

**CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL
CANADIEN DES DROITS DE LA PERSONNE**

**ROBERT D. ADAIR, BARRY CATLEY, JOSEPH T.B. CORRIGAN,
PAUL D. CROSS, JOHN FRASER, ARTHUR W. GUTHREAU,
BARBARINE HENRY, DOUGLAS HORSMAN, JOHN HURLEY,
JOSEPH EDWARD KORPONAY**

Complainants

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

CANADIAN ARMED FORCES

Respondent

REASONS FOR DECISION

MEMBER: J. Grant Sinclair

2004 CHRT 28
2004/08/18

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I. MATERIAL FACTS

[1] This matter involves ten complaints brought to the Canadian Human Rights Commission between October 1992 and July 1994.

[2] Each of the complainants reached their prescribed retirement age prior to September 3, 1992. However, none of the complainants were released from the Canadian Armed Forces until after September 3, 1992.

[3] Prior to September 3, 1992, each of the complainants were required to take fully paid leave made up of a combination of different forms of leave including: accumulated leave (i.e. accumulated annual leave), annual leave (i.e. annual leave for the year of release), special leave and rehabilitation leave in accordance with the QR&O and the Canadian Armed Forces Administrative Orders. This leave is collectively referred to as retirement leave in article 16.18 of the QR&O. The complainants were required under the QR&O to take this leave prior to their release.

[4] The complainants received their full salary and benefits and accumulated full pensionable time while on leave prior to release. They were not required to report for active duty during their leave but were subject to being recalled to report for active duty at any time until their release from the CAF.

[5] All of the complainants were released from the CAF after September 3, 1992.

II. BACKGROUND

[6] On August 14, 1992 the Canadian Human Rights Tribunal issued its decision in *Martin et al. v. Canada (Dept. of National Defence)* (1992), 17 C.H.R.R. D/435. The Tribunal held that articles 15.17 and 15.31 of the *Queen's Regulations and Orders* were not regulations made for the purpose of paragraph 15(1)(b) of the *Canadian Human Rights Act* and, accordingly, could not justify the discriminatory practice of compulsory retirement.

[7] On September 3, 1992, the Governor in Council amended articles 15.17 and 15.31 of the QR&O to comply with paragraph 15(1)(b) of the *CHRA*, thereby rendering the compulsory retirement provisions operative from that day forward.

[8] The Canadian Human Rights Tribunal subsequently confirmed in *Carter v. Canadian Armed Forces*, [2000] C.H.R.D. No. 1 No. T.D. 2/00, aff'd, [2001] F.C.J. No. 1922 (F.C.T.D.); [2003] F.C.J. No. 212 (F.C.A.), that the amendment to articles 15.17 and 15.31 of the QR&O on September 3, 1992, put an end to the discriminatory practice that occurred with the release of Mr. Carter on May 27, 1992, because he had reached the compulsory retirement age. Accordingly, the Tribunal concluded that the Canadian Forces were not required to pay damages for lost wages after September 3, 1992.

III. QUESTION IN ISSUE

[9] The issue for the Tribunal in this proceeding is whether the requirement that the complainants take their retirement leave prior to September 3, 1992, is a discriminatory practice contrary to sections 7 and 10 of the *CHRA*.

IV. ARGUMENT OF THE COMMISSION

[10] The Commission argues that the complainants were compelled to take retirement leave under the CAF retirement policy when such policy was found to be discriminatory.

[11] According to the Commission, the complainants were, in effect, forced out of the workplace because of their age as compared to other CAF members. This, the Commission argues, constitutes adverse differentiation in employment, contrary to s. 7(b) of the *CHRA*, and is pursuant to a policy that deprived the complainants of employment opportunities, contrary to s. 10 of the *CHRA*.

[12] The Commission also argues that as a result of the discriminatory practice, the complainants had a "vested right" to compensation that is in no way affected by the amendment to the QR&O. The QR&O amendments are not retroactive. The QR&O amendments may impact compensation, they cannot impact liability. For this proposition, the Commission relies on the *Carter* decision.

V. THE ARGUMENT OF THE RESPONDENT, CAF

[13] The structure of the CAF's argument is built on the decisions of the Tribunal and the Federal Court in *Carter*. Master Corporal Carter filed a complaint against the CAF with the Commission on August 25, 1993, alleging age discrimination,

contrary to s. 7 of the *CHRA*. He was released from the CAF on May 27, 1992 and had been on retirement leave from June 1991 until his release. At the time of his release, the compulsory retirement provisions of QR&O 15.31 were not operative because of the *Martin* decision.

[14] There was no issue that Mr. Carter, because of the discriminatory practice, was entitled to compensation. The issue was the amount of compensation. The Commission's position was that the compensation period should run for 24 months from his release date. The CAF countered that the compensation period should run from his release date, May 27, 1992 to September 3, 1992, when the CAF compulsory retirement policy was validated.

[15] The Tribunal concluded that Mr. Carter had a vested right to compensation once it was proved that he was the victim of a discriminatory practice. And the appropriate compensation period should be from May 27, 1992 to September 3, 1992.

[16] The Federal Court on judicial review, agreed with the Tribunal's conclusion that Mr. Carter had a vested right to compensation, but no vested right as to the amount of compensation. As to the compensation period, the Court said that there must be a causal connection between the discriminatory practice and the amount of compensation. In Mr. Carter's case, the causal connection was broken on September 3, 1992, by the amendment to the QR&O, which allowed the CAF to release Mr. Carter. It was on that date when the discriminatory practice ended.

[17] The CAF argues that the Commission has failed to make a *prima facie* case for the contravention of ss. 7 & 10 of the *CHRA* because it has not shown that the complainants suffered any adverse consequences or lost opportunities.

[18] The CAF points out that it was a matter of record both before the Tribunal and the Federal Court, that Mr. Carter was put on retirement leave from June 1991 to May 27, 1992. If being put on retirement leave was a discriminatory practice, then it was open to the Commission to argue that the compensation period for Mr. Carter should have started in June 1991, not May 27, 1992. But the Commission did not argue this. Rather, the Commission's position was that Mr. Carter's right to compensation crystallized on May 27, 1992, the day of his discriminatory release. Both the Tribunal and the Federal Court in their decision explicitly referred to Mr. Carter's release as being the discriminatory practice. Thus, the CAF argues, *Carter* stands for the proposition that the requirement to take retirement leave is not a discriminatory practice.

[19] And with good reason, says the CAF, because there are no adverse consequences to being put on retirement leave. This is because a member of the

CAF, while on retirement leave, receives everything that he would be entitled to if on active duty.

[20] The CAF makes another argument which also focuses on release. The QR&O require retirement leave to be taken prior to release. As pointed out in *Carter*, Mr. Carter could have been released from the CAF as of September 3, 1992, when the CAF compulsory retirement policy was validated. All of the complainants in this case were released after September 3, 1992. Presumably, if the complainants wanted to take their retirement leave, they would have to do so prior to their release. They did so. Accordingly, there was no discriminatory practice.

VI. DECISION

[21] The argument of both the Commission and the CAF are somewhat seductive. But I have concluded that the policy of the CAF that required the complainants to take their retirement leave prior to September 3, 1992, constitutes a discriminatory practice contrary to ss. 7(b) and 10 of the *CHRA*. As stated earlier, the complainants were taken out of active duty and put in retirement status, although still on the CAF roster. They became "stay at home soldiers". Many of the complainants wanted to continue on active service as demonstrated by their requests for an extension of service. Some were granted, some were not.

[22] In my view, it is not accurate to say that there were no adverse consequences because the complainants received the same benefits that they would have received if on active service. There are other benefits in addition to salary and pension benefits that are available to those on active duty, but not to those on retirement leave. Promotion, occupation transfers, would be examples. Undoubtedly, the CAF offers educational training, upgrading of a member's trade or occupation, leadership courses, all of which could enhance a CAF member's career opportunities.

[23] Another adverse impact was poignantly described by Chief Justice Dickson in *Reference re Public Service Employee Relations Act (Alta)* [1987] 1 S.C.R. 313, 368, where he said:

"Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being".

[24] Further, I do not accept the CAF's contention that *Carter* decided that retirement leave is not a discriminatory practice. Although it was open to the Commission to argue this in *Carter*, its failure to do so is not determinative in this case. Nor can it be said that the Federal Court, by referring to the discriminatory practice being Mr. Carter's release on May 27, 1992, conclusively decided that Mr. Carter's retirement leave could not be a discriminatory practice. It must be remembered that in *Carter*, liability for the CAF's retirement policy was not in issue, only compensation. Neither the Tribunal nor the Federal Court was asked to consider a compensation period running from the date of retirement leave instead of the date of the release. In my opinion, whether or not being put on retirement leave prior to September 3, 1992 was a discriminatory practice, remained an open question after *Carter*.

[25] Finally, there is the argument of the CAF that the compulsory release policy was immunized by the September 3, 1992 amendment to the QR&O. And, because retirement leave is an incident of the former, it also is immunized.

[26] To accept this argument would require that the amendment to the QR&O be given retroactive application. What was once discriminatory before the amendment is no longer discriminatory because of the amendment. The amendment to QR&O 15.17 and 15.31 did not expressly provide for retroactive application, nor did the CAF argue that it had this effect.

[27] For the reasons set out above, I have concluded that the CAF policy requiring the complainants to take retirement leave prior to September 3, 1992 was a discriminatory practice contrary to s. 7(b) and s. 10 of the *CHRA*. The result is that the complainants have a claim for compensation because of the discriminatory practice. As to the amount of the compensation, if any, that is left to another day.

Signed by

J. Grant Sinclair

OTTAWA, Ontario
August 18, 2004

PARTIES OF RECORD

TRIBUNAL FILE:	T811/6103
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APPEARANCES:	
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Michael Peirce	For the Respondent