechanics. During one meeting with the worker, I compared the duties of a heavy machinery mechanic with the functional limitations of the worker, the physical environment, the skills and physical abilities. In light of the description of the system benchmark tasks, they do not meet the worker's functional limitations. This work requires working in the cold, an ability to move fingers quickly and precisely and being able to make distinctions by touch.

[12] On June 17, 2004, the Ministère de l'Éducation du Québec gave the complainant a secondary school vocational diploma in heavy highway vehicle mechanics.

[13] The complainant was supposed to complete two on-the-job training sessions in heavy highway vehicle mechanics. Both sessions were done with the respondent. The first session was completed between May 23 and June 6, 2003. The complainant successfully completed this training. On the [Translation] "Trainee Evaluation Form", the training supervisor, Mario Tanguay, the respondent's employee, wrote: [Translation] "Very good sense of mechanics, good initiative, very good productivity". During this training, the complainant stated that he had worked in the garage under the supervision of a mechanic. He said that over this two-week period he covered everything involving mechanics. He added that not having his index finger did not cause him any problems.

[14] Following this training, he applied for a summer job with the respondent. He was hired for the operating station and he worked for the respondent from June 20 to August 25, 2003, i.e. for the duration of the summer contract. During this summer employment, he performed many tasks, including interior and exterior painting, groundskeeping and landscaping. He also mowed the lawn and jet-washed the workstations.

[15] The second training session took place from April 5 to April 23, 2004. Once again, the complainant successfully completed his training. The comments by the training supervisor about him were again positive. Mr. Tanguay noted in particular that the complainant was [Translation] "a very good team player, mastered the training well, reliably performing the work" and that he was an "excellent trainee."

[16] Following this second training session, the complainant expressed interest in working for the respondent. He then applied for the position of service attendant. The complainant was responding to a competition for recruiting temporary on-call service attendants, which meant that the persons hired did not have a position and had no guaranteed work hours. It appears that obtaining an attendant's position was the first step to obtaining a position as a mechanic.

[17] Work is assigned to on-call service attendants as required. As a general rule, the foreperson assesses the work for the following week and assigns the work to the permanent employees on a seniority basis. Shifts are assigned to the permanent employees for a four- to five-month period. After the work has been assigned to the permanent employees, there is another work assignment for the "floating" permanent employees, i.e. for permanent employees guaranteed 40 hours of work each week, but who do not have a particular shift. The remaining shifts that are unfilled are then assigned to the on-call attendants. Given that the permanent employees prefer working the day and evening shifts, the on-call employees are generally assigned to the night shifts.

[18] According to the work description for the position of "service attendant", the attendant works under the supervision of the "foreperson – service and rebuilding", ensuring that vehicles are serviced through the periodic maintenance of the buses. The attendant inspects buses before their departure, fuelling, topping up lubricants and checking the air in the tires. Further, he or she cleans all of the vehicles and carries out all related tasks requested by the immediate superior.

[19] On May 25, 2004, the respondent contacted the complainant and proposed that he take a competency test for the position he had applied for. The complainant passed this test and was

given an interview. In a document from the respondent entitled [Translation] “The management committee summary . . . meeting of June 1, 2004”, it is indicated that the complainant was hired as a part-time, on-call service attendant.

[20] On May 26, 2004, like all of the other candidates hired, the respondent contacted the complainant and asked him to submit to a pre-hiring medical exam by the respondent’s designated consulting physician, Dr. Pierre Matte. Before the medical exam, each candidate is asked to fill out the pre-employment medical exam form. The consulting physician then sees the candidate.

[21] In the [Translation] “pre-employment exam” form filled out by the complainant on June 1, 2004, questions were asked about his “personal history”. To the question [Translation] “Have you ever had a work-related accident or illness?”, the complainant responded in the affirmative and referred to the accident involving the index finger of his right hand on May 5, 1998. However, he left the section on functional limitations blank. Similarly, for the question [Translation] “Will you receive or have you received a *lump sum* payment following an illness or injury resulting in a *permanent* injury?”, he checked off “no”. The complainant signed the form on June 1, 2004.

[22] On that same day, the respondent’s consulting physician examined the complainant. Dr. Matte then observed that the complainant had been the victim of a work-related accident and had consequently had the index finger of his right hand amputated. He then informed the complainant that his hiring would be delayed because he had to review his CSST record before he could decide his case. With the complainant’s permission, the respondent then asked the CSST to forward the complainant’s record to Dr. Matte.

[23] On July 5, 2004, after receiving the CSST record, the respondent’s Chief of human resources management, Lucie Plouffe, sent a letter to Dr. Matte in which she asked him to determine the complainant’s physical ability to perform the work of a service attendant. She also joined to the letter a work description of the position of service attendant and, as additional

information, she listed the [Translation] “type of load” that the worker could be called to lift when performing his job:

- Opening the motor door, 90 times/day (75 pounds) (On cross-examination, Mr. Langlois, head of vehicle maintenance, explained that the “75 pounds” referred to the total weight of the door, not the force required to open this door.)
- Emptying fare box, turning mechanism 35 times/day
- Fuelling 90 buses/day (squeezing lever)
- Washing exterior of bus with six-foot brush
- Moving 205 litre (45 gallons) oil barrels when necessary – (On cross-examination, Mr. Langlois explained that there are forklifts for moving these barrels)
- Working outside to remove snow (occasionally)
- Jet washing interiors (3000 pounds of pressure) – (On cross-examination, Mr. Langlois pointed out that the pressure is created by the motor used and not by the activation of the sprayer)
- Washing under chassis with jet sprayer
- Cleaning parts, must pick up parts weighing between 5 and 75 pounds
- The door going outside opens and closes regularly during the day.

[24] Mr. Langlois prepared this description at the request of Lucie Plouffe and Jacynthe Poulin, the respondent’s health and safety advisor. Mr. Langlois explained that they had asked him to prepare a list of tasks for an employee with a functional limitation in his hand.

[25] In light of the mandate conferred to him, as well as the complainant’s work-related accident record and permanent functional limitations, Dr. Matte determined that the complainant did not meet the requirements of the service attendant position on July 14, 2004. During his testimony, Dr. Matte acknowledged, *inter alia*, that the functional limitation indicating that the [Translation] “complainant’s prehensile force was diminished by almost 50%” is a relatively vague description. He stated that without verifying it, he relied on the average prehensile force,

which in his opinion is about 50 kilograms. Accordingly, he determined that the complainant's prehensile force in his right hand was between 25 to 30 kilograms. However, when questioned by the complainant, he admitted that a woman, having approximately that much prehensile force, could in fact perform the duties of service attendant. He was quick to point out that he is not considering one particular task, but all of the tasks as a whole.

[26] He also adds that the service attendant position requires working in the cold given that the employees are required to wash the buses. Further, the "motor door" is opened regularly – according to Dr. Matte, it is opened 90 times a day [Translation] "because there are about 90 buses that leave" – so that buses can get in so that they can be washed. In the winter, the cold comes in when the door is open, the water for washing the buses is cold and the buses are covered with ice and frost. He therefore determined that the complainant could not perform these tasks because of the functional limitation indicating that his entire right hand is intolerant to the cold.

[27] Dr. Matte also adds that washing buses requires that the employee handle a "water jet" with 3,000 pounds of pressure. He pointed out that this work easily requires constant prehensile force of 20 to 25 kilograms. He also stated that the incumbents for this position are asked to move [Translation] "large 45-gallon barrels", requiring [Translation] "a good grip". During a good part of his testimony in chief, Dr. Matte continued to describe the work to be performed by the employees, determining that the complainant could not perform these tasks because of his functional limitations.

[28] On cross-examination, he stated that he did not have to verify the complainant's limitations since the injury had been assessed and that permanent limitations had been found. He added: [Translation] "For me, permanent means permanent. That means that in 20 years, it will still be permanent." When cross-examined by the complainant, Dr. Matte stated that his responsibility and his obligations in a CSST file are to respect the limits determined by the attending physician, in this case those established by Dr. Carter.

[29] Having considered all of the work that an employee must perform as well as the complainant's permanent limitations, Dr. Matte determined that the complainant could not do the work of an attendant.

[30] Before taking a final position on the complainant's case, the respondent gathered its accommodation committee, made up of Lucie Plouffe and Jacynthe Poulin, human resource representatives, and two managerial employees from the maintenance division, i.e. Claude Renaud, the manager, and Sylvain Martel, the chief engineer of the maintenance division. The committee met in order to determine whether it was possible for the respondent to accommodate the complainant. After reviewing the matter, the accommodation committee determined that it was not possible without undue hardship to accommodate the complainant in order to enable him to assume the position of attendant while respecting his functional limitations.

[31] Specifically, according to the minutes of the accommodation committee's meeting that was held on July 20, 2004, the committee summarily considered the positions of "service attendant – interior washing" and "janitor" to see whether it would be possible to accommodate the complainant in these positions. The committee determined that the complainant's functional limitations were inconsistent with these positions. The committee also considered the possibility of setting aside the duty of fuel attendant in the position of "service attendant", for the complainant [Translation] "since this could meet his limitations". However, the document continues, indicating that [Translation] "as it is not conceivable to eliminate the possibility of working at night and the aspect of rotating duties (less popular work shift, usually worked by those with less seniority), this option was eliminated." Further, the committee determined that it did not [Translation] "see how it could earmark this duty for the complainant without affecting the morale of the teams, or perhaps their stability". The committee also determined that no other position was available for which the complainant would be qualified. It also stated that it had not examined the possibility of creating a new position, because it would be subject to the posting rules of the collective agreement, and also create financial hardship. Finally, a part-time position was not considered because the duties would be similar to the ones already assessed.

[32] During her examination, Ms. Plouffe added that the respondent could perhaps have offered a bus driver position to the complainant. She added that she immediately ruled out this position without performing a thorough analysis because she had already had an ergonomic report done for a driver who had injured his thumb and the report pointed out [Translation] "significant difficulties in terms of driving the vehicle." However, on cross-examination, she acknowledged that the career development report prepared by the CSST proposed bus driving as a possible job for the complainant.

[33] Ms. Plouffe also testified that the accommodation committee had discussed the possibility of eliminating the night work in the complainant's case in the event that he was hired, so that he would not have to perform all of the duties of a service attendant. According to the committee, the rules of the collective agreement would not allow them to place the complainant ahead of the other workers. Further, she added that temporary employees like the complainant are hired as replacements, especially at night.

[34] The accommodation committee therefore determined that no accommodation could be made for the complainant's functional limitations.

[35] On July 27, 2004, the respondent advised the complainant, by letter, that he could not be considered for the position. Lucie Plouffe and Jacynthe Poulin then met with the complainant to give him the letter and to explain the respondent's decision. They then explained that the respondent was bound by the functional limitations indicated in the CSST record and that they could not consider him for the attendant position.

[36] Following the respondent's decision, the complainant again contacted Dr. Carter who had prepared the 1998 report. On October 6, 2004, Dr. Carter had the complainant submit to another medical exam. According to the new report prepared by Dr. Carter, the purpose of this assessment was to determine whether the state of the complainant's hand had improved since the first assessment in 1998, which indicated permanent functional limitations. On October 10, 2004, the complainant sent the respondent Dr. Carter's new report indicating that the complainant no

longer had any functional limitations. According to Dr. Carter, the complainant no longer had difficulty grasping small objects and the sensation at the tip of his middle finger had returned to normal. He added that the complainant used his right middle finger as though he were using the index finger that was amputated. Dr. Carter pointed out that the prehensile force was now [Translation] "more or less" normal and that the complainant was no longer intolerant to the cold.

[37] After receiving the second medical report, the respondent took steps with the CSST in order to see whether it would agree to lift the functional limitations established by Dr. Carter in 1998. The CSST refused to change its 1998 decision and to lift the functional limitations. The respondent therefore considered that it was still bound by the CSST's 1998 decision. By letter dated December 2, 2004, the respondent informed the complainant that it was not changing its decision not to hire him. In this letter, it stated that [Translation] "like any other employer, it has the obligation to take all the measures necessary to ensure the health, safety and integrity of its workers. Pursuant to *An Act respecting Industrial accidents and occupational diseases* which is a statute of public order, as it was established that you have permanent functional limitations, the STO feels that it is bound by this decision. Moreover, as our company's physician confirmed that your limitations are inconsistent with the duties of a service attendant, we cannot consider your application."

[38] In a note filed on December 1, 2004, one Louise Audet, a CSST agent, after discussions with Jacynthe Poulin, wrote: [Translation] "We confirm to Ms. Poulin that there was no legal change to the record. The CSST cannot make another determination on the ability to work unless there has been an RRA. The new MER prepared by Dr. Carter at the worker's request does not give rise to an RRA. **Moreover, the STO, while not bound by the legal decisions in this matter, is justified in wanting to verify the worker's actual capacity to perform this work. If the STO considers that Dr. Carter's report is not sufficiently conclusive in this regard, the STO can require that the worker provide an assessment of his functional capacity or have him submit to a pre-employment test. We ask the STO to deal with this worker as it would with a worker who had been involved in the same accident outside the workplace. It**

is the worker's responsibility to respect his functional limitations while the employer must ensure that the worker is fully able to perform the task." [Emphasis added.]

[39] Following the respondent's decision, the complainant said that he retained the services of counsel to take steps with the CSST. In a letter dated December 14, 2004, which he sent to the CSST, Réjean Bélanger, the complainant's counsel, asked the CSST not to change the 1998 medical report, but rather to include Dr. Carter's medical report, prepared in 2004, in the complainant's medical record. On January 10, 2005, the CSST informed the complainant that the medical report had in fact been filed into his record.

[40] At the hearing, the respondent also filed into evidence the job descriptions of many duties in the maintenance division. Therefore, the "office janitor (interior and exterior)" is responsible for tidying, maintaining and cleaning the maintenance division's offices. The "service attendant" ensures that vehicles are serviced, through the regular maintenance of the buses. The attendant carries out an inspection before departure, fuels, tops up lubricants and checks the air in the tires. The attendant cleans all of the vehicles and performs all related tasks. The "labourer (parts cleaning)" cleans all of the mechanic parts and cleans the garage. Finally, the "labourer (interior and exterior)-garage" ensures the overall tidiness of the buildings, the windows and the floors, taking care of internal and external movement of materials as required.

[41] In the minutes of the respondent's accommodation committee meeting referred to earlier, the position of service attendant is described as being divided into three [Translation] "large groups of duties":

(1) Parking buses in assigned places and emptying the fare box. (Which Mr. Langlois described as the [Translation] "parking attendant".

(2) Inspection and adjustment of oil levels and inspection of right tires.

(3) Fuel attendant, inspection of left tires and electronic data entry (Which Mr. Langlois described as the [Translation] "bus refueler".).

According to the minutes, “duty 1” involves emptying the fare box and therefore handling the mechanism which requires applying a great deal of uniform pressure with both hands. “Duty 2” requires lifting the “motor door” weighing 75 pounds, 90 times a day. The tire inspection requires that the tire be struck hard with a 5-pound hammer.

[42] The night shift employees perform the three duties on a rotational basis. The day shift employees, for their part, informally divide up the three duties and the maintenance division tolerates it since it suits the employees and since it does not want to create animosity within the group. The two night shift employees carry out each of the three duties.

[43] In the wintertime, the service attendants also have the duty to clean the garage doors at the entrances. Mr. Langlois stated that once the buses are on the road, the employees must ensure that the level of antifreeze and oil is adequate. They then have to move what he described as 45-gallon barrels, adding however that they have forklifts to assist them with this task.

[44] In the daytime, there are three service attendants who work: three parking attendants, one bus refueler and someone to check the oil. For the evening shift, there are also five service attendants: two work from 3:00 p.m. to 6:00 p.m. and the three others from 6:00 p.m. to 2:00 a.m. As a general rule, the workers on the evening shift perform the same tasks as those who work in the morning. However, those who work on the night shift carry out all of the tasks. For the day shift, these duties are divided between three workers.

[45] According to Mr. Langlois’ testimony, the service attendants who work in the daytime have to take care of about 90 buses, while those working the night shift could have between 25 to 45 buses.

[46] The witness then explained the work of the “labourer (interior and exterior)-garage”. This employee ensures that the premises are tidy. In the wintertime, the labourer is responsible for ensuring that the exits are well cleaned. This employee must also satisfy the needs of the

maintenance service; he or she would be responsible for moving the 45 gallon barrels with the forklift. This employee works on the day shift.

[47] The “labourer–parts cleaner” works at what Mr. Langlois described as “reconditioning parts”. This labourer must clean the parts before they are given to the mechanics for reconditioning and must lift and place the mechanical parts in a large “washer”. He pointed out that there is a hoist for lifting the largest parts but that parts weighing between 30 and 75 pounds must be handled manually by the employee.

[48] The collective agreement provides that the respondent is reserved the right to hire nine (9) temporary employees and that these temporary employees will only perform the functions of service attendant, labourer and janitor. Temporary employees do not have guaranteed hours.

[49] During her testimony, Lucie Plouffe described how a temporary employee could change status with the respondent. First, the temporary employee must accumulate work hours. After accumulating 1,040 work hours, the employee is placed on a priority hiring list for the position of service attendant. Once a permanent position becomes available, following a departure or the creation of a new position, the employee who is at the top of the list then obtains the regular position as a service attendant. Once the employee has a regular position, the employee is guaranteed 40 hours of work per week.

[50] Ms. Plouffe also stated that temporary employees are given a performance evaluation and that if the evaluation is unsatisfactory, the employer can terminate the employment. Further, according to the collective agreement, the temporary employee who is selected to become a regular employee is subject to a predetermined probationary period. According to the terms of the collective agreement, if the employee accumulated 5,200 working hours or if the employee accumulated 2,080 working hours over a 15-month period, he or she would not be subject to a probationary term. Employees who have accumulated 2,080 working hours over an 18-month

period are subject to a three-month probationary period, while the other employees are subject to a six-month probationary period.

B. Issues

[51] The issues are as follows:

a) Are the respondent and the complainant bound by the decision of the Commission de la santé et de la sécurité du travail of the province of Québec establishing permanent functional limitations?

b) Did the respondent discriminate on the basis of a disability when it refused to hire the complainant because of his disability?

c) In the event that question (b) is answered in the affirmative, did the respondent establish that it is impossible to accommodate Mr. Knight without causing it undue hardship?

d) In the event the complaint is allowed, what compensation should be awarded to the complainant?

C. The Decision of the Commission De La Santé Et De La Sécurité Du Travail

[52] On May 5, 1998, while he was working as a butcher, the complainant was involved in a work-related accident, which resulted in the amputation of the index finger of his right hand. Following the recommendations issued on August 4, 1998, by the complainant's attending physician, the Commission de la santé et de la sécurité du travail (the "CSST") of the province of Quebec set out the functional limitations which we referred to earlier in this decision.

[53] On October 10, 2004, the complainant obtained a new report from his attending physician establishing that he no longer had any functional limitations. The respondent submitted this new

report to the CSST. The CSST nevertheless confirmed that the permanent functional limitations were maintained and did not revise its 1998 decision.

[54] At the hearing, the complainant asked the Tribunal to lift the functional limitations established by the CSST or, at the very least, to determine that the complainant no longer had any functional limitations, based on the new report of the attending physician and on an occupational therapy assessment report.

[55] The Tribunal does not think it necessary to address this issue for the purposes of this matter. Indeed, on reviewing the *Canadian Human Rights Act*, it is not clear that the Tribunal would have this power. The purpose of the Act is not to determine whether or not a provincial occupational health and safety board was correct to maintain the functional limitations that it assessed. Its purpose is to give effect to individuals' rights to equality for chances to grow independent of considerations based on their disability.

[56] The issue of whether the functional limitations assessed in 1998 by the CSST on the recommendation of the complainant's attending physician should be lifted may be resolved with the procedure provided under the *An Act respecting Industrial accidents and occupational diseases* (R.S.Q. chapter A-3.001). In order to achieve the objective of the *Canadian Human Rights Act* ("CHRA") and to determine whether the complaint is founded, the Tribunal need not decide this first issue because, as the respondent admitted, a person afflicted with functional limitations is a person afflicted with a disability within the meaning of the CHRA and the issue is therefore whether the respondent satisfied its duty to accommodate this person, as provided under the CHRA.

[57] Moreover, on this point I agree with the remarks of arbitrator Dissanayake, in the arbitration award *Re Air Canada and International Association of Machinists and Aerospace Workers* (1998), 74 L.A.C. (4th) 233, where he stated:

> The WCB drew to the employer's attention its obligation under the *Workers' Compensation Act*, R.S.O. 1990, c. W.11, to attempt to provide the grievor with

> suitable work. It also had an obligation to accommodate the grievor under the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, and the collective agreement. . . .[The employer] went on the basis that as long as it followed the advice of the WCB and complied with that legislation, it would be acting legitimately. That, I find to be a serious error, although I have no doubt whatsoever that management was acting in good faith. **The problem is that the WCB has no responsibility for compliance with the *Human Rights Act*. On the other hand, the employer does have an ongoing responsibility under the Act and the agreement to accommodate the grievor's disability to the point of undue hardship, which is a duty independent of any obligations under workers' compensation legislation.** [Emphasis added.]

D. Did The Respondent Discriminate on the Basis of a Disability in Refusing to Hire the Complainant Because of His Disability?

[58] These are the relevant provisions of the *Act*:

> 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.
>
> …
>
> 7. It is a discriminatory practice, directly or indirectly,
>
> (a) to refuse to employ or continue to employ any individual,
>
> on a prohibited ground of discrimination.
>
> …
>
> 15(1) It is not a discriminatory practice if
>
> (*a*) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a *bona fide* occupational requirements
>
> …
>
> (2) For any practice mentioned in paragraph (1)(*a*) to be considered to be based on a *bona fide* occupational requirements and for any practice mentioned in paragraph (1)(*g*) to be considered to have a *bona fide* justification, it must be

established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.

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. Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, par des moyens directs ou indirects :

a) de refuser d'employer ou de continuer d'employer un individu

(…)

15(1) Ne constituent pas des actes discriminatoires :

a) les refus, exclusions, expulsions, suspensions, restrictions, conditions ou préférences de l'employeur qui démontre qu'ils découlent d'exigences professionnelles justifiées

(…)

(2) Les faits prévus à l'alinéa (1)*a*) sont des exigences professionnelles justifiées ou un motif justifiable, au sens de l'alinéa (1)*g*), s'il est démontré que les mesures destinées à répondre aux besoins d'une personne ou d'une catégorie de personnes visées constituent, pour la personne qui doit les prendre, une contrainte excessive en matière de coût, de santé et de sécurité.

[59] Therefore, according to the Act, it is a discriminatory practice to refuse to employ an individual on the basis of their disability. A disability is defined under section 25 of the Act as a physical or mental disability, past or present.

[60] The employer's conduct will not be considered discriminatory where it can be established that the refusal of employment was based on *bona fide* occupational requirements ("BFOR") (subsection 15(1) of the Act). For a practice to be considered a BFOR, it must be established that

accommodating the needs of the individual or class of individuals affected would impose undue hardship on the employer considering health, safety and cost (subsection 15(2) of the Act).

[61] In *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.*, [1999] 3 S.C.R. 3 (*Meiorin*) the Supreme Court of Canada stated the method to be followed to establish whether a BFOR exists.

[62] First, the complaining party has the burden of establishing *prima facie* evidence of discrimination (*Ontario Human Rights Commission v. Simpsons-Sears Ltd.* [1985] 2 S.C.R. 536, paragraph 28 (*O'Malley*)). In this context, the *prima facie* evidence is the evidence bearing on the allegations that were made and which, if they are to be believed, is complete and sufficient to justify a finding in favour of the complainant, absent a reply by the respondent. Once the existence of the discrimination has been established *prima facie*, the respondent can justify the impugned standard by establishing the following, on a balance of probabilities:

- The respondent adopted the standard for a purpose rationally connected to the performance of the job at issue;
- The respondent adopted that particular standard with the sincere belief that it was necessary in order to fulfill that legitimate work-related purpose;
- The standard is reasonably necessary in order to fulfill that legitimate work-related purpose. In order to establish that the standard is reasonably necessary, the respondent must show that it is impossible to accommodate the complainant without the respondent suffering undue hardship. The respondent must establish that it considered and reasonably rejected all viable forms of accommodation.
  (See: *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868, at paragraph 20 (*Grismer*)).

(i) *Prima facie* evidence

[63] In this matter, given the respondent's admission, the issue of whether the complainant suffers from a disability within the meaning of the Act has been determined. Moreover, even if

the respondent had not admitted it, I would have nevertheless determined that the complainant's physical handicap – namely the absence of an index finger on the right hand and the resulting functional limitations – amounted to a disability within the meaning of the *Act.* The issue is therefore whether the respondent can justifiably refuse to employ the complainant on the basis of his disability.

(ii) The Application of the Meiorin test and section 15 of the *CHRA*

(a) The first two elements of *Meiorin*

[64] The respondent submits that the standard adopted and the ensuing conduct was justified. It contends that considering the functional limitations imposed on the complainant, it was unable to provide him individual accommodation without undue hardship.

[65] In submitting evidence and in their final arguments, the parties did not see fit to address the first two requirements of *Meiorin*. On this basis we can infer that they acknowledge that the standard adopted by the respondent – namely to ensure that the work of the service attendants can be carried out safely and without risk – had a purpose rationally connected to the performance of the job at issue. In my opinion, there is no reason to question this finding.

[66] Further, I am persuaded that the respondent adopted this standard in good faith, believing that it was necessary to ensure the safe operation of its business. Therefore, the second *Meiorin* requirement was also met.

(b) Did the respondent establish that it would be impossible to accommodate Mr. Knight without causing the respondent undue hardship?

[67] To establish that a standard is reasonably necessary (the third step of *Meiorin*, which was codified in subsection 15(2) of the CHRA), an employer must establish that it is impossible to accommodate the complainant and other employees affected by the standard without imposing an undue hardship.

[68] The Supreme Court in *Meiorin*, at paragraph 64, advises courts of law and administrative tribunals to consider various ways in which individual capabilities may be accommodated. The employer should determine whether there are different ways to perform the work while still accomplishing the employer's legitimate work-related purpose. The skills, capabilities and potential contributions of the individual complainant and others like him or her must be respected as much as possible.

[69] In this case, the hiring standard emphasizes the need to ensure workplace safety. The fact that this standard excludes certain classes of persons is not discrimination if the respondent can establish that it is reasonably necessary to meet the appropriate objective and if the accommodation was incorporated in the standard. Exclusion is only justifiable where the employer or service provider has made every possible accommodation short of undue hardship. (See *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868, at paragraph 21).

[70] One form of accommodation could, for example, be to carry out an individual assessment of the complainant in order to determine whether he is able to work as a service attendant. There is nothing indicating that the respondent attempted to assess the complainant in such a way. Moreover, the testimony of Dr. Matte, the respondent's consulting physician, was very clear on this issue: he had not examined the complainant personally, nor had he been asked to do so. The evidence establishes that the respondent's decision was based solely on the findings made by Dr. Carter in 1998 regarding the complainant's functional limitations. The respondent and Dr. Matte appear to recognize, in good faith I agree, that the decision not to hire the complainant would be legitimate if the respondent adhered to the CSST's findings with regard to the functional limitations. One problem with this approach is that it fails to take into account the fact that the CSST is not in any way bound to comply with the Act. The respondent is not exempted from the obligations of the Act simply because there is the *An Act respecting Industrial accidents and occupational diseases*, R.S.Q. chapter A-3.001 (the "AIAOD"). Moreover, I must point out that with regard to the CSST, the respondent did not show why or how it was bound by the CSST's findings at the hiring stage, especially when these findings were based on medical

information that was no longer current. The respondent had the burden of establishing how the failure to respect these findings would amount to “undue hardship”.

[71] I am not persuaded, according to the evidence filed, that the respondent made any effort to assess the complainant individually in order to establish whether his condition would prevent him from carrying out the duties and responsibilities of a service attendant, or how the individual assessment of the complainant would cause it undue hardship. On this point, the respondent appears to have focussed all of its attention on the obligations imposed on it by the AIAOD, and failed to pay sufficient attention to the obligations under the Act.

[72] The respondent claims that it was not necessary to assess the complainant’s individual ability. It is convinced that the functional limitations issued by the CSST made him unable to safely perform the service attendant duties. I am not persuaded by this argument. Allowing an employer to rely on opinions regarding its employees’ disabilities that it perceives to be obvious without carrying out an individual assessment of their abilities to safely carry out the work would have the effect of giving it too easy a justification for conduct which could otherwise be discriminatory. As the Supreme Court stated in *Grismer, supra*, at paragraph 19, accommodation must be incorporated into the standard itself to ensure that each person is assessed according to her or his own personal abilities, instead of being judged against presumed group characteristics which are frequently based on bias and historical prejudice. Accordingly, an employee’s individual assessment is an essential step in the accommodation process unless it is in itself an undue hardship for the respondent (See *Grismer,* at paragraphs 22, 30, 32 and 38; *Meiorin*, at paragraph 65; and *Audet v. National Railway*, 2006 CHRT 25, at paragraph 61.)

[73] However, even if I were to determine that the respondent did not have to carry out a personal assessment of the complainant because it would cause undue hardship, there would still be the issue of whether the respondent, after establishing that the complainant was unfit for the position of service attendant, investigated and reasonably dismissed all other possible alternatives that it could have offered him without causing it undue hardship (See *Meiorin, supra*, at paragraph 65). In my opinion, it failed to establish that it satisfied this requirement.

[74] The respondent's evidence is that it assessed all of the alternatives of reasonable accommodation taking into account the complainant's disability and functional limitations. Before making a final decision regarding the complainant's case, it formed an accommodation committee made up of representatives from human resources and the maintenance division. This committee met to assess whether it was possible for the respondent to accommodate the complainant without suffering undue hardship.

[75] According to the evidence, the accommodation committee determined, after reviewing Dr. Matte's analysis, that it was not possible to accommodate the complainant so as to enable him to work as an attendant while respecting his functional limitations. According to the analysis that the committee carried out, the different duties assigned to the service attendants did not respect the complainant's functional limitations.

[76] The accommodation committee "summarily" examined the positions of "service attendant – interior cleaning" and "janitor" to see whether it would be possible to accommodate the complainant. It determined that the complainant's functional limitations were inconsistent with these positions. The committee said that it had also examined the possibility of setting aside the function of fuel attendant for the complainant, within the position of "service attendant", [Translation] "since this could fit his limitations". The committee determined [Translation] "as there is no option of eliminating the night shift and the aspect of rotating duties (less popular shift usually worked by those with less seniority", this option was eliminated. The committee was also of the opinion that it could not [Translation] "set aside this duty for the complainant without affecting the moral or even the stability of the teams".

[77] The committee also determined that no other position was available for which the complainant could qualify. It did not examine the option of creating a new position because, according to the committee, it would have been subject to the rules of the collective agreement, and it would have created financial hardship for the respondent. Finally, a part-time job was not assessed since, according to the committee, the tasks would have been similar to those already assessed.

[78] During her examination, Ms. Plouffe stated that there may perhaps have been a bus driver position that the respondent could have offered the complainant. She added that, without carrying out an exhaustive analysis of the complainant's ability to fill that position, she eliminated it [Translation] "from the outset" because she had already had an ergonomic report performed for another driver who had injured his thumb and the report pointed out [Translation] "significant difficulties in terms of driving the vehicle." However, on cross-examination, she acknowledged that the career development report prepared by the CSST proposed bus driving as a possible job for the complainant.

[79] Ms. Plouffe also testified that the accommodation committee had discussed the possibility of eliminating the night work in the complainant's case in the event that he was hired, so that he would not have to perform all of the duties of a service attendant. According to the committee, the rules of the collective agreement would not allow them to place the complainant ahead of the other workers. The committee therefore determined that there was no way to accommodate the complainant's functional limitations.

[80] Let us first address the argument advanced by the accommodation committee to the effect that accommodating the complainant would undermine the teams' morale. First, I note that this submission is not supported by the evidence. Further, in *Meiorin*, *supra*, the Supreme Court stated the following in regard to a similar issue, at paragraph 80: "Although serious consideration must of course be taken of the 'objection of employees based on well-grounded concerns that their rights will be affected', discrimination on the basis of a prohibited ground cannot be justified by arguing that abandoning such a practice would threaten the morale of the workforce."

[81] To determine what constitutes undue hardship, the respondent relied on several arbitration awards including, *inter alia*, the one in *Syndicat des technologues en radiologie du Québec et Centre hospitalier des Vallées de l'Outaouais (Pavillon de Hull)*, T.A. 199-08-12, DTE 99T -1044 (Denis Nadeau), decided a few months before the Supreme Court decisions in *Meiorin* and *Grismer*. In this award, the arbitrator listed a certain number of rights that could be

adversely affected by the implementation of an accommodation measure. He refers to, *inter alia*: burdening other employees called to assume part of the accommodated person's duties, exposing the health and safety of employees to a greater risk when they have to work with a colleague requiring a particular accommodation, agreeing to a less advantageous work schedule, waiving an expected promotion or deployment to another position. Without deciding whether these concerns are founded with regard to the duty to accommodate provided in the Act, I would point out again that there was no evidence establishing that this was the case here and that this would cause undue hardship to the respondent.

[82] While under certain circumstances these considerations could perhaps justify the refusal to accommodate persons with disabilities, we must avoid not assigning enough importance to the accommodation of the handicapped person. It seems far too easy to raise these considerations to justify a refusal to give equal treatment to handicapped persons. I am not saying that these considerations can never be relevant in matters of accommodation; rather I am saying that the evidence, made up of impressions, is not enough.

[83] According to the *Meiorin* requirements, the respondent had to establish that it considered and reasonably rejected all viable forms of accommodation. It had to demonstrate that it was impossible to incorporate individual aspects of accommodation without causing it undue hardship. In *Grismer*, at paragraph 43, the Supreme Court describes the respondent's burden in a case like this one as follows: "Common sense and intuitive reasoning are not excluded, but in a case where accommodation is flatly refused there must be some evidence to link the outright refusal of even the possibility of accommodation with an undue safety risk."

[84] I also understand that the complainant has the right to be accommodated as long as this does not cause undue hardship to the respondent. The use of the adjective "undue" indicates that some degree of "hardship" is acceptable, only the hardship that is "undue" can excuse the employer from its duty. The evidence did not persuade me that the accommodation of the complainant would require a substantial reorganization of all of the duties to the point where it would have caused "undue" hardship to the respondent. The respondent alleges, without

persuasive evidence, that accommodation – without specifically defining this accommodation – would result in risks to the health, safety and security of the complainant and the company's other salaried employees. In its opinion, that amounts to undue hardship. However, nothing in the evidence submitted at the hearing supports these claims.

[85] While accepting that the duty to accommodate does not go so far as to oblige the creation of a tailor-made position for the complainant, we must point out that that is not what the complainant is requesting. The complainant is asking for the opportunity to show that he can, with accommodation, perform the tasks of the position for which he applied.

[86] The evidence filed by the respondent has not persuaded me that providing an accommodation for the complainant could cause it undue hardship. There were possible accommodation options but the employer dismissed them for reasons which, if indeed they could be described as "hardships", are far from being "undue" hardships, at least based on the evidence submitted at the hearing.

[87] I also note that in his arguments, the respondent's counsel notes at paragraph 66: [Translation] "After receiving the second report of the complainant's attending physician, the STO even took steps with the CSST in order to see whether it would agree to change the functional limitations, but without avail." I can infer that had the CSST lifted those limitations, the respondent would have hired the complainant. Therefore, we can ask ourselves whether the respondent's apparent perceived "hardship" was based on its perception that its obligations under the *An Act respecting Industrial accidents and occupational diseases* prevented it from hiring the complainant. However, as we have determined that the obligations under that statute do not relieve the employer of the obligation to comply with the Act, it would be difficult to find undue hardship, especially since the respondent did not provide evidence of it.

E. The Finding on Discrimination

[88] For all of the reasons stated above, I find that the respondent did discriminate against the complainant based on his disability, breaching section 7 of the Act. The respondent did not

establish that its decision not to hire the complainant for the position of service attendant was based on *bona fide* occupational requirements, pursuant to section 15 of the Act.

[89] Mr. Knight's complaint is therefore founded.

F. The Relief Sought By Mr. Knight

[90] The complainant is seeking the following relief:

i. An order requiring the respondent to be integrated into the workplace in a permanent service attendant position;

ii. Compensation for loss of salary pursuant to paragraph 53(2)(*c*) of the Act;

iii. Compensation for pain and suffering in accordance with paragraph 53(2)(*e*) of the Act; and

iv. The reimbursement of certain expenses.

(i) Integration into the workplace

[91] The complainant is seeking an order, under paragraph 53(2)(*b*) of the Act, providing that the respondent integrate him in a service attendant position as a regular employee. Paragraph 53(2)(*b*) states that the Tribunal, when it finds that a complaint is substantiated, may order that the respondent make available to the complainant, on the first reasonable occasion, the rights, opportunities or privileges that were denied to him as a result of the practice.

[92] The complainant submits that he is entitled to this relief since the evidence established that the employees hired after the respondent denied him the position are now regular employees. He is therefore asking that the Tribunal order the respondent to integrate him into a service attendant position as a permanent employee, retroactive to June 1, 2004. I note however that the evidence does not establish that all of the employees hired after June 1, 2004, have regular positions today. Some did not pass the probationary period and are no longer in the respondent's

employ. The possibility that the complainant could have suffered the same fate cannot be excluded. With regard to the complainant's integration to a more senior position, it is an issue of sufficiency of evidence. The complainant has the burden of establishing that what he is seeking was reasonably foreseeable. He did not satisfy this burden in this case. I am not persuaded that the evidence filed indicates that there was a serious possibility that the complainant would have attained a permanent position at the time of the Tribunal's decision. (See *Canada (A.G.) v. Uzoaba*, [1995] 2 F.C. 569.)

[93] Under the circumstances, the Tribunal cannot grant the complainant's request and order that the respondent integrate him in a regular service attendant position. The respondent's discriminatory practice did not deprive the respondent of such a position, but rather of the opportunity to be entitled to such a position on call and the opportunity after a "probationary period" to apply for a regular position, in accordance with the provisions of the collective agreement.

[94] In the arbitration award *Air Canada and I.A.M. (Petelka) (Re), supra*, Arbitrator Dissanayake was faced with a factual situation that resembled this case on several points. This is what he had to say about a request for a remedy similar to the one sought by the complainant :

> **Quite apart from the qualifications and skill, before I order that the grievor be appointed to a particular position, I must be satisfied that he is medically fit to do the functions of the position. On the basis of the evidence before me I am not able to satisfy myself with any reasonable level of confidence whether or not the grievor can do so. It would be irresponsible for me to order that the grievor be appointed to a particular position in the absence of any evidence that the grievor is capable of performing without posing undue risk to himself or his fellow employees. Nor can I decide what accommodation, if any, he may require to be able to do either job. The WCB personnel who assessed the grievor did not testify before me, nor did the Air Canada physician. The only medical expert who testified was the grievor's personal physician, Dr. Bhatia. His evidence is not very helpful to me in that he testified without ever having turned his mind to the actual duties and responsibilities of a Station Attendant job at the Ottawa Airport. He had not even seen a position description. The employer had not gone through any exercise of identifying the essential duties of either job. It had not had the**

> **grievor assessed medically in relation to his ability to perform those duties. If the grievor had some duties outside his restrictions the employer had not considered how he may be accommodated. The grievor's own assessment of his ability is not dependable either.**

[95] In this case I am faced with a similar problem. Apart from the complainant's professional abilities, no convincing evidence was submitted regarding his physical ability to perform the duties required for the service attendant position without the need of accommodation. I cannot in good conscience issue an order requiring the respondent to give a regular position to the complainant without being persuaded that he can perform these duties. It is also impossible for me to determine on the basis of the evidence before me what accommodations would be appropriate for the complainant, if need be. The only medical evidence that I have about the complainant's abilities is from Dr. Carter, who did not assess his functional limitations while considering the duties of the desired position, and from Dr. Matte, who determined that the complainant could not perform these duties, although he had not assessed the complainant.

[96] Accordingly, I order that the respondent integrate the complainant into an on-call service attendant position. Before the complainant begins working, however, the respondent could proceed with an independent expertise to assess his abilities to perform the duties required of a service attendant and to assess, if need be, the accommodations which could be required. In the event that this expert's report should establish that the complainant is able to perform these duties with or without accommodation, the complainant shall then be submitted to the "probationary period" provided under the collective agreement.

[97] I also order that the respondent and the complainant cooperate in good faith in enforcing this order.

(ii) Compensation for lost salary pursuant to paragraph 53(2)(*c*) of the Act

[98] As a second remedy, the complainant is seeking compensation for loss of salary pursuant to paragraph 53(2)(*c*). According to the assessment prepared by the complainant, he allegedly lost $75,352.84 in salary between June 2004 and December 2006 because of the respondent's

discriminatory practice. He is therefore claiming this amount as compensation for loss of salary. Without accepting the figures presented by the complainant or his right to recover this or any other amount, the respondent recalculated while taking into account the collective agreement, and arrived at the amount of $73,019.40.

[99] The respondent argued first, and correctly, that the complainant had the duty to mitigate its losses. This duty to mitigate, whether it results from the Quebec Civil Code or from the common law, has the same purpose in both cases, namely to alleviate the aggravation of damages by taking the measures that a reasonably prudent and diligent person would have taken under the same circumstances. The failure to mitigate damages could lead to a significant reduction of the compensation awarded and even to the dismissal of the complainant's claim. The issue is therefore whether the complainant established that he reasonably responded to this duty to mitigate his prejudice. (See *Canada (Attorney General) v. Morgan (C.A.)*, [1992] 2 F.C. 401, at paragraph 24.).

[100] After July 27, 2004, the date the complainant learned that the respondent would not hire him for the attendant position, he stated that he was self-employed in his landscaping business. He said that he started this business during the summer of 2003. The business operated essentially, the first year, from April to August.

[101] From September 2003 to June 2004, the complainant stated that he did not work because during this period he was training to become a heavy highway vehicle mechanic. As of June 2004, he said that he resumed his landscaping business. During 2004, he said that he continued his business beyond the summer until the wintertime, when he began to do snow removal with a snow blower.

[102] The complainant stated that he began to actively seek employment in the winter of 2005 by sending his curriculum vitae almost everywhere. He added that he applied for work mostly in Quebec because he did not think his knowledge of English was good enough to apply for work in

Ontario. He stated that he received very few acknowledgements of receipt and was never called for an interview.

[103] The complainant filed his income tax returns for 2004 and 2005. In both of these returns, he stated that he was self-employed in the field of landscape design. For 2004, his total revenue was negative, i.e. a loss of $3,947.66. This amount included $5,464 in revenue from employment insurance benefits and from a job that he worked during the year and a loss of $9,511.66, for his work in his landscaping business. In the statement of business activities for that year, he reported $23,839.34 in revenue and expenses of $33,251.66. *Inter alia*, he reported $4,448.53 in advertising expenses, $11,215.97 in motor vehicle expenses and $14,537.19 in expenses for supplies.

[104] In his 2005 income tax return, the complainant stated once again that he had a negative income of ($4,993.31). Specifically, his statement of business activities indicated sales of $22,177.34 and expenses of $27,170.65. The motor vehicle expenses for this year were $14,149.14 and those for supplies were $9,569.59.

[105] He explained the expenses for supplies were for purchasing equipment for his business, namely a trailer, mowers, tractors, “trimets” and saws. He also added to his supplies expenses the cost of cedars that he had to plant during those years. In his expenses, he included a claim for the payments made on the mortgage interest of his home. On cross-examination, he stated that this expense was unrelated to his business and that he did not see relevance.

[106] For 2004 and 2005, he declared that he had not had any job.

[107] I must admit that I have a great deal of difficulty accepting the figures submitted by the complainant regarding his revenues for the years 2004 and 2005. Although I can admit that a business can operate at a loss, I have trouble accepting that the complainant could have worked for two consecutive years without making any income. Nobody would agree to operate a business under those circumstances.

[108] For 2004, I note that the gross revenues of the complainant's business were $23,839.34, according to his tax return. If I accept that half of the expenses declared by the complainant in his return are reasonable, his net income for that year would then be about $12,000. I find that this amount more reasonably represents the complainant's revenue for 2004.

[109] In his calculations for 2004, the complainant claimed $10,925 for lost salary. He states that if he had worked for the respondent in 2004, he would have worked for 25 weeks, i.e. the equivalent of 575 hours, at the hourly rate of $19.00. According to the evidence of Ms. Plouffe, the hourly rate of the agreement would rather have been $17.07 per hour, for a salary of $9,815.25. I find the calculations of Ms. Plouffe more trustworthy. Taking into consideration the evidence, I find that for the months of June, July and August 2004, the complainant did not suffer from any loss of salary because he was then operating his landscaping business. However, for the months of September to December 2004, I assess his loss at $4,000, namely somewhat less than half of the amount calculated by Ms. Plouffe.

[110] For 2005, he declared gross earnings of $22,177.34 for his business activities. Once again, I find that the expenses that he is claiming for that year seem excessive. In fact, he says that he had business expenses of $27,170.65, which would mean that he had lost income for a second consecutive year in operating his business. I consider the claims for both the motor vehicle expenses ($14,149.14$ - namely 100% of the use of the vehicle) and the supplies expenses (9 569,59$) to be excessive. These expenses alone would absorb all of the business' revenues. He again claimed mortgage costs which he recognized on cross-examination had nothing to do with his business.

[111] For 2005, it would be more realistic to consider a lesser amount for the complainant's expenses. As the respondent suggested, I believe that this amount could be reduced by half, which would mean that for this year the complainant's income would be about $11,000. According to the figures submitted by Ms. Plouffe, the complainant would have earned $28,736.43 had he worked for the respondent during that year. Therefore, for 2005, considering

the income of $11,000, his loss of salary would be $17 000. I determine that the loss of salary for the complainant for 2005 was $17,000.

[112] For 2006, the complainant did not submit any statement regarding his income and without such evidence, it is impossible for me to grant an amount for the loss of salary.

[113] In conclusion, the complainant is entitled to $4,000 for loss of salary for 2004. For 2005, the amount is $17,000. There is no amount awarded for 2006, based on the lack of evidence.

[114] Under paragraph 53(2)(*c*) of the Act, the complainant is therefore entitled to $21,000 for loss of salary following the respondent's discriminatory act. This amount seems reasonable to me given the evidence and the complainant's duty to mitigate his loss.

(iii) Compensation for pain and suffering – paragraph 53(2)(*e*) of the Act

[115] The complainant is also claiming $20,000 as compensation for pain and suffering under paragraph 53(2)(*e*). I must admit that the evidence submitted at the hearing in support of this claim seems weak to say the least and is certainly not enough to justify the amount claimed by the complainant which is the maximum provided under the Act. While subsection 53(2) of the Act gives discretion to the Tribunal with regard to granting various remedies when a complaint proves to be founded, such discretion must be exercised judiciously in light of the evidence before the Tribunal. In this case the complaint is allowed and nothing in the complainant's testimony indicates any reason to refuse awarding him compensation for pain and suffering. (See *Dumont v. Transport Jeannot Gagnon*, 2002 FCT 1280.)

[116] I agree that the respondent's decision did cause the complainant pain and suffering, if only in terms of anxiety. I therefore award $2,000 as compensation for pain and suffering.

(iv) Expenses incurred - 53(2)(*c*).

[117] Pursuant to paragraph 53(2)(*c*) a complainant can claim additional costs and expenses incurred as a result of the discriminatory practice. In this case, the complainant is claiming the reimbursement of:

- An invoice for legal representation before the CSST for $312.01;
- An invoice for an occupational therapy report for $55; and
- An invoice for a medical report for $315.65.

[118] For the invoice for legal representation before the CSST, I cannot see how the complainant's dealings with the CSST could be blamed on the respondent in this matter. This claim is therefore refused.

[119] With regard to the invoice for an occupational therapy report, we refer to a report prepared by a firm called CRD Physiothérapie et Réadaptation. This report was never filed into evidence. The claim for the reimbursement of these fees is therefore also refused.

[120] The invoice for the reimbursement of Dr. Carter's second medical report is however accepted since it resulted from the discriminatory practice. If the respondent had carried out an individual assessment of the complainant, this second report would not have been necessary. I therefore order the reimbursement of the invoice for $315.65.

(v) Interest

[121] Interest is payable with regard to all indemnities awarded in this decision (subsection 53(4) of the Act). Interest shall be calculated in accordance with subsection 9(12) of the *Canadian Human Rights Tribunal Rules of Procedure (03-01-04*) simple interest calculated on a yearly basis based on the official rate set by the Bank of Canada. Interest shall accrue from the date of the complaint until the date the indemnity is paid.

Signed by

Michel Doucet
Tribunal Member

Ottawa, Ontario
May 2, 2007

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1116/9705

Style of Cause: Michel Knight v. Société de transport de l'Outaouais

Decision of the Tribunal Dated: May 2, 2007

Date and Place of Hearing: November 6 to 9, 2006

Ottawa, Ontario

Appearances:

Michel Knight, for himself

Ikram Warsame, for the Canadian Human Rights Commission

Jean-François Pedneault, for the Respondent