

T.D. 5/96
Decision rendered on April 9, 1996

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

HUMAN RIGHTS TRIBUNAL

BETWEEN:

SATISH CHANDER
NARENDRA NATH JOSHI

Complainants

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

DEPARTMENT OF NATIONAL HEALTH AND WELFARE

Respondent

DECISION OF THE TRIBUNAL RELATED TO DAMAGES

TRIBUNAL: Keith C. Norton, Q.C. - Chairperson
Janet Ellis - Member
Subhas Ramcharan - Member

APPEARANCES: Eddie Taylor - Counsel for the
Commission

Arnold Fradkin - Counsel for the
Respondent

DATES AND LOCATION February 19 and 20, 1996
OF HEARING: Ottawa (Ontario)

Reference: T.D. 16/95
December 13, 1995

The hearing was reconvened on February 19, 1996, to hear evidence on the question of remedy.

1. THE POSITIONS OF THE PARTIES

The Canadian Human Rights Commission ("the Commission") presented the following position:

Dr. Narendra Nath Joshi

The Commission argued that Dr. Joshi should be reinstated to the BI-04 position denied him on May 30, 1989 with appropriate seniority. It was further argued that he is entitled to lost wages from June 10, 1989 including salary progressions plus all lost benefits including pension, less his unemployment insurance benefits and income from all other sources during this period.

The other remedies sought were limited to a travel expense claim, general expenses including legal fees and an award for hurt feelings.

Dr. Satish Chander

The Commission argued that Dr. Chander should be promoted to a BI-04 position which he was denied on May 30, 1989 and paid the difference in wages between his actual remuneration from July, 1989 and the remuneration he would have received, including salary progressions, if he had received the appointment.

In Dr. Chander's case, the Commission also claimed lost benefits, legal expenses and an award for hurt feelings.

The Respondent's position was that the appropriate remedy should be an order to establish another competition and to constitute a new selection board composed of persons outside Health Canada (as the department is now designated) for the sole purpose of considering whether or not the two individuals are qualified for the BI-04 position.

The Respondent Counsel further stated that if the Complainants were found to be qualified by such a selection board, the Respondent would then have no objection to their appointment to BI-04 positions with back pay and benefits as requested by the Commission with the exception of a few details.

2. THE LAW

The Canadian Human Rights Act (the "Act") reads as follows:
S. 53(2) 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 or privileges as, in the opinion of the

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Tribunal, are being or were denied the victim as a result of the practice;

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

In the case of the Attorney General of Canada v. Morgan et al [1992] 2 F.C. 401, Marceau, J.A. in addressing the issue of the period of compensation states with respect to compensation, at page 414:

[...] In both fields (ie. human rights law and tort law), the goal is exactly the same: make the victim whole for the damage caused by the act source of liability. Any other goal would simply lead to an unjust enrichment and a parallel unjust impoverishment. The principles developed by the courts to achieve that goal [...] are therefore necessarily applicable. It is well known that one of those principles has been to exclude from the damages recoverable the consequences of the act that were only indirect or too remote.

He continues at p. 416, to discuss the difficulty of establishing a cut-off point and ultimately adopts the analysis of this issue in the minority decision of McGuigan, J.A. which reaches the same conclusion as De Jager v. Canada (Department of National Defence) (1987), 8 C.H.R.R. D/3963 (C.H.R. Trib.) that only that part of the actual loss which is reasonably foreseeable by the person engaging in the discriminatory practice is recoverable.

3. FINDING

Before making any order in this case, the Tribunal wants to make the statement that it is unanimous that the decision rendered December 13, 1995 by both the majority and the dissent clearly found, if not in these specific words, that the evidence overwhelmingly supported the conclusion that each of the two complainants was qualified for a BI-04 position.

Furthermore, no evidence was called by the Respondent to counter such a conclusion.

The Tribunal finds that it would be an inappropriate remedy to order a further selection board to determine this issue.

4. ORDER

DR. JOSHI:

i) REINSTATEMENT

The Tribunal orders, pursuant to section 53(2)(b) of the Act, that on the first reasonable occasion Dr. Joshi be appointed to an appropriate position at the BI-04 level on an indeterminate basis. The actual position should be one commensurate with his educational qualifications and professional experience.

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It is further ordered that appropriate consideration be given to the fact that Dr. Joshi has been absent from the Respondent Department for a considerable period and, therefore, should be provided with appropriate support and/or training to assist in his readjustment to his duties and responsibilities.

ii) COMPENSATION

In considering the evidence respecting lost wages the Tribunal was cognizant of the law, as set out above, with respect to reasonable foreseeability.

The T4 slips presented in evidence (EX. HR-8, TAB D) showed that by 1991, Dr. Joshi's income had risen to almost the level he was claiming as salary at the BI-04 level in Table A. (Exhibit HR-8, TAB A)

The Tribunal finds that bearing in mind the law set out above, it would be proper to compensate for lost wages up to December 31, 1991.

Therefore the Tribunal orders that the Respondent compensate Dr. Joshi for lost wages in the amount of \$63,588.44.

This figure was calculated by totalling the salary amounts claimed in Table A (Exhibit HR-8, TAB A) to the end of 1991 and deducting the income from all sources to that date as shown in the evidence in TAB D of the same exhibit.

The assumptions included in the tables presented other than Table A were rejected by the Tribunal as there was insufficient evidence to support the assumptions. The Tribunal also decided that retroactive benefits are not properly applicable to this case.

iii) INTEREST

The Tribunal orders that on the sum of \$63,588.44 the Respondent pay to Dr. Joshi simple interest at the Bank of Canada rate calculated from December 31, 1991 until date of payment.

iv) TRAVEL CLAIM

The Tribunal finds that Dr. Joshi travelled to New Orleans for the Respondent prior to his termination. Dr. Joshi's receipts were unavailable to him because he had no access to his desk after June 9, 1989. He had been advanced \$1,000.00 (U.S.) and an airplane ticket worth \$972.65.

In the absence of a completed claim form with receipts, the Respondent deducted these amounts from Dr. Joshi's superannuation payment after his employment ceased.

The Tribunal orders the Respondent to pay to Dr. Joshi the actual amount deducted from Dr. Joshi namely, \$2,162.65 plus interest at the Bank of Canada rate from October 16, 1989 until the date of payment.

v) LEGAL EXPENSES

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There being insufficient evidence that the legal costs were necessarily incurred by the complainant for the purpose of advancing the complaints, the Tribunal denies the request for reimbursement.

vi) SPECIAL COMPENSATION PURSUANT TO S. 53(3)(b)

There was ample evidence to support the Tribunal's decision to award Dr. Joshi the maximum award of \$5,000.00 in respect of hurt feelings.

DR. CHANDER:

i) REINSTATEMENT

Dr. Chander continues to be employed by the Respondent at the BI-03 level. The Tribunal orders pursuant to S. 53 (2)(b) of the Act that on the first reasonable occasion he be appointed to an appropriate position at the BI-04 level on an indeterminate basis.

The Tribunal's order could be satisfied by an appointment in any division of the Respondent Department as long as the indeterminate BI-04 position is commensurate with Dr. Chander's educational qualifications and experience.

ii) COMPENSATION

The Tribunal reviewed all the Tables in HR-8, TAB B and decided that Table A is the only table applicable. As distinguished from Dr. Joshi's case, Dr. Chander was, prior to the discrimination a permanent employee of long standing in the civil service.

It was reasonably foreseeable in Dr. Chander's case that his losses would be ongoing because he was limited to seeking positions within the civil service and constrained from looking elsewhere by virtue of his long standing service or established career path.

The Tribunal awards Dr. Chander the sum of \$40,601.25 for lost income together with simple interest at the Bank of Canada rate from the date of the order until the date of payment.

The Tribunal decided that retroactive benefits were not applicable in this case.

iii) LEGAL EXPENSES

For the same reason as stated above the Tribunal does not order reimbursement of this expense.

iv) SPECIAL COMPENSATION PURSUANT TO S. 53(3)(b)

It was clear from the evidence that although Dr. Chander has suffered hurt feelings, he has not suffered to the same extent emotionally as Dr. Joshi. The Tribunal orders payment to Dr. Chander of \$1,000.00.

Dated this day of March, 1996.

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Keith C. Norton, Q.C.
Chairperson

Janet Ellis
Member

Subhas Ramcharan
Member