

TD 5/ 87

Decision rendered on February 20, 1987

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

DAVID J. DeJAGER Complainant

- and

DEPARTMENT OF NATIONAL DEFENCE Respondent

BEFORE: M. Wendy Robson (Chairman)

Paul J. D. Mullin

A. Wayne MacKay

DECISION

This Tribunal reconvened in Halifax, Nova Scotia on the 16th of October, 1986 for the purpose of hearing evidence on the question of damages and remedies following the Tribunal's earlier finding of discrimination under S. 7 of The Canadian Human Rights Act.

The Tribunal may make an order under Section 41(2) and Section 41(3) of the Act and the relevant portions of those sections are as follows:

"S. 41(2) If, at the conclusion of its inquiry, a Tribunal finds that the complaint to which the inquiry relates is substantiated, ... 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:

(c) that such person compensate the victim, as the Tribunal may consider proper, to 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:"

"S. 41(3) In addition to any order that the Tribunal may make pursuant to subsection (2), if the Tribunal finds that:

(a) a person is engaging or has engaged in a discriminatory practice willfully or recklessly, or

(b) the victim of the discriminatory practice has suffered in respect of feelings or self-respect as a result of the practice,

the Tribunal may order the person to pay such compensation to the victim, not exceeding Five Thousand Dollars (\$ 5,000.00), as the Tribunal may determine."

SPECIAL COMPENSATION

The only witness called in the resumed hearing was the complainant, Mr. DeJager. He was asked whether his release from the forces had had impact on his personal life and he indicated that it had caused arguments with his wife, (transcript page 13) and went on to say,

"No source of income coming in at the time, just hers, and a lot of her bosses were razzing me because they thought I was just hanging onto her because she was the one bringing in all the money and we got into quite a few fights over that, and just our personal relationship. We had more fights while I was out than we did when I was in."

It is the opinion of the Tribunal that the complainant did suffer in respect of feelings and self-respect and accordingly orders that the Department of National Defence pay to him the sum of Three Hundred Dollars (\$ 300.00) pursuant to Section 41(3) of the Act.

REINSTATEMENT

Both counsel for the Human Rights Commission and the Department of National Defence substantially agreed on the matter of reinstatement and the Tribunal acquiesces in that agreement.

Therefore the Tribunal orders, pursuant to Section 41(2)(b), that: The Complainant be reinstated in the Canadian Armed Forces for a period of three years with the position of Acting Corporal, Provisional provided he meets the present medical requirements without reference to the medical condition of asthma that has been the subject matter of this hearing.

COMPENSATION

The question of compensation for lost wages under Section 41(2)(c) elicited considerable argument from both counsel.

Counsel for the Commission argued that the complainant should be compensated for lost wages from the date of release from the armed forces until the date of hearing less any other income earned.

Counsel for the Department of National Defence argued that the complainant should only be compensated for a reasonable period of time which he suggested was two and a half years being equivalent to the length of his service or, alternatively, he proposed the outside date for the calculation of compensation was May 7, 1985, the date on which the complainant's enrollment with the armed forces would have ended. Mr. Saunders also raised the matter of mitigation of damages.

In *Rosanna Torres v. Royalty Kitchenware and Francesco Guerico*, reported on CHRR vol. 3, paragraphs 7597- 7770, Peter Cumming, chairman of the board of inquiry under the Ontario Human Rights Code, reviewed extensively the question of mitigation.

At paragraph 7735, he says: "... the presumption in human rights cases ought to be that complainants, if their complaint has been justified, are entitled to compensation for their financial losses. In the absence of special circumstances, only the duty upon complainants to mitigate their losses should offset the amount of damages awarded." and further at paragraph 7742: "Thus, the duty to mitigate is a duty to act reasonably. It will be a question of fact in each case as to whether a complainant made reasonable efforts to reduce his or her losses."

In the case before us there was evidence of Mr. DeJager's efforts to obtain employment in some cases successfully and in others, not so successfully. He also attempted a retraining program which was not completed but evidently through no fault of his own. We consider the attempts he made to mitigate his circumstances were adequate.

The problem remaining is to assess a reasonable length of time for compensation. Considerable case law was cited by counsel.

Via Rail Canada Inc. v. Marilyn Butterill, David J. Forman and I. Cyril Wolfman and Canadian Human Rights Commission reported in [1982] 2 F. C. at page 830 is a decision of the Federal Court of Appeal and counsel for the Commission referred it to us for the proposition that the compensation should be for a period from the date of Mr. DeJager's release to the date of the hearing of this Tribunal. We do not accept that interpretation of the case. The thrust of the case is that the complainants did not have to provide proof of ability to pass the eye examination in order to be eligible for compensation. The fact of an unlawful discriminatory practice gives rise to compensation for wages lost that one otherwise would have earned.

In *Brian Villeneuve v. Bell Canada* (CHRR, vol. 6, paragraphs 24097- 24156), the Tribunal did grant compensation for lost wages from the date of release to the date of hearing but without giving reasons for establishing that period of time.

A similar result was obtained in *Clement Labelle and Denis Claveau v. Air Canada* (CHRR, vol. 4, paragraphs 11367- 11393). Again, no reasons were given and it would appear to have resulted from the agreement of counsel. More precise guidance can be found in the *Torres* case previously cited in which Professor Cumming reviews extensively the caselaw and the considerations upon which awards of compensation are made. At paragraph 7748, he says:

"... there is a cut- off point in awarding general damages by way of compensation. I would express this by 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 test was applied in *B. L. Mears et al v. Ontario Hydro et al* (CHRR vol. 5, paragraphs 16507- 16613) and in *Cindy Cameron v. Nel- Gor Castle Nursing Home and Merlene Nelson* (CHRR vol. 5. paragraphs 18284- 18566)

In the case before us we were persuaded that the reasonably foreseeable time applicable is the end of Mr. DeJager's five year enrollment, namely May 7, 1985.

We therefore order that compensation be payable as follows:

1. For the period of September 11, 1982 up to and including the 30th of June, 1983, a private's pay less severance pay received, and
2. For the period of July 1, 1983 to and including May 7, 1985, a corporal's pay less other salaried income received. The total compensation subject to usual income tax, standard deductions and to U. I. C. repayment is \$40,943.56.

There shall be no interest payable on the sum owing.

Dated at Peterborough, Ontario this 31st day of December, 1986.

(signed) M. Wendy Robson (Chairman)

(signed) A. Wayne MacKay

(signed) Paul J. D. Mullin