T.D. 13/96
Decision rendered on December 13, 1996

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

HUMAN RIGHTS TRIBUNAL

BETWEEN:

CLARENCE LEVAC

Complainant

and

CANADIAN HUMAN RIGHTS COMMISSION

Appellant

and

CANADIAN ARMED FORCES

Respondent/
Counter-Appellant

DECISION OF THE REVIEW TRIBUNAL

TRIBUNAL: Lise Leduc, Chairperson
Andrée Marier, Member
Grégoire Mputu-Bijimine, Member

APPEARANCES: François Lumbu, Counsel for
Canadian Human Rights Commission

Alain Préfontaine, Counsel for
Canadian Armed Forces

DATES AND
LOCATION OF HEARING: June 12 and 13, 1995
Montreal, Quebec

INTRODUCTION

The President of the Human Rights Tribunal Panel, Keith C. Norton, appointed a Human Rights Review Tribunal composed of the undersigned: Lise Leduc, Andrée Marier and Grégoire Mputu-Bijimine, lawyers in the province of Quebec, to consider the appeal filed by the Canadian Human Rights Commission on February 23, 1995, and the appeal filed by the Canadian Armed Forces on February 28, 1995, of the decision rendered by the Human Rights Tribunal in Clarence Levac v. Canadian Armed Forces.

REASONS FOR THE APPEAL

On February 23, 1995, the Canadian Human Rights Commission appealed decision T.D. 2/95 rendered by Marie-Claude Landry following the proceeding for damages in respect of a complaint filed by Clarence Levac against the Canadian Armed Forces on December 7, 1984, which was modified July 10, 1987.

The Canadian Human Rights Commission based its appeal on the following grounds:

1. The Tribunal erred in fact and in law in suggesting to the parties the use of an incorrect method to calculate the Complainant's loss in respect of the pension fund. This method involved the double deduction of the amounts received as pension, in the five-year period of compensation, for damages related to the discriminatory practice.

2. The Tribunal erred both in fact and in law in not ruling on the loss of future pension as of 1989, the year in which, according to the ruling, the Complainant should have been released had it not been for the discriminatory practice.

3. The Tribunal erred both in fact and in law in drawing a ludicrous and arbitrary conclusion from the elements of proof submitted to it regarding the Complainant's hurt feelings, for which no award was made.

REASONS FOR THE COUNTER-APPEAL

The Canadian Armed Forces are also appealing the decision rendered by Marie-Claude Landry, and their notice of appeal of February 28, 1995, gives the following reasons:

1. The Tribunal erred in fact and in law in fixing the period of compensation at five (5) years.

2. The Tribunal erred in fact and in law in retaining its jurisdiction as to the amount of the damages in respect of the pension fund during the period of compensation and, in so doing, exceeded its jurisdiction.

GENERAL CONSIDERATIONS

Clarence Levac was born February 27, 1938, and joined the Canadian Armed Forces (Navy), in 1955. According to his re-engagement contract of June 22, 1978, he was to serve for a period of fifteen (15) years, until February 27, 1993, on which date the Complainant would reach age 55. On February 26, 1984, he was released from the Canadian Armed Forces on medical grounds.

The Human Rights Tribunal found that the complaint of discriminatory practice filed by Mr. Levac was well founded, stating:

For all of the above reasons, the Tribunal declares the Complaint in the present case to be well founded and concludes that the Respondent, though not willfully or recklessly, has nevertheless engaged in a discriminatory practice in contravention of s. 7(a) (1) of the Canadian Human Rights Act.

On July 8, 1992, the Federal Court of Appeal denied the application of the Canadian Armed Forces filed pursuant to the Federal Court Act (R.S.C., (2) c. F-7) that it review and overturn the decision of August 2, 1991.

As the parties had agreed, before the hearing, to deal with the complaint in two stages - first, to determine whether the complaint would be substantiated and second, to return before the Tribunal regarding damages - on September 16, 1993, a Human Rights Tribunal composed of Marie-Claude Landry was appointed to proceed with the inquiry into the complaint and to make the necessary orders, pursuant to section 53 of the Act.

The question that arises within the scope of this appeal is whether the Tribunal made any error in fact or in law that would give this Tribunal reason to change the decision of Marie-Claude Landry, pursuant to subsections 42.1(4), 42.1(5) and 42.1(6) of the Canadian Human Rights Act.

The evidence brought before the Review Tribunal is identical to that brought before the original Tribunal.

In the circumstances, the Review Tribunal must therefore give all due respect to the Tribunal's opinion as to the facts, and not substitute its own finding as to the facts for that of the Tribunal unless it is satisfied that an obvious error has been committed in the interpretation of the facts. This is a general principle adopted and applied in Brennan v. The Queen (1984, 2 F.C., 799).

1. HURT FEELINGS

It is in light of this principle that the Tribunal analysed the Canadian Human Rights Commission's third ground for appeal. A study of three decisions submitted by the Appellant's counsel regarding hurt feelings reveals that in these three cases, sufficient evidence was presented to the Tribunal for an award to be made for hurt feelings. The decision in Commission des droits de la personne du Québec c. Bar (3) La Divergence states:
[Translation]

1 Levac v. Canadian Armed Forces, T.D. decision 13/91 rendered August 2, 1991.
2 Canada v. Levac (1992), 3 F.C. 463 (F.C.A.).
3 (1994) R.J.Q., 847, p. 855.

It appears from the evidence that the situation in this case caused Mme Jacques great disappointment and a feeling of exclusion, even rejection, which in a way aggravated the social isolation resulting from her disability....(4)

In Cindy Cameron v. Nel-Gor Castle Nursing Home and Marlene Nelson , the Board of Inquiry notes:

She was undoubtedly hurt deeply and psychologically traumatized by the event. Her self-confidence was shattered. She suffered severe depression for some two weeks.... (5)

In Howard v. University of British Columbia , in which $1,500 was awarded for loss of dignity, the Court states:

The conduct in this case is analogous to that in Woolverton v. B.C. Transit operating Handydart (reported 19 C.H.R.R., D/200).... In that case $1,500 for emotional distress was awarded to the Complainants who testified. I think that a similar award is appropriate in this case. I therefore order the respondent to

pay $1,500 to the Complainant as compensation for his loss of dignity.

On page 16 of her decision, Ms. Landry states:

"Since the Tribunal has no satisfactory evidence that the complainant suffered hurt feelings, it dismisses his application on this point..."

The Review Tribunal upholds the original judgment regarding the request for damages for hurt feelings, respecting the opinion of Marie-Claude Landry, who heard the evidence and assessed the consequences of the discriminatory practice referred to under special compensation in paragraphs 53(3)(a) and (b) of the Canadian Human Rights Act. As there was not sufficient evidence to convince Ms. Landry, we will not overturn this part of the original judgment.

2. PERIOD OF COMPENSATION

As for the period of compensation, the first reason for the counter-appeal that must be dealt with before the others, the Tribunal notes that Ms. Landry, after hearing the evidence and carefully reviewing and analysing the criteria established in precedents, found that a period of compensation of five (5) years from the effective release, namely, February 26, 1984, was justified. he thoroughly covered what the courts had to say on this matter of principles applicable to compensation, emphasizing the constant idea of limiting the liability of the wrongdoer. The members of the Tribunal do not intend to intervene on this ground, as they fully endorse Ms. Landry's finding.

4 (1994) 5 C.H.R.R., D/2170, para. 18542.
5 (1995) 21 C.H.R.R., D/142, para. 17.

3. PECUNIARY LOSS

After reviewing the transcript, testimonies, exhibits produced and arguments of counsel, the members of the Tribunal noted the original Tribunal's difficulty in ruling on the amount of the damages to be awarded for the pecuniary loss suffered by Mr. Levac. On page 13 of her decision, Ms. Landry notes:

On the subject of damages for lost wages, the only evidence presented to the Tribunal by the Commission is the report by the actuary, Wayne Woods.

On page 16 of the decision, she summarizes the problem before us:

It appears from the only evidence submitted on this subject that the Complainant withdrew a pension fund from the Canadian Armed Forces but that he would have received a larger pension fund had he remained in the Respondent's employ.

However, the report of the actuary H. Wayne Woods, produced as Exhibit HR-5, assumed that Mr. Levac would have continued his employment with the Canadian Armed Forces until age 55. No calculation based on the working assumption of employment until February 26, 1989, was presented. At the (6) hearing, Ms. Landry expressed the difficulty in assessing real damages:

[Translation]
Certainly the question the Tribunal asks itself is whether the interest of justice is also served to the extent that it has no additional information about other assumptions raised, but it will be up to the Tribunal to decide what it does about that.

On page 17 of the decision, however, she concluded:

In light of the foregoing, the complainant is entitled to have his pension fund adjusted in respect of the compensation period of five (5) years from Feburary 26, 1984 to Feburary 26, 1989.

Before quantifying the actual injury, the parties must establish what Mr. Levac's pension fund would have been on February 26, 1989. On this subject, the Tribunal reserves its jurisdiction if the parties are unable to agree on the actual loss related to the pension fund for the established compensation period. (7)

The report of the actuary H. Wayne Woods, ordered for the purpose of establishing the value of Mr. Levac's financial loss resulting from his release from the Canadian Armed Forces on February 26, 1984, on page 3 sets

6 p. 1116 of the stenographer's notes, Vol. 6, line 2 et seq.
7 Report of Woods & Associates, actuaries, prepared November 10, 1993.

the parameters for determining future Canadian Forces Superannuation (CFS) annuities.

[Translation]
Canadian Forces Superannuation provides for annuities of 2% for every year of service to a maximum of 35 years, multiplied by the average salary of the six best years. At age 65, there is a CPP/QPP deduction of 0.7% for every year of service after 1965, multiplied by the average eligible Canada pension earnings for the calendar year of retirement and the two previous years....

The pension is fully indexed at the Consumer Price Index (CPI) on January 1 of each year after the date on which age plus service equals 85, after age 55 or at age 60 or over.

Appendix B of the same report, attached hereto, also establishes Mr. Levac's presumed employment income had he remained in the Canadian Armed Forces from February 26, 1984, to February 26, 1989, that is, for the five-year period of compensation.

LOSS OF FUTURE PENSION

This Tribunal therefore concludes that in light of the information contained in the actuary's report and the provisions of the Canadian Forces Superannuation Act, c. C-17, paragraph 18(1)(b), the parties could adjust Mr. Levac's pension fund and add an additional five-year period to the annuity to which he was entitled for retirement due to a disability, as though he had left the Canadian Armed Forces on February 26, 1989.

4. RETAINING JURISDICTION

The Tribunal reretained its jurisdiction in the event the parties could not agree on the real losses in respect of the pension fund for the established period. We do not believe that the Tribunal exceeded its jurisdiction in so finding in order to facilitate the execution of its decision. It made good sense. The members of the Tribunal in Martin v. (8) Canadian Armed Forces reached a similar conclusion on the calculation of interest:

If the parties cannot agree on the actual calculations of interest due, the matter can be brought back to the Tribunal.

In many decisions involving the Canadian Human Rights Act, the Tribunal stated in the order awarding compensation that it was retaining its jurisdiction to facilitate the execution of its decision. This issue

was examined particularly in Chander P. Grover v. National Research Council (9) of Canada :

8 Martin v. Canadian Armed Forces, C.H.R.R., Vol. 17, D/435.
9 Grover v. National Research Council of Canada, T.D. 6/94.

It is our finding however that the decision in Robichaud provides that human rights legislation by its nature is to be remedial as opposed to punitive. The general powers therefore under s. 53 require therefore in our opinion as Justice Sopinka calls for in the Chandler case the power of a Tribunal to "carry out its task". We are of the opinion that it necessarily follows by implication that a Tribunal under these circumstances will be within its power to retain jurisdiction over the subject matter.

The Tribunal is therefore satisfied that Ms. Landry was entitled to reserve her jurisdiction to facilitate the execution of her order, and therefore committed no error in fact or in law and did not exceed her jurisdiction.

5. LOSSES IN RESPECT OF THE PENSION FUND: DOUBLE DEDUCTION

The Tribunal studied the provision of the original judgment as to the first ground of appeal, namely, that the Tribunal erred in fact and in law in suggesting to the parties the use of an incorrect method to calculate the Complainant's loss in respect of the pension fund, because the method involved the double deduction of the amounts received as pension in the five-year period of compensation.

While noting once again that the parties were able to calculate Mr. Levac's future pension by using February 25, 1989, as the release date, taking into account the period of compensation granted, the Tribunal sees how Ms. Landry's comments may have led to confusion and the risk of injustice when she stated, on page 14 of her decision:

The parties must of course take the amounts received by Mr. Levac from 1984 to 1989 into consideration.

According to Appendix B of the decision, the calculation of lost wages did take into account the retirement pension Mr. Levac received between February 26, 1984, and February 26, 1989. The Tribunal finds that Mr. Levac is not entitled to an amount for lost wages: his income was higher than it would have been had he remained with the Canadian Armed Forces.

As for losses regarding the pension fund, Mr. Lumbu, representing the Canadian Human Rights Commission, addressed the Tribunal as follows (page 18 of the transcript):

[Translation]
It is consistent with Supreme Court of Canada decisions that I ask that Mr. Levac's pension income not be taken into account because, as we will see when I explain in a minute, the pension amounts are considered amounts received as an insurance.

To draw to its attention that there is a double deduction if the sums received from 1984 to 1989 are taken into account.

The Tribunal, in this case, does not draw this analogy between entitlement to a disability pension and entitlement to insurance income argued by Mr. Lumbu. It does note, however, that it is by virtue of a right recognized under paragraph 18(1)(b) of the Canadian Forces Superannuation Act that Mr. Levac received so-called disability benefits. This annuity entitlement constituted a payment to compensate for what Mr. Levac would have earned had he remained in his job. However, his retirement income was first taken into account to determine lost wages. Therefore, the Tribunal notes that if the amounts so received were taken into account to determine damages in respect of his pension fund, this would in fact be a double deduction.

The desired objective is to place Mr. Levac in the same position he would have been had there been no discriminatory practice.

According to subsection 56(5) of the Canadian Human Rights Act, the Review Tribunal can either dismiss the decision or order being appealed, or allow it and render the decision or make the order that should have been rendered or made. This Tribunal therefore finds that the amounts received as pension for the period February 26, 1984, to February 26, 1989, should not be deducted when calculating the compensation awarded for losses in respect of the pension fund.

CONCLUSION

Accordingly, we uphold the orders issued by Marie-Claude Landry on the following points:

1. as to hurt feelings;

2. as to the determination of the period of compensation at five (5) years, from June 26, 1984, to February 26, 1989;

3. as to retaining jurisdiction;

And we modify the order to establish 26/02/89 as the date of release and order that the amounts paid pursuant to paragraph 18(1)(b) of the Canadian Forces Superannuation Act, c. C-17, for the period 16/12/84 to 26/02/89 not be taken into account in determining loss in respect of the pension fund.

Signed at Ottawa, this 25th day of November, 1996.

(S)
LISE LEDUC, Chairperson

(S)
ANDRÉE MARIER, Member

9

DISSENTING OPINION OF GRÉGOIRE MPUTU-BIJIMINE RESPECTING DAMAGES

I subscribe to the opinion stated in the Tribunal's decision by my colleagues Lise Leduc and Andrée Marier. In my opinion, however, there should have been an award for hurt feelings. The sense of accomplishment from doing a job one loves can bring, requires, in my view, a combination of two elements, namely, the material and the psychological, in other words, the material benefits and the psychological benefits.

In the case under review, it is obvious, and the evidence has shown, that the Complainant was seriously affected by his release from the Canadian Armed Forces, which for him provided an ideal job structure in which he loved to work and to which he was clearly very attached after 29 years of service.

(S)
GRÉGOIRE MPUTU-BIJIMINE, Member