Federal Court  Cour fédérale

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T-1293-18

Citation: 2019 FC 1026

Ottawa, Ontario, July 31, 2019

PRESENT: The Honourable Mr. Justice LeBlanc

Docket: T-1286-18

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

CHRIS HUGHES

Respondent

Docket: T-1293-18

AND BETWEEN:

CHRIS HUGHES

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

PUBLIC JUDGMENT AND REASONS

I. INTRODUCTION

[1] Mr. Chris Hughes, the Respondent/Applicant in these proceedings, is a former Federal Public Service employee suffering from a disability, namely anxiety and depression.

[2] On July 9, 2014, the Canadian Human Rights Tribunal [Tribunal] held that Transport Canada [TC] had discriminated against him on the basis of his disability in staffing positions for Intelligence Marine Analysts within the Department, contrary to paragraph 7(a) of the *Canadian Human Rights Act*, RSC 1985, c H-6 [Act]. After having been set aside by this Court on reasonability grounds, the Tribunal's decision [Liability Decision] was restored by the Federal Court of Appeal (*Hughes v Canada (Attorney General)*, 2016 FCA 271 [*Hughes FCA*]).

[3] In a subsequent hearing, the Tribunal proceeded to determine what would be an appropriate remedy for TC's discriminatory conduct against Mr. Hughes. In a decision issued on June 1, 2018 [Remedial Decision], the Tribunal ordered TC to instate Mr. Hughes to the position of Intelligence Marine Analyst and to pay him compensation for lost wages and benefits from the time he should have been appointed to the position to the point when, according to the Tribunal, the causal link between TC's discrimination and Mr. Hughes' loss of wages was severed, that is

from May 2006 to May 2011. It also ordered TC to pay Mr. Hughes damages for pain and suffering and for its reckless conduct in the events that led to the discrimination.

[4] Both parties are unhappy with the Remedial Decision and have each launched their own judicial review proceedings against the decision. Each side challenges the Tribunal's finding regarding the end-point – May 2011 – at which Mr. Hughes was, according to the Tribunal, no longer entitled to compensation for lost wages and benefits. TC, as represented by the Attorney General, claims that the end-point occurred in September 2007, when Mr. Hughes obtained a position at Human Resources and Skills Development Canada [HRSDC] (now Employment and Social Development Canada), or even earlier when it was determined by the Tribunal, in a separate proceeding, that Mr. Hughes should have obtained a position at HRSDC as early as 2006. Mr. Hughes contends that there is no rational justification, in the circumstances of this case, for limiting his recovery for lost wages and benefits as such. In particular, he says that there is no principled reason why he should not be compensated up to the point of his instatement in an Intelligence Marine Analyst position.

[5] The Attorney General further claims that it was unreasonable for the Tribunal to order Mr. Hughes' instatement in light of its own finding that the causal link between TC's discrimination and Mr. Hughes' loss of wages and benefits had been severed in May 2011. He also contends that it was not open to the Tribunal to find that TC recklessly engaged in discriminatory conduct towards Mr. Hughes since it had previously held, in the Liability Decision, that such conduct was indirect and unintentional.

[6] These two judicial review proceedings were heard together on June 19, 2019, in Victoria, British Columbia. For the reasons that follow, the Attorney General's challenge of the Remedial Decision is dismissed and that of Mr. Hughes, granted in part.

II. BACKGROUND

A. *The complaints against TC*

[7] From 1995 to 2005, Mr. Hughes was employed as a term employee by the Canada Customs and Revenue Agency (now the Canada Revenue Agency) and the Canada Border Services Agency, where he held a number of positions, including that of Custom Inspector and Collections Officer. In 2006, he participated in the competition referred to above for the staffing of a number of Intelligence Marine Analyst positions at TC. These positions were classified at the PM-04 level. At about the same time, he also applied for three Transportation Security Inspector positions at the TI-06 level advertised by TC. In all four instances, his job application was rejected by TC.

[8] In 2008, Mr. Hughes filed a complaint under the Act against TC in relation to these four competitions. He claimed that he was discriminated against because of his mental disability. He also claimed that TC had retaliated against him contrary to section 14.1 of the Act because he had filed other human rights complaints against his former employers, the Canada Revenue Agency and the Canada Border Services Agency.

[9] In particular, Mr. Hughes' complaint regarding the Intelligence Marine Analyst position turned on a specific criterion for the position requiring candidates to be "detail-oriented". He alleged that the selection committee insisted on having verbal references from his former employers to confirm that he was detail-oriented. He informed the selection committee that it would be difficult to obtain such references as he had commenced litigation against his former employer, the Canada Revenue Agency, and that he had been the subject of discrimination based on his mental health from former employers. He also told the selection committee that he suffered from depression.

[10] Mr. Hughes eventually got a reference from a former supervisor, who could not comment on whether he was detail-oriented or not, but provided a neutral reference regarding the criterion. Mr. Hughes also submitted a document package, comprised in part of past performance evaluations, demonstrating that he was detail-oriented. Nevertheless, the selection committee failed him on this criterion on the basis of the neutral reference from his former supervisor.

B. *The Liability Decision*

[11] The Tribunal upheld Mr. Hughes' complaints in part, finding that he had established a case of *prima facie* discrimination for the Intelligence Marine Analyst competition. According to the Tribunal, the positive documentation showing that Mr. Hughes met the detail-oriented criterion, which was just as sufficient, if not more, compared to the other candidates, should have offset the lack of verbal references. The Tribunal found troubling that positive notations ("VG" for "very good") were erased from Mr. Hughes' application without any reasonable explanation. Given that the selection committee did not offer a credible response to its decision to screen out

Mr. Hughes, the Tribunal concluded that TC had violated paragraph 7(a) of the Act in relation to its treatment of Mr. Hughes' application.

[12] Mr. Hughes' complaints regarding the three competitions held to staff Transportation Security Inspector positions were, however, dismissed by the Tribunal. In one instance, the Tribunal noted that Mr. Hughes no longer intended to pursue his complaint. In the other two instances, the Tribunal held that the explanations provided by TC for screening out Mr. Hughes, that is a lack of sufficient experience in conducting investigations, appeared credible and that, therefore, Mr. Hughes' exclusion from these two competitions was not a pretext.

[13] As I indicated at the outset of these Reasons, the Federal Court of Appeal restored the Liability Decision, being satisfied that the judge of this Court who had set aside said decision had in fact engaged in "re-weighing" and "effectively re-deciding the case", and had failed, therefore, to correctly apply the applicable (reasonableness) standard of review (*Hughes FCA* at para 8).

C. *Mr. Hughes' 2007-2008 employment with HRSDC and subsequent human rights complaints*

[14] Relevant to this case is the fact that after having been unsuccessful in securing a position at TC, Mr. Hughes was hired, as a term employee, in a CR-04 position at HRSDC. His term, which commenced in September 2007, was renewed twice. However, after having requested accommodation for his disability, Mr. Hughes was informed that his term would not be renewed again. His employment with HRSDC ended in June 2008.

[15] As a result of HRSDC's decision to not renew his term, Mr. Hughes filed two complaints under the Act against HRSDC. First, he claimed that HRSDC refused to renew his term because of his disability. Second, he complained that despite being qualified in a pool at the CR-05 level, HRSDC refused to hire him at equivalent positions (PM-01, PM-02 or CR-04) because of his disability. Both complaints were rejected by the Canadian Human Rights Commission, but those findings were quashed on judicial review (*Hughes v Canada (Attorney General)*, 2010 FC 837). The complaints then proceeded to the Tribunal for adjudication.

[16] The Tribunal upheld both complaints (*Hughes v Human Resources and Skills Development Canada*, 2012 CHRT 22 [HRSDC Decision]). On judicial review, the discrimination findings were upheld, but the remedies were quashed as the Tribunal stated it would hold a separate remedies hearing, but proceeded nevertheless to determine the remedies without submissions from the parties (*Canada (Attorney General) v Hughes*, 2014 FC 278). In January 2015, the parties came to an agreement as to the appropriate remedies [HRSDC Settlement].

D. *The Remedial Decision*

[17] Mr. Hughes sought the following relief as a result of the Liability Decision:

a. Appointment as an Intelligence Marine Analyst at the PM-04 level retroactive to May 8, 2006;

b. Appointment as a Transportation Security Inspector at the TI-06 level as of late 2008;

c. Lost wages up until instatement in the amount of $581,697.97;

d. Lost benefits up until instatement;

e. An order that TC continue to pay his medical and dental bills until he is reintegrated into the federal public service medical and dental plans;

f. Expenses totalling $22,500 for medical, dental and health coverage and for costs incurred associated with refinancing and selling his matrimonial home;

g. Shift premiums, weekend premiums and overtime totalling $225,000;

h. Return of 15 weeks of sick leave credits;

i. Cash payout of vacation pay;

j. 9 days' credit for volunteer leave or payment of the case value;

k. 45 days' credit for family leave;

l. Compensation for pain and suffering and special compensation totalling $40,000;

m. Pension adjustment and payout retroactive to 2006;

n. Interest on all of the above-mentioned amounts;

o. Gross-up, calculated by an actuary or accountant, paid by TC, for any negative tax liability arising out of any of these payments.

[18] At the remedial hearing, TC conceded that but for the discrimination, Mr. Hughes would have been appointed to an Intelligence Marine Analyst position at the PM-04 level in May 2006.

In June 2018, the Tribunal found that there was a direct causal connection between the discrimination and the loss of that position. In light of the remedial nature of the Act, the fact that Mr. Hughes had never worked for TC, and therefore that there could not be a fractured working relationship, and that Mr. Hughes met the requirements for the position, the Tribunal ordered his instatement to an indeterminate Intelligence Marine Analyst position at the PM-04 level, subject to obtaining the required security clearance. The Tribunal was not, however, satisfied that there was a mere but serious possibility that by reason of the experience he would have gained as an Intelligence Marine Analyst, he would have later been promoted to a Transportation Security Inspector position.

[19] The Tribunal then ordered TC to pay lost wages and benefits to Mr. Hughes. May 2006, the date at which Mr. Hughes ought to have been appointed, served as a starting point for these findings.

[20] TC requested that the HRSDC Settlement monies be deducted from the award for lost wages and benefits. The Tribunal rejected this request because the HRSDC Settlement also settled a pending civil suit, did not mention compensation for lost wages, and provided that no T4 would be issued. Furthermore, the Tribunal made it clear that TC could not rely on HRSDC's discriminatory practices to limit its own liability under the Act.

[21] TC argued that causation should cease once Mr. Hughes found temporary employment with HRSDC in 2007. As this was simply a term contract, the Tribunal concluded that it was not comparable to an indeterminate Intelligence Marine Analyst position.

[22] The Tribunal ruled that the causal link between the discrimination and Mr. Hughes' lost wages and benefits was severed in May 2011, and thus ordered compensation for lost wages and benefits up until this point. The Tribunal cited a number of intervening factors: Mr. Hughes' employment with HRSDC from 2007-2008, the eye surgeries he underwent in 2008 and the related temporary side effects they had on his sight, his employment with the Canadian Coast Guard in 2010, his difficulty finding employment, and the fact that a significant number of people hired to Intelligence Marine Analyst positions in 2006 were no longer working in that capacity after five years in the position. The Tribunal noted that instatement and compensation were two distinct remedies grounded in different factual and legal considerations.

[23] The Tribunal awarded $15,000 to Mr. Hughes for pain and suffering in addition to $5,000 due to TC's reckless discriminatory conduct. Finally, the Tribunal invited the parties to come to an agreement as to an award for overtime, leave, vacation pay, and medical, dental, and health coverages.

III. THE PARTIES' CLAIMS AGAINST THE REMEDIAL DECISION

A. *The Attorney General*

[24] The Attorney General claims that the Remedial Decision is unreasonable because the Tribunal ordered the appointment of Mr. Hughes to an Intelligence Marine Analyst position at the PM-04 level, yet also found that the causal connection between TC's discrimination and the lost wages and benefits had been severed in May 2011. He argues that this unjustly enriches Mr. Hughes. In his view, compensation for lost wages and benefits resulting from the

discrimination would have been sufficient. The Attorney General also critiques the Tribunal in its failure to determine that causation ended once Mr. Hughes obtained employment at HRSDC in September 2007, or once he should have obtained such position, as allegedly ordered by the Tribunal in the HRSDC Decision.

[25] Furthermore, the Attorney General reiterates that the HRSDC Settlement monies should have been deducted from the lost wages and benefits award. On a final note, he states that the Tribunal could not have awarded special damages for reckless conduct under subsection 53(3) of the Act because this was not a finding in the Liability Decision.

B. *Mr. Hughes*

[26] Mr. Hughes only challenges the Tribunal's decision insofar as it limited the award for lost wages and benefits to the period between May 2006 and May 2011. The crux of his contention is that there is no rational explanation, in light of the factors cited by the Tribunal, as to why it found that the causal link between the discrimination and his losses was severed in May 2011.

[27] To this end, he notes that the Tribunal factored in the end of his temporary contract with HRSDC in 2008, even though it was simply a mitigation measure. He also points out that the Tribunal concluded that had he been appointed in May 2006, he would have received disability benefits during his 14-week convalescence after his eye surgery, yet also concluded that as the surgery did not result from the discrimination, it justified a break in causation. Moreover, he notes that the Tribunal determined that his temporary employment with the Canadian Coast

Guard proved that he was capable of working while recovering from the eye surgery, yet also found that this same employment contributed to severing causation. Finally, he states that the Tribunal erred by failing to explain how the fact that many other prospective employers had declined Mr. Hughes' job applications had any bearing on the severance of the causal link, in addition to why it relied on the career trajectory of appointees to Intelligence Marine Analyst positions without accounting for their individual circumstances.

[28] Given the exceptional circumstances of this case, Mr. Hughes asks that the Court remit the decision to the Tribunal with a direction that wages and benefits should be awarded until his instatement.

IV. ISSUES AND STANDARD OF REVIEW

[29] In my view, the present matter raises the following three issues:

1. Was it reasonable for the Tribunal to order that Mr. Hughes be instated in a position at TC?

2. Did the Tribunal commit a reviewable error in ordering TC to compensate Mr. Hughes for lost wages and benefits the way it did?

3. Was it reasonable for the Tribunal to award special damages pursuant to subsection 53(3) on the basis that it recklessly discriminated against Mr. Hughes?

[30] It is well-settled that the Act confers on the Tribunal broad remedial powers and that the exercise of these powers requires a "fact-intensive inquiry" commanding a high degree of

deference from reviewing Courts. As a result, remedial decisions of the Tribunal are reviewed on a standard of reasonableness (*Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53 at paras 25, 27 [*Mowat SCC*]; *Collins v Canada (Attorney General)*, 2013 FCA 105 at para 2 [*Collins FCA*]; *Public Service Alliance of Canada v Canada Post Corporation*, 2010 FCA 56 at paras 168, 301 [*PSAC*], aff'd 2011 SCC 57; *Canada (Attorney General) v Davis*, 2017 FC 159 at para 37).

[31] Reasonableness means that the Court shall only interfere with the Tribunal's decision if it does not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47). In particular, it means that it is not within the Court's purview to re-weigh and effectively re-decide the case before it (*Hughes FCA* at para 8).

V. ANALYSIS

A. *Relevant principles under the Act*

[32] The purpose of the Act is not to punish wrongdoings but to prevent discrimination (*Canada (Attorney General) v Mowat*, 2009 FCA 309 at para 22, aff'd 2011 SCC 53, citing *CN v Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114 at 1134). In addition to compensating victims of discrimination, the remedial authority under human rights legislation serves another important societal goal: to prevent future discrimination by acting as both a deterrent and an educational tool (*Walsh v Mobil Oil Canada*, 2013 ABCA 238 at para 31 [*Walsh*], citing *Robichaud v Canada (Treasury Board)*, [1987] 2 SCR 84).

[33] The rights protected under the Act are quasi-constitutional in nature, and when crafting remedies, the Tribunal must give the Act a large and liberal interpretation to ensure its objectives are attained and that protected rights are given full recognition and effect (*Mowat SCC* at para 62; *Canada (House of Commons) v Vaid*, 2005 SCC 30 at paras 80-81; *Jane Doe v Canada (Attorney General)*, 2018 FCA 183 at para 23; see also: *Interpretation Act*, RSC 1985, c I-21, s 12).

[34] As this Court stated in *Canada (Attorney General) v Grover* (1994), 80 FTR 256, at para 40:

> The nature of a Human Rights Tribunal is that of a quasi-judicial body charged with the difficult statutory task of resolving often complex and emotional disputes between parties in a manner which emphasizes the compensation of victims of discrimination. Such a task demands innovation and flexibility on the part of the Tribunal in fashioning effective remedies and the Act is structured so as to encourage this flexibility.

[35] In order to achieve this goal, Parliament has equipped the Tribunal with an arsenal of remedies enumerated in section 53 of the Act. This section reads as follows:

Complaint dismissed	**Rejet de la plainte**
53 (1) At the conclusion of an inquiry, the member or panel conducting the inquiry shall dismiss the complaint if the member or panel finds that the complaint is not substantiated.	53 (1) À l'issue de l'instruction, le membre instructeur rejette la plainte qu'il juge non fondée.
Complaint substantiated	**Plainte jugée fondée**
(2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or	(2) À l'issue de l'instruction, le membre instructeur qui juge la plainte fondée, peut, sous réserve de l'article 54,

panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:

ordonner, selon les circonstances, à la personne trouvée coupable d'un acte discriminatoire :

(a) that the person cease the discriminatory practice and take measures, in consultation with the Commission on the general purposes of the measures, to redress the practice or to prevent the same or a similar practice from occurring in future, including

a) de mettre fin à l'acte et de prendre, en consultation avec la Commission relativement à leurs objectifs généraux, des mesures de redressement ou des mesures destinées à prévenir des actes semblables, notamment :

(i) the adoption of a special program, plan or arrangement referred to in subsection 16(1), or

(i) d'adopter un programme, un plan ou un arrangement visés au paragraphe 16(1),

(ii) making an application for approval and implementing a plan under section 17;

(ii) de présenter une demande d'approbation et de mettre en oeuvre un programme prévus à l'article 17;

(b) that the person make available to the victim of the discriminatory practice, on the first reasonable occasion, the rights, opportunities or privileges that are being or were denied the victim as a result of the practice;

b) d'accorder à la victime, dès que les circonstances le permettent, les droits, chances ou avantages dont l'acte l'a privée;

(c) that the person compensate the victim for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice;

c) d'indemniser la victime de la totalité, ou de la fraction des pertes de salaire et des dépenses entraînées par l'acte;

(d) that the person compensate the victim for any or all additional costs of obtaining alternative goods, services, facilities or accommodation and for any expenses incurred by the victim as a result of the discriminatory practice; and	d) d'indemniser la victime de la totalité, ou de la fraction des frais supplémentaires occasionnés par le recours à d'autres biens, services, installations ou moyens d'hébergement, et des dépenses entraînées par l'acte;
(e) that the person compensate the victim, by an amount not exceeding twenty thousand dollars, for any pain and suffering that the victim experienced as a result of the discriminatory practice.	e) d'indemniser jusqu'à concurrence de 20 000 $ la victime qui a souffert un préjudice moral.
Special compensation	**Indemnité spéciale**
(3) In addition to any order under subsection (2), the member or panel may order the person to pay such compensation not exceeding twenty thousand dollars to the victim as the member or panel may determine if the member or panel finds that the person is engaging or has engaged in the discriminatory practice wilfully or recklessly.	(3) Outre les pouvoirs que lui confère le paragraphe (2), le membre instructeur peut ordonner à l'auteur d'un acte discriminatoire de payer à la victime une indemnité maximale de 20 000 $, s'il en vient à la conclusion que l'acte a été délibéré ou inconsidéré.
Interest	**Intérêts**
(4) Subject to the rules made under section 48.9, an order to pay compensation under this section may include an award of interest at a rate and for a period that the member or panel considers appropriate.	(4) Sous réserve des règles visées à l'article 48.9, le membre instructeur peut accorder des intérêts sur l'indemnité au taux et pour la période qu'il estime justifiés.

[36] The purpose of this provision is to make whole the victim of the discrimination (*PSAC* at para 301; *Canadian Human Rights Commission v Canada (Attorney General)*, 2001 FCT 1399 at

para 60 [*Carter*]). This may mean reinstating an employee in the position they would have been in had the discrimination not occurred and/or compensating for losses arising out of the discriminatory conduct (*Fair v Hamilton-Wentworth District School Board*, 2013 HRTO 440 at paras 13, 29 [*Fair HRTO*], aff'd *Hamilton-Wentworth District School Board v Fair*, 2016 ONCA 421 [*Fair ONCA*]). A complainant is, however, limited to the remedies which the Tribunal has the authority to grant (*Chopra v Canada (Attorney General)*, 2007 FCA 268 at para 36 [*Chopra*]).

[37] When an employee is denied an opportunity for employment as a result of discrimination, the purpose of compensation is to place the employee in a position they would have been in, but for the discrimination which denied the prospective employee an opportunity for employment (*Ayangma v Eastern School Board*, 2008 PESCAD 10 at para 43 [*Ayangma*], leave to appeal to SCC refused, 32978 (16 April 2009)). The quantum of such loss is determined by assessing the circumstances of each case, but there must always be a causal connection between the discrimination and the loss of income (*Ayangma* at para 70).

[38] The Alberta Court of Appeal has reiterated the delicate task of determining such quantum:

> Damage awards that do not provide for appropriate compensation can minimize the serious nature of the discrimination, undermine the mandate and principles that are the foundation of human rights legislation, and further marginalize a complainant. Inadequate awards can have the unintended but very real effect of perpetuating aspects of discriminatory conduct.
>
> (*Walsh* at para 32)

[39] In the past, Courts have used the common law tort doctrine of foreseeability as a tool for assessing damages flowing from discriminatory practices (see: *Canada (Attorney General) v McAlpine*, [1989] 3 FC 530 at 538-539 (FCA)). The underlying rationale was that the assessment of damages recoverable by a victim ought not to be different in the spheres of tort law and human rights law, as the goal is exactly the same: to make the victim whole for the damages caused by an act of liability (*Canada (Attorney General) v Morgan*, [1992] 2 FC 401 at 414 (FCA) [*Morgan*]).

[40] However, the Federal Court of Appeal has cautioned against the use of certain tort law rules, such as foreseeability, underscoring the fact that human rights legislation does not create a common law cause of action (*Chopra* at paras 36-37, 39; *Canada (Attorney General) v Johnstone*, 2013 FC 113 at para 148 [*Johnstone FC*], rev'd 2014 FCA 110 [*Johnstone FCA*], but not on this point). Rather, it has noted that the right to recourse under the Act is of a statutory nature (*Chopra* at paras 35-36). The Federal Court of Appeal has, however, confirmed that the discretion given to the Tribunal to award any or all of the losses suffered by the complainant leaves it open to the Tribunal to impose a limit to losses caused by the discriminatory practice (*Chopra* at para 40).

[41] The Court affirmed two guiding principles for limiting the losses for which a complainant may be compensated. First, there must be a causal link between the discrimination and the loss claimed. Second, the discretion afforded to the Tribunal to make an order for any or all of the lost wages as a result of the discriminatory practice must be exercised on a principled basis (*Chopra* at para 37).

[42] First, as regards causation, when determining a "cut-off" date for compensation, meaning the point at which causation between the discrimination and the complainant's losses has been severed, there must be a rational connection between the cut-off date and the factual record (*Morgan* at 409; *Johnstone FC* at para 153; *Pitawanakwat v Canada (Attorney General)*, [1994] 3 FC 298 at 314, 316-317 [*Pitawanakwat*]). In essence, the reviewing judge must be able to discern from the Tribunal's decision why the Tribunal chose the cut-off date in question (*Tahmourpour v Canada (Attorney General)*, 2010 FCA 192 at para 47 [*Tahmourpour FCA*]).

[43] Such finding will depend on the circumstances of each case and need not necessarily coincide with the date of instatement or reinstatement, if ordered (*Morgan* at 409, 415). The thrust of this principle is that common sense requires that some limits be placed upon liability for the consequences flowing from an act, absent bad faith (*Morgan* at 415). This "common sense requirement" has been interpreted to justify limiting a wage compensation award due to the complainant's multiple causes of loss of income, including health issues which were, in part, exacerbated by the discrimination (*Walsh* at para 117).

[44] Second, as regards the "principled basis" approach described in *Chopra*, one such principled basis is the application of the principle of mitigation (*Walsh* at para 41). Originally, in *Chopra*, the Federal Court of Appeal held that the Tribunal could consider the doctrine of mitigation, but was not obliged to do so (*Chopra* at para 40). However, in *Tahmourpour FCA*, the Federal Court of Appeal, at paragraph 46, confirmed the necessity to take into account a complainant's obligation to mitigate their losses. Other jurisdictions, such as Prince Edward Island, whose human rights legislation is similar to the Act, have also held that a victim of

discrimination has an obligation to mitigate losses (*Ayangma* at paras 71, 73). The interrelated obligation is therefore for the victim of discrimination to look for and to accept "comparable employment". Simply put, the law does not require an employer to pay the victim of discrimination for loss of income that could have been avoided by the reasonable efforts of the victim to obtain comparable employment (*Ayangma* at para 76).

[45] However, "comparable employment" does not mean "any employment" but "comprehends employment comparable to the dismissed employee's employment with his or her former employer in status, hours and remuneration" [emphasis added] (*Dussault v Imperial Oil Limited*, 2019 ONCA 448 at para 5 [*Dussault*]). Several factors may intervene. Of significance is the impact of being dismissed from employment, a bad economy, a small, shrinking, or obsolescent occupation, industry or set of skills, in addition to the age of the employee (*Payne v Bank of Montreal*, 2013 FCA 33 at para 81; *Merrill Lynch Canada Inc v Soost*, 2010 ABCA 251 at para 30, leave to appeal to SCC refused, 33910 (14 April 2011)).

[46] Another principled basis appears to be the application of the rule against double recovery. In essence, a complainant cannot recover more than what was sufficient to compensate the losses flowing from the discriminatory conduct (*Chopra* at para 46; *Royal Canadian Mounted Police v Tahmourpour*, 2009 FC 1009 at paras 78-82 [*Tahmourpour FC*], rev'd in part 2010 FCA 192, but not on this point; *Carter* at paras 53-55, 61).

B. *It was reasonable for the Tribunal to instate Mr. Hughes*

[47] As indicated previously, before the Tribunal, Mr. Hughes sought appointment to the position of Intelligence Marine Analyst at the PM-04 level, retroactive to May 2006. He also sought an order appointing him to a Transportation Security Inspector position at the TI-06 level once he would have gained the necessary experience, through his work as an Intelligence Marine Analyst, to fill a Transportation Security Inspector position. The Tribunal ordered the former but not the latter. In particular, it ordered that Mr. Hughes be instated on the first reasonable occasion in an Intelligence Marine Analyst position at the PM-04 level, subject to the requisite security clearance being granted.

[48] The Attorney General concedes that but for TC's discrimination, Mr. Hughes would have been appointed to an indeterminate Intelligence Marine Analyst position in May 2006. He argues, however, that instatement was unreasonable as the Tribunal found that causation between the discrimination and the wage losses ceased in May 2011. Relying on *Ontario (Human Rights Commission) v Naraine*, 2001 CanLII 21234 (ON CA) [*Naraine*], he claims that instatement and an award for lost wages and benefits amounts to double recovery.

[49] I note that nothing in the language of subsection 53(2) of the Act limits ordering both remedies, given the open wording of this provision:

> the member […] may […] make an order […] and include in the order <u>any</u> of the following terms <u>that the member or panel considers appropriate</u>:
>
> […]

> (b) that the person make available to the victim of the discriminatory practice, on the first reasonable occasion, the rights, opportunities or privileges that are being or were denied the victim as a result of the practice;
>
> (c) that the person compensate the victim for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice;
>
> [emphasis added]

[50] In the Remedial Decision, the Tribunal found that there was a direct causal connection between TC's discriminatory practices and Mr. Hughes' loss of an indeterminate position as an Intelligence Marine Analyst (Remedial Decision at para 267). The Tribunal therefore ordered Mr. Hughes' instatement (Remedial Decision at para 272). It took care in justifying awarding lost wages and benefits in addition to instating Mr. Hughes in specifying that each remedy was based on different factual and legal considerations (Remedial Decision at para 348).

[51] In a section specifically related to the issue of double recovery, the Tribunal went on to state that the limits on the lost wages and benefits award did not terminate TC's liability vis-à-vis Mr. Hughes, as they were grounded in the fact that the Act restricts compensation for lost wages to those which were a result of the discrimination (Remedial Decision at para 350). As such, it concluded that losing the appointment to an Intelligence Marine Analyst position was a continuing and direct result of TC's discrimination (Remedial Decision at para 351).

[52] Insofar as the Tribunal provided clear and coherent reasoning as to why coupling instatement with a lost wages and benefits award did not result in double recovery, this part of

the decision ought not to be interfered with. As the Tribunal stated, these conclusions seek to remedy different components.

[53] Instatement is inherently *forward-looking* and seeks to remedy the opportunity lost, which, by admission of the Attorney General, was an indeterminate position as an Intelligence Marine Analyst. A lost wages and benefits award, commonly referred to in employment law as "back pay", seeks to compensate *past* loss, which would not have occurred but for the discrimination.

[54] Reinstatement with back pay is a common remedy in the realm of employment law upon an unjustified dismissal (see for example: *Bergey v Canada (Attorney General)*, 2017 FCA 30 at para 36, leave to appeal to SCC refused, 37657 (15 February 2018); *Bahniuk v Canada (Attorney General)*, 2016 FCA 127 at para 22). With this in mind, an award for lost wages and benefits on its own would not have made Mr. Hughes whole, as it would negate the indeterminate nature of the employment he was deprived of by reason of TC's discrimination.

[55] It must be noted that contrary to the Attorney General's contention, Mr. Hughes is not claiming the same relief twice in this case. He is simply claiming instatement and payback. This does not amount to double recovery. Double recovery has served as a barrier for complainants to recover lost wages while also receiving grants and bursaries for enrolling in an educational institution (*Pitawanakwat* at 319-320), to recover lost wages while also receiving severance pay and pension pay (*Carter* at para 61), or, finally, to claim compensation for the loss of the *ability*

to compete on a fair basis and also to be awarded the position itself (*Chopra* at para 46). Such is not the case here.

[56] In *Chopra*, the Tribunal concluded that a compensation award amounted to full compensation for the *opportunity* to compete for an indeterminate position. Furthermore, the Tribunal did not conclude that but for the discrimination, the complainant would have been awarded an indeterminate position. In the case at bar however, the loss was not the *opportunity* to participate in a competition, but rather indeterminate employment itself, by admission of the Attorney General.

[57] The case of *Naraine*, on which the Attorney General relies, can also be distinguished. In that case, the Ontario Court of Appeal noted that the Board of Inquiry's decision was internally inconsistent because, on the one hand, it found that the complainant's subsequent comparable employment terminated the discriminator's liability, yet on the other hand, it reinstated the complainant to his original position with the discriminator (*Naraine* at para 71). It is worth noting that in *Naraine*, an arbitrator, in an employment related dispute, had held that the complainant's dismissal was justified notwithstanding the human rights litigation (*Naraine* at para 1). In the case at bar, the Tribunal did not conclude that Mr. Hughes found comparable employment and specifically noted that TC's liability was not terminated by the lost wages and benefits award, and his screening out was not confirmed by a third party decision-maker.

[58] On a final note, counsel for Mr. Hughes has referred to a certain number of cases in which reinstatement was ordered despite a significant passage of time. Notably, in *Fair HRTO*,

affirmed by the Ontario Court of Appeal in *Fair ONCA*, the complainant was reinstated 14 years after the discrimination. Similarly, in *Uzoaba v Canada (Correctional Services)*, [1994] CHRD No 7, the complainant was reinstated 13 years after the discrimination. Likewise, in a case not cited by counsel for Mr. Hughes, *Cremona v Wardair Canada Inc* (1993), 20 CHRR D/398, an employer responsible for discrimination was ordered to provide the complainant the position he had been denied 8 years prior.

[59] In *Fair ONCA*, the Ontario Court of Appeal specifically stated that the "passage of years is not, by itself, determinative of whether reinstatement is an appropriate remedy. Rather, the decision as to whether to order reinstatement is context-dependent" (*Fair ONCA* at para 95). In a similar vein, this Court held in *Pitawanakwat* that a "recipe for disaster", contemplated by the Tribunal, flowing from the complainant's potential instatement into a toxic work environment was an issue to be dealt with by the discriminating employer (*Pitawanakwat* at 318). The Court further ruled that a "recipe for disaster" cannot be justification for failing to grant a full remedy of instatement when the Tribunal acknowledges that reinstatement is an appropriate remedy (*Pitawanakwat* at 318). In this regard, as underscored by his counsel, Mr. Hughes has never worked for TC, and there is no evidence on the record that his instatement would result in a "recipe for disaster", nor that he bears ill-will towards TC.

[60] At the hearing of this matter, counsel for Mr. Hughes raised two additional arguments. First, he argued that the Tribunal ought to have ordered that his client be appointed as a Transportation Security Inspector shortly after his appointment as an Intelligence Marine Analyst. Counsel for the Attorney General objected on the basis that this contention was a fresh

argument, not included in the written pleadings before the Court. I agreed with counsel for the Attorney General and, as such, did not allow counsel for Mr. Hughes to pursue his submissions on this point.

[61] Second, counsel for Mr. Hughes questioned the scope of the requirement in the Remedial Decision that his client's instatement be subject to obtaining a security clearance. As the security clearance requirements for the Intelligence Marine Analyst position had changed in the course of the underlying litigation from a "secret" to a compulsory "top secret" security clearance, counsel argued that his client should not be penalized by that change and that he should therefore be instated subject only to obtaining a "secret" security clearance.

[62] Counsel for the Attorney General objected, once again, as this fresh argument was not included in the written pleadings before the Court and was not even raised before the Tribunal. Counsel for Mr. Hughes ultimately withdrew this submission.

[63] In summary, I see no reason to interfere with the Tribunal's order that Mr. Hughes be instated at the first reasonable opportunity to the position of Intelligence Marine Analyst, at the PM-04 level, subject to the requisite security clearance.

C. *Lost wages and benefits award*

[64] Both parties agree that paragraph 53(2)(c) of the Act confers on the Tribunal the power to order compensation for "any or all the wages that the victim was deprived of" [emphasis added]. Both parties further agree that pursuant to *Chopra* and *Tahmourpour FCA*, there are two limits to

compensation for lost wages: (i) causation must exist between the discriminatory practice and the loss claimed; and (ii) the discretion to award "any or all wages" must be exercised on a principled basis (*Tahmourpour FCA* at para 45; *Chopra* at paras 37, 40).

[65] The contention between the parties stems from the causation findings of the Tribunal. The Attorney General claims that Mr. Hughes' employment with HRSDC or the HRSDC Decision should have severed the causal link between the discrimination and the losses claimed. He additionally argues that the HRSDC Settlement should have been deducted from the lost wages and benefits award.

[66] Mr. Hughes takes the position that the Tribunal should have ordered lost wages and benefits up until his date of instatement, less any income earned from employment during this time. In other words, he argues that causation should never have ceased until his potential instatement with TC. He cites several alleged internal inconstancies within the Tribunal's reasoning.

[67] In the Remedial Decision, the Tribunal stated that the concept underlying paragraph 53(2)(c) of the Act is that it may only order compensation of any or all of the wages Mr. Hughes was deprived of as a result of the discriminatory conduct (Remedial Decision at paras 306, 309). It reasoned that TC could not rely on the discriminatory practices of HRSDC to relieve itself of responsibility for its own discrimination, and that Mr. Hughes' temporary employment with HRSDC was not comparable to the indeterminate Intelligence Marine Analyst position at TC (Remedial Decision at para 304).

[68] It appears from the Tribunal's reasons that many factors, characterized as "intervening facts" lead it to conclude that causation between TC's discrimination and Mr. Hughes' lost wages and benefits was severed in May 2011. These include his inability to work as a result of eye surgery, barriers to employment, including his depression, which was exacerbated by TC's discrimination, the career trajectory of Intelligence Marine Analysts appointed in 2006 at TC, and his employment with HRSDC and the Canadian Coast Guard (Remedial Decision at paras 317-318, 320, 327-331).

[69] However, the ultimate breaking point in causation appears to be based on the approximate 5-year tenure of the Intelligence Marine Analysts at TC based on the experience of the candidates that were appointed at the time Mr. Hughes ought to have been appointed to this position. Among all of the other "intervening facts", this seems to be the only factor which coincides with the cut-off date of May 2011. This is problematic for a number of reasons.

[70] It is true that the evidence before the Tribunal established that a significant number of Intelligence Marine Analysts hired in 2006 at TC had left by 2011 (Remedial Decision at para 329). The Tribunal noted, however, that these individuals may have left for their own personal reasons, and that Mr. Hughes may not have had reason to leave at such time (Remedial Decision at para 330). This nevertheless weighed into the Tribunal's causation analysis.

[71] The fundamental error arising from this finding is that it relies on the presumption that Mr. Hughes would have, on a balance of probabilities, left the Intelligence Marine Analyst

position with TC after 5 years. The premise of this is simply not grounded in the evidence directly related to Mr. Hughes, but is rather based on the personal circumstances of other individuals. Whereas the Tribunal did recognize that the Intelligence Marine Analysts may have left for their own personal reasons, nothing supports the finding that Mr. Hughes would have left the position after 5 years (Remedial Decision at para 330). It is worth recalling that the Intelligence Marine Analyst position to which Mr. Hughes ought to have been appointed was of an indeterminate nature. Presuming that Mr. Hughes would have left the position after five years negates the indeterminate nature of the position. Furthermore, it is unclear if Mr. Hughes' personal circumstances were taken into account in this finding.

[72] Although causation findings are intensive fact-finding inquiries which attract a high level of deference, the error of the Tribunal runs contrary to the well-developed line of cases requiring a rational connection between a cut-off date and the factual record (*Morgan* at 409; *Johnstone FC* at para 153; *Pitawanakwat* at 314, 316-317; *Walsh* at para 49).

[73] Counsel for the Attorney General relied on the case of *Ayangma* for the proposition that the experience of the Intelligence Marine Analysts appointed in 2006 was a highly relevant factor in the causation analysis. In that case, the Appeal Division of the Supreme Court of Prince Edward Island held that in assessing the extent of compensation for lost income or wages, a human rights tribunal must consider such contingencies as the likelihood of the complainant not being offered a position of employment if the *opportunity* to compete for the position had not been denied on the basis of discrimination (*Ayangma* at para 67) [emphasis added]. It further

ruled that in such a context, looking to the experience and qualifications of other applicants could be pertinent (*Ayangma* at para 67).

[74] Akin to the situation in *Chopra*, *Ayangma* dealt with a case in which a complainant was denied the *opportunity* to compete for a position, unlike the case at bar where the loss was in fact indeterminate employment itself. Hence, the case of *Ayangma* can be distinguished on the facts.

[75] Furthermore, counsel for the Attorney General submits that the cumulative effect of the several intervening factors, taken as a whole, was sufficient to sever causation in May 2011, or even before, as claimed. As indicated earlier, these factors include Mr. Hughes' employment with HRSDC, the HRSDC Decision, his eye surgeries and other barriers to employment (including his depression), his employability and his employment with the Canadian Coast Guard.

[76] First, I cannot agree with the Attorney General's contention that Mr. Hughes' employment with HRSDC amounted to comparable employment warranting a break in causation. The Tribunal drew a stark contrast between the position at HRSDC, which was temporary and on a term basis, and the Intelligence Marine Analyst position, which was indeterminate and not temporary (i.e. permanent) (Remedial Decision at para 304).

[77] This reflects the teachings of the case law that "comparable employment" must correspond in "status, hours, and remuneration" (*Dussault* at para 5). As the position with HRSDC was simply not the same status as the Intelligence Marine Analyst position, that is to

say, on a permanent indeterminate basis, it could not have constituted comparable employment. In turn, Mr. Hughes' employment at HRSDC could not have served as the ultimate cut-off date for the Tribunal's causation findings.

[78] Regarding the HRSDC Decision, the Tribunal concluded that HRSDC wilfully refused to continue to employ Mr. Hughes contrary to paragraph 7(a) of the Act (HRSDC Decision at para 85). However, contrary to the Attorney General's submission, I note that the Tribunal never went so far as to state that Mr. Hughes ought to have been appointed to a position with HRSDC, let alone as early as 2006. Moreover, the HRSDC Settlement, which provided for the appropriate remedies flowing from the HRSDC Decision, does not mention such appointment. Therefore, I cannot conclude that either of these events should have interrupted causation.

[79] As it pertains to Mr. Hughes' barriers to employment and his employability, I do acknowledge that the Tribunal accepted Mr. Hughes' testimony in which he stated that an Employment Insurance Contractor found that he faced significant barriers to employment (Remedial Decision at para 318). However, as the Tribunal pointed out, these barriers to employment did not stop Mr. Hughes from obtaining a temporary position with the Canadian Coast Guard in April 2010 (Remedial Decision at para 321). Furthermore, the Tribunal noted that Mr. Hughes also worked briefly for Elections British Columbia in 2011, and for the British Columbia Children's Ministry in 2013 and 2014 (Remedial Decision at paras 322, 324). Given these findings, Mr. Hughes appears to have been employable for certain positions. In line with my analysis above, the position with the Canadian Coast Guard, as it was temporary, could not have amounted to "comparable employment".

[80] In any event, none of the intervening factors cited by counsel for the Attorney General, whether taken individually or cumulatively, allow me to discern why the Tribunal chose May 2011 as the cut-off date (*Tahmourpour FCA* at para 47). In other words, I am unable to see the rational connection between these factors and the cut-off date. In light of this, I am left to conclude that the ultimate cut-off date of May 2011 hinges on the defective presumption that Mr. Hughes would have left the Intelligence Marine Analyst position after five years. As there is no rational connection between this finding and the factual record before the Tribunal, I must conclude that this finding is unreasonable.

[81] As for the HRSDC Settlement, the Attorney General contends that as it awarded damages for hurt feelings in accordance with paragraph 53(2)(e) of the Act and for wilful and reckless damages in accordance with subsection 53(3) of the Act, the remainder of the settlement monies ought to have been for lost wages. Reasoning by deduction, he asserts that all other categories under section 53 of the Act were dealt with, leaving the Tribunal only to conclude that the remaining sum was meant to cover lost wages, especially given the fact that this sum corresponded to the period of time during which Mr. Hughes ought to have been employed by HRSDC, according to the Attorney General, as ordered in the HRSDC Decision.

[82] Furthermore, the Attorney General submits that the text of the HRSDC Settlement provides that some payment may be required to the competent tax authorities relative to the HRSDC Settlement. Finally, he points to a clause which states that the Federal Crown can introduce the HRSDC Settlement as evidence in any hearing before the Tribunal. To ignore the

HRSDC Settlement is tantamount, in the Attorney General's opinion, to awarding Mr. Hughes a collateral benefit.

[83] The Tribunal's analysis of this issue essentially focused on clause 7 of the HRSDC Settlement, which reads as follows:

> 7. The Respondent will pay the Complainant $[redacted] to compensate him for damages incurred between March 2006 and January 2008 ([redacted]) and between June 2008 to present ([redacted]), in accordance with Subsection 53(2) of the CHRA.

[84] The Tribunal determined that this clause did not refer specifically to "wages" but rather to "damages", and thus, could not be deducted from the lost wages and benefits award. It noted that the clause refers to subsection 53(2) of the Act which addresses a range of remedies, including compensation for expenses resulting from a discriminatory practice under paragraph 53(2)(c) of the Act (Remedial Decision at para 300).

[85] Furthermore, it observed that under the HRSDC Settlement, HRSDC was not to issue a T4 slip and that HRSDC agreed not to take any position as to whether the sums were taxable, despite the fact that if the monies were wages, they would be liable to taxation (Remedial Decision at para 301). The Tribunal took note of TC's concession that the language used in the HRSDC Settlement was ambiguous as to whether clause 7 related to lost wages (Remedial Decision at para 301). Finally, the Tribunal determined that the HRSDC Settlement also included a settlement payment for a civil action filed by Mr. Hughes, which only added to the cloud of ambiguity surrounding the settlement (Remedial Decision at para 301).

[86] Ultimately, the interpretation of the HRSDC Settlement is a question of fact which commands a high level of deference on judicial review. Put simply, it is not the role of the reviewing judge to redo the same contractual interpretation exercise which the Tribunal undertook. Given the well-reasoned, clear and convincing analysis of the Tribunal on this point, I must reject the Attorney General's arguments. I am not convinced that the HRSDC Settlement monies ought to have been deducted from the lost wages and benefits award.

D. *It was reasonable for the Tribunal to award special damages*

[87] The Attorney General contends that the Tribunal erred in awarding damages for reckless discrimination under subsection 53(3) of the Act, given that the Tribunal found in the Liability Decision that the discrimination was indirect and unintentional (Liability Decision at para 253).

[88] The Tribunal concluded that because of its finding of unintentional discrimination in the Liability Decision, it could not order damages for *wilful* discrimination (Remedial Decision at para 397). However, it did order damages for *reckless* discrimination as the selection committee disregarded and showed indifference to the consequences of its actions (Remedial Decision at paras 403, 405).

[89] Subsection 53(3) of the Act provides that the Tribunal "may order the person to pay such compensation […] if [it] finds that the person is engaging or has engaged in the discriminatory practice wilfully or recklessly" [emphasis added]. In *Johnstone FC*, Justice Mandamin established the principles governing this subsection:

> This is a punitive provision intended to provide a deterrent and discourage those who deliberately discriminate. A finding of wilfulness requires the discriminatory act and the infringement of the person's rights under the *Act* is intentional. Recklessness usually denotes acts that disregard or show indifference for the consequences such that the conduct is done wantonly or heedlessly.
>
> (*Johnstone FC* at para 155)

Moreover, a finding of recklessness does not require proof of intention to discriminate (*Collins FCA* at para 4, rev'g *Canada (Attorney General) v Collins*, 2011 FC 1168 at para 33).

[90] Given this, I see no reason to interfere with the Tribunal's decision in this regard.

[91] The Tribunal relied on a number of factual findings in the Liability Decision to conclude that the selection committee acted recklessly. In a nutshell, the chair of the selection committee was advised that he ought to look at all relevant information, yet did not conduct a comprehensive and careful analysis of Mr. Hughes' document package showing his capability to be detail-oriented and continued to express his inclination for communication with references directly rather than referring to the documentation provided to him (Remedial Decision at paras 401-402). Another member of the selection committee simply "brushed aside" Mr. Hughes' documentation package (Remedial Decision at para 401).

[92] Proceeding in this manner meant that the Remedial Decision was coherent with the Liability Decision, as the findings for special damages were grounded in the same factual findings. This does not offend the congruity of both decisions. As such, I must reject the Attorney General's arguments on this point.

E. *Conclusion*

[93] In light of the above, the Remedial Decision is set aside insofar as the Tribunal erred in its causation analysis by setting the cut-off date for compensation for lost wages and benefits in May 2011.

[94] As a remedy, counsel for Mr. Hughes asked the Court to direct the Tribunal to order compensation for lost wages and benefits, less what he earned from other employment, to the date of his instatement. This form of redress amounts to an order of *certiorari* and *mandamus*, redress sometimes referred to as a "directed verdict" (*Canada (Citizenship and Immigration) v Tennant*, 2018 FCA 132 at para 28; *Canada (Attorney General) v Allard*, 2018 FCA 85 at para 44 [*Allard*]).

[95] Counsel for Mr. Hughes alluded to the case of *D'Errico v Canada (Attorney General)*, 2014 FCA 95, in which the Federal Court of Appeal rendered a directed verdict, namely given a substantial delay flowing from an administrative regime intended to provide rapid determinations. He states that his client's case presents these same attributes and thus warrants similar redress.

[96] Despite the discretionary nature of remedies on judicial review, directing an administrative decision-maker on how to decide an issue within its jurisdiction ought to be exercised only in the "clearest of circumstances" and on a strictly exceptional basis (*Allard* at para 44, citing *Canada (Minister of Human Resources Development) v Rafuse*, 2002 FCA 31 at

para 14). In addition, this remedy should only be exercised when there is only one possible reasonable outcome open to the decision-maker (*Allard* at para 45). The Federal Court of Appeal has cautioned that when the issues are highly factual and require significant specialized expertise, the judicial review judge should be hesitant to conclude that there is only one potential outcome (*Allard* at para 45).

[97] Given the inherent factual nature of the causation findings as it pertains to the lost wages and benefits award, in addition to the multitude of possible outcomes, a directed verdict is not a suitable remedy in this case. Although the ultimate cut-off date of May 2011 was found not to be grounded in the evidence, this does not mean that there is no other point in time where the discrimination suffered by Mr. Hughes ceased to have effect on his income earning capacity. However, this is a question best left for the Tribunal, a specialized and expert decision-maker.

[98] Because of the reviewable error contained in the causation findings insofar as they relate to the flawed determination of the ultimate cut-off date of May 2011, the Remedial Decision must be quashed and the matter remitted to a differently constituted panel of the Tribunal for redetermination.

[99] Costs should be awarded in accordance with the result of these two proceedings. Since the parties did not make any particular submissions regarding costs, except claiming them, costs shall be assessed on a party-to-party basis in accordance with column III of the table to Tariff B, as provided for in section 407 of the *Federal Courts Rules*, SOR/98-106.

[100] As a confidentiality order protecting certain documents and information of a confidential nature filed in these proceedings was issued, on consent, for each file on November 15, 2018, a confidential draft of these Reasons was communicated to the parties on July 24, 2019, to allow them to propose redactions, if necessary, to the public version of said Reasons. On July 30, 2019, counsel for Mr. Hughes proposed certain redactions to paragraph 83 of these Reasons. Counsel for the Attorney General consented to the proposed redactions. I agree that these redactions are justified.

[101] A Confidential version as well as a Public version of these Reasons will therefore be issued simultaneously and a copy of each will be filed in both Court file T-1286-18 and Court file T-1293-18.

JUDGMENT in files T-1286-18 and T-1293-18

THIS COURT'S JUDGMENT is that:

1. The Application for Judicial Review in Court file T-1286-18 is dismissed;
2. The Application for Judicial Review in Court file T-1293-18 is granted in part;
3. The decision of the Canadian Human Rights Tribunal, dated June 1, 2018, in file number T1656/01111, is set aside insofar as it relates to the determination of the ultimate cut-off date of May 2011 for compensation for lost wages and benefits, and the matter is remitted to a differently constituted panel of the Tribunal for redetermination;
4. Costs in both Court files T-1286-18 and T-1293-18 are awarded to Mr. Hughes (the Respondent in Court file T-1286-18 and the Applicant in Court file T-1293-18) and shall be assessed on a party-to-party basis in accordance with column III of the table to Tariff B, as provided for in section 407 of the *Federal Courts Rules*.

"René LeBlanc"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1286-18
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v CHRIS HUGHES
DOCKET:	T-1293-18
STYLE OF CAUSE:	CHRIS HUGHES v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	VICTORIA, BRITISH COLUMBIA
DATE OF HEARING:	JUNE 19, 2019
JUDGMENT AND REASONS:	LEBLANC J.
DATED:	JULY 31, 2019

APPEARANCES:

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