T.D. 7/90
Decision Rendered on June 14, 1990.

THE CANADIAN HUMAN RIGHTS ACT
S.C.1976-7, c. 33, as amended

HUMAN RIGHTS TRIBUNAL

BETWEEN:

ROSANN CASHIN

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

CANADIAN BROADCASTING CORPORATION

Respondent

DECISION OF THE TRIBUNAL

HEARD BEFORE: Susan M. Ashley

Appearances: Ronald Pink and Kimberley Turner,
Counsel for the Complainant

Ian Kelly, Counsel for the Respondent

M. Cheryl Crane, Counsel for the Commission

DATE AND LOCATION: November 9-10, 1989
Halifax, Nova Scotia

This matter concerns an award of damages for lost wages arising from my decision in Cashin v. CBC rendered on December 5, 1985 (reported at 7 C.H.R.R. D/3203). In that decision, I found that the CBC had discriminated

against Rosann Cashin on the grounds of marital status in that they failed to re-employ her on account of her husband's position. At the time of the discriminatory act, the complainant was a Writer/Broadcaster in the Resources Unit at CBC Radio in St. John's, Newfoundland; her husband was a well-known fisheries activist who had just accepted an appointment to the Board of Petro Canada. It was this appointment that caused the CBC to terminate its relationship with Ms. Cashin. The respondent employer attempted to justify its failure to re-employ her on the grounds of a "bona fide occupational requirement" ('bfor') under (then) section 14 of the Canadian Human Rights Act. In their view, "perceived objectivity" was a 'bfor' that the complainant could not satisfy. After a lengthy hearing, I concluded that the respondent's conduct constituted a violation of the Act which was not saved by the 'bfor' exception. I ordered that the complainant be offered her old job or a similar position as soon as possible, that she be paid the sum of $2500 to compensate in respect of "feelings or self-respect" under section 41(3)(b), and left it to the parties to agree on the amount of lost wages under section 41(2)(c) for which she should be compensated.

More than four years have passed since the reinstatement order and the damage award were made. It was not until January

1989 that an offer of reinstatement was made to Ms. Cashin, and needless to say, the parties were not able to agree on the duration or quantum of compensation for lost wages. My 1985 decision has been appealed to the highest level: to a Review Tribunal (overturning my decision), the Federal Court of Appeal (restoring my decision), and finally to the Supreme Court of Canada, which denied leave to appeal in December 1988. I have now been asked by the parties to settle the matter of compensation for lost wages, as there is serious disagreement between them, primarily on the issue of the duration of the award.

The chronology of events is important in considering the duration of the damage award, for several reasons. There is a period of two years (June 1982 - July 1984) during which Ms. Cashin was forced to take the Canadian Human Rights Commission to the Federal Court of Canada, to challenge their initial decision not to allow the complaint to proceed. In July, 1984, the Court ordered the Commission to appoint a Tribunal. There is a question as to whether the respondent should be required to compensate the complainant for lost wages during this period. The respondent also questions whether they should be required to pay damages for lost wages for the period during which the matter was under appeal. The most significant issue in this respect however, is whether the respondent should compensate for wages lost from the date of the failure to re-employ to the date of the offer of reinstatement, as is suggested by the complainant and the Commission,

or whether they must only pay lost wages for a "reasonably foreseeable" period of time, as is suggested by the respondent.

The relevant dates are as follows:

September 11, 1981	failure to re-employ
October 15, 1981	complaint filed
June 23, 1982	complaint rejected by Commission
July 7, 1983	application to Federal Court of Appeal for judicial review of Commission's decision
April, 1984	hearing in Federal Court
July 6, 1984	Tribunal appointed
November 1984-May 1985	Tribunal hearings
December 4, 1985	Tribunal decision, awarding reinstatement and damages to complainant
April 25, 1986	Review Tribunal appointed
January 29, 1987	Review Tribunal decision, overturning Tribunal
February 2, 1987	Appeal by complainant to Federal Court of Appeal
May 13, 1988	Federal Court of Appeal decision overturning Review Tribunal and restoring Tribunal decision in complainant's favour
September, 1988	leave to appeal to Supreme Court of Canada sought by respondent
December 15, 1988	Supreme Court of Canada denied leave to appeal
January 11, 1989	CBC offer of employment to complainant.

Evidence and Argument

Hearings on the matter now under consideration were held on November 9 and 10, 1989 in Halifax. Counsel for the complainant called two witnesses: the complainant herself, and Mr. Philip Quinlan, a chartered accountant. The respondent also called two witnesses: Mr. Donald Fleming, currently Regional Controller for CBC Newfoundland, and Mr. Bruce Chafe, a chartered accountant.

The Commission did not call or examine witnesses. Oral submissions were then made by counsel for the complainant, the Commission, and the respondent.

The main issues in dispute between the parties are as follows:

1. Should the respondent CBC compensate the complainant for actual lost wages resulting from the discriminatory act, subject to mitigation, from the date of the failure to re-employ in September 1981 to the date of the offer of reinstatement in January 1989, or should there be some limit or "cap" on the amount of wages paid based on "reasonable foreseeability" or some other factors;

2. On what basis should the complainant's "miscellaneous income", i.e. income earned from work on projects other than her primary assignment, be projected for the relevant period;

3. Should the complainant be compensated for the contribution the employer would have made on her behalf to the Canada Pension Plan, for any or all of the relevant period;

4. Should interest be calculated on all or part of the amount of lost wages awarded and if so, at what rate;

5. How should the tax consequences of the award be handled.

The views of the financial witnesses for the complainant and respondent differ substantially on some of these matters.

1: Duration of the award

The complainant and the Commission agree that the employer, having breached the Act, must be responsible for the actual wages lost resulting from the discriminatory act, less mitigation. This interpretation is based on the wording of the Canadian Human Rights Act, the broad interpretation of the Act given by the Supreme Court of Canada in several key cases, and several similar

human rights cases. The complainant should be returned to the position she would have been in had it not been for the discriminatory act of the employer. Counsel for the complainant noted that damages in these cases are different from those in wrongful dismissal cases, where the measure of damages is generally wages lost during the period of reasonable notice. This

view has now been accepted by the Ontario Court of Appeal in Re Piazza et al. v. Airport Taxicab (Maltonj Assoc. et al (1989), 69 O.R. (2d)281.

The respondent, on the other hand, suggests that several limits should be placed on the measure of lost wages for which the employer must be responsible, relating to a) the "reasonable foreseeability" test, b) the 1982-4 time period during which the Commission refused to proceed with the complaint, and c) the consequences of pursuing their rights of appeal.

a) "Reasonable Foreseeability": The respondent argues in favour of placing a "cap" on the amount to be awarded for lost wages based on reasonable foreseeability, and relies on a number of provincial human rights cases as well as the Federal Court of Appeal decision in Attorney General of Canada v. McAlpine and the Canadian Human Rights Commission (rendered May 18, 1989). He suggests that McAlpine approves the use of the foreseeability test articulated by the Ontario board in Torres v. Royalty Kitchenware Ltd. and Guercio, [1982] 3 C.H.R.R. D/858 at D/872.

Counsel for the respondent suggests further that the fact that there was a reinstatement order in the Cashin case was not relevant, since the employer cannot know at the time of the discriminatory act whether a Tribunal will order reinstatement since that is within the Tribunal's discretion.

Counsel for the complainant and the Commission agreed with the respondent that the cases on this issue are in a state of flux, but that is the extent of their agreement. The tort test of "reasonable foreseeability" should be used in human rights cases with great circumspection, they felt, particularly where there has been a reinstatement order. They suggest that where an employer has been ordered to reinstate an employee, it should be reasonably foreseeable that the employer will be liable for the wages lost until the date of reinstatement. By its failure to reinstate in 1985, the employer has taken upon itself the responsibility for the refusal to comply.

They distinguish McAlpine on two grounds: that the issue in that case was foreseeability in relation to the payment of unemployment insurance benefits rather than lost wages, and that the McAlpine court based its analysis of the application of the foreseeability test on an incorrect interpretation of Torres.

Counsel for the respondent takes no clear position on what a "reasonably foreseeable" period of time for assessment of damages should be in the context of this case, choosing instead to raise a variety of options used in the cases.

b) Role of the Commission: The respondent's view is that it is unfair to penalize the employer for the sins of the Commission in not proceeding with the complaint in 1982-4. (It was noted that the CBC was not involved in the section 28 application to the Federal Court in 1984.) The Commission's position on this question is that it is not appropriate to reduce the award because of the Commission's conduct, as that would result in the complainant - the innocent party - suffering. The process of appointing the Tribunal, though unfortunate in hindsight, flowed from the discriminatory act, for which the employer must now be responsible. To make the complainant bear the consequences of the Commission's failure to act would be inconsistent with the Supreme Court of Canada's direction to look at the results or effects of discriminatory acts, rather than placing blame.

c) Right of Appeal: The respondent argues that it should not be penalized for pursuing legitimate rights of appeal from 1985 through 1989, noting that the now famous Bhinder case, where the Tribunal originally found discriminatory treatment and ordered reinstatement, was eventually overturned by the Supreme Court of Canada. The validity of "perceived objectivity" as a 'bfor' is a significant issue for the CBC, and they should not be required to compensate the complainant for attempting to have this important question determined at the highest level. The complainant argues, on the other hand, that had the respondent honoured the reinstatement order in 1985 and paid the lost wages at that time, it could have avoided a substantial amount of damages.

2: Miscellaneous income

Two approaches have been presented regarding the calculation of "miscellaneous income". The complainant suggested that a figure of 10% of basic fees should be accepted for 1981, with a 2% increase each year ending at 24% for 1988. The 10% figure was arrived at by averaging Ms. Cashin's actual miscellaneous income for 1979-September 1981. Two reasons were given for using this type of calculation. First, the 2% increase per year recognizes that the amounts for basic fees or salary that are being used in these calculations merely represent the minimum permitted by the ACTRA agreements over the years, and that had Ms. Cashin not been discriminated against by the employer, she could have negotiated a higher basic rate, as other employees had done. Second, Ms. Cashin was a senior, experienced and well-recognized journalist who would have been expected to increase her miscellaneous earnings over the years.

The respondent agreed that the amount of miscellaneous income earned depended on a variety of factors, including the energy and ability of the journalist, the resources of the station, and network requirements. He suggested two ways to project miscellaneous income: either by using the 10% figure representing Ms. Cashin's actual average over the years she worked at CBC, or using the average percentage of miscellaneous income to basic fee of other CBC employees in the relevant period (as outlined in Exhibit R-16).

The Commission made no submission on this issue.

3. Canada Pension Plan contributions.

The complainant argues that, since retroactive payments cannot be made to the Canada Pension Plan, Ms. Cashin has been denied the opportunity to contribute to the plan because of the respondent's actions. At the same time, the employer has had the benefit of this money that should have been paid into the plan on her behalf. These contributions (not made) should be returned to the complainant.

The respondent has not included the CPP amounts in its calculations. It argues that there is no evidence that the complainant's actual pension benefits on retirement would suffer, because of the manner in which benefits are calculated; further, the McAlpine case, which held that unemployment insurance benefits are statutory benefits coming from government and not "wages" to be compensated, would apply in this case to Canada Pension Plan contributions.

The Commission took no position on this issue.

4: Interest

All three parties agreed that there is no clear direction in the cases as to whether interest should be awarded and if it is awarded, at what rate and over what period of time. The cases are simply all over the map. Counsel for the complainant suggested that, if we accept that the complainant should be put back in the position she would have been in if not for the discriminatory act, so much as money can do so, this would include the calculation of interest. The cost of borrowing should be the applicable

rate. He noted that use of the prime rate had been upheld by the Federal

Court of Appeal in CBC v. Broadcast Council of Canadian Union of Public Employees et al., [1987] 3 F.C.515. The complainant noted also that the cases were not clear on the period of entitlement to interest: some said it should accrue as of the date of appointment of the Tribunal, while others suggested it was part of the loss and should accumulate from the date the loss began.

The Commission agreed with the latter approach, that interest should be seen as part and parcel of the loss, flowing directly from section 41(2)(c). The rate should be that which is common in society at the time of the entitlement. The respondent took the view that since the Act used the word "wages", this should preclude the award of interest. In the alternative, he suggested various methods of calculation, such as prime, 5% (based on the federal Interest Act), or 9% (based on the Newfoundland Judgment Interest Act). He noted that the complainant had not actually borrowed money to replace that which she was entitled to receive from the CBC, suggesting that using the prime lending rate might be inappropriate in this case.

5: Tax implications

There was no significant dispute between the complainant and respondent that any award made to Ms. Cashin for lost wages need be adjusted to accommodate income tax. There is disagreement, however, on the amount of income tax that will be payable. Mr. Quinlan, the accountant for the complainant, felt that the award

would incur tax in the normal way, so that a fairly substantial "gross-up" would be required to put Ms. Cashin in an acceptable after-tax position. Mr. Chafe, accountant for the respondent, had a different interpretation of the income tax implications of a lost wages award.

In Mr. Chafe's view, the tax treatment of Ms. Cashin's award depends on the nature of the payment and its components, and the date of dismissal. If the payment is seen as damages and not as something due from a contract or an agreement, then it is not included in income under the Income Tax Act. Since the loss of office occurred in September 1981, it would be classified as a termination payment under then s.56(1)(a)(viii) which covered payments for terminations occurring between November 17, 1978 and November 12, 1981. In his view, the payment to Ms. Cashin is not a retiring allowance under s.56(1)(a)(ii) since it occurred before November 12, 1981. It follows from this, in Mr. Chafe's opinion, that the only tax payable would be the lesser of any amount received on termination that is not required under other sections to be reported, and 50% of that person's 12 months salary before termination (s.248(1)).

Decision

Jurisdiction to award compensation for loss of wages is contained in (then) section 41(2)(c) of the Canadian Human Rights Act, as follows:

> 41.(2) If, at the conclusion of its inquiry, a Tribunal finds that the complaint to which
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> 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 terms that it considers appropriate:
> ... (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. ...

It is clear from the wording of the section that a Tribunal may, in its discretion, compensate a complainant for "any and all" wages lost as the result of a discriminatory act. If further direction on interpretation is necessary apart from that provided by the Act itself, one might look to the generous interpretation placed on human rights legislation by the Supreme Court of Canada in such cases as O'Malley v. Simpsons-Sears (1986) 7 C.H.R.R. D/3102 (S.C.C.), Action Travail des Femmes v. CN, [1987] 1 S.C.R. 1114 and Robichaud v. Brennan, [1987] 2 S.C.R. 84. In those cases, the court emphasized that human rights legislation is "quasi-constitutional" in nature, and should be interpreted in the broadest possible way in order to give effect to the individual rights protected by the legislation. In all three of these cases, the highest court has used the purpose section of the Act as an interpretive guide. Section 2 of the Canadian Human Rights Act states:

> 'The purpose of this Act is to extend the present laws in Canada to give effect ... to the principle that every individual should have an equal opportunity with other individuals to make for herself the life that ... she is able and wishes to have, consistent
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> with ... her duties and objectives as a member of society, without being hindered and/or prevented from doing so by discriminatory practices based on ... marital status ...

Particular attention should be paid to the words of Chief Justice Dickson in Action Travail des Femmes v. CN at page 1134, where he says that:

> "Human rights legislation is intended to give rise, amongst other things, to individual rights of vital importance, rights capable of enforcement, in the final analysis, in a court of law. I recognize that in the construction of such legislation the words of the Act must be given their plain meaning but it is equally important that the rights enunciated be given their full recognition and effect. We should not search for ways and means to minimize these rights and to enfeeble their proper impact."

Even if the wording of section 41(2)(c) were not clear, and I suggest that it is, the sentiment expressed by the Chief Justice makes clear that the wording should be interpreted sufficiently broadly to accomplish the purposes of the Act. In my view, a Tribunal clearly has the power to issue a "make whole" order. The issue of whether "any or all" of the lost wages are awarded is in the discretion of the Tribunal, "as the Tribunal may consider proper".

Are there factors in this case which suggest that the complainant should not be compensated for "any or all" of her lost wages?

(i) FORESEEABILITY: The argument that a cap should be placed on compensation for lost wages based on what would be reasonably foreseeable at the time of the breach is a significant potential

roadblock to the complainant's case. There are several decisions which adopt the foreseeability test, most of them arising under the Ontario Human Rights Code. There is one case at the Federal Court of Appeal which has approved this approach, and that is Attorney General of Canada v. McAlpine.

The complainant in that case was discriminated against on the basis of pregnancy. She was made an offer of employment, which offer was revoked when the employer learned that she was pregnant. The Tribunal held that this conduct violated the Canadian Human Rights Act, and ordered the employer to compensate the complainant for loss of maternity benefits that would have been payable under the Unemployment Insurance Act if not for the discriminatory act. The matter was appealed to the Federal Court of Appeal on two grounds, that section 41(2) does not allow an award for foregone unemployment insurance benefits, only "wages", and even if it did, it should not have been done as it was not a reasonably foreseeable consequence of the discrimination. On the first point, the court held that, even accepting that

unemployment insurance benefits can be said to be a consequence of the employment contract (which the court did not), these benefits could not be considered to be "wages" within the meaning of the Act, but are rather a form of insurance paid when wages are not received. Noting that a decision on that issue was sufficient to dispose of the section 28 application, the court went on to consider the "reasonable foreseeability" argument. The court

accepted that while the applicable principle in such cases was "restitutio in integrum",

> "The proper test must also take into account remoteness or reasonable foreseeability whether the action is one of contract or tort. Only such part of the actual loss resulting as is reasonably foreseeable is recoverable".

The court relied on the reasoning in the Torres case, at D/872, where the Board under the Ontario Code stated:

> "What is the durational extent to which general damages should be ordered in effectuating compensation? It seems to me, at first impression, that these principles are appropriate to awarding general damages under the Code. That is, there is a clear cut-off point in awarding general damages by way of compensation. I would express this as saying that a respondent is only liable for general damages for a reasonable period of time, a reasonable period of time being one that could be said to be reasonably foreseeable in the circumstances by a reasonable person if he had directed his mind to it. That is, what is the duration of time in which mitigation could reasonably be expected to have been achieved even though it could not be in the particular situation given the unique, exceptional situation of the aggrieved complainant".

This quote from Torres was in turn quoted in DeJager v. Department of National Defence, under the Canadian legislation ([1987] 8 C.H.R.R. D/3963 at 3966-7).

However, if one looks at the decision in Torres, it appears, as suggested by counsel for the complainant, that the quote from Torres, as applied in DeJager and McAlpine was taken out of context. At paragraph 7748, the Board in Torres says:

> "For example, hypothetically, an employee is fired from his employment because of a prohibited ground under the Code and he

simply cannot find any work elsewhere given his particular circumstances. That is, he has

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acted reasonably in trying to mitigate, but has not succeeded. Hypothesize further that it is not appropriate or practical in the circumstances to order reinstatement of the employee to his former position. In such a situation, what is the durational extent to which general damages should be ordered in effectuating compensation? ... "

The Board then goes on to finish the quote cited earlier suggesting that in such situations, only "reasonably foreseeable" damages should be compensated. Counsel for the complainant argues that all of the Torres rationale of foreseeability is based on a hypothetical situation which excludes the situation in Cashin, where a reinstatement order is in effect. He suggests that the context of the quote from Torres used in McAlpine suggests that the McAlpine case did not contemplate a situation where reinstatement existed as a remedy. I find this reasoning persuasive.

While she agreed with the complainant on this point, counsel for the Commission distinguishes McAlpine on other grounds. She argues that in that case, remoteness and foreseeability were appropriately at issue because while loss of unemployment insurance benefits might have been a direct result of the refusal to hire, it was a remote result. But it is important that the court was talking about unemployment insurance benefits and not lost wages. Wages are the direct responsibility of the employer, and not separate from the employer/employee relationship in the way that a statutory benefit such as unemployment insurance is separate from the employer's responsibility to pay wages.

The merits of McAlpine aside, it seems on its face to be inappropriate to apply the tort test of foreseeability to damages

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for discriminatory acts. The Supreme Court of Canada has stated in Bhaduria v. Board of Governors of Seneca College (1981), 124 D.L.R. (3d) 193 that there is no tort of discrimination. Moreover, that court has also expressed the view that one should not try to fit human rights remedies into inappropriate legal doctrines. For example, when asked in Robichaud v. Brennan to decide whether an employer was liable (vicariously or otherwise) for sexual harassment of an employee by a supervisor, the Supreme Court

looked first at the purpose of the Act and the wording and intent of the remedies provided by the Act, avoiding the problem of determining whether the employer's liability for discriminatory acts of its employees fell under the tort doctrine of vicarious liability or some other rubric. In the words of Laforest, J at p.89:

> " ... considerable attention was given to various theories supporting the liability of an employer for the acts of its employees, such as vicarious liability in tort and strict liability in the quasi-criminal context. As Thurlow, C.J. notes, however, the place to start is necessarily with the Act, the words of which like those of other statutes, must be read in light of its nature and purpose."

He goes on to state that the purpose of the Act is essentially to remove discrimination rather than punish anti-social behaviour. He then says, at p.91:

> "...The interpretive principles I have set forth seem to me to be largely dispositive of this case. To begin with, they dispose of the argument that one should have reference to theories of employer liability developed in the context of criminal or quasi-criminal conduct. Those are completely beside the point as being fault-oriented, for, as we

> saw, the central purpose of a human rights Act is remedial - to eradicate antisocial conditions without regard to the motives or intention of those who cause them".

In concluding that the Act contemplated the imposition of liability on employers for all acts of their employees, Laforest J. said that:

> "..It is unnecessary to attach any label to this type of remedy; it is purely statutory."

This method of interpretation supports my view that the wording of the Act itself in section 41(2), interpreted in light of the purpose of the legislation and the guidance provided by the Supreme Court of Canada, is sufficiently clear to dispose of the argument that the test of reasonable foreseeability should be considered to be a limit on the damages for lost wages that can be awarded. The section itself imposes its own limits, which are that the Tribunal may order that compensation for "any or all" lost wages be awarded, "as the Tribunal may consider proper".

(ii) ROLE OF THE COMMISSION: The argument of the parties on this issue has been stated earlier. It is clear that, had the Commission acted on the complaint in 1981, the two year period during which the complainant was forced to ask the Federal Court of Appeal to overturn the Commission's decision not to proceed (which the court did) might have been avoided. In theory, if the Commission had acted properly in this regard, the Tribunal would have been appointed and its decision rendered a full two years earlier. The employer's argument that they should not be responsible, in financial terms, for delays caused by the Commission,

is persuasive. On the other hand, it would be unfair to the complainant to exclude this period of time from any calculation, because of events which were out of her control.

The Commission should bear some responsibility for its actions in this regard, as these actions had serious implications for both the complainant and respondent. However, a Tribunal's power to award damages under the Act is limited to making "an order against the person found to be engaging or to have engaged in the discriminatory practice ..." (section 41(2)).

It should be noted also, as was done in my 1985 decision, that because of the position of the Commission in initially refusing to proceed with this complaint, Ms. Cashin was forced to retain her own counsel at her own expense, rather than having her complaint carried by the Commission. I urged the Commission to pay her legal fees, having no authority to order it under the Act, but am advised by counsel for the Commission that this was not done. The Commission's position on this matter has, in my view, been punitive and contrary to the aims of the legislation that it is attempting to enforce.

While I am somewhat sympathetic to the employer's position on this issue as the delay was as much out of its control as the complainant's, I am opposed to the principle of excluding this time period from the calculations, for to do so would be to place the responsibility on the shoulders of the innocent party - the complainant. The two year period leading up to the appointment of the Tribunal was a direct consequence of the discriminatory act

of the respondent. Moreover, delays in litigation should not be beyond the

contemplation of any parties to a dispute so as to affect the duration of the compensation award.

(iii) PURSUING RIGHTS TO APPEAL: Obviously, each party has a right to pursue their claim through the courts. The question is whether the respondent should have to compensate the complainant for lost wages during this period.

The respondent did not comply with the reinstatement order or damage award in 1985. I refer specifically to section 41(2)(b) of the Act, which states:

> 41. (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 terms that it considers appropriate:
> ...
> (b) that such person make available to the victim of the discriminatory practice on the first reasonable occasion such rights, opportunities or privileges as, in the opinion of the Tribunal, are being or were denied the victim as a result of the practice; ... (my emphasis)

It should be noted also that, even though the Review Tribunal overturned the original decision, they urged the CBC to rehire Ms. Cashin at that time. At paragraph 29295:

> "We cannot let this matter pass without stating that in view of Ms. Cashin's acknowledged journalistic) abilities the CBC would be well advised to offer her a commensurate position in an area of broadcasting which would not offend its policies. There was some conflict in the evidence as to whether such an offer had in fact been made at the time of

> removal from her position with the Resources Unit. Whether that was in fact the case or not, we recommend that the CBC consider making an appropriate offer to the complainant at this time".

This was not done. Nor was an offer made after the Federal Court of Appeal restored the Tribunal decision in May 1988. It was not until after the Supreme Court of Canada had denied leave to appeal in December 1988 that an

offer of reinstatement was made, the $2500 for "respect and feelings" was paid and the negotiations for lost wages were begun.

The employer, in fact, could have mitigated its own damages by offering Ms. Cashin a position at any time after 1985.

There is no question that the primary issue in the Cashin case, i.e. whether the standard of "perceived objectivity" is a bona fide occupational requirement under (then) section 14 of the Act, is a very significant one for the CBC and for the media generally and that it is a question with such potentially serious repercussions for the employers that one can understand pursuing it to the highest level. However, there is evidence that Ms. Cashin's husband's appointment to the Board of Petro Canada expired in the summer of 1984. Arguably, the employer could have rehired her at any time after his appointment expired, if in fact that was the justification for their reluctance to have her on air.

(iv) DISCRETION OF THE TRIBUNAL: A Tribunal may make an award for "any or all" lost wages, as it "considers proper". The discretion of the Tribunal must be exercised reasonably, but I am

not convinced that any of the factors that I have just described are sufficient in principle to limit damages in this case. I am satisfied that the complainant was, in fact, unable to find a job in the media during the relevant period. The CBC would not hire her and the private media in Newfoundland is a fairly limited market. Moreover, she had reason to believe she would be rehired by the CBC. In fact, at the only point in this lengthy process where a court or tribunal found against her, even then, the Review Tribunal strongly urged the CBC to rehire her, despite the fact that they had found in favour of the CBC.

It is likely that a journalist with Ms. Cashin's experience and level of recognition would have remained in the broadcast media. It is also likely that she would have progressed from a Writer/Broadcaster to a more highly paid and more prestigious position. By postponing its offer of employment until January 1989, Ms. Cashin has suffered not only lost wages but loss of career advancement and opportunities within the CBC.

Her reinstatement offer was for a job which was virtually identical to the one she was forced to leave in September 1981. That letter, dated January 11, 1989 and signed by Jim Byrd, Regional Director, says

"Dear Ms. Cashin:

In implementation of the Human Rights Tribunal decision, the Corporation is now in a position to make you the following offer of employment.

We are offering you an ACTRA Writer/Broadcaster contract. You will be assigned to our Radio daily information programme area in St. John's. Your responsibilities will place primary emphasis on all aspects of the Energy sector in the

province -- (coverage of offshore oil development, hydro development and other aspects of the energy field). Secondary responsibilities will include attention to the mining, farming and forestry sectors of the economy as well as other assignments as determined by your producers.

Your contract will be effective Monday, January 23rd, 1989 or such earlier date as may be convenient to you. In accordance with the current CBC-ACTRA Collective Agreement the contract will be for a term of one year.

Your weekly-fee as established by the collective agreement will be $590.50 plus 5 1/2 % payment in lieu of staff benefits (subject to collective bargaining presently in progress). ...

There is no question in my mind that, had it not been for the failure to re-employ in 1981, Ms. Cashin would have been in a much senior position in January 1989 than the one she was offered by the CBC.

Evidence at the Tribunal hearing established that Writer/Broadcaster contracts such as that under which Ms. Cashin was employed were generally for a 13-week period, and were renewed routinely and almost automatically, even though these contracts did provide for a 30-day notice period. Ms. Cashin had been working at the CBC in St. John's for approximately five years prior to September, 1981. While I have held that the Act permits a "make whole" order, I have also noted that the Tribunal may make such award for "any or all" lost wages, "as the Tribunal considers proper".

There are two distinct periods of time to be considered in arriving at the lost wage award - before and after the December 1985 Tribunal decision. Had I not left to the parties the calculation of lost wages in my 1985

decision, I believe I would then have awarded eighteen month's wages for that period.

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The period of time following the 1985 decision is more difficult. I have already noted that the employer was ignoring a reinstatement order for Ms. Cashin throughout most of the 1985-88 period. I have also noted that Mr. Cashin's appointment to Petro Canada had expired in 1984, and that the Review Tribunal, while reversing the Tribunal decision, strongly urged the CBC to rehire Ms. Cashin. In these circumstances and considering the factors I have outlined, I consider it appropriate that Ms. Cashin be awarded the equivalent of two years wages for the December 1985 to December 1988 period, for a total award of three and one half year's lost wages. I am convinced that this represents the proper balance between the interests of the complainant and the respondent in this lengthy and difficult matter.

Having concluded that the complainant should be compensated for lost wages for a three and one half year period from the refusal to reemploy, I will turn to the other specific matters still in dispute.

MISCELLANEOUS INCOME: I have set out the arguments for the complainant and respondent. I conclude that using a 10% calculation for miscellaneous income over and above the basic fees is a fair way to project this amount, balancing Ms. Cashin's actual miscellaneous earnings in the 1979-81 period, the actual miscellaneous earnings of her colleagues in the 1981-8 period (Exhibit R-16), and Ms. Cashin's experience and potential.

CANADA PENSION PLAN: I agree with the respondent that Canada Pension Plan contributions made by the employer on behalf of an

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employee are payments required by statute and are not "wages" that are recoverable under the Act. This interpretation is consistent with the approach taken to unemployment insurance benefits in McAlpine.

INTEREST: Should interest be awarded, and if so, at what rate and for what period? The Act makes no specific reference to the payment of interest; section 41(2)(c) refers to "wages that the victim was deprived of ... as a result of the discriminatory practice". Is this language broad enough to contemplate interest?

A similar question was considered in CBC v. Broadcast Council of Canadian Union of Public Employees et al. [1987] 3 F.C. 515 (F.C.A.). In that case, the Canada Labour Relations Board awarded interest on lost wages. The Federal Court of Appeal upheld the award of interest, and the use of the prime rate. The power of the Board to make awards at that time was contained in section 96.3 of the Canada Labour Code, R.S.C. 1970. c. L-1, giving the Board the power to require an employer to

> (c) pay to any employee or former employee affected by that contravention compensation not exceeding such sum as, in the opinion of the Board, is equivalent to the remuneration that would, but for that contravention, have been paid by the employer to that employee or former employee;

At page 521 of that decision, McGuigan J. stated:

> "Whether the sum is categorized as interest or as part of the award, I can find no fault with such an interpretation on a plain meaning basis."

If anything, the provisions of the Canada Labour Code are more restrictive than those of the Canadian Human Rights Act. Notwithstanding that the Code qualified the payment of "compensation"

by the phrase "equivalent to the remuneration", the Court approved the award of interest by the Board.

McGuigan J. at page 519 approved the principle quoted in Snively and Can-Am Services and United Truck Rental (1985), 12 C.L.R.B.R. (NS)97 as follows:

> 'The issue of whether interest is an addition to or part of a loss has been dealt with in The Westcoast Transmission Co. Ltd. and Majestic Wiley Contractors Ltd. ... a judgement subsequent to the Alan Miller decision. At p.101 of that decision, Seaton J.A. says: 'The interest factor would not be interest upon the loss or cost of adjustment, but part of the loss or cost of adjustment, calculate at the time 31 handing down the award." (emphasis included in the Federal Court of Appeal text).

A complainant can only 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..." (Butterill F.C.A. at 841) if the compensation referred to in section 41(2)(c) is full compensation including interest on the amounts the

complainant should have been paid during the actual loss period. Interest should be awarded to fully compensate a complainant for money for which she was out of pocket as a result of the discriminatory act of the employer.

There are a number of cases which have awarded interest at the prime rate (Scott v. Foster Wheeler Ltd. (1987), 8 C.H.R.R. D/4179 (Ont. S.C.), C.B.C. v. Broadcast Council of Canadian Union of Public Employees et al [1987], 3 F.C. 515 (F.C.A.), Boucher v. Correctional Service of Canada (1988), 9 C.H.R.R. D/4910 (Tribunal), Chapdelaine et al v. Air Canada (1987), 9 C.H.R.R. 4449

(Tribunal). I conclude that the prevailing prime rate is the appropriate measure of interest, payable from the date the loss was incurred.

The Respondent's Exhibit R-19 is a computer printout which calculates Ms. Cashin's income loss based on a variety of variables, such as duration of the award, calculation of miscellaneous income, and interest rate. With the award extending from September 11, 1981 for a three and one half year period, using a miscellaneous income figure calculated at 10%, and with interest at prime (with interest calculated on the interest), Exhibit 19 indicates that the appropriate lost wage amount is $169,195.00. This amount must be adjusted by calculating the amount set aside for the retirement plan at 5% of gross rather than net fees, and excluding this amount from the interest calculation. The evidence was unclear on whether amounts earned by the complainant as director's fees for 1982-3 were included as income; all of these fees and other earnings in the three and one half year period must be deducted. The employer is also responsible to remit from the award the amount of any unemployment insurance benefits Ms. Cashin received during the relevant period. The amount referred to above, obtained from Exhibit R-19, is thus not exact. Having set out my decision on each issue in dispute, I leave to the parties the detailed calculation which will result.

I direct the parties to seek a ruling on the taxation issue. Whether tax is or is not payable is a question that can be decided only by Revenue Canada. The end result of my decision is

that Ms. Cashin should be in the same after-tax position she would have been in had she been employed by the CBC for the three and one half year period.

I do not think it proper to order the employer to pay Ms. Cashin's legal fees, although I appear to be empowered to do so under (then) section 41(2)(c). I once again strongly urge the Canadian Human Rights Commission to pay the complainant's legal fees throughout these proceedings. This award has not taken into account the fact that she will probably be paying legal fees off the top, nor should it. It is unconscionable for the Commission to force the complainant to pay legal fees from the damage award, fees that should have been incurred by the Commission throughout, had it been doing its job properly.

While it would be preferable to fix the amount of the award to the penny, that is not possible without more detailed information. I leave to the parties a determination of the specific amount of the award calculated on the factors listed above. This amount shall be paid to the complainant immediately. Upon the parties obtaining a ruling from Revenue Canada on the tax implications of the award, the respondent shall forward that amount forthwith to the complainant to be paid to Revenue Canada. I retain jurisdiction over this award in the unlikely event that the parties are still unable to agree on the detailed calculation.

DATED this 18th day of May, 1990

Susan M. Ashley,
Tribunal