T.D. 10/90
Decision rendered on September 14, 1990

THE CANADIAN HUMAN RIGHTS ACT
R.S.C., 1985, c. H-6 (as amended)

HUMAN RIGHTS REVIEW TRIBUNAL

IN THE MATTER of the appeal filed by the Canadian Armed Forces dated April 12, 1989 against the Human Rights Tribunal Decision pronounced on March 17, 1989; Richard Morgan and Canadian Armed Forces.

BETWEEN:

CANADIAN ARMED FORCES
Appellant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

RICHARD RODERICK MORGAN

Respondent

BEFORE: NORMAN FETTERLY - Chairman
BARRY SHEPPARD - Member
RONALD LOU-POY - Member

DECISION OF THE REVIEW TRIBUNAL

Patricia Lindsey Peck
Counsel for the Canadian
Human Rights Commission

Mary Vincent
Counsel for Richard Morgan

Brian Saunders
Counsel for the Appellant

Date and Place of Hearing:
September 26th, 1989,
Victoria, B.C.

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INTRODUCTION

There are important and interesting questions arising out of an Appeal from the Decision of Lyman R. Robinson, Q.C. in the Matter of a Complaint by Richard Roderick Morgan against the Canadian Armed Forces. In that matter the Canadian Armed Forces admitted that it discriminated against Mr. Morgan for failing to consider his application for re-enrolment in the armed forces in a proper fashion, namely by failing to obtain at that time in 1980 an up-to-date psychiatric evaluation on the Respondent Morgan.

Based on that admission the Tribunal's function was limited to determining:

1) Whether what was denied the Respondent was a position with the Armed Forces versus an opportunity for a position with the Armed Forces;

2) Depending on the answer to the first question, what constitutes proper compensation for lost wages;

3) Re-instatement of the Respondent in the Canadian Armed Forces;

4) The amount of compensation if any, for injury to feelings of self-respect; and finally,

5) What interest, if any, should be awarded on the amount of compensation for wages and for injury to feelings.

The Tribunal's decision can be summarized as follows:

1) What was lost was a position with the Armed Forces not an opportunity for a position;

2) Compensation in the sum of $97,179.63 for loss of wages adjusted to run from July 1st, 1980 to December 31st, 1986 according to scenario "C" in Exhibit R-3. This amount was arrived at after deducting sums for failure to completely mitigate and for wages earned during the relevant period.

3) Compensation for hurt feelings and loss of self-respect in the sum of $1,000.00;

4) Interest, firstly, on the amount for hurt feelings and loss of self-respect from May 1st, 1980 until December 1st, 1986 employing a multiplier of 2.37 which was extracted from Law Reform Commission Report on the Court Order Interest Act resulting in an award of $2,370.00 which includes an interest component of $1,370.00; and, secondly, on the amount awarded for compensation for loss of wages, namely $97,179.63 with an interest component calculated on the net annual wage loss employing varying multipliers for a period of time resulting in an interest component of $29,381.29 for a grand total of

$126,560.92 which is the Respondent's net wage lost inclusive of an interest component.

5) Amounts awarded to the Respondent are subject to reimbursement of U.I.C. benefits received by him in the

sum of $9,137.00 with a direction made to reimburse the Ministry of Social Services and Housing of British Columbia, the sum of $17,248.44 plus an interest component of $14,350.70 making a total of $31,599.14 to be reimbursed to the Minister.

6) Re-enrolment of Mr. Morgan on the first available occasion in any of the occupations of infantryman, cook, vehicle technician or mobile support equipment operator without requiring an updated medical examination. There is also provision which would, in effect, permit the Respondent to reject an offer of infantryman and select any one of the three remaining occupations required to be offered to him by the Canadian Armed Forces.

The Tribunal embarked on a rather complicated and detailed series of calculations which resulted in awards for compensation for wages and for interest taking into account factors which the chairman considered appropriate in respect of the duty to mitigate.

The Appellant appealed the Tribunal's decision on the following grounds:

1. The Tribunal erred in finding that the Respondent Morgan was denied a position of employment with the Appellant and in ordering the Appellant to compensate the said Respondent for loss of wages.

2. The Tribunal erred in ordering the Appellant to re-enroll the Respondent Morgan in a military occupation.

3. Alternatively, the Tribunal erred in its determination of the amount of compensation to be awarded to the Respondent Morgan for loss of wages by:

(a) failing to take properly into account the Respondent Morgan's duty to mitigate;

(b) failing to take into account the contingency that the Respondent Morgan would not have been enrolled with the Appellant;

(c) ordering compensation for a period of time was unreasonable in all the circumstances.

4. The Tribunal erred in ordering interest on the amounts which it awarded the Respondent Morgan as compensation for loss of wages and for hurt feelings and loss of self-respect.

5. Alternatively, the Tribunal erred in the manner in which it calculated the interest payable on the amounts awarded to the Respondent Morgan as compensation for loss of wages and for hurt feelings and loss of self-respect.

The Review Tribunal after considering the issues at length was able to agree on all but one of them arising from the grounds set out in the Notice of Appeal. Reasons for the Tribunal's decisions on those issues on which there was unanimity will follow and reasons for the majority decision and the reasons for

the minority decision of the Chairman on the one issue on which the Review Tribunal was unable to agree will appear last. Those issues on which the Review Tribunal reached unanimous agreement are as follows:

1) The Respondent, Morgan, was denied a position with the Armed Forces rather than an opportunity for a position thus entitling him to compensation for loss of wages.

The first ground of Appeal fails and the decision of the Chairman is upheld.

2) The Respondent, Morgan, is entitled to be re-enrolled at the first available opportunity in any of the three

positions with the Armed Forces that he applied for, namely; cook, vehicle technician or mobile support equipment operator. He is not entitled to be re-enrolled in the position of infantryman and the Appeal therefore succeeds in part on this ground. The award of the Chairman is to be varied accordingly.

3) The Respondent, Morgan, is entitled to interest on the amount awarded for compensation but no interest on the amount awarded for hurt feelings and loss of self-respect. Based on the evidence the amount awarded for hurt feelings and loss of self-respect should be increased from $1,000.00 to $2,500.00 to reflect the Respondent's circumstances. The Appeal succeeds in part as to interest on the amount awarded for hurt feelings and loss of self-respect. The Chairman's decision is varied accordingly.

4) The rate of interest should be in accordance with the applicable rate of interest from time to time of Canada Savings Bonds on the amount outstanding from time to time during the period of compensation. The Appeal succeeds in part and the decision of the Chairman is varied accordingly.

In addition to the matters referred to above there were collateral findings by the Chairman as to reimbursement of Unemployment Insurance benefits, Social Assistance benefits and Income Tax. For the reasons which follow the Review Tribunal agreed that it should not order reimbursement of Unemployment Insurance or Social insurance benefits but does direct that the Appellant withhold amounts required to be withheld and remit it on account of income Tax and to pay said amounts to the Receiver General of Canada, the balance to go to the complainant.

With regard to compensation under the third ground of Appeal, the Review Tribunal as indicated earlier was unable to reach a consensus as to the period of time that compensation should run. Accordingly under item (c) of the third ground of Appeal the majority held that subject to an adjustment of some twenty-seven months for delay in filing his complaint, the Respondent was entitled to compensation for a period encompassing the date of the

discriminatory act, April 15th, 1980, to the date of the hearing, January 26th, 1989. As well, the majority held that the

Respondent was entitled to future compensation for a period running from the date of the Hearing in January 1989 until re-instatement is achieved. The Appeal therefore fails under item (c) of paragraph 3 of the Notice of Appeal and the initial Tribunal's award is varied accordingly.

The Chairman was of the opinion that compensation should run from the date when the Respondent would have begun to earn income as found by the initial Tribunal, namely July 1st, 1980 until December 31st,1983.

With regard to item (b) of the third ground of Appeal the Review Tribunal is of the opinion the Chairman's findings that what was denied was a job and not an opportunity for a job necessarily rejects the allegation of failing to take into account the contingency the Respondent would not have been enrolled with the Armed Forces. Accordingly this ground of Appeal fails and the decision of the Chairman is upheld.

With regard to the duty to mitigate - (a) of paragraph 3 the Review Tribunal was of the opinion, for reasons which follow, that the Chairman failed to apply correct principles in deducting specific amounts in two particular instances where the Respondent left his employment shortly after his rejection by the Armed Forces. Compensation would be adjusted and increased, in the view of the Chairman, in the amounts so deducted. The majority

hold the view that while the initial Tribunal erred in making deductions for failure to mitigate it was not relevant to their decision because the incidents occurred prior to the commencement of the compensable period as they determined it.

As to the duration of time during which compensation should be awarded to the Respondent, the Review Tribunal held differing views. The majority holding that where re-instatement is ordered it, of itself, determines the duration of the compensable period of time, while the minority view held that the principle of

reasonable forseeability applies in quantifying the amount of compensation to be awarded.

JOB VS OPPORTUNITY FOR A JOB

The question of whether the Respondent was denied a position of employment or the opportunity to compete for a position with the Appellant is a question of fact. Section 56 (3) of the Canadian Human Rights Act provides for an appeal ".....on any question of law or fact or mixed law and fact".

The findings of the Tribunal on the question of whether it was a job lost or an opportunity for a job which was lost must stand unless there was..... "some palpable and overiding error" on the part of the Tribunal as per MacGuigan J. of the Federal Court of Appeal in Rosann Cashin vs. Canadian Broadcasting Corporation (1988), 9 C.H.R.R. D/5343 at paragraph 40106. In the same case reference is made to Bonnie Robichaud and the Canadian Human Rights Commission vs. Her Majesty the Queen, as represented by the Treasury Board, [1987] 25 S.C.R., 1984 in which Thurlow J., writing for the majority of the court stated:

"It is no doubt true that in a situation of this kind where no evidence in addition to that before the Human Rights Tribunal was before the Review Tribunal the latter should, in accordance with the well-known principles adopted and applied in Stein et al vs. The Ship "Kathy K", [1976] 2 S.C.R. 802; 62 D.L.R. (3D) 1, accord due respect for the view of the facts taken by the Human

Rights Tribunal and, in particular, for the advantage of assessing credibility which he had in having seen and heard the witnesses. But, that said, it was still the duty of the Review Tribunal to examine the evidence and substitute its views of the facts if persuaded that there was palpable or manifest error in the view taken by the Human Rights Tribunal".

This then requires a close scrutiny of the facts in order to determine whether there was "palpable or manifest error" by the Tribunal in its view of the evidence which led the learned Chairman to conclude what was lost here was a job and not an opportunity for a job. The determination of this issue will affect the other findings of the Chairman as to reinstatement and the amount of compensation to be awarded for lost wages.

The factual background is summarized accurately in the Award of the Tribunal and there is no need to repeat in detail what the Chairman has written with regard to the prior history and activities leading up to the Respondent's application for re-enrolment with the Canadian Armed Forces. Suffice it to say that the Respondent was discharged for medical reasons in 1978 following a serious off duty motor vehicle accident which occurred in 1975 and left him unconscious for eight weeks and unable to perform his usual duties for a considerably longer

period of time. When the Respondent was released by the armed forces he held the rank of infantryman Pay Level Four and, but for his release, expected to soon achieve the rank of Corporal.

The application to re-enlist with Canadian Armed Forces is dated June 12th, 1979 and it was submitted for processing to the recruiting offices of the Appellant in Victoria. The Respondent's application to re-enlist triggered what was described by Counsel for the Appellant as the "recruiting process".

In interviews with the Recruiting Officer, Captain Ujimoto, the Respondent indicated he wished to learn a trade and gave, in order of his preference, the occupation or trades of Cook, Vehicle Technician and Mobile Support Equipment Operator. It is clear that he was not interested in his former occupation of infantryman. See Exhibit R-1, Tab 6.

The Respondent's application for re-enlistment was put on hold until July 21st, 1980 pending the expiration of a probationary period of six months following the completion of a sentence imposed for driving or being in control of a vehicle with a blood alcohol content in excess of .08.

The Respondent underwent the usual medical examinations by the Appellant's physician, Dr. Henderson in 1979 and had been

referred by him for psychological testing, not an uncommon procedure according to the evidence of Mr. Flewelling a witness for the Appellant.

When the Respondent's file was reactivated in 1980 Major Henderson authored a medical report dated March 7th in which he stated:

"fit for enrollment as per psychological test report. I personally have reservations (still)" and again in the same report: "on basis of psychological report, patient is fit for enrollment, although I do have some reservations about this man's impulsivity."

The Recruiting Officer, Captain Ujimoto, interviewed the Respondent and completed two written assessments as to his suitability for re-enrolment on August 8th, 1979 and again on March 7th, 1980. In his first assessment Captain Ujimoto concluded by stating:

"ot since his release which was not voluntary he has a strong desire to re-enter the C.F. he does deserve some special consideration. He has been advised that N.D.H.Q. has the final say".

In his final assessment Captain Ujimoto concludes by stating:

"it is recommended that Morgan be considered for re-enrolment C.F. in the trades of his choice".

What is apparent from the forgoing is:

a) Captain Ujimoto recommended the re-enrolment of the Respondent;

b) that ultimately the decision would be made by National Defence Headquarters;

c) that re-enrolment would, if granted, be in the trade of his choice.

d) that Major Henderson had some reservations about the Respondent's impulsivity.

These conclusions are in accordance with the evidence of Mr. Flewelling who is employed as a civilian by National Defence Headquarters in Ottawa and who is currently Section Head Policy and Evaluation. Mr. Flewelling testified at length as to the recruiting and selection process in which he had experience in various capacities from 1974 onwards.

He was in 1980 the head of the operations section of Directorate of Recruiting and Selection. Mr. Flewelling's operations section played a role in the handling of the Respondent's application for re-enrolment.

it was Mr. Flewelling's evidence that recruiting is conducted on a nationwide competitive basis, that it is trade or occupation specific, that the decision regarding re-enrolment by skilled persons or former members of the armed forces are reserved to the Directorate in Ottawa as against the local recruiting officer and that all things else being equal, preference will be given to former members of the armed forces in the selection process.

The recruiting process for skilled or former members is depicted in a chart, Exhibit R-2, Tab 6. After the application, accompanied by a recommendation of the local selection board which in this case included Captain Ujimoto, National Defence Headquarters, Directorate of Recruiting Services, deals with it in a normal situation on the following basis:

1) Determine if vacancy exists

2) Determine competitiveness of candidate

3) Negotiate offer - rank, pay, seniority

4) Instructions to recruiting unit

According to Mr. Flewelling the above four items do not necessarily occur in the order shown but may take place simultaneously. This process is then followed by either an offer to enroll or the denial of the application.
in the Respondent's case there was an intervention based apparently on the reservations expressed by the examining

physician, Major Henderson, which resulted in a re-evaluation by Lieut. Col. Pritchard who was then the Acting Director of Medical Treatment Services in Ottawa. Without further psychological testing or examination Dr. Pritchard gave it as his opinion that the Respondent was unfit for re-enrolment and in a memo dated March 26th, 1980 he states as follows:

"1) Review of medical documents has been completed and indicates for medical reasons no additional military service is advisable".

This advice was acted on by Captain Ujimoto who, on April 17th 1980, wrote the Respondent to the effect that as a result of the review by National Defence Headquarters, he was not considered fit for re-enrollment on medical grounds. Counsel for the Appellant sought to persuade the Tribunal there were other valid reasons as, for example, the alcohol related offence and the Respondent's discourteous behaviour to the members of the recruiting staff for rejecting his application. It is apparent, however, that the real reason for denying the Respondent's application for re-enrolment, as found by the Chairman of the Tribunal, was his medical record.

The nice question which then arises, absent the medical testing which the Appellant admits should have been done at that

stage of the recruiting process, was there on the evidence a reasonable possibility of enrollment or was there, on the other hand, a probability the Respondent would have been re-enrolled given the fact that he had completed all the requirements of the recruiting process.

The Chairman posed the question in the following way:

"What is the distinction between the denial of a position and the loss of an opportunity to compete for a position?"

He then answered his own question by commenting as follows:

"Where the Complainant has done all that it is necessary for him or her to do in order to complete the application process for a position and the only basis for rejecting the complainant's application is a prohibited ground of discrimination, this constitutes a denial of employment".

Counsel for the Appellant contended that absent the failed medical the Respondent would not be assured of a position with the armed forces for two reasons, namely:

a) he would have been required to compete on a nationwide basis with other candidates for the chosen positions and,

b) the armed forces were overstrength in the occupations the Respondent had applied for, and the availability of positions was therefore limited.

The Respondent as a former member of the armed forces admittedly held an edge over other skilled candidates in the competitive process. He had received an honourable discharge for medical reasons and there were, according to the evidence, no significant disciplinary problems prior to his discharge. He had during his four years of service achieved a ranking just below that of Corporal. He came from a military background and was keen to continue the family tradition. He was then, in 1980, twenty-three years of age and in good physical condition. His military potential and aptitudes as tested by the recruiting officer, Captain Ujimoto, were above average -see Exhibit R-1, Tab 4.

Whether or not the Respondent would have been successful, absent the failed medical, is a matter of conjecture but our understanding of the Chairman's findings on this point is that based on the evidence it was probable that the Respondent would have been accepted, insofar as the competitive aspect of the recruiting process was concerned.

With respect to the availability of positions in the defined trades or occupations, charts were introduced to depict

statistical information as to the number of applicants, the target strength and the existing enrolments in the various occupations as contained in Exhibit R-2, Tabs 7 & 8. Statistical information does not, except in a general way, assist in

determining whether in his particular situation a position would have been available to the Respondent. According to Mr. Flewelling the only reliable source as to whether or not a vacancy exists in the case of former service persons is the "crew manager" for that particular occupation. A "crew manager" was described and/or defined as the person who oversees the staffing for a particular occupation. No evidence was introduced by such a person as to the situation which existed in the occupations chosen by the Respondent. The evidence indicated notwithstanding the overstrength condition of the armed forces at the relevant time, one in three applicants for enrolment were, in fact, accepted for enrolment on an overall basis.

It is possible, it seems to us, to arrive at the opposite conclusion than that of the Chairman in that what occurred in the recruiting process was not the denial of a job but the denial of an opportunity to compete for a job. The Chairman canvassed a number of cases where tribunals in finding that the complainants had been denied an opportunity for a job had discounted the compensation awarded for that reason. He referred to Greyhound Lines et al vs. Canadian Human Rights Commission (1987), 78 N.R. 192 (F.C.A.) and distinguished it on the facts. Other cases referred to as "lost opportunity" cases included Lewington et al vs. Vancouver Fire Department et al (1985), 7 C.H.R.R. D/3247 (B.C Board of Enquiry); Dantu vs. North Vancouver District Fire

Department et al, (1986), 8 C.H.R.R. D/3647 (B.C. Board of Enquiry; Boucher vs. the Correctional Service of Canada (1988), 9 C.H.R.R. D/4910 (C.H.R. Tribunal).

He also referred to the decision of the Federal Court of Appeal in Via Rail of Canada vs. Butterill et al [1982] 2 F.C. 830 as the clearest example of a denial of employment and adopted the reasons of Chief Justice Thurlow where speaking for the Court he stated:

"In my opinion proof of the ability of the complainants to pass the eyesight examination referred to in the order of the Human Rights Tribunal was not an element of the case which it was incumbent on them to prove in support of their claim for compensation for wages lost by them as a result of the discriminatory practice. Their case was made out when they proved that they were refused employment as a result of the application to them of an unlawful discriminatory practice".

In his view the evidence established that what was lost was a job and not the opportunity for a job. He found that the facts in the Greyhound case, supra, were not analagous to the Respondent's situation and that they were more closely resembled by the facts in the Butterill case, supra. Significantly he did make an award in the alternative based on lost opportunity to compete for a position if he was found wrong in classifying this case as being the denial of a position of employment.

On the whole of the evidence this Tribunal is unable to conclude that there was a "...palpable overriding error" which would justify setting aside the factual findings of the Chairman that this was in fact the denial of a position of employment arising from the discriminatory act by the Appellant", as opposed to a lost opportunity for employment and his findings on this issue stand and that ground of appeal is dismissed.

RE-INSTATEMENT

The Tribunal ordered re-instatement of the Respondent in the Armed Forces as earlier described. In doing so the Tribunal exercised its discretionary power under Subparagraph (b) of Section 52(2) of the Act. It reads as follows:

"(b) that the 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;".

In doing so the Tribunal had before it evidence of the Respondent's keen desire to resume his military career in accord with his family background; the fact that he had been given a clean bill of health by the psychologist Dr. Spellacy; had passed his physical examination by Dr. Henderson and perhaps most importantly, presented himself to the Tribunal during the Hearing thus enabling the Chairman to make his own evaluation.

We are of the opinion that it would be inadvisable to interfere with the Chairman's discretion in awarding reinstatement except to limit the occupations or trades to be made available to the Respondent to that of cook, vehicle technician or mobile support operator because the Respondent himself made it clear when applying for re-enrolment that he was not interested

in the trade or occupation of infantryman. Moreover duties and responsibilities of an infrantryman are demanding and require a high standard of physical strength, stamina and confidence. See Exhibit R-2 Respondent's Book of Documents Tabs 9 and 13. The Respondent is now over thirty-two years of age and in his evidence he acknowledges he is unsuited at the present time to resume the occupation of infantryman - see page 49 and again at page 62 of the Transcript.

The Appeal therefore succeeds in part on this ground and the Order of the Chairman for re-instatement is to be varied accordingly.

INTEREST

Subparagraphs (c) and (d) of Section 52(2) of the Canadian Human Rights Act provide as follows:

"(c) That the person compensate the victim, as the Tribunal may consider proper, 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; and (d) that the 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 for any expenses incurred by the victim as a result of the discriminatory practice."

These Subparagraphs do not mention interest but in the one case provide that the person found to have engaged in the discriminatory act..... compensate the victim as the Tribunal may consider proper, for any or all of the wages that the victim was deprived of..... and in the other case that "the person compensate the victim, as the Tribunal may consider proper for any or all additional cost of obtaining alternative goods, services.....

The Tribunal referred to the fact that in recent years most of the Canadian provinces have enacted legislation that provides

for the payment of what is described as being either pre-judgement interest or court ordered interest.

Reference was made to a number of prior decisions by tribunals in which interest has been awarded, namely, Boucher vs. The Correctional Service of Canada (1988), 9 C. H. R.R. D/49 1 0 (C.H.R. Tribunal); Kearns vs. P. Dixon Trucking Ltd., unreported C.H.R.T. Decision (December 7th, 1988); Chapdelaine et al vs. Air Canada, (1987), 9 C.H.R.R. 4449 (C.H.R. Tribunal).

In addition to those tribunal decisions mentioned by the Chairman in which interest has been awarded on compensation for victims of discrimination there are others which include Olarte vs. De Phillips and Commodore Business machines Ltd. (1983), 4 C.H.R.R. D/1705; Scott vs. Foster Wheeler Ltd.

(1986), 7 C.H.R.R. D3193; Cameron vs. Nel-Gor Castle Nursing Home (1986), 5 C.H.R.R. D2170 and finally Leon Hinds vs. Canada Employment and immigration Commission a decision rendered October 1lth, 1988 by a Human Rights Tribunal chaired by Sidney Lederman Q.C. In that case the Chairman wrote, "in our opinion, the concept of "compensation" includes an interest value component".

The Tribunal considered an award made pursuant to the provisions of the Canada Labour Code in Canadian Broadcasting Corporation vs. Broadcast Council of Canadian Union of Public

equivalency, i.e. not the same nominal amount of money that would have been paid in the past but the present equivalent of that amount.

Counsel submitted that the Tribunal erred in its interpretation of Section 96.3 of the Labour Code as being narrower and more restricted than the wording of Section 53(2)(C) of the Canadian Human Rights Act. The word "equivalent" is not contained in Section 53(2)(C) of the Canadian Human Rights Act and, since the Court of Appeal found that the notion of "equivalency" strengthened its view of the sense of the word "compensation" as making whole and therefore entitling the complainant to interest on the amount awarded for compensation, the Tribunal in this case had erred in its interpretation of Section 96.3. Counsel also submitted that the Court of Appeal in the Canadian Broadcasting case, supra, interpreted the tense structure of Section 96.3 as suggesting that what Parliament intended as the limit of compensation was not past equivalency but present equivalency.

We are of the opinion that the comparison with the provisions of the Canada Labour Code and the Canadian Human Rights Act with respect to those provisions that provide for "compensation" do not bear the interpretation of the Tribunal which was, "if anything the power of the Canada Labour Relations Board to make

an award in relation to interest under the Canada Labour Code may

be more restricted because the payment of "compensation" is qualified by the phrase "equivalent to the remuneration". Use of that phrase rather than qualifying the word "compensation" strengthens it according to MacGuigan, J. in the Canadian Broadcasting Corporation case, supra.

in the Canadian Broadcasting case MacGuigan, J. refers to a decision of the B.C. Court of Appeal in Re West Coast Transmission Co. Ltd. and Majestic Wiley Contractors Ltd. (1982), 139 D.L.R. (3rd), 97 in which it was held that a commercial arbitrator had the same power to award interest as a court under the British Columbia Court Order interest Act. in that case, which involved a construction contract, the arbitrators awarded a substantial amount for interest and on appeal Seaton, J. in holding the arbitrators could award interest, stated:

"if the matter is at large and to be resolved as a question of policy, I would strongly favour permitting arbitrators to award interest. I can think of no valid reason why arbitrators deciding a claim should be powerless to grant a remedy that a judge hearing the same claim would be bound to grant. The claimant before the arbitrator would be severely prejudiced in this day of high interest rates. I can think of no good reason why the arbitrator should not be able to give him a complete remedy".

in Chandris vs. Isbrandtsen-Moller Co. Inc., (1951) 1 K.B. 240, the Court of Appeal in England held that arbitrators could award interest even though it was not recoverable at common law and did not fall within Section 28 of Lord Tenterden's Act.

In Minister of Highways for the Province of British Columbia vs. Richland Estates Ltd. (1973) 4 L.C.R., the issue to be decided by the British Columbia Court of Appeal was whether Section 16 of the Highway Act R.S.B.C. 1960, Chapter C172 gives to the Board of Arbitration the power, in determining the compensation to be paid for the compulsory taking of land, to include an item for interest. in holding that it did then Chief Justice Farris after referring to Section 16 (1) of the Highway Act which reads in part

"(16.1) Compensation shall be paid in respect of lands entered upon and taken possession of under this part.....", stated as follows:

"it should be noted that what is to be determined is not simply the value of the land taken, but compensation. I interpret the word "compensation" in the context of this Statute that the owner is to be made "economically whole". See Irving Oil Co. Ltd. vs. The King [1946] 4 D.L.R. 625.

In the same case, Branca, J.A. at Page 97 comments as follows: "At first blush I was momentarily impressed by the fact that Section 16(1) ends with the words.....for the following

With regard to the rate of interest it should be in accordance with the applicable rate of interest from time to time of Canada Savings Bonds on the amount outstanding from time to time during the period of compensation. The interest awarded is calculated on compensation for lost wages. The Appeal succeeds in part and the decision of the Chairman is varied accordingly.

HURT PRIDE AND LOSS OF SELF-RESPECT

The Tribunal awarded the sum of $1,000.00 for hurt feelings and loss of self-respect. The maximum compensation payable is $5,000.00 pursuant to section 53(3) (B) of the Canadian Human Rights Act. It then added interest from May 1st, 1980 to December 31st, 1986 using a multiple of 2.37 which resulted in an interest component of $1,370.00 for a total of $2,370.00.

We are inclined to accept the argument of Counsel for the Appellant that in determining the amount for hurt feelings the Tribunal purported to apply present day standards which, in our opinion, were too conservative. it then awarded compound interest

on the amount so determined from the date the injury occurred to the present time. We are of the opinion that having once determined what amount should be awarded according to present day standards the amount so determined should not be subject to interest.

On the other hand, considering all the circumstances including the extended period of time during which the Respondent was unable to find an equivalent occupation, the humiliation of being rejected - given the Respondent's military background - and of having to rely on social assistance and the charity of family and a friend, we would increase the amount awarded for hurt feelings and loss of self-respect from $1,000.00 to $2,500.00 which is in the amount suggested by Counsel for the Canadian Armed Forces in the hearing before the Tribunal. it is so ordered. -

UNEMPLOYMENT INSURANCE BENEFIT

The Tribunal referred to Sections 37 and 38 of the Unemployment Insurance Act, B.S.C. 1985 and interpreted those sections as requiring that the Respondent remit and/or reimburse to the Receiver General of Canada for benefits received during the period he was being compensated. The Tribunal then directed the Respondent (Appellant) Canadian Armed Forces to comply with Section 38 of the Unemployment insurance Act.

Section 37 (1) of the Unemployment Insurance Act R.S.C. 1985, c.U-1 provides as follows:

(1) if an order for payment of compensation for loss of wages is made pursuant to a labour arbitration, court judgement or otherwise, in respect of the same Period for which a U.I.C. benefit has been paid to a claimant and the order does not take U.I.C. into account, then, pursuant to Section 38(l), the employer or other person becomes liable to ascertain the amount of the U.I.C. benefits that were paid during the material time and remit that amount to the Receiver General."

The emphasis is ours.

As a result of this Appeal, the varying of the time period during which compensation is to run from that which was originally determined and the inability of the Review Tribunal to

agree on the compensable period of time it is not possible to make an Order with regard to U.I.C. benefits. In referring to the Complainant's income Tax Returns, Exhibit C-1, Tabs 4, 5, 6, 7 and 8 for the years 1980, 1981, 1982, and 1983, it appears no benefits were received during that period of time.

While we make no order with regard to re-imbursement to U.I.C. benefits we caution the parties to be governed insofar as they apply by Sections 37 and 38 of the Unemployment Insurance Act.

SOCIAL ASSISTANCE BENEFITS

Evidence that the Respondent was in receipt of social assistance benefits came as somewhat of a surprise to the Tribunal and to Counsel for the parties. As a result of an urgent request to the Ministry to furnish specific information in that regard a letter from the Ministry dated January 26th, 1989 was introduced and marked Exhibit C-2 in the proceedings. The letter reads as follows:

"TO WHOM IT MAY CONCERN:

RE: MORGAN, Richard
The above named received an estimated $17,248.44 in benefits from the Ministry of Social Services and Housing for the period January 1980 to May 1988.

Sincerely,

Lynne Garner,
District Supervisor, Esquimalt I.A./E.I.P."

It is to be noted that the letter does not comment on when and during what specific time periods the benefits were received. It simply refers to an estimated amount for a period extending from January 1980 to May 1988. Without a breakdown it is impossible therefore to allocate what amounts were received by the Respondent during the compensable period, whether it is

determined on the basis of the findings of the initial Tribunal, the majority findings of the Review Tribunal or on the findings of the Chairman of the Review Tribunal. Accordingly it is not appropriate, in our opinion, for us to order re-imbursement of welfare benefits on the evidence before the Tribunal.

We might add that as far as we know there is no provision in the legislation providing for social assistance which requires the recipient, absent fraud or dishonesty, to reimburse the Minister for welfare benefits, which, after all, are based on need rather than on earnings. We know of no case where an impecunious but successful litigant claiming damages for wrongful dismissal or an impoverished but successful litigant claiming damages for loss of income resulting from injuries received in an accident has been ordered by the court to reimburse the Minister for prior welfare benefits.

MITIGATION

The Tribunal described the duty to mitigate in these words:

"There is a clear duty on a complainant in these circumstances to mitigate his loss of wages by seeking other employment and remuneration".

The principle which has been enunciated in numerous cases is succinctly put by the learned author of McGregor on "Damages" 14th edition at page 150 as follows:

"1) The first and most important rule is that the plaintiff must take all reasonable steps to mitigate the loss to him consequent upon the defendant's wrong and cannot recover damages for any such loss which he could thus have avoided but has failed, through unreasonable action or in-action, to avoid. Put shortly, the plaintiff can recover for avoidable loss."

The recurrent idea in this excerpt from McGregor is the concept of "reasonableness".

The Tribunal found that in two instances in which the Respondent left his employment voluntarily he failed to fulfill the duty to mitigate. One of these occurred in 1980 when he left

a position he held as a tray carrier with Royal Jubilee Hospital in Victoria because in his own words "I'm more of an outdoors person". Again in 1981 he held a manual labour position with Steel Bros Canada Ltd. He left voluntarily because in his own words "you can hurt yourself packing drywall around all the time", and..... but it's something you don't want to look forward to doing all the time". Both of these incidents occurred within approximately one year of the Respondent's being notified that the Appellant had rejected his application for re-enrollment.

In calculating the amount which ought to be deducted for mitigation the Tribunal fixed an arbitrary time limit on the duration of the job with Royal Jubilee Hospital of thirteen weeks. With Steel Bros. of Canada Ltd. a time limit of ten weeks was fixed as a basis for estimating the duration of the Respondent's employment. Both estimates were based on conjecture or inferences and not based on any facts adduced in the evidence.

With regard to the evidence presented to the Tribunal and the testimony of the witnesses bearing on this aspect of the matter, i.e. mitigation, there were no apparent areas of conflict

pertaining to credibility which is an issue more properly and efficiently dealt with by the trier of facts. We are of the opinion that this Review Tribunal with the same evidence before it and the benefit of the transcripts, exhibits and submissions of Counsel is equally competent therefore to evaluate the

evidence, draw the necessary inferences and arrive at its own conclusions as was the Tribunal of first instance.

With respect, it seems to us, the Tribunal employed an overly simplistic basis on which to approach the problem of mitigation. The reasonableness or unreasonableness of the steps taken by the Respondent to mitigate can only be ascertained in the context of all the circumstances including, not only his effort to find employment but also his military background, his previous experience in the armed forces, the opportunities for career advancement, his age and personal qualifications. These are, in our opinion, factors to be considered.

The evidence was that the Respondent initially applied for a position with the Royal Canadian Mounted Police after notification he was not eligible for re-enrollment. He was refused and then applied for employment in the Federal and Provincial Penitentiary system, the Municipal Police Force and Sheriff's Office and was refused in each case.

All of these occupations bear a significant likeness to the Armed Forces and are characterized by structure, security and a lifestyle similar to the military. They were, in the Respondent's words "....a career employment".

Having failed to find employment in any of the occupations mentioned the Respondent found irregular employment in seasonal, temporary and labour oriented jobs as a warehousman, dock worker, delivery man, landscaper and hospital tray carrier.

His friend and neighbour, Mr. Sullivan, described in some detail the daily routine of the Respondent in pursuing all available means through, for example, the help wanted advertisements in the news media in his search for employment. it

is significant that during the period the Respondent was looking for employment the economy was in a state of recession.

In addition to seeking employment in the manner described the Respondent embarked on a program of self-improvement which included upgrading his education to grade twelve level, obtaining his First Aid Certificate from St. John's Ambulance, qualifying for a Class Three Licence to drive heavy duty trucks and a course in successful business management.

lt seems to us that the whole pattern of conduct by the Respondent in seeking employment and in upgrading his qualifications should be considered in determining the reasonableness of the steps taken by him to mitigate the loss consequent on the Appellant's discriminatory act in denying him a position with the Armed Forces.

From that perspective two isolated instances shortly after his rejection by the Armed Forces when the Respondent voluntarily left jobs become relatively insignificant. The Respondent persisted and continued in efforts to re-enlist or re-muster with the Armed Forces until July 1983 when he filed his complaint under the Canadian Human Rights Act.

While recognizing that analogies, if too strictly adhered to, may lead to unpredictable and at times erroneous conclusions see for example Airport Taxicab Association vs. Piazza et al (unreported) Ontario Court of Appeal, May 29th 1989, Court File No. 671/87, where, on appeal from the Divisional Court, the Court of Appeal rejected the proposition that "An amount to be awarded for loss of wages is restricted to the period of time of reasonable notice", we think it is useful, nevertheless, to seek some guidance from those cases involving wrongful dismissal in which courts have considered what amounts to a reasonable effort to mitigate. The main factors examined by the court are revealed in White vs. B.C. Timber (1983), 3 C.C.E.L. 284 (B.C.S.C.). In that case the defendant took the position that the plaintiff had not made sufficient efforts to find alternative permanent employment. The court thought it appropriate to consider the economic circumstances prevailing at the time of dismissal, the degree of specialization of the employment and the availability of similar employment in concluding the plaintiff had made sufficient

effort to find alternative work in the generally depressed economic climate prevailing at the time.

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With the regard to the onus of proof it was held in Red Deer College vs. Michaels (1975) 57 D.L.R. (3rd) 386 (S.C.C.) that the onus of proof lies with the defendant in wrongful dismissal cases to satisfy the court that the plaintiff has failed to take reasonable steps to mitigate his loss. In Levitt on the "Law of Dismissal in Canada" at page 234, paragraph 902 it is put in this way:

"The onus is on the employer to prove, first, failure to mitigate on the employee's part and, secondly, that the employee would have found another comparable position if one had been searched for".

In a recent unreported decision of the Court of Appeal of British Columbia (CA009795), Vancouver Registery, Taylor J.A., speaking for the Court stated at page 6 of his reasons as follows:

"The duty to "act reasonably" in seeking and accepting alternate employment cannot be a duty to take such steps as will reduce the claim against the defaulting former employer, but must be a duty as to take such steps as a reasonable Person in the dismissed employee's position would take in his own interest - to maintain his income and his position in his industry, trade or Profession. The question whether or not the employee has acted reasonably must be judged in relation to his own position, and not in relation to that of the

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employer who has wrongfully dismissed him. The former employer cannot have any right to expect that the former employee will accept lower-paying alternate employment with doubtful Prospects, and then sue for the difference in what he makes in that work and what he would have made had he received the notice to which he was entitled".

The emphasis is ours. Again referring to the principles applied by the courts in cases of wrongful dismissal it can be said that whether or not the Respondent's refusal to accept a job

during the period following the discriminatory act amounts to a failure to mitigate will depend upon a review of all the circumstances. As a general rule, if a person is offered a job which is substantially similar to his former employment, he or she would be in a breach of the duty to mitigate if the offer was declined. if the new employment is materially different, then the person need not accept it. See Roscoe vs. McGavin Foods Ltd. (1983), 2 C.C.E.L. 287 (B.C.S.C.).

Section 56(5) of the Canadian Human Rights Act provides the Review Tribunal with power to dispose of the appeal by:

(a) dismissing it; or

(b) allowing it and rendering the decision or making the order that, in its opinion, the Tribunal appealed from should have rendered or made.

The emphasis is ours.

The majority, while in agreement with the principles referred to under this heading as they pertain to the Respondent and his efforts to mitigate, do not consider it necessary to deal further with the matter since their decision on compensation for lost wages stipulates the commencement of the compensable period is July 15th, 1982, some time after the incidents in question occurred. These incidents did occur, however, during the compensable period as determined by the initial Tribunal and also fall within the compensable period as determined by the Chairman of the Review Tribunal. Accordingly, it is necessary to describe what the disallowance of the amounts deducted for failure to mitigate will have on the Award, not only of the initial Tribunal but also on the minority Award of this Tribunal.

The changes are as follows:

(a) The Tribunal deducted the sum of $2,114.32 from the Respondent's 1980 income surmising he would have been employed for an additional thirteen weeks and earned an additional $2,114.32 if he had retained his position at the Royal Jubilee Hospital. I therefore would not include in the amounts deducted for mitigation in 1980 the sum of $2,114.32

thus increasing the net wage loss for 1980 from $2,356.44 (corrected for error in addition) to $4,470.76

(b) in calculating the mitigation deductions for 1981 the

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Chairman surmised that the Respondent would have earned another $3,497.40 over a ten week period had he continued his employment with Steel Bros. Canada Ltd. By disallowing that deduction it increases the net wage loss for 1981 from $9,551.43 to $13,048.83.

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AWARD

The Review Tribunal having dealt with the foregoing issues and reached a unanimous decision have dismissed, allowed in part the Appeal and varied the Award as earlier indicated and for the reasons given.

SIGNED and DATED at Anglemont, B.C this 4th day of 1990.

Norman Fetterly

at Vancouver, B.C., this 4th day of 1990.

Barry Sheppard, Member

at Victoria, B.C., this 4th day of 1990.

Ronald Lou-Poy, Member

The majority decision and the minority decision on compensation follow:

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COMPENSATION - MAJORITY DECISION ON COMPENSATION AND LOST WAGES

INTRODUCTION

As stated by the Chairman, we were not able to agree with the Chairman's conclusion on compensation for loss of wages. Our decision on such compensation follows.

We wish to state at the outset that we indeed regret the length of time that it has taken to produce this decision. our conclusion on the issue of compensation for loss of wages in this case may be considered by some as excessive; not, we believe, because of the principle that we followed but because of the history of and elapse of time in this case. We can assure you that this and the fact that the inability of this Review Tribunal to reach a unanimous decision, thereby increasing the possibility of a further appeal and a further delay in the final determination of this case, were indeed not taken lightly.

COMPENSATION FOR LOSS OF WAGES

In his finding on compensation for loss of wages, the Chairman adopts the doctrine of reasonable foreseeability and determines that the initial Tribunal should have applied the doctrine in its award, and that in this case, the reasonable period of foreseeability is 3 years and 8 months. The Chairman would vary the award of the initial Tribunal by reducing the period of wage loss from 6-1/2 years to approximately 3 years 8 months.

In applying the doctrine of reasonable foreseeability, the Chairman relies principally on Rosanna Torres v. Royal Kitchen-ware, et al (1982) 3 C.H.R.R. D/858 (Ont. H.R.T.). The Torres case has been referred to with approval in David J. DeJager v. (Canada) Department of National Defence (1987), 8 C.H.R.R. D/3963 and in an unreported decision of the Federal Court of Appeal in the The Attorney General of Canada v. Marlene McAlpine, in Action No. A-827-88.

With respect, we do not concur that the doctrine of reasonable foreseeability applies in determining cases in which the complainant has satisfied his duty to mitigate and in which an order for reinstatement is deemed appropriate in the circumstances.

Professor Cummings, in the Torres case, presents us with a very helpful summary of the evolving trends of Human Right laws.

in his summary he quotes at paragraph 7688 the following from Heather Hawkes v. Brown's Ornamental iron Works:

"I have examined a number of awards in other violations of the Ontario Human Rights Code, and have come to the view that the primary purposes of awards do not appear to encompass giving full compensation by way of damages as in a civil suit for breach of contract or tort. Rather, they appear to be: to promote the purposes of the Code in encouraging respect for human rights in this province, to provide sufficient liability for violations so that would-be violators of the Code will be discouraged from ignoring it; and to provide a measure of recompense that is considerably

more than a token, and that compensates at least in part for monetary loss, and for the pain and suffering and loss of dignity inflicted upon an innocent complainant."

In paragraph 7716, Professor Cummings quotes the following from the decision of the review tribunal in Foreman, et al v. Via Rail Canada, Inc. (1980) 1 C.H.R.R. D/111, after stating that the Foreman Review Tribunal characterized the Hawkes decision as "simply wrong".

"The root principle of the civil law of damages is "restitutio in integrum": the injured party 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. (D/238)".

The quote is self-explanatory and does not need elaboration. We agree with the Foreman Review Tribunal's conclusion.

At paragraph 7739, Professor Cummings discusses the case of Akram Rajput v. Algoma University College (Professor Walter Tarnopolsky May 12, 1976) and quotes the following from the decision of the Board in that case:

"Because of the fact that it is now getting late to apply anywhere else for the following academic year, and because of the fact that Dr. Rajput has been placed in this position because of action of the respondents, I feel he must have

assurance for a further academic year of the salary he would have received for 1976-77 if he had been appointed to the probationary position in July, 1975. Therefore, if he fails to get an academic appointment for next year, which would yield the same salary, after taxes, and if he can satisfy the Ontario Human Rights Commission that he made all reasonable efforts to get such an appointment, he is to be compensated for the difference. (p.26)."

Thus, the concept of awarding future damages is recognized.

As a final topic in reviewing damage awards, Professor

Cummings hypothesizes in paragraph 7748 as follows:

"Supposing that discrimination on a prohibited ground is found by a Board, but mitigation by the Complainant has proven impossible, or not without a great lapse of time, and the only appropriate mode of compensation to be considered in giving the order is by way of damages..... Hypothesize further that it is not appropriate or practical in the circumstances to order reinstatement of the employee to his former position."

Professor Cummings then asks the question "in such a situation, what is the durational extent to which general damages should be ordered in effectuating compensation." His answer in paragraph 7748 is, in part contained in the following often quoted passages:

"That is, there is a 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."

We agree with the application of the doctrine to the extent that it is applied by Professor Cummings.

Professor Cummings hypothesizes a situation in which the complainant has satisfied his duty to mitigate as he has acted

reasonably in trying to mitigate his damages, and in which the only remedy is damages. The situation hypothesized by Professor Cummings expressly excludes reinstatement as an appropriate order. In our view, Professor Cummings clearly does not apply the doctrine to cases in which reinstatement is ordered.

We also agree that it is only reasonable to provide a cut-off point in awarding compensation, and that there comes a time when, apart from physical or mental impairment of a permanent nature, reason dictates that a victim of a discriminatory act assumes responsibility for his or her own we if are and when the duty to mitigate overrides other factors in weighing the rights of the complainant to compensation against the rights of the party responsible for the discriminatory act.

if however reinstatement is an appropriate order, as it is in the case before this Review Tribunal, then in my view a "cap" or cut-off point, or point of assuming responsibility, is automatically built into the award by the reinstatement order. The reinstatement order in itself contains the factor to make the period of time or cut-off point determinate, that being the date of actual reinstatement.

in our view, the application of the doctrine of reasonable foreseeability, for purposes of providing a cut-off point, is inappropriate to cases in which reinstatement is ordered, as that order in itself contains a cut-off point.

We agree with Professor Cummings at paragraph 7727 where he states:

"Another type of order that is sometimes made so as to effect "full compliance" (or to "rectify any injury") is reinstatement of an employee who has been discriminatorily dismissed. Such orders are, for obvious reasons, rarely made, yet they

are appropriate in some cases where immediate, substantive compliance is desired."

We do not believe that Professor Cummings applied or intended to apply the doctrine of reasonable foreseeability in cases where reinstatement is ordered.

We therefore in the case before this Review Tribunal, order that compensation for lost wages continue from July 15th, 1982 until the date the Respondent is reinstated. The Respondent did not file his complaint until July, 1983, some 3 years and 3 months after the discriminatory act. We find this time to be excessive and we accordingly do not award compensation for approximately 27 months of that period.

The compensatory period in this case seems extreme, but for whatever reasons, it has taken this length of time to process the complaint through the Human Rights system. if there was any evidence of the Respondent contributing to a delay in the procedure, then the delay should be taken into account in the compensation award. But there is no such evidence. it does not seem equitable or within the intent of the Human Rights Act that

a successful complainant should suffer because of the length of time that it takes to proceed through the mechanics established by the Human Rights legislation.

The compensation award for lost wages that we make in this case includes an award for future compensation, namely from this date to the date of reinstatement. in this regard, we note that while the reasons are not entirely analogous, the concept of future damages or compensation was accepted and awarded in the Akram Rajput which was quoted by Professor Cummings in the Torres case

If our reasoning is not considered correct and if the doctrine of reasonable foreseeability is applicable to cases in which reinstatement is ordered, then it is our view that the tests of reasonable foreseeability contained in that doctrine are complied with in this case without any change to the compensation for lost wages that we have awarded to the Respondent. It is in our view very reasonable for a person carrying out a discriminatory act to foresee that, in those cases in which reinstatement is

ordered, the compensation payable by him will include compensation for lost wages from the time of the discriminatory act to the time of reinstatement. if such is not the case, the person acting in a discriminatory manner will benefit

by delays and the time that it takes to process a claim through the mechanics of the Human Rights system. The aggrieved person is prejudiced.

The Torres case has been cited with approval in both the DeJager case (supra) and the McAlpine case (supra).

In the DeJager case, the doctrine of reasonable foreseeability was followed notwithstanding that reinstatement was ordered. in the decision of the Tribunal in the DeJager case, the often quoted passage of Professor Cummings in the Torres case is quoted commencing from "there is a cut-off point in awarding general damages....". We must question whether the Tribunal in the DeJager case considered the prior portion of Professor Cummings' decision. We can only believe that if the Tribunal did consider the prior portions, then the doctrine was inappropriately applied by the Tribunal.

in our view, the McAlpine case is clearly distinguishable as the case was not one in which reinstatement was ordered. We do not believe that the McAlpine case is applicable to the case before this Review Tribunal.

The award of the initial Tribunal regarding compensation of lost wages is varied to the extent that compensation, including interest thereon calculated as earlier set out, is payable at the

rate from time to time that would otherwise have been payable to the Respondent, for the period from July 15, 1982 until the date of reinstatement. Amounts earned by the Respondent during this period will of course be deducted from such compensation. The compensation award of this Review Tribunal for lost wages and interest thereon is set out in the next following section.

COMPENSATION AWARD FOR LOSS OF WAGES AND INTEREST THEREON
- from July 15, 1982 until the date of reinstatement.

Interest has been awarded on the amounts of compensation for loss of wages outstanding from time to time at the applicable rate of interest from time to time then payable on Canada savings Bonds. The following are the rates of interest payable on Canada Savings Bonds.

November, 1982 12.5%

November, 1983 changed during year - average 9.667%

November, 1984 changed during year - average 11.25%

November, 1985 9%

November, 1986 7.75%

November, 1987 9%

November, 1988 10.1667%

November, 1989 11.917%

November, 1990

From 1982 to 1988, the wage amount is taken from Exhibit R3, scenario 1C. The wage amount for 1989 was received from the Department of National Defence in Vancouver. The 1990 wage amount has not yet been determined by the Department of National Defence.

1. July 15, 1982 to December 31, 1982 (22 weeks)

   1982 wages lost - $7,716
   Less 1982 earnings - 381 (.423% of $901.46)
   Net 1982 wage loss - $7,335.00

2. 1983

   1983 wages lost - $17,592.00
   Less 1983 earnings - 4,861.80

   Net 1983 wage loss $12,730.20

Add interest at 12.5% on net 1982 wage loss of $7,335 $916.87
Add net 1982 wage loss $7,335.00

$8,251.87

Total net wage loss and interest as at December 31, 1983

$20,982.07

3. 1984

1984 wages lost - $21,918.33
Less 1984 earnings - 5,511.12

Net 1984 wage loss $16,407.21

Add December 31, 1983 total 20,982.07
Add interest at 9.667% on December 31, 1983
TOTAL OF $20,982.07 2,028.34

Total net wage loss and interest as at December 31, 1984
39,417.62

4. 1985

1985 wages lost - $24,538.00
Less 1985 earnings - 508.52

Net 1985 wage loss 24,029.48

Add December 31, 1984 total 39,417.62
Add interest at 11.25% on December 31, 1984 total of
$39,417.62 4,434.48

Total net wage loss and interest as at
December 31, 1985 $67,881.58

5. 1986

1986 wages lost - $25,950.33
Less 1986 earnings - 9,391.00

Net 1986 wage loss $16,559.33

Add December 31, 1985 total 67,881.58
Add interest at 9% on December 31, 1985
total of $67,881.58 6,109.34

Total net wage loss and interest as at
December 31, 1986 $90,550.25

6. 1987

1987 wages lost - $27,559.00
Less 1987 earnings - ?

Net 1987 wage loss $?
Add December 31, 1986 total 90,550.25
Add interest at 7.75% on December 31, 1986
total of $90,550.25 7,017.64

Total net wage loss and interest as at
December 31, 1987 $?

7. 1988

1988 wages lost - $28,841.00 Less 1988 earnings -
?

Net 1988 wage loss $? Add
December 31, 1987 total ?
Add Interest at 9% on December 31, 1987
total of $? ?

Total net wage loss and interest as at
December 31, 1988 ?

8. 1989

1989 wages lost ($2,464/month x 12) -
$29,568.00
Less 1989 earnings - ?

Net 1989 wage loss $?
Add December 31, 1988 total ?
Add interest at 10.1667% on December 31, 1988
total of $? ?

Total net wage loss and interest as at
December 31, 1989 ?

9. 1990

1990 wages lost (until reinstatement in 1990) - $?
Less 1990 earnings - ?

Net 1990 wage loss $?
Add December 31, 1989 total ?

Add Interest at 11.917% on December 31, 1989
total of $? until reinstatement in 1990 ?

Total net wage loss and interest as at date of reinstatement
in 1990.

We do not have any evidence on the Respondent's earnings for 1987, 1988, 1989 and 1990. We also do not have applicable wage amount, and the date that the Respondent will be re-instated. Consequently, we cannot complete the calculation of the total compensation payable for lost wages and interest thereon. If the parties cannot agree upon the missing information, then the matter may be referred back to this Review Tribunal for receiving evidence and determining the matter.
We note that this Review Tribunal unanimously awarded the Respondent $2,500.00 for hurt feelings and loss of self-respect.

SIGNED AND DATED at Vancouver, British Columbia, this 4th day of June, 1990.

at Victoria, British Columbia, this 4th day of June 1990

L. Barry Sheppard - Member
Ronald Lou-Poy - Member

COMPENSATION - MINORITY DECISION ON COMPENSATION AND LOST WAGES

I regret the delay in producing this Award and can only assure the interested parties of our careful and thorough consideration of all aspects of the matters to be determined.

I would like to express my appreciation of the cooperation and assistance of my colleagues on this Tribunal. We had to consider a variety of difficult issues and were able to reach a consensus on all but one. I am obliged to them for having been extended the opportunity of reading their conclusions on the matter of compensation. After careful consideration and with respect I do not agree with those conclusions or the reasons for them.

The most troubling and difficult aspect of this case to me is the inordinate lapse of time between the occurrence of the discriminatory act in April of 1980 until January 1989 when the matter was heard by the initial Tribunal.

I suspect the initial Tribunal, as well as my colleagues on this Review Tribunal, were similarly troubled by the lapse of time. Both the initial Tribunal and the Review Tribunal in their majority decision made an adjustment in the compensable time period for "delay" by the Respondent in filing a complaint some two and one half years after the occurrence. The initial

Tribunal disallowed compensation for the last two and one half years, namely, 1987, 1988 and the early months of 1989. lt then selected a period from July 1st, 1980 to December 31st, 1986 during which compensation would run. The Review Tribunal disallowed the first twenty-seven months from the date of the

discriminatory act and has ordered compensation to run from July 15th, 1982 until the Respondent is re-instated.

Interestingly, the initial Tribunal, by selecting the period between July 1st, 1980 and December 31st, 1986 as the compensable period, was basing its calculations on the lower rates of pay in effect then as shown in Scenario "C"of Exhibit R-3.

The Review Tribunal, on the other hand, by determining that the compensable period should run from July 15th, 1982 until the Respondent is re-instated has chosen the higher end of the pay schedule. it has also ordered the compensable period to continue beyond the date of the original hearing in January, 1989 until the date the Respondent is re-instated.

Turning to the disallowance by both Tribunals due to the delay by the Respondent in filing his complaint it should be noted, subject to section 41 (c), that the Act does not require the victim of discrimination to file a complaint within a predetermined time period. More importantly, however, the evidence

does not support the arbitrary adjustment of the compensable time period for the reasons given by both Tribunals.

The Respondent, Morgan, testified he continued to try to re-enroll in the Canadian Armed Forces after his rejection in April of 1980 until July of 1983. To that end he underwent psychological testing at his own expense by Dr. Spellachy in September of 1982 - see Transcript pages 18 and 19 and Respondent's Exhibit C-1 at Tab 12. When questioned by Counsel for the Human Rights Commission as to why he waited until July of 1983 to file his complaint, the Respondent testified:

"Because I tried to get back in, O.K.? And if they weren't going to let me back in after this duration then I might as well file it with the Federal Human Rights Commission". It is difficult to imagine the Respondent continuing to apply for re-enrollment while at the same time launching a complaint based on discrimination against the Canadian Armed Forces. In my opinion there is no more justification for penalising the Respondent for delay in filing his complaint than there is for excusing the Appellant for continuing to reject his efforts to re-enroll.

If my understanding of the evidence is correct, the compensable time period is significantly increased. It would run from the middle of April 1980 to the end of January 1989 or beyond depending on which of the two findings by the initial Tribunal or the Review Tribunal one accepts.

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After the filing of his complaint by the Respondent some five and a half years expired before the matter was heard.

No explanation for the delay in processing the Respondent's claim was offered. it is not certain it would have been helpful if it had been offered or in any case that it would have been properly admissible as evidence.

While it is true that the Appellant admitted liability for its discriminatory act to the Tribunal below, thus entitling the Respondent to seek the appropriate remedies provided under the Act, there was one important issue needing to be resolved before the relief sought could be granted. Keeping in mind the Respondent asked for compensation for the full period from 1980 onwards as well as re-instatement, it was whether the Respondent was denied a job or an opportunity for a job. Depending on the resolution of that issue was the extent to which relief could be given. As we have seen this issue might easily have been resolved differently in which case the Respondent would not have been entitled to the full extent of the relief he was seeking and was granted. in particular re-instatement depended on a favourable resolution of that issue.

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Therefore it is not appropriate, I suggest, to speculate on the reasons for the long delay or to buttress the rationale for one's decision as to the duration of the compensable time period by reliance on that fact. Moreover, if the Respondent has unjustly suffered from the long delay, then the awarding of interest on the lost wages during the compensable period will, hopefully, assuage the suffering and render him "economically whole" to the extent it is practical and just to do so.

The matter of future compensation was not before the initial Tribunal, was not claimed by the Respondent and was not the

subject of argument by Counsel on this Appeal. Counsel therefore has not been afforded an opportunity to address this issue and accordingly I do not think it within the competence of this Review Tribunal to award future compensation whether from this date forward or from the date of the Hearing before the initial Tribunal.

That being said, future compensation has been awarded by this Tribunal based on the decision of Professor Tarnopolsky in Akram Rajput versus Algoma University College (May 12th, 1976.) Compensation was awarded in that case because of the special circumstances which arose due to the academic year having nearly expired. This fact made it questionable whether the injured party's application for a position could be processed in time. Because of that uncertainty the Tribunal ordered compensation to be paid during

the interim, subject to satisfying it that the Claimant "made all reasonable efforts to get such appointment" the following academic year. The case, in my opinion, does not support the awarding of compensation from this date to the date of reinstatement as has been held by my colleagues.

Finally, there is the problem of the period of time during which compensation ought to be awarded given the acknowledged fact that the compensatory period as determined by my colleagues "seems extreme".

The Canadian Human Rights Act provides for relief to a victim of discrimination under Section 53 (2) (B), (C) and (D) as follows:

"If, at the conclusion of its inquiry, a Tribunal finds that the complaint to which the inquiry relates is substantiated, it may, subject to subsection (4) and section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in that order any of the following terms that it considers appropriate:

(B) that the person make available to the victim of the discriminatory practice, on the first reasonable occasion, such rights, opportunities and privileges

as, in the opinion of the Tribunal, are being or were denied the victim as a result of the practice.

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(C) that the person compensate the victim, as the Tribunal may consider proper, 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; and

(D) that the 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 for any expenses incurred by the victim as a result of the discriminatory practice."

It is important to emphasise that subsections (a) and (b) are discretionary and, as I read them, are not mutually exclusive or dependent on each other. In other words the Act does not restrict the Tribunal in any way in the exercise of its discretion. it may order one or the other or both of the remedies provided in those sections depending on the circumstances of the case. To illustrate my point and by way of contrast, where a plaintiff seeks specific performance of a contract the court may deny that relief but allow an alternative claim for damages. it rarely, if ever, orders both. Where damages are awarded the principle of "restitutio in integrum" is invoked and applied. I intend to examine that principle and its application to this matter in the course of this discussion.

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In Rosanna Torres vs Royalty Kitchenware Limited et al (1982) 3, C.H.R.R. D/858 (Ont. H.R.T.), Professor Cummings examined the development of human rights legislation and the decisions of boards of inquiry in Canada in great depth. An analysis of the decision in Butterill,Foreman et al versus Via Rail Canada 1 C.H.R.R. D/233 (Review Tribunal) and Albermarle Paper Co. versus Moody, 422 U.S. 405, 45 L.E.d. (2d) 280, (1975) leads him to conclude that "compensatory awards should not be completely discretionary" - see paragraph 7720.

When commenting on re-instatement, on the other hand he states, as follows:

"If another type of order that is sometimes made so as to effect "full compliance" (or to "rectify any injury") is re-instatement of an employee who has been discriminatorily dismissed. Such orders are, for obvious reasons, rarely made, yet they are appropriate in some cases where immediate, substantive compliance is desired".

From these comments I take it that compensation should follow more or less as a matter of course where there is a finding of discrimination. On the other hand, re-instatement is a purely discretionary remedy, rarely made and only if, in the opinion of the Tribunal, it is appropriate. it was for this reason the Review Tribunal on this Appeal chose not to interfere" with the decision of the Tribunal below notwithstanding the lengthy time period which had elapsed from the date of the discriminatory act.

This is not to say, had this Tribunal sat as a trier of the case in the first instance, it would have exercised its discretion in the same manner as did the Tribunal of first instance.

If re-instatement is purely discretionary and compensation is less so then it seems to me certain well known accepted principles of compensatory damages should guide the Tribunal in assessing or quantifying the financial loss. These principles are quoted with approval by the Review Tribunal in the Foreman, Butterill versus Via Rail case, supra, as follows at paragraph 7716:
"in our view the use of the language of "compensation" by the Canadian Act implies that tribunals are to apply the principles applied by courts when awarding compensatory damages in civil legislation. The root principle of the civil law of damages is "restitutio in integrum": the injured party 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." p. 538.

In a recent case, Attorney General of Canada vs McAlpine [1989] 3 F.C. 530, the Federal Court of Appeal on appeal from a

decision of a Human Rights Tribunal which relied on that principle in assessing damages for lost U.I.C. benefits commented as follows at page 538:

..... the proper test must also take into account remoteness or forseeability where the action is one of contract or tort. Only such part of the loss resulting as is reasonably forseeable is recoverable".

The Federal Court goes on to quote with approval from Professor Cummings in the Torres case, supra, with respect to a cut-off point in awarding general damages and notes the rationale quoted was followed by the Review Tribunal in DeJager vs Department of National Defence [1987] 8 C.H.R.R. D/3963 at D/3966 and D/3967 and also in other decisions where human rights tribunals have accepted the doctrine of reasonable forseeability as a necessary component in the assessment of damages.

It follows from the interpretation I have placed on the remedial provisions of the Act the duration of the compensatory period need not coincide with re-instatement whenever it may occur. Much less that it is automatically determined by the order for reinstatement. This is the crux of the matter on which I part company with my colleagues. I would agree if the victim of the discriminatory act were fired from a position he actually occupied and if re-instatement were to take place soon thereafter the duration of the compensatory period would logically coincide with that happening. What we have here, on the other hand, is a notional loss of a position in which the Respondent was not employed when the discriminatory act occurred. He was

it I re- einstated" as the consequence of an intervention by a Tribunal and a finding by it made some eight years after the event.

In Rosanno Torres, supra, Professor Cummings posits the following hypothesis in discussing the general topic of "damages" and "mitigation of damages" at paragraphs at 7748;

"Supposing that discrimination on a prohibited ground is found by a Board, but mitigation by the Complainant has proved

impossible, or not without a great lapse of time, and the only appropriate mode of compensation to be considered in giving the order is by way of damages. 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 acted reasonably in trying to mitigate, but has not succeeded. Hypothesize further that it is not appropriate or practical in the circumstances to order re-instatement 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? There are analogous issues in tort law and contract law, of course, where damages are limited to those reasonably forseeable to the wrongdoer. it seems to me, at first impression, that these principles are appropriate to awarding general damages under the Code. That is, there

Is a 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, "reasonable" period of time being one that could be said to be reasonably forseeable 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."

While there are similarities between this case and Professor Cummings's hypothesis there remain two important differences. They are:

1) he assumes an employee is fired from his present employment, and,

2) it is not appropriate or practical in the circumstances to order re-instatement of the employee to his former position.

Neither of these assumptions apply to the situation of the Respondent in this Appeal. What does apply, it seems to me, is

that in both cases the employee, Respondent, has acted reasonably in trying to mitigate and has not succeeded over a long period of time. Notwithstanding the similarities and differences between Professor Cummings's hypothesis and the facts of this case, it is

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appropriate, in my opinion, to adopt the general principle which he has ennunciated and which I have emphasised.

In De Jager vs Department of National Defence, supra, the Complainant suffered from asthma. He had enlisted in the Canadian Armed Forces in May 1980 for a five year tour of duty. He was discharged on medical grounds on October 12th, 1982. The Tribunal found that the defence of bona fide occupational requirement had not been made out and that Mr. De Jager had been discriminated against. The Tribunal adjourned to a later date to hear evidence and argument as to remedies and damages.

Following the adjourned Hearing, the Tribunal described Mr. De Jager's efforts to mitigate as follows:

"in the case before us there was evidence of Mr. De Jager'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." (see paragraph 31388).

The Tribunal then determined compensation be paid for a little less than three years to the end of his tour of duty and that he be reinstated for a period of three years. The decision is dated February 20th, 1987 and the Tribunal's Order for Reinstatement would therefore enable him to complete his original five year tour of duty.

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In De Jager, Counsel for the Human Rights Commission argued the Complainant should be compensated for lost wages from the date of release until the date of hearing. in rejecting that argument the Tribunal quoted with approval the excerpt quoted supra from Professor Cummings in the Torres case namely, that there is a cut-

off point in awarding general damages by way of compensation. Professor Cummings expresses this by saying:

"Is..... a respondent is only liable for general damages for a reasonable period of time, "reasonable" period of time being one that could be said to be reasonably forseeable in the circumstances by a reasonable person if he directed his mind to it". See Par. 31392.

Furthermore the Tribunal did not accept the Foreman, Butterill et al vs Via Rail case, supra, as authority for the proposition urged by Commission Counsel that compensation should run from the date of Mr. De Jager's release until the date of the hearing. Commenting on the Via Rail case the De Jager Tribunal stated:

"The thrust of that case is that the complainants did not have to provide proof of ability to pass eye examination in order to be eligible for compensation". See Par. 31390

Counsel for the Human Rights Commission argued that the decision of the initial Tribunal in this case is only

understandable in one way by reference to the Act itself and to a decision of the Supreme Court of Canada in Action Travail des Femmes vs. Canadian National Railways et al (1987) 8 C.H.R.R. D/4210 and other authorities including the Butterill case, supra.

The Action Travail des Femmes, who were a public interest group, alleged that C.N. was guilty of discriminatory hiring and promotion practices contrary to section 10 of the Act by denying employment opportunities to women in certain unskilled blue collar positions. In holding the Tribunal was within its jurisdiction in making an order under section 41 (2) (a) of the Act by the adoption of a special program designed to meet the problem of systemic discrimination, "to prevent the same or similar practice occurring in the future", the Court held, as follows:
to an employment equity program such as the one in the present case, is designed to break a continuing cycle of systemic discrimination. The goal is not to compensate past victims or even to provide new opportunities for specific individuals who have been unfairly refused jobs or promotion in the past. Rather, an employment equity program is an

attempt to insure that future applicants and workers from the affected group will not face the same insidious barriers that blocked their forebearers."

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The case is clearly distinguishable on its facts. Counsel, however, referred to it as authoratative of the proper interpretative attitude towards human rights codes and acts. She referred to a passage in which the Chief Justice stated as follows:

"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 those rights and to enfeeble their proper impact. Although it may seem common place, it may be wise to remind ourselves of the statutory guidance given by the Federal Interpretation Act which asserts that statutes are deemed to be remedial and are thus to be given such fair, large and liberal interpretation as will best insure that their objects are attained." See Par 33238.

Following through on this interpretation Counsel then urged that the purpose of the Act was "to make the Respondent whole".

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The concept of "making whole" which was articulated in a decision by the United States Supreme Court in Albermarle Paper Co. vs. Moody (1975) 422 U.S. 405 - involving racial discrimination - is not unlike the principle familiar to Canadian courts in dealing with civil claims for damages which is embodied in the phrase "restitutio in integrum". A reasonably accurate translation is "to restore to wholeness".

The Federal Court in the McAlpine case, supra, has set limits on the concept of "making whole" or restoring to wholeness it seems

to me, by holding that "only such part of the actual loss resulting as is reasonably forseeable is recoverable".

There are, in my opinion, considerations which ought to have been addressed and were not in this case and they are described by Professor Tarnopolsky in Phyllis Amber vs. Mr. and Mrs. Max Lager (April 10th, 1970 unreported) referred to by Professor Cummings in the Torres case, supra, where he quotes Professor Tarnopoisky as follows:

"As far as actual monetary loss is concerned, the difficulty faced by a Board of inquiry is to determine which items are traceable to the act or acts of discrimination, or whether there should be some limitation of these costs because of factors such as reasonableness, remoteness, intervening or contributory cause. (p. 17)".

Before considering the factors described by Professor Tarnopoisky I would like to refer briefly to the cases which Counsel relied on in support of her understanding of the concept of making whole. She referred to Bonnie Robichaud et al vs. Her Majesty the Queen [1987] 2 S.C.R. 84, a case of sexual harassment in which the only issue before the Supreme Court of Canada was whether or not an employer is responsible for the unauthorized discriminatory act of its employees in the course of their employment; Gadowsky vs. The School Committee of Two Hills, 21 1 C.H.R.R. D184 which is a case decided under the Alberta "Individual's Protection Act" in which the complainant alleged she was discriminated against because of her age. In holding that there was discrimination the Court held that Mrs. Gadowsky was entitled to be compensated for salary which she would otherwise have earned during the relevant years. it went on to hold that "as in any other action for compensation or damages for wrongful dismissal, the claimant or plaintiff is required to mitigate her damages"; Airport Taxicab Association vS. Piazza, an unreported decision of the Ontario Court of Appeal referred to earlier under the heading of "mitigation" in which the Court rejected the notion that compensation should be restricted to the period of time of reasonable notice as in wrongful dismissal; the Butterill case referred to earlier, in which on appeal to the Federal Court of Appeal it was held that the decision of the Review Tribunal in awarding compensation should be set aside and referred back to the Review Tribunal both

on the issue of liability and on the issue of quantum for the purpose of permitting the introduction of further evidence. At the same time the Court held that the proof of the ability of the complainants to pass the eyesight examination required by Via Rail was not an element of the case which it was incumbent on them to prove in support of their claim for compensation for wages lost by them as a result of the discriminatory practice; Foster Wheeler Ltd. vs Scott et al 8 C.H.R.R. D/4179 which the Supreme Court of ontario reduced the amount awarded by the Tribunal based on the expectation of one of a group of several workers as to the duration of his employment, to the average for the group; finally reference is made to Rinn and Russell vs Keewatin Air Limited 9 C.H.R.R. D/5106 in which the complainants were employed as pilots and the Tribunal held that Keewatin Air Limited discriminated against one of them when it terminated his employment because of his marital status.

The Rinn and Russell case is interesting for two reasons. Firstly it disagrees with the Review Tribunal in DeJager vs. (Canada) Department of National Defence, supra, in which the Tribunal adopted the principle of reasonable forseeability in awarding compensation: secondly, because reasons for rejecting the principle are expressed by the Chairman as follows:

"in my opinion this position is not applicable to the making of an award under the Canadian Human Rights Act. in tort law the principals of forseeability place a cap on damages only

to the extent that the kind of damage must be forseeable in order to be compensable. However, once the kind of damage is forseen the full extent of the damage need not be forseen in order to be compensable. I recognize that in DeJager vs. (Canada) Department of National Defence (1987), 8 C.H.R.R. D3963, a Tribunal composed of M. Wendy Robson, Paul J. D. Mullin and A. Wayne MacKay said in their reasons that they were placing a cap on damages based on reasonable forseeability. It seems to me that on reading the award that the Tribunal there made a full award of wages, but in the event that I am wrong I respectfully disagree with the principle which is stated in the award".

From this quote it is apparent that while the Chairman rejects the principle of reasonable forseeability he adopts and applies instead a principle of civil law that once the kind of damage is forseen the full extent of the damage need not be forseen in order to be compensable. This is a principle most frequently invoked where courts award damages in futuro. In my opinion, and with respect, it has no application to "compensation for wages' under the Canadian Human Rights Act.

The Federal Court in the McAlpine case, supra, concluded by stating:

"the doctrine of reasonable forseeability has also been accepted by other Human Rights Tribunals as a necessary component in the assessment of damages". See P. 538.

Some of the cases in which the doctrine of reasonable forseeability has been applied include Mears et al vs. ontario Hydro et al (1984) 5 C.H.R.R. D/858 (Ont. H.R.T.) where the Tribunal in finding racial discrimination under the Ontario leglislation awarded compensation for "a reasonably forseeable time" and expressed the opinion "I do not believe that it was intended by the legislature that..... the Code should provide a person who has been discriminated against compensation for an indeterminate period of time..... ; in Brazeau Transport Inc. vs. Pelletier et al (1988) 9 C.H.R.R. D/779 (C.H.R.T.) - (discrimination based on age) damages were assessed on the basis the complainant was entitled to a reasonable period of time to find another job while making reasonable efforts to find employment and thus mitigate damages. See also Hinds vs. Canada Employment and immigration Commission (1988) 10 C.H.R.R. D/864 (C.H.R.T.).

Apart from awards for damages where the victim suffers physical or mental impairment of a permanent nature, as in personal injury claims, a point is reached, it seems to me, when reason requires that the target of a discriminatory act become responsible for his or her well-being and when the duty to mitigate overrides other considerations. This really is the

other side of the coin which holds that the responsible party is accountable only for such part of the loss as is reasonably forseeable by a reasonable person who has directed his mind to it. The application of this principle need not and should not diminish the remedial nature of the legislation or defeat its intent.

What is the duration of time in which mitigation could have reasonably been expected to have been achieved by the Respondent even though it could not be, in his particular situation and given his unique exceptional situation? To thus paraphrase Professor Cummings in the Torres Case.

When asked by this Tribunal to suggest a reasonable period of time in the Respondent's case Counsel for the Appellant suggested eighteen months. He submitted the factors to be kept in mind included, firstly, the fact the Respondent had worked in his initial enrollment with the Armed Forces four and one half years; secondly, when he applied in 1980 there were no vacancies in the occupation to which he sought to be enrolled; and finally, he voluntarily left jobs in 1980 and 1981. This Tribunal has already referred to the last mentioned two items which are not, we have agreed, matters that are relevant in determining what was a reasonable time in the circumstances of this case.

In addressing the question of what is a reasonable time in this case I have borne in mind the comments of Chief Justice Dixon in Action Travail des Femmes, supra, that human rights legislation ".....is to be given such fair, large and liberal interpretation as will best insure that their objects will be obtained", and the comments of La Forest J. in Bonnie Robichaud vs. The Queen, supra..... the Act, as we saw, is not aimed at determining fault or punishing conduct. it is remedial. Its aims is to identify and eliminate discrimination".

One of the factors which was taken into consideration by the Tribunal when it determined that what the Respondent lost was a job and not an opportunity for a job is the fact that he previously had been a member of the Armed Forces. All else being equal this gave him an edge over other candidates in the competitive process. Accordingly it is appropriate and provides some guidance in determining what was a reasonable time for the Respondent to find other comparable employment to examine his

record of employment. Also it is useful to consider the events which occurred following the refusal by the Appellant to re-enrol him.

The Respondent joined the Armed Forces in 1973 at the age of seventeen and served until March 1978, approximately four and one half years. In November 1975 he was involved in a motor-vehicle

accident while off duty. His discharge on medical grounds in March of 1978 was related to head injuries he received in the motor-vehicle accident which rendered him unconscious for a period of eight weeks. He was hospitalized and put on what he described as the "medical holding list" and did not return to work until a year later in November of 1976. While incapacitated he remained a member of the Armed Forces until his medical discharge in 1978.

When he applied for re-enlistment in June of 1979 he was unemployed and it had been just over a year since his medical discharge.

After being notified by letter dated April 17th 1980 from Captain Ujimoto that his application for re-enlistment had been refused by National Defence Headquarters the Respondent set about trying to find employment in what he described as "other employment that was suitable to a standard of the military lifestyle".

He failed to find employment in any occupation similar to the military lifestyle previously described. He persisted in his efforts to re-enlist with the Armed Forces until July of 1983 when he registered his complaint of discrimination with the Canadian Human Rights Commission.

In the meantime the Respondent had found irregular and temporary employment as a Tabourer, truckdriver, landscaper and tray carrier. He also began to upgrade his education, obtain his "Class C" drivers licence and First Aid Certificate from the St. John's Ambulance Society.

None of these laudable efforts and achievements by the Respondent resulted in the kind of structured, career oriented occupation that he was deprived of when he received his medical discharge and that he strove to regain afterwards.

While one cannot but sympathise with the Respondent in his struggle to regain what was lost it must be borne in mind that what occurred was set in motion by an event, i.e. the off duty motor-vehicle accident, for which the Appellant was not responsible.

It seems to me when the Respondent filed his complaint in July of 1983 with the Canadian Human Rights Commission he had come to the conclusion that his own efforts to re-enlist were futile. it was then - some three years after the event - when one might reasonably have forseen mitigation would have been achieved even though it was not given the unique, exceptional situation of the Respondent.

Put in another way, ought the Appellant to have reasonably forseen that the consequences of its discriminatory act would extend for some six and a half years after the event, or, longer if one accepts my view of the evidence. With respect, it seems to me, the initial Tribunal in awarding damages for that period of time after making an adjustment of two and a half years for failure to lodge a complaint in a timely fashion, went far beyond what was reasonably forseeable. The six and one half year period for which compensation was awarded substantially exceeds the Respondent's service time with the Armed Forces.

In De Jager, supra, compensation was awarded for less than three years. A careful examination of the facts in the Respondent's case leads me to conclude, given the circumstances including his military background, the career opportunities in the Armed Forces, his prior training which was limited to a rather narrow area of expertise and the prevailing economic conditions, the Appellant ought reasonably to have forseen the consequences of its discriminatory act as extending tar beyond a period of three years until the end of December 1983. In that time it ought reasonably to have been expected that the Respondent would have found comparable employment even though he in fact did not. in my opinion, the Respondent will be fairly and adequately compensated by ordering compensation from the beginning of the earning period

on July 15th 1980, as determined by the initial Tribunal to the end of 1983 i.e. December 31st, 1983.

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I calculate the income earned during the relevant time period from 1980 to the end of 1983:

1980 income earned per T4's $ 1,833.24
Casual Income 200.00
Total: $ 2,033.24

1981 Income earned per T4's $ 770.17
Casual Income 500.00
Total: $ 1,270.17

1982 income earned per T4's $ 901.46
Casual Income nil
Total: $ 901.46

1983 Income earned per T4's $ 4,861.80
Casual Income nil
Total: $ 4,861.80

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The actual loss of income using scenario "C" of pay rates according to the table marked Exhibit R-3 and deducting the amounts earned by the Respondent are as follows:

Year	Wage Loss	Deductions	Net Wage Loss
1980	$ 6,504.00	$ 2,033.24	$ 4,470.76
1981	$ 14,319.00	$ 1,270.00	$ 13,049.00

1982	$ 16,392.00	$ 901.46	$ 15,490.54
1983	$ 17,592.00	$ 4,861.80	$ 12,730.20

$ 45,740.50

It should be noted that the deduction for income earned during 1980 is for the full calendar year without adjustment on income earned prior to July 1st, 1980.

Interest on the net wage loss is to be calculated according to the annual rate of interest payable on Canada Savings Bonds as at the date of issue. The calculations follow. I point out the Registrar's rates under the Court Order Interest Act of British Columbia during the relevant time period produce a result somewhat less (by approximately $2,000.00) than does the Canada Savings Bond rates. Both calculations were based on simple interest and I am advised it is not the Registrar's practice to apply compound interest, nor to my knowledge has compound interest been awarded by any other Tribunal or Court except, of course, in this case by the Tribunal below and by my colleagues on this Review Tribunal.

Apart from precedent and on principle alone I am unable to appreciate the rationale for awarding compound interest unless one assumes the claimant invests his or her entire wage earnings over a period of time with nothing left over for living expense. The Canada Savings Bonds rates of interest as at date of issue are:

Series 35	November 1, 1980	10.50%
Series 36	November 1, 1981	19.50%
Series 37	November 1, 1982	12.00%
Series 38	November 1, 1983	9.66%

Series 39 November 1, 1984 11.25%
Series 40 November 1, 1985 9.00%
Series 41 November 1, 1986 7.75%
Series 42 November 1, 1987 9.00%
Series 43 November 1, 1988 10.16%
Series 44 November 1, 1989 10.91%

1. 1,980

Annual Wage Simple Total Wage Loss Interest Loss

1980 wage loss $ 6,504.00
Less 1980 wages earned 2,033.24
$ 4,470.76

2. 1981

1981 wage loss $ 14,319.00
Less 1981 wages earned 1,270.00

$ 17,519.76

Add 10.5% interest on $ 4,470.76
$ 469.43

3. 1982

1982 wage loss $ 16,392.00
Less 1982 wages earned 901.46
$ 33,010.30

Add 19.5% interest on $ 17,519.76
$ 3,416.35

4. 1983

1983 wage loss $ 17,592.00
Less 1983 wages earned 4,861.80

$ 45,740.50

Add 12% interest on $ 33,010.30
$ 3,961.24

5. 1984

1984 wage loss $ 45,740.50

Add 9.66% interest on $ 45,740.50
$ 4,418.53

6. 1985

1985 wage loss $ 45,740.50

Add 11.25% on $ 45,740.50
$ 5,145.81

Sub-totals carried forward $ 17,411.36
$ 45,740.50

Sub-totals brought forward $ 17,411.36
$ 45,740.50

7. 1986

1986 wage loss $ 45,740.50

Add 9% interest on $ 45,740.50
$ 4,116.65

8. 1987

1987 wage loss $ 45,740.50

Add 7.75% interest on $ 45,740.50
$ 3,544.89

9. 1988

1988 wage loss $ 45,740.50

Add 9% interest on $ 45,740.50
$ 4,116.65

10. 1989

1989 wage loss $ 45,740.50

Add 10.16% interest on $ 45,740.50 x 269 divided by 365
$ 3,424.94

Grand Total $ 78,354.99
$ 32.614.49
$45,7 0.50

I therefore award the Respondent as compensation for lost wages the sum of $78,354.99 in total, inclusive of interest.

SIGNED AND DATED at Anglemont, British Columbia, this day of June, 1990.

Norman Fetterly