T.D. 2/95
Decision rendered on February 2, 1995

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

HUMAN RIGHTS TRIBUNAL

BETWEEN:

CLARENCE LEVAC

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

CANADIAN ARMED FORCES

Respondent

TRIBUNAL DECISION

TRIBUNAL: Marie-Claude Landry

APPEARANCES: François Lumbu, Counsel for the Commission
Alain Préfontaine, Counsel for the Respondent

DATES AND LOCATION
OF HEARING: February 8 and 9, 1994, Montreal, Quebec

TRANSLATION

INTRODUCTION

On September 16, 1993, the President of the Human Rights Tribunal Panel, Keith C. Norton, Q.C., B.A., LL.B., appointed the undersigned, Marie-Claude Landry, as a tribunal to continue, on the issue of damages, the inquiry into the complaint filed by Clarence Levac on December 7, 1984,

as amended on July 10, 1987, against the Canadian Armed Forces for discrimination based on disability in relation to employment.

On February 20, 21 and 22, 1990, at Montreal, and June 7, 1990, at Ottawa, a Human Rights Tribunal consisting of William I. Miller, Jacques Chiasson and Goldie Hershon inquired into the complaint filed by Clarence Levac, who alleged that he had been forcibly released from the Canadian Armed Forces on or about February 26, 1984, for medical reasons, and that in releasing him the Canadian Armed Forces had engaged in a discriminatory practice on a prohibited ground of discrimination, namely physical disability, thereby contravening section 7(a) of the Canadian Human Rights Act (R.S.C. 1985, c. H-6) (the "Act"). 1 On August 2, 1991, the Human Rights Tribunal declared Mr. Levac's
complaint to be substantiated, although the Canadian Armed Forces had not acted wilfully or recklessly.

The parties had agreed at the opening of the hearing to begin with the inquiry into the validity of the complaint and then to return before the Tribunal, should the complaint be substantiated, for an inquiry into damages.

The Canadian Armed Forces made an application under section 28 of the Federal Court Act (R.S.C., c. F-7) to set aside the Tribunal's decision of (2) August 2, 1991. On July 8, 1992, the Federal Court of Appeal dismissed the applicant's application to review and set aside, and this Tribunal was then appointed to inquire into damages.

BACKGROUND

The hearing of the inquiry into damages was held on Tuesday and Wednesday, February 8 and 9, 1994, at Montreal. The following information was also sent after being requested by the Tribunal:

- on February 22, 1994, a supplementary Book of Authorities from counsel for the Canadian Armed Forces; and

- on March 1, 1994, a letter of reply from counsel for the Canadian Human Rights Commission.

At the opening of the hearing, counsel for the Canadian Human Rights Commission requested the following damages:

(i) loss of wages by Clarence Levac from February 26, 1984, to February 26, 1993;

(ii) loss of salary-related pension fund and future pension;

(iii) fringe benefits (dental care); and

(iv) hurt feelings.

1 Levac v. Canadian Armed Forces, T.D. 13/91, rendered on August 2, 1991.
2 Canada v. Levac, [1992] 3 F.C. 463 (F.C.A.).

Clarence Levac was called to testify before the Tribunal as to the circumstances and facts that in his opinion justified compensation for the injury he suffered; he also restated the facts that gave rise to the complaint. Mr. Levac told the Tribunal that he was hired by the Canadian Armed Forces in 1955, at which time he signed an initial contract for a period of five (5) years, and that he signed a series of contracts, each for the same duration as the first, up until 1978. He said that in 1978 he signed a contract for an indeterminate period; according to the terms of the contract, it was to expire on February 27, 1993, which was the date of his scheduled release for retirement. In his testimony to the Tribunal, he repeated the ranks he had held in the Canadian Armed Forces. The Complainant also explained that he underwent an electrocardiogram in 1979 and that the Canadian Armed Forces experts concluded that he had a heart problem placing him at an 8-10 percent risk of having a heart attack within five (5) years. Between the discovery of his heart problem and his release, Mr. Levac testified that he worked for the Canadian Armed Forces at Versatile Vickers. In 1983, he was placed on rehabilitation leave, which he explained to be a period during which he received a salary from the Canadian Armed Forces but no longer either wore a uniform or worked in the Armed Forces. He explained that he received his full salary until February 26, 1984. He added that he worked for the Versatile Vickers company from September 1983 to August 1984 and that he subsequently worked for MIL Systems Engineering until April 21, 1988, when he was laid off. The Complainant said that he performed more or less the same duties at Vickers as he had as a Canadian Armed Forces employee but "[TRANSLATION] 3 that the hours were much longer and the wages lower". It was adduced in evidence before the Tribunal that a letter dated April 20, 1988, was sent to the Complainant to tell him that his employment would terminate on April 21, 1988, but that he would receive his salary until June 30 of that year. The Complainant then said that he found it hard to no longer be in the (4) military and said the following in his testimony in response to a question by Mr. Lumbu, counsel for the Commission:

[TRANSLATION]
Q. If we go back to 1990, to the hearing by the first tribunal, if you had been asked to return to the Armed Forces, would you have done so?

A. Immediately. I would definitely have returned to the Forces. I would have been happy to do so.

Throughout his testimony, the Complainant told the Tribunal that he had looked for work but that it was difficult in view of his age and training and the overall economic situation.

Counsel for the Commission submitted that the Complainant should be compensated for his lost wages between February 26, 1984, and the scheduled release date of February 26, 1993, and for the salary-related pension fund and future pension losses, including the survivor's benefits for which his

3 Transcript, Vol. 5, p. 810.
4 Transcript, Vol. 5, p. 814.

spouse would have been eligible. Counsel for the Commission further submitted that the Complainant should be compensated for fringe benefits in respect of dental work he had to have done, and that the Canadian Armed Forces should be ordered to pay the Complainant for hurt feelings.

Concerning Mrs. Levac's rights to survivor's benefits, counsel for the (5) Commission finally concluded in a letter sent to the Tribunal on March 1, 1994, that, according to section 53(2) of the Act, she is not entitled to compensation in respect of the Canadian Armed Forces pension fund. The debate on this issue is accordingly closed.

On cross-examination, counsel for the Canadian Armed Forces raised, inter alia, the following points:

- that Clarence Levac has spent every winter in Florida since June 1988;

- that the Complainant was, due to his high degree of technical qualification, kept in the employ of the Canadian Armed Forces even after his heart problem was diagnosed in 1979;

- that Clarence Levac, in performing his duties in the Armed Forces, was supposed to rotate between shore and sea postings, with sea duty being more dangerous; and

- that the Canadian Armed Forces kept the Complainant on their team as long as possible, and counsel points out in this respect that the good faith of the Canadian Armed Forces is obvious.

On cross-examination, the Complainant said that he had presented a grievance to his captain to remain in the Canadian Armed Forces but that no action had been taken on it.

Counsel for the Canadian Armed Forces also mentioned an internal memorandum dated March 10, 1988, which was distributed to the employees of MIL Systems Engineering of Montreal, on the possibility of transfer to other MIL Systems Engineering offices, and submitted that the Complainant had not exercised all due diligence to mitigate his losses. The Complainant told the Tribunal that he could not "[TRANSLATION] afford to (6) retire at that time".

In concluding his arguments, counsel for the Canadian Armed Forces submitted that no amount is owed to Clarence Levac, since the causal link between the discriminatory practice and the alleged losses no longer existed in 1988, and prior to that date, that is, for the period between 1983 and 1988, the amounts earned by the Complainant were more than he would have earned in the Canadian Armed Forces.

ISSUES

5 Letter of March 1, 1994, from counsel for the Commission.
6 Transcript, Vol. 5, p. 892, line 18.

The Tribunal must rule on the following issues:

1. Lost wages

(a) Compensation period:

To answer this question, the Tribunal conducted an in-depth study of (7) the authorities relevant to this case. Each case is sui generis, and the circumstances must be analyzed carefully. In light of the evidence adduced and of the tests laid down by the courts, the Tribunal must establish a

compensation period, that is, a period in respect of which the Complainant's injury might reasonably be related to the discriminatory practice.

Regarding the established tests, we refer, inter alia, to those mentioned in dissent by the Chairman of the Tribunal, Norman Fetterly, sitting on an appeal to the Human Rights Review Tribunal in Canada v. (8) Morgan; he carried out an exhaustive analysis of the state of the law on this subject.

The Chairman of the Tribunal said the following at page D/74:

[129] If reinstatement is purely discretionary and compensation is less so then it seems to me certain well-known, accepted principles of compensatory damages should guide the Tribunal in assessing or quantifying the financial loss. These principles are quoted with approval by the Review Tribunal in the Foreman (Can. Rev. Trib.) case, supra, as follows at para. 7716 [D/869 of Torres, supra]:

In our view the use of the language of "compensation" by the Canadian Act implies that tribunals are to apply the principles applied by courts when awarding compensatory damages in civil legislation. The root principle of the civil law of damages is "restitutio in integrum": 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

7 Thwaites v. Canada (Armed Forces) (1993), T.D. 9/93, released on June 7, 1993; Martin v. Canada (Dept. of National Defence), 17 C.H.R.R. D/435, Decision 25; Canada v. Morgan, [1992] 2 F.C. 401, and 13 C.H.R.R. D/42, Decision 11; DeJager v. Canada (Dept. of National Defence) (No. 2) (1987), 8 C.H.R.R. D/3963; Torres v. Royalty Kitchenware Ltd. (1982), 3 C.H.R.R. D/858 (Ont. Ad-806).

8 Supra note 7.

party's obligation to take reasonable steps to mitigate his or her losses. (D/238)

[130] In a recent case, Canada (Attorney General) v. McAlpine, supra, the Federal Court of Appeal, on appeal from a decision of a human rights tribunal which relied on that principle in assessing damages for lost U.I.C. benefits, commented as follows at p. 538 [para. 13, D/258]:

...the proper test must also take into account remoteness or foreseeability where the action is one of contract or tort. Only such part of the loss resulting as is reasonably foreseeable is recoverable.

The Federal Court goes on to quote with approval from Professor Cumming in the Torres case, supra, with respect to a cut-off point in awarding general damages, and notes the rationale quoted was followed by the Review Tribunal in DeJager v. Canada (Dept. of National Defence) (No. 2), supra, at D/3966 and D/3967, and also in other decisions where human rights tribunals have accepted the doctrine of reasonable foreseeability as a necessary component in the assessment of damages.

The Chairman of the Tribunal added the following at page D/76:

[136] In DeJager, counsel for the Human Rights Commission argued the complainant should be compensated for lost wages from the date of release until the date of hearing. In rejecting that argument the Tribunal quoted with approval the excerpt quoted supra from Professor Cumming in the Torres case, namely, that there is a cut-off point in awarding general damages by way of compensation. Professor Cumming expresses this by saying...:

...a respondent is only liable for general damages for a reasonable period of time, "reasonable" period of time being one that could be said to be reasonably foreseeable in the circumstances by a reasonable person if he directed his mind to it.

He also added the following at page D/82:

[159] In DeJager, supra, compensation was awarded for less than three years. A careful examination of the facts in the respondent's case leads me to conclude, given the circumstances including his military background, the career opportunities in the Armed Forces, his prior training (which was limited to a rather narrow area of expertise), and the prevailing economic conditions, [that] the appellant ought reasonably to have foreseen the consequences of its discriminatory act as extending

far beyond a period of three years until the end of December 1983. In that time it ought reasonably to have been expected that the respondent would have found comparable employment even though he in fact did not. In my opinion, the respondent will be fairly and adequately compensated by ordering compensation from

the beginning of the earning period on July 15, 1980 as determined by the initial Tribunal, to the end of 1983, i.e. December 31, 1983.

In its judgment in the same case, the Federal Court of Appeal adopted the tests and analysis of the dissenting member of the Human Rights (9) Tribunal. At page 404 of the judgment, Marceau J.A. made the following comment:

> The initial Tribunal and the majority members of the Review Tribunal erred in refusing to establish a cut-off point for the period of compensation, independent of the order of reinstatement. The principles developed in tort cases to restore the victim to the position he would have enjoyed, but for the wrongful act, apply to human rights cases. Therefore the consequences of the act that were indirect or too remote must be excluded from the damages recoverable. The minority member was the only one to analyze the circumstances of the case to establish a cut-off point and his conclusion should be accepted. 10

In Martin, the members of the Tribunal said the following on the principles applicable to compensation at page D/463:

> 1. As to the period of compensation, the criterion which is implicit in the CHRA is that damages awarded have to flow from the discriminatory practice. There must be a clear requirement of causal connection between the wages awarded and the discrimination.
> ...
>
> We feel that a standard period of two years from the date of release ("valuation date") is a more reasonable measure of assessing loss, given the variety of times between each complainant's release date and the date of commencement of the hearing. Moreover, this period is more causally connected to the discriminatory practice in question. It strikes the correct balance, considering on the one hand the time needed to retrain

and reintegrate into civilian employment, and on the other hand the unforeseen contingencies which might cause the complainants to leave the CAF at ages prior to 60 and 65. Thus there will be an order that each of the complainants be compensated for his net loss as of the valuation date as specifically set out hereafter. 11

Finally, in Thwaites, the members of the Tribunal reached the following conclusion at page 65:

In this regard, although admittedly not embodied in his report as a

9 Supra note 7.
10 Supra note 7.
11 Supra note 7.

consideration, Mr. Cohen testified that eyeballing his calculations, if an award of $66,218.00 for future loss of income were made, Thwaites would effectively be compensated for a future loss of income (and therefore a corresponding life expectancy) of five years from June 1992 (see transcript page 3187).

They added the following at page 66:

The Tribunal finds that the past ($97,132.00) and future ($66,218.00) loss of income calculations require the application of a contingency deduction for two reasons: first, to provide for the possibility that Thwaites would have discontinued his career with the CAF for other reasons either before or after June of 1992 and secondly, because Thwaites' current medical condition suggests that a life expectancy of five years from June 1992 may indeed be overly optimistic. As a result, the Tribunal applies a 10% contingency reduction to the accepted actuarial calculations of past and future income.

In this case, the Complainant had been in the Canadian Armed Forces since 1955, when he was 17 years old. According to his testimony, he (12) became specialized as a warship engineer during his time there. He held his job in the Canadian Armed Forces until August 1983.

The Complainant was 46 years old at the time of his release.

Regarding his level of education, he says that he "[TRANSLATION] studied (13) until grade 8, or the equivalent of grade 12 in Nova Scotia" . Prior to the date of his actual release on February 26, 1984, in September 1983 to be exact, he found another job at Versatile Vickers, which subsequently became MIL Systems Engineering. On April 21, 1988, after the offices of MIL Systems Engineering were closed, the Complainant was laid off, although he continued to receive his salary until June 30, 1988.

In view of the evidence and of the tests laid down by the courts, the Tribunal finds a compensation period of five (5) years from his actual release on February 26, 1984, to be appropriate. More specifically, although this list is not exhaustive, the number of years of service in the Canadian Armed Forces, the Complainant's training and the specific duties he performed in the Canadian Armed Forces are, in my view, all factors in favour of the establishment of this compensation period. As a result, all the Complainant's monetary losses subsequent to February 26, 1989, are, in the Tribunal's view, too remote to be related to the discriminatory practice engaged in by the Canadian Armed Forces.

On the subject of damages for lost wages, the only evidence presented to the Tribunal by the Commission is the report by the actuary, Wayne Woods. According to that evidence, which the Tribunal accepts, the income earned by the Complainant between February 26, 1984, and February 26, 1989, appears to be more than he would have received had he remained in the

12 Transcript, Vol. 5, p. 792, lines 16-17.
13 Transcript, Vol. 5, p. 799.

employ of the Canadian Armed Forces. The Tribunal refers to the tables found in Appendix B of the actuary's report prepared on November 10, 1993, which are reproduced at the end of this decision.

It appears from calculations based on the report by the actuary, Wayne Woods, that Mr. Levac should have earned $215,518.67 in the Canadian Armed Forces between February 26, 1984, and February 26, 1989, and that he in fact received an amount of $245,068.17, thus establishing a positive (14) difference of $29,549.50.

The Tribunal accordingly finds that no amount is owed to the Complainant as compensation for lost wages, as the Complainant's earnings were more than he would have received in the Canadian Armed Forces.

2. Pension fund

As for pension fund compensation, the Tribunal having established a compensation period of five years for damages resulting from the discriminatory practice, the possibility of damages related to the pension fund must be analyzed. It appears from the only evidence submitted on this subject that the Complainant withdrew a pension fund from the Canadian Armed Forces but that he would have received a larger pension fund had he remained in the Respondent's employ.

In light of the foregoing, the Complainant is entitled to have his pension fund adjusted in respect of the compensation period of five (5) years from February 26, 1984, to February 26, 1989. Before quantifying the actual injury, the parties must establish what Mr. Levac's pension fund would have been on February 26, 1989. On this subject, the Tribunal reserves its jurisdiction if the parties are unable to agree on the actual loss related to the pension fund for the established compensation period.

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

3. Fringe benefits (dental care)

The evidence presented to the Tribunal by the Complainant on damages in respect of fringe benefits, namely dental care during the compensation period, does not in all probability prove that Mr. Levac suffered actual injury. At the very most, this evidence represents an estimate of ideal dental care received by the Complainant.

At any rate, if there were damages on this subject, they would be far less than the difference between the amounts received by the Complainant during the compensation period and the amounts he would have received from the Canadian Armed Forces.

4. Hurt feelings

Subsection 53(3) of the Act reads as follows:

14 Report by the actuaries, Woods & Associates, prepared on November 10, 1993, Appendix B, calculation of what Mr. Levac should have earned in the Canadian Armed Forces between February 26, 1984, and February 26, 1989.

In addition to any order that the Tribunal may make pursuant to subsection (2), if the Tribunal finds that

(a) a person is engaging or has engaged in a discriminatory practice wilfully or recklessly,
or

(b) the victim of the discriminatory practice has suffered in respect of feelings or self-respect as a result of the practice,

the Tribunal may order the person to pay such compensation to the victim, not exceeding five thousand dollars, as the Tribunal may determine.

The Tribunal that ruled on the validity of the complaint held as (15) follows:

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

Since the Tribunal has no satisfactory evidence that the Complainant suffered hurt feelings, it dismisses his application on this point and adds that the Canadian Armed Forces did not act wilfully or recklessly in this case.

5. Mitigation

In view of the tests laid down by the courts on mitigation, and of the evidence before it, the Tribunal is satisfied with the Complainant's efforts to mitigate his loss and declares that he has discharged his obligations in this respect.

6. Interest rate

As for the interest rate to be awarded in respect of the compensation, the Tribunal considers the Bank of Canada rate to be appropriate in this case.

7. Other factors

On December 19, 1994, the Tribunal received a letter from counsel for the Respondent asking it to take the decision in Clarke v. Canadian Armed

(16) Forces into account in making its own decision. The Chairperson of the Tribunal is bound by the decision of the Federal Court of Appeal in the case before her and is accordingly barred from substituting her own decision therefore.

CONCLUSION

For all these reasons, the Tribunal:

15 Supra note 1.
16 Clarke v. Canadian Armed Forces, T.D. 17/94.

DECLARES that the Complainant shall be granted a compensation period of five years from February 26, 1984, to February 26, 1989;

DECLARES that, according to the evidence before it, the Complainant's lost income was set off by his earnings for the said period;

OBSERVES that there is no evidence permitting it to establish the actual loss related to the pension fund during the compensation period;

RESERVES its jurisdiction in respect of the amount of actual injury related to the pension fund during the compensation period, which the Tribunal shall establish should the parties fail to reach an agreement;

DISMISSES the Complainant's claim respecting fringe benefits and hurt feelings;

DECLARES that the applicable interest rate, if necessary, shall be that of the Bank of Canada.

MARIE-CLAUDE LANDRY
Chairperson

Woods & Associates

APPENDIX B

Earnings from employment, unemployment insurance, compensation for loss of employment, pension and other

Year	Earnings	Actual	If still in CAF	Losses
1984	From employment	$13,547	$38,223	
	Pension	$14,254	$0	
	UI benefits	$148	$0	
	Compensation for loss of employment	$20,070	$0	
	Other	$3,530	$0	
	Total	$51,549	$38,223	($13,326)

Year	Earnings	Actual	If still in CAF	Losses
1985	From employment	$29,605	$39,729	
	Pension	$16,930	$0	
	Total	$46,535	$39,729	($6,806)

Year	Earnings	Actual	If still in CAF	Losses
1986	From employment	$30,876	$41,406	
	Pension	$16,930	$0	
	Total	$47,806	$41,406	($6,400)

APPENDIX B

Earnings from employment, unemployment insurance, compensation for loss of employment, pension and other

Year	Earnings	Actual	If still in CAF	Losses
1987	From employment	$33,247	$43,419	
	Pension	$16,930	$0	
	Total	$50,177	$43,419	($6,758)

Year	Earnings	Actual	If still in CAF	Losses
1988	From employment	$10,182	$44,745	
	Pension	$16,930	$0	
	UI benefits	$7,716	$0	
	Other	$9,835	$0	
	Total	$44,663	$44,745	$82

Year	Earnings	Actual	If still in CAF	Losses
989	From employment	$0	$47,980	
	Pension	$16,930	$0	
	UI benefits	$9,099	$0	
	Total	$26,029	$47,980	$21,951