T. D. 5/ 89 Decision rendered March 17, 1989

IN THE MATTER OF THE CANADIAN HUMAN RIGHTS ACT R. S. C. 1985, c. H- 6, as amended AND IN THE MATTER of a Hearing Before a Human Rights Tribunal Appointed under Section 39 of the Canadian Human Rights Act.

BETWEEN:

RICHARD RODERICK MORGAN Complainant and

CANADIAN ARMED FORCES Respondent and

CANADIAN HUMAN RIGHTS COMMISSION Commission

Tribunal Lyman R. Robinson, Q. C.

DECISION OF TRIBUNAL

APPEARANCES: P. Lindsey- Peck Counsel for the Commission
M. Vincent and C. Starkey Counsel for the Complainant
B. Saunders and Lt. Colonel R. A. McDonald Counsel for the Respondent

Dates and Place of Hearing: January 25 and 26, 1989 Victoria, B. C. >

2 Unless otherwise stated, all references in this Decision to the word "Act" refer to the Canadian Human Rights Act, R. S. C. 1985, c. H- 6.

In the Complainant Form signed by Richard Morgan (hereinafter called the "Complainant") and dated July 31, 1983, he alleged that he had applied to re- enrol in the Canadian Armed Forces and that his application was rejected

on the basis that he was medically unfit and that the Department of National Defence had thereby engaged in a discriminatory practice by refusing to employ him contrary to section 7 (a) of the Act. The prohibited ground of discrimination alleged in the Complaint was physical handicap.

At the commencement of the hearing before the Tribunal, it was agreed by counsel representing all of the parties that the proper name of the Respondent in these proceedings is the Canadian Armed Forces rather than the Department of National Defence as alleged in the Complaint Form and as stated in the Notice of Appointment of a Human Rights Tribunal dated the 9th day of June, 1988.

ADMISSION OF LIABILITY Prior to the calling of any witnesses, counsel for the Respondent stated that the Respondent was admitting liability in the following terms:

"for failing to consider Mr. Morgan’s application in 1980 in a proper fashion; namely, by failing to obtain at that time an up- to- date psychiatric evaluation of the complainant."

PRELIMINARY FACTUAL BACKGROUND The Complainant became a member of the Canadian Armed Forces in 1973. He completed the basic training, which all new members must complete, and he was assigned to the 2nd Battalion, Princess Patricia's Canadian Light Infantry. Prior to 1973, he had been a member of the Canadian Armed Forces cadets.

In 1975, while he was stationed in Winnipeg, Manitoba, he was involved in a serious motor vehicle accident. The accident occurred on a "day- off" rather than during the course of his duties with the Armed Forces. He sustained a serious head injury and was unconscious for several weeks.

On March 30 1978, he was released by the Canadian Armed Forces on & basis of what is known as a "3A Medical Discharge". The Medical Discharge was apparently

> 3 based on a medical opinion that Mr. Morgan had suffered some brain damage as a consequence of the above mentioned motor vehicle accident.

Prior to his Medical Discharge, the Complainant held the rank of Private at Pay Level 4 and he was in the Armed Forces occupation known as "infantryman".

APPLICATION TO RE- ENLIST After his Medical Discharge, the Complainant sought to obtain a disability pension which was available to members of the Armed Forces through Maritime Life Insurance. In order to qualify for the pension, it was necessary for him to undergo a medical examination. Upon completion of this medical examination, he was told that there was nothing wrong with him. Upon receiving this information, he sought to re- enrol in the Canadian Armed Forces. An Enrolment Application, dated June 12, 1979 was completed by the Complainant and submitted to the Canadian Armed Forces Recruiting Office in Victoria. In an interview with the Recruiting Officer, he applied for one of three occupation trades within the Canadian Armed Forces; namely, cook, vehicle technician, and mobile support equipment operator (MES). He told the

Recruiting Officer that he was not interested in going back into the infantryman occupation but that he would go back to the infantry if that was what it would take to re- enrol. After various reviews which will be described in more detail later, the Complainant received a letter dated April 17, 1980, from the Canadian Forces, informing him that he was not considered to be medically fit for re- enrolment.

REMEDIES SOUGHT BY COMPLAINANT The Complainant seeks the following remedies:

(1) an order pursuant to section 53 (2)(b) of the Act requiring the Canadian Armed Forces to re-enrol the Complainant and to make available to the Complainant, on the first reasonable occasion, one of the positions for which he had applied;

(2) an order pursuant to section 53 (2)(c) of the Act, requiring the Canadian Armed Forces to compensate the Complainant the wages that he would have earned between the time when he could reasonably be expected to have been re- enroled following his application in 1980 and the present;

> 4 (3) an award of compensation in respect of hurt feelings or loss

of self respect pursuant to section 53 (3)(b) of the Act; (4) interest on any order for compensation. PURPOSE OF THE ACT Section 2 of the Act states that the purpose of the Act is to give effect to the principle that every individual should have an equal opportunity with other individuals to make for himself or herself the life that he or she is able and wishes to have, consistent without being hindered in or prevented from doing so by discriminatory practices based on certain specified grounds including disability. In Via Rail Canada Inc. v. Butterill et al [1982] 2 F. C. 830 (F. C. A.), Chief Justice Thurlow quoted, at page 841, without criticism, the following portion of the interim Decision of the Tribunal:

"... 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."

In Greyhound Lines et al v. Canadian Human Rights Commission et al (1987), 78 N. R. 192 (F. C. A.), Mr. Justice Heald expressed agreement, at page 199 with the statement of the Tribunal Chairman, Mr. Kerr, when he said:

"With respect to the refusal to employ the complainant, the complainant is entitled to be put in the position he would have been in but for the application to him of the respondent's age of hire policy... "

CLAIMS FOR RE- ENROLMENT & COMPENSATION FOR LOST WAGES In order to determine whether and to what extent the Complainant is entitled to compensation for lost wages, it is necessary to consider whether the

prohibited discrimination that has been admitted by the Respondent had the effect of denying the Complainant a position of employment with the Respondent or whether it had the- effect of denying the Complainant the opportunity to compete for a position of employment with the Respondent.

Counsel for the Complainant and the Commission submitted that the Complainant was denied a position of employment with the Respondent and the Complainant should be compensated by an award of wages that he would have earned in the position had he been re- enroled, in 1980.

> 5 Counsel for the Respondent submitted that the Complainant was not denied a position of employment but rather that he was only denied the opportunity to compete for a position with the Canadian Armed Forces in competition with other applicants. The Respondent's position is that even if the Complainant was medically fit in 1980, his application for re- enrolment would not necessarily have been successful because there were more applicants than there were positions and applicants are selected on a variety of criteria in addition to their medical condition.

What is the distinction between the denial of a position and a loss of an opportunity to compete for a position? 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. Where, the Complainant is disqualified from further competition in the application process for a position before the Complainant's application has been considered for employment, this constitutes a loss of an opportunity to compete for a position, if the person is disqualified on the basis of a prohibited ground of discrimination.

The clearest example of a denial of employment is Via Rail Canada Inc. v. Butterill et al, [1982] 2 F. C. 830 (F. C. A.). In that case the Tribunal had held that the visual acuity standard was not a bona fide occupational requirement but had declined to make an award of compensation. on appeal, the Review Tribunal made an interim decision that the Complainants were entitled to compensation for loss of wages but did not make an assessment of the amount of compensation. The Federal Court of Appeal upheld the interim decision of the Review Tribunal. On the application to the Federal Court of Appeal, VIA Rail argued that there was no evidence on the record upon which the Review Tribunal could conclude that the the complainants were able to satisfy less stringent eyesight requirements. Speaking for the Court, Chief Justice Thurlow stated, at page 844:

"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."

And further on the same page: "If ... the applicant VIA could resist such an inference by establishing facts showing that the complainants, or

> 6 any of them, could not meet any "bona fide occupational requirement" as to their eyesight... it was for VIA to put the evidence of such facts before the Tribunal. Not having done so, its objection cannot succeed." (emphasis added)

The clearest example of a loss of an opportunity to compete for a position is Greyhound Lines et al v. Canadian Human Rights Commission et al (1987), 78 N. R. 192 (F. C. A.). In that case the Complainant was denied the opportunity to enter the Greyhound's driver training program by reason of a prohibited ground of discrimination. Successful completion of the the driver training program was a prerequisite to being considered for employment by Greyhound. The Tribunal ordered Greyhound to offer the Complainant the next available position in its training program rather than a position of employment with the Respondent. Clearly, the effect of the prohibited discrimination was to deny the Complainant an opportunity to complete the prerequisites for applying for a position of employment. Even if the Complainant in that case had passed the driver training program, the Complainant still had to meet the normal qualifications for employment as a bus driver by Greyhound.

Other examples of "lost opportunity cases" include cases where an applicant was required to meet a variety of standards or pass a variety of tests but the applicant was disqualified from completing the application process for employment because of a prohibited ground of

discrimination. These cases include Lewington et al v. Vancouver Fire Department et al (1985), 7 C. H. R. R. D/ 3247 (B. C. Board of Inquiry); Dantu v. North Vancouver District Fire Department et al, (1986), 8 C. H. R. R. D/ 3649 (B. C. Board of Inquiry); Boucher v. The Correctional Service of Canada (1988), 9 C. H. R. R. D/ 4910 (C. H. R. Tribunal). In each of these cases, the Complainant was disqualified, by reason of a prohibited ground of discrimination, from completing the competition process before the process had been completed. Chapdelaine et al v. Air Canada et al (1987), 9 C. H. R. R. D/ 4449 (C. H. R. Tribunal), may also be classified with this group of cases.

Does the evidence in this a case support a finding of a loss of employment or a loss of an opportunity to compete for a position of employment? To answer this question, it is necessary to briefly outline the process by which applications for re- enrolment are considered by the Canadian Armed Forces. This process was described in the testimony of Eugene A. Flewelling, who, during the period when the Complainant's application for re- enrolment would have been considered, was in charge of the Operations Section of the Directorate of Recruiting and Selection Organization of the Canadian Armed Forces. An application for re- enrolment by a former service member, who applied for re- enrolment within five years of his departure from the Armed Forces, was

> 7 treated differently than an application from a person who has not previously been a member of the Armed Forces. Preliminary screening was undertaken by the local Canadian Armed Forces recruiting centre. In the Complainant's case, his application for re- enrolment was submitted to the recruiting centre in Victoria and the preliminary screening was undertaken by that office. Preliminary screening included an examination of the basic eligibility requirements, a review of the former member's file to determine whether the

member's previous service was satisfactory and whether there had been any disciplinary problems. If no obstacles to re- enrolment were encountered in preliminary screening, a medical examination was arranged.

A medical examination was usually conducted by the base surgeon. If a medical examination of an applicant has been conducted by Armed Forces personnel within the year prior to the consideration of the application, that medical report was considered to be still valid. In the Complainant's case, he had been medically examined by Dr. Henderson of C. F. B. Esquimalt within the year prior to the consideration of his application. Dr. Henderson's Report was tendered as Exhibit R- 1, Tab 3. After requesting some psychological testing, Dr. Henderson reported that the Complainant was fit for enrolment.

If an applicant is found to be medically fit for enrolment, the Recruiting Centre will convene a selection board composed of two or more officers to interview the applicant. The selection board conducts a complete review of everything the applicant has done since his or her separation from the Armed Forces. The selection board will make an assessment of the applicant and will make a recommendation on whether or not the applicant should be re- enrolled. This assessment and recommendation are forwarded by the Commanding Officer of the Recruiting Centre to National Defence Headquarters in Ottawa.

In the case of the Complainant Morgan, the assessment was prepared by the Captain Ujimoto, the Commanding Officer of the Victoria Recruiting Centre and he recommended that the Complainant be re- enrolled.

The decision on whether or not to accept an application for re- enrolment is made in the Operations Section at National Defence Headquarters in Ottawa. Final decisions on applications for re- enrolment of former members are made in Ottawa for several reasons because some portion of the training sequence may be by- passed and it is necessary to make an assessment of the level and currency of an applicant's previously acquired skills in relation to the occupations for which the former member has applied. Applications by former members are considered for available

> 8 openings in competition with other former members. The Operations Section considers an applicant's medical fitness, and education and personal characteristics in relation to the requirements of the occupational classification for which an applicant has applied. Mr. Flewelling testified that on some occasions, when an applicant's file indicates that there may be a medical problem, the Operations Section may seek a further medical evaluation of the file. That was procedure was followed with respect to the Complainant's application and a review was undertaken by Lieutenant Colonel R. B. Pritchard who was the Acting Director of Medical Treatment Services within the Surgeon General's office. His report, dated March 26, 1980, was tendered as Exhibit R- 1, Tab 7. It states:

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

The enrolling authority in Ottawa made the decision that the Complainant would not be re- enrolled. Colonel Vandal, the Director of the enrolling authority in Ottawa communicated this decision to the Victoria recruiting centre by a message which was tendered as Exhibit R- 1, Tab 8. It read:

"A full and complete review of this case has been completed by the office of the Sug/ gen. The results of this review indicate that subject is not considered medically fit for re- enrolment. File Closed."

By a letter dated April 17, 1980, Captain Ujimoto communicated this decision to the Complainant. This letter was tendered as Exhibit R- 1, Tab 9. The only reason expressed in this letter for rejecting the Complainant's application for re- enrolment was that the Complainant was not considered to medically fit for enrolment.

In the documentary evidence in this case, the only basis for rejecting the Complainant's application that is mentioned in either the decision that was communicated from Headquarters to the Victoria Recruiting Centre or in the letter that was sent to the Complainant, was the Complainant's medical condition. The Respondent did not introduce any evidence before this Tribunal to show that the Complainant was unable to meet a bona fide occupational requirement.

Evidence was tendered on behalf of the Respondent to show that during the year 1980,. the Armed Forces received approximately three times as many applications for enrolment as they had positions available and consequently they were unable to accept all of the applications which they received. Evidence was also introduced that at the time when the Complainant applied for re- enrolment, the Armed Forces were over strength in the positions of cook, vehicle technician and mobile support equipment operator. However, no evidence was tendered to suggest that the Respondent

> 9 rejected the Complainant's application on the basis that, in competition with applications of other former service members, the Complainant's skills, education and other characteristics were less meritorious. Furthermore, there is no evidence that the Respondent rejected the Complainant's application on the basis that all of the positions, for which he had applied, were over strength.

Mr. Flewelling testified that when the Complainant's application was considered by the enrolling authority at Headquarters in Ottawa, there were three concerns about the Complainant's application. First, there was the concerns with respect to the medical advice that had been received from Dr. Pritchard. Second, there was a concern about the Complainant's rudeness toward administrative staff and Medical Examination Centre staff. Third, there was a concern about the Complainant's conviction during the preceding year for an alcohol related offence (driving a motor vehicle with a blood alcohol content in excess of .08). With respect to the second concern, Captain Ujimoto of the Victoria recruiting centre was in a much better position to assess any concern of this nature and he recommended that the Complainant's application be accepted.

With respect to the third concern, Mr. Flewelling acknowledged under cross- examination, that it was not unusual for the Canadian Armed Forces to enrol an applicant who has had a conviction for an alcohol related offence. More importantly, however, neither the second or third "concerns" were expressed as reasons for rejecting the Complainant's application.

With respect to all of the above "possible" bases for rejecting Complainant's application, if they had in fact been a reason for rejecting his application,

surely they would have been recorded in the documentation and communicated to the Complainant. since there is no mention of these grounds, I conclude that in the absence of the medical ground, the Respondent would have accepted the Complainant's application for re- enrolment. Indeed, Mr. Flewelling testified that applicants for re- enrolment, who had not been out of the Armed Forces for long period, were more favourably considered than- applicants with no previous military training because the cost of basic training could be saved.

Consequently, I find that the only real reason the Respondent had for rejecting the Complainant's application for re- enrolment in 1980 was his medical record and the Respondent has admitted liability for failing to consider this aspect of the Complainant's application in a proper fashion. On the evidence before me, I find that the consequence of the Respondent's failure to properly consider the Complainant's application was that the Complainant was

> 10 denied a position of employment with the Respondent on the basis of a prohibited ground of discrimination.

I do not find the evidence in this case to be analogous to the facts of the Greyhound case, supra. In Greyhound, the Complainant was denied an opportunity to participate in a pre- employment training program. Applicants for re- enrolment in the Canadian Armed Forces were not required to successfully complete a pre- employment program before being considered for enrolment.

Similarly, I do not find the evidence in this case to be analogous to the other "lost opportunity" cases where the Complainant's had been disqualified from further competition in the application process before the Complainant's application has been considered for a position of employment. In the present case, the Complainant had done all that was required of him in order to complete the application process. His application was rejected after being considered by the enrolling authority at National Defence Headquarters in Ottawa and it was rejected on what has been admitted by the Respondent to be a prohibited ground of discrimination.

Several consequences flows from this finding. First, the Complainant is entitled to an Order pursuant to section 53 (2)(b) that the Respondent be required to re- enrol the Complainant in the Canadian Armed Forces and that the Respondent make available to the Complainant, on the first reasonable occasion, one of the occupations for which the Complainant applied. Second, the Complainant is entitled to an order pursuant to section 53 (2)(c) that Respondent be required to pay compensation to the Complainant in relation to the wages with respect to which the Complainant has been deprived. The quantum of this compensation will be dealt with later.

CLAIM FOR RE- ENROLMENT With respect to the order that the Complainant be re- enrolled, counsel for the Respondent argued that if such an Order was made, it should be made conditional upon the Complainant passing a new medical examination. I do not think that this is an appropriate condition. The object is to place the Complainant, as nearly as possible, in the position that he would have been in if his application had been fairly handled in 1980. At the time of his application for re- enrollment in 1980, he had a valid medical assessment from Dr. Henderson who had pronounced him fit for enrolment. It may be that

the Complainant's medical condition has deteriorated in some manner since his last military medical in 1979. If that is the case, he should be dealt with, after re- enrolment, in the same fashion as if he had been

> 11 re- enroled in the Armed Forces since 1980 and the medical condition has just been discovered in 1989.

The Order shall provide that the Respondent shall re- enrol the Complainant and make available to the Complainant, on the first reasonable occasion, one of the occupations for which the Complainant applied. The evidence is that the Complainant told the Recruiting Officer that he was applying for any of the following positions, namely, cook, vehicle technician or mobile support equipment operator (MES) and that the Complainant told the recruiting officer that he would accept a position in the infantry if that was what it took to re- enrol.

Counsel for the Respondent pointed out that if the order merely provided that the Respondent must offer a position to the Complainant on the first reasonable occasion, there might be uncertainty with respect to whether the Respondent's obligation would be satisfied by offering any one of the above mentioned occupation classifications and whether the Complainant must accept the first occupation offered to him. In order to remove this uncertainty, the Order shall provide that the Respondent must offer the Complainant the first position that becomes available in any of the above mentioned occupations. If the first offer is an Infantryman position and the Complainant does not accept that offer, the Respondent shall offer the Complainant the first available position in the remaining above named positions. If the Complainant does not accept the first offer of the remaining occupations, the Respondent will have discharged its obligations under this aspect of the Order and will not be obligated to make any further offers to the Complainant.

QUANTUM OF COMPENSATION FOR LOST WAGES I have already found that the Complainant is entitled to compensation for lost wages. It remains to assess the quantum of the loss of wages. In order to determine the quantum, several issues must be considered.

THE DATE FROM WHICH COMPENSATION SHOULD BEGIN The prohibited discrimination, which has been admitted by the Respondent, occurred when the decision was made to reject the Complainant's application for re- enrolment on medical grounds. The decision was made on or about April 15, 1980. If the decision had been to accept the Complainant's application, Mr. Flewelling testified that it would have been necessary to consult with the "crew manager" of the relevant occupation classification and to determine where the Complainant would be sent and the amount of

> 12 recognition that could be given for the applicant's previous service and skills. This process normally takes from one to three months from the date of the decision to re- enroll. The Complainant would not have been entitled to a

salary until this process had been completed and the Complainant had been assigned to a unit. The Respondent tendered in evidence as Exhibit R- 3, three tables showing the income that the Complainant would have received based on three different commencement dates, namely, May 1, 1980, June 1, 1980 and July 1, 1980. I don't think that it is unreasonable to select July 1, 1980 as the date upon which the Complainant would have begun to earn income if he had been accepted for re- enrolment. "Scenario 1C" of Exhibit R- 3 depicts the income that would have been earned if the Complainant had begun to earn income on July 1, 1980.

THE DATE UNTIL WHICH COMPENSATION FOR WAGES SHOULD RUN Normally, where an order for compensation for loss of wages is made, the compensation should continue up to the date of the commencement of the Tribunal Hearing. Different considerations should apply in this case. The Complainant did not file his Complaint with the Canadian Human Rights Commission until July 31, 1983 which is more than three years after the date upon which he was advised that his application for re- enrolment had been rejected. There is no limitation period for filing a complaint under the Act. Nevertheless, a substantial delay' by the Complainant in pursuing a claim should be taken into account when assessing compensation for loss of wages and where there is an order that the Respondent offer the Complainant the first available

position. Unless the delay is taken into account in these circumstances, the Respondent would be required to pay for the Complainant's services for an extended period of time without receiving the benefits of the Complainant's services. The Complainant must be allowed some time, after receiving the letter rejecting his application for re- enrolment, to consider his position, make inquiries and consult with advisors. I think that it is reasonable to expect the Complainant to have filed his complaint within one year. If this had been done, a Tribunal Hearing would presumably have been held and the consequent orders for re- enrolment and payment of compensation for loss of wages would presumably have been made at least two years earlier. This would have meant that the Respondent would have had the benefit of the Complainant's labours since January 1, 1987. Therefore, the Complainant should not be compensated for the wages he would have earned in during the years 1987 and 1988, and the early months of 1989.

On this basis, the Complainant should be compensated for loss of wages for the period extending from July 1, 1980 until December 31, 1986.

> 13 MITIGATION There is a clear duty on a Complainant in these circumstances to attempt to mitigate his loss of wages by seeking other employment and remuneration. Any amounts that the Complainant earned during the period for which he is entitled to compensation for loss of wages (July 1, 1980 until December 31, 1986) must be deducted from his compensation. Any failure, in whole or in part, to fulfil this duty to mitigate his losses, must be taken into account by a reducing the compensation for loss of wages.

Since the Complainant will not be compensated for the any loss of wages during the years 1987 and 1988, and 1989, no deduction will be made with respect to any income he received during those years.

A failure by the Complainant to seek gainful employment or a voluntary resignation from employment may constitute a failure to fulfil the duty to

mitigate. The Complainant described his attempts to obtain steady employment after his application for re- enrolment was rejected. He testified that he submitted applications to the Royal Canadian Mounted Police, the Federal Penitentiary Service, the Provincial Corrections Service, municipal police forces, and the British Columbia Sheriff's service. His attempts to find steady employment were corroborated by the testimony of Mr. O'Sullivan who was a neighbour of the Complainant throughout most of the material period and who advised him in his quest for employment. The Complainant also testified that during this period, he upgraded his education in an attempt to make himself more employable. This included taking an English course at Camosun College and obtaining a Grade 12 equivalency diploma. He also took a driving course at the Victoria School of Driving and obtained a Class 3 driver's license which qualified him to become a truck driver. He also took a St. John's Ambulance First Aid Course. Unfortunately, most of the positions of employment that he obtained were either part- time positions or they turned out to be of short duration. In several instances, the employer went bankrupt during the economic recession which occurred in British Columbia in the early 1980s. Save for two occasions, I find that the Complainant fulfilled his duty to mitigate his loss of wages.

The two occasions when the Complainant failed, in part, to fulfil his duty to mitigate his loss of wages occurred when he voluntarily resigned from two full time positions. In 1980, he held a position at the Royal Jubilee Hospital in Victoria in the food service department. He testified that he voluntarily resigned from that position because, in his words, "I'm more of an outdoors person". In 1981, he held a position manual labour position working with drywall at

> 14 Steel Brothers Canada Ltd. He testified that he voluntarily resigned from that position because, in his words, "You can hurt yourself packing drywall board around all time". In both of these instances, there was no evidence that he had another position of employment which he could take up. The Respondent should not have to compensate the Complainant for the loss of wages he would have earned in these positions for a period of time, to be described later, following each of these voluntary resignations.

Much of the evidence with respect to mitigation was tendered on a calendar year basis. Therefore, I shall deal with this subject on a calendar year basis.

1980 In 1980, the Working Copy of the Complainant's Income Tax Return (Exhibit C- 1, Tab 4) shows that his total employment income for 1980 prior to any deductions was $1,833.24. On the basis of the Complainant's testimony, it appears that all of this income was earned subsequent to April 15, 1980. Therefore the whole of this amount must be deducted from the compensation to which the Complainant would otherwise be entitled for 1980.

In addition to the income reported in his Income Tax Return, the Complainant testified that he earned additional income by assisting with the loading and unloading of household moving trucks. He was paid in cash for this work and he did not receive a T- 4 slip for income tax purposes. He did not keep a record of the amounts that he earned in this manner. In cross-examination, the Complainant testified that the amount that he earned in that manner in 1980 would not be more than $200. This amount must also be deducted from the

compensation to which the Complainant would otherwise be entitled for 1980. In 1980, the Complainant was employed by the Royal Jubilee Hospital. He voluntarily resigned from this position apparently without another full time position of employment to take up. No evidence was tendered with respect to the rate pay or the period of the year in which the Complainant held the position at Royal Jubilee Hospital or the wage rate that he was paid. On the basis of the amount earned from the Royal Jubilee, the Complainant obviously held that position for a very short period. It was a unionized position and therefore it is likely that he was earning more than the minimum wage. I therefore infer that the amount he earned at the Royal Jubilee, namely, $325.28, represents a weekly wage of $162.64. He was employed by four other employers who issued T- 4 slips to him in 1980. Most of these four positions were outside work of a nature that would likely be performed during the summer months. Therefore, I draw the inference that he was employed by the

> 15 Royal Jubilee Hospital in the last two weeks of September, 1980. Employment with a hospital is not subject to the seasonal fluctuations and there is no reason to believe that he could not have retained this position until the end of 1980. If he had retained his position at the Royal Jubilee for the balance of 1980, he would have been employed for an additional 13 weeks and he

would have earned an additional $2,114.32. This amount must also be deducted from the compensation to which the Complainant would otherwise be entitled for 1980.

The total deductions from the compensation to which the Complainant would otherwise be entitled for 1980 are:

Income per T- 4 Slips $1,833.24 Casual cash income 200.00 Failure to retain Royal Jubilee Hospital position 2,114.32

TOTAL DEDUCTION FOR 1980 $4,092.56 1981 In 1981, the Working Copy of the Complainant's Income Tax Return (Exhibit C- 1, Tab 5) shows that his total employment income for 1981 was $770.17. The whole of this amount must be deducted from the compensation to which the Complainant would otherwise be entitled for 1981.

In addition to the income reported in his Income Tax Return, the Complainant testified that he earned some additional income assisting with the loading or unloading of household moving trucks. He was paid in cash for this work and he did not receive a T- 4 slip for income tax purposes. He did not keep a record of the amounts that he earned in this fashion. In cross-examination, the Complainant testified that the amount that he earned in that fashion in 1981 might have been as much as $500. Therefore, the amount of $500 must be deducted from the gross compensation payable.

The Complainant earned $699.48 at the Steel Brothers Canada Ltd. The Complainant voluntarily resigned from this position apparently without another full time position of employment to take up. There is no evidence with respect to the period of the year in which the Complainant held the position at Steel Brothers Canada Ltd. or the wage rate that he was paid. On

the basis of the amount earned from Steel Brothers Canada Ltd., the Complainant obviously held that position for a short period. It was a unionized position and therefore it is likely that he was earning more than the minimum wage. I infer that the amount of $699.48 represents a weekly wage of $349.74. Employment in the construction industry does not have the degree of continuity of employment in other sectors of the economy . Employment

> 16 often continues only until the contractor or sub- contractor completes a project. It is impossible to determine how long the Complainant would have been employed by Steel Brothers Canada Ltd. if he had not voluntarily resigned. I think that it would not be unreasonable to expect that his employment as a Labourer with Steel Brothers Canada Ltd. would have continued for another 10 weeks if he had not resigned. In a 10 week period, he would have earned another $3,497.40. This amount must also be deducted from the compensation to which the Complainant would otherwise be entitled for 1980.

The total deductions from the compensation to which the Complainant would otherwise be entitled for 1981 are:

Income per T- 4 Slips $ 770.17 Casual cash income 500.00 Failure to retain Steel

Brothers Canada Ltd. position $3,497.40 TOTAL DEDUCTIONS FOR 1981 $4,767.57 1982 In 1982, the Working Copy of the Complainant's Income Tax Return (Exhibit+ C- 1, Tab 6) shows that his total employment income for 1982 was $901.46. The whole of this amount must be deducted from the compensation to which he would otherwise be entitled.

The Complainant denied, under cross- examination, that he had earned any unreported income in 1982 from loading or unloading moving trucks. Therefore, no deduction for this type of income will be made in 1982 or succeeding years.

Therefore, the only deduction from compensation, to which he would otherwise be entitled for 1982, will be $901.46.

1983 In 1983, the Working Copy of the Complainant's Income Tax Return (Exhibit C- 1, Tab 7) shows that his total employment income for 1983 was $4,861.80. The whole of this amount must be deducted from the gross compensation payable for 1983.

1984 In 1984, the Working Copy of the Complainant's Income Tax Return (Exhibit C- 1, Tab 8) shows that his total employment income for 1984 was $5,511.12. The whole of this amount

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17 must be deducted from the compensation to which he would otherwise be entitled for 1984.

1985 In 1985, the Working Copy of the Complainant's Income Tax Return (Exhibit C- 1, Tab 9) shows that his total employment income for 1985 was $508.52. The whole of this amount must be deducted from the compensation to which he would otherwise be entitled for 1985.

In addition, the Complainant received $8,761 in 1985 by way of Unemployment Insurance Benefits. For reasons that will be explained later in this Decision, the amount of Unemployment Insurance Benefits should not be deducted from the gross compensation but rather the amount UIC benefits received by the Complainant should be remitted by the Respondent to the Receiver General of Canada.

1986 In 1986, the Complainant testified that he worked on three projects at the Dockyard. No Working copy of the Complainant's Income Tax Return was tendered in evidence but a computer print- out obtained from Revenue Canada was tendered as Exhibit C- 1, Tab 10. The print- out shows that the Complainant's total employment income for 1986 was $9,391.00. The whole of this amount must be deducted from the compensation to which he would otherwise be entitled for 1986.

In addition, the Complainant received $376 in 1986 by way of Unemployment Insurance Benefits. This will not be deducted for reasons that will be explained later.

CALCULATION COMPENSATION FOR WAGE LOSS: Wage Loss per Ex. R- 3 Mitigation Year Scenario 1C Deduction Net Wage Loss

1980: $ 6,504.00 - $ 4,092.56 = $ 2,411.44 1981: $ 14,319.00 - $ 4,767.57 = $ 9,551.43 1982: $ 16,392.00 - $ 901.46 = $ 15,490.54 1983: $ 17,592.00 - $ 4,861.80 = $ 12,730.20 1984: $ 21,918.33 - $ 5,511.12 = $ 16,407.21 1985: $ 24,538.00 - $ 508.52 = $ 24,029.48 1986: $ 25,950.33 - $ 9,391.00 = $ 16,559.33

TOTALS: $127,213.66 $30,034.03 = $ 97,179.63 > 18 UNEMPLOYMENT INSURANCE BENEFITS Counsel for the Commission submitted that the amount of Unemployment Insurance Benefits should not be deducted from the gross compensation payable. In support of this submission, she cited Piazza v Airport Taxicab (1987), 9 C. H. R. R. D/ 4548 (Ont. S. C.); Torres v. Royalty Kitchenware Limited (1982), 3 C. H. R. R. D/ 858 (Ont. Bd. of Inquiry) and Gadowsky v. School

Committee of the County of Two Hills, No. 21 (Alta. Q. B.). She also candidly brought to my attention the case of Foulger v.- Bremco Holdings Ltd. (1984), 5 C. H. R. R. D/ 2229 (B. C. Board of Inquiry) wherein the Board deducted U. I. C. benefits from the gross compensation payable.

Counsel for the Commission also submitted that there was no requirement upon the recipient of U. I. C. benefits, to return the benefits if the recipient is subsequently compensated for a loss of wages.

In DeJager v. Department of National Defence (1987) C. H. R. R. D/ 3963 (C. H. R. Tribunal), the order provided that the award of compensation was subject to U. I. C. repayment.

My interpretation of sections 37 and 38 of the Unemployment Insurance Act, R. S. C. 1985, c. U- 1, is that the amount of the U. I. C. benefits received by the Complainant during a period for which he is being compensated by this award must be remitted to the Receiver General of Canada. Sections 37 and 38 contemplate three scenarios.

(1) If an order for payment of compensation for loss of wages is made pursuant to a labour arbitration, court judgment or otherwise, in respect of the same period for which a U. I. C. benefit has been paid to a claimant (the Complainant in these proceedings) and the order does not take U. I. C. into account, then, pursuant to section 38 (1), the employer or other person (the Respondent in these proceedings) 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.

(2) If the arbitration award, court judgment or other order deducts the amount of U. I. C benefits from the compensation otherwise payable by the Respondent to the Claimant, the Respondent becomes liable pursuant to section 38 (2) of the Unemployment Insurance Act to remit, to the Receiver General of Canada, the amount by which the award has been reduced.

(3) If the arbitration award, court judgment or other order does not make any deduction for U. I. C. benefits and the employer or other person (the Respondent in these

> 19 proceedings) fails to deduct the amount of the U. I. C. benefits as required by s. 38 (1) and pays the full amount of the award to the claimant, the claimant becomes liable, pursuant to

section 37 to pay an amount to the Receiver General of Canada, that is equal to the U. I. C. benefits that would not have been paid if the remuneration had been paid at the time the U. I. C. benefits were paid.

Therefore, no matter which way the matter of compensation is handled, the U. I. C. benefits must be repaid.

In this case, the evidence is that the Complainant received $9,137 by way of U. I. C. benefits during the period with respect to which the Respondent is being ordered to pay compensation for loss of wages. No deduction will be made from the award of compensation for loss of wages but the Order for payment of compensation shall direct the Respondent to comply with section 38 of the Unemployment Insurance Act. Section 38 of the Unemployment Insurance Act places a legal obligation on the Respondent to ascertain amount of benefits paid during the period for which the Respondent has been ordered to

pay compensation, and then remit that amount to the Receiver- General. SOCIAL ASSISTANCE PAYMENTS During the cross- examination of the Complainant, it became apparent that in addition to his employment income and Unemployment Insurance Benefits, he had received social welfare assistance from the Province of British Columbia during various periods between April, 1980 and May, 1988. The Complainant did not regard social assistance payments as income and he did not keep records of the amounts that he had received. Counsel had not anticipated the potential relevance of these payments to the issue of the compensation. After its relevance became apparent, counsel for the Complainant made an expedited request to the British Columbia Ministry of Social Services and Housing for this information. With the consent of all counsel, a letter from the Ministry dated January 26, 1989 was tendered in evidence as Exhibit C- 2. The letter states that the Complainant "... received an estimated $17,248.44 in benefits from the Ministry of Social Services and Housing for the period January, 1980 to May 1988. Counsel advised me that the Ministry was unable to give a breakdown of the amounts received in each calendar year of that period.

In Foulger v. Bremco Holdings Ltd. (1984), 5 C. H. R. R. D/ 2229 (B. C. Board of Inquiry), the Board reduced the amount of the award for compensation for loss of wages by the amount of social assistance payments that had been received during the material- time from Ministry of Human Resources.

> 20 Counsel for the Commission submitted that no deduction from the award should be made in respect of social assistance payments received by the Complainant. In the alternative, she submitted that the order should provide that the amount of the social assistance payments received by the Complainant should be returned to the Receiver General for the Province of British Columbia.

I think that the proper principle is that social assistance payments received by a Complainant during a period for which he is being compensated for loss of wages should not be deducted from the award but rather the Respondent should be required to remit the amount of such payments to the receiver General of British Columbia. The Complainant would not have required

social assistance if had not been discriminated against. Therefore, the payor of the social assistance which should be reimbursed.

COMPENSATION IN RESPECT OF FEELINGS OR SELF- RESPECT Counsel for the Complainant asserted a claim pursuant to section 53 (3)(b) for $5,000 by way of compensation in respect of hurt feelings and a loss of self- respect suffered by the Complainant as a consequence of the prohibited discrimination.

On the basis decisions in Chapdelaine, supra; Brazeau, supra; and Boucher, supra, counsel for the Respondent agreed that an award in the range of $2,000 to $2,500 would be appropriate. Nevertheless, he did cite DeJager v. Department of National Defence (1987) C. H. R. R. D/ 3963 (C. H. R. Tribunal) where an award of $300 was made in relation to a Complainant who had been released from his employment with the Department of National Defence because of his asthma. Since the date of the hearing in this case, the Decision in Gauthier et al v. Canadian Armed Forces, Unreported February 14, 1989 (C. H. R. Tribunal) has been released. The Tribunal found sexual discrimination and awarded $1,000 to the Complainant Gauthier by way of compensation under

section 53 (3)(b). There is evidence that the Complainant did suffer hurt feelings and a loss of some self- respect. The Complainant experienced frustration in his attempts to get the Canadian Armed Forces to recognize that he was medically fit when he had received reports from other experts that there was nothing wrong with him. In regard to the loss of self- respect, both the Complainant's father and his uncle, for whom he had great respect, had served for lengthy periods as members of the Canadian Armed Forces. The rejection of his application to re- enrol in the Armed Forces meant that he would not be able to carry on the family tradition of

> 21 military service and this caused him to lose some self- respect in relation to some members of his family.

The issue is where, on the monetary scale of compensation provided by section 53 (3) of the Act, does the Complainant's loss of self- respect and hurt feelings fall. I do not think that the evidence of the Complainant's loss of self- respect and hurt feelings is anywhere near the level of hurt feelings, humiliation, and embarrassment that a person suffers who has been discriminated against in public on the basis of race, religion, colour, or sex and particularly where there may have been repetitions of the prohibited practice and there is evidence of either physical or mental manifestations of stress caused by the hurt feelings of loss of self- respect. In my opinion, the high end of the monetary scale is more appropriate for these latter types of cases.

In this case, almost nine years have passed since the admitted discrimination that caused the hurt feelings and the loss of self- respect and six years have passed since the Complainant filed his Complaint under the Act. In the absence of such a lengthy period, I would have set the amount of compensation payable pursuant to section 53 (3)(b) at a lower amount but in these circumstances, the compensation shall be fixed at $1,000.

INTEREST Counsel for the Claimant made a claim for interest on any monetary award. This claim was supported by counsel for the Commission. The claim for interest is based on

subparagraphs (c) and (d) of section 52 (2) of the Act. Interest has been awarded in a number of decisions under the Act including: Boucher v. The Correctional Service of Canada (1988), 9 C. H. R. R. D/ 4910 (C. H. R. Tribunal); Kearns v. P. Dickson Trucking Limited, Unreported C. H. R. Tribunal Decision (December 7,1988); Chapdelaine et al. v. Air Canada (1987), 9 C. H. R. R. 4449 (C. H. R. Tribunal). I am advised that the latter decision is under appeal.

Counsel for the Respondent took the position that unless the Act specifically provides for an award of interest, a Tribunal under the Act does not have the power to make an award interest. By analogy, he referred to refusal of Tribunals to make an award, in the absence of any specific provision in the Act, for payment of legal costs. He cited the case of Corlis v. Canada Employment and Immigration Commission (1985), 8 C. H. R. R. D/ 4146 (C. H. R. Tribunal) which quoted with approval from the case of Morrell v. Canada Employment and Immigration Commission (1985), 6 C. H. R. R. D/ 3021 as cases where Tribunals have refused to make an award of legal costs. A claim for interest was rejected,

> 22 without reasons, in DeJager v. Department of National Defence (1987) C. H. R. R. D/ 3963 (C. H. R. Tribunal).

In recent years, most of the Canadian provinces have enacted legislation that provides for the payment of what is described as being either pre- judgment interest or court order interest. There is very little in the way of federal legislation that pertains to the awarding of interest between the time of an event which has given rise to a claim for compensation and the date of the decision. Sections 36 and 41 of the Federal Court Act, R. S. C. 1985, c. F- 7, which deal with the awarding of interest by the Federal Court, do not have any application beyond proceedings in the Federal Court. Section 3 of the Canada Interest Act, R. S. C. 1985, c. I- 15, fixes the rate of interest at five per cent per annum, when no rate is fixed by law, but the Interest Act does not determine when interest may be awarded.

Section 53 (2)(c) of the Canadian Human Rights Act provides that a Tribunal may make an order that the respondent

" ... compensate the victim, as the Tribunal may consider proper, for any or all of the wages that, the victim was deprived of...".

Is this language broad enough to encompass an award of interest? A similar question was considered in Canadian Broadcasting Corporation v. Broadcast Council of Canadian Union of Public Employees et al., [1987] 3 F. C. 515 (F. C. A.). In that case, the Canada Labour Relations Board had made an award that the employer compensate the employee for loss of wages but the Board remained seized of the matter to deal with several issues including whether the employee was entitled to interest on the unpaid wages from the time of the employee's suspension. Upon consideration of this issue, the Board made an award of interest based on the loss of wages. The employer made application to the Federal Court of Appeal for a review of this latter decision of the Board. The Federal Court of Appeal upheld the award of interest. The power of the Canada Labour Relations Board to make awards was contained, at that time, in the Canada Labour Code, R. S. C. 1970, c. L- 1, s 96.3, and included, inter alia, the power to require an employer to

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

> 23 At page 521, the Court stated:

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

When section 96.3 (c) of the Canada Labour Code is compared with section 53

(2)(c) of the Canadian Human Rights Act, the similarities can be readily identified. Both refer to "compensation" for loss of wages. 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". Notwithstanding this qualification, the Court approved the award of interest by the Canada Labour Relations Board.

Earlier in this decision, when discussing the purpose of the Act, I quoted a passage from the decision of the Tribunal Chairman in Via Rail Canada Inc. v. Butterill et al., [1982] 2 F. C. 830 (F. C. A.). At page 841, Chief Justice quoted the following passage from the decision of the Tribunal Chairman

"the applicable principle was that '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... '"

In relation to a loss of wages, a Complainant can only be fully put back into the position he or she would have enjoyed, if the compensation referred to in section 53 (2)(c) is full compensation including interest on the amounts that should have paid from the dates from when the Complainant should have received the wages. Therefore, I am satisfied that a Tribunal has the power to award interest, by way of compensation, under the Canadian Human Rights Act.

This reasoning also extends to compensation payable under section 53 (3) of the Act.

Counsel for the Respondent submitted, in the alternative that even if a Tribunal has the power under the Act to award interest, interest should not be awarded on the facts of this case because the facts are similar to Villeneuve v. Bell Canada (1985) C. H. R. R. D/ 2988 (C. H. R. Tribunal) wherein interest was denied on an award for loss of wages. The Tribunal's reason for denying interest is found at paragraph 24156 wherein it was stated:

"... no interest is allowed given that the money would have been acquired by the complainant gradually and that he would have used it to meet his living expenses and that there was no evidence adduced on the interest which the complainant might have earned on a saved portion of his salary."

> 24 I disagree with this reasoning. In my view, the award of interest is to compensate a Complainant for being kept out of money which this Tribunal finds he was rightfully entitled to receive. Lord Denning, when speaking of court order interest, in the case of Harbatt's "Plasticine" Ltd. v. Wayne Tank and Pump Co., [1970] 1 Q. B. 447 stated at page 468:

"... the defendant has kept the plaintiff out of his money; and the defendant has had the use of it himself. So he ought to compensate the plaintiff accordingly."

RATE OF INTEREST In this case, counsel for the Respondent submitted that if interest is awarded, the rate of interest should be five per cent because that is the rate of interest provided by section 3 of the Canada Interest Act, R. S. C.

1985, c. I- 15. Although both Counsel for the Respondent and the Commission submitted that they were prepared to accept an interest rate five per cent, I do not think that the rate should be restricted to 5 per cent.

In Boucher v. The Correctional Service of Canada (1988), 9 C. H. R. R. D/ 4910 (C. H. R. Tribunal), the Order specified that the rate of interest should be " ... at the prevailing prime lending rate in force at one of Canada's chartered banks." In Chapdelaine et al. v. Air Canada (1987), 9 C. H. R. R. 4449 (C. H. R. Tribunal), the Order specified that the rate of interest should be " ... at the prime lending rate of the respondent's principal bankers... ". In Kearns v. P. Dickson Trucking Limited, Unreported C. H. R. Tribunal Decision (December 7,1988), the Order provided for interest at the "Registrar's rate". Although the Decision does not contain definition of the "Registrar's rate", I assume that it refers to the practice in British Columbia courts where rate of pre- judgment interest is often expressed as being the "Registrar's rate". That is the rate of interest fixed by the Registrar of the British Columbia Supreme Court for the purpose of determining interest payable on default judgments. In Scott v. Foster Wheeler Ltd. (1987) 8 C. H. R. R. D/ 4179 (Ont. S. C.), the Supreme Court of Ontario (Divisional Court) approved a Board of Inquiry award which simply provided that interest should be payable at "the prime interest rate". The Board also held that interest should not be compounded.

In Canadian Broadcasting Corporation v. Broadcast Council of Canadian Union of Public Employees et al. [1987] 3 F. C. 515 (F. C. A.), the Canada Labour Relations Board had awarded interest at "... the Bank of Canada prime rate...". The Federal Court of Appeal upheld the decision of the Board. In so doing, I think it may be assumed that the Federal

> 25 Court approved of a rate of interest that was higher than the rate provided by section 3 of the Canada Interest Act. Presumably, the higher rate may be justified on the basis that the award is "compensation" rather than interest and therefore the Canada Interest Act does not apply.

While there is some attraction to using the Bank of Canada prime rate, it would be a chore to determine the applicable prime rates since 1980. For reasons that will become apparent later, I prefer to use the prime rate charged by the Canadian Imperial Bank of Commerce with respect to its most credit worthy customers. This is consistent with the holding in Boucher v. The Correctional Service of Canada (1988), 9 C. H. R. R. D/ 4910 (C. H. R. Tribunal).

PERIOD OF ENTITLEMENT TO INTEREST In both Boucher v. The Correctional Service of Canada (1988), 9 C. H. R. R. D/ 4910 (C. H. R. Tribunal); and Chapdelaine et al. v. Air Canada (1987), 9 C. H. R. R. 4449 (C. H. R. Tribunal), the Order provided that interest was payable from the date the Tribunal was appointed. Although no termination date for the payment of interest was specified, presumably it was intended that interest would accrue until the amount of the award was paid.

In Kearns v. P. Dickson Trucking Limited, Unreported C. H. R. Tribunal Decision (December 7, 1988), the Order provided that interest was payable from the date of termination of employment on a prohibited ground of discrimination until a date that was two days prior to the date of the Award.

In Scott v. Foster Wheeler Ltd. (1987) 8 C. H. R. R. D/ 4179 (Ont. S. C.), the Board of Inquiry had awarded interest for the period beginning with the date when the complaint was served on the respondent. The Supreme Court of Ontario (Divisional Court) reduced the award for lost wages but did not change the period or rate of interest ordered by the Board of Inquiry. If the date of service of the Complaint is used in the case before this Tribunal, it was agreed by counsel that the date of service of the Complaint on the Respondent was August 16, 1983.

I do not see any logic in selecting the date of the appointment of Tribunal as the date for the commencement of an entitlement to interest. The commencement of the entitlement to interest should vary with the nature of the compensation. With respect to compensation for hurt feelings and loss of self- respect, interest should begin to accrue from the date when the Complainant suffers the hurt feelings and loss of self- respect. This will normally be the date when the Complainant learns of prohibited discrimination by the Respondent.

> 26 Applying those principles to this case, interest on the award for compensation for hurt feelings should begin to accrue from the date when the letter to the Complainant dated April 17, 1980, can reasonably be expected to have reached the Complainant. In the normal course of the post, the Complainant would have received the letter and learned of the prohibited discrimination within two weeks. Therefore, interest should be calculated on the award for hurt feelings and loss of self- respect from May 1, 1980.

With respect to compensation for loss of wages, interest should normally begin to accrue from the date when the wages would have become due and payable. Under a strict application of this principle, it would be necessary to calculate interest on the wage loss from the end of each pay period. Although the Complainant's monthly wage loss is easy to determine from Scenario 1C of Exhibit R- 3, the evidence of the amounts which must be deducted by reason of a either mitigation or a failure to mitigate can only be calculated on an annual basis. Therefore, in this case, it will only be possible to calculate interest on the basis of the net wage loss at the end of each calendar year.

Normally, interest should be calculated up to the date of the award. However, in this case. as mentioned earlier, the Complainant is partly responsible for the delay in this matter coming before a Tribunal. If the Complainant had filed his Complaint under the Act within a reasonable

time, it may be presumed that a Decision would have been made by December 31, 1986. Therefore, compensation by way of interest shall only be calculated until December 31, 1986.

The calculation of pre- decision interest is made easy by reference to the Report of the Law Reform Commission of British Columbia entitled, Report on The Court Order Interest Act, (1987). Appendix "F" of that Report, which appears on page 133 of the Report, contains a set of prime rate multiplier tables. A copy of that Appendix is attached to this Decision as Appendix I. The table at the top of Appendix "F" applies when interest is being calculated to December 31, 1986 which is the date which I have selected in this case. Several points should be made with respect to the preparation of the table in Appendix "F". The table was prepared using the prime rate of the Canadian Imperial Bank of Commerce for the period covered by the table less 0.25%. The deduction of 0.25% from the Prime rate was made to offset the use

of monthly compounding rather than semi- annual compounding which is more commonly used in commercial practice. The use of compound interest rather than simple interest is a more accurate reflection of the commercial practice of financial institutions.

Using the table prime Interest rate multipliers in > 27 Appendix I, the components of this award, with interest added have been calculated below:

Compensation for hurt feelings and loss of self- respect: Principal plus Interest from May 1, 1980 until December 31, 1986 on $ 1,000:

$1,000 x 2.37 = $2,370.00 compensation for loss of wages: 1980: Net Wage loss = $2,411.44 Principal plus Interest from January 1, 1981 until December 31, 1986 on $2,411.44:

$2,411.44 x 2.171 = $ 5,235.24 1981: Net Wage Loss $ 9,551.43 Principal plus Interest from January 1, 1982 until December 31, 1986 on $9,551.43:

$9,551.43 x 1.794 = $17,135.27 1982: Net Wage Loss $ 15,490.54 Principal plus Interest from January 1, 1983 until December 31, 1986 on $15,490.54:

$15,490.54 x 1.531 = $23,716.02 1983: Net Wage Loss $12,730.20 Principal plus Interest from January 1, 1984 until December 31, 1986 on $12,730.20:

$12,730.20 x 1.372 = $17,465.83 1984: Net Wage Loss $16,407.21 Principal plus Interest from January 1, 1985 until December 31, 1986 on $16,407.21:

$16,407.21 x 1.22 = $20,016.80 > 28 1985: Net Wage Loss $24,029.48 Principal plus Interest from

January 1, 1986 until December 31, 1986 on $24,029.68:

$24,029.48 x 1.1 = $26,432.43 1986: Net Wage Loss was $16,559.33 but on the principle of only calculating interest on the net accumulated wage loss at the end of each calendar year to December 31, 1986, the net wage loss accumulated in 1986 would not attract interest.

Using this method of calculating compensation by way of interest, the amount attributable to interest is:

With respect to compensation for hurt feelings and loss of self- respect, the interest component is:

Principal & Interest Principal Interest

$ 2,370 - $ 1,000 $ 1,370.00 With respect to compensation for loss of wages, the interest component is:

Net Wage Loss Net Interest Year & Interest Wage Loss Component

1980: $ 5,235.24 - $ 2,411.44 = $ 2,823.80 1981: $ 17,135.27 - $ 9,551.43 = $ 7,583.84 1982: $ 23,716.02 - $15,490.54 = $ 8,225.48 1983: $ 17,465.83 - $12,730.20 = $ 4,735.63 1984: $ 20,016.80 - $16,407.21 = $ 3,609.59 1985: $ 26,432.43 - $24,029.48 = $ 2,402.95 1986: $ 16,559.33 - $16,559.33 = $ 0.00 Total $126,560.92 $97,179.63 = $29,381.29

INTEREST ON AMOUNTS TO BE REMITTED If the Complainant is entitled to compensation on account of interest, should the amount which is to be remitted to Receiver General of Canada on account of Unemployment Insurance benefits received by the Complainant during the period of compensation be remitted together with interest on the amount that is to be repaid? Sections 37 and 38 of the Unemployment Insurance Act only provide for the repayment of the amount of the actual amount of the benefits paid during

> 29 the material time and they do not appear to contemplate the repayment of benefits together with interest thereon.

A similar question may be asked with respect to the amount which is to be remitted to the Receiver General of the Province of British Columbia on account of social assistance payments received by the Complainant during the period of compensation. Should this amount be remitted together with interest on the amount that is to be repaid?. The relevant legislation does not provide any assistance in determining this question. In principle, where compensation for wages includes additional compensation by way of interest,

the repayment of social assistance payments should also be with interest. The practical difficulty in this case is that there is little precise evidence as to when the social assistance payments were received. The Complainant testified that he received social assistance payments in 1980. It is likely that he also received social assistance payments in the 1981 and 1982 calendar years because in each of those years his employment income was less than $1,300. In the absence of more specific evidence, I shall assume that one third of the $17,248.44 was received in each of the years 1980, 1981 and 1982. Furthermore, it must be remembered that the Complainant is only being compensated on account of interest until December 31, 1986. On this basis, the amount of interest on the $17,248.44, using the same interest table that was used for the calculation of interest on the net wage loss claim, is :

Principal and interest from January 1, 1981 until December 31, 1986 on $5,749.48:

$5,749.48 x 2.171 = $12,482.12 Principal and Interest from January 1, 1982 until December 31, 1986 on $5,749.48:

$5,749.48 x 1.794 = $10,314.57 Principal and Interest from January 1, 1983 until December 31, 1986 on $5,749.48:

$5,749.48 x 1.531 = $ 8,802.45 TOTAL Principal & Interest = $31,599.14 Principal Component = $17,248.44 Interest Component = $14,350.70

ALTERNATIVE BASIS FOR COMPENSATION - IF LOST OPPORTUNITY TO COMPETE FOR A POSITION

If I am wrong in classifying the effect of the discrimination in this case as being the the denial of a

> 30 position of employment, I would award of compensation on the basis of the factors referred to in both Lewington et al v. Vancouver Fire Department et al, supra, at page D/ 3249, and Dantu v. North Vancouver District Fire Department et al, (1986), 8 C. H. R. R. D/ 3649 (B. C. Board of Inquiry) at page D/ 3650. In the latter case, the Chairman stated:

"They also agreed that, in determining the amount of compensation to be awarded in such a case, one had to take into account inter alia

(a) the likelihood that the complainant would have been successful in the competition for the job in question;

(b) the wages the complainant would have received if he had been hired;

(c) the amount the complainant earned at other jobs he worked at,

and any other income received, since the date of the initial rejection; and

(d) the efforts made by the complainant to mitigate his losses." In Lewington et al v. Vancouver Fire Department et al, supra, the Chairman stated, at page D/ 3249:

"Clearly, the loss of a job is to be valued more highly than the loss of an opportunity to compete for a job."

In this case, it must be borne in mind that the Complainant is now almost 33 years of age and it will be much more difficult for him to physically compete with other applicants who are 15 years younger. Furthermore, he has now been out of the Armed Forces for more than 5 years and therefore he is no longer considered as a "former member" for the purpose of re- enrolment since his previous training is no longer considered to be current. Taking these factors and the factors in the Dantu case into account, I would take the net wage loss compensation calculated (after

deducting those amounts earned by way of employment income and those amounts deducted for a failure to fully mitigate) and reduce it by one- half. On this basis, the value of the loss of opportunity would be:

$ 97,179.83 x 1/ 2 = $ 48,589.92 The Complainant would be entitled to compensation by way of interest on the loss of his opportunity. Since the loss of the opportunity occurred when he received the letter rejecting his application, interest should run on the full amount from May 1, 1980 until December 31, 1986 calculated on the same manner as above. Using the same Table in Appendix I that was used earlier, principal plus interest of

> 31 the loss of an opportunity to compete for a position would amount to:

$ 48,589.92 x 2.370 = $ 115,158.11 COSTS Both counsel for the Respondent and counsel for the Commission took the position that a Tribunal does not have the power under the Act to make an Order for Costs. Since no claim for costs was advanced by counsel on behalf of the Complainant, I do not propose to consider the matter. There will be no order for costs

INCOME TAX The Respondent may be required by the Income Tax Act to withhold at source and to remit to the Receiver General of Canada directly, any income tax that is payable on the award of compensation for loss of wages.

ORDERS 1. The Respondent shall re- enrol the Complainant and make available to the

Complainant, on the first reasonable occasion, one of the following occupations, namely, cook, vehicle technician, mobile support equipment operator (MES), or infantryman. If the first occupation offered to the

Complainant is that of infantryman and the Complainant does not accept that offer, the Respondent shall offer the Complainant the first available position in one of the remaining occupations named in this paragraph. If the Complainant does not accept the latter offer, the obligations of the Respondent under this paragraph of the Order are discharged.

2. (a) Pursuant to section 53 (2)(c) the Respondent shall compensate the Complainant with respect to the loss of wages. The amount of compensation payable by the Respondent consists of:

(i) Compensation for the net loss of wages after deducting amounts in relation to mitigation, $97,179.63 and;

(ii) Compensation on account of interest on the amount stipulated in subparagraph (i) $29,381.29

> 32 (b) From the aggregate of the amounts specified in subparagraph (a),

the Respondent shall pay: (i) to the Receiver General of Canada in respect of

Unemployment Insurance Benefits received by the Complainant during the period of compensation for loss of wages: $ 9,137.00 or such other sum as the Respondent is obliged to remit pursuant to the Unemployment Insurance Act ;

(ii) to the Receiver General of British Columbia in respect of Social Assistance payments received by the Complainant during the period of compensation for loss of wages, by way of principal: $17,248.44

and by way of Interest: $14,350.70 (iii) to the Receiver General of Canada, any amounts required

to be withheld and remitted on account of income tax pursuant to the Income Tax Act.

(iv) the balance to the Complainant. 3. Pursuant to section 53 (3)(b) of the Act, the Respondent shall compensate the Complainant by the payment of;

(a) For hurt feelings and loss of self- respect, the amount of $1,000.

(b) By way of compensation on account of interest on the amount ordered to be paid in subparagraph (a), the amount of $1,370.

Signed in Victoria, Province of British Columbia, this 11th day of March, 1989.

Lyman R. Robinson, Q. C.

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APPENDIX I The Law Reform Commission of British Columbia

REPORT ON THE COURT ORDER INTEREST ACT Appendix F ADDITIONAL MULTIPLIER TABLES

PRIME RATE MULTIPLIERS December 1986 - February 1987 RATE ADJ. PRIME RATE MULTIPLIERS DEC. 1986 ADJ. > -0.25%

JAN FEB MAR APR MAY JUN JUL AUG SEP OCT NOV DEC 1975 4.057 4.021 3.987 3.957 3.928 3.900 3.871 3.843 3.816 3.788 3.758 3.729 1976 3.699 3.670 3.642 3.613 3.583 3.553 3.524 3.495 3.466 3.437 3.409 3.381 1977 3.354 3.329 3.305 3.281 3.258 3.235 3.213 3.191 3.170 3.149 3.128 3.108 1978 3.087 3.067 3.046 3.026 3.005 2.982 2.960 2.938 2.916 2.893 2.870 2.844 1979 2.818 2.791 2.764 2.738 2.711 2.685 2.659 2.633 2.606 2.580 2.553 2.522 1980 2.492 2.461 2.432 2.402 2.370 2.338 2.312 2.287 2.264 2.242 2.219 2.196 1981 2.171 2.139 2.107 2.076 2.046 2.016 1.984 1.952 1.917 1.882 1.850 1.820 1982 1.794 1.769 1.746 1.722 1.699 1.675 1.652 1.628 1.605 1.584 1.565 1.548 1983 1.531 1.516 1.501 1.487 1.473 1.460 1.447 1.435 1.422 1.409 1.397 1.384 1984 1.372 1.360 1.348 1.336 1.323 1.311 1.298 1.285 1.271 1.257 1.244 1.232 1985 1.220 1.209 1.198 1.187 1.176 1.166 1.156 1.146 1.136 1.127 1.118 1.109 1986 1.100 1.091 1.081 1.069 1.059 1.049 1.041 1.032 1.024 1.016 1.008 1.000 1987 1988 1989

ADJ. PRIME RATE MULTIPLIERS JAN. 1987 RATE ADJ. > -0.25 %

JAN FEB MAR APR MAY JUN JUL AUG SEP OCT NOV DEC 1975 4.089 4.053 4.019 3.988 3.959 3.931 3.902 3.874 3.846 3.818 3.788 3.758 1976 3.729 3.699 3.670 3.642 3.611 3.582 3.552 3.523 3.494 3.465 3.436 3.408 1977 3.381 3.356 3.331 3.307 3.284 3.261 3.238 3.217 3.195 3.174 3.153 3.132 1978 3.111 3.091 3.070 3.050 3.029 3.006 2.984 2.961 2.939 2.916 2.892 2.867 1979 2.840 2.814 2.786 2.759 2.732 2.706 2.680 2.654 2.627 2.600 2.573 2.542 1980 2.511 2.481 2.451 2.421 2.389 2.356 2.330 2.305 2.282 2.259 2.237 2.214 1981 2.188 2.156 2.124 2.092 2.062 2.032 2.000 1.967 1.933 1.897 1.864 1.834 1982 1.809 1.783 1.760 1.736 1.712 1.689 1.665 1.641 1.618 1.597 1.577 1.560 1983 1.544 1.528 1.513 1.499 1.485 1.472 1.459 1.446 1.433 1.420 1.408 1.395 1984 1.383 1.371 1.358 1.346 1.334 1.321 1.309 1.295 1.281 1.267 1.254 1.241 1985 1.229 1.218 1.207 1.196 1.185 1.175 1.165 1.155 1.145 1.136 1.126 1.117 1986 1.108 1.099 1.089 1.087 1.067 1.058 1.049 1.040 1.032 1.024 1.016 1.008 1987 1.000 1988 1989

ADJ PRIME RATE MULTIPLIERS FEB. 1987 RATE ADJ > -0.25 %

JAN FEB MAR APR MAY JUN JUL AUG SEP OCT NOV DEC 1975 4.122 4.085 4.051 4.020 3.991 3.962 3.933 3.905 3.876 3.848 3.818 3.788 1976 3.758 3.829 3.699 3.670 3.640 3.610 3.580 3.511 3.521 3.492 3.463 3.435 1977 3.408 3.382 3.357 3.333 3.310 3.287 3.264 3.242 3.221 3.199 3.178 3.157 1978 3.136 3.115 3.095 3.074 3.053 3.030 3.007 2.985 2.963 2.939 2.915 2.889 1979 2.862 2.836 2.808 2.781 2.754 2.727 2.701 2.675 2.648 2.621 2.593 2.562 1980 2.531 2.501 2.470 2.440 2.408 2.375 2.349 2.323 2.300 2.277 2.255 2.231 1981 2.205 2.173 2.140 2.109 2.079 2.048 2.015 1.983 1.948 1.912 1.879 1.849 1982 1.823 1.798 1.773 1.750 1.726 1.702 1.679 1.654 1.631 1.609 1.590 1.572 1983 1.556 1.540 1.525 1.511 1.497 1.484 1.470 1.457 1.444 1.432 1.419 1.406 1984 1.394 1.381 1.369 1.357 1.344 1.332 1.319 1.305 1.291 1.277 1.264 1.251 1985 1.239 1.118 1.217 1.206 1.195 1.184 1.174 1.164 1.154 1.145 1.135 1.126 1986 1.117 1.108 1.098 1.086 1.076 1.066 1.057 1.048 1.040 1.032 1.024 1.016 1987 1.008 1.000 1988 1989