

T.D. 11/97
Decision rendered on October 31, 1997

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

BETWEEN:

HARBANS SINGH RANDHAWA
Complainant

and

CANADIAN HUMAN RIGHTS COMMISSION
Commission

and

GOVERNMENT OF THE YUKON TERRITORY
Respondent

DECISION REGARDING REMEDY

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| TRIBUNAL: | Anne L. Mactavish | Chair |
| | Mohinder Dhillon | Member |
| | Magda Seydegart | Member |

APPEARANCES: Margaret Rose Jamieson,
Counsel for the Canadian Human
Rights Commission

Thomas Ulyett
Counsel for the Government of the
Yukon Territory

Harbans Singh Randhawa
On his own Behalf

DATES AND PLACE

OF HEARING: September 24-26, 1997
Whitehorse, Yukon

I. BACKGROUND

This case comes before this Tribunal through a somewhat unusual route. The complainant, Harbans Singh Randhawa, filed complaints against the respondent, the Government of the Yukon Territory (hereinafter 'YTG') in 1987 and 1991, alleging that he had been the victim of racial harassment in the workplace and that he had been denied three promotions because of his race.

A Tribunal, chaired by Donald Souch, was appointed to inquire into these complaints. This Tribunal (hereinafter 'the original Tribunal'), held approximately four weeks of hearings between September, 1992 and March, 1994. In a brief decision released on November 4, 1994, the original Tribunal found that the complaints had been substantiated, and provided, in general terms, the appropriate remedy. The original Tribunal further indicated that it would be providing full, written reasons for its decision, and would set out in more specific detail the remedial orders to be made pursuant to section 53 of the Canadian Human Rights Act (the 'CHRA'). These Reasons were issued on February 16, 1996, and provided for the reinstatement of Mr. Randhawa in one of several positions within the YTG at the first reasonable opportunity, compensation for hurt feelings and as well, provided a methodology for the quantification of the various financial losses sustained by Mr. Randhawa as a consequence of the discrimination that the original Tribunal had found to have existed in Mr. Randhawa's workplace. The Reasons further provided that the Tribunal would entertain further submissions in the event that the parties could not agree on the calculation of Mr. Randhawa's income loss.

The YGT filed a Notice of Appeal from the decision of the original Tribunal. Shortly before the Review Tribunal was to commence its hearing in the Fall of 1996, the appeal was withdrawn. Notwithstanding the appeal, since February of 1996, the parties have been in negotiations in an effort to resolve the outstanding issues. Between February of 1996 and May of 1997, the YGT paid Mr. Randhawa a total of \$232,795.61 on account of its obligations under the terms of the order of the original Tribunal. In addition, since February of 1997, the YTG has paid to Mr. Randhawa, on a monthly basis, the sum of \$2,084.25, which sum represents the respondent's calculation of the difference between Mr. Randhawa's salary in his present position and what he would have earned for the same period, had he

succeeded in obtaining the first promotion that the original Tribunal determined had been denied to him by reason of racism.

Notwithstanding the efforts of the parties, a number of issues with respect to remedy remain unresolved, and as a result, the parties asked that a Tribunal be appointed to deal with these. It should be noted that Mr. Souch, the Chair of the original Tribunal, is no longer a member of the Human Rights Tribunal Panel. The parties were in agreement that the outstanding matters raised discrete issues, and that it was therefore appropriate to have a new Tribunal appointed to resolve the remaining questions. This Tribunal was appointed on August 6, 1997, and held three days of hearing in Whitehorse from September 24-26, 1997.

II. TRIBUNAL MANDATE

Under the terms of its appointment, the mandate of this Tribunal was limited to interpreting and clarifying the orders and/or the relief granted by the original Tribunal.

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In interpreting and clarifying the orders and/or the relief granted by the original Tribunal, this Tribunal was guided by the apparent intention of the original Tribunal to attempt, insofar as was possible, to place Mr. Randhawa in the same position that he would have been, but for the discriminatory conduct of the YGT. This intent on the part of the original Tribunal is evident from a reading of the decision of the original Tribunal, and further, is consistent with the remedial nature of the legislation, the wording of section 53 of the CHRA, and the pronouncements of the Federal Court on the issue. (See, for example, *Canada (Attorney General) v. McAlpine* (1989), 99 N.R. 221.)

It would have been the Tribunal's preference to be able to quantify Mr. Randhawa's losses under each of the disputed heads of damage with precision, so as to enable the parties to reach a final resolution of this longstanding dispute, to permit them to close the book on this unfortunate episode and to get on with their lives. Regrettably, this is not possible. While certain losses can be quantified precisely, there is insufficient evidence before this Tribunal so as to permit the Tribunal to arrive at a dollar value for other losses. In these cases, the Tribunal has attempted to identify the appropriate methodology to be used to calculate the losses with as much specificity as possible, so as to guide the parties in determining the quantum of these losses between themselves. If, notwithstanding the guidance provided by this Tribunal, the parties are still unable to arrive at a mutually agreeable determination of the final

amount of Mr. Randhawa's losses, this Tribunal retains jurisdiction to deal with these unresolved issues on the terms that are spelled out further on in this decision.

Each of the outstanding issues will be dealt with in turn.

III. INSTATEMENT

The order of the original Tribunal provides that Mr. Randhawa is to be awarded the first of the following positions to become available:

- i) Field Mechanical Superintendent;
- ii) Mechanical Superintendent, Central Workshop; and
- iii) Heavy Equipment Mechanic Foreman.

The original tribunal further ordered that if the Heavy Equipment Mechanic Foreman position was the first position to become available, then Mr. Randhawa should be awarded the position, but only until such time as a Field Mechanical Superintendent or Mechanical Superintendent, Central Workshop position became available. Mr. Randhawa was to be awarded a position or positions without having to go through another selection or hiring process.

According to the testimony of Megan Slobodin, the Director of Staff Relations for the Public Service Commission of the YTG, the position of Mechanical Superintendent, Central Workshop had ceased to exist as of June of 1989, well before the decision of the original Tribunal. The Field Mechanical Superintendent position and the Heavy Equipment Mechanic Foreman position were each occupied at the time of the decision of the original Tribunal, and have not become vacant since that time.

The Canadian Human Rights Commission argues that the order of the original Tribunal should be interpreted so as to require the YTG to create an acting position for Mr. Randhawa to occupy until such time as one of the Field Mechanical Superintendent or Heavy Equipment Mechanic Foreman

positions becomes available. In support of this argument, counsel for the Commission makes reference to the order made by the original Tribunal on November 4, 1994, wherein the original Tribunal directs that Mr. Randhawa be instated by the YTG at the first reasonable opportunity into a position:

'... similar to the position that he was denied because of race upon

the terms which I will set out in more detail in my written reasons to follow' (at p. 2, emphasis added)

The Commission argues that, as one of the three positions identified by the original Tribunal as similar has now disappeared, it is open to this Tribunal to interpret the November 4, 1994 order of the original Tribunal to include acting positions and special assignments.

Counsel for the YTG argues that the order of the original Tribunal with respect to reinstatement was clear and unambiguous, and that it has not, as yet, been implemented because the triggering event (ie: a vacancy in one of the enumerated positions) has not yet occurred. Counsel contends that the order of the original Tribunal does not require the YTG to place Mr. Randhawa in any acting positions that may become available, although it has done so on a voluntary basis. It is not open to this Tribunal, counsel argues, to rewrite the order of the original Tribunal.

In the Tribunal's view, to accept the argument of the Canadian Human Rights Commission, and to require the YTG to create an acting position for Mr. Randhawa, pending a vacancy in either the Field Mechanical Superintendent or Heavy Equipment Mechanic Foreman positions would indeed amount to a rewriting of the order of the original Tribunal. This Tribunal is not sitting as a Review Tribunal, and it is not open to us to substitute another remedy for that provided by the original Tribunal. That said, we do interpret the order of the original Tribunal to mean that Mr. Randhawa is entitled to occupy either of the positions of Field Mechanical Superintendent or Heavy Equipment Mechanic Foreman as soon as either of them becomes open, whether that opening is permanent or only temporary. As a consequence, Mr. Randhawa is entitled, as of right, to any acting assignments that may become available with respect to either of the two positions, in addition to his absolute entitlement to fill either of the positions on a permanent basis, in accordance with the terms of the order of the original Tribunal. It should be noted that these rights are in addition to Mr. Randhawa's entitlement, like any employee, to apply for and/or be considered for other job opportunities, promotions, acting assignments and transfers.

IV. WAGE LOSS - MAY 20, 1986 TO FEBRUARY 16, 1996

a) Starting Salary

The order of the original Tribunal provides that Mr. Randhawa is to receive compensation for loss of wages, retroactive to May 20, 1986, which is the date that Mr. Randhawa's salary for the Field Mechanical Superintendent position would have been effective, had he been awarded the position.

The parties have not been able to agree to the appropriate starting salary figure to be used in calculating Mr. Randhawa's wage losses, although there is agreement with respect to the percentage adjustments to

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be made to the salary from May 20, 1986 for merit increases, salary rollbacks, wage and scale increases and the like.

Immediately prior to May 20, 1986, Mr. Randhawa occupied the position of Heavy Equipment Mechanic. As a member of the bargaining unit, he was paid at an hourly rate of \$19.38. This equates to an annual income of \$40,310.00, excluding overtime. The Field Mechanical Superintendent position was a management position. On May 20, 1986 the position was classified at the MG05 level, and had an assigned salary range of \$40,166 to \$52, 232.

There is a disagreement between the parties as to the applicable policy to be utilized in determining what Mr. Randhawa's starting salary would have been, had he been awarded the Field Mechanical Superintendent position effective May 20, 1986. The YTG maintains that the Management Salary Administration Policy in effect at the time provided:

6. Salary on Promotion:

6.1 When an employee is promoted into or within the Management Category to a position having a salary maximum which is at least 4% higher than the salary maximum for the previous position, the Public Service Commissioner, in consultation with the Deputy Minister of the hiring department, shall establish the employee's salary by considering the following factors:

- Degree of increase in responsibilities.
- The employee's qualifications in relation to the desirable qualifications of the position to be occupied.
- The relationship of the employee's new salary to that of immediate supervisor, subordinates and peers.

6.2 The salary increase on promotion will normally approximate 5% of the previous salary. Where, however, in the opinion of the Public Service Commissioner and the Deputy Minister of the hiring department, circumstances warrant, promotional increases may be greater or less than 5%, but not more than 10%. Notwithstanding the above, in no circumstances may a promotional increase result

in a salary which is below the minimum or above the maximum of the range for the new class. (Exhibit R-66, Tab 1)

That this was the applicable policy was confirmed by the testimony of Patricia Cumming, the Public Service Commissioner for the YTG. According to Ms. Cumming, this policy was revised in the early 1990's. The revised policy was filed as part of Exhibit HR-61.

The Canadian Human Rights Commission and Mr. Randhawa maintain that the version of the Management Salary Administration Policy marked as part of Exhibit HR-61 should be used to calculate the starting salary for the purpose of determining Mr. Randhawa's wage losses. This version of the Management Salary Administration Policy provides that:

6. Salary on Promotion:

6.1 When an employee is promoted into or within the Management Category to a position having a higher salary than the salary

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maximum for the previous position the Public Service Commissioner shall, in consultation with the Deputy Head of the department, determine the employee's salary by considering the following factors:

market conditions;
the combination of education and experience of the individual in relation to that of other employees in the same class;
the salary of the individual's supervisor and subordinates.
(Exhibit HR-61)

This policy does not create a 5% norm, nor establish a cap on salary increases of 10%.

The Canadian Human Rights Commission and Mr. Randhawa argue that he should be entitled to a starting salary of \$47,500, that is an increase of 17.9% over his bargaining unit salary. The Commission argues that in order to achieve substantive fairness, we should calculate Mr. Randhawa's salary increases as if he had made a two step progression from mechanic to foreman, and then foreman to superintendent, adjusting his salary each time. Mr. Randhawa relies upon a number of factors, including the salaries for other positions in the Central Workshop, the salary awarded to the individual who was actually awarded the Field Mechanical Superintendent

position in May of 1986, and Mr. Randhawa's own experience and qualifications.

According to Mr. Randhawa, it was the policy at HR-61 that was provided to his counsel by counsel for YTG on August 23, 1996 (Exhibit C-10). By letter dated Oct. 31, 1996, counsel for YTG confirmed that this was the policy that was in effect in May of 1986, and that the policy remained in effect to the date of the letter (Exhibit C-12). Mr. Randhawa testified that all subsequent settlement discussions were predicated upon the understanding that this was the appropriate policy. Mr. Randhawa stated that the first time that he saw the policy at Tab 1 of Exhibit R-66 was approximately six days before the commencement of this hearing.

Neither version of the Management Salary Administration Policy was dated, although Ms. Cumming testified that other policies within the YTG had their effective date noted on the face of the policy. No explanation was given for this apparent aberration.

In considering the evidence as a whole, the Tribunal is satisfied, on a balance of probabilities, that the policy appearing at Tab 1 of Exhibit R-66 was the policy in effect on May 20, 1986. In arriving at this conclusion, the Tribunal has considered the evidence of Ms. Cumming, the person responsible for the administration of personnel policies for the YTG, and thus the person best in a position to be aware of the applicable government policies. In addition, when one reviews the salary histories of a number of individuals working in Mr. Randhawa's area (Exhibit HR-63), it appears that the salaries actually awarded on promotion during the mid to late eighties were consistent with the policy at Tab 1 of Exhibit R-66 having been applied. While we accept Mr. Randhawa's testimony as to the information provided to him by counsel for the YTG as to the applicable policy, it appears that Mr. Randhawa has little independent knowledge of the relevant policies, and thus was largely dependant on YTG for that information. Although there was

a resounding silence from YTG when it came to explaining what had gone on in the summer and fall of 1996 with respect to the communication of the policy to Mr. Randhawa's counsel, the most probable explanation is that counsel for the YTG simply sent Mr. Randhawa the wrong policy. Why this error was not explained to Mr. Randhawa or corrected when it was discovered remains unclear. No doubt, the initial mis-communication and subsequent failure to communicate on the part of YTG were significant factors in the inability of the parties to agree on the appropriate compensation between

themselves, and have further served to heighten the tensions and hard feelings already existing between the parties.

Having concluded that the Management Salary Administration Policy at Tab 1 of Exhibit R-66 is the applicable policy, it remains to be determined how that policy would have been applied to Mr. Randhawa, had he been awarded the Field Mechanical Superintendent position on May 20, 1986.

The policy provides that the decision with respect to salary on promotion would be made by the Public Service Commissioner, in consultation with the Deputy Minister of the hiring department, in this case the Department of Community and Transportation Services. According to Megan Slobodin, neither of the individuals occupying these positions in May of 1986 were available after the release of the decision of the original Tribunal in February of 1996, and thus the YTG could not ask them what they would have done had they been required to fix a starting salary for Mr. Randhawa. In the absence of these individuals, and in an effort to pinpoint objective landmarks to assist in arriving at a fair starting salary for Mr. Randhawa, what the YTG did was to look at what other individuals who were promoted from bargaining unit positions into management positions in the Department of Community and Transportation Services during this time period actually received. Ms. Slobodin prepared a summary of the relevant pay records (Exhibit R-66, Tab 2), which discloses that two individuals were promoted from bargaining unit positions into management positions - one in 1986 and the other in 1989. The first individual (Case # 1) went from a foreman position to a Mechanical Superintendent, Central Workshop position, and received a salary increase of 1.9%, taking his salary from \$47,112 to \$48,000 (See also Exhibit HR-63). The second individual (Case #2) was promoted from a foreman position to the Field Mechanical Superintendent position in 1989. His salary went up by 5% on his promotion to management.

According to Ms. Cumming, using this information, the YTG settled on the higher figure of 5% as the appropriate increase for the purpose of calculating Mr. Randhawa's wage loss.

Ms. Cumming also testified that a 5% salary increase on promotion was the norm, and that it was rare to deviate from the 5% figure, although such deviations did occur. Any increase over 10% would have required Cabinet approval.

No attempt was made to actually apply the three factors in the Management Salary Administration Policy to Mr. Randhawa's situation as it existed on May 20, 1986.

Using the 5% figure, Mr. Randhawa's salary would have gone from \$40,310 as a mechanic to \$42,326. The payments that have been made to date by the YTG are predicated upon this being the appropriate starting salary, adjusted annually to take into account various factors.

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In the Tribunal's view, the approach taken by the YTG, while taken in good faith, does not reflect the reality of Mr. Randhawa's situation as it existed in 1986. Looking at the criteria enumerated in Section 6.1 of the Policy, it is apparent that it is not appropriate to compare Mr. Randhawa to the two individuals used as comparators by the YTG. Both individuals moved from foreman positions into management. Their base salaries as foremen would have been significantly higher than was Mr. Randhawa's as a mechanic. By way of example, Mr. Randhawa's 1986 annualized mechanic's salary was \$40,310, whereas Case # 1 had an annualized salary as a foreman of \$47,112. It is clear that the relationship of the employee's new salary to that of their immediate supervisor, subordinates and peers is a factor that would be considered in arriving at the appropriate starting salary on promotion. While there was evidence that in some cases, supervisors were paid less than their subordinates, relativity clearly played a role in fixing salaries on promotion. It follows logically that a person moving from a mechanic position to a superintendent position would be more likely to receive a larger percentage increase than would an individual moving from the intermediate position of foreman to superintendent, in order to take into account the relativity factor.

Similarly, if one were to consider the degree of increase in responsibility, it follows that there would be a greater increase in responsibility going from a non-supervisory mechanic's position to that of superintendent than there would have been moving from foreman to superintendent. According to Ms. Cumming, foremen have supervisory responsibilities.

There is little evidence before the Tribunal with respect to the third factor, that is, the employee's qualifications in relation to the desirable qualifications of the position, that would enable us to make a comparative assessment of Mr. Randhawa's qualifications relative to others. We do, however, have a letter written on April 3, 1986 by R.B. Arnold, a member of the selection committee for the Field Mechanical Superintendent competition in the Spring of 1986 to D.T. Campbell, the Assistant Deputy Minister, Highways and Transportation at the Department of Community and Transportation Services (Exhibit HR-6). In this letter, Mr. Arnold reports to Mr. Campbell on the results of the interviews for the position. After describing the requirements and responsibilities of the position in some

detail, Mr. Arnold offers his observations with respect to each of the candidates. Mr. Arnold noted:

Har [Mr. Randhawa] has the best combination of general knowledge and experience of all candidates interviewed.

While this does not squarely address the issue of Mr. Randhawa's qualifications in relation to the desirable qualifications of the position, it does suggest that he was well qualified for the job. Mr. Arnold's letter also demonstrates the inappropriateness of using Case #1 as a comparator, Case #1 having also been a candidate for this position, and having, in Mr. Arnold's estimation, not as good a combination of general knowledge and experience as did Mr. Randhawa.

We are now placed in the difficult position of having to determine what two other individuals would have done in a given situation, more than eleven years ago. Applying the factors set out in section 6.1 of the Management Salary Administration Policy, on the evidence before us, the

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Tribunal is satisfied that the Public Service Commissioner and the Deputy Minister of Community and Transportation Services, presuming them to have been reasonable people, acting honestly and in good faith, would have concluded that Mr. Randhawa's situation justified deviating from the 5% norm, and warranted a salary increase at the upper limit of the range or 10%. For the purposes of calculating Mr. Randhawa's total wage loss, the Tribunal therefore orders the parties to use a starting salary as of May 20, 1986 of \$44,341 (ie: 10% over his mechanic's salary of \$40,310). From May 20, 1986, Mr. Randhawa's salary is to be adjusted in accordance with the percentage changes listed in Schedule A-i-2, at page 5 of the Tanner Financial Analysis Report (Exhibit HR-62). (For ease of reference, these adjustments will hereafter be referred to as 'the agreed upon annual adjustments'.)

To date, the YTG has paid Mr. Randhawa the sum of \$138,032.30 on account of lost wages for the period from May 20, 1986 to February 29, 1996 (being the end of the month in which the decision of the original Tribunal was released) (Exhibit R-66, Tab 4). YTG shall forthwith pay to Mr. Randhawa the difference between \$138,032.30 and the total wage loss for the same period, calculated as set out above (hereinafter 'the wage loss differential').

b) Increase on Reclassification

On June 30, 1989 the Field Mechanical Superintendent position was reclassified upwards from the MG05 level to the MG06 level. Although it was initially in dispute, by the conclusion of the hearing the parties were in agreement that 4% was the appropriate salary increase at the time of reclassification (Transcript, pp. 3386-7) The 4% figure has been incorporated in to the agreed upon annual adjustments.

c) Interest

The order of the original Tribunal provided that Mr. Randhawa is to receive interest on the lost wages, such interest to be paid from May 20, 1986 until the date of payment at the same rate of interest as the Court Order Interest Rate established pursuant to the Court Order Interest Act of British Columbia. Interest was to be calculated on each year's loss of wages at the average rate in effect during the year.

The parties are now in agreement as to the appropriate rates and methodology to be used in calculating Mr. Randhawa's entitlement to interest (see Exhibit 62, Schedule A-ii, pages 1-9). Mr. Randhawa has been fully paid interest on his wage losses from May 20, 1986 to the end of February, 1996 to the extent that such wage losses have been calculated presuming a starting salary of \$42,326. In that the Tribunal has determined that Mr. Randhawa is entitled to a starting salary of \$44,341, Mr. Randhawa is entitled to be paid interest on the wage loss differential. Interest shall be calculated using the same rates and methodology as have been previously agreed to by the parties.

d) Interest Overpayment

According to Ms. Slobodin, on February 26, 1997 the YTG paid Mr. Randhawa a sum on account of interest on his wage loss to and including February, 1996. While the precise figure is not readily calculable from the evidence before the Tribunal, it appears that it was approximately

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\$13,000. Mr. Randhawa took issue with the methodology used to calculate his entitlement to interest on his wage loss, and YTG subsequently agreed to recalculate the interest owing in accordance with Mr. Randhawa's method. Using this method, Mr. Randhawa's total interest claim for his wage loss for the same period came to \$53,549.68, rather than the \$13,000 previously paid. On May 19, 1997, the YTG paid Mr. Randhawa \$53,549.68, without making any adjustment for the \$13,000 previously paid. A credit is now claimed for what the YTG claims was an overpayment of interest.

Mr. Randhawa does not know whether there had, in fact, been an overpayment of interest on the part of the YTG. Rather, Mr. Randhawa relies on Ms. Tanner's calculation of his losses. A review of the Tanner report and Ms. Tanner's testimony reveals that she simply calculated Mr. Randhawa's entitlement to interest, premised upon a starting salary of \$47,500, and set off against those losses the payments received from the YTG.

The Tribunal is satisfied, based upon a consideration of all of the evidence, that the YTG did pay Mr. Randhawa more interest than he was entitled to on the amount which has been paid on account of wage losses to February, 1996. The YTG is therefore entitled to set off against the monies owing to Mr. Randhawa pursuant to this award the sum of \$13,000 to reimburse the YTG for its overpayment of interest.

V. CONTINUING COMPENSATION

a) Monthly Payments

The original Tribunal provided that commencing on February 16, 1996, every two months Mr. Randhawa was to be paid an amount representing the difference, if any, between what he actually earned as a mechanic, exclusive of overtime, and what he would have made as a Field Mechanical Superintendent, until such time as he is appointed to either the Field Mechanical Superintendent or Mechanical Superintendent Central Workshop position.

It appears that the parties have been able to resolve the issue of Mr. Randhawa's entitlement to this continuing compensation. The parties agree that from March 1, 1996, Mr. Randhawa shall be paid the sum of \$2,084.25 per month in satisfaction of Mr. Randhawa's claims under this head (Transcript, p. 3327, Tanner Report, Schedule A-i). This agreement appears to have been reached notwithstanding the fact that the sum of \$2,084.25 as a monthly wage differential has been arrived at using a 5% increase on promotion (Exhibit R-66, Tab 3).

On February 26, 1997 the YTG paid Mr. Randhawa the sum of \$22,927.00, which sum represented Mr. Randhawa's lost wages from March 1, 1996 to January 31, 1997 (11 months x \$2,084.25). The order of the original Tribunal requiring bi-monthly payments was modified by the agreement of the parties, and the YTG has paid Mr. Randhawa the sum of \$2,084.25 each month since February of 1997.

As a result of the agreement of the parties, no further order will be made in this regard.

b) Interest on Continuing Wage Loss

The order of the original Tribunal provides:

(e) The Complainant shall receive interest on the loss of wages to be paid pursuant to (b) above. (at p. 63)

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Paragraph (b) referred to relates to compensation for lost wages up to the date of the decision (ie: February 16, 1996). The decision goes on, in paragraph (c), to deal with the issue of continuing compensation. No mention is made in the decision with respect to the payment of interest on the continuing compensation.

As noted in the preceding section, it was not until February 26, 1997 that Mr. Randhawa was paid a lump sum of \$22,927, representing the monthly payments for the period from the date of the decision. Mr. Randhawa claims interest on this amount. YTG argues that no interest is payable on this amount under the terms of the decision of the original Tribunal .

As previously stated, there is no mention of interest on the continuing compensation in the order of the original Tribunal, no doubt because the original Tribunal assumed that the payments would be made right away, and no loss sustained as a result. With the benefit of hindsight we can say that had we been the Tribunal originally hearing this matter, we would have ordered that interest be paid on this amount. However, given the limited nature of our mandate, we cannot now go back and re-write the order of the original Tribunal so as to provide for the payment of interest. Accordingly, no interest shall be paid on the continuing compensation.

c) Adjustment for Acting Position

Mr. Randhawa testified that from October 1, 1996 to March 31, 1997 he acted in the position of Heavy Equipment Mechanic Foreman, and that he was paid at the rate for a foreman for that period. In addition, Mr. Randhawa continued to receive the sum of \$2,084.25 per month from the YTG as his monthly continuing compensation. In other words, no adjustment was made for Mr. Randhawa's increased level of pay while he was acting as a foreman. Such an adjustment should have been made, and the YTG is entitled to a credit for the amount of the difference between what Mr. Randhawa actually earned as a foreman for the six month period and his mechanic's salary.

VI. INCOME TAX GROSS-UP

The order of the original Tribunal provided, with respect to Mr. Randhawa's wage losses to the date of the decision, that Mr. Randhawa should not be required to pay any more income tax than he would have had to pay had he been receiving his income annually since May 20, 1986.

Thus far in the 1997 taxation year, Mr. Randhawa has received a lump sum payment of \$138,032 with respect to lost wages from May 20, 1986 to the end of February, 1996, and \$66,549.68 on account of interest. Obviously, significantly more income tax will be payable by Mr. Randhawa by reason of this receiving his compensation in one tax year than would have otherwise been payable had he received the income as it should have been earned in the normal course over the intervening period. Mr. Randhawa is therefore entitled to a 'gross-up' to take into account the income tax consequences to him of receiving this compensation in this fashion.

The parties are in agreement that the appropriate methodology for calculating the gross-up is that used by Ms. Tanner in Schedule B of her Report (Exhibit HR-62). The schedule will have to be recalculated to take into account the additional amounts payable to Mr. Randhawa by YTG pursuant to this award.

VII. BENEFITS

The order of the original Tribunal provided that Mr. Randhawa was to receive the same employee benefits as he would have received in the Field Mechanical Superintendent position, retroactive to May 20, 1986.

a) Disability Insurance, Public Service Health Care Plan and Life Insurance

As of May 26, 1997, Mr. Randhawa subscribed to the Public Service Management Insurance Plan benefits, including a 100% employer paid Long Term Disability Plan, basic Life Insurance, Accidental Death and Dismemberment Insurance, Dependant's Life Insurance, and 100% employee paid Supplementary Life Insurance. Compensation is claimed for the loss of benefits for the period up to May 26, 1997.

The parties are in agreement that Mr. Randhawa is entitled to be paid the sum of \$1,237.03, which sum represents the difference between what Mr. Randhawa paid as a bargaining unit employee and the amount that he would have had to pay as a management employee for disability insurance and Public Service Health Care Plan premiums. Accordingly, the Tribunal orders the YTG to pay forthwith to Mr. Randhawa the sum of \$1,237.03.

With respect to life insurance, as a management employee, Mr. Randhawa was entitled to coverage equal to two times his annual salary.

Mr. Randhawa testified that at various times between May of 1986 and May of 1997, he had purchased replacement Life Insurance in the policy amount of \$100,000, with the exception of a three month period in 1987-88, when he had \$150,000 coverage. Over the eleven year period he spent a total of \$6,354.44 on premiums, for which he seeks reimbursement.

The YTG does not dispute its obligation to compensate Mr. Randhawa for the replacement cost of the insurance coverage. Counsel for the YTG argues, however, that the coverage purchased by Mr. Randhawa exceeded two times Mr. Randhawa's salary, and that their obligation to provide compensation should be pro-rated accordingly.

While the coverage that would have been available to Mr. Randhawa through the YTG in 1986 would have been slightly less than the replacement coverage he obtained (2 x \$44,341 or \$88,682 versus \$100,000), the evidence suggests that by 1996, twice Mr. Randhawa's annual salary as a Field Mechanical Superintendent would have exceeded \$100,000 (see Exhibit R-66, Tab 3). Further, there is no evidence before the Tribunal that an individual, purchasing life insurance on the open market, could have purchased coverage in a policy amount such as \$88,682, rather than in round numbers such as \$50,000 or \$100,000. As a result, the Tribunal finds that Mr. Randhawa's efforts to replace his life insurance coverage were reasonable, and that he should be fully indemnified for these losses. The Tribunal therefore orders the YTG to pay to Mr. Randhawa the sum of \$6,354.44 for the loss of the life insurance benefit.

b) Pension Losses

There is no material difference in the percentage contributions between bargaining unit employees and management employees - in each case the employer contributes an amount equal to 7.5% of salary, which amount is matched by the employee.

The YTG has offered to reconstruct Mr. Randhawa's salary for the period from May 20, 1986 to February 16, 1996 to account for his increased salary for the purposes of making the necessary pension contributions so as to bring his pension entitlement to the same place that it would have been had Mr. Randhawa occupied the Field Mechanical Superintendent position as of May 20, 1986.

The pension plan for YTG employees is evidently administered by the Federal Public Service Superannuation authorities. Although no evidence was led by any of the parties directly on this point, reference was made in a letter from counsel for the YTG to the fact that the Superannuation Branch of Treasury Board had characterized Mr. Randhawa's award in a manner that would preclude the recalculation and supplementing of Mr. Randhawa's pension contributions for the last ten years. (Exhibit C-12)

Although this information was received sometime prior to October 31, 1996, no effort appears to have been made by any of the parties to clarify the situation, to challenge the Treasury Board decision, if indeed such a decision had been made, or to determine what, if any options are available to Mr. Randhawa under the terms of the Superannuation Plan. Indeed, it appears that to date, no formal request may in fact have been made to the pension authorities to permit Mr. Randhawa's pension entitlement to be recalculated based upon his revised salary history.

The Tribunal orders the YTG to formally request, in writing, within seven days of the date of this decision, that the appropriate Federal Superannuation authorities permit contributions to the credit of Mr. Randhawa's pension account to be made by the YTG and by Mr. Randhawa, based upon Mr. Randhawa's revised salary history, calculated in accordance with the terms of this decision, so as to permit Mr. Randhawa to be placed in the same position for pension purposes that he would have been in, but for the discrimination. The YTG is further ordered to provide the Federal pension authorities with a copy of this decision together with a copy of the decision of the original Tribunal, at the time of their written request, and to use its best efforts and to take all steps necessary to ensure that the request is treated favourably.

While the Federal Superannuation authorities are not parties to this case, and thus no order may be made that is binding upon them, the Tribunal urges the Federal Superannuation authorities to give careful and favourable consideration to this request, so as to ensure that the remedial goals of the Canadian Human Rights Act are fully carried out.

The YTG may withhold from the sums otherwise payable pursuant to this decision, for a period not to exceed ninety days, an amount equal to 7.5% of the value of the wage loss differential for the period from May 20, 1986 to February 16, 1996. In the event that it is possible to supplement Mr. Randhawa's pension account, then this sum shall be paid by the YTG to the appropriate pension authority, along with any amounts which have been withheld from the monies previously paid for wage losses for the same period on account of pension contributions, as Mr. Randhawa's share of the pension contributions.

In the event that approval with respect to the supplementing of Mr. Randhawa's pension account has not been received from the Federal pension authorities within ninety days of the date of this decision, then all of the amounts retained on account of Mr. Randhawa's contributions are to be paid forthwith to Mr. Randhawa, together with an amount representing the

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employer's share of the pension contributions that should have been made on Mr. Randhawa's account for the relevant period.

There was no evidence before this Tribunal as to what the income tax consequences would be for Mr. Randhawa if he were to receive the value of his own pension contributions together with an amount equal to the value of the employer's contribution as well as the interest provided for in the next section as a lump sum payment rather than having the money (exclusive of interest) paid into his pension account. In the event that there are any adverse income tax consequences for Mr. Randhawa as a result of the payment being made in this fashion, then the YTG is to pay to Mr. Randhawa an additional amount sufficient to ensure that he suffers no adverse financial consequences as a result.

c) Interest on Lost Benefits

The original Tribunal provided :

I am not inclined to award interest for loss of benefits at this time as I do not know what this loss is. However, the parties can address this issue further with the Tribunal if it becomes an issue. (at p. 63)

Mr. Randhawa and the Canadian Human Rights Commission are now claiming interest on the lost employment benefits (see Exhibit HR-62).

From a review of the decision of the original Tribunal, it is apparent that the original Tribunal did not finally determine the issue of Mr. Randhawa's entitlement to be paid interest on his lost employment benefits, but rather retained jurisdiction to deal with the matter at a later date, if necessary.

Insofar as the Disability Insurance, Public Service Health Care Plan and Life Insurance benefits are concerned, it appears that Mr. Randhawa actually expended money over the period from May of 1986 to May of 1997 which he would otherwise not have had to expend, but for the discrimination. The Tribunal therefore orders that Mr. Randhawa be paid

interest on these losses at the rates and using the method that the parties have agreed to for the calculation of interest on Mr. Randhawa's wage losses.

The issue of interest on Mr. Randhawa's pension losses is more problematic. If the YTG can reconstruct Mr. Randhawa's pension so as to place him in the same position for pension purposes that he would have been in, but for the discrimination, then no interest should be paid, as no loss will have been suffered by Mr. Randhawa in this regard. If such a reconstruction is not possible, and it is necessary to return to Mr. Randhawa any deductions that have been made from his salary for his share of pension contributions, then interest shall be payable on this amount, calculated as aforesaid. Similarly, interest shall be payable on YTG's share of the pension contributions, in the event that it becomes necessary to pay this money directly to Mr. Randhawa.

VIII. RETENTION OF JURISDICTION

In the event that the parties are unable to agree to the calculation of Mr. Randhawa's entitlement under one or more of the heads of damage referred to in this decision, then the parties may make further submissions

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to the Tribunal, in writing, providing however, that any such submissions must be received no later than thirty days from the date of this decision.

DATED THIS DAY OF OCTOBER, 1997

Anne L. Mactavish

Mohinder Dhillon

Magda Seydegart