

SHIV CHOPRA

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

**DEPARTMENT OF NATIONAL HEALTH AND
WELFARE**

Respondent

REASONS FOR DECISION ON REMEDY

MEMBER: Athanasios D. Hadjis

2004 CHRT 27
2004/08/17

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[1] This decision relates to remedy. In an earlier decision in this case, I determined that the Respondent, the Department of National Health and Welfare (**Health Canada**), had discriminated against the Complainant, Dr. Shiv Chopra (*Canada (Human Rights Comm.) v. Canada (Dept. of National Health and Welfare) (No. 5)* (2001), 40 C.H.R.R. D/396 (C.H.R.T.)). At the request of the parties, I only addressed the question of the Respondent's liability under the *Canadian Human Rights Act*. I retained jurisdiction to hear evidence and submissions on remedy at a later time, if the parties were unable to reach an agreement in this respect.

[2] On July 8, 2002, the Complainant notified the Tribunal that the parties had failed to come to an agreement and requested that a hearing be convened to deal with the issue of remedy.

I. BACKGROUND

[3] Dr. Chopra filed his complaint with the Canadian Human Rights Commission (**Commission**) on September 16, 1992. He alleged that Health Canada had discriminated against him because of his race, colour, and national or ethnic origin, in the manner in which the management position of Director of the Bureau of Human Prescription Drugs (**BHPD**) was staffed between September 1990 and the spring of 1992. In 1995, a Tribunal chaired by Daniel Soberman dismissed the complaint. In 1998, the Federal Court of Canada - Trial Division reviewed and set aside that decision. The Court remitted the matter back to the Tribunal to be determined on the basis of the existing record augmented by the statistical evidence that had been excluded by the first Tribunal. In January 1999, the Federal Court of Appeal upheld the Court's decision. The additional evidence was led before me during hearings that were conducted between May 1999 and December 2000.

[4] In my decision, I noted that Dr. Chopra was screened out of the competition for the BHPD Director's position because he lacked "recent management experience". During the two-year period leading up to this competition, the indeterminate BHPD Director's position remained vacant. Dr. Chopra had requested that he be assigned to act in the position temporarily but he was turned down. Had he been appointed, he would have acquired the recent management experience that he needed to be screened into the competition. On the basis of the evidence presented, I found that the denial to Dr. Chopra of the opportunity to act in the position was due in part to discrimination on the basis of his national or ethnic origin.

[5] However, I also observed that even if Dr. Chopra had been screened into the final competition, he would not necessarily have won. This was a question to be determined later, when addressing the issue of remedy.

II. LEGAL FRAMEWORK

[6] The Tribunal derives its remedial jurisdiction from s. 53 of the *Act*. The remedies contemplated therein are designed to prevent future discrimination as well as to compensate individual victims. The goal of compensation is to make the victim whole for the damage caused by the act that is the source of liability (*Canada (Attorney-General) v. McAlpine* (1989), 12 C.H.R.R. D/253 at para. 13 (F.C.A.)).

[7] Dr. Chopra is seeking an immediate appointment to an EX-level position and compensation for wage loss from 1990 to this day. To establish his entitlement to these remedies, he must demonstrate that the Respondent's discriminatory practice denied him the opportunity to gain recent management experience, which would have in turn led the way for him to act in the position and to later be screened into the final competition. This exercise is obviously speculative. The Tribunal must endeavour to turn back the clock and consider what **would** have happened had the discrimination not occurred. By what standard must such a determination be made?

[8] Commission and Complainant counsel both submit that the Tribunal need only conclude that there existed a **serious possibility** of the occurrence of an event. For instance, if there existed a serious possibility of Dr. Chopra's winning the 1992 final competition, had he been screened in, a finding could be reached that he was denied the position because of the discriminatory act. In support of their contention, they cite the reasons given by Mr. Justice Marceau in *Canada (Attorney General) v. Morgan* [1992] 2 F.C. 401 (F.C.A.). The complainant in that case had attempted to enrol in the Canadian Forces but was turned down for

grounds that were ultimately deemed discriminatory. The issues before the Federal Court of Appeal pertained to the remedies to which the complainant was entitled. The Court reflected on the question of how to identify the loss to be compensated. On this point, Mr. Justice Marceau wrote the following, at pages 412-13:

I have great difficulty with the proposition adopted by the Review Tribunal and accepted by my colleague that it was sufficient to look at the probable result of the recruiting process to be able to draw the conclusion that the loss was that of a job rather than a mere opportunity. We are not dealing with the establishment of a past fact which in a civil court need only be proved on a balance of probabilities. Nor are we concerned with the relation between a particular result and its alleged cause. It seems to me that the proof of the existence of a real loss and its connection with the discriminatory act should not be confused with that of its extent. To establish that real damage was actually suffered creating a right to compensation, it was not required to prove that, without the discriminatory practice, the position would certainly have been obtained. Indeed, to establish actual damage, one does not require a probability. In my view, a mere possibility, provided it was a serious one, is sufficient to prove its reality. But, to establish the extent of that damage and evaluate the monetary compensation to which it could give rise, I do not see how it would be possible to simply disregard evidence that the job could have been denied in any event. The presence of such uncertainty would prevent an assessment of the damages to the same amount as if no such uncertainty existed. The amount would have had to be reduced to the extent of such uncertainty.

(my emphasis)

[9] The other two Federal Court of Appeal judges who sat on the *Morgan* case did not adopt the same approach. Mr. Justice MacGuigan, at page 425 of his dissenting judgment, suggested that a tribunal should look at the **probable** result of the whole hiring process in determining whether a complainant is entitled to compensation for the loss of a position. Mr. Justice Mahoney opted to not articulate any position on this question. He noted that he and his colleagues all agreed that in any event, on the facts of the case, the complainant would "certainly" have been able to enlist but for the discrimination.

[10] In *Canada (Attorney General) v. Uzoaba* [1995] 2 F.C. 569 (F.C.T.D.), Mr. Justice Rothstein explicitly referenced and adopted the test articulated by Mr. Justice Marceau in *Morgan*. In *Canada (Attorney General) v. Green* [2000] 4

F.C. 629 at para 142 (F.C.T.D.), Mr. Justice Lemieux stated that he took from *Morgan* the principle that if a complainant seeks "to establish actual damage, losing a job, her losing a promotion, probability is not required but a possibility is sufficient provided it was a serious one". The Court went on to explain, at paragraph 151, that in making certain of its findings, it was "guided by the serious possibility test in *Morgan*". In *Nkwazi v. CSC* (2001), 39 C.H.R.R. D/237, the Canadian Human Rights Tribunal applied the "serious possibility" test in determining whether the complainant would have succeeded in obtaining a more senior position had the respondent's act of discrimination not hindered her from competing.

[11] Based on these and the other authorities submitted by counsel, I am satisfied that a complainant seeking a remedy with respect to a discriminatory denial of a higher employment position need only present evidence of a *serious possibility* of success.

III. REMEDIES BEING SOUGHT BY DR. CHOPRA

A. Compensation for wage loss - Acting BHPD Director

[12] In my earlier decision, I found that Health Canada had discriminated against Dr. Chopra by having failed to give him the opportunity to act in the BHPD Director's position. I concluded that one of the factors for not appointing him was his national or ethnic origin, and that Health Canada's explanation for not considering him for the position (lack of recent management experience) was pretextual.

[13] Health Canada contends that Dr. Chopra was unqualified to act in the position and that, as a result, he never would have been selected to act in the BHPD Director's position, whether or not the discrimination had occurred. This contention cannot be sustained, however. Dr. Claire Franklin was given the assignment and it was renewed thereafter even though she herself was found by the Public Service Commission Appeal Board to have not been fully qualified for the acting post. It is evident that at this stage, Health Canada was not overly concerned about whether a candidate met each of the stated qualifications. I am therefore satisfied, taking into account the evidence in this case regarding Dr. Chopra's qualifications at the time and the minimal concern for qualifications demonstrated by Health Canada, that there existed a serious possibility of Dr. Chopra's being assigned to act in the BHPD Director's position were it not for the acts of discrimination practised against him.

[14] What would have been the length of his acting assignment? Dr. Franklin was assigned to a series of three acting term appointments from October 20, 1990, to September 20, 1991, a total of eleven months. From September 20, 1991, until February 13, 1992, Dr. Franklin no longer formally acted in the position, but she informally continued to retain the responsibilities of the position. Her classification and salary returned to the levels of her previous posting. Although Dr. Franklin had officially ceased acting in the BHPD Director's position, I am satisfied, based on the findings in my earlier decision, that her acting appointment was in effect maintained throughout this period. From February 13, 1992, to April 21, 1992, the evidence is that no one acted in the position. On April 21, 1992, the Public Service Commission confirmed Dr. Franklin's appointment as BHPD Director on an indeterminate basis. This decision was appealed but the Federal Court ultimately decided to not interfere with the appointment. Accordingly, the period in question during which the acting position was occupied consists of about sixteen months (or 68 weeks) that extended from October 20, 1990, to February 13, 1992.

[15] On September 13, 1990, Dr. Chopra wrote to the Director-General of the Drugs Directorate, Dr. Emmanuel Somers, proposing himself as a candidate for the acting position. Dr. Chopra suggested that he and other candidates be assigned to act on a rotational basis. The most "efficient" of these persons would then be allowed to continue in the position indeterminately. In the circumstances, this would have been a reasonable option that Dr. Somers and Assistant Deputy Minister, Dr. Albert Liston, could have chosen to implement, were it not for the decision that they had already taken to appoint Dr. Franklin. The evidence is that acting assignments were usually given for terms not exceeding four months because when this course was followed, a formal competitive process was not required. Acting assignments that extended beyond four months were treated as appointments against which other employees could file appeals pursuant to the *Public Service Employment Act*, R.S.C. 1985, c. P-33. In the present case, although Dr. Franklin's assignments were each of a duration of four months or less, they were formally renewed two times, for a total period of eleven months.

[16] There were at least three individuals who expressed an interest in the acting BHPD Director's position: Dr. Chopra, Dr. Franklin and Dr. Michele Brill-Edwards. Dividing the period during which Dr. Franklin occupied the position (68 weeks) by three, to reflect the number of interested candidates, would in my view be appropriate. I am not concerned by the fact that the figure derived ($22\frac{2}{3}$ weeks or about $5\frac{1}{3}$ months) exceeds the ordinary four-month term of acting assignments. As I have said, in Dr. Franklin's case, Health Canada had no difficulty renewing and effectively extending the terms beyond this period.

[17] Respondent counsel suggested that I should base my calculations on a period of eleven months to reflect the fact that as of September 20, 1991, Dr. Franklin had ceased acting in the position. However, as I stated earlier, the change

occurred only in theory. In practice, she continued to exercise the same functions as before. The 68-week period is more realistic.

[18] As my determination on this point is based on the assumption that the three candidates were equally interested in acting in the BHPD Director's position, I see no reason not to order that the damages for lost wages should run from the date of the first acting term. Dr. Chopra is therefore to be indemnified for all wages and other benefits that he lost over a period of 22 $\frac{2}{3}$ weeks commencing October 20, 1990, the date when the first acting term began.

B. Compensation for wage loss - BHPD Director, Indeterminate Position

[19] Dr. Chopra is seeking compensation for wage loss in relation to the indeterminate BHPD Director's position. He claims that had he acted in the post in the months leading up to the 1992 final competition, he would have acquired the recent management experience needed to be screened in. Once screened in, he maintains that there would have existed a serious possibility of his winning the competition.

[20] The screening guide to the competition set out certain minimal qualifications required for a candidate to advance to the second stage of his or her assessment. They relate to the individual's education, experience, official languages proficiency and previous job performance. In the screening record used by the Selection Committee, only four of the fourteen candidates considered were identified as being qualified in each of these categories, including Dr. Franklin and Dr. Brill-Edwards. Dr. Chopra was excluded because he lacked recent experience in managing a scientific or medical organization with responsibility for a number of disciplines or program activities and a budget. This deficiency is identified on the screening record with an "X". However, in addition to this annotation, a question mark was placed next to Dr. Chopra's name with respect to his level of recent experience as an official spokesperson for Health Canada or other organizations on health issues encompassing multiple dimensions. While no evidence was led to fully explain the connotation of the question mark, it is obvious that this rating is not as affirmative as the check marks found elsewhere on the screening record, such as the one confirming that Dr. Chopra had the necessary educational background.

[21] Of the four candidates who were screened in, two opted to withdraw their candidacies, and the remaining two (Dr. Franklin and Dr. Brill-Edwards) proceeded to the next stage of assessment. A separate "Selection Profile" was adopted for this phase, which contained the statement of qualifications found in the screening guide augmented by several new requirements. They included knowledge of management techniques, knowledge of conducting trials and tests of the safety and efficacy of drugs, knowledge of the scope and nature of drugs

for human use, and knowledge of the role of government in health protection and related policies, programs, objectives and priorities. In addition, the candidate was to be assessed on his or her abilities to communicate, to manage a regulatory program, and to judge, summarize and discuss scientific and medical data. The person's leadership skills and his or her personal suitability were also factors to now be considered.

[22] The Selection Committee concluded that Dr. Franklin was the only qualified candidate. She testified before the Tribunal during the recent set of hearings regarding remedy. She detailed in what respects she felt she satisfied the various requirements contemplated by both the screening guide and selection profile for the BHPD Director's position. For instance, from 1984 to 1990, she had managed a division within the Environmental Health Directorate of Health Canada, with a staff of about 45 persons and a budget of about \$10,000,000. She had been an official spokesperson for Health Canada before numerous committees and had been interviewed by the media. She also discussed in detail the reasons for which she felt that she met the knowledge requirements for the position.

[23] Dr. Franklin described the assessment process used by the Selection Committee. Twenty-four hours prior to her interview with the Committee, she was given a one hundred page document on a scientific topic unrelated to the field of human prescription drugs and about which none of the candidates would have had any specific knowledge. She was required to read the information overnight, assimilate it, and then make a brief presentation and answer questions during the interview. Furthermore, one hour before meeting with the Committee, the candidates were given a document about which they had to prepare a briefing note intended to be read by someone at a more senior level. The topic of this document was unrelated to human prescription drugs. Dr. Franklin recalls that her interview with the Selection Committee was long and intense. Her evidence with respect to the assessment process was not challenged.

[24] Dr. Chopra testified at the recent hearings on remedy as well. He was asked what would have happened to him had he gained the acting experience in the BHPD Director's position. He replied that he always had excelled in his studies in multiple disciplines. He is an industrious person who, for instance, had applied himself to learn French well before it became popular or necessary to do so. He claims that his managers recognized his potential, as reflected in his being recommended for the Career Assignment Program and the Objectives Oriented Management (**OOM**) Program. He believes that he was more qualified than Dr. Franklin with respect to the knowledge component, since it related to scientific areas in which he had worked for years, areas about which he claims she lacked sufficient knowledge.

[25] It was pointed out to Dr. Chopra that Dr. Franklin had about thirteen years of management experience leading up to her acting appointment to the BHPD Director's position in 1990, far in excess of the several months' experience he would have acquired had he also been rotated into the acting position. Dr. Chopra's response was that in his view, management skills constituted a minor component of the job relative to the far more important scientific knowledge skills. As such, he contended that he had would have been more qualified than Dr. Franklin had he been given the opportunity to compete against her. Yet at no time did Dr. Chopra specify in what manner he could satisfy each of the required qualifications stipulated in the Selection Profile.

[26] Did he have experience acting as a spokesperson for Health Canada or a similar organization on sensitive health issues? Did he have knowledge of the role of government in health protection? Did he have knowledge of management techniques and approaches? Dr. Chopra and the Commission are apparently of the view that it is somehow self-evident that he possessed, or would have possessed, the necessary qualities for the position. His performance assessments were fully satisfactory. He worked within the Bureau so he must have been knowledgeable in the relevant field. He was seconded to the OOM project in 1975, and participated in a six-week management-training program in 1977, so he must have knowledge in management techniques and approaches.

[27] Other than Dr. Chopra's personal assertions that he was more qualified than Dr. Franklin, no attempt was made to lead any specific evidence to support that claim. The Commission and the Complainant argue strenuously that such an exercise is wholly unnecessary. They submit that one need not compare the two aspirants to the position, given the serious possibility test articulated in *Morgan*. The Complainant is not obliged to prove that he certainly, or even probably, would have been selected for the job. If it was seriously possible for Dr. Chopra to be successful in the competition, his actual loss will have been established and all that will remain to be determined will be the extent of the damage and the evaluation of the monetary compensation to which it gives rise.

[28] The Complainant argues that the experience he would have acquired while acting in the BHPD position, in and of itself, would have created a serious possibility of his winning the competition. In its 1992 annual report, the Public Service Commission referred with some concern to a then recent study indicating that employees who have received an acting appointment are four times more likely to receive a subsequent promotion than those who have not. In its 2000-2001 annual report, the PSC reiterated its concern about the use of acting appointments and the fact that acting incumbents have an advantage in subsequent competitive processes for the same position. The report referenced a study regarding 249 EX appointments made over two three-month periods in 1998 and 1999. The study showed that of 83 candidates who acted in a position prior to staffing, 77 (or about 93%) won the competition for that position.

[29] The Respondent led evidence to demonstrate that the data from this last study is incomplete. For instance, there was no way of knowing whether more than one person had acted in those 77 positions nor whether the periods studied were in any way representative. The study's writer, Madeleine Desroches, testified that she selected the periods at random. She also acknowledged that she identified the 83 candidates based principally on information she culled from several forms prepared in the course of the appointment processes. Apparently there was no obligation on the part of the employer to note in these forms whether the position had been previously staffed on an acting basis. This, therefore, allowed for the possibility that Ms. Desroches may have failed to identify all of the cases where someone had acted prior to the indeterminate staffing action.

[30] The Respondent contends that if this type of analysis is to be conducted at all, it should be focussed on Health Canada. Of the 25 acting EX-1 level appointments of four months or longer between July 1990 and July 1993, only six of the employees were later promoted into EX level positions on an indeterminate basis (about 24%). Of the ten acting EX-2 level appointments of four months or longer during the same period, four were later promoted (40%). The combined percentage would be about 29%.

[31] I do not find the concerns raised by the Respondent with respect to the PSC data to be significant. It is certainly possible that the employer omitted to note in some of the forms that the position had been previously staffed on an acting basis, but the fact remains that in 93% of those cases where the form contained sufficient information, it was found that the acting candidates were subsequently promoted to the position. This evidence must surely have been compelling enough to cause the PSC to bring the issue up in its 2001-2002 annual report. I also cannot ignore the fact that the PSC had conducted another study prior to its 1992 report that drew a similar conclusion: those who act in a position are more likely to receive a subsequent promotion than those who have not. No evidence was led to contradict the 1992 PSC study, which falls precisely into the period when the BHPD Director's position was being staffed. Even when one turns to the Health Canada data presented by the Respondent, the percentages do not rule out a serious possibility of success for persons who act in the position.

[32] These findings all lead me to conclude that had Dr. Chopra acted in the BHPD Director's position for just over five months, a mere but serious possibility would have existed of his later being successful in the final competition for the indeterminate position.

[33] The story does not end there, however. It may be that Dr. Chopra suffered this loss but, as Mr. Justice Marceau noted in *Morgan, supra*, to establish the extent of Dr. Chopra's damage and evaluate the monetary compensation to which it gave rise, evidence of any uncertainty related to Dr. Chopra's acceding to the

position cannot be ignored. The damage award must be reduced to the extent of such uncertainty.

[34] I have already identified many of the elements giving rise to uncertainty in this case. The selection process was very complicated and some of the testing procedures were deliberately organized so as to not provide any advantage to persons already working within the Bureau of Human Prescriptions Drugs. With respect to Dr. Chopra's particular case, I have no specific evidence before me of whether he would have satisfied the criteria set out in the Selection Profile and to what extent. His most recent management experience would have been limited to his acting assignment of just over five months. In accordance with my earlier findings, Dr. Brill Edwards and Dr. Franklin would also have gained the same experience. However, the evidence is that Dr. Franklin had additional and extensive management experience, far in excess of Dr. Chopra's.

[35] It should also not be forgotten that although Dr. Brill-Edwards was screened into the competition, she was not found to be qualified for the position. Being screened in does not necessarily mean you are qualified. In Dr. Chopra's case, there also remained the issue of the question mark that had been entered on his screening record with respect to his experience as an official spokesperson. I am equally mindful that this case does not involve jobs of a generic nature. The evidence is uncontroverted that each EX position is unique, requiring different skill sets, abilities, knowledge and education. Acceding to an EX position is by no means simple or automatic.

[36] Taking all of these elements into account, I am satisfied that the Complainant's wage loss should be reduced by two thirds ($\frac{2}{3}$) to reflect the relatively high level of uncertainty of his being successful in the final competition.

[37] There is another factor to be considered as well. As noted by the Federal Court of Appeal in *McAlpine, supra*, at paragraph 13, only such loss as is reasonably foreseeable is recoverable. The victim of discrimination must therefore demonstrate that he has taken reasonable steps to mitigate his loss (see *Morgan, supra* at para. 14). For instance, in the present case, the Complainant must show that he took steps to improve his chances of successfully competing for an EX-level position and that he applied for such positions when the opportunity arose.

[38] In 1997, Dr. Chopra was named Acting Chief of the Central Nervous System, Endocrine and Antiparasitic Drugs Division, Bureau of Veterinary Drugs, in which position he gained four months of line management experience. Yet in the ensuing years, he never entered any competition for promotion to the EX level. In 2002, Dr. Chopra was offered the opportunity to act as Leader for the Microbiological Safety Team in the Human Safety Division. Dr. Chopra claimed

in his testimony that he refused this offer out of protest because this sort of staffing action would have been unfair to his fellow employees. However, in his letter of refusal, he gave as his reason for turning down the offer the fact that the position would effectively not constitute a promotion for him. As a VM-4 level employee, acting in the proposed REM-01 level position would not have been treated as a promotion. Be that as it may, had he accepted the position, he would have gained additional critical line management experience. Evidence was led in this case that employees often accept new positions even if they technically do not constitute promotions just for the purpose of gaining experience for future advancement.

[39] Overall, aside from the 1993 Bureau of Veterinary Drugs competition, to which I referred in my previous decision, no evidence was led to indicate that Dr. Chopra had since applied for any other promotions to indeterminate positions at the EX level. He was screened out of two competitions for positions at the VM-5 level, and this only occurred fairly recently, in 2002. It may be that Dr. Chopra did not perceive himself as having any chance of success, or that he felt some level of frustration with his previous attempts at being promoted. But the fact remains that the only finding of discrimination with respect to Dr. Chopra relates to the staffing of the acting BHPD Director's position in 1990. In my previous decision in this case, I found that prior to 1990, Dr. Chopra had failed to seize upon several opportunities for advancement when they arose. He was unwilling to search for promotions in areas that were not directly within his scientific field of expertise, even though in respect of EX employees, senior management skills are generally more important than expertise in a particular scientific discipline. I concluded that no inference of discrimination could be drawn from this period. The evidence suggests that this pattern has continued to this day. I am not persuaded that the Complainant has taken all reasonable measures to mitigate his damages.

[40] Considering these shortfalls with respect to Dr. Chopra's duty to mitigate his damages, I find that the Complainant's entitlement to compensation should be limited to a period of six years following the date when the PSC confirmed Dr. Franklin's appointment to the position, April 21, 1992.

[41] To summarize, the Complainant is entitled to a sum equivalent to one third ($\frac{1}{3}$) of his lost wages and benefits at the EX-2 level over a period of six years, commencing April 21, 1992 and ending April 20, 1998.

C. Compensation for wage loss beyond the EX-2 level

[42] Dr. Chopra is claiming compensation for wage loss with respect to subsequent promotions that he would have received after obtaining the indeterminate BHPD Director's position in 1992. He submits that he would have

reached the EX-3 level by about 1995, the EX-4 level by 1998, and the EX-5 level by 2001.

[43] In support of this claim, Dr. Chopra led the evidence of Dr. John Samuel, Ph.D., who testified as an expert in systemic discrimination and career progression in the Federal Public Service. Dr. Samuel described the efforts that have been made since the early 1990's to promote the "upward mobility" of visible minorities within the Federal Public Service as a result of which visible minorities could have gained an advantage in the promotions process. In Dr. Samuel's opinion, had Dr. Chopra secured an initial foothold into the EX level, he would have benefited from these efforts, adding that it is "quite likely" Dr. Chopra would have risen within the EX ranks given his "capabilities, determination and tenacity".

[44] I have difficulty accepting Dr. Samuel's findings. First of all, it is not clear by what measure he has reached his conclusion regarding Dr. Chopra's capabilities, determination and tenacity. It appears that Dr. Samuel basically reviewed Dr. Chopra's *curriculum vitae* and concluded that he is a "highly motivated" individual whose capabilities went "far beyond the kind of positions he has been able to occupy in the Public Service". Dr. Samuel suggested that the career progression of other EX-level employees indicated that the Complainant would have successfully advanced to the highest levels of management. Yet Dr. Samuel's analysis of the career paths of employees who would have been Dr. Chopra's peers at the EX-2 level in 1992 was incomplete and inconclusive. Only a few individuals were studied and it was revealed on cross-examination that many of them were not appropriate comparators.

[45] Dr. Samuel referred to a handful of visible minority group members who held very senior executive posts over the last decade. However, few if any of these individuals would have been Dr. Chopra's peers at the EX-2 level in 1992. No comparison was conducted between the progression of visible minority group and non-visible minority group employees in support of his contention that Dr. Chopra would have benefited from the Government's policy of encouraging the promotion of minority group members, advancing to the level of Assistant Deputy Minister by 1998, as envisaged by Dr. Samuel. I also have some concern about the expert's objectivity. He demonstrated an affinity for the Complainant and his cause, and a predisposition against the Respondent. He declared at one point, for instance, that he did not trust even the most basic employment and career progression data produced by Health Canada because in his view, Health Canada's "cultural assessment is not favourable" and the department is "not very conducive to people with certain backgrounds".

[46] However, irrespective of the probity of the expert's evidence, I am simply not persuaded that Dr. Chopra's denial of a promotion to the EX-3 level or beyond

was a serious possibility. Let us not forget that the Respondent's discriminatory conduct related to its failure to appoint Dr. Chopra to the acting BHPD Director's position in 1990. It is far too remote and speculative to conclude that even a serious possibility would have existed of Dr. Chopra's reaching the highest echelons of senior management merely because he would have acted in the Director's position for a little over five months, especially when one also factors in the mitigation concerns discussed earlier as well as the unique nature of every EX position. No person can assume that advancement within the EX ranks will come automatically in the normal course of his or her career. The Complainant's claim for wage loss compensation beyond the EX-2 level is denied.

D. Compensation for wage loss - another EX-level position

[47] I have already found that there existed significant uncertainty with respect to the Complainant's likelihood of winning the BHPD Director's competition in 1992. The Complainant argues, however, that even if he had not been successful on this occasion, the recent management experience that he would have acquired while acting in this position would have resulted in his being appointed to another EX-level position at some point in his career.

[48] I am not persuaded that this would have been the case. As I have already discussed, the appointments process to the senior management level can be distinguished from that of lower employment levels. The qualifications for each position are unique and the competition to gain entry into EX-level positions appears to be quite intense. Dr. Samuel acknowledged in his evidence, for instance, that there were typically thousands of applicants for the hundreds of EX-level jobs he has analyzed as part of his past research studies.

[49] The mere fact that Dr. Chopra would have acquired five to six months' management experience were it not for the discrimination does not result in there being a serious possibility of his being appointed to an EX position later in his career. An obvious distinction is to be drawn from my finding with respect to the EX-2 BHPD Director's competition of 1992. In that instance, the acting experience he would have acquired **within that very position** led me to conclude that there existed a mere but serious possibility of his winning the competition. I cannot draw the same conclusion with respect to any of the other EX positions that were staffed over the course of the last twelve years, and even more so when considering that no evidence was led identifying a specific EX-level position for which Dr. Chopra would have become more qualified had he acquired the recent management experience in the Acting BHPD Director's position. Indeed, the Complainant did manage to acquire recent management experience five years later, in 1997, when he served as an Acting Chief of a division. Nonetheless, this has not, in and of itself, led to his gaining an appointment to an indeterminate EX-level position in the ensuing years.

[50] For these reasons, I am not convinced that merely by serving as Acting BHPD Director for just over five months in 1990-91, there would have developed a serious possibility of the Complainant's later gaining an indeterminate appointment to a different EX-level position.

E. Dr. Chopra's Claim for an Immediate Appointment to an EX-level Position

[51] In addition to his claim for lost wages, the Complainant is seeking an order from the Tribunal that he be appointed immediately to an EX-level position. Although I have concluded that but for the discrimination, there existed a mere but serious possibility of his having won the 1992 BHPD Director's position, I have also reduced the award of compensation to account for the considerable uncertainty relating to his being successful in that competition and the shortfalls regarding his duty to mitigate his loss, in accordance with the *Morgan* test. As such, I am satisfied that full restitution of the Complainant's loss with respect to his loss of a promotion has been made. Under these circumstances, an order that Dr. Chopra now be appointed to an EX-level is not justified.

F. Gross-up for Income Tax Liability

[52] The lump-sum payment to Dr. Chopra with respect to wages that he would have otherwise earned over several years may result in an unexpected increase to his income tax burden. I therefore direct the Respondent to pay Dr. Chopra an additional amount sufficient to cover any additional income tax liability he may incur as a result of the payment.

G. Non-pecuniary Damages

[53] The act of discrimination in this case occurred in 1990, prior to the 1998 Bill S-5 amendments to the *Act*. Under the older version of s. 53(3) of the *Act*, a victim could only seek non-pecuniary damages up to a maximum of \$5,000. The amended version of the *Act* allows for compensation of up to \$20,000 for pain and suffering (s.53(2) e)), and an additional sum of up to \$20,000 if the Tribunal finds that the person who engaged in the discriminatory practice did so in a wilful or reckless manner (s.53(3)).

[54] Dr. Chopra contends that he is entitled to compensation under the newer provisions of the *Act*. In *Nkwazi, supra*, at paragraphs 257-270, the Tribunal held that these provisions did not have retrospective effect and therefore could not be applied to cases where the discriminatory conduct occurred prior to the coming into force of the amendments to the *Act*. Counsel for the Complainant respectfully submits that this interpretation is in error. I have carefully reviewed the *Nkwazi*

decision as well as the authorities referenced by Complainant Counsel, but I am not persuaded by his arguments. I am instead in agreement with the conclusions of the Tribunal in *Nkwazi*. Dr. Chopra's claim for non-pecuniary damages therefore remains subject to the older version of the *Act*.

[55] Dr. Chopra testified as to the emotional strain and embarrassment he experienced as a result of his inability to elevate himself to an EX-level position. He spoke of his discomfort at work and of being shunned by others, due in large part to the publicity he has attracted. I am mindful, however, that some of this publicity may be attributable to issues that are not related to the present complaint.

[56] When assessing this award, the maximum amount of \$5,000 must be reserved for the very worst cases that fall within the range (*Premakumar v. Air Canada* (2002), C.H.R.R. D/63 at para. 107 (C.H.R.T.); *Desormeaux v. Ottawa Carleton Regional Transit Commission* 2003 CHRT 2 at para. 128). Having considered all of the circumstances in this case, I order the Respondent to pay to the Complainant the sum of \$3,500 in special compensation, pursuant to s. 53(3) of the older version of the *Act*.

H. Interest

[57] The Complainant and the Commission contend that interest should be awarded on the basis of the rates established in accordance with the Ontario *Courts of Justice Act*, R.S.O. 1990, c. C-43, given that the discrimination occurred in Ontario, the province in which Dr. Chopra also resides. They allege that the Canada Savings Bond (**CSB**) rates are "conservative" and will not satisfactorily remedy the loss suffered by the Complainant. I am not persuaded of this. No evidence was led to demonstrate how CSB, or other rates set by the Bank of Canada for that matter, would not result in the Complainant's gaining full restitution for his loss. Did these rates, for instance, fall below the rate of inflation over the same period? It was argued that there have been lengthy delays in this case, none of which were the fault of the Complainant. That may be, but I do not believe that any blame can be attributed to the Respondent either. The delays came about in large part because of the sinuous course his case has taken, from Tribunal to the Federal Court and back.

[58] The Tribunal has adopted the Bank Rate (Monthly series) set by the Bank of Canada in its recent decisions and I see no reason for not applying this rate in the present case (see *Bushey v. Sharma* 2003 CHRT 21 at para. 147; *Groupe d'aide et d'information sur le harcèlement sexuel au travail de la province de Québec Inc. v. Barbe* 2003 CHRT 24 at para. 77; *Boudreault v. Great Circle Marine Services Inc.* 2004 CHRT 21 at para. 117).

[59] I am not persuaded that interest should be compounded either, as proposed by the Complainant. Compound interest is warranted only if it can be deduced from the evidence or circumstances of the case that it was required to cover the loss (see *Morgan, supra* at 420). Aside from the long period between the date of the complaint (September 16, 1992) and the date of my decision (August 13, 2001), I do not see any circumstances in this case to distinguish it from any other complaint that typically comes before the Tribunal. I have already explained that I do not attribute the delay to the fault of anyone. I am not convinced that the delay creates any special circumstances that would result in the Complainant's not being fully compensated through the payment of simple interest.

[60] Simple interest is therefore payable with respect to all of the monetary awards made in this decision. The interest shall be calculated on a yearly basis at a rate equivalent to the Bank Rate (Monthly series) set by the Bank of Canada. The interest with respect to wage loss shall be calculated as the wages would have become payable, in accordance with the findings in this decision.

[61] With respect to the award for non-pecuniary damages, interest shall be payable from October 20, 1990. However, in no case shall the interest be allowed to exceed the maximum allowable sum of \$5000 (*Canada (Attorney General) v. Hebert* (1995), C.H.R.R. D/375 at para. 23 (F.C.T.D.)).

I. Public Posting of Decision

[62] The Complainant is seeking an order that this decision be posted publicly within Health Canada's facilities and distributed across the country via internal electronic mail to all employees of the department. It is argued that such a publication will serve the educational function of human rights legislation. The Respondent opposes this request.

[63] I do not think such an order is needed. I fail to see how a mass e-mailing and large-scale publication of a decision discussing the details of the compensation to which the Complainant is entitled can significantly serve to promote human rights. One must not forget that this was a case of individual discrimination. I did not make any findings of systemic discrimination. Furthermore, there already was widespread coverage of this case in the national media when my previous decision was issued and the Complainant made no request for public posting prior to its release. In any event, this and all previous decisions regarding the complaint are and will remain accessible to the public on the Internet. The Tribunal's website is www.chrt-tcdp.gc.ca.

IV. RETENTION OF JURISDICTION

[64] I retain jurisdiction in the event a dispute may arise with respect to the quantification or implementation of any of the remedies awarded in this decision.

Signed by

Athanasios D. Hadjis

OTTAWA, Ontario

August 17, 2004

PARTIES OF RECORD

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APPEARANCES:	
David Yazbeck	For the Complainant
Peter Engelmann	For the Canadian Human Rights Commission
David Migicovsky	For the Respondent

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