Federal Court  Cour fédérale

Date: 20091006

Docket: T-768-08

Citation: 2009 FC 1009

Ottawa, Ontario, October 6, 2009

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

THE ATTORNEY GENERAL OF CANADA ON BEHALF OF THE ROYAL CANADIAN MOUNTED POLICE

Applicant

and

ALI TAHMOURPOUR

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Introduction

[1] Ali Tahmourpour was accepted as a cadet in the Royal Canadian Mounted Police (the RCMP). He commenced his training at the RCMP training facility (the Depot) in Regina, Saskatchewan, on July 12, 1999. His cadet contract was terminated by the RCMP on October 20, 1999, prior to the completion of the training program, and the RCMP decided that he would not be accepted for re-enrolment in the training program.

[2] Mr. Tahmourpour lodged a complaint with the Canadian Human Rights Commission. He claimed that he was discriminated against and harassed by the RCMP during the training program, and that the decisions of the RCMP to terminate his training and prevent his re-enrolment were discriminatory on the basis of his national or ethnic origin and his religion contrary to sections 7 and 14 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6. These sections are as follows:

7. It is a discriminatory practice, directly or indirectly, (a) to refuse to employ or continue to employ any individual, or (b) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination.	7. Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, par des moyens directs ou indirects : a) de refuser d'employer ou de continuer d'employer un individu; b) de le défavoriser en cours d'emploi.
14. (1) It is a discriminatory practice, (a) in the provision of goods, services, facilities or accommodation customarily available to the general public, (b) in the provision of commercial premises or residential accommodation, or (c) in matters related to employment, to harass an individual on a prohibited ground of discrimination.	14. (1) Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait de harceler un individu : a) lors de la fourniture de biens, de services, d'installations ou de moyens d'hébergement destinés au public; b) lors de la fourniture de locaux commerciaux ou de logements; c) en matière d'emploi.

(2) Without limiting the generality of subsection (1), sexual harassment shall, for the purposes of that subsection, be deemed to be harassment on a prohibited ground of discrimination.	(2) Pour l'application du paragraphe (1) et sans qu'en soit limitée la portée générale, le harcèlement sexuel est réputé être un harcèlement fondé sur un motif de distinction illicite.

[3] The complaint was referred to the Canadian Human Rights Tribunal for a hearing which commenced on August 13, 2007, and lasted for 20 days. In *Tahmourpour v. Canada (Royal Canadian Mounted Police)*, 2008 CHRT 10, the Tribunal upheld the complaint and issued numerous remedial orders.

[4] The RCMP submits that the Tribunal made errors of law and that its decision was unreasonable. It asks that the decision be quashed. For the reasons that follow, I am of the view that the Tribunal made errors of law and that portions of its decision were unreasonable; thus, the decision as issued cannot stand.

[5] The applicant requested that the Style of Cause be amended to reflect as the applicant the Attorney General of Canada. The respondent agreed and an order will issue as a part of this Judgment so amending the style of cause.

Background

[6] Mr. Tahmourpour is an Iranian-born Muslim. He came to Canada when he was a teenager. He professes to having had a long-standing desire to become a police officer. He got his opportunity when at age 26 he was accepted as a cadet in the RCMP training program.

[7] RCMP cadet training is a 22 week period of instruction at the Depot. Each cadet signs a training agreement and is provided with a handbook and other documents outlining the assessment procedures in place. The cadet training agreement contains specific provisions with respect to the termination of the agreement and provides, in relevant part, that the agreement may be terminated if the cadet "does not meet set standards of performance." It further provides that the cadet is required to meet all the training requirements as set out in the cadet training handbook in order to continue with the training program.

[8] The assessment procedures indicate that each cadet is assessed using the RCMP CAPRA problem solving model. Cadets are monitored in five major areas of competency, known as CAPRA, an acronym for the following:

C	understanding **C**lients and their needs;
A	**A**cquiring and **A**nalysing information;
P	establishing and maintaining **P**artnerships for problem solving;
R	applying **R**esponse strategies to solve problems and avoid and manage incidents; and
A	**A**ssessing and reviewing the outcomes of actions taken to support continuous improvement.

[9] There are five rating categories:

P – Professional
S – Superior
NI – Needs Improvement
U – Unacceptable
N/O – Not Observed

[10] A cadet fails training if he or she receives two U ratings in the same competency during one assessment period, with no improvement shown, or a total of two U ratings across the CAPRA components, or within the same CAPRA component. If a cadet receives two U ratings in the same competency, and he or she is recommended for termination, the cadet's file is reviewed before termination is effected.

[11] Mr. Tahmourpour was a member of Troop 4 at the Depot. Some of his instructors, the key players in his complaint, were Sergeant Hébert, the fitness instructor, Corporal Boyer, one of the firearms instructors, and Corporal Bradley and Corporal Jacques, both Applied Police Sciences instructors.

[12] Mr. Tahmourpour arrived at the Depot in July of 1999. The Exhibits filed at the hearing show that the following written feedback was given to him in addition to verbal feedback provided during training:

July 30, 1999	From Corporal Jacques – firearms review at request of Mr. Tahmourpour
August 1999	Unidentified Supervising Member - Effective Presentation Techniques feedback
August 20, 1999	Unidentified Supervising Member - Pistol inspection failed – dirty pistol – Firearms NI issued. "If cleaned properly, NI will be removed after that."

August 25, 1999	Corporal Henry - Defensive Tactics – NI given
August 26, 1999	Corporal Boyer – Pistol Inspection – Pistol clean Firearms NI removed
August 26, 1999	Corporal Boyer – Firearms NI – "failed to achieve minimum score"
August 26, 1999	Unidentified Supervising Member - Firearms Training – NI – problems with manipulation skills and loading and knowing condition of gun – "instructors will monitor on the line for several more HB's before removing NI"
September 1, 1999	Corporal Jacques – Firearms NI – failed to achieve minimum score on day 3
September 8, 1999	Corporal Bradley and Corporal Jacques – Cadet Performance Feedback Sheet – 12 NI ratings - main areas of difficulty were communication skills and decision-making abilities. The Applied Police Sciences Team and Cadet Tahmourpour are to meet again in 1 month to "discuss how the situation is evolving"
September 9, 1999	Corporal Boyer – U – pistol dirty – "Cadet TAHMOURPOUR's pistol was examined today and found to be dirty. He had received an NI on 99-8-20 for the same thing." Although this report was written and signed by Corporal Jacques and although Corporal Boyer testified that he had no recollection of the incident or the report, the Tribunal accepted Mr. Tahmourpour's evidence that the inspection was done and infraction given by Corporal Boyer
September 9, 1999	Corporal Boyer – Firearms – NI – poor manipulation skills and loading and knowledge of pistol
September 9, 1999	Corporal Jacques – Firearms NI – failed to display competent use of shotgun
September 10, 1999	Corporal Halstead – provided remedial one-on-one firearms training
September 14, 1999	Corporal Jacques – provided remedial training re NI on shotgun received September 9, 1999
September 20, 1999	Peer Review – the majority of his peers ranked his performance as U or NI in leadership, initiative and communication skills
September 22, 1999	Corporal Jacques – 7 NI ratings given relating to a prisoner escort and suspect vehicle exercise
September 24, 1999	Corporal Jacques – later signed by Corporal Bradley on September 28, 1999

	– 10 NI ratings given arising out of troop's halfway detachment visit. "Although this visit is meant to be a learning experience, this cadet's performance was deemed to be below average and areas for improvement needed to be identified. This cadet has already received a feedback document (dated 99-09-08) which identified similar problem areas, but this detachment visit has also produced concerns in the Response area."
September 28, 1999	Corporal Jacques – gave a U rating on pistol inspection – "residue found in barrel above the ramp. Area was shown to Cdt. Tahmourpour. This cadet was issued a "U" for the same thing on 99-09-09. This was the 2nd pistol inspection as part of clearing the first "U". Inspections (3 remaining) will continue to be performed."
September 28, 1999	Corporal Jacques – gave an NI rating for incident review and self evaluation – the rating relates to the above noted NI on pistol inspection. "This feedback reflects the facts that cadet TAHMOURPOUR failed to identify the reasons for his performance difficulties and apparently did not seek assistance to produce a clean firearm. Suggestions were given to him, but these appeared to have been ignored."
September 28, 1999	Corporal Halstead – NI given in manipulation skills relating to loading and unloading shotgun.

[13] By memo dated September 30, 1999, Corporal Boyer recommended to his supervisor, Sergeant Guay, that Mr. Tahmourpour's file be reviewed and that his contract be terminated. This recommendation was based on Mr. Tahmourpour having received 2 U ratings in the same competency – cleaning of his pistol. In the lengthy memorandum accompanying this request, Corporal Boyer outlined in some detail the difficulties that Mr. Tahmourpour had with firearm instruction.

[14] As was required by protocol, Corporal Boyer's memo and recommendation was passed on to the Troop 4 facilitators, Corporal Bradley and Corporal Jacques, for their review of Mr. Tahmourpour's file. It was sent with a covering memo that read, in part: "It is clear that this cadet

is experiencing problems which may impair his ability to perform police work in a safe and effective manner."

[15] On October 1, 1999, Corporal Bradley and Corporal Jacques prepared a Progress Report on Mr. Tahmourpour for the period from July 12, 1999 to October 1, 1999. They note that there has been a request for termination of contract and that the request was under review. They rated his performance in the period from the commencement of his training. He received 1 U rating in firearms. He received 18 NI ratings in ethics, professionalism and integrity; defining problems; communication skills; knowledge of law, policy and procedures; information gathering; records management; conduct of searches; team building and facilitation; consultation, negotiation and conflict resolution; inter-agency and multi-disciplinary cooperation; planning and coordination; incident and risk management; public and police safety; decision-making; care and handling, arrest and release, suspects and prisoners; driving; monitoring and contingency planning; and incident review and self evaluation. He received 7 P ratings in dress, cleanliness and deportment; client service/orientation; crime scene investigation and evidence gathering; crime prevention/alternatives to enforcement strategies; and fitness and life-style. He received 2 N/O ratings in testimony in court; and tactical manoeuvres and operations. Mr. Tahmourpour signed as having received the report on October 7, 1999.

[16] On October 7, 1999, Corporal Bradley and Corporal Jacques completed their file review. They recommended the termination of the cadet contract and summarize the basis for their recommendation as follows:

12. On 99-09-22 to 99-09-24 Troop 4 participated in their half way detachment visit. Cadet Tahmourpour was involved in two scenarios in which he received feedback from two separate monitors. It should be noted that, in order to receive feedback at the half-way detachment visit, the performance of the cadet has to be far below what is expected at this stage in training because the detachment visit is developmental in nature and it is expected that cadets will make mistakes. Cpl.s Joyce and Jacques observed that Cadet Tahmourpour had serious difficulties in the areas of Communication Skills, Records Management, Conduct of Searches, Planning and Coordination, Incident and Risk Management, Public and Police Safety, Decision-Making, Care and Handling of Prisoners, Driving and Incident Review and Self Evaluation. Several of these areas were the same ones that were brought to Cadet Tahmourpour's attention during the meeting on 99-09-10.

13. On 99-10-01 Troop 4 had their CTO's Inspection and Cadet Tahmourpour had several deficiencies noted in his pit. In comparison to the other members of his troop he was far below average. It should be noted that this was not a surprise inspection but one that had been expected and prepared for.

14. On 99-10-07 Cadet Tahmourpour met with his APS team leaders to discuss the request for termination of contract and his mid-term progress report. He was presented with a summary sheet of his troopmates peer assessment at that time. The overwhelming majority of Cadet Tahmourpour's troopmates noted that he needs improvement in the following skills: shares leadership, shows initiative and good communication skills. Comments included that he lacked personal organization and planning skills and that he needs to be more assertive. According to his peers, although he needs help he does not accept help. Several concerns for officer and public safety were expressed because of his lack of skills. A copy of the peer assessment summary sheet and mid-term progress report is attached for your information.

15. On 99-10-17 Cadet Tahmourpour received an NI in Firearms for his Benchmark #2. To date he has not passed a benchmark for Firearms.

16. The one month diary date for the feedback given Cadet Tahmourpouir on 99-09-10 is on 99-10-08. As this is tomorrow's date we are issuing Cadet Tahmourpour with a number of U's which reflect that he has not been able to show improvement in the

> area's[*sic*] discussed one month ago. He is receiving U's in Communication Skills, Planning and Coordination, Incident and Risk Management, Decision-Making and Incident Review and Self Evaluation. These are areas in which he received NI's for his detachment visit that reflected the same concerns the APS team had identified two weeks earlier, in the meeting of 99-09-10.
>
> 17. In summary, a review of Cadet Tahmourpour's training file to date reflects two U's and six NI's in Firearms, one NI in driving (as a result of the half way detachment), twelve NI's in APS across every CAPRA component and five U's in APS, across four of the five CAPRA components. According to the Cadet Assessment Procedures, which was provided to the cadets as part of the Welcome Package, "Termination of the contract at the first Cadet Progress Report will result if the cadet receives: a. two U's in the same competency during one assessment period, with no improvement shown. (as is the case in Firearms) b. a total of two U ratings across the CAPRA component, or within the same CAPRA component" (as is the case with the 5 U's in APS, two of which are under Response). Formal feedback from APS, FTU and peers indicate the same difficulties with Cadet Tahmourpour, specifically his communication and listening skills, his planning and coordination and his decision-making abilities. As a result of these difficulties his incident and risk management become a concern as well, and this was witnessed in his half way detachment visit. Informal feedback with facilitators in PDT and Fitness (which was shared with Cadet Tahmourpour) revealed the same problems. The most serious of all, however, is his apparent inability to learn from his past mistakes and improve. This is what is at the heart of the matter in regards to his dirty pistol. He appears to be unable to learn from his past mistakes and he continues to…. [missing text]
>
> 18. Based on the information provided and the guidelines in the Cadet Assessment Procedures we are recommending that Cadet Tahmourpour's training contract be terminated.

[17] In this report they also note that on the next day (October 8, 1999) they are issuing a one-month follow-up report to that given to Mr. Tahmourpour on September 10, 1999, and that it will

contain a number of U ratings as he has not been able to show improvement in the areas discussed in that assessment. Specifically with respect to this follow-up review, they note:

> He is receiving U's in Communication Skills, Planning and Coordination, Incident and Risk Management, Decision-Making and Incident Review and Self Evaluation. These are areas in which he received NI's for his detachment visit that reflected the same concerns the APS team had identified two weeks earlier, in the meeting of 99-09-10.

[18] The follow-up review is dated October 8, 1999, and indicates that it was provided to Mr. Tahmourpour the same day. They wrote:

> On 99-09-22 to 99-09-24 Cadet Tahmourpour participated in the has way detachment visit. He received a number on NI's as a result of three of the four scenarios he participated in. Many of the areas that were indicated as needing improvement were the same areas that wre brought to his attention on 99-09-10. As a result of failing to show any improvement in these areas, we are issuing him with U's in the areas indicated. The previous correspondence from the detachjment visit (dated 99-09-24 and the correspondence from 99-09-10 refers to the specific incidents. Cadet Tahmourpour has copies of these documents.
>
> Although Cadet Tahmourour appears to be working hard to overcome his difficulties no real improvement has been [illegible]. As a result none of the previous NI's are removed and some of he areas have been down graded to U's. The real concern here is that Cadet Tahmourpour appears unable to learn from his mistakes and improve his performance despite the fact that he has received one on one feedback from facilitators on the occasion of the halfway visit and during scenarios.
>
> As well Cadet Tahmourpour continues to perform poorly in Firearms. He did not pass the second benchmark. In addition to his poor shooting skills Cpl. Jacques has observed that he appears confused on the line and has approached Cpl. Jacques (on 99-10-05) after a range session and stated that he was "tired and totally our[*sic*] of it". This type of comment has been expressed by Cadet

> Tahmourpour on several occasions in the past, out at firearms, in APS and in Fitness.
>
> A request for termination of contract and file review for Cadet Tahmourpour is currently in progress. No other recommendations will be made at this time pending the outcome of the A/N process.

[19] Mr. Tahmourpour prepared and submitted a response to the memo from Corporal Jacques and Corporal Bradley recommending the termination of his contract. He also responded in this document to matters raised in their first assessment given to him on September 10, 1999. His response is dated October 10, 1999, but the record reveals that it was not submitted until a few days later. On October 12, 1999, Corporal Bradley and Corporal Jacques prepared a memo indicating that no response had yet been received from Mr. Tahmourpour in spite of the fact that when it was given to him he was told that he had the weekend to prepare it and that it was to be given to Sgt. Hébert prior to 8:00 hours on Tuesday, October 12, 1999. Corporal Jacques spoke to Mr. Tahmourpour who said that he had prepared something but had not submitted it. "He stated that he did not know it was required first thing in the morning and had no recollection that he had been asked to submit it prior to 08:00 hrs." As a result of Mr. Tahmourpour's failure to comprehend the instructions previously provided to him regarding his response, a U rating was issued relating to communication skills; this was his second U rating in this area. The officers remarked that this "is an example of exactly the area that has been identified as a concern, and to which he has been asked to pay particular attention. His listening skills are unacceptable and the fact that he did not understand the direction given to him in [a] situation with such serious consequences to him is an example of this."

[20] After the decision was made to effect termination, the RCMP, following protocol, considered whether to permit Mr. Tahmourpour to re-enrol in the cadet training program. In a memo dated December 23, 1999, Sgt. Champigny recommended against re-enrolment. He wrote:

> While undergoing the termination process, Cadet Tahmourpour began demonstrating physical symptoms that appeared to be related to stress. On two separate occasions, his troopmates had to escort him to the Medical Treatment Centre because he was exhibiting symptoms of vomiting, shaking, hyperventilating and incoherent speech. He seemed to mentally withdraw from his environment and was unable to interact with people around him. There was some concern as to his state of mind prior to his departure. The facilitators consulted with the "F" Division psychologist who described his behaviour as "passive suicidal ideation". Cadet Tahmourpour's reaction to termination was extreme, to the point of being unable to function normally.
>
> A follow-up discussion with Dr. Roy revealed that in his opinion, he had concerns regarding Cadet Tahmourpour's ability to handle difficult and challenging situations. Dr. Roy would not recommend this cadet for re-engagement.
>
> RECOMMENTATION:
>
> That, should Cadet Tahmourpouir wish to re-enroll in the CTP, he be given NO CONSIDERATION by the recruiting Division.

The document contains a notation that it was "perused and initialled by Dr. Garry L. Bell, Acting IC Cadet Training, 'Depot' Division who comments: 'Agree with the recommendation of the Career Manager'."

The Complaint

[21] On March 21, 2001, eighteen months following the termination of his cadet contract, Mr. Tahmourpour lodged a complaint with the Canadian Human Rights Commission alleging that the

RCMP had discriminated against him and harassed him on the basis of his national or ethnic origin and his religion.

[22] In his complaint, Mr. Tahmourpour alleged the following discriminatory practices and harassment by the RCMP:

a. On the first day of fitness training, he made a confidential arrangement with Sgt. Hébert to wear his religious pendant which was permitted; however, Sgt. Hébert announced to the class, "in a hostile and condescending tone" that Mr. Tahmourpour was allowed to wear his "religious jewellery" as an exception to the general rule prohibiting the wearing of jewellery during fitness classes.

b. His troop leaders, Corporal Jacques and Corporal Bradley claimed that they had trouble understanding Mr. Tahmourpour's English which he felt was without basis and was directed at his ethnic and racial background. He was singled out and treated differently than other cadets as he was regularly taken out of lectures by both of them and criticized for personal characteristics, such as his "soft-spoken" voice and manner. During one lecture, Corporal Bradley ridiculed him for being soft-spoken and showed a film and "gruesome photographs" of officers killed in the line of duty. It was said that one of them had been soft-spoken and that this contributed to his death.

c. Corporal Boyer was often hostile and verbally abusive to him during firearms training. On one occasion when Mr. Tahmourpour signed his signature (in Persian script) he said "What kind of fucking language is that, or is it something you made

up?" He was aware that his behaviour was offensive and announced to the troop that he was "politically incorrect" and did not care who knew or objected. On first contact with his monitor, Corporal Joyce, she commented, "so you're not Canadian born, you're foreign born."

d. These incidents of discrimination affected the instructors' evaluations of his performance. Specifically, on September 9, 1999, Corporal Boyer gave him an unacceptable evaluation for pistol cleaning despite the pistol being clean. When Mr. Tahmourpour disputed the evaluation, Corporal Boyer became "hostile".

e. On September 10, 1999, Corporal Bradley and Corporal Jacques discussed his performance feedback evaluation with him. He was "kept for over an hour and yelled at in an abusive and hostile manner."

f. On September 28, 1999, Corporal Jacques inspected his pistol and claimed that it was not properly cleaned. When Mr. Tahmourpour disputed that evaluation, he admitted that his evaluation may have been faulty. Mr. Tahmourpour was allowed to use the pistol on the shooting range, but afterwards Corporal Jacques and Corporal Boyer took him aside and told him that the pistol had not been properly cleaned. As a result of this, Corporal Boyer initiated a file review which led to the termination of the cadet contract.

Tribunal's Characterization of the Allegations

[23] The Tribunal, after hearing the evidence, summarized Mr. Tahmourpour's allegations of discrimination and harassment to be five-fold, as follows:

a. Mr. Tahmourpour was subjected to discriminatory remarks, hostile treatment and verbal abuse by his instructors at the Depot;
b. Mr. Tahmourpour's performance at the Depot was improperly evaluated;
c. Mr. Tahmourpour's training contract was terminated on the basis of false pretences;
d. Mr. Tahmourpour was improperly designated as being ineligible for re-enrolment in the Cadet Training Program at the Depot; and
e. Mr. Tahmourpour was the victim of harassment on the basis of a prohibited ground of discrimination while at the Depot.

Tribunal Findings

[24] The Tribunal made specific findings of fact with respect to each of these reformulated allegations.

(A) Discriminatory remarks, hostile treatment and verbal abuse

[25] The Tribunal found that Mr. Tahmourpour was subjected to discriminatory remarks, hostile treatment and verbal abuse by his instructors at the Depot. Specifically, it found:

a) that the RCMP Dress and Hygiene Instructions, and an announcement made by Sergeant Hébert to Troop 4 that the complainant was permitted to wear his religious jewellery in physical education class adversely discriminated against him on the basis of his religion;

b) that Corporal Boyer discriminated against him based a his ethnic or national origin in making a derogatory comment about Mr. Tahmourpour's signature, which he made in the Persian style right to left; and

c) that Corporal Boyer adversely discriminated against Mr. Tahmourpour on the basis of his race, religion and national or ethnic origin by being especially verbally abusive and hostile towards Mr. Tahmourpour.

(B) Discriminatory performance evaluation

[26] The Tribunal found that Mr. Tahmourpour's performance evaluation was done, in part, on the basis of discriminatory grounds. Specifically, it found:

a) that although the assessment of the RCMP in the September 8, 1999 Feedback document as to his failings in communication skills was an accurate reflection of Mr. Tahmourpour's performance, the discriminatory treatment he was receiving at the Depot was a factor in the difficulty he was having in developing and demonstrating acceptable communication skills;

b) that the reference in the September 8, 1999 Feedback document as to Mr. Tahmourpour not being present during a pepper spray exercise on August 26, 1999 was factually inaccurate as the video evidence showed that he was present and conducted himself appropriately;

c) that parts of the September 8, 1999 Feedback document were prepared on that date but additions were later made on September 9 or 10, 1999 and that parts were fabricated or inaccurately prepared in response to an incident that occurred on

September 9, 1999 between Corporal Boyer and Mr. Tahmourpour when the latter challenged Corporal Boyer's assessment that his pistol was not cleaned properly;

d) that he was not given immediate verbal feedback on his performance, contrary to standard practice at the Depot; and

e) that Mr. Tahmourpour's race, religion and/or ethnic or national background was a factor in Corporal Boyer's assessment of the cleanliness of Mr. Tahmourpour's pistol on both September 9 and 28, 1999.

(C) Discriminatory termination

[27] The Tribunal found that the decision to terminate the cadet contract was based on recommendations that were based on discriminatory assessments of Mr. Tahmourpour's skills and were based on an evaluation of his performance where he was not given an equal opportunity to develop and demonstrate his skills at the Depot.

(D) Discriminatory decision to preclude re-enrolment

[28] The Tribunal found that the decision to prevent him from re-enrolling in the training program was made on the basis of a medical opinion that was given without having met him and that his facilitators were instrumental in ensuring that he would not be permitted to re-enrol, based in part on his race, religion and/or ethnic or national background.

(E) Harassment

[29] The Tribunal found that Mr. Tahmourpour was not subject to harassment on the basis of a prohibited ground of discrimination.

Remedy Ordered

[30] The Tribunal ordered the following as a remedy for the discriminatory actions of the RCMP:

(a) The RCMP was to offer Mr. Tahmourpour the opportunity to re-enrol in the Cadet Training Program and his program will be based on a fair assessment of the areas where training is required;

(b) He shall be paid the lost salary and benefits for the first 2 years and 12 weeks of work as an RCMP officer after graduating from the Depot, discounted by 8%;

(c) He shall be paid the difference between the average industrial full-time wage for persons of his age in Canada and the salary he would have earned as an officer in the RCMP until the time he accepts or rejects re-enrolment in the training program;

(d) He shall be paid the average amount of overtime paid to other constables who graduated from the Depot in 1999, discounted by 8%;

(e) All compensation must reflect a promotion to Corporal after 7 years;

(f) $9,000.00 for pain and suffering caused by the discriminatory conduct of the RCMP;

(g) $12,000.00 as special compensation under section 53(3) of the Act;

(h) $9,500.00 in compensation for expenses incurred in minimizing his losses; and

(i) Interest and reimbursement of legal expenses incurred.

Issues

[31] The applicant raises a number of issues in this application which I have grouped and reframed as follows:

a. Test Used in Making Findings of Direct Discrimination. Whether the Tribunal erred in applying the wrong test for direct discrimination in making a finding of direct discrimination by Sergeant Hébert.

b. Expert Evidence. Whether the Tribunal erred in law in failing to allow the RCMP to adduce expert evidence regarding the attrition rate of visible minorities at Depot. Whether the Tribunal erred in law in relying upon statistical data contained in the report of the respondent's expert which merely repeated the data contained in the report of the applicant that was not in evidence.

c. Ignoring Evidence. Whether the Tribunal erred in ignoring relevant evidence or in misapprehending evidence in making its findings of direct discrimination by Corporal Boyer.

d. Remedial Orders. Whether the Tribunal erred in finding that there was a serious possibility that discrimination caused the loss of the training opportunity, erred in its assessment of Mr. Tahmourpour's potential success and erred in its calculation of the financial award.

Analysis

[32] The applicant acknowledges that the standard of review in this application is that enunciated by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, namely,

reasonableness on findings of fact and correctness on questions of law. The respondent submits that questions of law may also be reviewed on the reasonableness standard if they are related to the decision-maker's area of expertise and are not of a central importance to the legal system. In my view, the standard to be applied when an error of law is alleged, is correctness.

[33] Review on the standard of reasonableness does not entitle the reviewing court to ask what the correct decision would have been. The Supreme Court made this clear in *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, at para. 50, where it wrote:

> Applying the standard of reasonableness gives effect to the legislative intention that a specialized body will have the primary responsibility of deciding the issue according to its own process and for its own reasons. The standard of reasonableness does not imply that a decision-maker is merely afforded a 'margin of error' around what the court believes is the correct result.

[34] In *Dunsmuir*, the Supreme Court of Canada held that where the standard is reasonableness a spectrum of possible answers is available, and the reviewing Court should show deference to the decision-maker's role as the delegate of Parliament. The decision should be vacated only where it does not fall within the range of possible reasonable decisions on the evidence. Therefore, in conducting a review for reasonableness the Court looks for intelligibility, transparency, and justification in the decision-making process: *Dunsmuir*, at para. 47.

[35] I have come to the conclusion that the Tribunal erred in law and that some of its findings were unreasonable. The decision will be set aside.

(i) Test Used in Making Findings of Direct Discrimination

[36] The cadets were instructed to remove all jewellery and watches during Physical Training, except for medic-alert bracelets. Mr. Tahmourpour wears a religious pendant and he explained to Sergeant Hébert, the fitness instructor, that he did not wish to remove it. Sergeant Hébert told him that he did not need to remove it. Mr. Tahmourpour says that he asked Sergeant Hébert to keep this confidential as he did not want to be singled out on the basis of his religion. He testified that contrary to this request, at the commencement of the class, Sergeant Hébert announced to the class that "there is no jewellery to be worn during Physical Training, except for Ali here, who's allowed to wear his religious pendant." Mr. Tahmourpour testified that Sergeant Hébert made this statement in a "loud, sarcastic and condescending voice while rolling his eyes in the direction of Mr. Tahmourpour." Mr. Tahmourpour testified that for several days thereafter he was questioned by his troopmates about his religion and the reason why he wore the pendant.

[37] Sergeant Hébert testified that it is his practice is to ask the cadets if there is anybody that needs to wear a medic-alert or a religious item. He announced to the entire troop that Mr. Tahmourpour was allowed to wear his religious pendant because it was an exception to the general rule against wearing jewellery; but, he says, that he did not do so in the manner or tone of voice suggested by Mr. Tahmourpour. He says that he would have made the announcement in a loud voice in order to be heard as they were in a gym.

[38] Sergeant Hébert says that he told the entire troop that Mr. Tahmourpour was allowed to wear his pendant in order to avoid any cadet from "getting on Mr. Tahmourpour's case" because

when a cadet is not properly dressed that cadet and sometimes the entire troop is disciplined by having them do push-ups as a reminder to follow the rules. He further testified that he had dealt in the past with others who wore religious jewellery in the same manner. He testified that he had no recollection of Mr. Tahmourpour asking that the arrangement that he was allowed to wear his pendant be kept confidential and said that if there had been such an arrangement he would have informed only the right marker, a cadet who is responsible for ensuring the troop is properly dressed for class, that Mr. Tahmourpour was permitted to wear the pendant as otherwise the marker would be insistent that it be removed.

[39] The Tribunal accepted Sergeant Hébert's testimony that he made the announcement to the class in a neutral manner and not as described by Mr. Tahmourpour. Nonetheless, the Tribunal held that the making of the announcement constituted discrimination. Its reasoning was as follows:

> … Mr. Tahmourpour felt that he had been identified as being different from the rest of the troop on the basis of his religion.
>
> …Mr. Tahmourpour's own perception that he had been identified as different is sufficient for me to find that, although unintended, the effect of the RCMP's policy with respect to dress and hygiene and Sergeant Hébert's announcement about Mr. Tahmourpour's religious pendant was to adversely differentiate against Mr. Tahmourpour on the basis of his religion. This allegation [that Sergeant Hébert's statement to the class adversely differentiated against Mr. Tahmourpour] is therefore, substantiated, on a balance of probabilities.

[40] The applicant submits that the Tribunal erred in law in holding that a complainant's own perception of differential treatment is sufficient to find there was discrimination, or, as it is defined in the Act, adverse differential treatment of Mr. Tahmourpour because of his religion.

[41] A finding of discrimination must require more than just a complainant's own perception that he has been identified as different. If it were otherwise, there would be no need to adjudicate complaints as every complaint would be well-founded because every complainant perceives that he or she has been treated differently on the basis of one or more of the prohibited grounds of discrimination.

[42] The Tribunal erred in failing to ask itself the proper question: Did the mere announcement to the class that Mr. Tahmourpour was permitted to wear his religious pendant discriminate against him on the basis of his religion?

[43] The *Canadian Human Rights Act* prohibits specified "discriminatory practices". Section 7 of the Act defines a discriminatory practice as "adverse differentiation on the basis of a prohibited ground of discrimination." Therefore, discrimination is something more than mere differentiation; it is adverse differentiation.

[44] What is the meaning of "adverse differentiation"? "Differentiation" is a noun that in its ordinary meaning means a distinction between things. "Adverse" is an adjective that in its ordinary meaning means harmful, hurtful or hostile. In my view, "adverse differentiation" means a distinction between persons or groups of persons that is harmful or hurtful to a person or a group of persons. It can also, in my view, mean a distinction that is made or indicated in a hostile manner, where it is the manner of its making that harms or hurts. If it is to be an adverse differentiation that

is prohibited by human rights legislation, the distinction must be based on or made because of one of the prohibited grounds set out in the legislation.

[45] This sense of the term is consistent with the exploration of the term "discrimination" made by Justice McIntyre in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 174, where he stated:

> I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.

[46] The following examples illustrate the requirement. The coach's statement "Jack is a Black man" made to a hockey team of 15 Caucasian players and Jack, the only Black player, serves to distinguish Jack from the others. It is differentiation. But it is not adverse differentiation unless the mere making of the statement burdens or disadvantages Jack or results in opportunities and benefits being withheld from him. However, the same statement made in a demeaning manner after Jack has missed a goal, as if to say, what else would you expect given his origin, is adverse differentiation as it is made in a hostile manner that perpetuates or suggests stereotyping and which harms or hurts Jack.

[47] In this case, the statement to the troop that Mr. Tahmourpour was permitted to wear his religious pendant served to differentiate him from the others in the troop. However, the statement alone simply confirmed the differentiation that Mr. Tahmourpour himself had sought. It was he

who asked to be treated differently from the other cadets by being permitted to wear the pendant. Admittedly, the statement brought the difference home to all of the cadets who might otherwise not have noticed the pendant. But, there was no evidence that the RCMP or Mr. Tahmourpour's instructors treated him differently than others in the Phys Ed class or imposed any burdens on him that were not imposed on the troop or other cadets. In fact, there was evidence that this was the usual way Sergeant Hébert dealt with such requests.

[48] Equally important is that there was no evidence that the manner in which the statement was made was hostile or demeaning of Mr. Tahmourpour. Mr. Tahmourpour's evidence that this was said in a loud, sarcastic voice with eyes rolling was not accepted by the Tribunal.

[49] The only consequence of the statement was Mr. Tahmourpour's evidence that his fellow cadets stared at him when the statement was made and that over the next two days they asked him questions. Specifically his evidence was as follows:

> Everybody was looking at me. Everybody was staring at me. I ended up - - I'm not particularly a religious person, but the next two days, I had to deal with questions about what it is that I practice in my religion. Why I - - just curious questions, left and right, from my troop mates. Why I should be wearing the pendant? Is it - - what are my religious beliefs? It was a very, very uncomfortable situation.

[50] There was no evidence and no finding made that Mr. Tahmourpour's "uncomfortable situation" was a burden, obligation or disadvantage as described by Justice McIntyre. Further, there was no evidence at all that the making of the statement had any impact on Mr. Tahmourpour's relationship with his fellow cadets, his instructors or his performance as a cadet. In short, there was

no basis on which the Tribunal, properly instructed in the law, could reasonably conclude that the statement made by Sergeant Hébert constituted adverse differentiation or discrimination in employment by the RCMP.

(ii) Expert Evidence

[51] The applicant raised a legal issue relating to the decision of the Tribunal to refuse to admit into evidence the Bell/Rannie report and its refusal to permit Dr. Bell to testify regarding the report.

[52] On the second to last day scheduled for the hearing, the RCMP called Dr. Bell to testify. Dr. Bell is a civilian member of the RCMP and was then the Director, Training Innovation & Research Unit, RCMP Training Academy. He has a Ph.D. in Psychology from the University of Calgary. He was the co-author of a report (the Bell/Rannie Report) that had been prepared at the request of the RCMP specifically to address the allegations of systemic discrimination at the Depot.

[53] The Bell/Rannie Report compiled data on the number of visible minority and Caucasian cadets who passed and failed the Depot from 1998 to 2003. It also contained the authors' analysis of the data and an opinion as to whether it established systemic discrimination.

[54] The report had been provided to the respondent some four months prior to the date Dr. Bell was to testify; however, on the day he was to testify, the respondent, for the first time, raised an objection to him testifying as an expert.

[55] The respondent objected that Dr. Bell "is not qualified to be an expert witness by the simple fact that he's not independent." The objection to his independence was based on the fact that he was employed by the RCMP and that he had signed off on the recommendation that Mr. Tahmourpour not be readmitted to the training program. The Tribunal upheld the objection stating:

> I think we all know the role of an expert in a proceeding is to provide independent opinion evidence that will assist the trier of fact in matters about which the trier of fact is not knowledgeable. And so there has to be a degree of independence and impartiality so that the material that is presented to the tribunal is as credible and as reliable as possible, and is something that will provide the basis for an informed decision.
>
> This is compromised I think when you have an expert witness who is essentially employed by the respondent. I don't think there can be any way that individual can then be qualified as an independent and impartial expert who will give the kind of testimony that an expert is intended to give.
>
> I think that Dr. Bell clearly has extensive and deep experience in many aspects of the cadet training program, and I think that his evidence would certainly be interesting to the tribunal, <u>but as an expert giving evidence about attrition rates at Depot where he has been employed, where he is employed, and given his involvement in Mr. Tahmourpour's case, which is the very case before us now, I cannot see how I could qualify him as an expert in this matter</u>. (emphasis added)

[56] The evidence of Dr. Bell's involvement in Mr. Tahmourpour's case was that at one point in 1999 he was Acting In Charge of Cadet Training. On January 6, 2001, he signed off on the report of the Career Manager at the Depot who recommended that Mr. Tahmourpour be given no consideration should he wish to re-enrol in the cadet training program. The document indicates on its face that Dr. Bell commented: "Agree with the recommendation of the Career Manager." He did

not recall his involvement until the document was put to him when cross-examined on his qualification as an expert.

[57] The only other witness who could have spoken to the Bell/Rannie Report was Dr. Rannie, but presumably he would have been found not to be independent as he too was a civilian member of the RCMP.

[58] The applicant submits that the Bell/Rannie Report was the "best evidence" of attrition rates at the Depot and that the failure of the Tribunal to admit this evidence brings into question the fairness or reasonableness of the adjudicative process. The applicant relies on the decision of the Supreme Court of Canada in *Université du Québec à Trois Rivières v. Larocque*, [1993] 1 S.C.R. 471 as authority for the proposition that where highly relevant and admissible evidence is not admitted into evidence, this constitutes a situation where the Tribunal is refusing to exercise its jurisdiction or acting in excess of its jurisdiction requiring the Court's intervention.

[59] In my view, the cited authority is unhelpful to the applicant. The evidence at issue in *Larocque* was factual evidence as to whether there was a lack of funds. The Court held this to be admissible. There was no issue as to whether the witness who was to offer that evidence was competent to testify. Here, the proffered evidence is not just factual evidence, it was also opinion evidence, and the fundamental question was whether the witness was competent, as an expert, to offer that evidence. That, in my view, is distinguishable from the *Larocque* case.

[60] While it was open to the Tribunal Chair to accept the evidence and to assign less weight to it given Dr. Bell's connections with the RCMP and the complainant, I cannot find that she erred in law in rejecting Dr. Bell as an expert based on these connections.

[61] What is problematic, however, is that the Tribunal accepted the evidence of the respondent's expert which was based on the data contained in the Bell/Rannie Report that the Tribunal had ruled was not in evidence.

[62] Although it refused to accept the Bell/Rannie Report as an Exhibit, the Tribunal accepted and marked it for identification, as it had been extensively referenced previously by the respondent's expert, Dr. Wortley. The Tribunal specifically ruled that the Bell/Rannie Report was not in evidence and it was not accepted for the truth of its contents. Nonetheless, the Tribunal ruled that "if Dr. Wortley's evidence is accepted and he adopts certain portions of the [Bell/Rannie Report]…then that's the evidence on that point and [the Bell/Rannie Report] is not evidence." The error was in accepting as probative evidence of a fact a "fact" that was merely repeated by Dr. Wortley from a document not in evidence when he had no personal knowledge of the alleged fact.

[63] An opinion based on facts not in evidence is of no value whatsoever and ought not to have been relied upon by the Tribunal.

[64] Dr. Wortley was asked in cross-examination (Transcript of hearing August 28, 2007, at page 133) what data he considered in forming his opinions and he indicated that it was the data contained in the Bell/Rannie Report:

> Q. You didn't ask – you didn't take any raw numbers of your own and do any analysis for your report?
> A. Well, the numbers that I worked with and recalculated are based on the data that was provided.
> Q. You didn't base any data on Tab 143?
> A. No. I think we went through it a little bit, for instance, yesterday when we were using this table and eliminating particular years and that –
> Q. Is that the first time you'd seen that table?
> A. Yes, or the first time that I focussed on this last document, the tone of the report that was provided by the experts was that the best, you know, that they had problems computing the data and getting it and that these were the best data they had on the attrition rate at depot. So I focussed most of my attention on the data provided by Rainey-Bell [sic] rather than this table.

[65] Not only did the Tribunal accept and rely upon the opinion evidence of Dr. Wortley which was based on data that was without an evidentiary foundation, it also repeats and makes findings relying on that data. For example, at paragraph 152 of the decision, the Tribunal sets out the attrition rates of cadets at the Depot from 1998-2003. This data was extracted from Dr. Wortley's report where he merely repeats these numbers from the Bell/Rannie Report.

[66] The respondent submitted that this was not an error as that approach was approved by counsel for the applicant at the hearing. He relies on the following exchange:

> KAREN JENSEN: Now, there's the question of the Bell Raney report to which Dr. Wortley referred in his testimony. We haven't had any testimony on this particular document other than through Dr. Wortley; what are your thoughts about that?

MR. EDWARDS: A substantial portion of Dr.Wortley's testimony was in reference to the Bell Raney report and responding to it directly. I'm not sure how the examination would remain if the report itself, which has just been marked for identification purposes and not given any weight at the time were to be removed, were the references also have to removed is the question that comes to my mind.

…

MR. EDWARDS: I think again, the document is a matter that Mr. Wortley or Mr. Or - -

KAREN JENSEN: Doctor.

MR. EDWARDS: Dr. Wortley this had examined and made reference to as part and parcel of his evidence and reviewing material. I think the document should remain in reference. As my friend said, when there is a matter which with Dr. Wortley disagrees and his evidence accepted there is simply no evidence on that point (INAUDIBLE) the document itself is put into argument per say, however, just for the completeness of the record it should remain.

KAREN JENSEN: I don't think it's in evidence except to the extent it is referred to by Dr. Worthy and I accept both of your qualifications because I think they're the same, if Dr. Wortley's evidence is accepted and he adopts certain portions of his reports or his report or agrees with them, then that's the evidence on that point, if he disagrees with it then that's the evidence on that point and this is not evidence. I may refer to it simply to understand what Dr. Wortley is saying, but this will not be considered to be part of the evidentiary record.

MR. EDWARDS: A large part of Dr. Wortley's review was actually based on using that material so (INAUDIBLE) Dr. Wortley's review was based on.

KAREN JENSEN: I don't consider this to be evidence of truth of the contents of the truth, I will refer to it in order to understand what Dr. Wortley was saying and Dr. Wortley's evidence is in fact if accepted is what I will be judging my assessment of the evidence on.

MR. WEINTRAUB: In particular, I suppose, there's the data in there that he refers to that is part of his evidence and again subject to what you just said; another part of it that may be significant is his comments on the response by the RCMP to the issue of self-identification, something to the effect that the comment by the RCMP that good high performing Cadets might choose not to self-identify is actually some evidence of further, of a discriminatory attitude.

> KAREN JENSEN: That's referred to in the Raney (*sic*) Bell report?
>
> MR. WEINTRAUB: That's his comment on the Raney (*sic*) Bell report.
>
> KAREN JENSEN: Right. Okay. As long as it's understood that this in itself is not in evidence.

[67] I do not read the statements of counsel for the RCMP to be more than an observation that the evidence of Dr. Wortley requires that the Bell/Rannie Report be considered as he makes reference to it. However, the Tribunal errs in law when it states that the data in the Bell/Rannie Report becomes evidence before it simply because Dr. Wortley accepts or adopts that data in his evidence and I do not read the applicant's counsel as having said otherwise. Having stated that the Bell/Rannie Report is not accepted for the truth of its contents, it is unreasonable and an error of law to find that the content in that Report – the statistical data – becomes evidence merely because it is adopted by another witness who played no role in generating that data and who cannot speak to its accuracy.

[68] The Tribunal further erred in improperly relying on the only data properly in evidence, Exhibit C 143. At paragraph 150 of its decision the Tribunal deals with the overall attrition from the training program and states that "for 1999/2000, the year that Mr. Tahmourpour's contract was terminated at the Depot, the attrition rate for visible minorities was 16.98%, and for non-visible minorities it was 6.88%." The Tribunal then draws an inference of discrimination from these attrition rates at paragraph 155 of the decision:

> Given the circumstantial evidence of differential attrition rates and discriminatory attitudes towards visible minority members and cadets, I think that it is a reasonable inference that the minimization

> or discounting of Mr. Tahmourpour's abilities in the October 8 Feedback and in the Request for Termination was based, at least in part, on his race, religion and/or ethnic or national origin. Mr. Tahmourpour has, therefore, established a *prima facie* case with regard to this allegation.

[69] I concur with the applicant that the Tribunal erred in applying this statistical evidence to Mr. Tahmourpour's situation without considering that the data "was not adjusted for cadets who left training for personal reasons, i.e. family illness, injury, medical conditions, a change of mind" and whose contracts were not terminated by the RCMP. The only evidence that the Tribunal ought to have considered was that of visible minority candidates who were in the same position as Mr. Tahmourpour – those whose contracts were terminated by the RCMP.

[70] In summary, in accepting the evidence of Dr. Wortley, insofar as it reflects the data in the Bell/Rannie Report, the Tribunal erred in law. There was no such evidence before the Tribunal and it does not become probative evidence merely because Dr. Wortley repeats the data it in his report. Further, in failing to recognize that the only data in evidence related to cadets who did not complete the program in circumstances that, in many instances, were different from those involving Mr. Tahmourpour, the Tribunal accepted and relied upon irrelevant and arguably prejudicial evidence. That too, in my view, constitutes an error of law. As a consequence, any part of the decision of the Tribunal that was based on this evidence must be set aside.

(iii) Ignoring Evidence

[71] The applicant raised numerous examples where it submits that the Tribunal erred in its appreciation of the evidence. With one exception, I will not address these individually as I agree with the submission of the respondent that the applicant's real dispute is its view that that the Tribunal should have weighed the evidence differently. It is not a proper role for this Court to reweigh evidence. It is only when material evidence is ignored without reason or with insufficient reason that the Court may intervene.

[72] Mr. Tahmourpour alleged that his performance at the Depot was inaccurately assessed by his instructors. The Tribunal asserts at paragraph 4 of the decision that Mr. Tahmourpour alleged that he was subject to "ongoing verbal harassment, hostile treatment and negative performance evaluations by his instructors" which "had the effect of undermining his confidence and impairing his ability to develop and demonstrate the necessary skills at Depot." Certainly the first phrase is accurate as those are indeed the allegations of discrimination he advanced. However, with one exception, there is nothing in the record that supports the assertion that Mr. Tahmourpour alleged that these acts impaired his ability to perform well.

[73] The applicant attached as Appendix 1 to its Memorandum selected passages from Mr. Tahmourpour's evidence that constitute a summary of Mr. Tahmourpour's perception of his own performance at the Depot. It is replete with phrases such as "I did exceptionally well", "I was quite ahead of the rest of the troop", "I was exceptionally good at this", "I was performing satisfactorily", and "I passed with flying colours". The only exception was that he testified that he told Corporal Boyer at one point "You're not allowing me to perform. You're screaming at me. You're swearing

at me…" He testified that "his abuse of gesture and words and shouting and screaming did affect to some extent my performance". This was the one exception and it involved only one of the persons whose evaluations were examined by the Tribunal. Mr. Tahmourpour's position otherwise was that the evaluations of his performance were inaccurate and discriminatory – not that they were accurate but unfair as he had not been given the opportunity to perform well.

[74] Notwithstanding that Mr. Tahmourpour did not assert that the discriminatory conduct hampered his performance, the Tribunal found that it did. The Tribunal accepted the evidence of Corporal Bradley that she had legitimate concerns with respect to Mr. Tahmourpour's performance but then discounts this evidence on the basis that his performance was impaired by the treatment he had experienced:

> 171 I accept Corporal Bradley's testimony that she had real concerns about Mr. Tahmourpour's communication skills, judgment and ability to solve problems. She did not think that he would be able to do police work because of these deficiencies. The problem with this explanation, however, is that in a training environment where derogatory comments about race are condoned and directed at people like Mr. Tahmourpour, where evaluations are inaccurate and improper, and where instructors take pride in being "politically incorrect", it is difficult for someone like Mr. Tahmourpour to develop and demonstrate his skills in these areas. I find it reasonable to infer that such conditions erode one's confidence and ability to perform well. Therefore, the Respondent's explanation that Mr. Tahmourpour's performance at Depot was weak is not satisfactory. *Mr. Tahmourpour's performance was more likely than not affected by the discrimination to which he was exposed*. (emphasis added)

[75] The difficulty with this analysis is that there is no evidentiary foundation at all for the conclusion that his performance was affected by the treatment he received. As noted, he did not make that claim, nor did anyone else. No doubt, there may be situations where discrimination does

impact performance; but it is not a universal rule. Unless there is evidence that a complainant would have performed better but for the discrimination, there is no basis, other than mere speculation, on which such a finding can be made.

[76] In this one respect, I find that the Tribunal improperly considered the evidence. It discounted entirely the evidence of performance difficulties, which it had otherwise accepted based on the evidence of Corporal Bradley, because it speculated that while an accurate assessment of his performance, his performance had been negatively impacted by the treatment he received.

(iv) Remedial Orders

[77] The applicant submits that the Tribunal erred in:

a. Awarding two years' full salary for mental distress as well as damages for mental distress as that constitutes double recovery;
b. Awarding reinstatement to the training program and lost wages in the interim as that constitutes double recovery;
c. Failing to discount his wages by only 8%;
d. Failing to cap the compensation and in awarding wages until Mr. Tahmourpour is reinstated to Depot; and
e. Reimbursing him for career-related courses takes to mitigate his damages.

[78] The applicant is in error when it submits that the Tribunal awarded two years' full salary for mental suffering. The Tribunal awarded Mr. Tahmourpour two years' full salary based on its

finding that he could not work during the two years after the termination of his cadet contract because of the psychological impact of the discrimination as found. This was an award for lost wages coupled with a finding that he was unable to mitigate his damages during that time period. He was also given an award for mental suffering; however, this is not, as was submitted by the applicant, double recovery. This remedial award does not constitute double recovery.

[79] The Tribunal ordered that after the initial two-year period following the termination, Mr. Tahmourpour was to receive the difference between what he would have earned at a full-time job and what he would have received as an RCMP officer. The Tribunal also ordered that he be reinstated to the training program, at which time this payment would end. The applicant submits that this constitutes double recovery. The applicant relies on the decision of the Federal Court of Appeal in *Chopra v. Canada (Attorney General)*, 2007 FCA 268.

[80] In *Chopra*, Dr. Chopra was denied an opportunity to fill a position with two others on an acting basis and was then denied appointment to the full-time position because he lacked recent management experience. The Tribunal found that there existed a serious possibility that he would have been appointed to both positions but for the employer's discrimination; however, it also found that the probability of his appointment to the position was low. Accordingly, it reduced the amounts otherwise payable on account of lost wages by two-thirds. Dr. Chopra submitted that the Tribunal erred in failing to order that he be appointed to the position. In rejecting this submission, the Court stated:

> 45 In my view, the premise underlying Dr. Chopra's argument is flawed. The Tribunal did not decide that but for the discrimination

> practiced against him, Dr. Chopra would have been awarded the Indeterminate position. In fact, if one considers the reduction in compensation which it imposed on Dr. Chopra, it appears clear that the Tribunal was of the view that there was only one chance in three that Dr. Chopra would actually have been appointed to the Indeterminate position. The more likely possibility was that Dr. Chopra would not have been awarded the Indeterminate position.
>
> 46 In those circumstances, Dr. Chopra was compensated for what he lost, the opportunity to compete for the Indeterminate position on a non-discriminatory basis. Whether in light of *McAlpine*, this amounts to wages within the meaning of paragraph 53(2)(c) is another question, a question which is not before us. Having been compensated for the loss of the ability to compete on a fair basis, it would be double compensation to then award him the position itself.

[81] By analogy, the applicant submits that ordering Mr. Tahmourpour to be reinstated at the Depot was in full and final satisfaction of the lost opportunity that he suffered. He could not be paid wages in compensation for this lost opportunity and also provided with that opportunity without giving him double recovery.

[82] *Chopra* is distinguishable. Dr. Chopra was asking for appointment to an indeterminate full-time position; Mr. Tahmourpour is not seeking appointment as an RCMP officer - merely the opportunity to complete the training program. While discrimination was found in both cases, the Tribunal in *Chopra* thought it improbable that he would have been appointed had there not been discrimination, and as a result substantially discounted the wage loss and capped it at six years. Here the Tribunal found that but for the discrimination Mr. Tahmourpour would have been permitted to re-enrol in the training program. Accordingly, there is no double recovery as alleged.

[83] The applicant submits that the 8% discount applied by the Tribunal was unreasonable and that it ought to have been discounted by two-thirds as was done in *Chopra*. These cases are fundamentally different. Here there was no question in the mind of the Tribunal that but for the discrimination it found, Mr. Tahmourpour would have been permitted to re-enrol in the program. The evidence was that there was some possibility that he would not complete the program. On the evidence, submitted 8% was a reasonable estimate of that possibility. The Tribunal's order in this respect is reasonable.

[84] Next, the applicant submits that there ought to have been a cap on the lost wages award in the order of two years. The applicant relies on the decisions of the Canadian Human Rights Review Tribunal and the Federal Court of Appeal in *Morgan v. Canada (Canadian Armed Forces)*, [1990] C.H.R.D. No. 10 (QL); rev'd [1992] 2 F.C. 401 (C.A.).

[85] In *Morgan*, Mr. Morgan was found to have been denied a position of employment with the Canadian Armed Forces by the discriminatory action of the Forces, as opposed to merely losing an opportunity for employment. A majority of the Review Tribunal held that when an order of reinstatement is made, compensation ought to continue until there is compliance with that order. The Federal Court of Appeal disagreed. It found that the Review Tribunal erred in failing to establish a cap or cut-off point for the compensation period independent of the reinstatement order. The Court endorsed the observation of the minority member of the Review Tribunal that "the duration of the compensatory period need not coincide with re-instatement whenever it may occur" and held that the majority erred in failing to establish that cap:

> In my view, the initial Tribunal and the majority members of the Review Tribunal were wrong in refusing to establish a cap or cut-off point for the period of compensation, independent of the order of reinstatement. The establishment of that cut-off point was, as it is in all such cases, a difficult exercise requiring a careful analysis of the circumstances of the case. The minority member is the only one who has gone through the exercise and I think this Court, instead of ordering a new hearing, should accept his conclusion, a conclusion that had previously been reached, in similar circumstances, in the case of *De Jager v. Department of National Defence* (1987), 8 C.H.R.R. D/3963.

[86] The minority member, whose decision the Court of Appeal accepted, held that the Armed Forces ought reasonably to have foreseen the consequences of its discriminatory acts as extending for a period of some three and one-half years.

[87] In this case, the Tribunal made no assessment of any cut-off period, nor did it engage in any analysis as to whether the period could reasonably extend to the date of its decision, which was some eight and one-half years after the termination of his cadet contract.

[88] In failing to engage in that analysis the Tribunal erred in law. The damages awarded under the Act cannot run forever and, as the Court of Appeal observed in *Morgan*, "common sense requires that some limits be placed upon liability for the consequences flowing from an act [of discrimination]."

[89] The applicant made submissions as to the reasonable limit in this case. In light of the findings made with respect to the other reviewable errors made in this decision by the Tribunal, it is

not appropriate for this Court to substitute its judgment as to the reasonable limit that ought to have been imposed by the Tribunal. Had this been the only error in the decision under review, then that may have been appropriate rather than sending the matter back for a redetermination. However, as it is my view that the decision cannot stand, this is a question best left to the next person hearing the matter.

[90] The last submission on remedy was that Mr. Tahmourpour ought not to have been compensated for the courses he took attempting to mitigate his damages, as the Tribunal had already awarded him full salary for the period in which the courses were taken. Again, this was described as double recovery. It is not. These were expenses incurred to mitigate his loss. I am confident that had he been successful in that regard the applicant would have taken full advantage of his earned income as off-setting the damages otherwise payable. The course expenses were reasonably awarded to Mr. Tahmourpour.

Summary

[91] I find that the Tribunal:

a. erred in applying the wrong test for direct discrimination in making a finding of direct discrimination by Sergeant Hébert;
b. erred in law in relying upon statistical data contained in the report of the respondent's expert which merely repeated the data contained in the report of the applicant that was not in evidence;

c. erred in concluding without evidence and only on the basis of speculation, that Mr. Tahmourpour's performance was affected by the discriminatory treatment he received at Depot; and

d. erred in awarding lost wages to the date of reinstatement in a training program having engaged in no analysis as to whether that period could reasonably extend to that date.

[92] For the foregoing reasons, the Tribunal's decision is set aside. The applicant is entitled to its costs of this application.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The Style of Cause is amended to reflect as the proper applicant the Attorney General of Canada:

ATTORNEY GENERAL OF CANADA

Applicant

and

ALI TAHMOURPOUR

Respondent

2. The decision of the Canadian Human Rights Tribunal made April 16, 2008, is set aside and the complaint of Mr. Tahmourpour is referred to a different Member for hearing; and

3. Costs of this application are awarded to the applicant.

"Russel W. Zinn"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-768-08
STYLE OF CAUSE:	THE ATTORNEY GENERAL OF CANADA ON BEHALF OF THE ROYAL CANADIAN MOUNTED POLICE v. ALI TAHMOURPOUR
PLACE OF HEARING:	Toronto, Ontario
DATES OF HEARINGS:	March 31, 2009 and June 30, 2009
REASONS FOR JUDGMENT AND JUDGMENT:	ZINN J.
DATED:	October 6, 2009

APPEARANCES:

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David Yazbeck	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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