

T.D. 9/92
Decision rendered on July 31, 1992

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

HUMAN RIGHTS TRIBUNAL

BETWEEN:

STANLEY DWYER
Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

CANADA POST CORPORATION

Respondent

DECISION OF THE TRIBUNAL

TRIBUNAL: Marilyn L. Pilkington
Ruth S. Goldhar
Ronald W. McInnes

APPEARANCES:

R.F. Lee, Esq. Counsel for the Commission

Zygmunt Machelak, Esq. Canada Post Corporation

DATES AND LOCATION

OF HEARING: February 14, March 27 and 28, April 8 and 9,
June 11, 12 and 13, 1991
Toronto, Ontario

I. THE COMPLAINT

Stanley Dwyer filed a Complaint with the Canadian Human Rights Commission on January 5, 1988, alleging that his then employer, Canada Post Corporation, had discriminated against him on the basis of race, in violation of s. 7 of the Canadian Human Rights Act. He relied on two incidents as establishing that he had been treated differently because he is black. First, he alleged that in January 1987 a security guard prevented him from entering the plant without a pass until his supervisor had authorized his entry, whereas the same security guard, on the same occasion, allowed a white employee to enter the plant without a pass and without authorization. Second, he alleged that on May 27, 1987 he and Ms Guhl, a white employee whom he was assisting as union steward, were both accused of being away from their work areas without permission and being in a safety shoe area without safety shoes, but that while he received a five-day disciplinary suspension, Ms Guhl was not disciplined.

It was agreed at the commencement of the hearing that evidence pertaining to remedial issues would be postponed pending the Tribunal's determination whether the Complaint is substantiated. At the opening of the hearing, Mr. Lee, for the Commission, characterized the Complaint as describing "two very isolated, very precise instances." He indicated that he would call a series of witnesses to describe what they had observed with respect to the two incidents as well as the atmosphere at the Gateway plant with respect to race relations (Tr., p.11). In his closing argument, Mr. Lee asserted more expansively that the case is about "a poisoned work environment" (Tr., p.1152). Mr. Dwyer in his closing submissions asked that we "save some lives, save some health of the workers in the plant from deteriorating further, save some pregnant mothers in the plant that have been harassed, daily, by management at Canada Post, at the Gateway plant" (Tr., p.1178).

Mr. Machelak, for the Respondent, submitted that the inquiry is restricted to the incidents particularized in the Complaint and is not a general inquiry into racial or other employment conditions at Canada Post. We agree with Mr. Machelak's submission, noting that a Complaint brought pursuant to section 7 of the Act deals with specific acts in relation to a specific employee. Section 7 provides that

"It is a discriminatory practice, directly or indirectly,

...

(b) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination."

The prohibited grounds of discrimination, specified in subsection 3(1) of the Act, include "race" and "colour." By contrast, section 10 of the Act applies to more generalized discriminatory practices and policies of an employer. While we allowed the Commission and the Complainant some leeway in leading evidence concerning race relations at the Gateway Plant, we find this evidence, which will be referred to in more detail below, of little assistance in dealing with the matters of complaint.

II. REPRESENTATION OF THE COMPLAINANT

At the first day of hearings, Mr. Dwyer was represented by Ms A. Pietranton-Hardy who advised the Tribunal by letter prior to the second day of hearing that she had withdrawn for financial reasons and that Mr. Dwyer would "continue to be represented by Mr. Lee," counsel to the

2

Commission (Ex. T-1). There was initially some confusion as to whether Commission counsel represented Mr. Dwyer in these circumstances. The role of Commission counsel, as provided in section 51 of the Canadian Human Rights Act is to act "in the public interest having regard to the nature of the complaint being inquired into." In this case, the positions advocated by the Commission and the Complainant were consistent, and Mr. Lee provided assistance to Mr. Dwyer throughout. Mr. Dwyer himself took an active part in the proceedings.

III. THE EVIDENCE

After reviewing the evidence pertaining to the particular incidents which are the basis of complaint, we will comment on the evidence pertaining to the racial climate at the Gateway Plant of Canada Post.

1. Alleged Differential Treatment of Employees Without Passes

Mr. Dwyer's Complaint alleged that in January 1987 a security guard prevented him from entering the plant without a pass until his supervisor had authorized his entry, whereas the same guard, on the same occasion, allowed a white employee to enter without a pass and without authorization.

It is common ground that employees entering the Gateway Plant of Canada Post to begin their shift were required to present their passes to security guards. When an employee did not have his or her pass, the security guard was required to telephone a supervisor to authorize entry. Gus Raffai, security supervisor in 1987, testified for the Respondent that the procedure applied to everyone and to all racial groups (Tr., p.938). He indicated that in 1987 six or seven of the twenty-four security officers and one of the four supervisors were members of visible minorities (Tr., p.931).

Joseph Rizzutti, a former security guard called by the Respondent, testified that in a given week five to ten employees would forget their passes on his shift, and that they were always detained until entry was authorized by a supervisor (Tr., p.959).

The Commission's witness, Edgar Cowie, formerly a security guard at Canada Post, testified that the requirement of showing a pass is "not adhered to at all" (Tr., p.111). On his calculation, approximately twenty-five employees per week forgot their passes. He testified that white security officers allowed some white employees in without passes, but required black employees to obtain authorization (Tr., pp.112-13). He further stated that white guards allowed white or Chinese employees in with little scrutiny, but examined the passes of black employees with care (Tr., p.137). When Mr. Cowie complained that employees were being let in without passes and were using each other's passes, he says he was told that this was "okay" (Tr., p.134). Although Mr. Cowie denied that he himself had been disciplined for letting in an employee without a pass (Tr., p.126), Mr. Raffai, his supervisor, testified that he disciplined Mr. Cowie for doing so, and that Mr. Cowie had filed a grievance concerning the discipline (Tr., p.939). Mr. Cowie indicated that he had been dismissed by Canada Post because of disability and that he had complained to the Human Rights Commission that his disability had not been accommodated in the same manner as were the disabilities of white employees (Tr., p.119).

To the extent that Mr. Cowie's evidence about policies and procedure conflicts with that of Mr. Raffai, we find that the evidence of Mr. Raffai is more probable. The fact that Mr. Cowie was disciplined for

allowing an employee in without a pass, supports a conclusion that the policies were in fact enforced. The only other evidence that entry policy was not enforced equally was the evidence of Mr. Dwyer of what other unidentified employees had told him (Tr., pp.336-7). We attach little weight to this unattributed hearsay.

In any event the material issue for determination is whether the policy was enforced equally in the incident which is the subject of the Complaint.

Mr. Dwyer testified that on an unspecified day in January 1987, when he arrived at the Gateway Plant before his shift, he found that he had forgotten his wallet which contained his pass. According to Mr. Dwyer, a white employee named Gerry Sacher, who was directly in front of Mr. Dwyer, told the security guard that he had forgotten his pass, and was allowed to enter (Tr., p.190). The same guard told Mr. Dwyer he would have to wait and be signed in by a supervisor (Tr. pp.192-94). Mr. Dwyer testified that he reported the different treatment to his supervisor, Delmon Allan, and to the plant Director, Roy Nias, but that nothing was done (Tr., pp.194-98). The other witnesses denied Mr. Dwyer's account. The security guard, Joe Rizzutti, denied letting any employee in without a pass (Tr., p.956). He testified that he knew neither Mr. Sacher nor Mr. Dwyer in 1987 (Tr., p.960). Mr. Rizzutti said he had been unable to locate the 1987 log book after the security department had been disbanded and its work contracted out, but he had checked his notebook and found no record of an incident as alleged by Mr. Dwyer (Tr., pp.943, 988).

Gerry Sacher testified that he could not recall any incident in January 1987 when he had forgotten his pass and the guard had let him in (Tr., p.922). In his experience, when he forgets his pass, he is stopped and a supervisor signs him in (Tr., p.922). He further testified that in January 1987 he did not know Mr. Rizzutti (Tr., p.924).

Mr. Nias denied that Mr. Dwyer had spoken to him about the pass incident, and testified that if Mr. Dwyer had done so, Mr. Nias as a black Plant Director concerned about morale and fairness, would have dealt with the problem (Tr., pp.833, 855). Mr. Dwyer attempted to show that Mr. Nias was prejudiced against him and his family, relying in part on incidents in which his wife's requests for changes in her work schedule had been denied (Tr., pp.188-89, 860-67). One of these incidents was the subject of another human rights complaint which, we were advised, was unsuccessful (Tr., p.866).

Delmon Allan, the supervisor who authorized Mr. Dwyer's entry was not called as a witness. In response to Mr. Dwyer's suggestion that Mr. Allan had discussed the incident with Mr. Sacher, the latter testified that he could recall no such discussion (Tr., p.929).

The Respondent submitted that the Commission and Mr. Dwyer had failed to establish that Mr. Dwyer and Mr. Sacher had been treated differently as alleged. In addition to the evidence of Mssrs. Raffia, Rizzutti, Sacher and Nias, the Respondent relied upon the fact that Mr.

Dwyer had not filed a grievance concerning the incident. Mr. Machelak argued that Mr. Dwyer's record as a litigious shop steward, employee, and union member indicates that he was well aware of his rights, and vigorously enforced them through the grievance process and other procedures. He invited the tribunal to conclude that Mr. Dwyer's failure to exercise his rights in relation to the alleged pass incident supports the inference that

4

the incident did not actually occur (Tr., pp.388, 404).

There is no doubt that Mr. Dwyer is a frequent grievor and experienced litigant. As a shop steward, Mr. Dwyer was knowledgeable about grievance procedures. The Respondent's computer printout, the validity of which is disputed by Mr. Dwyer, names "S. Dwyer" as the grievor in 164 grievances filed from 1983 to 1990 (Tr., pp.1049-54, Ex.R-26). Mr. Dwyer is also engaged in litigation arising from his previous employment at Chrysler Canada (Tr., p.402). When asked specifically about his litigation experience, his answers were evasive. Mr. Machelak asked him about proceedings referred to in an account of litigation proceedings in a decision of Vice-Chair R.O. MacDowell of the Ontario Labour Relations Board, in *Stanley Dwyer v. United Automobile, Aerospace & Agricultural Implement Workers of America U.A.W.*, [1982] O.L.R.B. Rep. 1417. The decision recounts Mr. Dwyer's experience with various legal proceedings relating to his employment at Chrysler, including arbitrations, applications for judicial review, applications for leave to appeal, complaints to the human rights commission, complaints to labour relations boards directed against his union, civil suit and an appeal to the Ombudsman. Mr. Dwyer confirmed his participation in arbitrations, an application for judicial review and applications to the labour relations board, (Tr., pp.406-14) but then became agitated, suggested that the report could have been fabricated and repeatedly answered "I don't remember" concerning the remaining proceedings (Tr., p.415-17). We are sceptical of the validity of this memory loss. In any event, the proceedings in which Mr. Dwyer admits participating indicate in themselves a substantial experience with grievance processes and litigation which he vigorously pursued against his former employer and his former union. As we ruled during the hearing, the decision of the Ontario Labour Relations Board was before us solely for the purpose of refreshing Mr. Dwyer's memory with respect to prior proceedings in which he had been engaged, for the purpose of establishing his knowledge of and willingness to assert his rights and we attach no other significance to it (Tr., pp.390, 392, 395, 397, 403, 415).

Mr. Dwyer asserted that he did not file a grievance over the pass incident because the union does not favour grievances against other

employees (Tr., p.539). He also alleged that there was little point to filing a grievance since he gets no satisfaction from management through the grievance process, and insufficient support from the union (Tr., pp.556-79, Ex. C-1, C-2). Although Mr. Dwyer is clearly not satisfied with the responsiveness of the Respondent in the grievance process, the evidence establishes that Mr. Dwyer filed grievances on a timely basis in many other instances both before and after the alleged events of January 1987. The evidence of James Turner, a labour relations officer with Canada Post, indicates that a substantial number of Mr. Dwyer's grievances have been taken to the second level of hearing and that several of these have been scheduled for arbitration (Tr., pp.1037-39, 1049, Ex.26). Some grievances, material to Mr. Dwyer's discharge from Canada Post, were arbitrated during the course of our hearing (Tr., pp.1045-46, Ex.25).

Mr. Dwyer's failure to grieve the alleged pass incident or to file a timely complaint with the Commission is consistent with our conclusion, on the basis of the other evidence, that the Commission and Mr. Dwyer have not discharged their onus of proving on a balance of

5

probabilities that Mr. Dwyer was treated differently from Mr. Sacher as alleged in the Complaint.

2. Alleged Differential Disciplinary Treatment

On May 27, 1987, Stanley Dwyer and Ms B. Guhl were accused of being away from their work areas on union business without permission and of being in a safety shoe area without safety shoes. Mr. Dwyer was eventually suspended for five days whereas Ms. Guhl, a white employee, received only a verbal reprimand. Mr. Dwyer's Complaint cited this differential treatment as racial discrimination.

Ms. Guhl testified that she had no prior discipline on her file that year (Tr., p.1083). Stephen Moore, a supervisor who investigated the incident, testified that Ms. Guhl was verbally reprimanded on May 27, 1987 and given a notice of interview on May 28, 1987. He did not have a copy of the notice (Tr., p.1128), but understood that the information would be forwarded to the unit to which she was being transferred and that management staff at that unit would conduct the interview (Tr., p.1127).

Ms Guhl testified that she was not given a notice of interview but was verbally reprimanded (Tr., p.1083). In any event, it appears that no interview took place. Ms. Guhl was away from work on rotation days and annual leave from May 29 until June 8, 1987, at which time she transferred

to the bulk mail facility, from which she took maternity leave on June 15, 1987 until November 1987 (Tr., pp.1087, 1127-30).

Although Ms Guhl and Mr. Dwyer were accused of the same wrongful acts, Mr. Dwyer was disciplined with a five day suspension. The Respondent submits that this penalty reflects the policy of progressive discipline at Canada Post. Roy Nias, the then Plant Director, and James Turner, a labour relations officer at the Gateway Plant, testified that the progressive discipline scheme starts with oral warnings or reprimands which are not documented in the file. When there are further infractions, the employee is given a notice of discipline and an interview, the findings of which are recorded and kept on file for twelve months. Where discipline is warranted, the employee is given, first, a letter of warning, followed successively by one, three and five day suspensions and then discharge (Tr., pp.812-13, 1008).

Mr. Dwyer testified that he was not aware of any progressive discipline scheme at Canada Post. He asserted that black employees and white employees are not treated equally, but when pressed could not refer to any specific cases. He indicated that he could look up the information and produce it, but he did not do so (Tr., pp.342-47, 466).

The records of the Respondent show that on February 2, 1987, a written reprimand was issued to Mr. Dwyer for using foul, abusive and derogatory language toward a supervisor (Ex. R-8). On March 24, 1987, a one-day suspension was imposed on Mr. Dwyer for using abusive language towards the shift superintendent (Ex. R-9). On April 28, 1987, a three-day suspension was imposed on Mr. Dwyer for insubordinate behaviour and abusive language directed at an Area Superintendent (Ex. R-10). On June 11, 1987, the five-day suspension was imposed on Mr. Dwyer for entering a safety shoe area without the appropriate footwear and performing union business without permission (Ex. R-11, HRC-4).

In addition, during the same time period, three grievances were filed on behalf of Mr. Dwyer arising out of the insistence of supervisors that he obtain permission before seeing other employees on union business

(Ex. R-2, R-3, R-4). The Respondent relied on these exhibits to establish that Mr. Dwyer had been warned repeatedly that he must follow the required procedures. Mr. Dwyer asserted that he did not remember any of these grievances, alleging that grievances are taken forward without his knowledge and that he does not always receive the copies that are supposed to be delivered to him (Tr., pp.291-310). The documents relating to these

three grievances indicate that one of the hearings was conducted in the absence of Mr. Dwyer and his union representative and that a copy of the Grievance Reply was mailed to Mr. Dwyer's home (Ex.R-3). The documents indicate that the other hearings were held in the presence of Mr. Dwyer and a union representative and that Mr. Dwyer elected not to sign to acknowledge receipt of the Grievance Reply (Exs.R-2, R-4). Mr. Bryce testified that copies of the Corporation's reply to grievances are not always sent out as required (Tr., p.746). Whether or not Mr. Dwyer was aware of each of these grievances or their results, he was aware that supervisors were insisting he obtain permission before conducting union business and he confirmed that it was clear to him that he must obtain such permission (Tr., p. 310).

The evidence amply demonstrates that the different discipline imposed on the two employees arising out of their actions on May 27, 1987 is based, not on their different races, but on their very different discipline records. There is no evidence that race was a factor in the imposition of the discipline penalties.

3. Alleged Targetting of Mr. Dwyer

In argument, Mr. Lee sought to shift the Complaint to another ground. In effect he suggested that the fact that Mr. Dwyer was disciplined at all on May 27, 1987 indicated that he was being unfairly targetted and that this targetting was motivated by racial discrimination. There are various versions of the events of May 27, 1987, which we now examine.

(a) Conducting union business without permission

According to Mr. Dwyer, on May 27, 1987 he requested his supervisor Indra Nanda (now Indra Chatrisha) to make an appointment for him to see Ms Guhl. He reminded Ms Nanda of this request again during the shift. Finally near the end of the shift she told him to address the request to Ms Guhl's supervisor, Sandy Nartowicz. Ms Nartowicz told him that the employee's request for changes in vacation time must be put in writing, and that he and Ms Guhl should go to the dock office, get paper and write down the request. Another supervisor named Stephen Moore was in the dock office. Mr. Moore did not have any paper, so Mr. Dwyer went to get some from his locker. On his return, Mr. Dwyer and Ms Guhl drafted the request and then presented it to Ms Nartowicz. The next day, according to Mr. Dwyer, Mr. Bourgault, a Plant Superintendent, and Mr. Moore served him with a notice of interview accusing him of doing union business without permission and being on the docks without safety shoes (Tr., pp. 198-203).

Stephen Moore, who at the time was a newly appointed supervisor at Canada Post, and subsequently left the company to go into business, testified that after Mr. Dwyer and Ms Guhl left the dock office, he spoke to Claude Bourgault for advice as to whether he was handling the matter appropriately. Following this conversation, Mr. Moore verified that Mr. Dwyer was not wearing safety shoes. He also telephoned Mr. Dwyer's supervisor Ms Nanda who stated that she had not authorized Mr. Dwyer to

7

conduct union business. He understood from Mr. Bourgault that Ms Nartowicz also reported that she had not given permission for the conduct of union business. On the basis of this information, Mr. Moore issued notices of interview to Mr. Dwyer and, to his recollection, to Ms Guhl (Tr., p.1121-24). Ms Guhl testified that she received no notice of interview (Tr., p.1083). Otherwise, her evidence is consistent with the evidence of Mr. Dwyer and Mr. Moore.

Ms Nartowicz was not called as a witness. Mr. Dwyer's supervisor, Ms Nanda (now Chatrisha), gave a confused, changing and unreliable account of her mischievous role in the events. In her testimony in chief she stated that she had in fact known that Mr. Dwyer wanted to go to the dock area on union business and had given him permission. However, when Claude Bourgault, one of three superintendents at the Plant, allegedly spoke with her the following day, she told him she was not aware that Mr. Dwyer was on union business when she gave him permission to see another employee. Her only explanation for telling this supposed lie to Mr. Bourgault was that she was under probation at the time (Tr., p.649). On cross-examination, she admitted that, in fact, she was not on probation when this incident occurred (Tr., p.662). She gave no explanation why, as a new supervisor, she would consider it necessary or appropriate to deny that she had given Mr. Dwyer permission to conduct union business.

Ms Nanda (Chatrisha) gave two written statements concerning the incident, one to the Respondent's human rights investigator, on March 17, 1988 (Ex. R-14) and the other to the Human Rights Commission's investigator on November 28, 1988 (Ex. R-15). In examination-in-chief she said Claude Bourgault had told her to tell the investigators that she had not given Mr. Dwyer permission to do union business and that she had complied because she was on probation in a new position (Tr., p. 660). In fact, at the time she gave the second statement she was an Acting Superintendent at the Plant, equivalent in authority to Mr. Bourgault. Nonetheless she says she felt "intimidated" and unable to correct the false information she had provided earlier to Mr. Bourgault (Tr., p.687).

It is significant that in her second written statement (Ex. R-15), Ms Nanda (Chatrisha) stated that it was Stephen Moore, a newly appointed supervisor, not Claude Bourgault, who inquired on May 28th whether she had given Mr. Dwyer permission to conduct union business. This is consistent with Mr. Moore's testimony, and makes it unlikely that Ms Nanda spoke to Mr. Bourgault or was intimidated by him.

In the meantime, according to Allan Bryce (Tr., p.733) and Mr. Dwyer (Ex. R-7), Ms Nanda (Chatrisha) told Mr. Dwyer in the presence of Mr. Bryce that she had told management she had authorized Mr. Dwyer to see Ms Guhl on union business.

When cross-examined as to how she had known that Mr. Dwyer wanted to see an employee on union business, she first of all stated that "for a couple of days that's all he was doing. For a couple of days...he was going to the dock to see the same employee" (Tr., p.668). She said she remembered making only one appointment for Mr. Dwyer at the dock and assumed that he had permission from the dock supervisor to go back. When pressed on details, she said she could not remember what happened three years ago and that it was possible, as Mr. Dwyer had testified, that she had not made any arrangements with the other supervisor (Tr., pp.678-79). Ms Nanda (Chatrisha) was fired by Canada Post for selling jobs.

8

Her discharge has been upheld at arbitration (Tr., p.993). She testified that she still thinks Canada Post is a good company and that during her employment she learned to stand up, so that she is now able to admit that she made a mistake when she lied about not having given Mr. Dwyer permission to conduct union business (Tr., pp.688-92). While under examination-in-chief she became highly emotional, recounting hurts she had experienced at Canada Post when it was alleged in graffiti that she had been promoted in return for sexual favours. She also referred to the fact that, when she was a superintendent, she was assigned black supervisors and labelled as "black," while white superintendents were assigned white supervisors (Tr., p.657). She was upset, as well, by the allegation that she had been selling jobs (Tr., p.657). She attributed these and other hurts to the fact that she is East Indian. She too has a complaint before the Human Rights Commission. She alleged on the one hand that she had complained but that nothing was done (Tr., p.655). On the other hand, she alleged that no one could speak up for fear of losing their jobs (Tr., p.655). The inconsistencies in Ms Chatrisha's testimony and her manner in testifying lead us to conclude that it would be unsafe to rely upon her testimony. She has amply demonstrated in this hearing and the events

leading up to it that she is prepared to say anything that suits her immediate purposes without regard to truth or even consistency.

It was on the basis of Ms Nanda's denial that she had authorized Mr. Dwyer to conduct union business that Mr. Dwyer was disciplined.

Assuming that Ms Nanda (Chatrisha) was lying when she made this denial, it has not been suggested that her decision to lie was motivated by racial discrimination.

The only evidence that the decision to discipline Mr. Dwyer may have been affected by racial discrimination is Ms Chatrisha's statement to the Tribunal that when she supposedly told Claude Bourgault she had not given Mr. Dwyer permission to conduct union business, he stated, "All right. I'm going to fix that black bastard" (Tr., p. 649). The evidence of Stephen Moore, however, is that it was he, not Claude Bourgault, who questioned Ms Nanda about this matter, while Mr. Bourgault questioned Ms Guhl's supervisor, Ms Nartowicz. Mr. Moore's evidence, which was candid and credible, is consistent on this point with Ms Nanda's second written statement (Ex. R-15), referred to above. Mr. Moore testified that he reported on his discussion with Ms Nanda to Mr. Bourgault who advised him that notices of interview were warranted. Although it would have been helpful to have the testimony of Mr. Bourgault on this point, we conclude, on the probabilities of the credible evidence, that the decision to issue notices of interview was taken without Mr. Bourgault speaking with Ms Nanda (Chatrisha).

(b) Safety Shoes

We turn now to the issue of safety shoes. In April 1987 the Plant Manager, Roy Nias, notified employees that as of April 30, 1987, the Dock Area would be designated as a safety shoe area (Ex. R-16B & 16C). Two classifications of employees, PO-2 and PO-5, were required to purchase and wear safety shoes and were provided with an allowance for that purpose (Ex. R-16A). Other employees designated to perform tasks requiring protective footwear were told to purchase footwear and apply for the allowance (Ex. R-16C). The final written notice issued before the April 30th deadline stated that "The Docks, Battery Room and Maintenance Shop are declared safety shoe areas. Employees working in those areas must wear approved

protective footwear" (Ex. R-16D).

Employees without safety shoes were permitted to walk through a corridor in the dock area, outlined by marks on the floor, which provided access to a meeting room (Tr., p.805). Stephen Moore testified that, otherwise, employees without safety shoes were not allowed on the dock.

PO-4 clerks who brought mail to the dock were supposed to bring it to one of the openings into the dock area, where a PO-2 or PO-5 employee, required to wear safety shoes, would take it from them (Tr., p.1132). He testified that if he saw a PO-4 clerk on the dock without safety shoes, he would remove him or her from the dock immediately and issue a notice of interview for committing an unsafe act (Tr., p.1132). He further testified that a union steward must wear safety shoes in a safety shoe area since he could be injured as easily as anyone else (Tr., p.1150). He admitted that when Mr. Dwyer and Ms Guhl asked if they could use the dock office, he should have checked whether they were wearing safety shoes. He described this as "an oversight" on his part (Tr., pp.1135-38).

Ms Guhl, classified as a PO-2, was required to wear safety shoes but was not wearing them because her feet had swollen in pregnancy (Tr., p.1079). Mr. Dwyer testified that he did not own safety shoes, and was not aware that he was required to wear safety shoes in the dock area (Tr., pp.206-7, 255-73). His lack of knowledge on this point seems improbable in light of the official notices circulated and filed in the preceding month, with their references to the availability of funding to purchase safety shoes. It is likely that an active shop steward such as Mr. Dwyer would be vigilant to ensure that employees did not enter a safety shoe area unprotected. However, it does not appear that the need for safety shoes was well-known or enforced.

Other employees testified that they were not aware of the safety shoe policy (Tr., pp.26-34, 39-42; 78; 92-4; 100-4). Mr. Machelak argued that some of this testimony is ambiguous in that the witnesses spoke of going to the docks rather than onto the docks or into the dock area. There is, however, evidence that employees without safety shoes went onto the docks without interference. No means were put in place for enforcing the safety shoe directive. Mr. Moore, who was a supervisor in the dock area, acknowledged that he does not know of any other employees being disciplined for being on the docks without safety shoes (Tr., p.1149). He noted that the dock is a large and busy area and that some safety shoes look like ordinary shoes so that it is difficult to enforce the requirement.

It thus appears, on the evidence before us, that Mr. Dwyer and Ms Guhl were singled out for not wearing safety shoes. However, there is no credible evidence that this action was racially motivated.

(c) Discrimination on the basis of race

In order to establish a breach of the Canadian Human Rights Act, it is sufficient to establish that race was one of the bases of the respondent's decision to discipline Mr. Dwyer: *Holden and Canadian Human Rights Commission v. Canadian National Railway*, Fed. C.A., May 4, 1990, at p. 4; *Foster Wheeler Limited v. Ontario Human Rights Commission and Scott* (1987), 8 C.H.R.R. D/4179.

The evidence does, in our view, support an inference that management personnel at the Gateway Plant intended to hold Mr. Dwyer to compliance with the strict requirements of his position as an employee and a union steward. Mr. Dwyer had been repeatedly instructed by supervisory

10

personnel and also notified by the Corporation that he must follow requisite procedures in conducting union business. The evidence indicates that Mr. Dwyer was an active grievor who took technical and obstructive positions. He frequently refused to sign to acknowledge receipt of documents served on him. He also insisted that management personnel must not speak with him directly, but only through his supervisor (Tr., pp.204, 473-83). He was disciplined for abusive language and insubordinate behaviour toward management (Ex. R-8, R-9, R-10).

On several occasions in the course of these hearings which were unduly lengthened by Mr. Dwyer's evasiveness in response to proper questions, Mr. Dwyer demonstrated his inability to control himself. On one occasion while he was testifying, his wife intervened to settle him down.

On other occasions it was necessary to recess the proceedings. One of his outbursts was triggered by the fact that a copy of the same document appeared in two different exhibits each consisting of several documents (Tr., pp.488-96). He made several allegations of impropriety against Respondent counsel which were without foundation and, in response to adverse rulings, accused the Tribunal of infringing his equality rights guaranteed by the Canadian Charter of Rights and Freedoms. He amply demonstrated by his behaviour that he is difficult, unco-operative, abusive, and manipulative. On the basis of our observations, it is clear to us why Mr. Nias would not agree with Mr. Dwyer's suggestion that he was "a model employee" (Tr., p. 842) and why management would be vigilant to ensure that he complied with his obligations. There is no evidence that this approach was influenced by racial considerations.

Mr. Lee acknowledged that Mr. Dwyer is "verbally aggressive," but sought to attribute this condition to his frustration, inter alia, with the racial climate at Canada Post (Tr., p.1173). We have concluded that the

general state of race relations, and the state of labour relations, at Canada Post is not in issue before us. Nor are we in a position to determine the causes of Mr. Dwyer's attitudes and behaviour and whether they developed before or after he was employed by Canada Post. Mr. Lee relied upon the decision of E.J. Ratushny sitting as a board of inquiry pursuant to the Ontario Human Rights Code in *Cousens v. Canadian Nurses Association* (1980), 2 C.H.H.R. D/365, which held that a board of inquiry was required, pursuant to the specific statutory wording in the Ontario Human Rights Code then in effect,

"not merely to decide upon the specific ground of discrimination which has been alleged, but to hear the circumstances of the complaint as presented by the parties and decide whether or not any party has `contravened this Act.' The written complaint is not, therefore, in the nature of an information or indictment in a criminal case. Rather, it serves as general notice to a party in an administrative hearing."

This decision has no application to a Tribunal appointed pursuant to the Canadian Human Rights Act, which authorizes a Tribunal to "inquire into the complaint" (s. 49(1), s. 50(1)). Subsection 53(1) of the Act provides that "If, at the conclusion of its inquiry, a Tribunal finds that the complaint to which the inquiry relates is not substantiated, it shall dismiss the complaint."

4. Findings on the Complaint

11

The particulars of Mr. Dwyer's Complaint are very specific. With respect to the alleged pass incident, we find that the Commission and the Complainant have not established on a balance of probabilities that the incident actually occurred. With respect to the incident involving discipline for failing to wear safety shoes and conducting union business without permission, the Commission and the Complainant have not established that the different discipline imposed on Mr. Dwyer and Ms. Guhl, or the fact that they were disciplined for these infractions, was tainted by racial considerations.

5. Evidence of the Racial Climate at the Gateway Plant

Nonetheless, we consider it appropriate to indicate the nature of the background evidence before us with respect to the racial climate at the Gateway Plant. Mr. Nias testified that 40% of the workforce at the West Letter Processing Plant at Gateway consists of visible minorities (Tr.,

p.821). Members of minority groups have been appointed as supervisors, superintendents and as plant Directors (Tr., p.53). Several witnesses testified, and Mr. Nias confirmed, that there is a problem with graffiti in washrooms and that such graffiti frequently contains personal and racist remarks (Tr., p.24, 49, 89, 654-55, 735). Mr. Nias testified, and other witnesses confirmed, that the policy is to clean away such graffiti, but it reappears (Tr., 822, 62, 755, 924). Sharwan Bhasin testified that in his view little could be done to stop this graffiti (Tr., p.62). Ali Chawdry testified that "it is part of life" (Tr., p.66). Neither of these witnesses had experienced racial discrimination directed at them, although they had occasionally heard others referred to by racist epithets such as "Paki". Mr. Chawdry testified that he could recall only two such incidents in his twelve years at the plant, but he also testified that there is a racist undercurrent: "The attitude is there. Like when they talk to people, they talk differently" (Tr., p.69). Anthony Jackson testified that he recalled Mr. Bourgault saying "The problem with you blacks, you're all alike and you're always trying to create a problem in the work place" (Tr., p. 90). This allegation was the subject of another human rights complaint on which the evidence was apparently found to be inconclusive (Tr., p.920).

Mr. Cowie testified that he had heard Mr. Rizzutti make remarks about "Pakis" who "like to come in here to take over," comments on their "smell," and comments on the appearance of Rasta Jamaicans who are "always trying to create some kind of a disturbance." Mr. Cowie says he complained about these remarks but that nothing was done.

Mr. Dwyer alleged that Mr. Bourgault had said to him "I don't know why you blacks are so irritable" (Tr., p.210), and that Ms Nartowicz had commented adversely on "Indians" and "Chinese" in his presence and had advised him against representing certain individuals who were members of visible minorities (Tr., p.211). He stated that both whites and blacks have commented on how whites are let into the plant without passes but blacks are not (Tr., p.337).

Both Mr. Bryce and Mr. Dwyer referred to an incident when an application form was filled out in the name of "Nigger". This incident is also the subject of a separate complaint. Ms Kerr, the human rights co-ordinator for York Division of Canada Post testified that the Plant Director asked her to investigate this incident right away, and that she reported within five days. The application had been found on a black

supervisor's desk by a white supervisor who showed it to a black employee who showed it to other black employees. It could not be determined who initiated the document. The white supervisor involved was verbally reprimanded for exercising poor judgment in dealing with the situation. Ms. Kerr acknowledged that in conducting her investigation she had not talked with any of the employees on the floor who had seen the document (Tr., p.915).

Ms Kerr described the human rights training programmes she has developed for supervisors at the Gateway plant. It appears, however, that there is no process for ensuring that human rights policies are being enforced by supervisors or brought to the attention of employees (Tr. p.917). Gus Raffai recalled that recently he received a letter circulated by management concerning racist expressions and jokes, but it was the first time he could recall receiving such a communication (Tr., p.947).

Several of the alleged incidents reported to us are or have been the subject of other specific complaints to the Canadian Human Rights Commission and their validity is clearly not before this Tribunal. We make no findings with respect to them other than to note what was said about them by witnesses before us. Nor are the general policies or practices of Canada Post at issue before us, except to the extent that they serve as background to the specific complaints referred to the Tribunal.

With those caveats, we nonetheless wish to emphasize that the general evidence we heard concerning racist graffiti and comments by some employees at the Gateway Plant emphasizes the need for a strong human rights policy clearly communicated and vigorously enforced at all levels of Canada Post Corporation. Racist graffiti, jokes and comments should not have to be tolerated as "part of life." They certainly should not be allowed to flourish within a Crown corporation. Every attempt should be made through a vigorous human rights compliance policy to create a working environment in which members of all racial groups are treated, by management and by co-workers, with equal respect for their human dignity. In our view the human rights programme at the Gateway Plant, as described to us, is not adequately addressing the full dimensions of racial discrimination.

Order

For the reasons given, the Complaint of the Canadian Human Rights Commission and Stanley Dwyer against Canada Post Corporation, dated January 5, 1988, alleging violation of s. 7 of the Canadian Human Rights Act is hereby dismissed.

DATED at Toronto, this 17th day of June, 1992.

Marilyn L. Pilkington, Chair

Ruth S. Goldhar

Ronald W. McInnes