Date: 20070821

Docket: A-52-06

Citation: 2007 FCA 268

CORAM: **DESJARDINS J.A.**
PELLETIER J.A.
MALONE J.A.

BETWEEN:

DR. SHIV CHOPRA

Appellant

and

ATTORNEY GENERAL OF CANADA
AND THE CANADIAN HUMAN RIGHTS COMMISSION

Respondents

Heard at Ottawa, Ontario, on March 6, 2007.

Judgment delivered at Ottawa, Ontario, on August 21, 2007.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: DESJARDINS J.A.
MALONE J.A.

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REASONS FOR JUDGMENT

PELLETIER J.A.

Introduction

[1] In the fall of 1992, the appellant, Dr. Shiv Chopra, filed a complaint with the Canadian Human Rights Commission (the Commission), alleging that his employer, the Department of National Health and Welfare (the Employer), had discriminated against him in the staffing of a management position. A tribunal appointed under the *Canadian Human Rights Act*, R.S.C. 1985, c. H-5 (the Act) eventually agreed with him and awarded him compensation for his resulting losses. Dr. Chopra sought judicial review of that decision, claiming that the Tribunal did not apply the

correct legal principles in determining the compensation to which he was entitled. Phelan J. dismissed his application for judicial review, thus giving rise to this appeal.

The Facts

[2] In the fall of 1990, the position of Director of Bureau of Human Prescription Drugs, Department of National Health and Welfare, became vacant. Dr. Chopra, a long term employee, was interested in applying for the position and suggested to the Employer that he be appointed to the position on an acting basis (the Acting position). Since two other candidates were also interested in the position, Dr. Chopra suggested that they all be rotated through the position. This suggestion was rejected and management's preferred candidate was appointed to the position on an acting basis. When it came time to fill the position on a full-time permanent basis (the Indeterminate position), Dr. Chopra applied but was screened out by the selection committee because he lacked recent management experience. The incumbent in the Acting position was successful in the competition for the Indeterminate position.

[3] Dr. Chopra complained to the Commission, which sent the matter to the Human Rights Tribunal for adjudication. In a first decision, the Tribunal dismissed Dr. Chopra's complaint: see *Chopra v. Canada (Department of National Health and Welfare)*, [1996] C.H.R.D. No. 3. This decision was overturned by the Federal Court on the basis that the Tribunal ought to have considered certain statistical evidence which it had excluded. The matter was referred to the Tribunal for a new hearing: see *Canada (Canadian Human Rights Commission) v. Canada (Department of National Health and Welfare) (re Chopra)*, [1998] F.C.J. No. 432, affirmed [1999]

F.C.J. No. 40. The matter was heard before a differently constituted Tribunal. The new Tribunal split the hearing into a liability and a remedy phase. After an exhaustive review of the evidence, including the statistical evidence, the Tribunal concluded that Dr. Chopra was denied the opportunity to serve in the Acting position as a result of discrimination on the basis of his national or ethnic origin. No application for judicial review was taken from that decision. In the remedy phase, the Tribunal awarded Dr. Chopra certain compensation but limited that compensation on various grounds. That decision, the Remedy decision, reported at [2004] C.H.R.D. No. 23 (*Chopra v. Health Canada),* was the subject of an application for judicial review. The application judge dismissed Dr. Chopra's application, for reasons to which we shall return, in a decision reported as *Chopra v. Canada (Attorney General),* 2006 FC 9, [2006] F.C.J. No. 33.

The Remedy Decision

[4] The substrate for this appeal is the Remedy decision. In it, the Tribunal began by setting out the legal principles which it would apply in considering the question of remedies. Relying on jurisprudence from this Court, in particular the reasons of Marceau J.A. in *Canada (Attorney General) v. Morgan (C.A.),* [1992] 2 F.C. 401 (*Morgan*), the Tribunal held that "a complainant seeking a remedy with respect to a discriminatory denial of a higher employment position need only present evidence of a serious possibility of success.": (see Remedy decision, at para. 11). On the other hand, the amount of compensation payable is a function of the probability of the complainant being appointed to the position: see Remedy decision, at para. 33. Applying this principle to the facts before it, the Tribunal concluded that there existed a mere but serious possibility that Dr. Chopra would have been appointed to the Acting position but for the Employer's discrimination.

Given that Dr. Chopra himself had suggested rotating the three candidates through the position on an "acting" basis, the Tribunal concluded that sharing the position between the three interested candidates would have been a reasonable alternative. As a result, Dr. Chopra's compensation was set at wages and benefits for one third of the period during which the position was filled on an acting basis, namely 22 weeks.

[5] The Tribunal then considered whether Dr. Chopra was entitled to any compensation with respect to the Indeterminate position. In its Liability decision, the Tribunal found that the selection committee had legitimately screened Dr. Chopra out of the competition for the Indeterminate position because he lacked one of the necessary qualifications, recent management experience. In the Remedy decision, the Tribunal noted that even if Dr. Chopra had possessed the necessary recent management experience, he would not necessarily have been selected for the Indeterminate position. One of the requirements for appointment to the job was experience as a spokesperson for Health Canada. It was unclear whether Dr. Chopra had this experience (Remedy decision, para. 26). Nonetheless, the Tribunal concluded that had Dr. Chopra had the benefit of sixteen weeks in the Acting Director position, there was a serious possibility that he would have been successful in the competition for the Indeterminate position.

[6] Having reached that conclusion, the Tribunal then considered, for the purpose of determining the quantum of the compensation to which he was entitled, the probability that Dr. Chopra would have been awarded the Indeterminate position. In addition to the issue of management experience and the question of acting as a spokesman for the Employer, there was also

uncertainty as to whether he would have passed the second, more rigorous, assessment. For these reasons, the Tribunal concluded that while there was a serious possibility that Dr. Chopra would have been appointed to the position, the probability of his appointment was sufficiently low that it reduced his compensation for wages and benefits by two thirds of the amounts otherwise payable: see Remedy decision, at para. 36.

[7] The Tribunal then turned its mind to the questions of foreseeability and mitigation. It held that Dr. Chopra had not taken all reasonable measures to mitigate his damages. For this reason, compensation was limited to a period of six years following April 21, 1992, the date when the successful candidate was confirmed: see Remedy decision, at para. 39 and 40.

[8] Dr. Chopra claimed that appointment to the Indeterminate position would have allowed him to progress to other positions at the EX (Executive) level and that the award for lost compensation should reflect this progression. The Tribunal considered the expert evidence in support of Dr. Chopra' position but concluded that the likelihood of appointment to other EX positions was simply so remote as to be speculative. Promotions were not automatic and EX positions were non-generic: see Remedy decision, at para. 46. The Tribunal concluded that there was no serious possibility of appointment to any other EX-level position at some time in Dr. Chopra's career on the basis of his limited (imputed) service in the Acting position.

[9] Dr. Chopra also claimed that he should be immediately appointed to an EX-level position. The Tribunal reasoned that having awarded Dr. Chopra compensation for the loss associated with

the Indeterminate position, he had been awarded full compensation so that appointment to an EX position was not justified: see Remedy decision, at para. 51.

[10] With respect to non-pecuniary damages, the Tribunal found that since the acts of discrimination occurred prior to the 1998 amendments to the Act, when the $5,000 maximum award for non-pecuniary damages for pain and suffering was increased to $20,000, the $5,000 maximum applied. The Tribunal relied on *Nkwazi v. Canada (Correctional Service),* [2001] C.H.R.D. No. 1, which held that the 1998 amendments did not have a retrospective effect. Since the maximum of $5,000 was reserved for the most extreme cases, the Tribunal awarded $3,500.

[11] Finally, with respect to interest on the lost wages, the Tribunal was of the view that, despite the long delay between complaint and remedy, a result of the "sinuous course" that Dr. Chopra's case took, the circumstances did not warrant a departure from the norm. It awarded simple interest calculated at the rate generally used in tribunal decisions rather than compound interest, such interest to be calculated from October 1990. With respect to interest for non-pecuniary damages, the Tribunal held the total could not exceed the $5,000 maximum under the Act as it stood prior to the 1998 amendments. The Tribunal relied on *Canada (Attorney General) v. Hebert* (1995) C.H.R.R. D/375, in coming to this result.

Dr. Chopra's Application for Judicial Review

[12] Dr. Chopra sought judicial review of the Remedy decision. In doing so, he relied upon the following grounds of review, which he set out in his Notice of Application:

> a) the Tribunal erred in law in its interpretation and application of the principles of reasonable foreseeability and mitigation of damages. In particular, the Tribunal erred in concluding that these principles would have the effect of reducing the monetary award flowing from the denial to Dr. Chopra of an appointment to an indeterminate EX-02 position;
>
> b) the Tribunal erred in law in not appointing Dr. Chopra to an EX-level position in spite of the fact that the Tribunal had concluded that, but for the discrimination, Dr. Chopra ought to have been appointed to the position of Director, The Bureau of Human Prescription Drugs;
>
> c) the Tribunal erred in law in its interpretation of section 53 of the *Canadian Human Rights Act* and, in particular, in concluding that the non-pecuniary damages available to Dr. Chopra were limited to $5, 000;
>
> d) the Tribunal erred in concluding that only simple interest would be payable on the monies owing.

The Standard of Review

[13] Since this is an appeal from the decision of a superior court sitting in judicial review of an inferior tribunal, the standard of review is taught at paragraph 43 of the decision of the Supreme Court of Canada in *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226 (*Dr. Q)*:

> …The role of the Court of Appeal was to determine whether the reviewing judge had chosen and applied the correct standard of review, and in the event she had not, to assess the administrative body's decision in light of the correct standard of review, reasonableness. At this stage in the analysis, the Court of Appeal is dealing with appellate review of a subordinate court, not judicial review of an administrative decision. The question of the right standard to select and apply is one of law and, therefore, must be answered correctly by a reviewing judge…

[14] The application judge dealt with the issue of standard of review as follows:

> [38] As to the determination of the applicable legal principles, while the Court is sensitive to the fact that these principles arise in a human rights context, rather than as a matter of general law, the determination is one of law; a function generally left to courts. This is particularly the case here, where the determination of the proper legal principles flows from

> the Court of Appeal's decision *Morgan*, *above*. Therefore, the appropriate standard of review on the applicable legal principles is that of correctness.
>
> [39] With respect to findings of fact, particularly where the decision-maker must base part of the conclusions on his or her observations of the witnesses, the Court should accord considerable deference to the Tribunal member consistent with the Supreme Court's decision in *Royal Oak Mines Inc. v. Canada (Labour Relations Board)*, [1996] 1 S.C.R. 369 at 408. It is my conclusion that the standard of review should be reasonableness *simpliciter*.
>
> [40] As to the standard of review on issues of mixed law and facts, which are essentially the conclusionary aspect of the Tribunal's function, section 53(2) and (3) give the Tribunal a broad discretion. In light of that discretion and the predominantly fact-driven nature of the remedy phase, the appropriate standard of review is likewise reasonableness *simpliciter*.

[15] In summary, the application judge found that the standard of correctness applied to questions of law while the standard of reasonableness applied to questions of mixed fact and law.

[16] The application judge did not distinguish between questions of general law which the Tribunal dealt with in the course of its inquiry, and questions of law arising from the Tribunal's interpretation of its home legislation. The Supreme Court has not only drawn that distinction but it has also distinguished between questions of general law, on the one hand, and questions of general law with respect to which a tribunal has developed a particular expertise by reason of the inter-relatedness of those questions with other questions lying at the heart of the tribunal's expertise, on the other. The Supreme Court has found that deference to tribunal decisions is appropriate where the tribunal is interpreting questions of general law with which it has a particular expertise as well as when the tribunal is interpreting its own statute: see *Toronto (City) v. Canadian Union of Pubic Employees (C.U.P.E.), Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at paragraphs 70 to 75.

[17] Consequently, the application judge's finding that the standard of review for questions of law was correctness was overly broad. The standard varies with the nature of the legal question in issue. While the standard may be correctness, it need not be so.

[18] As for findings of fact and findings of mixed fact and law, no objection was taken to reasonableness as the appropriate standard of view. I will therefore approach the case on that basis.

The Relevant Legislation

[19] Before venturing further into the application judge's reasons, it will be useful to set out the relevant statutory provisions:

4. A discriminary practice, as described in sections 5 to 14.1, may be the subject of a complaint under Part III and anyone found to be engaging or to have engaged in a discriminatory practice may be made subject to an order as provided in sections 53 and 54.	4. Les actes discriminatoires prévus aux articles 5 à 14.1 peuvent faire l'objet d'une plainte en vertu de la partie III et toute personne reconnue coupable de ces actes peut faire l'objet des ordonnances prévues aux articles 53 et 54.
. . .	. . .
7. It is a discriminatory practice, directly or indirectly,	**7.** Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, par des moyens directs ou indirects :
(*a*) to refuse to employ or continue to employ any individual, or	*a*) de refuser d'employer ou de continuer d'employer un individu;
(*b*) in the course of employment, to differentiate adversely in relation to an employee,	*b*) de le défavoriser en cours d'emploi
on a prohibited ground of discrimination.	

. . .

40. (1) Subject to subsections (5) and (7), any individual or group of individuals having reasonable grounds for believing that a person is engaging or has engaged in a discriminatory practice may file with the Commission a complaint in a form acceptable to the Commission.

. . .

53. (2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or 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:

. . .

(*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;

…

(*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.

. . .

40. (1) Sous réserve des paragraphes (5) et (7), un individu ou un groupe d'individus ayant des motifs raisonnables de croire qu'une personne a commis un acte discriminatoire peut déposer une plainte devant la Commission en la forme acceptable pour cette dernière.

. . .

53. (2) À l'issue de l'instruction, le membre instructeur qui juge la plainte fondée, peut, sous réserve de l'article 54, ordonner, selon les circonstances, à la personne trouvée coupable d'un acte discriminatoire :

. . .

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

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

…

e) d'indemniser jusqu'à concurrence de 20 000 $ la victime qui a souffert un préjudice moral.

(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.
(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.

[20] At the time of Dr. Chopra's complaint, section 53(2) was section 41(2), and provided as follows:

41. (2) If, at the conclusion of its inquiry, a Tribunal finds that the complaint to which the inquiry relates is substantiated, subject to subsection (4) and section 42, it may make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in such order any of the following terms that it considers appropriate:	41. (2) À l'issue de son enquête, le tribunal qui juge la plainte fondée peut, sous réserve du paragraphe (4) et de l'article 42, ordonner, selon les circonstances, à la personne trouvée coupable d'un acte discriminatoire
…	…
(*b*) that such person make available to the victim of the discriminatory practice on the first reasonable occasion such rights, opportunities or privileges as, in the opinion of the Tribunal, are being or were denied the victim as a result of the practice;	*b*) d'accorder à la victime, à la première occasion raisonnable, les droits, chances ou avantages dont, de l'avis du tribunal, l'acte l'a privée;
(*c*) that such person compensate the victim, as the Tribunal may consider proper, for any or all of the wages that the victim was deprived of and any expenses incurred by the victim as a result of the discriminatory practice; and	*c*) d'indemniser la victime de la totalité, ou de la fraction qu'il juge indiquée, des pertes de salaire et des dépenses entraînées par l'acte; et

. . .	. . .
(3) In addition to any order that the Tribunal may make pursuant to subsection (2), if the Tribunal finds that	(3) Outre les pouvoirs que lui confère le paragraphe (2), le tribunal, ayant conclu
(*a*) a person is engaging or has engaged in a discriminatory practice wilfully or recklessly, or	*a*) que la personne a commis l'acte discriminatoire de propos délibéré ou avec négligence, ou
(*b*) the victim of the discriminatory practice has suffered in respect of feelings or self-respect as a result of the practice,	*b*) que la victime a souffert un préjudice moral par suite de l'acte discriminatoire,
the Tribunal may order the person to pay such compensation to the victim, not exceeding five thousand dollars, as the Tribunal may determine.	peut ordonner à la personne de payer à la victime une indemnité maximale de cinq mille dollars.

Summary and Analysis of the Application Judge's Reasons

i) the Acting position and the Indeterminate position

[21] The application judge began his analysis by reviewing the applicable legal principles. He relied heavily upon this Court's decision in *Morgan* to establish the principles applicable to the assessment of compensation in discrimination in employment cases. *Morgan* is an unusual case in that it contains three opinions which differ in important ways. The application judge relied upon the following passages from the reasons given by Marceau J.A.:

> …To establish that real damage was actually suffered creating a right to compensation, it was not required to prove that, without the discriminatory practice, the position would certainly have been obtained. Indeed, to establish actual damage, one does not require a probability. In my view, a mere possibility, provided it was a serious one, is sufficient to prove its reality. But, to establish the extent of that damage and evaluate the monetary compensation to which it could give rise, I do not see how it would be possible to simply disregard evidence that the job could have been denied in any event. The presence of such uncertainty would prevent an assessment of the damages to the same amount as if no such

> uncertainty existed. The amount would have had to be reduced to the extent of such uncertainty.
>
> …
>
> …I am afraid, I say it with respect, that there exists some confusion between the right to obtain reparation for a damage sustained and the assessment of that damage. While the particular nature of the human rights legislation -- which has been said to be so basic as to be near-constitutional and in no way an extension of the law of tort (see e.g. *Robichaud v. Brennan* (*sub nom. Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84. at p. 89, and *Bhadauria v. Board of Governors of Seneca College (sub nom. Seneca College v. Bhadauria)*, [1981] 2 S.C.R. 181) -- renders unjustifiable the importation of the limitations to the right to obtain compensation applicable in tort law, the assessment of the damages recoverable by a victim cannot be governed by different rules. In both fields, the goal is exactly the same: make the victim whole for the damage caused by the act source of liability. Any other goal would simply lead to an unjust enrichment and a parallel unjust impoverishment. The principles developed by the courts to achieve that goal in dealing with tort liability are therefore necessarily applicable. It is well known that one of those principles has been to exclude from the damages recoverable the consequences of the act that were only indirect or too remote.
>
> [*Morgan*, at para. 15 and 19.]

[22] The application judge took the following propositions from these passages:

> - the standard of proof to establish real loss (from discrimination) has been lowered from the normal standard of probability to the criterion of a "mere but serious possibility" that the individual would have obtained the position (Reasons for Order, at para. 47).
>
> - once the existence of the loss is established, the evaluation of the extent of the loss requires an assessment of "uncertainties, contingencies and likelihoods – an exercise of foreseeability and remoteness (Reasons for Order, at para. 48).

[23] The application judge then applied these propositions to the Tribunal's treatment of the staffing of both the Acting position and the Indeterminate position. In the case of the Acting position, the application judge took no issue with the finding that there was a serious possibility that Dr. Chopra would have been awarded the position. He agreed with the Tribunal's reasoning that

Dr. Chopra's recovery should be limited to the time he would have served in the Acting position if his suggestion had been accepted.

[24] As for the Indeterminate position, the application judge found reasonable the Tribunal's conclusion that if Dr. Chopra been given the opportunity to serve in the Acting position, there was a serious possibility that he would have been appointed to the Indeterminate position. Citing *Morgan* and *Canada (Attorney General) v. McAlpine (C.A.)*, [1989] 3 F.C. 530 (*McAlpine*), the application judge agreed that the Tribunal was entitled to consider the uncertainty as to whether Dr. Chopra would have actually been awarded the position in determining the amount of compensation payable. He declined to interfere with the reduction of Dr. Chopra's compensation by 2/3 to reflect that uncertainty.

[25] The application judge then considered the Tribunal's reduction in the period for which compensation was payable. He noted the Tribunal's reference to the foreseeable length of time during which the effects of discrimination could extend, as well as the evidence of Dr. Chopra's failure to mitigate his loss. In the end, he was not persuaded that the Tribunal's conclusions on this issue were unreasonable.

[26] In his appeal to this Court, Dr. Chopra argued that the Tribunal erred in law in importing tort law concepts into the determination of compensation payable under the Act. In his view, the only factor relevant to the calculation of his loss was proof of causation. Once it was shown that there was a nexus between the discrimination and the loss, then the entire loss was payable without regard

to probabilities. Furthermore, to the extent that mitigation is to be taken into account, the Tribunal erred in requiring him to show that he sought to mitigate his loss rather than imposing on the Employer the burden of showing that he had not.

[27] The issues raised on this aspect of the appeal have to do with the narrow question of the use of certain loss-limiting concepts from the law of remedies in the determination of compensation for victims of discrimination. Notwithstanding the lack of a majority in *Morgan* on the "mere but serious possibility" test, the application judge treated Marceau J.A.'s reasons as the current state of the law on this issue. That position was not attacked in argument before us.

[28] We are only asked to decide if the Tribunal was entitled to take foreseeability and mitigation into account so as to reduce the compensation which would otherwise be payable to Dr. Chopra under the heading of "wages of which he was deprived" as a result of the Employer's discriminatory practice. The application judge proceeded on the basis that this question was settled by this Court's decisions in *McAlpine* and *Morgan*. I am less certain that this is so.

[29] The application of forseeability to losses arising from discriminatory practices was first raised in this Court in *McAlpine*. After having decided that the complainant was not entitled to compensation for lost unemployment insurance benefits because the latter were not "wages" within the meaning of the Act, the Court went on to consider an alternate ground of review. Commenting on the application of "*restituo in intergrum*" as a principle of compensation, the Court held that "the proper test must also take into account remoteness or reasonable foreseeability whether the action is

one of contract or tort. Only such part of the actual loss resulting as is reasonably foreseeable is recoverable.": see *McAlpine*, at para. 13.

[30] This view was questioned by MacGuigan J.A. in *Morgan* who wrote:

> The notion of placing a cap on the amount to be awarded for lost wages based on a principle of reasonable foreseeability is one that, to my mind, cannot be deduced from *McAlpine*…
>
> This Court held that what are now paragraphs 53(2)(b), (c) and (d) of the Act did not permit or allow an award of compensation for foregone unemployment insurance benefits. That decision was the only one necessary for the disposition of the case, but the Court went on in obiter dicta to endorse the principle of reasonable foreseeability [Note: Reasonable foreseeability might be said to be the common-law principle whether the act was classified as being of contract or of tort: see *Asamera Oil Corporation Ltd. v. Sea Oil & General Corporation et al.*, [1979] 1 S.C.R. 633, at pp. 645 ff. Estey J. concludes, at p. 673, that "the same principles of remoteness will apply to the claims made whether they sound in tort or in contract".]. However, in my opinion, the Court applied that principle only to the kind of damages claimed: in other words, that it was not reasonably foreseeable by an employer that such an act of discrimination would lead to a loss of unemployment insurance benefits.
>
> [Parenthetical comment in original.]

[31] In his reasons in *Morgan*, Marceau J.A. agreed that there should be a limit placed on the liability for consequences flowing from a discriminatory practice but was disinclined to use reasonable foreseeability for that purpose, as the latter appeared to him to be more appropriate to contractual losses. Mahoney J.A. referred to this issue only obliquely. After saying that he agreed with his colleagues that there must be a causal connection between the discriminatory practice and the amount of wages lost as a result, he went on to say that the time during which a causal connection exists is a matter to be determined in the circumstances of each case, thus suggesting causation-over-time as the limiting factor.

[32] If one were pressed to identify, in law school fashion, the *ratio decidendi* of *Morgan* on this issue, it seems to me that the most that could be said is that the three members of the Court agreed on the need for a limit on liability for the consequences flowing from a discriminatory practice, but the nature of that limit was uncertain. The members of the Court agreed that there must be causal connection between the discriminatory practice and the losses, but they did not agree as to whether foreseeability cut off liability for events past a certain point in time or past a certain event in the chain of causation. As a result, *Morgan* is not authority for the proposition that forseeability applies to limit the extent of loss recoverable, as opposed to the kind of loss recoverable.

[33] At common law, only those kinds of damages which are the reasonably foreseeable consequences of a wrongful act are recoverable as damages. Heads of damages which are not reasonably foreseeable are not recoverable.

[34] This issue was examined in *Cotic v. Gray* (1981), 33 O.R. (2d) 356, a decision of the Court of Appeal for Ontario at paragraph 76:

> 76 …The judgment of the Privy Council in *The "Wagon Mound" No. 1*, *supra*, overruled *Polemis*, *supra*, and made the requirement of reasonable foreseeability applicable to the damage suffered as well as to the duty owed. In other words, the damage suffered must be reasonably foreseeable. *Hughes v. Lord Advocate*, *supra*, modified this requirement so that it is not necessary that the wrongdoer foresee the precise kind of damage or injury. The damage or injury is not too remote if it is of a type or kind which was reasonably foreseeable or in the words of Dickson J. in *R. v. Cote*, [1976] 1 S.C.R. 595 at p. 604, 51 D.L.R. (3d) 224 at p. 252, 3 N.R. 341 sub nom. *Kalogeropoulos and Millette v. Cote, Minister of Highways and Ontario Provincial Police Force*:
>
> > It is not necessary that one foresee the "precise concatenation of events"; it is enough to fix liability if one can foresee in a general way the class or character of injury which occurred…

[35] In the context of compensation for losses suffered as a result of a discriminatory practice, the question of foreseeability does not arise for the simple reason that Parliament has set out the kind of losses which are recoverable. Paragraph 53(2)(*c*) of the Act provides that a Tribunal may make an order that the wrong-doer pay compensation for wages lost, and expenses incurred, as a result of the discriminatory practice.

[36] Human rights legislation does not create a common law cause of action (see *Seneca College of Applied Arts and Technology v. Bhadauria*, [1981] 2 S.C.R. 181, at p. 195). If one can only seek a remedy for a discriminatory practice from a tribunal appointed under the Act, then it follows that the complainant is limited to the remedies which the tribunal has the power to grant. It is not open to the complainant to seek to improve upon this by invoking "*restituo in integrum*".

[37] The fact that foreseeability is not an appropriate device for limiting the losses for which a complainant may be compensated does not mean that there should be no limit on the liability for compensation. The first limit is that recognized by all members of the Court in *Morgan*, that is, there must be a causal link between the discriminatory practice and the loss claimed. The second limit is recognized in the Act itself, namely, the discretion given to the Tribunal to make an order for compensation for *any* or *all* of wages lost as a result of the discriminatory practice. This discretion must be exercised on a principled basis.

[38] In this case, the Tribunal appears to have conflated foreseeablity and mitigation:

> There is another factor to be considered as well. As noted by the Federal Court of Appeal in *McAlpine, supra*, at paragraph 13, only such loss as is reasonably foreseeable is recoverable.

> The victim of discrimination must therefore demonstrate that he has taken reasonable steps to mitigate his loss (see *Morgan, supra* at para. 14). For instance, in the present case, the Complainant must show that he took steps to improve his chances of successfully competing for an EX-level position and that he applied for such positions when the opportunity arose.
>
> [Remedy decision, at para. 37.]

[39] Dr. Chopra argues that tort principles, including mitigation, do not apply to compensation awarded under the Act. As noted above, the kinds of losses which are recoverable are defined in the legislation, thus making reference to foreseeability unnecessary. Limitations on the extent of recoverable losses do not arise as a matter of law from the application of tort principles, a conclusion which, it seems to me, is the necessary corollary of the principle that human rights legislation does not create a statutory cause of action. Consequently, I would agree with Dr. Chopra that there is no legal requirement that the doctrine of mitigation be invoked to limit his recovery.

[40] That said, the discretion given to the Tribunal to award any or all of the losses suffered leaves it open to the Tribunal to impose a limit on losses caused by the discriminatory practice. A tribunal may well find that the principles underlying the doctrine of mitigation of losses in other contexts apply equally in the context of claims for lost wages under the Act. Society has an interest in promoting economic efficiency by requiring those who have suffered a loss to take steps to minimize that loss as it is not in the public interest to allow some members of society to maximize their loss at the expense of others, even if those others are the authors of the loss: see *British Columbia v. Canadian Forest Products Ltd.*, 2004 SCC 38, [2004] 2 S.C.R. 74 at para. 184. Thus while a tribunal is not bound to apply the doctrine of mitigation, it is not prohibited from doing so in the exercise of its discretion to determine the amounts payable to a complainant.

[41] Dr. Chopra argues that if those principles are to be applied, then the Tribunal incorrectly placed the onus on him to prove it. The following passage is illustrative, in Dr. Chopra's view, of the Tribunal's error:"…the Complainant must show that he took steps to improve his chances of successfully competing for an EX-level position and that he applied for such positions where the opportunity arose.": see Remedy decision, at para. 37.

[42] The question of onus is, with respect, a red herring. Where the evidentiary record allows the Tribunal to draw conclusions of fact which are supported by the evidence, the question of who had the onus of proving a given fact is immaterial. The question of onus only arises when it is necessary to decide who should bear the consequence of a gap in the evidentiary record such that the trier of fact cannot make a particular finding. "Onus has no role to play when all the evidence is in the record": see *Michaels v. Red Deer College*, [1976] 2 S.C.R. 324 per de Grandpré J.

[43] In the result, there is no reason to interfere with the application judge's disposition of this aspect of the case. While there may have been some confusion as to the role of forseeability in the awarding of compensation, there was no error in the application judge's deferral to the Tribunal's exercise of its discretion in limiting the compensation payable to Dr. Chopra on the basis of his failure to take steps to mitigate the loss of wages which he claimed to have suffered, or on the basis of the Tribunal's assessment of the extent of Dr. Chopra's loss flowing from the Indeterminate position.

ii) Instatement of Indeterminate Position

[44] Dr. Chopra claims that the Tribunal erred in not appointing him to the Indeterminate position, given its conclusion that but for the discrimination, he would have been appointed to that post. In his submission, "the Tribunal's conclusion that a mere but serious possibility existed that [he] would have won the indeterminate Director's competition but for the [Employer's] discriminatory practice requires an order of instatement." It will be recalled that the Tribunal decided that the compensation which it awarded to Dr. Chopra amounted to full compensation and that, as a result, no order of instatement was required. The application judge approved of this reasoning.

[45] In my view, the premise underlying Dr. Chopra's argument is flawed. The Tribunal did not decide that but for the discrimination practiced against him, Dr. Chopra would have been awarded the Indeterminate position. In fact, if one considers the reduction in compensation which it imposed on Dr. Chopra, it appears clear that the Tribunal was of the view that there was only one chance in three that Dr. Chopra would actually have been appointed to the Indeterminate position. The more likely possibility was that Dr. Chopra would not have been awarded the Indeterminate position.

[46] In those circumstances, Dr. Chopra was compensated for what he lost, the opportunity to compete for the Indeterminate position on a non-discriminatory basis. Whether in light of *McAlpine*, this amounts to wages within the meaning of paragraph 53(2)(*c*) is another question, a question which is not before us. Having been compensated for the loss of the ability to compete on a fair basis, it would be double compensation to then award him the position itself.

[47] The application judge clearly recognized the nature of Dr. Chopra's claim under this heading:

> 66 The essence of the Applicant's submission is that he should receive the position about which he had a mere possibility of obtaining. In that regard, having lost the opportunity to compete for an EX position, he seeks to obtain more than he lost.

[48] The Tribunal did not err in its assessment nor did the application judge in his review of the Tribunal's decision.

iii) Pain and Suffering

[49] In the interval between the discriminatory practice giving rise to Dr. Chopra's right to compensation and the rendering of the award in his favour, the Act was amended to increase the amount payable by way of compensation for pain and suffering (formerly in respect of feelings of self-respect) from $5,000 to $20,000. The Tribunal relied upon prior jurisprudence, specifically the decision of the Tribunal in *Nkwazi v. Canada (Correctional Service) No. 3)* (2001), 39 C.H.R.R. D./237 (Can. Trib.) (*Nkwazi*), in coming to the conclusion that the increase in the limit payable in respect of pain and suffering did not have retrospective effect and so, did not apply to discriminatory practices which occurred prior to the amendment to the legislation. The Tribunal then considered Dr. Chopra's evidence as to the psychological toll exacted by the discriminatory practice to which he was subjected and, with the upper limit of $5,000 in mind, awarded him $3,500 for pain and suffering.

[50] The issue of the retrospective application of the Act to Dr. Chopra's situation is a matter of the interpretation of the amendment to the Act to determine if Parliament intended it to apply to discriminatory practices which occurred prior to the amendment. This is a matter of the interpretation of the Tribunal's own statute, albeit an amendment to that statute, which is in the area within which deference is accorded to the Tribunal's treatment of legal questions. The Tribunal relied upon prior tribunal jurisprudence to conclude that the amendments did not have retrospective application. That jurisprudence, *Nkwazi*, includes a careful review of the law relating to retrospective application of legislation. The issue is not whether that analysis was right or wrong but whether it was reasonable, a question to which the answer is an unqualified "Yes". The application judge applied the standard of correctness to this question but declined to intervene as he was of the view that the Tribunal had reached the correct conclusion. While I am of the view that the application judge chose the wrong standard of review, I agree that no intervention is required.

iv) Interest

[51] The Tribunal rejected Dr. Chopra's claim that interest should be awarded on the basis of the rates established in accordance with the Ontario *Courts of Justice Act*, R.S.O. 1990, c. C. 43, since the conduct giving rise to the claim occurred in Ontario. It did so because there was no evidence before it to show that awarding interest on the basis of the Canada Savings Bond rates, or other rates set by the Bank of Canada, would not result in full compensation e.g. were these rates below the rate of inflation? In the end, the Tribunal awarded interest at the Bank Rate (Monthly series) as set by the Bank of Canada, in accordance with the usual practice of federal human rights tribunals.

[52] The Tribunal also rejected Dr. Chopra's claim for compound interest on the basis that there was no evidence that it was required to cover the loss.

[53] Finally, the Tribunal capped interest payments at $5,000 in reliance upon the decision of the Federal Court in *Canada (Attorney General) v. Hebert* (1996), 122 F.T.R. 274, at para.22, where Gibson J. considered himself to be bound by the comments of MacGuigan J.A. in *Morgan* to the effect that since the power to award interest under the Act, prior to its amendment, was implicit in the power to award compensation for loss and hurt feelings to a limit of $5,000, the award, including interest, could not exceed the $5,000 cap.

[54] The application judge applied the standard of correctness to the Tribunal's reasons and concluded that, since the amendments to the Act did not have retrospective effect, the $5,000 cap continued to apply to awards for hurt feelings and interest.

[55] While I am of the view that the standard of review is reasonableness, since the Tribunal is dealing with a provision of its own legislation, I find nothing unreasonable in the Tribunal's conclusion so that, like the application judge, I would not intervene.

Conclusion

[56] In the end result, applying the analysis taught by the Supreme Court in *Dr. Q*, I find that there is no basis for this Court's intervention. With the exception of questions of law, the application judge correctly identified the standard of review applicable to his review of the Tribunal's decision

and applied it properly. As for questions of law, I would grant the Tribunal more deference on those questions of law with which it is most intimately familiar. Applying that standard, I find no reason for intervention in any aspect of the Tribunal's decision. To the extent that the Tribunal's use of foreseeability to limit Dr. Chopra's remedies was attacked, I am of the view that the effective limiting factor was Dr. Chopra's failure to mitigate. The Tribunal's use of that device to limit recovery cannot be attacked as unreasonable.

[57] As for the other issues raised by Dr. Chopra, like the application judge, I can see no basis for intervention by this Court. I would therefore dismiss the appeal with costs.

"J.D. Denis Pelletier"
J.A.

"I agree
Alice Desjardins J.A."

"I agree
B. Malone J.A."

FEDERAL COURT OF APPEAL
NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-52-06
APPEAL FROM AN ORDER OF THE FEDERAL COURT DATED JANUARY 4, 2006, COURT FILE NO. T-1683-04	
STYLE OF CAUSE:	*Dr. Shiv Chopra and Attorney General of Canada and The Canadian Human Rights Commission*
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	March 6, 2007
REASONS FOR JUDGMENT BY:	PELLETIER J.A.
CONCURRED IN BY:	DESJARDINS J.A. MALONE J.A.
DATED:	August 21, 2007

APPEARANCES:

David Yazbeck Bijon Roy	FOR THE APPELLANT
David Migicovsky Laura K. Scott	FOR THE RESPONDENT, AGC
Philippe Dufresne Reuben East	FOR THE RESPONDENT, CHRC

SOLICITORS OF RECORD:

Raven, Cameron, Ballantyne & Yazbeck LLP Ottawa, Ontario	FOR THE APPELLANT
Perley-Robertson, Hill & McDougall LLP Ottawa, Ontario	FOR THE RESPONDENT, AGC
Canadian Human Rights Commission Ottawa, Ontario	FOR THE RESPONDENT, CHRC