DECISION RENDERED ON JUNE 11, 1981
T.D. 7/81

CANADIAN HUMAN RIGHTS TRIBUNAL
BEFORE: A. Webster Macdonald, Jr.
BETWEEN:
RAWN PHALEN
Complainant
- and -
THE SOLICITOR GENERAL OF CANADA
Respondent

TRIBUNAL DECISION
APPEARANCES:
RUSSEL G. JURIANSZ
Counsel for Complainant and
Canadian Human Rights Commission

DAVID AKMAN
Counsel for Respondent

DATE OF HEARING: October 27, 1980
DATE OF WRITTEN ARGUMENT: January 7, 1981
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This matter was originally heard on October 27, 1980, at Vancouver, British Columbia.

This hearing concerned a complaint filed by Rawn Phalen, dated May 25, 1979, against the Solicitor General of Canada (Correctional Services Canada) ("the Respondent"), alleging that the Respondent had engaged in a discriminatory practice in the denial of the employment on the basis of physical handicap, contrary to sections 3 and 7 of the Canadian Human Rights Act. The complaint was filed as Exhibit C-2, in the within proceedings.

At the outset of the hearing, counsel agreed that a consent order would be prepared and filed, subject to the calling of certain evidence.

Following the hearing of evidence, a draft order was submitted with a final order to be submitted and filed in due

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course.
The parties caused such an order to be filed with the Tribunal Secretariat on November 13, 1980, a copy of which is annexed to this decision as Schedule "A".

This Tribunal hereby approves the order annexed as Schedule "A", to this decision and it shall form a part of the within decision.

On October 27, 1980, the Tribunal adjourned to await the decision of the Review Tribunal in the matter of Marilyn Butterill

et al and Via Rail Canada, Inc. ("the Via Rail Case") together with written argument from counsel with respect to the issue of damages.

The Review Tribunal decision was handed down on November 5, 1980 and counsels' written arguments were received on or about January 7, 1981.

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This tribunal must review the question of damages, if any, arising as a result of the approval of the consent order, which acknowledges that the Respondent has contravened the Canadian Human Rights Act.

FACTS:
The material filed and the evidence called disclosed the following:

(1) The Complainant suffered a blunt traumatic injury to his left eye at the age of four, which left him with no hope of achieving visual acuity of any better than 20/400 or thereabouts in his left eye.

(2) The Complainant had worked for two years at the Haney Correctional Center, in the British Columbia correctional system, initially as a security officer and then as a unit officer in a fifty-cell unit.

(3) The Complainant then moved to Alberta, where he was employed for three years in the Alberta correctional system, initially as a security officer, then as a camp director, then as a placement officer and finally as a classification officer.

(4) Between February 17, 1979 and March 10, 1979, the Complainant applied for the job in question, preferring to take a reduction in pay but hoping to be able to purchase a home for his family in an area where the cost of real estate was somewhat cheaper.

(5) As part of the interviewing procedure, the Complainant was advised on or about April 18, 1979 that he must pass a medical and was provided with a medical report form for completion by his doctor.

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6) The Complainant was of the view, after his personal physician had completed the report, that he had passed the medical, and as a result, he would obtain the position; he therefore gave notice to his then current employer and moved to Agassiz, British Columbia.

(7) On May 15, 1979, he was advised that he had failed to meet the required medical standards and as a result, the position would not be made available to him.

(8) The Complainant acknowledged that he had terminated his prior employment without confirmation that he had been accepted for the new position.

(9) The Complainant acknowledged that in his discussions with the recruiting officer, the matter of visual standards had arisen, but the Complainant indicated that he formed the impression that they were not a serious impediment to his application; the recruiting officer in his testimony indicated that while the eyesight question was discussed, he did not provide the standards to the Complainant.

(10) The Complainant indicated that prior to leaving Alberta, he had received some assurance from his employers that if he ever wished employment with them, he could have it, but this "offer" was not of an "official" nature.

(11) The Complainant was of the view that if he returned to Alberta, he would have to commence employment at base salary and he would be in a similar position as when he left Alberta with regard to the question of acquisition of a home, and as a result he sought employment in British Columbia.

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12) On July 15, 1980, the Complainant commenced employment with the British Columbia Correctional Services as a security officer, in Campbell River, British Columbia, which position he held at the hearing of this matter.

(13) The Complainant indicated that he had incurred various items of expense as a result of his search for work, and costs of commuting to his new place of employment, which costs totalled $757.12.

(14) The Complainant was advised by letter, dated October 20, 1980, that the Respondent was now prepared to accept the Complainant for the same position for which he had been rejected on May 15, 1979.

(15) The Complainant has supported himself in the following manner:

(a) Unemployment Insurance $ 3,375.00

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(b) ARDI Developments Ltd. 5,955.56
(c) British Columbia Government 5,320.00
in the period May 15, 1979
to October, 1980

(16) The Complainant testified that he attempted to have his rejection overturned and filed his complaint with the Human Rights Commission on May 25, 1979.

(17) The Complainant expressed that the rejection of his application caused him dismay, at the disruption in his home-life, embarrassment, at being out of work, and anger, at the length of time the matter took to be resolved.

As indicated at the outset, the Respondent admitted the the visual standards invoked to reject the Complainant's application constituted a discriminatory practice as envisaged by sections 3, 7 and 10 of the Canadian Human Rights Act.

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By virtue of the order upon consent filed herein, the Respondent has ceased to employ such discriminatory practice.

It is acknowledged by the parties that the question of damages as contemplated in section 41 of the Act must be considered:

This tribunal accepts that:
(1) the general principal of damages is to restore, as best as money can do, a party whose rights have been violated to the same position as though his rights had been observed. (See Victoria Laundry v. Neuman Industries 1949 2 K.B. 528 at 539.)

(2) in legislation of this type, there must be some form of penalty or damages, where violations occur, in that to simply make orders eliminating discriminatory practices, as they are discovered, does nothing to encourage employers to review their practices to ensure compliance with the spirit and intention of the Act. (See Albermarle Paper Company 422 U.S. 405.)

Section 41 of the Canadian Human Rights Act states as follows:

"(1) If, at the conclusion of its inquiry, a Tribunal finds that the complaint to which the inquiry relates is not substantiated, it shall dismiss the complaint.

"(2) If, at the conclusion of its inquiry, a Tribunal finds that the complaint to which the inquiry relates is substantiated, subject to subsection (4) and section 42, it may make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in such order any of the following

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terms that it considers appropriate:
"(a) that such person cease such discriminatory

practice and, in consultation with the Commission on the general purposes thereof, take measures,

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including adoption of a special program, plan or arrangement referred to in subsection 15(1) to prevent the same or a similar practice occurring in the future;

"(b) that such person make available to the victim of the discriminatory practice on the first reasonable occasion such rights, opportunitites or privileges as, in the opinion of the Tribunal, are being or were denied the victim as a result of the practice;

"(c) that such person compensate the victim, as the Tribunal may consider proper, for any or all of the wages that the victim was deprived of and any expenses incurred by the victim as a result of the discriminatory practice; and

"(d) that such person compensate the victim, as the Tribunal may consider proper, for any or all additional cost of obtaining alternative goods, services, facilities or accommodation and any expenses incurred by the victim as a result of the discriminatory practice."

With respect to section 41(2)(c), it would appear that the Complainant has sustained the following loss of wages and expenses:

(a) Wages:
Wages which would have ordinarily been paid by the Respondent in the period, May 22, 1979 to October 24, 1980 $24,772.65

LESS wages and payments received from the Unemployment Insurance Commission 14,650.56

$10,122.09
PLUS amount of repayment to the Unemployment Insurance Commission 3,375.00

$13,479.09
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(b) Expenses:
(i) Moving 262.12
(ii) Commuting 495.00
$ 757.12
The Review Tribunal in the Via Rail case, has considered this section as follows:

"Although the languange used is permissive, it is our opinion that the award of compensation should be regarded as normal in every case where such losses have been incurred. The reason for the permissive language, in our opinion, is to cover situations in which no actual loss has been sustained, or in which some special circumstance would render an award of compensation inappropriate. Since Parliament has indicated the desirability of compensating financial losses resulting from discriminatory practices, it seems only reasonable, in view of the philosophy underlying the legislation, that this should be the norm, applicable except where some good reason for not awarding compensation can be proved. Would it not be ludicrous to interpret a statute designed to eliminate unjustifiable discrimination in Canada as entitling the victims of discrimination to monetary recompense only where they can persuade a Tribunal to make a purely discretionary (and therefore at least potentially discriminatory) ruling in their favour? It is our view that, as in the case of other rights under the Act, those who have suffered financially as a result of discrimination should be entitled to relief as a matter of course, unless compelling reasons for denying compensation can be established by the opposing parties."

What are the compelling reasons, if any, for denying compensation in this case?

The Respondent urges:
(1) the Complainant placed himself in a situation whereby the aforementioned losses were occassioned in that he left his former position before his position with the Respondent was confirmed; and

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(2) the Complainant acted unreasonably in not returning to Alberta to his former employment, (a higher paying position), when he was refused employment with the Respondent.

In short, the Respondent urges that the Complainant is the author of his own wrong and that he has not acted reasonably in mitigating his loss.

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While it is acknowledged that the Complainant may well have acted in a premature fashion in giving notice and leaving his

former employment before having his new employment confirmed, the effective cause of the loss was the policy or practice employed by the Respondent. Had the Respondent been following their present policy, the premature action of the Complainant would have not been of any consequence, in that he would have been hired. Indeed, it is difficult to say that the Complainant acted in an unreasonable fashion in assuming he had completed all requirements given his five-year background in correctional work, the fact that he had taken and passed medical examinations including the one he took with his family doctor for this position, and his discussions with the Respondent's employee wherein the employee was unable to advise the Complainant of the specific standards with respect to visual acuity. His actions may have been premature but they were not unreasonable; the effective cause of the loss was the practice of the Respondent.

With respect to the question of mitigation, the Complainant has clearly mitigated his loss. He has given evidence of his search for employment, and the earnings he eventually obtained from same.

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The only question is whether or not he should have returned to Alberta to his former employment.

The Complainant had testified that he had moved his young family to British Columbia with a view to obtaining a home in a less costly real estate market. He had also testified that while two directors had indicated he could have a position again if he chose to do so, same was not guaranteed. Further, he indicated that if he took such a position, he would have to commence same at his initial position.

In view of his reasons for coming to British Columbia, and the situation with respect to his former employment, it would not seem reasonable to expect the Complainant to return to Alberta, thereby uprooting his family once again. As a result, his efforts at mitigation are found to be acceptable, and this submission is rejected as well.

This Tribunal finds that there are no compelling reasons as contemplated in the Via Rail decision for refusing compensation. In the result, the Complainant is awarded a total of $13,479.09 for wages, and $757.12 for expenses, all pursuant to section 41(2)(c) of the Act.

With respect to the claim for $4,000.00 pursuant to section 41(3), it is clear that the Respondent has not engaged in a discriminatory practice willfully or recklessly.

However, the Complainant has suffered in respect of feelings or self-respect as a result of this practice.

According to the Review Tribunal in the Via Rail case, this head of damage is not an "extraordinary remedy calling for

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unusual circumstances to justify its award".
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Where there has been suffering in respect of feelings or self-respect, then the Tribunal must attempt to determine an appropriate monetary equivalent for the suffering, not a token amount.

The Respondent argues with respect to this head of damage, i.e., 41(3)(b):

(1) that the Complainant was only before the Tribunal to collect damages, not employment, as he had rejected the job offer of the Respondent;

(2) that there was no evidence of suffering in the area of self-respect or feelings; and

(3) that a rejection based upon a failure to meet visual standards does not occasion damage to feelings or self-respect.

If the Complainant were before the Tribunal to obtain damages, not employment, such is his right, and if a discriminatory practice had indeed occurred, a Tribunal must consider this claim. In this case, the Complainant did put evidence before the Tribunal of suffering as described pursuant to this head of damage.

It would appear that as a result of this incident, a man has been placed in a position where he is forced to seek assistance (Unemployment Insurance) for the first time in eight or nine years; in his efforts to mitigate his losses he is forced to separate from his wife and two young children, and clearly the well being of his family unit was in a state of some uncertainty.

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It is indeed understandable that the Complainant felt anger and embarrassment as a result of this incident, and it would seem to be no less understandable because the discriminatory practice was based upon a physical handicap relating to visual standards.

As a result, in all the circumstances of this case, there will be an award of $2,500.00 pursuant to section 41(3)(b) of the Act.

It is hoped that these awards reflect compensation, both pecuniary and nonpecuniary, for the Complainant and reflects the view that where there are contraventions of this Act, that the

awards provide some initiative for prospective and not solely retroactive change.

DATED at the City of Calgary, in the Province of Alberta, this 24th day of May, 1981.

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A. Webster Macdonald, Jr.,
Chairperson

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SCHEDULE "A"
ORDER ON CONSENT
WHEREAS the parties to these proceedings have agreed to the following facts

(1) The pre-employment medical standard applicable to living unit personnel of the respondent prescribed visual acuity requirements of uncorrected vision to be et least 6/18 in each eye, examined separately, or 6/12 in the better eye and 6/30 in the other. Corrected vision to be 6/6 in the better eye and 6/9 in the other.

(2) The complainant was successful in Competition #79-V-CPS-15 for the position of Living Unit Officer at Kent Institution, Agassiz, B.C., but was not appointed to the position because he failed to meet the visual acuity standard in paragraph #1. Had he been hired, the complainant would have commenced employment on May 22, 1979 and he would have earned $24,772.65 to October 24, 1980. During this period he has had an income of $14,650.56, which includes U.I.C. benefits in the amount of $3,375.00.

(3) The complainant’s eyesight is as described in the medical reports of Doctors Young, Pilley, and Cambon which have been filed as exhibits.

(4) The respondent’s visual acuity standard for the Living Unit Officer is not a bona fide occupational requirement within the meaning of s. 14(1) of the Canadian Human Rights Act, in that it is not reasonably necessary for the performance of the duties of the job, and the application of the current visual acuity standard constitutes a discriminatory practice under sections 7 and 10 of the Canadian Human Rights Act.

AND WHEREAS the parties, by their counsel, have consented to the making of this Order by the Tribunal;

AND WHEREAS the Tribunal, having heard the testimony of Dr. Pilley, Dr. Marriott, Mr. Robert Bell and Mr. Rawn Phalen, having examined the exhibits filed, and having heard what was alleged by counsel, is satisfied that this Order on Consent is appropriate;

NOW THEREFORE IT IS ORDERED THAT:
(1) The respondent cease applying the current pre-employment visual acuity standard.

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(2) The respondent shall complete the review (that it has already commenced) of its pre-employment visual acuity

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standards and shall make diligent efforts to prescribe a new standard by no later than July 1, 1981. During the interim the respondent will apply the following as its pre-employment visual acuity standard for Living Unit Officer:

(i) Uncorrected vision of both eyes together shall be not worse than 6/60; and

(ii) Vision (either unaided or corrected by the individual's usual distance refractive correction) in the eye used to aim a rifle shall be not worse than 6/9 and there shall be an unrestricted field of vision in that eye when measured by confrontation.

DATED at OTTAWA, this 4th day of November, 1980.

David Akman,
Counsel for the Respondent.

Russell Juriansz,
Counsel for the Complainant.