

**CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES DROITS
DE LA PERSONNE**

DAN DURRER

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

CANADIAN IMPERIAL BANK OF COMMERCE

Respondent

REASONS FOR DECISION

MEMBER: Matthew D. Garfield 2007 CHRT 6
2007/03/30

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I. INTRODUCTION

[1] By October 19, 1999 Dan Durrer had worked for one company - the Canadian Imperial Bank of Commerce ("CIBC") - for over 28 years. On that day, he was notified that his position was to be eliminated and his employment terminated. He was 48 years old. His job was one of many that was eliminated as part of a company-wide downsizing and restructuring plan. He stayed on in three temporary positions with the Bank for 2.5 years, until finally, not having secured another position, his moving date of termination crystallized on April 12, 2002.

[2] On July 23, 2002, Mr. Durrer filed a Complaint with the Canadian Human Rights Commission ("Commission") alleging that CIBC had discriminated against him on the basis of age, in violation of section 7 of the *Canadian Human Rights Act* ("CHRA"). The Commission referred the Complaint to the Canadian Human Rights Tribunal ("Tribunal") on January 30, 2006. The Commission has chosen not to participate in the hearing portion of the inquiry, while still remaining a party. The hearing of the evidence took place in November 2006. These are my Reasons for Decision.

II. MR. DURRER'S COMPLAINT

[3] The exact nature of the Complaint appeared to be different from inception to the hearing. What exactly was the basis of Mr. Durrer's Complaint? In his Complaint Form filed with the Commission under the section "Allegation", Mr. Durrer states: "I, Dan Durrer, allege that the Canadian Imperial Bank of Commerce discriminated against me in employment by terminating my employment on the ground of age (50) in contravention of section 7 of the *Canadian Human Rights Act*." Since he indicated age 50, that would suggest that the basis of his Complaint crystallized on April 12, 2002 - his last day of work. The rest of the Complaint focuses on the events in that time-frame, and not on the initial decision to eliminate his position and not redeploy him in the new Compliance Department.

[4] In the Statement of Particulars - in essence his pleading - filed by Mr. Durrer's counsel with the Tribunal, the Complainant focuses on "discrimination based on age and years of pensionable service." The Complainant pleads that "CIBC developed a policy of dismissing employees who were close to retirement, depriving those employees of a job simply by stint of their age." The Statement of Particulars underscores CIBC's alleged refusal to let Mr. Durrer take a fourth temporary job and attempt to reach the bridgeable age of 53 plus two-years' worth of severance to get that immediate, unreduced pension. "CIBC terminated Mr. Durrer at age 50.5 in an effort to defeat Mr. Durrer's pension entitlement and its pension obligations." Further on, he writes:

Mr. Durrer was precluded from receiving the benefit of the pension offered to employees who were 53 years of age at the time of their termination, because CIBC would not allow him to extend his career with CIBC through [temporary] term assignments. CIBC's actions constitute adverse differentiation in employment contrary to section 7(b) of the *CHRA*, and is pursuant to a policy that deprived Mr. Durrer of employment opportunities contrary to section 10 of the *CHRA*.

[5] Counsel for CIBC filed its Statement of Particulars - its responding pleading - *inter alia*, objecting to the Complainant's addition of the section 10 aspect to the Complaint, saying it appeared for the first time in the Complainant's pleading. The Complainant did

not file a Reply. In his opening statement, CIBC's counsel raised the section 10 issue and said that he would wait to see how Mr. Durrer's case "is going to go in". Complainant's counsel did not mention section 10 in his very brief opening statement. By the end of the hearing, no further mention of a "section 10" violation *per se* had arisen. Counsel for the Complainant did not make submissions about it in final argument, except for one brief reference. That reference was to a statement in CIBC's pleading, found in the Bank's "in the alternative" response on the merits to the section 10 allegation in the Complainant's pleading. CIBC's counsel did not make submissions about a section 10 violation in closing argument. In the Complainant's Book of Authorities, two B.C. Human Rights Tribunal decisions dealing with the power to amend complaints are included. However, counsel for the Complainant made no submissions about them. I also note importantly that the Complainant never sought to amend the Complaint to add section 10. I interpret the above as an abandonment of the allegation that CIBC violated section 10 of the *CHRA*. In the alternative, I find that by the end of the hearing, CIBC had a reasonable expectation that I would be considering the evidence and argument from the perspective of a section 7 violation only. For me to consider a section 10 violation at this point would constitute a denial of fairness and natural justice. Accordingly, I will consider the evidence and argument only as they relate to a violation of subsections 7(a) and 7(b) of the *CHRA*.

[6] While the Complainant's pleading and the testimony of Mr. Durrer focused on CIBC's alleged refusal to allow the Complainant to continue to work in temporary assignments to the bridgeable age of 53, I did hear evidence about whether the initial decision to eliminate Mr. Durrer's Compliance position was discriminatory. And evidence was led and argument made by the Complainant's counsel about whether Mr. Young's decision not to "redeploy" Mr. Durrer in the newly revamped Compliance Department constituted discrimination based on age. In closing argument, counsel for the Complainant succinctly stated that the section 7 violation in this case was two-fold: first, when the termination decision was made by Mr. Young because age was a factor; and then, in March-April 2002 when Human Resources thwarted his attempt to get a fourth temporary job and his employment came to an end.

III. ISSUES

[7] I deal with the following issues:

- (1) Did CIBC eliminate Mr. Durrer's position in October 1999 on account of his age;
- (2) Did CIBC decide to not transfer Mr. Durrer to another position in the same department (Compliance) on account of his age; and
- (3) Did CIBC interfere with Mr. Durrer's attempts to seek redeployment within CIBC because of his age.

IV. FINDINGS OF FACT

[8] In this section, I make my findings of fact, including those derived from the Agreed Statement of Facts filed.

A. Background

[9] Dan Durrer was born on October 9, 1951. He joined CIBC in January 1971. He had a Grade 12 diploma. He worked his way up through the Bank, holding various branch line and regional office positions. From 1994 until his last day of work in 2002, Mr. Durrer worked in the Head Office in Toronto in various positions. At the time of his notice of termination on October 19, 1999, Mr. Durrer held the executive position of Director,

Business Risk and Control Consulting, Retail Banking, in one of the Bank's three Compliance Departments. He was 48 years old.

[10] According to the Agreed Statement of Facts, "Throughout his employment with CIBC, Mr. Durrer was a dedicated and loyal employee who received numerous promotions and commendations from his superiors including two Chairman's awards for outstanding performance." By his own admission, he was a generalist in a workplace that was becoming more specialized.

B. Company-wide Restructuring and Downsizing

[11] In 1999, CIBC hired a new President and CEO, John Hunkin. The new CEO directed a company-wide downsizing and restructuring program, to make CIBC more competitive, among other goals. I accept the evidence that this was a tough time for CIBC financially. The restructuring resulted in approximately 2,500 jobs being eliminated. Mr. Durrer's was one of

them. The internal e-mail that was sent to executives and managers (including Mr. Durrer) on September 27, 1999, directing them to distribute it to staff, reads in part:

CIBC's commitment to bring its cost base into line with that of our competitors will result in significant restructuring activity over the coming months...

This CIBC restructuring initiative is likely to result in fewer redeployment opportunities for staff in the immediate future. Therefore, we need to provide more flexibility to employees whose jobs have been eliminated - greater flexibility to explore career opportunities outside CIBC earlier, and more support to sustain what might be a longer job search externally.

[12] The e-mail clearly states that there would be "fewer redeployment opportunities" and employees would be encouraged to look for jobs outside CIBC. I accept Mr. Durrer's evidence that he did not believe the restructuring would affect him and his job would be eliminated, although as early as when he received this e-mail, he knew that "big" changes were coming soon.

[13] I find that part of the restructuring involved the elimination of waste and duplication and involved a degree of cost-cutting. That is to be expected from such a process. The evidence does not suggest a targeting of "older" workers or the elimination of jobs on the basis of an employee's age. For example, in his *viva voce* evidence and his expert's report, Michael Banks, an expert on pensions and actuarial science and partner at Mercer Human Resources Consulting, outlined the "experience rates of termination of employees covered by the ETSP program which are included in our report on the Actuarial Valuation of the CIBC Pension Plan as at October 31, 2005." In the age category of 21-30 years, there was a rate of ETSP termination of one percent for each age in that range. In the age category of 31-52 years, it was 1.5 percent for each age in that range. His conclusion was: "The experienced rate of termination under the ETSP program is uniform for employees aged anywhere between 31 and 52. There is no indication of selection by age in this range." I accept Mr. Banks' evidence.

C. Employment Continuity Policy (EC) and Restructuring Support Program (RSP)

[14] In 1992 and 1993, CIBC created its Employment Continuity policy ("EC") and Restructuring Support Program ("RSP") respectively. EC and RSP worked *in tandem* to

give employees who lost their jobs through position elimination the opportunity to either redeploy themselves into another position within the Bank, or if they could not do this, to receive a severance package and other benefits, including counseling, vocational rehabilitation, and legal and financial advice, to assist them in transitioning into employment outside CIBC.

[15] One of the most significant benefits offered to qualifying employees affected by the restructuring concerned the Bank's pension plan. For these employees, if they were 55 years of age at the date of their termination, or if they were between 53 and 55 years of age *and* their severance entitlement (a two-year maximum) would be sufficient to "*bridge*" them to age 55, they would be entitled to have the normal early retirement actuarial reduction under the pension plan waived. In other words, they would be eligible to receive an immediate, unreduced pension upon leaving the Bank. In normal circumstances, if they elected to retire at age 55, they could receive an immediate, reduced pension or a deferred, unreduced pension at age 65. This waiver of the early retirement pension reduction was a significant benefit to those employees terminated during this period. I accept the evidence of pensions expert Michael Banks that this was a very generous benefit, and uncommon in the workplace. At page 3 of his report, he writes that over the course of a 4-year period ending October 31, 2004, there were 1,795 terminations of employment at CIBC of employees aged 20-53 and 700 retirements at age 55 and over (including those individuals between 53-55 years old who were "bridged" to age 55).

[16] As will be addressed later, the core of Mr. Durrer's Complaint is that CIBC didn't allow him to continue to work to the bridgeable age of 53 years. Had he been permitted, with his maximum 24-month severance period, he would have reached the target age of 55 years. He then would have been entitled to the pension reduction waiver and an immediate, unreduced pension. Thus, CIBC's actions prevented him from accessing this benefit. CIBC responded by saying that Mr. Durrer simply did not qualify for this generous benefit which it was not legally required to provide to its terminated employees in the first place. Mr. Durrer was 48 years old in October 1999 when he received notice that his position in the Compliance Department would be eliminated, effective January 7, 2000. Even after his subsequent three temporary positions over a 2.5 year period (he was 50.5 years old at that point) and his 2-year severance are added to the mix, he would be at the 52.5 year post - *still 2.5 years short of the "bridging" requirement*.

[17] CIBC introduced "one-time amendments" to its RSP, effective September 1, 1999. It established working notice period payouts *and* enhanced severance to employees in Canada who were given notice of job elimination as a result of the restructuring. I accept the evidence of the Bank that some employees were successful in obtaining temporary positions (*e.g.*, Mr. Durrer) that allowed them the opportunity to either develop new skills to get a new permanent position or to give them additional time to find a job outside CIBC. As will be dealt with later, the intention or goal of its program was not to allow employees to use the vehicle of temporary jobs or assignments to accumulate time to qualify for pension "bridging", but simply as "a means to an end" of finding a permanent job within CIBC or transitioning to work outside CIBC.

D. Introduction of the Employee Transition Support Program (ETSP)

[18] In April 2001, CIBC introduced its Employee Transition Support Program ("ETSP") which replaced EC and RSP. Employees were given the option to either remain on EC

and RSP or elect to be in ETSP. Mr. Durrer elected to participate in ETSP - the benefits under ETSP were greater than under the former programs. While he would continue to receive a 2-year severance amount, the dollar amount of the total package (including other "supports") was greater under ETSP. The waiver of early retirement pension reductions was the same, and for Mr. Durrer, he still did not qualify for this generous benefit.

[19] One notable difference between the former and latter programs concerned the formal role of the "supporting manager". Under ETSP, while the supporting manager would assist the terminated employee in finding alternate work, the onus was on the employee to be more responsible and accountable for his/her job search. As will be seen later, regardless of what program Mr. Durrer was under at a given time, he was very proactive and showed a lot of initiative in seeking permanent and temporary work within CIBC. He was not so diligent with regard to searching for work outside CIBC. He testified: "So there was absolutely no doubt, my job search was focused internally." Later, he stated:

But as I said earlier and I will say it numerous timing [*sic*] again, I had a lot invested in CIBC. My life, my working lifetime, was invested there. I had substantial investment in the pension fund and I had a career that I loved.

I guess in my own mind I wasn't going to just go away, I was going to go out fighting, and I think that I did that for the balance of my time at CIBC.

E. Restructuring in the Compliance Departments

[20] The new CEO appointed a new Senior Vice-President for Compliance - the Bank's Chief Compliance Officer. This individual, Eric Young, was brought in from the New York office and commuted back and forth from New York to Toronto. He was entrusted with the responsibility of developing a new Compliance Department bank-wide. At that time, CIBC had three Compliance Departments - one in the Personal & Commercial group; one in World Markets; and one in the Corporate Centre. He ultimately decided to consolidate the three departments into a single, integrated and effective department. I accept Mr. Young's evidence that while cost-cutting was a factor or consideration (albeit not a "driving" one), he was given no mandate or direction regarding the amount of costs to reduce or how to go about it. The goal from his perspective was not to reduce costs but to "come up with an effective compliance function". In fact, he testified that any cost-savings from his exercise would probably need to be reinvested in the end product. He was given no specific budget ceiling.

[21] From Mr. Young's perspective, much needed to be done in his task. In his testimony, he referred to his contemporaneous handwritten notes which were entered as an exhibit. The notes outlined the "old world" of compliance at the Bank vs. the "new world" that he envisaged. When he arrived, the Compliance Departments were fraught with duplication, "sometimes triplication" of functions, part-time in nature, and too passive. He envisaged going from three Compliance Departments to one, where the Department would be multi-disciplinarian in nature (*i.e.*, composed of lawyers, accountants, etc.). The compliance officers would be more proactive ("not sitting in an ivory tower issuing notices of compliance policy...or regulatory changes" to the business users), full-time and possess specialized training and expertise. He wanted his compliance officers to be more institutionally independent, like auditors. The "new world" of compliance was to look very different from the "old world". Reform and restructuring were also key, according to Mr. Young, because of the changing nature of compliance in the banking industry. It was

growing more complex, with greater legislative and regulatory pressures. The risk exposure to the Bank was also increasing. His overriding goal was "to protect the Bank overall."

[22] Part of the restructuring of Compliance would affect the personnel in the three Compliance Departments. He testified that he had no "preconceived notions" regarding how many positions would be left. What was certain is that there would be fewer. This is not surprising given his view that there was duplication, and sometimes triplication occurring in the compliance functions at CIBC. One area of redundancy was at the management levels of the three Compliance Departments.

(i) The Process Used by Mr. Young

[23] Mr. Young had to decide which positions to keep, which were to be eliminated and which ones would be modified or restructured. And of course, what to do with the employees who held these positions in the three Compliance Departments. He interviewed various people in the Compliance Departments, especially the executives/managers and compliance officers. He also spoke with the business people (the CIBC employees who would liaise and interact with the compliance officers) "to get their perspectives on compliance functions" and their opinion about various managers/officers in compliance: whether they "added value." In addition, Mr. Young consulted with Human Resources, including Cindy Nicholls, Senior Human Resources Consultant, who would deal with Mr. Durrer in the ensuing years.

[24] Importantly, Mr. Young interviewed (sometimes more than once) all employees whose positions he was considering to eliminate or whose employment he was considering to terminate. He also looked at their performance records and personnel files.

(ii) The Criteria Used by Mr. Young

[25] CIBC entered into evidence excerpts from Mr. Young's notebook, which he made in the fall of 1999 and handed over to CIBC when he left its employ. Much was made in examination-in-chief and cross-examination regarding these excerpts. Suffice to say that they involved short-form notes with arrows and were diagram-like. They certainly were not prose-like or written in complete sentences. His memory was fairly good, notwithstanding the events took place over seven years ago.

[26] Having carefully examined the excerpts from his notebook and his testimony about them, I find that Mr. Young considered the following major factors when deciding whether to keep an employee in compliance:

- (1) Did the employee "understand what compliance is and means";
- (2) How much regulatory or compliance experience (including education) did the employee possess; and
- (3) What were the perceptions of the "business people" regarding the compliance employee and whether he or she "added value" to the "new world" model of the Compliance Department.

[27] From reviewing the evidence of Mr. Young, I find that, to a lesser degree, he also factored in the compensation (salary and benefits) of various employees in deciding whether to keep them. One of the notebook excerpts on its face could have been used as a basis for his assessment as to whether to keep those employees and/or as a performance assessment for awarding bonuses or "team dollars" to them, which Mr. Young testified occurred during the same period (October 1999). In re-examination, he said the notes were used for both purposes. I accept his evidence on this point.

[28] I also find that Mr. Young was not just determining who to keep and who to terminate in the three Compliance Departments. He was also looking at which positions to keep, which to eliminate and which to split and distribute to other positions. This included examining the question of redundancy of management level positions (like Mr. Durrer's) in the three Compliance Departments.

(iii) The Result: Positions Were Eliminated and Employment Was Terminated

[29] I accept Mr. Young's evidence that this function was not an easy task. Based on the evidence, I find that the result of Mr. Young's decisions was a single Compliance Department with a "diversified composition by gender, age, background and experience."

[30] Two charts created by CIBC and a contemporaneous handwritten note of Mr. Young were entered into evidence regarding the age composition of employees whose positions were eliminated/employment terminated and those retained by him. The evidence suggests that the employees in the merged and modified chart below were executives/managers in Compliance.

NAME	AGE AT RESTRUCTURING	AGE RELATIVE TO MR. DURRER ¹
Employees Positions Eliminated²		
Dan Durrer	48	--
Employee A	51	older
Employee B	49	older
Employee C	44	younger
Employee D	38	younger
Employee E	40	younger
Employees Retained		
Employee F	52	older
Employee G	52	older
Employee H	59	older
Employee I	40	younger

This column was added by me.

One of the charts had the headings "Employees Positions Eliminated" and "Employees Retained". The other chart read "Retained" and "Terminated". From reviewing the *viva voce* and documentary evidence, I believe that those managers whose positions were eliminated, also had their employment terminated.

[31] The above chart shows that the employees who were retained (except for Employee I) were the three oldest ones, including Employee H who was 11 years older than Mr. Durrer. Further, three of the employees whose positions were eliminated were younger than Mr. Durrer. I will deal with the significance of this later in these Reasons. Suffice to

say that it is probative evidence that there was no "targeting" by Mr. Young of Mr. Durrer or others on account of their respective ages.

F. Mr. Young's Consideration of Mr. Durrer and His Position

[32] Mr. Young made the decision to eliminate Mr. Durrer's position and not to redeploy him within the new Compliance Department. He averred that Mr. Durrer's position - Director, Business Risk and Control Consulting, Retail Banking - was "redundant" and unnecessary and that he had transferred approximately fifty percent of its functions and responsibilities to other employees in the Bank. Regarding his decision to eliminate Mr. Durrer's position, Mr. Young stated: "I didn't need that many people to do these different activities [such as Mr. Durrer's duties] within the department." What he meant was that he did not need a full-time manager to carry out Mr. Durrer's duties. The Complainant did not challenge this evidence.

[33] The focus of Mr. Durrer's testimony was not about the *bona fides* of Mr. Young's decision to eliminate his position, or even that he wasn't redeployed within Compliance. Rather, Mr. Durrer was upset that CIBC ended his then-28-month extended working notice period in April 2002, preventing him from getting a fourth temporary job (and a fifth if required) to get him to the magic age of 53 years, and thus "bridgeable" to 55 and the immediate, unreduced pension. The irony is, if Mr. Durrer had gotten a permanent job within CIBC (as he claims he was seeking as well as temporary jobs), he would no longer have been eligible for ETSP and therefore, not entitled to either a severance package or the pension "bridging" benefit - the latter of which has been his focus throughout this case (the "brass ring" as CIBC's counsel puts it). I find that Mr. Young had legitimate, business reasons, untainted by Mr. Durrer's age, for arriving at his decision to eliminate Mr. Durrer's position. I acknowledge Mr. Young's expertise in compliance matters within the banking industry. It was his job to make that call and he was well positioned to do so.

[34] What about Mr. Young's decision not to redeploy Mr. Durrer within the new Compliance Department? Mr. Young testified that Mr. Durrer didn't meet his qualifications for a job in the "new model" of Compliance at CIBC. Indeed, Mr. Durrer had spent most of his working life at CIBC in retail banking. He had been in Compliance for less than three years. He met with Mr. Durrer a couple of times, reviewed his personnel file and spoke with his managers and business users. Mr. Young felt the Complainant "didn't understand compliance issues." Mr. Young stated: "He was more of a project manager and hadn't been with Compliance that long." Mr. Young also said business users he spoke with thought Mr. Durrer didn't have the skills that brought value to compliance. Simply put, he didn't have the legal/accounting/regulatory experience that others had and that Mr. Young was looking for. Regarding Mr. Durrer's grade 12 education, Mr. Young said he would have kept him on, notwithstanding his lack of post-secondary education, if he had had the experience and understanding of compliance issues. By Mr. Durrer's own admission, he was more of a "generalist" in an industry that was becoming more in need of specialists, as was the case in compliance.

G. Mr. Durrer's Age as a Consideration

[35] Mr. Young was asked whether he knew Mr. Durrer's age. After all, it was in his personnel file, which he reviewed. Based on his various answers to many questions in direct, cross and re-examination, I find that he might have seen Mr. Durrer's birth date, but that he certainly wasn't looking for it. Whether he saw his birth date is not a major issue. After all, by just doing the mathematical computation (Mr. Durrer had by 1999

been working at CIBC for over 28 years and knowing that he couldn't have started employment much less than 18 years of age), he knew Mr. Durrer had to be in his late 40s at a minimum. Mr. Young knew that he wasn't dealing with a 25 or 35-year old employee.

[36] More importantly, did age play a factor in Mr. Young's decision to eliminate his position and/or not to redeploy him within the Compliance Department? I think not. I accept his evidence that: "If he had the experience then I would have conserved¹ him for other positions, but he didn't have the experience and I didn't need the position."

[37] He was queried about the issue of age in various parts of his examination-in-chief, cross-examination and re-examination. Because this is a key issue and some of his evidence upon first examination was somewhat equivocal or ambiguous, I cite the various excerpts of the transcript on this issue below:

Examination-in-chief (p. 564 of transcript)

MR. GROSMAN: In evaluating Mr. Durrer and in making the decision to eliminate his position, did age play any factor whatsoever?

MR. YOUNG: No.

Cross-examination (pp. 588-89, 594)

MR. MORIN: ...At the time he had received notice, Mr. Durrer had just turned 48 years old. Is that your recollection, sir?

MR. YOUNG: In terms of the letting him go, yes.

MR. MORIN: Okay.

MR. YOUNG: In terms of age, no, because it was not really important to me. And what I mean by that is particularly having come from the States, age was really something not to be considered. But, you know, based on -- you base decisions on performance and need.

... ..

MR. MORIN: Having looked at the personnel file, you would have looked at his date of birth?

MR. YOUNG: I could have, sure.

MR. MORIN: All right.

MR. YOUNG: I guess I want to just emphasize it was not a primary factor.

... ..

MR. MORIN: So in reviewing that personnel file as part of the overall review into his background, you knew what his date of birth was and you knew what his age was?

MR. YOUNG: I could have, sure. I wasn't looking for it, I'll put it that way.

Re-direct examination (pp. 640-42)

MR. GROSMAN: ...Do you have any recollection of seeing Mr. Durrer's birth date?

MR. YOUNG: No, if I could elaborate a little?

MR. MORIN:² Sure, that's fine.

MR. YOUNG: Having come from the States, birth dates are less relevant in terms of -- less relevant in terms of criteria. It's just a different environment, so having come from there, it wasn't something that I was looking for.

MR. GROSMAN: What do you mean by less relevant?

MR. YOUNG: It's -- age discrimination is -- well, first, the States is very litigious. Second, because of that, asking for or considering age is a red flag in terms of just managing people generally in the States.

It's something to be sensitized to. So having come up to Canada to restructure the department and just to manage people, and just given the experience of managing that I have had even up to that point, I knew birth dates and age were less relevant in terms of running the department.

MR. GROSMAN: Okay. And so when you come to assess Mr. Durrer is age a factor at all?

MR. YOUNG: It's a factor, not a driving factor. It's -- you know, going back to experience, performance, value added, et cetera.

THE CHAIRPERSON: Sorry, age is a factor, not a driving factor. A factor in terms of what?

MR. YOUNG: It's just performance, just being a compliance officer or any employee, age is -- particularly in terms of restructuring, it's out there, I guess is what I'm trying to say, but it's not a driving factor in terms of whether to keep or not keep employees.

THE CHAIRPERSON: Sorry, one second. It's not a driving factor in terms of whether to keep or not keep employees, but it's a factor in terms of whether you're going to keep or not keep employees, is that correct?

MR. YOUNG: Yes, and the reason why I say that, having come from the States, as a manager, a manager should be sensitive to not making decisions because of age.

[38] At first look, one could interpret some of Mr. Young's statements as tantamount to an admission of liability: that age, however small, was a consideration in his decision not to keep Mr. Durrer in the Compliance Department. However, when considering all of his evidence and his actions regarding the Compliance restructuring exercise, a different picture emerges. I find that age was not a factor used by Mr. Young to the detriment of the Complainant. I make this finding for several reasons:

(1) The objective evidence of the chart showing the employees by age whose positions were eliminated/retained suggests that Mr. Durrer's age was not used against him;

(2) In several exchanges above, Mr. Young repeats the statements that considering age constitutes discrimination and is not to be done - a "red flag". He also flatly denies in examination-in-chief that he considered age as a factor in his decision to eliminate Mr. Durrer's position;

(3) No one ever asked Mr. Young how age was used as a factor in Mr. Durrer's case and whether it was used to his benefit, to his detriment or not at all - a neutral factor. Hypothetically speaking, if Mr. Young considered Mr. Durrer's age as a *positive* factor (with the attendant advantages like experience, maturity, knowing his way around the Bank, etc.), but the non-age-based negative factors weighed heavier, that would not constitute differentiating adversely against Mr. Durrer on account of his age per subsection 7(b) of the *CHRA*;

(4) I interpret his comment "it's out there" and "it's not a driving factor" as meaning that one cannot ignore age - it's in an employee's personnel file, one can do the math re: years of services and in talking with an employee, a manager can tell if someone is 25 or 55 years of age, to use an example. Age is a self-evident characteristic. That is different from saying, for example, that one used an employee's age to his/her detriment, acting on pejorative, stereotypical, ageist prejudices, resulting in an employee being denied employment; and

(5) Mr. Young, holding the senior compliance position that he did which involves complex legal and regulatory issues and having worked in a litigious environment like

the United States', is "sensitized" (as he stated in his testimony) to the legal prohibition that an employer cannot terminate an individual's employment because of his or her age.

[39] I wish to point out that I find Mr. Young a credible witness. He was candid in his testimony.

H. October 19, 1999: Notice of Termination Given to Mr. Durrer

[40] On October 19, 1999, Mr. Young and Cindy Nicholls, Senior Human Resources Consultant, met with Mr. Durrer. He was told that his position was being eliminated, effective January 2000. He was given a letter offering him a 12-week notice of termination, a severance package of 24-months' salary and other supports, including vocational rehabilitation and counseling, in recognition of his over 28 years of service with CIBC and pursuant to the RSP and EC. The RSP stated that, "The notice period, whether used as working notice or taken as payment in lieu is provided in addition to applicable severance payments." Employees also could use the termination notice period to find a temporary assignment or permanent position within CIBC.

[41] As part of the termination package, Mr. Durrer met with an outplacement officer on that day to prepare him to search for alternate employment both within and outside CIBC. The Bank also provided him with internal job search support from Ms Nicholls, who met and/or communicated with him (in person, by phone or e-mail) many times over the course of the next 2.5 years to discuss and assist in his re-employment plans.

I. Mr. Durrer's Employment Post-October 19, 1999: the Three Temporary Assignments

[42] For the next 28 months, Mr. Durrer extended his working notice period of 12 weeks with the Bank through project assignments. I find that this was contrary to the purpose and intent of the EC/RSP and ETSP policies. I accept the evidence from Ms Nicholls that no other employee stayed in these programs for as long a time as Mr. Durrer, via the vehicle of temporary positions.

[43] I also find that the wording of the ETSP, while not absolutely clear, supports the reasonable conclusion that ETSP employees were not to stay on that program for a long period of time. The section entitled "Temporary Assignments" found at page 12 of the ETSP Employee Guide reads:

One way for employees to develop their capabilities and position themselves for alternate employment within CIBC is through a temporary job assignment.

How Do Temporary Assignments Work?

In general, temporary assignments should be less than 12 months duration.

The employee's notice period will continue to run even if the employee receives a temporary assignment.

If the employee is on temporary assignment when the notice period ends, the employee's employment with CIBC will terminate, and severance will be paid, at the end of the assignment unless the employee secures another position before then.

The employee will be provided the opportunity to continue the search for a permanent position within CIBC while on temporary assignment.

NOTE

Should the employee find alternate employment within CIBC during the course of a temporary assignment, the employee will no longer be entitled to a severance payment under the Program.

[44] I find that CIBC uses the term "position" above to refer to a permanent position and "temporary assignment" to refer to a temporary position. A reasonable interpretation is

that the Bank also is using the term "alternate employment" to refer to a permanent position. For example, looking at the first sentence above ("One way for employees..."), it would not make sense if "alternate employment" meant a "temporary assignment". It would then read: "One way for employees to develop their capabilities and position themselves for a temporary assignment within CIBC is through a temporary job assignment." While not perfectly clear, I am more inclined to believe that the bullet "In general, temporary assignments should be less than 12 months duration" meant that employees should not be in ETSP for more than 12 months in total. It did not mean that ETSP employees could take as many temporary assignments as they wished, provided that each was under 12 months' duration. If one takes that same interpretation (*i.e.*, that CIBC is using the term "position" to refer to a permanent one), then the third bullet above would suggest that if an employee is in a temporary assignment when his/her notice period ends, his/her employment will terminate unless the employee secures a permanent position before then.

[45] CIBC did not express its concerns with the practice *vis-a-vis* Mr. Durrer until he first raised the issue with Ms Nicholls on March 21, 2002 - 28 months after getting his notice of termination. So while a more reasonable interpretation of the policy as found in the ETSP Employee Guide is that the temporary jobs were a means to the end of finding alternate *permanent* employment, I can understand how Mr. Durrer came to believe that it was okay for him to go from temporary job to temporary job (while also looking for a permanent one).

[46] The three subsequent temporary positions held by Mr. Durrer were:

(1) Business Deployment (Implementation) Leader, Measure and Manage Project: January 4, 2000-May 13, 2001. He was told about this opportunity by Ms Nicholls and was assisted by her in obtaining the job;

(2) Process Leader, Base Transaction Financial Project: May 16, 2001-January 31, 2002; and

(3) Branch Banking Process Mapping project: February 1, 2002-March 29, 2002.

[47] CIBC agreed to maintain the two weeks that Mr. Durrer had remaining from his initial notice of position elimination in 1999, which allowed him a further two weeks to find alternate employment within CIBC. Unless Mr. Durrer found another position, his moving date of termination would crystallize on April 12, 2002 - his last day of employment at CIBC.

J. April 4, 2002 Meeting and the Issue of No More Temporary Assignments

[48] On April 4, 2002, Ms Nicholls gave Mr. Durrer his final termination letter. I accept and acknowledge Mr. Durrer's evidence that this was a very stressful moment for him. After 31 years of service, it looked like his working relationship with CIBC was over.

[49] In his testimony, Mr. Durrer stated that he learned for the first time at this meeting that CIBC would not extend his employment via a fourth temporary position, if he found one. If he did not come up with a permanent position at CIBC by April 12, 2002, his employment would be terminated. Based on Ms Nicholls' evidence as well as documentary evidence (*i.e.*, e-mails), it is clear that Ms Nicholls and her colleagues in Human Resources had indicated by March 21, 2002 their displeasure at Mr. Durrer continuing to go from temporary position to temporary position with a severance package at the end of it. But did Ms Nicholls outright refuse to consider a fourth temporary position? And as will be discussed later, even if that were so, absent her actions being

age-based, would a blanket refusal constitute a violation of section 7 of the *CHRA*? Mr. Durrer's contemporaneous notes of the conversation between him and Ms Nicholls on March 21, 2002 read:

3. If I were to secure another ST [short-term, temporary] assignment, say 6-8 months, would HR support?

a. [Ms Nicholls' answer] Didn't know. Would look into this. Would speak to Jackie Stewart. Wanted to speak to Lori Kennedy. Wouldn't commit on when she would get back to me.

[50] In cross-examination, Mr. Durrer acknowledged that in his March 21st conversation with Ms Nicholls, when asked if Human Resources would support a fourth short-term assignment if he found one, Ms Nicholls replied, "I'll look into it; we'll consider it, yes." I note that it was Mr. Durrer who raised the issue for the first time.

[51] CIBC disputes Mr. Durrer's assertion that it told him on April 4, 2002 that it would no longer entertain extending his working notice period yet again with a fourth temporary position. Ms Nicholls testified that she simply meant that Mr. Durrer could not keep extending his notice period indefinitely with the view that he would also get the 24-month salary severance at the end of it. She averred that she did not mean that he was barred from getting a fourth temporary assignment. She stated that had he come up with one, she would have checked with her "superior" to see if it would be fine.

[52] The e-mail of Lori Kennedy (of Human Resources) to Ms Nicholls dated April 11, 2002 (the day before Mr. Durrer's final day as a CIBC employee) deals with Ms Kennedy's discussion with Mr. Durrer. It reiterates the view that Human Resources was taking the position that it would not look favourably upon Mr. Durrer continuing in a fourth temporary position. However, Ms Kennedy's e-mail did state, "I also offered to follow up with my Risk client to see what they had and they are not in a position to help him out at this time..." That might suggest that Human Resources would have been open to extending him in a fourth temporary assignment, if one was available. Ms Kennedy was not called as a witness. I do not know for example, if Ms Kennedy offered to help find him a fourth temporary job with her "Risk client" or a contract position.

[53] Examining the testimony of Ms Nicholls and Mr. Durrer and the e-mails that were exchanged in this one month period, I come to the conclusion that CIBC certainly gave the impression that it would not look kindly on extending Mr. Durrer's employment if he found a fourth temporary job, but CIBC did not outright refuse to consider it. I also find that CIBC did not prevent Mr. Durrer from looking for another temporary position or a permanent one, as he clearly did.

[54] Mr. Durrer secured neither a fourth temporary job nor a permanent one at CIBC by April 12, 2002. We will never know whether CIBC would have allowed Mr. Durrer to remain an employee in a fourth temporary job. I should also add that even if CIBC had indicated to him that a fourth temporary job was unacceptable, Mr. Durrer's actions were not ones of acceptance. He continued to scramble for a temporary or permanent position, showing his proactive initiative, as he always had demonstrated over the last 2.5 years. In cross-examination, Mr. Durrer stated that after April 4th, "I looked for full-time [permanent job] primarily. I held out hope because of all the things I contributed to the bank over the years that if I had a term assignment, that it would be considered."

K. Termination Date and Post-Termination

[55] Mr. Durrer received his letter of confirmation that his working relationship with CIBC as an employee would come to an end on April 12, 2002. He was 50.5 years of age. On May 1, 2002, CIBC hired him back on a contract basis as a Business Analyst (not in the Compliance Department). He worked on contract from June 5, 2002 to February 21, 2003.

[56] On July 23, 2002, Mr. Durrer filed a Complaint with the Commission, alleging that CIBC had "discriminated against him by refusing to continue his employment due to his age, in contravention of section 7 of the *Canadian Human Rights Act*." As of the last day of hearing on November 22, 2006, Mr. Durrer had not accepted any of the severance packages offered to him by CIBC. He has also filed an action in the Superior Court of Justice against CIBC mirroring this Complaint.

V. THE LAW

[57] The initial onus of establishing a *prima facie* case of discrimination under the *CHRA* rests with the Complainant or the Commission: *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, at para. 28 ("*O'Malley*"). Once that is established, the burden then shifts to the Respondent to establish a justification or explanation for the discriminatory practice or action. If that is done, the Complainant or Commission has the burden of showing that such a justification or explanation was a pretext for the discriminatory practice or action: *Basi v. Canadian National Railway Company (No. 1)*(1988), 9 C.H.R.R. D/5029 (C.H.R.T.), at para. 38474.

[58] Also relevant to the instant case is the legal principle that: "It is not necessary that discriminatory considerations be the sole reason for the actions in issue in order that the complaint may succeed. It is sufficient that the discrimination be one of the factors [however small] for the employer's decision": *Morris v. Canada (Armed Forces)*(2001), 42 C.H.R.R. D/443 (C.H.R.T.), at para. 69.

A. Definition of Discrimination

[59] There is no definition of "discrimination" in the *CHRA*. One often quoted definition was formulated by McIntyre J. in an early section 15 *Canadian Charter of Rights and Freedoms* decision of the Supreme Court of Canada, *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at p. 175:

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

B. "Age" as a Prohibited Ground

[60] "Age" is one of the enumerated prohibited grounds of discrimination found in subsection 3(1) of the *CHRA*. The *CHRA* provides various defences, exceptions and justifications to what otherwise would be discriminatory practices related to age such as issues concerning membership in employee associations, mandatory retirement, insurance and pension plans: ss. 9(2), 15(1)(b)-(d). The *CHRA* also provides a *bona fide* occupational requirement/justification based on age: ss. 15(1)(a), 15(1)(g). Some of the defences/exceptions are unique to the prohibited ground of age. The foregoing illustrates Parliament's legislating of certain exceptions to the general principle that age discrimination is unlawful.

C. Applicable Statutory Provision

[61] The Complaint involves allegations that CIBC violated the following section of the *CHRA* on the prohibited ground of age:

7. It is a discriminatory practice, directly or indirectly,

(a) to refuse to employ or continue to employ any individual, or

(b) in the course of employment, to differentiate adversely in relation to an employee,

on a prohibited ground of discrimination.

VI. ANALYSIS

A. Did CIBC eliminate Mr. Durrer's position in October 1999 because of his age?

[62] Based on the findings I made earlier on this issue, I find that CIBC did not eliminate Mr. Durrer's position in October 1999 because of his age. Mr. Young eliminated the position for lawful business reasons: the position was redundant and not needed in CIBC's newly consolidated, single Compliance Department model. No one replaced Mr. Durrer in that position: it was eliminated as a result of the restructuring. The chart herein shows there was no age pattern in terms of the managers in Compliance whose positions were eliminated and those whose positions were not and were retained.

[63] Mr. Young was brought in by the new CEO of CIBC with a mandate to create the most effective Compliance Department possible. Mr. Young has the expertise to do so. Mr. Durrer does not challenge this. I would add that it is not the Tribunal's mandate to second-guess the business merit of Mr. Young's management decisions, but rather, to determine if they were tainted by discrimination.

[64] The fact that CIBC saved money from eliminating Mr. Durrer's position *per se* does not make the act a discriminatory one under the *CHRA*. If that was so, then no employer could eliminate any position that results in a cost-savings because the employee holding that position could argue age discrimination regardless of his/her age: *i.e.*, "if he or she was 25 years of age, he or she was discriminated against because he or she was "young"; if he or she was 60 years old, the employee was treated adversely because he or she was "old." The concepts of "young" and "old" are of course relative.

B. Did CIBC decide not to transfer Mr. Durrer to another position in the same department (Compliance) because of his age?

[65] Based on my earlier findings, I find that Mr. Young's decision not to offer Mr. Durrer a position in the new Compliance Department was not made, in whole or in part, because the Complainant was 48 years old. I accept his evidence that he had the difficult task of downsizing from three Compliance Departments to one. Mr. Durrer did not possess the compliance experience, background and understanding of compliance issues that Mr. Young was looking for. The chart reproduced in these Reasons demonstrates from an objective perspective that employees older than Mr. Durrer were retained (including one 11 years older) and ones younger than Mr. Durrer were "let go." There is no pattern of targeting of "older workers" (in this case, ones close to Mr. Durrer's age). In fact there is no age pattern at all. I accept Mr. Banks' evidence that, "The experienced rate of termination under the ETSP program is uniform for employees aged anywhere between 31 and 52. There is no indication of selection by age in this range."

[66] Regarding the excerpts from the transcript of Mr. Young's evidence reproduced earlier in these Reasons, I make the following observations and findings. I examined carefully Mr. Young's entire testimony, as well as the documentary evidence adduced. I do not take Mr. Young as saying he used Mr. Durrer's age to the latter's detriment in

deciding whether to keep him in the Compliance Department. Indeed, Mr. Young was never asked if age was a factor in his mind, did he use it to Mr. Durrer's benefit, detriment or was it a neutral factor? Of course, Mr. Young either knew Mr. Durrer's exact age or had an idea of his proximate age. He said, "it's out there." Just as he knew Mr. Durrer was male. That doesn't mean he punished Mr. Durrer for being 48 years old by not giving him a position in the revamped Compliance Department. In other words, Mr. Durrer's age was not counted against him by Mr. Young in his decision not to redeploy Mr. Durrer in the new Compliance Department. Mr. Durrer was not retained because he lacked the qualifications sought by Mr. Young and relative to the other employees in the three Compliance Departments under consideration.

[67] To find otherwise and to hold that CIBC ought to have kept him employed in the new Compliance Department, because Mr. Durrer was 48 years old and notwithstanding that he lacked the qualifications sought, would have troubling consequences. It would mean that the mere "age" of an employee (and it could be any age) is more important than experience, education, "value-addedness", etc. In essence, "age" becomes the deciding or "primary" factor, not whether the employee is qualified.

C. Did CIBC interfere with Mr. Durrer's attempts to seek redeployment within CIBC because of his age?

[68] This was the crux of Mr. Durrer's case: by not allowing him to take a fourth temporary assignment and crystallizing his date of termination, CIBC prevented Mr. Durrer from reaching the bridgeable age of 53, which stopped him from realizing his goal - an immediate, unreduced pension. Throughout his testimony and in pre-referral letters from Mr. Durrer to the Commission, this issue was the focal point of Mr. Durrer's concern about how CIBC treated him. In his testimony, he said, "Why couldn't they make an exception for me? There was lots of work." He also said words to that effect in other parts of his testimony. He even testified that they had bridged other people who did not meet the EC/RSP and ETSP criteria for bridging: (*i.e.*, the employee's job was being eliminated, and he or she was neither 55 years old nor 53-55 with enough severance to bridge them to 55). At the hearing, CIBC denied having done this. Mr. Durrer produced no probative evidence of CIBC having bridged other people falling outside the eligibility criteria.

[69] The Complainant states that various e-mails from Ms Nicholls and other human resources people in 2002 illustrate that CIBC was "frustrating" his attempts to find other work. Per my earlier findings of fact, I do not find this to be the case. On the contrary, I find that CIBC provided assistance to Mr. Durrer from the moment he was notified that his position was being eliminated in October 1999. CIBC offered him a very generous severance package, which as of the last day of the hearing, he had not accepted. The EC/RSP and ETSP paid a premium to workers 45 and older. Mr. Durrer was offered the maximum 24-month severance package. CIBC provided him with vocational rehabilitation counseling and training. Ms Nicholls met and spoke with him right from the start. Indeed, it was as a result of her suggestion and assistance that Mr. Durrer got his first temporary assignment. I also accept her evidence that she met frequently with other CIBC Human Resources staff about "leads" for Mr. Durrer.

[70] In addition, CIBC allowed Mr. Durrer and others similarly situated to continue to look for permanent work within CIBC, or even temporary work with the goal of finding a permanent job in CIBC. He had access to the computerized internal job postings system

at CIBC. Indeed, under the EC/RSP and ETSP, displaced employees like Mr. Durrer received preferential consideration over other employees applying for the same position, but who were not in the EC/RSP or ETSP programs. Employees like Mr. Durrer were to identify themselves on their application, and if they were equally qualified as the non-ETSP applicant, the former would win the job competition. Mr. Durrer's detailed log shows he applied for many jobs (most being temporary). Indeed, Mr. Durrer held three successive temporary positions from January 2000-April 2002: almost 2.5 years after he was given notice of termination. All during this time Mr. Durrer was accruing pension and other benefit entitlements. CIBC also hired him back on a contract for a 9-month period in June 2002. Simply put, I find that CIBC treated Mr. Durrer well and with respect during what was no doubt a difficult time for him. Indeed, there are e-mails entered into evidence from the Complainant wherein he was thanking CIBC managers and staff for their assistance.

[71] By way of the Agreed Statement of Facts, Mr. Durrer held three temporary positions over a 28-month period. That is probative evidence *per se* that CIBC did not frustrate his attempts to find permanent or temporary work on account of his age. Indeed, for all we know, his "age" and all its attendant benefits (*e.g.*, experience, maturity, etc.) might have contributed to his getting one, two or all three of those temporary positions.

[72] Mr. Durrer had used the word "conspiracy" in his testimony and in a letter to the Commission to describe CIBC's action in preventing him from finding further work to reach the bridgeable age. His counsel showed more restraint. He said CIBC's actions did not constitute a conspiracy, nor were they done "deliberately or intentionally, but they showed a willful disregard, an act of utter neglect, shameful." I do not find that CIBC's actions constituted any of those things, nor were they on account of his age.

[73] As indicated in the section dealing with findings of fact, one will never know whether CIBC ultimately would have allowed Mr. Durrer to continue into a fourth (or fifth or sixth, if necessary) temporary assignment to reach the bridgeable age of 53. Per my earlier finding, I believe CIBC would have *considered allowing* Mr. Durrer to take a fourth temporary assignment. The evidence is clear that, as of the April 12, 2002 effective date of termination (and even at the April 4th meeting where Mr. Durrer said he learned for the first time that CIBC wouldn't let him continue in a fourth temporary job), Mr. Durrer had neither secured nor even tentatively secured a temporary or permanent job at CIBC.

[74] Even if I had found that CIBC refused to consider a fourth temporary job, Mr. Durrer has not satisfied me that such a refusal was tied to his age, contrary to section 7 of the *CHRA*. And if Mr. Durrer had secured a permanent job at that time, he would no longer have been eligible for ETSP and thus would not be entitled to either the severance payment or the waiver of the early retirement pension reduction, both of which were his goals.

(i) Avoiding Pension Liability

[75] In his Statement of Particulars, the Complainant pleads that "CIBC terminated Mr. Durrer at age 50.5 [on April 12, 2002] in an effort to defeat Mr. Durrer's pension entitlement and its pension obligations."

[76] I find no merit to this allegation. First, Mr. Durrer did not lose any pension entitlement or benefits as of April 12, 2002 under the CIBC Pension Plan. They remain intact. He simply did not qualify for the pension reduction waiver. As of today at age 55,

he can start to receive an actuarially reduced pension or wait to age 65 to receive a full, unreduced pension. Second, if his allegation is that the Bank was defeating his "future" pension entitlement and its "future" pension obligations by preventing him from working another 2.5 years to reach the bridgeable age of 53, I still disagree. Had CIBC really wanted to avoid any further pension obligations to Mr. Durrer, it would have dismissed him without cause in October 1999, and not allowed him to continue at the Bank for the next 2.5 years in temporary assignments. During that time, he was accruing additional pension benefits. As CIBC's counsel stated, if that was his client's intention, it had the reverse effect, of increasing the Bank's pension obligation to Mr. Durrer. That doesn't make much "business sense" if its goal was to get rid of Mr. Durrer to save some money. [77] I also accept Mr. Banks' statement "that the impact on pension liabilities of the termination of employees by CIBC, pursuant to the ETSP program has been immaterial." Accordingly, the impact on pension liabilities from only one employee's pension (*i.e.*, Mr. Durrer's) would have been negligible.

VII. CONCLUSION

[78] There is no doubt that it was a sad and stressful time for Dan Durrer. His entire working life had been spent at CIBC. And by all accounts, he was a hard-working and successful employee. However, for the foregoing reasons, his age played no adverse part in his employment termination from CIBC. Accordingly, the Complaint is dismissed.

"Signed by"

Matthew D. Garfield

OTTAWA, Ontario

March 30, 2007

¹ While the transcript reads "conserved", I believe the witness said "considered".

² While the transcript reads "MR. MORIN", it was probably Mr. Grosman who made the comment.

PARTIES OF RECORD

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David Morin / Diane Ware

For the Complainant

No one appearing

For the Canadian Human Rights
Commission

Norman Grosman / Mark Fletcher

For the Respondent