

Canadian Human
Rights Tribunal



Tribunal canadien
des droits de la personne

Between:

Ali Tahmourpour

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Royal Canadian Mounted Police

Respondent

Ruling

Member: Wallace G. Craig

Date: December 13, 2010

Citation: 2010 CHRT 34

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I. Introduction

[1] On April 16, 2008, Tribunal Member Karen A. Jensen rendered a decision in *Tahmourpour v. Canada (Royal Canadian Mounted Police)* that a complaint of discrimination had been substantiated.

[2] The Federal Court reversed Member Jensen's decision, however it was restored by the Federal Court of Appeal with one exception, remedial order (iv), set out below, which the Federal Court of Appeal required the Tribunal to reconsider.

[3] The Tribunal Chair asked Ms. Jensen to undertake reconsideration of the remedial order but she respectfully declined, and the Tribunal Chair then assigned the matter to me.

II. Summary of the Proceedings

[4] On March 21, 2001, Mr. Ali Tahmourpour filed a complaint with the Canadian Human Rights Commission against the Royal Canadian Mounted Police ("RCMP"), alleging violations of sections 7 and 14 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6. Mr. Tahmourpour's complaint led to a hearing before the Canadian Human Rights Tribunal ("CHRT") in August and September of 2007. In a decision dated April 16, 2008, Member Jensen concluded that the complaint was substantiated in a number of respects. Pursuant to s. 53(2) of the *Act*, Member Jensen made the following remedial orders:

- (i) Unless otherwise agreed upon, the Respondent shall offer Mr. Tahmourpour an opportunity to re-enrol in the next available RCMP Cadet Training Program at Depot;
- (ii) If Mr. Tahmourpour accepts the offer of re-enrolment, the Respondent shall undertake a fair assessment of his skills at the outset of the training program to determine the areas in which training is needed;
- (iii) The Respondent shall pay Mr. Tahmourpour compensation for salary and benefits he lost for the first 2 years plus 12 weeks of work as an RCMP officer after graduating from the Depot. The compensation shall be discounted by 8%;

- (iv) The Respondent shall pay Mr Tahmourpour the difference between the average full-time industrial wage in Canada for persons of his age, and the salary that he would have earned as an RCMP officer until such time as Mr. Tahmourpour accepts or rejects an offer of re-enrolment in the training program at Depot. The Respondent shall compensate Mr. Tahmourpour for the average amount of overtime paid to other constables who graduated from Depot in 1999, unless otherwise agreed upon by the parties. The compensation shall be discounted by 8%;
- (v) The compensation must reflect a promotion to Corporal after 7 years;
- (vi) The parties shall attempt to agree upon the measures and a timetable for addressing the issues set out in the “Systemic Remedy” part of this decision. In the event that they are unable to reach an agreement on this portion of the award within 3 months from the date of this decision, the Tribunal will make a final determination;
- (vii) The Respondent shall pay \$9,000 to Mr Tahmourpour in compensation for the pain and suffering caused by its discriminatory conduct;
- (viii) The Respondent shall pay \$12,000 to Mr Tahmourpour pursuant to s. 53(3) of the *Act*;
- (ix) The Respondent shall pay \$9,500 to Mr. Tahmourpour in compensation for the expenses he incurred in minimizing his losses. The Respondent shall also compensate Mr. Tahmourpour for the legal expenses he incurred in this matter;
- (x) The Respondent shall pay interest on the compensation awarded in this decision as set out above.”

[5] The RCMP applied to the Federal Court for judicial review of the decision of the Tribunal, and on October 6, 2009, the Federal Court set aside the decision and referred the complaint back to the Tribunal for rehearing by a different member (2009 FC 1009). Mr. Tahmourpour appealed the judgment of the Federal Court, and on July 19, 2010, the Federal Court of Appeal restored the decision of the Tribunal on all issues but one, remedial order (iv), which awards financial compensation for future wage loss:

“The appeal is allowed except on the question of the cap or limitation on the top-up portion of the compensation award. Paragraphs 2 and 3 of the judgment of the Federal Court are set aside and replaced with the following;

2. The application for judicial review is allowed only in respect of the first sentence of item (iv) of paragraph 267 of the decision of the Canadian Human Rights Tribunal made April 16, 2008, and is otherwise dismissed.

3. This matter is referred back to the Tribunal for reconsideration of the first sentence of item (iv) of paragraph 267 in accordance with the reasons for judgment of the Federal Court of Appeal in A-453-09.”

III. Extracts from Previous Proceedings

[6] The following extracts from the reasons for judgment of the Federal Court of Appeal and the judicial review in the Federal Court are pertinent to a proper reconsideration of this matter.

The Federal Court of Appeal

“[40] The relevant part of the Tribunal award reads as follows (from paragraph 267 of the Tribunal’s decision):

(iii) the Respondent shall pay Mr. Tahmourpour compensation for salary and benefits he lost for the first 2 years plus 12 weeks of work as an RCMP officer after graduating from Depot. The compensation shall be discounted by 8%.

(iv) the Respondent shall pay Mr. Tahmourpour the difference between the average full-time industrial wage in Canada for

persons of his age, and the salary that he would have earned as an RCMP officer until such time as Mr. Tahmourpour accepts or rejects an offer of re-enrolment in the training program at Depot.

...

[41] As I understand this part of the award, it establishes two different time periods for the purpose of monetary compensation. The first time period, which the parties sometimes refer to as the 'grace period,' runs for 2 years and 12 weeks starting with the date on which Mr. Tahmourpour would have graduated from the Depot but for his termination. For the grace period, Mr. Tahmourpour was held to be entitled to an amount equal to the compensation he would have received as an RCMP officer less 8%.

[42] The second time period begins immediately after the grace period and ends on the date on which Mr. Tahmourpour accepts or rejects an offer of re-enrolment. During that second time period, Mr. Tahmourpour is entitled to further compensation, which I will call the 'top-up,' determined as the difference between what he would have earned during the second time period if he had been employed at the average full-time industrial wage in Canada and the amount he would have earned during the second time period as an RCMP officer, with the difference discounted by 8%.

[43] The end date of the second time period necessarily would occur at some time after the date of the Tribunal award on April 16, 2008. That means that the second time period would run for at least 6 years (i.e. from some time in 2002 until at least April 16, 2008).

[44] It is not clear from the record whether the second time period has ended, or when it is likely to end. If this part of the remedy is read literally and Mr. Tahmourpour simply declines to accept or reject an offer of re-enrolment, the second time period may never end unless, as counsel suggested at the hearing of this appeal, the offer of re-enrolment is made subject to a condition that it must be accepted within a stipulated time or be deemed to have been rejected.

[45] The RCMP argued in the Federal Court, and the judge agreed, that the top-up portion of the award of compensation is not consistent with the principle that the Tribunal must find a causal link between the discriminatory practice and the loss claimed (see *Chopra v. Canada (Attorney General)* (F.C.A.), 2007 FCA 268).

[46] It is clear that the Tribunal was aware of *Chopra* and the principles relating to damages as stated in that case. In that regard, the Tribunal made a number of factual findings which I summarize as follows:

The RCMP's discriminatory treatment of Mr. Tahmoupour denied him the opportunity to complete his training at the Depot and to make his living as an RCMP officer. He must be compensated for the loss of wages that he would have earned. Non-visible minority cadets had a 93% chance of completing training. That justifies some discount from the compensation to be awarded (justifying a 7% discount). A further 1% discount is warranted because the average rate of attrition for regular members during the first 20 years of employment is 1%. No discount is warranted to reflect the chance that Mr. Tahmoupour's demonstrated weaknesses increased the likelihood that he would not graduate, because it is not possible to know to what extent his weaknesses were caused by discriminatory treatment. It is necessary to take into account Mr. Tahmoupour's obligation to mitigate his losses. Mr. Tahmoupour did not make sufficient efforts to minimize his losses from the time he left the Depot until the commencement of the hearing. However, from 2000 to 2002, it was difficult for him to work because of the psychological impact of his experiences at the Depot, and because of the time necessarily spent by him on his complaint. On that basis, the 'grace period' was established at 2 years and 12 weeks. However, Mr. Tahmoupour could have been gainfully employed after that time. (emphasis added)

[47] As I understand the Tribunal's decision, there were no other facts that were taken into account in determining the amount of the monetary compensation awarded to Mr. Tahmoupour. **I am unable to discern from the Tribunal's decision why the Tribunal chose, as the end point of the second time period, the date on which Mr. Tahmoupour accepts or rejects an offer of re-enrolment, as opposed to an earlier fixed date. I agree with the judge that the Tribunal did not put its mind to the question of when, after the end of the grace period, the discrimination suffered by Mr. Tahmoupour ceased to have an effect on his income earning capacity. In the absence of an explanation from the Tribunal, that part of the Tribunal's award providing for the top-up cannot be found to be reasonable. (emphasis added)**

[48] As there is one ground of appeal on which I agree with the judge, a question arises as to whether the remedy ordered by the judge (that the matter be returned to the Tribunal for rehearing) should be permitted to stand. **In my view, the**

question as to what cap or other limitation should be placed on the top-up is a question that must be answered by the Tribunal. Therefore, I would return this matter to the Tribunal only for the purpose of considering the imposition of a cap or limitation on the top-up.” (emphasis added)

Judicial Review by the Federal Court

“[84] Next, the applicant (RCMP) submits that there ought to have been a cap on the lost wages award in the order of two years. The applicant relies on the decisions of the Canadian Human Rights Review Tribunal and the Federal Court of Appeal in *Morgan v. Canada (Canadian Armed forces)*, [1990] C.H.R.D. No. 10 (QL); rev’d [1992] 2 F.C. 401 (C.A.).

[85] In *Morgan*, Mr. Morgan was found to have been denied a position of employment with the Canadian Armed Forces by the discriminatory action of the Forces, as opposed to merely losing an opportunity for employment. A majority of the Review Tribunal held that when an order of reinstatement is made, compensation ought to continue until there is compliance with the order. The Federal Court of Appeal disagreed. It found that the Review Tribunal erred in failing to establish a cap or cut-off point for the compensation period independent of the reinstatement order. **The Court endorsed the observation of the minority member of the Review Tribunal that ‘the duration of the compensatory period need not coincide with re-instatement whenever it may occur’ and held that the majority erred in failing to establish that cap. ...** (emphasis added)

[86] The minority member, whose decision the Court of Appeal accepted, held that the Armed Forces ought reasonably to have foreseen the consequences of its discriminatory acts as extending for a period of some three and one-half years.

[87] In this case, the Tribunal made no assessment of any cut-off period, nor did it engage in any analysis as to whether the period could reasonably extend to the date of the decision, which was some eight and one-half years after the termination of his cadet contract.

[88] In failing to engage in any analysis the Tribunal erred in law. The damages awarded under the Act cannot run forever and, as the Court of Appeal observed in *Morgan*, ‘common sense requires that some limits be placed upon liability for the consequences flowing from an act [discrimination].

[91] I find that the Tribunal: ... (iv) erred in awarding lost wages to the date of reinstatement in a training program having engaged in no analysis as to whether that period could reasonably extend to that date.”

IV. Extracts from the Decision of the Tribunal

[7] I have carefully reviewed the decision of the Tribunal, in particular the following extracts:

“Should compensation for lost wages be provided to Mr. Tahmourpour for the loss of the opportunity to complete training that was caused by the RCMP’s discriminatory conduct?”

[218] Yes. The RCMP’s discriminatory conduct denied Mr. Tahmourpour the opportunity to complete training and to make his living as an RCMP officer. He must be compensated for the loss of wages that he would have earned.

How is compensation for wage loss resulting from the denial of the opportunity to be calculated?

“[219] The Tribunal’s approach in Chopra of providing compensation for wage loss, discounting for any uncertainty in obtaining the position, was found by the Court of Appeal to be an acceptable way of compensating for lost opportunity (Chopra, at para.43) I shall follow suit. ...

For what time period should Mr. Tahmourpour be compensated?

[224] Mr. Tahmourpour claimed that he should be paid wages and benefits lost on a retroactive basis for the entire period from 1999 until instatement as an RCMP officer or, in the alternative, until the date of this decision with a further order for future wage loss in the event that instatement is not ordered.

[225] Dealing first with the claim for retroactive wage and benefit loss, in Chopra, the Court of Appeal stated that in exercising its discretion under s. 53(2)(c) to award compensation for any or all wages lost as a result of the discriminatory practice, the Tribunal may well find that the principles underlying the doctrine of mitigation of losses in other contexts apply. Society has an interest in promoting economic efficiency by requiring those who have suffered a loss to take steps to minimize that loss as it is not in the public interest to allow some members of society to maximize their loss at the expense of others, even if those

others are the authors of the loss. Thus while a tribunal is not bound to apply the doctrine of mitigation, it is not prohibited from doing so in the exercise of its discretion to determine the amounts payable to a complainant.

[226] **I find that it is appropriate in this case to consider whether Mr. Tahmourpour took steps to minimize his losses. Mr. Tahmourpour's evidence on this issue was weak. ...** (emphasis added)

[231] **I find that Mr. Tahmourpour has not made sufficient efforts to minimize his losses from the time he left Depot until the commencement of the hearing in August 2007.** (emphasis added)

[232] **... I am not convinced that Mr. Tahmourpour put real effort into pursuing gainful employment that would have minimized his losses. Indeed, he stated that he could not do so because his human rights complaint took all of his time.** (emphasis added)

[233] **I do not accept that working on his human rights complaint required Mr. Tahmourpour's full-time effort ... Therefore I find it unreasonable that Mr. Tahmourpour was unable to work at all, other than to sell one property and perform one translation assignment from January 2002 to the present time.** (emphasis added)

[236] The RCMP shall pay Mr. Tahmourpour the full-time wages and benefits that he would have received for two years from January 2000... In addition, the RCMP must pay Mr. Tahmourpour the wages and salary that he would have received for an additional 480 hours of work.

[237] **Taking into account the period during which Mr. Tahmourpour could not work for health and complaint-related reasons, I find that Mr. Tahmourpour could have been gainfully employed until the present time.** I do not accept that working on his human rights complaint precluded full-time employment from the time that he was well enough to work until the commencement of the hearing in August of 2007. People make all sorts of arrangements and accommodations to pursue important activities outside of full-time employment. Mr. Tahmourpour could have done so too. (emphasis added)

[238] The RCMP should be required to pay only the difference between what Mr. Tahmourpour would have earned at a full-time job and what he would have earned as an RCMP officer from the date upon which the "grace period" for health and complaint-related time ends **until the date of this decision.** The RCMP is therefore, ordered to pay the difference between the average full-time

industrial wage in Canada for persons of his age and the salary that he would have received as an officer for this time period. (emphasis added) ...

Should there be an order for future wage loss?

[242] **There was no evidence that the discriminatory conduct caused any permanent damage to Mr. Tahmourpour's ability to work.** ... (emphasis added)

[243] Therefore, until Mr. Tahmourpour is provided with an offer to enter the training program, he should be paid the difference between the average full-time industrial wage in Canada for persons of his age and the salary that he would have received as an RCMP officer **up to the date of the training offer.** (emphasis added)

[244] Upon the extension of the offer to attend training, the RCMP's obligation to compensate Mr. Tahmourpour for the loss of the opportunity to complete training in 1999 is extinguished. No further payments shall be made under this head of compensation."

V. Reconsideration

[8] There is some inconsistency in the Tribunal's reasons regarding the time period for which Mr. Tahmourpour should be compensated. Initially, the Tribunal concludes that the RCMP should be required to pay Mr. Tahmourpour a "top-up" only from the end of the "grace period" until the date of her decision (see paragraph 238). The Tribunal then finds that the "top-up" should be paid until the RCMP extends a training offer to Mr. Tahmourpour (see paragraph 243). Finally, the Tribunal's remedial order (iv) requires the RCMP to pay a "top-up" until such time as Mr. Tahmourpour accepts or rejects an offer of re-enrollment in the RCMP training program.

[9] Bearing in mind the decisions of the Federal Court of Appeal in *Morgan* and *Chopra*, and having examined the judgment of the Tribunal on this issue, in particular the Tribunal's findings that Mr. Tahmourpour could have been gainfully employed from the time of the expiry of the "grace period" until the date of the Tribunal's decision, that there was no evidence that the discriminatory conduct caused any permanent damage to Mr. Tahmourpour's ability to work, and that Mr. Tahmourpour did not make sufficient efforts to minimize his losses, I am unable to

identify any facts, reasons or causal connection that would justify remedial order (iv) and the continuation of compensation for lost wages beyond the grace period of two years and twelve weeks.

Signed by

Wallace G. Craig
Tribunal Member

Ottawa, Ontario
December 13, 2010

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1151/3306

Style of Cause: Ali Tahmourpour v. Royal Canadian Mounted Police

Ruling of the Tribunal Dated: December 13, 2010

Appearances:

Paul Champ, for the Complainant

Giacomo Vigna and Samar Musallam, for the Canadian Human Rights Commission

Kathryn Hucal, for the Respondent