T.D. 2/00

Decision Rendered on March 2, 2000

Revised on June 13, 2000

CANADIAN HUMAN RIGHTS TRIBUNAL

R.S.C., 1985, c. H-6 (as amended)

BETWEEN

ROBERT CARTER

Complainant

and

CANADIAN HUMAN RIGHTS COMMISSION

Commission

and

CANADIAN ARMED FORCES

Respondent

–

DECISION

–

TRIBUNAL:

Pierre Deschamps, Chairperson

APPEARANCES:

Ian Fine Counsel for the Canadian Human Rights Commission

Brian Saunders Counsel for the Canadian Armed Forces

DATE AND PLACE OF HEARING:

October 12, 1999

Ottawa, Ontario

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I. INTRODUCTION

Initially, the Canadian Human Rights Tribunal, (the "Tribunal"), was asked to rule on three complaints filed under s. 7 of the *Canadian Human Rights Act* (the *CHRA*) by Frank Bernard, Michael Merrick, Robert Carter and one complaint filed under ss. 7 and 10 of the same Act by Antonio Tremblay, all against the Canadian Armed Forces (CAF). All of the complainants alleged that the Respondent had engaged in a discriminatory practice on the ground of age in a matter related to employment.

At the beginning of the hearing, the Tribunal was informed that the complaints filed by Mr. Merrick, Mr. Bernard and Mr. Tremblay were all at various stages of settlement. The Tribunal adjourned these complaints *sine die*. These three complaints were finally settled. The Tribunal is thus seized of only one complaint, that of Mr. Carter.

II. BACKGROUND

Mr. Carter was born on June 27, 1941. He joined the CAF on January 11, 1960. Under cross-examination, Mr. Carter acknowledged that, at the time he joined the armed forces, he was aware of the compulsory retirement requirement in force and that he did not use the grievance procedure to complain.

On October 2, 1968, Mr. Carter signed a Certificate of Election where he elected to have his retirement age determined in accordance with s. 15.31 of the *Queen's Regulations and Orders for the Canadian Forces*[(1)] (the "*Queen's Regulations*") (See Exhibit R-1, document entitled *Retirement Option - Men*, dated October 2, 1968).

On May 31, 1990, Mr. Carter received a letter from Commodore B. P. Moore (Exhibit R-4) with enclosed information. At the hearing, Mr. Carter stated that he did not recall receiving the information. He did, however, recall getting information about the services the CAF provides to assist people in making the transition from military life to civilian life. Mr. Carter acknowledged having taken advantage of several seminars.

Before leaving the CAF, Mr. Carter had, on two occasions, attempted to prolong his service with the military. On July 20, 1990, he first asked for a five-year extension, up to June 1996, as appears from a memorandum filed as Exhibit HR-4. The request was eventually rejected. On September 14, 1990, Mr. Carter sent another memorandum, filed as Exhibit HR-5, asking for a service extension again up to June 1996. He was then given a one-month extension. The record shows that Mr. Carter received a number of additional extensions, which totalled 11 months past his compulsory retirement age.

Mr. Carter was released from the CAF on May 27, 1992, after having reached the compulsory retirement age of 50. At the time of his release, Mr. Carter was employed as a Physical Education and Recreation Instructor (PERI) at CFB Kingston. He had attained the rank of Master Corporal.

For a period of time extending from June 1991 up to his release on May 27, 1992, Mr. Carter was on retirement leave. He did not have to report for duty while still receiving his full salary as Master Corporal. At the time of his release, on May 27, 1992, Mr. Carter received severance pay and started receiving his military pension. He also received unemployment insurance.

In September 1991, while still on retirement leave, Mr. Carter left Kingston where he was stationed and moved to Bridgewater, Nova Scotia, some 110/120 kilometres from Halifax, to be near his dying father, hospitalized at Camphill Hospital in Halifax. He chose Bridgewater instead of Halifax because the cost of living was lower in Bridgewater than Halifax.

Upon his arrival in Bridgewater in September 1991, Mr. Carter did not begin looking immediately for work. He waited until the month of November to start seeking work. He consulted the local business directory, sent résumés to prospective employers (Exhibit HR-1), visited the employment office 3 to 4 times a week and consulted the local newspaper. He was especially looking for a job as a driver. Exhibit HR-2 contains a list of prospective employers

Mr. Carter says he contacted. In cross-examination, Mr. Carter acknowledged that not all of the employers had been contacted during the fall of 1991.

The first job Mr. Carter landed, was with a taxi company where he worked for only one day as a taxi driver, being paid $20 for his work. During the summer of 1993, he worked as a baseball umpire. He was paid between $15 and $20 each game and earned $1,100 for the season. This income was not declared and is not reflected in his Income Tax Return. In cross-examination, Mr. Carter acknowledged that there was no urgency in 1992 for his job search because 1992 was a high-income year.

Mr. Carter started working on a regular basis in January 1995, first at the YMCA, for six months, then with the Canadian Corps of Commissionaires as a security guard. He stopped working in November 1998.

On August 14, 1992, a Canadian Human Rights Tribunal ("Tribunal") ruled in the case of *Martin et al. v. Canadian Armed Forces*[(2)] that ss. 15.17 and 15.31 of the *Queen's Regulations*, as then written, which prescribed compulsory retirement ages for members of the CAF, did not constitute regulations for the purposes of s. 15(1)(*b*) of the *CHRA* as they did not specifically state that they were passed for the purposes of s. 15(1)(*b*). The Tribunal also ruled that the CAF had not established a *bona fide* occupational requirement in respect of the compulsory retirement ages.

The CAF sought judicial review of the Tribunal's decision. Its judicial review application was dismissed by the Federal Court - Trial Division in January of 1994[(3)]. An appeal to the Federal Court of Appeal was dismissed on March 18, 1997[(4)].

On September 3, 1992, as a direct consequence of the Tribunal's ruling in *Martin*, the *Queen's Regulations* prescribing mandatory retirement were amended[(5)] to refer specifically to s. 15(1)(*b*) of the *CHRA*. Section 15.31(12) of the *Queen's Regulations*, was made to read as follows:

> (12) This article is a regulation made for the purposes of paragraph 15(*b*) of the *Canadian Human Rights Act*.

The amendment came into force on September 3, 1992.

III. THE COMPLAINT

In a letter dated February 16, 1993, addressed to FSNA (Federal Superannuates National Association) South Shore Branch (Exhibit HR-3), an organization that keeps retired military personnel updated as to their benefits, Mr. Carter, who is a member of that organization, inquired about the possibility of obtaining compensation for lost wages as a result of his release from the Armed Forces after having read a newspaper clipping which dealt with the *Martin* decision. The newspaper article, titled "Military's retirement policy ruled unfair", published in February 1993,

referred to nine service members who had initiated proceedings against the CAF based on age discrimination.

On May 12, 1993, Mr. Carter wrote to Brigadier General D. E. Munro (Exhibit R-2). The latter wrote back on June 10, 1993, (Exhibit R-3) providing him with the address of the Canadian Human Rights Commission (hereafter referred to as the "Commission"). On June 28, 1993, Mr. Carter firstcontacted the Commission in respect to his release.

On August 25, 1993, Mr. Carter filed a complaint with the Commission under the *CHRA* against the CAF alleging discrimination on the ground of age. In his complaint, Mr. Carter alleged that on or about May 27, 1992, the CAF was engaging or had engaged in a discriminatory practice at CFB Kingston, Ontario, on the ground of age in contravention of the *CHRA*, more specifically that the CAF discriminated against the complainant by refusing to continue to employ him because of his age(50), contrary to s. 7 of the *CHRA*.

By letter dated March 25, 1994, the Commission informed the CAF of its decision to extend the time limit within which Mr. Carter could file his complaint.

By letter dated September 22, 1994, the Commission informed the Canadian Forces of its decision to stand down Mr. Carter's complaint pending the final outcome in *Martin*.

By letter dated March 17, 1999, the Commission informed the CAF of its decision to refer Mr. Carter's complaint to the Tribunal for inquiry.

IV. ISSUES

Initially, the Commission and the Complainant were seeking compensation for lost wages and pension entitlement and an award for hurt feelings pursuant to s. 53(2)(*e*) of the *CHRA*.

At the outset, the Respondent acknowledged a *prima facie* case of discrimination against Mr. Carter following the decision of this Tribunal in *Martin* and admitted liability in that respect. During the hearing, both the Commission and the Respondent agreed that no proof had been adduced as to hurt feelings that Mr. Carter would have experienced.

The issues thus before the Tribunal are limited to an assessment of the complainant's damages for lost wages and the appropriate amount of compensation to which he is entitled under the *CHRA*.

The three main issues the Tribunal has to decide are the following:

(a) the appropriate period of time for which compensation should be awarded;

(b) the calculation of damages for lost wages;

(c) the appropriate period of interest.

V. ARGUMENTS

A. The appropriate period of time for which compensation should be awarded

The Commission and the Complainant contend that the appropriate period of time for which compensation should be awarded is that of 24 months following the date of Mr. Carter's release from the CAF, that is from May 27, 1992 to May 27, 1994, a period which is consistent with the principles adopted by the Federal Court of Appeal in *Canada (A.G.)* v. *Morgan*[(6)], and the finding of this Tribunal in *Martin*.

The Commission and the Complainant further posit that limiting the recovery period to that ending on September 3, 1992, as suggested by the Respondent, is tantamount to applying retroactively an amendment to the *Queen's Regulations* and is, therefore, contrary to law. According to the Commission and the Complainant, for a law or a regulation to have a retroactive effect, the legislator or regulator must have clearly mentioned that this was their intention.[(7)]

The Commission argues that the amendment of the *Queen's Regulations* on September 3, 1992, is irrelevant to the determination of the appropriate period of time for which compensation should be awarded and submits that the Respondent is liable for all damages which flow from the discriminatory practice, having regard for the limits of foreseeability as established by the Federal Court of Appeal in *Morgan*. The Commission thus invites the Tribunal to give no effect to the amendment made to the *Queen's Regulations* on September 3, 1992. To give any effect to the amendment would affect the Complainant's vested right to obtain compensation.

As for the Respondent, it contends that the period of damages for lost wages should be limited to the period of May 27, 1992, the date of Mr. Carter's release from the CAF, to September 2, 1992, the date preceding the date when the *Queen's Regulations* were amended to refer specifically to s. 15(1)(*b*) of the *CHRA*. The Respondent submits that on September 3, 1992, the discriminatory practice ended and it became legal to have mandatory retirement within the CAF. The Respondent argues that the date the amendment to the *Queen's Regulations* was passed and came into force should serve as a cut-off period.

According to the Respondent, the amendment to the *Queen's Regulations* does not have a retroactive effect. It was enacted so as to fill a loophole in the *Queen's Regulations* and to cure a technical defect, not to correct a discriminatory practice. Thus, it should not be held responsible or accountable for lost wages suffered beyond the curing date.

B. The calculation of damages for lost wages

The Commission argues that the Respondent is accountable for all damages suffered from the date of the discriminatory act and onward and that there can be no cut-off period. Furthermore,

the Commission and the Complainant contend that neither the Unemployment Insurance Benefits nor the severance pay received by Mr. Carter should be included in the calculation for determining wage loss. The only relevant deduction should be mitigating income.

The Commission and the Complainant further rely on the insurance exception to support their position with respect to the non inclusion of Unemployment Insurance Benefits and severance pay and, most significantly on the concession on the issue of severance pay made by the CAF in *Cranston* v. *Canada*[(8)]. They argue that the insurance exception developed in tort law applies to proceedings under the *CHRA*.

With respect to the wage loss issue, the Respondent argues that under s. 53(2) of the *CHRA*, the Tribunal has discretion with respect to the assessment of lost wages. It posits that the law clearly states that these losses must be a result of a discriminatory practice. There must be a causal connection between the discriminatory practice and the lost wages. Thus, it submits that, if the discriminatory practice stops, this should be considered as the cut-off point for any claim for lost wages. It further argues that the effect of the amendment to the *Queen's Regulations* which came into force on September 3, 1992, was to deny, from the date it came into effect and from that point onwards, a right to compensation for a discriminatory practice which arose in the past.

With respect to the issue of Unemployment Insurance Benefits, the Respondent accepts the Commission's view that unemployment insurance is not typically taken into account as mitigating income. As to the insurance exception, the Respondent argues that the fact that in *Cranston*, it was conceded that the insurance exception applied to both pension income and insurance income in human rights cases, is in no way binding on the Respondent in the present case. The Respondent is thus not prevented from raising the issue in a subsequent case. Furthermore, relying on the case of *Koeppel* v. *Canada (Dept. Of National Defence)*[(9)], the Respondent argues that the insurance exception does not apply in the field of human rights.

C. Interest

Relying on the *Martin* decision, the Commission and the Complainant contend that the interest on the amount payable for lost wages should run from May 27, 1994, that is from the date that the loss is calculated. Furthermore, they submit that, as was the case in *Martin*, the Bank of Canada prime rate should be used and not the Canada Savings Bond rate as was the case in *Cranston*.

As for the Respondent, it acknowledges that customarily tribunals do award interest for lost wages. However, it submits that, in the present case, there are grounds for the Tribunal to exercise its discretion not to award interest.

VI. ANALYSIS

In assessing damages for lost wages, the Tribunal's jurisdiction is governed by s. 53 of the *CHRA*, more specifically by par. (2)(*c*). Section 53(2)(*c*) of the *CHRA* provides:

> 53. (2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:
>
> c) that the person compensate the victim for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice.

Furthermore, the following principles, which were clearly established in *Morgan* and applied in *Martin* and in *Cranston* should guide the Tribunal:

> as to the **period of compensation**, the latter cannot be indefinite or
>
> open-ended and a cut-off point or date must be established;
>
> as to the **amount of compensation**, the compensation awarded must flow from the discriminatory practice. There must thus be a causal connection between the discriminatory practice and the amount of wages found to have been lost as a result of it; the principles developed in tort law are applicable ; thus consequences of a discriminatory practice which are only indirect or too remote must be excluded.

A. The appropriate period of time for which compensation should be awarded

In *Morgan*, the Federal Court of Appeal recognized that "some limits (must) be placed upon liability for the consequences flowing from an act, absent maybe bad faith"[(10)]. These limits will vary from one case to another. There is thus no set cut-off point. The time during which a causal connection exists is a matter to be determined by taking into account the circumstances of each case[(11)].

The establishment of a cut-off point is a difficult exercise. Tribunals are thus instructed to carefully analyze the circumstances of each case[(12)].

The peculiarity of the present case stems from the fact that, three months after a Tribunal had ruled in *Martin*, a decision which was subsequently upheld by the Federal Court of Appeal, that ss. 15.17 and 15.31 of the *Queen's Regulations* did not meet the requirement of s. 15 (1)(*b*) of the *CHRA* and that the Department of National Defence regulations did not satisfy the BFOR test under s. 15(1)(*a*), an Order in Council amended the *Queen's Regulations* making the setting of a compulsory retirement age legally valid.

Section 15 (1) (*b*) *CHRA* provides:

(1) It is not a discriminatory practice if

(b) employment of an individual is refused or terminated because that individual has not reached the minimum age, or has reached the maximum age, that applies to that employment by law or under regulations, which may be made by the Governor in Council for the purposes of this paragraph.

It is clear that, when a regulation falls within s. 15(1)(*b*) of the *CHRA*, there is no discriminatory practice if the regulation sets a retirement age[(13)]. In order for a regulation to fall within s. 15(1)(*b*) of the Act, the regulation has to specifically state that it was made for purposes of s. 15(1)(*b*) of the Act. On September 3rd, 1992, the Privy Council complied with this requirement and closed a loophole that existed in the *Queen's Regulations* which did not specifically refer to s. 15(1)(*b*) of the *CHRA*.

In argument, the Commission and the Complainant relied heavily on the *Martin* decision, inviting the Tribunal to follow *Martin* and to determine that the appropriate period of compensation in the present case was a period of 24 months. The Commission and the Complainant further submitted that the amendment of the *Queen's Regulations* on September 3, 1992 was irrelevant to the determination of the appropriate period of time for which compensation should be awarded.

The facts of the present case are not, notwithstanding the contrary view expressed by the Commission, identical to the *Martin* case. In the Martin case, not only was it found that the respondent, the Department of National Defence, had not met the requirement of s. 15(1)(*b*) of the Act but also that it had not met the BFOR test of s. 15(1)(*a*).

It is the view of this Tribunal that the fact that the respondent, by amending its *Queen's Regulations*, brought them in line with the requirement of s. 15(1)(*b*) of the *CHRA*, must be taken into consideration in the present case. The purpose of compensation is not to punish but to put the aggrieved party in the same position that it would have been in had it not been for the discriminatory practice.

The Tribunal espouses here the Respondent's view that, when the amendment to the *Queen's Regulations* came into force on September 3, 1992, this put an end to the discriminatory practice. There was no longer a causal or direct connection between the discriminatory practice and the compensation being sought by the complainant beyond that date. When a discriminatory practice ends, this fact should be taken into consideration in determining the period of compensation for which a person can claim damages for lost wages.

In the present case, the amendment made to the *Queen's Regulations* on September 3, 1992 constitutes an intervening factor which must be taken into consideration in assessing compensation for lost wages. The fact that the Respondent complied with the law should not have a neutral effect. It constitutes a *novus actus* which severs the link between the discriminatory practice and the damages the complainant claims for lost wages.

By adopting this view, the Tribunal is not applying retrospectively or retroactively a law or a regulation to a situation and depriving someone of a vested right, that is, the right to receive the equivalent of two years salary for lost wages. The facts of the present case are distinguishable from those found in *Angus* v. *Sun Alliance Insurance Company*[(14)]. In *Sun Alliance*, what was in issue was the right of the victim to recover damages and not the extent of the damages the victim was entitled to recover.

The only vested right that the complainant can invoke in the present case is the right to obtain compensation once it has been proven that he was the victim of a discriminatory practice, which is the case here. The amount of compensation the complainant is entitled to is a different matter. What is in issue here is not Mr. Carter's right to obtain compensation but the extent of the compensation he is entitled to for lost wages in view of all the circumstances of the case[(15)].

Furthermore, in determining if a complainant should be compensated for lost wages resulting from a discriminatory practice, the Tribunal must be guided by the principle that the complainant is entitled to be wholly compensated for lost wages as long as it is proven that the loss results from the discriminatory practice, that there is a causal connection between the discriminatory practice and the compensation claimed for lost wages[(16)]. Thus, the complainant "should be put back into the position he or she would have enjoyed had the wrong not occurred, to the extent that money is capable of doing so, subject to the injured party's obligation to take reasonable steps to mitigate his or her losses"[(17)].

Thus, the Commission cannot only claim that, in view of the decision rendered in *Martin*, the Complainant is entitled to claim two years salary for lost wages. Obtaining the equivalent of two years salary for lost wages is not a matter of law but a matter of fact. The compensation for lost wages must flow from the discriminatory practice[(18)].

In the past, different compensation periods have been applied: they range from two years (*Martin*) to three years (*Cranston*). In *Cranston*, the evidence showed that a three year transition period had originally been considered by the respondent to allow complainants to find alternate employment. The Tribunal found that it was therefore foreseeable that lost wages could be incurred to that point by the complainants and that a three year cap was appropriate in the circumstances. In *Martin*, the Tribunal felt that a standard period of two years from the date of the release seemed to be a reasonable measure of assessing damages for lost wages and more causally connected to the discriminatory practice in question[(19)].

In the present case, the evidence shows that, before his release, Mr. Carter made two attempts to have his stay in the armed forces extended beyond his compulsory release date. He, in fact, obtained two extensions of his service, which totalled 11 months. He was finally released on May 27, 1992. This goes to show that Mr. Carter wanted to remain in the Armed Forces beyond the prescribed retirement age.

Relying on the discretion it is vested with and in view of all the circumstances of the present case, the Tribunal is of the view that the proper compensation period in the present case is that which started on May 27, 1992 and ended on September 2, 1992.

B. The calculation of damages for lost wages

Having found that the proper compensation period is that which started on May 27, 1992, and ended on September 2, 1992, the Tribunal must now proceed to determine the amount of the compensation the complainant is entitled to for lost wages.

1. Preliminary matter

At the hearing, there was some confusion about Mr. Carter's 1992 Income Tax Return Form (Exhibit R-5). The confusion stems from the mention in the form of RRSP income that Mr. Carter would have received in 1992.

At first, Mr. Carter stated that the RRSP income represented his severance pay from the Armed Forces. He was, however, unable to explain what the *other income* represented, stating that he had received no other income during 1992. Under cross-examination, he stated that the other income possibly represented his severance pay from the Armed Forces. The Respondent agreed that the other income appeared to be the severance pay Mr. Carter had received upon his release from the Armed Forces. This left the mention of an RRSP on Mr. Carter's Income Tax Return unexplained. Upon re-examination, Mr. Carter stated that he never had an RRSP.

During the hearing, the complainant and the Commission undertook to provide the Respondent and the Tribunal with documentation from Mr. Carter's bank confirming an RRSP withdrawal in 1992 in the amount of $21,153. In addition, the parties agreed to provide the Tribunal with two additional actuarial scenarios which cover the period running from May 27, 1992 to May 27, 1994.

As to Mr. Carter's RRSP withdrawal in 1992, the Tribunal was advised, by a letter dated October 25, 1999, from the Commission that Mr. Carter's bank records were no longer available. The only document available pertaining to Mr. Carter's 1992 earnings was H & R Block's computerized Income Tax Return printout which was filed in evidence. After a careful review of the evidence, the Tribunal is of the view that Mr. Carter received no income during that taxation year other than that disclosed during the hearing.

2. Lost wages

During the hearing, the Tribunal was initially presented with three scenarios prepared by Mr. Daniel Hébert, an actuary employed at the Office of the Chief Actuary which is part of the Office of the Superintendent of Financial Institutions. Mr. Hébert is responsible for the CAF' superannuation account report. At the outset, both parties agreed that Mr. Hébert should be qualified as an expert. The tribunal thus proceeded to recognize Mr. Hébert as an expert.

Two of the scenarios presented by Mr. Hébert were prepared at the request of the Respondent (Exhibit R-6) and one at the request of the Commission and the Complainant (Exhibit HR-6). For each scenario, Mr. Hébert did a number of different calculations taking or not taking into account items such as severance pay and unemployment insurance.

For the purpose of this hearing, Mr. Hébert was asked to examine Mr. Carter's personal situation and to do a series of actuarial calculations. In a letter dated July 16, 1999, addressed to Captain D.S. Mackay, filed as Exhibit R-6, Mr. Hébert presents his assessment of Mr. Carter's potential loss of income and/or pension income caused by his mandatory retirement, as compared to the situation had Mr. Carter been able to remain employed in the CAF. The methodology adopted follows directly from Mr. Cohen's report, filed as Exhibit R-7, presented to the Commission in the *Martin* case.

In his report, dated July 16, 1999, Mr. Hébert uses two different valuation dates: one covers the period of May 27, 1992 to September 2,1992, the other, the period of May 27, 1992 to May 27, 1994. As for the May 27, 1992 to May 27, 1994 period, two scenarios are envisaged, one where the unemployment insurance benefits are taken into consideration and one where they are not. His assumptions are well described in his report, e.g. mortality rate and interest rate.

Following his July 16, 1999 report, Mr. Hébert was asked by the Respondent to perform two other sets of calculations. These are found in Exhibit R-8, dated September 30, 1999. In one scenario, the employment income after release is removed; in the other, unemployment insurance is removed as mitigating income.

Upon cross-examination, Mr. Hébert was provided by the Commission's lawyer with a third scenario which he had prepared for the Commission (Exhibit HR-6). This third scenario does not include pension income and severance pay but does include mitigating income, that being unemployment insurance. The Commission and the Complainant urge the Tribunal to accept its scenario with one change, that is the mitigating income, which was unemployment insurance benefits. According to the Commission and the Complainant, this amount should be taken out and in its place should be put in the sum of $1,120, which represents the income Mr. Carter earned during a two-year period.

At the hearing, Mr. Hébert acknowledged that the general actuarial principles include severance pay and pension payments. He further acknowledged that these principles were not in tandem with court rulings in these matters.

3. Mitigating factors

a. Employment Insurance

In *Bernard* v. *Waycobah Board of Education*[(20)], the Tribunal did not take Employment Insurance benefits into account and refrained from making any deduction from the award for lost wages, leaving it to the parties to determine who will remit the required amount to the Receiver General as required by law.

In the present case, since the Tribunal has adopted the scenario found in Exhibit R-6, covering the period extending from May 27, 1992 to September 2, 1992, there is no need for the Tribunal to concern itself with this issue, since Mr. Carter did not receive Unemployment Insurance until 1993.

b. Severance pay and pension income

In *Cranston*[(21)], the Tribunal came to the conclusion that pension income and severance pay should not be considered as earned income which can be set-off against the wages that would have been earned by the complainants. It applied the insurance exception. This Tribunal feels that there is no compelling reason to depart from this rule.

4. Relevant scenario

In view of the preceding findings, the Tribunal assesses Mr. Carter's damages for lost wages according to the following scenario:

RESULTS

(as at 2 September 1992)

a) Remains in the Canadian Forces Until 2 September 1992:

Present Value of: (dollars)

Salary 9,487

Severance Pay 0

Pension 373,359

Total 382,846

b) Left the Canadian Forces on 27 May 1992:

Present Value of (dollars)

Mitigating income 0 *

Pension Income 0

Severance Pay 0

Future Pension 367,076

Total 367,076

c) Loss:

Present Value of: (dollars)

a) minus b) 15,770

*** The mitigation income earned by Mr. Carter was earned after September 2, 1992 and should not be taken into consideration.**

C. Interest

Relying on the *Martin* decision[(22)], the Commission and the Complainant contend that the interest on the amount payable for lost wages should run from the date that the loss is calculated. Furthermore, they submit that, as was the case in *Martin*, the Bank of Canada prime rate should be used and not the Canada Savings Bond rate as was the case in *Cranston*[(23)]. In *Morgan*, Mr. Justice Marceau, with whom Mr. Justice Mahoney concurred, was of the opinion that the Canada Savings Bonds rate should be adopted[(24)]. For his part, in cross-examination, Mr. Hébert indicated that the interest rate used in his different scenarios was the Treasury Bill rate, stating however that there is not that big a difference between the Canada Saving Bonds rate and the Treasury Bill rate.

In all of the scenarios prepared by Mr. Hébert, simple interest was applied to the loss to bring it up to July 16, 1999.

The Tribunal sees no reasons why it should not follow the ruling in *Morgan*[(25)]. Furthermore, it sees no merit in the Respondent's submission that the Complainant is here exploiting a loophole in the law. The Complainant should not, in the present case, have to bear financially the delays in processing his complaint.

The interest will thus cover the period running from May 27, 1992, up to February 29, 2000. The Canada Saving Bonds rate will be used.

VII. ORDER

For the foregoing reasons, the Tribunal declares that the Complainant's rights under the *CHRA* have been contravened by the Respondent, and orders :

1. that the Respondent pay to the Complainant the sum of $15,770 for lost wages;

2. that the Respondent pay simple interest on the sum awarded pursuant to paragraph 1, such interest to start to run from May 27, 1992, in accordance

with the average Canada Saving Bonds rate for the period from May 27, 1992, to February 29, 2000.

Dated at Ottawa, Ontario, the 29th day of February, 2000.

Pierre Deschamps

Chairperson

1.[1] (1994 Revision), Volume 1 (Administrative), issued under the authority of the *National Defence Act* R.S.C., 1985, c. N-5

2. [2] (1992) 17 C.H.R.R. D/435 (CHRT)

3. [3] [1994] 2 F.C. 524

4. [4] (1997) 146 D.L.R. (4th) 380 (F.C.A.)

5. [5] (P.C. 1992-1991, 3 September, 1992)

6. [6] [1992] 2 F.C. 401 (C.A.)

7. [7] See, in that respect, *Gustavson Drilling (1964) Ltd* v. *M.N.R* [1977] 1 S.C.R. 271, at 279.

8. [8] (1997) 30 C.H.R.R. D/456 (CHRT)

9. [9] (1997) 32 C.H.R.R. D/107 (CHRT)

10. [10] at p. 415

11. [11] at p. 409

12. [12] at p. 416

13. [13] *Martin*, CHRT

14. [14] [1988] 2 S.C.R. 256.

15. [15] See, in this respect, *Morgan*, at 414

16. [16] *Morgan*, p. 401 at page 409

17. [17] *Morgan* at 415

18. [18] *Martin*, at D/463

20. [20] (1999) 36 C.H.R.R. D/51 (CHRT)

21. [21] at D/494

22. [22] CHRT, at D/463

23. [23] at D/502

24. [24] F.C.A. at p. 419

25. [25] F.C.A.