

Canadian Human Rights Tribunal Tribunal canadien des droits de la personne

BETWEEN:

BERYL NKWAZI

Complainant

- and -

CORRECTIONAL SERVICE CANADA

Respondent

REASONS FOR DECISION

T.D. 1/01
2001/02/05

PANEL: Anne Mactavish, Chairperson

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I. INTRODUCTION

[1] Beryl Nkwazi worked for several years as a casual nurse at the Regional Psychiatric Centre operated by the Correctional Service of Canada in Saskatoon. She alleges that she was subject to differential treatment in the course of her employment with CSC because of her race and colour. Ms. Nkwazi further alleges that CSC refused to continue her employment for the same reason.

II. LAW

[2] Ms. Nkwazi's complaint is brought under Section 7 of the Canadian Human Rights Act, which makes it a discriminatory practice to refuse to continue to employ an individual, or to

differentiate adversely in relation to an employee in the course of their employment on a prohibited ground of discrimination.

[3] Race and colour are prohibited grounds of discrimination.

[4] In a case of this nature, the burden of proof is on Ms. Nkwazi to establish a prima facie case of discrimination. Once that is done, the burden then shifts to the respondent to provide a reasonable explanation for the conduct in issue. (1)

[5] A prima facie case is one which covers the allegations made, and which, if believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent. (2) The allegations made by the complainant must be credible in order to support the conclusion that a prima facie case has been established. (3)

[6] If CSC does provide a reasonable explanation for otherwise discriminatory behaviour, Ms. Nkwazi then has the burden of demonstrating that the explanation was pretextual, and that the true motivation behind her employer's actions was, in fact, discriminatory. (4)

[7] It is difficult to prove allegations of discrimination by way of direct evidence. As was noted in *Basi*, discrimination is not a practice which is ordinarily displayed overtly. (5) It is the task of the Tribunal to view all of the circumstances to determine if there exists what was described in *Basi* as the "subtle scent of discrimination".

[8] The standard of proof in discrimination cases is the ordinary civil standard of the balance of probabilities. In cases of circumstantial evidence, an inference of discrimination may be drawn where the evidence offered in support of it renders such an inference more probable than the other possible inferences or hypotheses. (6)

[9] It is not necessary that discriminatory considerations be the sole reason for the actions in issue for a complaint to succeed. It is sufficient that the discrimination be a basis for the employer's actions or decisions. (7)

III. THE EVIDENCE

[10] This hearing involved the testimony of some 29 witnesses, and took nearly three weeks to complete. As a consequence of the significant volume of evidence adduced in the course of the hearing, and in the interest of providing a coherent decision, I have outlined the evidence as it relates to each of Ms. Nkwazi's principal allegations. While each issue is dealt with separately, I have also considered each of the allegations in the context of the totality of the evidence, in an effort to determine whether there existed a discernible pattern of discriminatory conduct on the part of the respondent.

A. Background

[11] Ms. Nkwazi is a black woman, who was born in Zimbabwe. Ms. Nkwazi trained in England as a psychiatric nurse, qualifying as a Registered Nurse and Registered Psychiatric Nurse in 1978. After working as a public health nurse in England, Ms. Nkwazi emigrated to Canada in 1983. Shortly after arriving in Saskatoon, Ms. Nkwazi gave birth to the first of her three children, and spent the next several years raising her family. Following the break-up of her marriage in 1989, Ms. Nkwazi updated her nursing training and passed the Canadian nursing examinations. Ms. Nkwazi spent a couple of years working in various hospitals before commencing work on her Bachelor of Science degree at the University of Saskatchewan. Ms. Nkwazi graduated from this program, with distinction, in 1995.

[12] In the course of her studies at the University of Saskatchewan, Ms. Nkwazi completed a practicum at the Regional Psychiatric Centre operated by the Correctional Service of Canada in Saskatoon. The RPC is a psychiatric hospital facility operating within the correctional system, providing psychiatric care for federal inmates.

[13] Following her graduation, Ms. Nkwazi sought employment as a nurse. Unable to find full-time employment, on October 23, 1995, Ms. Nkwazi took a position as a casual nurse at the RPC. As a single parent of three children, Ms. Nkwazi wanted full-time employment. As a result she continued to look for a full-time position, while at the same time hoping that her position at the RPC would turn into a full-time job.

B. Casual Employment at the RPC

[14] Ms. Nkwazi was hired for an initial term of three months. Prior to commencing her employment, Ms. Nkwazi signed a written contract setting out the terms and conditions of her employment at the RPC. Ms. Nkwazi's contract incorporated by reference certain provisions of the Public Service Terms and Conditions of Employment Regulations. These Regulations dealt with issues such as entitlement to various forms of leave, vacation pay, overtime, statutory holidays as well as entitlement to acting pay.

[15] Ms. Nkwazi's initial contract provided that it would run from October 23, 1995 to January 23, 1996. Ms. Nkwazi did not have fixed hours of work, but was called in on an as-needed basis. According to her contract, as a casual employee, Ms. Nkwazi could not work more than 125 days in any 12 month period. Ms. Nkwazi's contract stipulated that nothing in it should be construed as an offer of indeterminate employment.

[16] Ms. Nkwazi's casual contract was renewed nine times, each time for a term of three months. Each subsequent contract contained comparable provisions regarding the terms and conditions of her employment.

[17] The RPC is made up of a number of Units, each providing different forms of treatment to prisoners suffering from various psychiatric illnesses. As a casual employee, Ms. Nkwazi could be assigned to work in any of the Units in the institution. For administrative purposes, however, each casual is assigned to a particular Unit. In Ms. Nkwazi's case, she was assigned to Churchill Unit. According to Ms. Nkwazi, as the casual assigned to Churchill Unit, she would ordinarily be called first to work any available shifts on that Unit.

C. Access to Training for Churchill Unit

[18] Ms. Nkwazi alleges that the first time that she was treated in a differential fashion by CSC as a consequence of her race or colour was in relation to training offered to the staff of Churchill Unit.

[19] During the summer of 1996, Churchill Unit was converted from a facility for male inmates to one for federally-sentenced female offenders. In order to deal with the unique needs of these women, in August of 1996, training was offered to individuals who were going to be working on Churchill Unit. It is not clear who made the decision as to who would be offered training.

[20] Ms. Nkwazi is of the view that, as the casual employee assigned to Churchill Unit, she should have been provided with access to the training. When Ms. Nkwazi became aware that training was being offered, she approached Anita Uwiera, who was involved in setting up the women's program on Churchill Unit. Ms. Nkwazi asked Ms. Uwiera if she could attend the training. According to Ms. Nkwazi, it was only after she asked that she was allowed to participate, joining the program after it had already started. Ms. Nkwazi received 18 days of training out of what appears to have been a 21 day program.

[21] Ms. Nkwazi initially stated that other, Caucasian, casual employees, specifically Tracey Houk Kushniruk, were included in the training, and did not have to ask to participate. She subsequently testified that, at the time of the training, Ms. Kushniruk was a term employee.

[22] Ms. Nkwazi acknowledged that casual employees were not ordinarily included in staff training.

[23] Ms. Uwiera testified that the training was being provided to those individuals who were going to be working on Churchill Unit. She confirms that Ms. Nkwazi was not originally included in the training program. After Ms. Nkwazi raised the issue with her, Ms. Uwiera brought the matter to the attention of Tim Leis, who was at that time the Director of Programs and Operations at the RPC. As a result of Ms. Uwiera's discussion with Mr. Leis, Ms. Nkwazi was permitted to join in the training.

[24] Ms. Kushniruk confirmed that she was included in the training program from the outset, and did not have to ask to participate. According to Ms. Kushniruk, at the time of the creation of the women's program on Churchill Unit, she was working as a term employee on the Clearwater Unit. When she heard about the new female offender program, she applied to work with the female inmates, and was subsequently accepted to work on the Unit. Ms. Kushniruk was then offered training to equip her to work with the female offenders. In late August, 1996, Ms. Kushniruk was notified that her term contract was not being renewed as a result in a change in staffing requirements, and she reverted to casual status in January of 1997.

(i) Analysis

[25] Ms. Nkwazi's evidence is that casual employees are not ordinarily included in staff training. There was no evidence of any casual employee, apart from Ms. Nkwazi, who participated in the

training for the female offender program. Counsel for Ms. Nkwazi suggests, however, that it was known that Ms. Kushniruk would be reverting to casual status, and that she was nevertheless included in the training. This, Ms. Glazer says, is evidence of differential treatment based upon Ms. Nkwazi's race and colour.

[26] I do not accept counsel's submissions in this regard. A review of the contemporaneous documentary evidence suggests that the decision not to extend Ms. Kushniruk's term after December 31, 1996 was only made on August 23, 1996. This was several weeks after the training started.

[27] While it is true that Ms. Nkwazi was initially excluded from the training program, in my view it is more probable that the original decision not to include her was based upon Ms. Nkwazi's status as a casual employee, and had nothing to do with any consideration of race or colour.

D. Call Back Pay

[28] The second example of differential treatment cited by Ms. Nkwazi related to 'call-back' pay. According to Ms. Nkwazi, when casual employees were called in to work, they were entitled to be paid for a minimum of three hours, even if they were sent home having worked less than three hours.

[29] On October 24, 1996, Ms. Nkwazi was called by Bill Hayes to come in to work. She reported for work at 6:45 in the morning, and worked until 8 am, whereupon she was advised by Albert Boucher that she was no longer needed, and was being sent home. Ms. Nkwazi was paid for the 1.25 hours she actually worked.

[30] Ms. Nkwazi stated that she was not initially given any reason as to why she was being sent home, but states that she later heard that a manager by the name of Diane Neufeld wanted another employee named Winnie Church to take over Ms. Nkwazi's duties. Ms. Nkwazi was not sure where she heard this.

[31] According to Ms. Nkwazi, she was very upset at being sent home early when she had anticipated working a full shift. Mr. Hayes had reportedly assured Ms. Nkwazi that she would be paid the three hour minimum, and was surprised to hear that she had not received such payment. Ms. Nkwazi spoke to several of her colleagues about the situation, asking whether they had ever been treated in a comparable fashion. Bonnie Roth evidently advised Ms. Nkwazi that she had regularly received the three hour minimum when she was sent home early. Jackie Kemp reportedly advised Ms. Nkwazi that she understood that casuals were entitled to call-back pay.

[32] Ms. Nkwazi also spoke to Carol Smith with respect to her entitlement to call-back pay. Ms. Smith is the Chief of Personnel at the RPC. Ms. Nkwazi stated that Ms. Smith advised her that she was not entitled to the three hour minimum payment. Ms. Nkwazi did not pursue the matter any further. Although it is not entirely clear from Ms. Nkwazi's testimony, it appears that she also spoke to Reg Brecknell, the former Chief of Personnel, concerning this matter.

[33] Ms. Roth testified that she was occasionally called in to work, only to be sent home because too many staff had been called in. When this happened, Ms. Roth says she was paid for three hours. When confronted with her pay records, however, Ms. Roth acknowledged that there were several occasions where she had been sent home early, having worked less than three hours, where she was only paid for the time she had actually worked. Ms. Roth testified that she had previously tried to get clarification of the policy governing call-back pay, and was never able to nail down the applicable policy. She was unsure if the policy differed for term and indeterminate employees as opposed to casuals.

[34] Jackie Kemp also testified but was not asked any questions about the issue of call-back pay. Ms. Kushniruk acknowledged having worked a 2.5 hour shift, for which she was only paid for 2.5 hours. Ms. Kushniruk states, however, that she had agreed in advance to work an abbreviated shift.

[35] Reg Brecknell was the Chief of Personnel at the time that Ms. Nkwazi's concerns with respect to the issue of call-back pay first arose. He recalls Ms. Nkwazi coming to see him concerning her claim for call-back pay. According to Mr. Brecknell, he told Ms. Nkwazi that entitlement to call-back pay was derived from the collective agreement, and that, as a casual employee, Ms. Nkwazi was not governed by the agreement. Accordingly, she was not entitled to call-back pay. Mr. Brecknell described Ms. Nkwazi as 'overly-persistent' on the issue, and stated that Ms. Nkwazi did not appear satisfied with his explanation.

[36] Carol Smith took over from Reg Brecknell as Chief of Personnel in October of 1996, when Mr. Brecknell became an Associate Program Director on one of the Units at the RPC. Ms. Smith explained that the Public Service Terms and Conditions of Employment Policy stipulates that, subject to any Treasury Board enactment, casual employees are entitled to call-back pay. This entitlement is to be administered in accordance with the provisions of the relevant collective agreement, in this case, the Health Services agreement. Article 10.01 of this agreement indicates that employees are entitled to a minimum of three hours pay when they are called back to work any time outside their normal working hours. According to Ms. Smith, guidance was sought from Treasury Board with respect to the application of these provisions to casual employees at the RPC. By memo dated August 2, 1996, Bonnie Davenport, the Regional Chief of Staff Relations, advised that casual employees with regularly scheduled hours were entitled to the three hour minimum when they were called in to work. A casual employee could have regularly scheduled hours of work where, for example, the casual was replacing a staffer who was on a training course for a fixed period. For employees employed on a sporadic basis, the call-back provisions would not apply, as the employees are hired on an 'as-needed' basis, and do not have regular working hours. According to Ms. Smith, this policy is applied to all casual employees working at the RPC.

[37] Ms. Smith testified that shortly after she took over from Mr. Brecknell, Ms. Nkwazi approached her with respect to the issue of her entitlement to call-back pay. Ms. Smith explained that Ms. Nkwazi did not meet the requirements of the collective agreement, and that was the end of the matter.

[38] Ms. Neufeld denied asking that Ms. Nkwazi be sent home on October 24, 1996, noting that at the time she was the Program Director on MacKenzie Unit, and had no involvement with Churchill Unit.

(i) Analysis

[39] The policy governing the entitlement of casual employees to the three hour minimum as call-back pay is confusing, and does not appear to have been communicated clearly to the employees in question. Indeed, when Bonnie Roth tried to clarify the question of her entitlement to call-back pay, she was unable to do so. It is no wonder that Ms. Nkwazi was concerned when she did not receive the three hour minimum payment for October 24, 1996.

[40] Having said that, there is documentary evidence from within RPC pre-dating Ms. Nkwazi's complaint that suggests that casual employees in Ms. Nkwazi's situation were not entitled to call-back pay. The evidence of Ms. Roth and Ms. Kushniruk indicates that other, Caucasian, casuals were treated in a comparable fashion. Consequently, I cannot conclude that Ms. Nkwazi's race or colour had anything to do with the decision to deny her call-back pay.

[41] I also cannot conclude that Ms. Neufeld had anything to do with Ms. Nkwazi being sent home on October 24. Ms. Nkwazi's testimony in this regard is based on nothing more than rumour, and she was unable even to identify the source of her information. Not only did Ms. Neufeld specifically deny having anything to do with the decision to send Ms. Nkwazi home that day - she wasn't even working on Churchill Unit at the time.

E. Acting Pay

[42] It is common ground that casual employees are entitled to acting pay when they assume the duties of a higher position. Ms. Nkwazi states that from time to time, she was put in charge of Churchill Unit, and would receive acting pay to compensate her for taking on this additional responsibility. She points to a number of instances where she received acting pay.

[43] Ms. Nkwazi states that she acted as the charge nurse on May 3 and 4, 1997, and again from June 29 to July 2, July 19 and 20, and August 16 and 17, and did not receive acting pay for any of these shifts. She states that she did not pursue this matter because she 'was afraid of making waves'. Ms. Nkwazi then stopped recording when she was in charge on the shift records. Ms. Nkwazi also mentioned an occasion in December of 1997, when she was paid acting pay for two shifts when she was not in fact in charge. Ms. Nkwazi has no explanation for why this payment was made.

[44] In support of her claim, Ms. Nkwazi produced a document entitled "Quarterly Nursing Acting Pay Authorization and Request", which document appears to have been signed by Sandra Pozniak, the Associate Program Director on Churchill Unit, on July 2, 1997. Curiously, although the form indicates that it is for the quarter from April 1 to June 30, it lists shifts from May to August, for which Ms. Nkwazi claims she was wrongfully denied acting pay.

[45] Sandra Pozniak did not testify. Carol Smith confirmed that where a casual employee acted in a higher position for two consecutive shifts, that employee was entitled to acting pay. The two-shift qualifying period originates in the nursing collective agreement.

[46] Ms. Smith noted certain irregularities in the documentation produced by Ms. Nkwazi in support of her claim. Specifically, the Quarterly Nursing Acting Pay Authorization and Request form purports to be for the quarter from April 1 to June 30, 1997, and appears to have been signed by Ms. Pozniak immediately after the end of the quarter. Nonetheless, the document appears to record shifts worked by Ms. Nkwazi in July and August - after the form was approved by Ms. Pozniak. Ms. Smith states that further investigation would have been necessary before the claim could have been paid. She was prepared to concede that if the claims were valid, Ms. Nkwazi should have been paid acting pay for the period in question.

(i) Analysis

[47] There is no dispute that casual nurses are entitled to acting pay when they act as Charge Nurse for two consecutive shifts. What is in dispute is whether or not Ms. Nkwazi was wrongfully denied acting pay for shifts she claims to have worked as Charge Nurse in May, June, July and August of 1997, and whether discriminatory considerations played any role in this denial.

[48] The documentary evidence relied upon by Ms. Nkwazi in support of her claim is confusing. It seems odd that a document purporting to record shifts between April 1 and June 30 would also record shifts in July and August. My concern with respect to the reliability of the documentation is heightened by the fact that Ms. Pozniak appears to have approved the document on July 2, 1997. It is eminently reasonable for a supervisor to approve shift records at the end of the period to which the records relate. It is more that a little odd for additional shifts to then be recorded on the document, after it has been approved by the supervisor. How could Ms. Pozniak have known, on July 2, 1997 that Ms. Nkwazi would be acting as Charge Nurse in mid-August? Further - assuming that Ms. Nkwazi did in fact act as Charge Nurse on August 16 and 17 - why would that not be recorded on the Quarterly Nursing Acting Pay Authorization and Request form for the quarter from July 1 to September 30?

[49] It may well be that there is a perfectly reasonable explanation for the way in which these time records were completed. However, Ms. Nkwazi did not testify in reply, and made no attempt to explain the discrepancies in the documentation once the questions were raised by Ms. Smith.

[50] In light of all of the evidence, I am not satisfied that Ms. Nkwazi has established that she in fact acted as Charge Nurse on the dates in question. As a result, I do not have to consider whether there was differential treatment based on race or colour in the denial of acting pay.

F. 125 Day Limit

[51] Ms. Nkwazi contends that she was held to the 125 day limit provided for in her contract of employment with the RPC, whereas other, Caucasian, employees were permitted to work in

excess of 125 days in a twelve month period. She also states that Diane Neufeld told her to stop coming in to work before she had reached her 125 day limit.

[52] Dealing with the second allegation first, Ms. Nkwazi says that in August of 1997, she was approached by Ms. Neufeld with respect to the number of days Ms. Nkwazi had left to work before her anniversary date. At this point, Ms. Neufeld was the Program Director on Churchill Unit. Ms. Neufeld reportedly told Ms. Nkwazi that Ms. Nkwazi had worked close to 125 days since her last anniversary date, and had only 4 days left to work. Ms. Nkwazi says that she was sure that she had more days left than that, and told Ms. Neufeld so. Ms. Neufeld was adamant that Ms. Nkwazi had almost reached her limit, forcing Ms. Nkwazi to cancel three of the seven shifts that Ms. Nkwazi was booked to work.

[53] Ms. Nkwazi testified that she was very upset by this, but did not challenge Ms. Neufeld because Ms. Neufeld held a great deal of power at the RPC, and was involved in many of the hiring decisions for positions in the institution. Ms. Nkwazi said that, as a result, she did not work for approximately three weeks.

[54] Ms. Nkwazi says that on September 15, she received a call at home from Sandra Pozniak. Ms. Pozniak advised Ms. Nkwazi that there had been an error in the calculation of her shift total, and that, in fact, Ms. Nkwazi had seven shifts left to work before she would reach the 125 day maximum. Ms. Nkwazi returned to work the following day, and worked until October 9, 1997 when she reached the 125 day limit.

[55] Ms. Neufeld does not recall the discussion with Ms. Nkwazi, although she does not say that it did not happen. Normally it is the responsibility of the Associate Program Director to monitor the number of shifts worked by casual employees. Ms. Neufeld speculated that she may have had some occasion to deal with the issue while Ms. Pozniak was on holiday. Ms. Neufeld does recall Ms. Pozniak telling her that there had been some mistake with respect to the calculation of Ms. Nkwazi's remaining available shifts.

[56] In the course of dealing with Ms. Nkwazi's complaint, Carol Smith interviewed Ms. Neufeld with respect to Ms. Nkwazi's allegations. According to Ms. Smith, Ms. Neufeld acknowledged that, in late August of 1997, she had advised Ms. Nkwazi that her 125 days were almost up.

[57] As previously noted, Sandra Pozniak did not testify.

[58] A review of Ms. Nkwazi's time records for this period confirms that she worked eleven days in August of 1997, her last day of work being August 24. Ms. Nkwazi did not work again until September 16. An examination of Ms. Nkwazi's records for the preceding year confirms that, throughout the year, Ms. Nkwazi worked steadily at the RPC, rarely going more than a few days without a shift. Nowhere else is there a three-week hiatus.

[59] The other aspect of Ms. Nkwazi's complaint as it relates to the 125 day limit is her allegation that she was held to the 125 day limit, whereas a Caucasian employee named Gordon Hirschfeld was permitted to work more than 125 days in a twelve month period. Ms. Nkwazi bases her allegation on discussions that she had with Mr. Hirschfeld.

[60] In cross-examination, Ms. Nkwazi acknowledged that, between October of 1996 and October of 1997, she herself exceeded the 125 day limit, having worked a total of 126 days during that period. This is confirmed by a review of the relevant time records.

[61] Mr. Hirschfeld testified that he worked as a casual nurse at the RPC from July of 1994, until September of 1995, at which point he obtained a term position. Mr. Hirschfeld stated that during the time that he was employed on a casual basis, he was not held to the 125 day limit. According to Mr. Hirschfeld, a review of his records reveals that he worked 133 days in the full year that he worked as a casual. He says that he believes that he worked more than that, perhaps closer to 150 days, although he is unable to verify this.

[62] Mr. Hirschfeld was taken through his time records in some detail in cross-examination. During the course of this review, it became apparent that, in instances where Mr. Hirschfeld had worked beyond the scheduled hours of a regular shift, he had counted the overtime period as a separate shift for the purposes of calculating the total number of days worked. He subsequently acknowledged that the overtime should not be counted as a separate day worked. With this adjustment, he ultimately stated that it was possible that he had worked a total of 128 days in his year as a casual. Carol Smith says that there were instances where, as a result of mathematical errors, the 125 day limit was inadvertently exceeded.

[63] Theresa Kosmas, a Caucasian casual employee, testified that she was held to the 125 day limit.

(i) Analysis

[64] I am satisfied that in August of 1997, Ms. Neufeld told Ms. Nkwazi that Ms. Nkwazi was close to her 125 day limit, and that she had only four days left to work before her anniversary date. Ms. Nkwazi's testimony in this regard was clear and unequivocal. In contrast, while Ms. Neufeld denied any recollection of the events in question, she was not prepared to say that they did not happen. The reliability of Ms. Neufeld's evidence is further called into question by the testimony of Carol Smith, who testified that Ms. Neufeld had previously confirmed having had such a discussion with Ms. Nkwazi.

[65] In addition, the number of shifts she had left to work was an issue clearly of considerably more importance to Ms. Nkwazi than it would have been to Ms. Neufeld, and as a consequence, Ms. Nkwazi's recollection in this regard is more likely to be accurate.

[66] From a review of the time records in question, I am also satisfied that Ms. Neufeld's statement to Ms. Nkwazi in this regard was incorrect, and that Ms. Nkwazi had more days left to work before reaching her 125 day limit. What remains to be determined is whether Ms. Nkwazi's race or colour were factors in Ms. Neufeld's conduct.

[67] I am not persuaded that either Ms. Nkwazi's race or her colour played any part in Ms. Neufeld's actions in August of 1997. It is apparent from a review of the RPC time records for casual employees that the records are very confusing. It is difficult to readily ascertain precisely how many days a casual employee may have worked in the course of a year. This point was

graphically illustrated as various witnesses were taken through their own time sheets and asked to indicate how many shifts they had worked at various times.

[68] Confusing or not, however, there are records kept with respect to the number of shifts worked by casual employees, and that information can be verified by reference to objective data. It does not make sense that Ms. Neufeld would tell Ms. Nkwazi that she had reached her limit, knowing full well that she had not. Several witnesses testified that it was well known that casual employees kept a close watch on the number of days that they had worked. It is therefore reasonable to assume that Ms. Nkwazi would have been aware of any errors in the calculation of her remaining shifts. If Ms. Nkwazi thought that she had more days left to work, all she would have had to do was to check with personnel to verify the correct information.

[69] It seems far more likely that an error in the calculations was made by the Pay and Benefits section at the RPC, and that Ms. Neufeld was provided with incorrect information. When the error was subsequently detected, management on Churchill Unit was notified, and Ms. Nkwazi was able to resume working until her limit had been reached.

[70] Insofar as the other aspect of Ms. Nkwazi's complaint with respect to the 125 day limit is concerned, that is, the allegation that Ms. Nkwazi was held to the 125 day limit while others were not, on the evidence before me, I am not persuaded that there is any substance to this part of Ms. Nkwazi's complaint.

[71] This allegation is based upon Ms. Nkwazi's discussions with Gordon Hirschfeld. It is understandable that Ms. Nkwazi would be concerned, as it is apparent that Ms. Nkwazi was indeed told by Mr. Hirschfeld that he had been permitted to work well in excess of 125 days in a twelve month period. While Mr. Hirschfeld persists in his belief that he worked something more like 150 days in 1994-1995, the fact is that the time records signed by him simply do not bear this out. It is apparent that Mr. Hirschfeld had an incomplete understanding of how days worked were recorded, and it may well be that this influenced his statements to Ms. Nkwazi, as well as his testimony.

[72] It is clear that the RPC tries to limit casual employees to 125 days of work in a twelve month period. Perhaps because of the confusing state of the time records, this is not always done, and some employees occasionally exceed the limit. This happened with both Ms. Nkwazi and Mr. Hirschfeld. As a result, I am unable to conclude that Ms. Nkwazi suffered any race or colour-based adverse differential treatment in this regard.

G. Attempt to Intimidate Gordon Hirschfeld

[73] Although not directly related to the allegations contained in Ms. Nkwazi's complaint, an issue arose in the course of Mr. Hirschfeld's testimony that bears comment. Gordon Hirschfeld testified that on October 19, 1999, he was approached by Diane Neufeld, who asked to meet with him. The two went into an interview room, whereupon Ms. Neufeld advised Mr. Hirschfeld that his name had surfaced in the context of a human rights proceeding. Ms. Neufeld said that Mr. Hirschfeld was quoted as having said that he had worked 180 days in a year at the RPC, and told him that he better get his facts straight. Ms. Neufeld told Mr. Hirschfeld that he could get the

information from Human Resources. According to Mr. Hirschfeld, Ms. Neufeld said that if he were to be called as a witness 'we would rip you apart up there'. Mr. Hirschfeld stated that Ms. Neufeld appeared angry, and that he perceived her words as a threat.

[74] Mr. Hirschfeld stated that a couple of hours later, he again encountered Ms. Neufeld. This time Ms. Neufeld asked him to go to Human Resources and sign a statement saying that he had not worked 180 days. Mr. Hirschfeld said that he told Ms. Neufeld that he would not do so until he spoke to someone from the Canadian Human Rights Commission.

[75] According to Mr. Hirschfeld, he felt threatened and intimidated by Ms. Neufeld's behaviour, as Ms. Neufeld had quite a bit of power within the RPC. He was so shaken by what had occurred that he went home and wrote out an account of what had transpired with Ms. Neufeld. Mr. Hirschfeld's notes of the encounter were produced in the hearing.

[76] Mr. Hirschfeld expressed considerable trepidation about coming forward with this information, and the possible ramifications that this could have for his job, pointing out that he still worked at the RPC, and was dependant upon his job for the support of his wife and two children.

[77] Ms. Neufeld acknowledged meeting with Mr. Hirschfeld on October 19, 1999. According to Ms. Neufeld, Paul Urmson, the Director of Programs and Operations at the RPC, told Ms. Neufeld that he had seen a copy of the Canadian Human Rights Commission investigation report relating to Ms. Nkwazi's complaint. Mr. Urmson reportedly said that the investigation report attributed certain comments to Mr. Urmson's wife, who was herself an RPC employee. Mr. Urmson asked his wife whether she had in fact made the comments attributed to her, and she said that she had not. Mr. Urmson suggested to Ms. Neufeld and Carol Smith that they should speak to the other employees mentioned in the report to verify whether they had made the statements attributed to them.

[78] According to Ms. Neufeld, they were concerned about doing this because of 'what it would be perceived to be'. They were apparently advised by Regional Headquarters that there was no problem in simply asking the employees if they had been accurately quoted. As a result, the decision was made that Mr. Urmson and Ms. Smith would speak to Bonnie Roth, and that Ms. Neufeld would speak to Gordon Hirschfeld. Ms. Neufeld said that, in hindsight, it was silly for her to speak to Mr. Hirschfeld alone, and that she does not know why she did it.

[79] Ms. Neufeld confirms meeting with Mr. Hirschfeld in an interview room. According to Ms. Neufeld, she discussed the fact that Mr. Hirschfeld's name had been mentioned in the Commission report. They also discussed the 125 day policy for casual employees. Ms. Neufeld confirms telling Mr. Hirschfeld that he could check the number of days that he had worked with Personnel 'to get his facts straight'. According to Ms. Neufeld, that was the end of the meeting. Ms. Neufeld denies threatening Mr. Hirschfeld. She also denies saying anything about ripping Mr. Hirschfeld apart. According to Ms. Neufeld, she was already nervous about the discussion with Mr. Hirschfeld, being aware that the meeting might be perceived as coercive, and was thus very careful about what she said. Ms. Neufeld has no recollection of a second encounter with Mr. Hirschfeld that day.

(i) Analysis

[80] There are significant discrepancies between the evidence of Gordon Hirschfeld and Diane Neufeld as to what went on in the meeting of October 19, 1999. I have no hesitation in preferring the evidence of Mr. Hirschfeld over that of Ms. Neufeld. Although it appears that Mr. Hirschfeld may have exaggerated his evidence with respect to the number of days he had worked as a casual employee at the RPC, his evidence with respect to his encounter with Ms. Neufeld was clear and forthright. Mr. Hirschfeld's testimony was unshaken in cross-examination, and was buttressed by notes that he had prepared shortly after the meeting in question. Mr. Hirschfeld was clearly very nervous about bringing this matter forward to the Tribunal, and anxious about the possible repercussions that his testimony might have for his career. Mr. Hirschfeld had nothing to gain by making these allegations against Ms. Neufeld, and much to lose.

[81] In contrast, the evidence of Diane Neufeld on this issue was quite unconvincing. According to Ms. Neufeld, she was worried about meeting with Mr. Hirschfeld. Nevertheless, Ms. Neufeld went ahead and met with Mr. Hirschfeld on her own, although two managers went to the meeting with Bonnie Roth. Ms. Neufeld's conduct has to be considered in light of the fact that Ms. Neufeld was an experienced manager - one who was quite alive to the fact that her meeting with Mr. Hirschfeld might be perceived as coercive in nature. Ms. Neufeld says that, in hindsight, it was 'silly' for her to meet alone with Mr. Hirschfeld. Ms. Neufeld does not strike me as a silly person. I can only conclude that she made a conscious decision to meet alone with Gordon Hirschfeld, and that Mr. Hirschfeld's description of the discussion is indeed accurate.

[82] Although Ms. Neufeld's attempt to intimidate Gordon Hirschfeld is not directly relevant to the allegations put forward by Ms. Nkwazi, the issue of Ms. Neufeld's management style was dealt with in some detail in the course of the hearing. Several RPC employees testified as to their positive experiences working with Ms. Neufeld. In this context, Ms. Neufeld's actions with respect to Gordon Hirschfeld are significant as they relate to Ms. Neufeld's management style, and as well, with respect to her credibility.

H. The Rest Period

[83] Ms. Nkwazi alleges that Ms. Neufeld attempted to exclude her from participating in a competition for a nursing position in October of 1997.

[84] According to Ms. Nkwazi, on October 9, 1997, she shared a lunch table at the RPC with Ms. Neufeld, Shirley Junop and Sandra Pozniak. Ms. Pozniak reminded Ms. Nkwazi that it was Ms. Nkwazi's last day to work, having reached her 125 day limit. Ms. Pozniak then asked Ms. Nkwazi when she would be coming back to work. Ms. Nkwazi replied that she would be returning to work on her October 23 anniversary date. According to Ms. Nkwazi, Ms. Neufeld then interjected, saying that Ms. Nkwazi could not come back on October 23, as she was obliged to take a 'rest period' for a week after her anniversary date, and could only return to work on October 30. Ms. Nkwazi said that she had never heard of such a thing, and Ms. Neufeld assured her that was how it worked. Ms. Nkwazi was very concerned, but did not want to argue with Ms. Neufeld, and excused herself from the table.

[85] Ms. Nkwazi says that she was afraid to challenge Ms. Neufeld on the issue because Ms. Neufeld was very powerful within the RPC. Ms. Nkwazi later asked Theresa Kosmas if she had ever heard of a requirement for a rest period. Ms. Kosmas said she had not. Ms. Nkwazi decided to go along with Ms. Neufeld, and not do anything further at that time.

[86] Theresa Kosmas confirms that Ms. Nkwazi spoke to her about having been told to take a rest period. Ms. Kosmas said that she had never heard of such a thing, and asked Ms. Nkwazi who had told her this. According to Ms. Kosmas, Ms. Nkwazi initially declined to tell her who had said it, but later told Ms. Kosmas that it was Ms. Neufeld who had told her to stay home. Ms. Kosmas testified that her conversation with Ms. Nkwazi took place in the front lounge at the RPC. She initially said that it occurred in October of 1997, although she later conceded that it might have been several months later.

[87] Lorraine Gibney is a Registered Psychiatric Nurse, working at the RPC. She testified with respect to a telephone conversation that she had with Ms. Nkwazi in which Ms. Nkwazi recounted the story of Ms. Neufeld telling Ms. Nkwazi to stay off of work for a rest period. Ms. Gibney says that the incident stuck in her mind because it was so strange. It appears that this discussion took place during the week of October 23.

[88] On October 23 or 24, Ms. Nkwazi received a telephone call at home from Bonnie Roth. Ms. Roth was calling to tell Ms. Nkwazi that a notice regarding a competition for a term staff nurse position had been posted on October 22, with a deadline for applications of October 29. Ms. Nkwazi realized that the dates during which applications could be submitted for the competition coincided with the period that Ms. Neufeld had told Ms. Nkwazi to stay away from work and concluded that Ms. Neufeld was trying to exclude Ms. Nkwazi from the competition. Ms. Nkwazi says that if Ms. Roth had not called her, she would never have been aware of the competition. As it was, Ms. Nkwazi did apply for the position.

[89] Bonnie Roth says that she called both Ms. Nkwazi and Ms. Kosmas (who was also off of work that week, having reached her own 125 day limit) to tell them about the competition. Ms. Roth says that she made the calls on her own initiative, and that no one in management had asked her to call either Ms. Kosmas or Ms. Nkwazi. Ms. Kosmas confirmed that she had been made aware of the competition as a result of a telephone call from Bonnie Roth.

[90] Ms. Nkwazi says that she returned to work on October 29, 1997. According to Ms. Nkwazi, she received a phone call at home on that day from one of her supervisors named Joyce Jackson. Ms. Jackson asked Ms. Nkwazi to come into work that evening. Ms. Nkwazi explained to Ms. Jackson that she could not come in to work that day. Ms. Jackson called Ms. Nkwazi a little while later, saying that she had been unable to find anyone else to come in to work, and again asked Ms. Nkwazi to come in. Ms. Nkwazi says that she was reluctant to do so because of what Ms. Neufeld had said, but that Ms. Jackson was in a bind, and it was nearly October 30, so she agreed to work.

[91] Joyce Jackson recalls speaking to Ms. Nkwazi on the telephone sometime around October 29, 1997 when Ms. Jackson asked Ms. Nkwazi to come into work. According to Ms. Jackson, Ms. Nkwazi initially declined. Ms. Jackson understood that the reason for Ms. Nkwazi's refusal

was that she had used up all of her 125 days, and had been told that she could not come in to work. Ms. Jackson kept looking for another casual nurse and was becoming desperate. Sometime later that day, Ms. Jackson says Ms. Nkwazi called back, saying that she would come in to work.

[92] As Head of the RPC Nursing Council, Ms. Neufeld was responsible for running the nursing competition. Ms. Neufeld does not recall having lunch with Ms. Nkwazi on October 9, but categorically denies telling Ms. Nkwazi to stay away from work until October 30, 1997, stating that she would have no reason to do so, there being no rest period requirement. According to Ms. Neufeld, Ms. Nkwazi had many avenues that she could have taken, had she wanted to challenge any such statement by Ms. Neufeld, and that it 'would have been no big deal' for Ms. Nkwazi to have challenged Ms. Neufeld.

[93] Ms. Neufeld was not sure when the need for additional nurses arose, but states that they suddenly found themselves short-staffed. Ms. Neufeld agreed that the one week period allowed for applications for this competition was unusually short - most competitions allowed for at least two weeks during which applications could be submitted. Ms. Neufeld addressed the short application period, saying 'We wanted to hasten the process'. The reason she gave for abbreviating the application period was that, although the competition was theoretically open to those not already working at the RPC, it was directed at casual employees already there. Carol Smith stated that, in her view, the period allowed for the applications was sufficient, given that the position was only advertised within the RPC.

[94] Shirley Junop has no specific recollection of having had lunch with Ms. Nkwazi on October 9, 1997, but acknowledges that she could well have done so. Ms. Junop states that she does not recall any discussion with respect to Ms. Nkwazi's anniversary date, her return to work or the need for a rest period. Ms. Junop did mention the significant level of background noise in the dining room. She was also very careful to say that she prefers not to take notice of other people's conversations, unless she is specifically brought into the discussion. Sandra Pozniak was included on the respondent's list of witnesses, but was not called to testify.

[95] After Ms. Nkwazi first raised her concerns with respect to Ms. Neufeld's actions with RPC management, Ms. Smith began looking into Ms. Nkwazi's allegations. On February 17, 1998, Ms. Smith prepared a document entitled "Summary of Concerns of Beryl Nkwazi", which document summarized Ms. Smith's discussions with various individuals implicated in Ms. Nkwazi's complaint. Ms. Smith confirmed, under oath, that the document represents an accurate summary of those discussions. Ms. Smith's summary notes that '[Ms. Neufeld] also stated that she had advised Beryl personally regarding the upcoming competition and therefore could not understand these allegations.' In contrast to Ms. Smith's version of events, Ms. Neufeld denied ever claiming that she had personally advised Ms. Nkwazi with respect to the nursing competition. Ms. Neufeld says that she spoke to Dolores Stevens, and Ms. Stevens assured her that Ms. Nkwazi had been made aware of the competition by Ms. Roth.

[96] Ms. Stevens says that after she became aware of the competition, she called Ms. Kosmas herself, to notify her, and asked Ms. Roth to notify Ms. Nkwazi. According to Ms. Stevens, this was done 'out of kindness'.

(i) Analysis

[97] The issue of Ms. Nkwazi being forced to take a 'rest period' ultimately boils down to a question of credibility between Ms. Nkwazi and Ms. Neufeld. Ms. Nkwazi says Ms. Neufeld told her to stay off of work between October 23 and Oct 30. Ms. Neufeld denies ever saying any such thing. I have no hesitation in preferring the evidence of Ms. Nkwazi over that of Ms. Neufeld.

[98] Ms. Nkwazi was on the witness stand for 3 days. During that time she was subjected to a lengthy and careful cross-examination. While Ms. Nkwazi's testimony was shown to be in error in a number of minor respects, many of these discrepancies are explained by confusion, particularly as they relate to the applicable policies within the RPC. On balance, I found her to be a credible witness. Ms. Nkwazi testified with a quiet dignity about events that have clearly caused her tremendous pain, and her testimony in this regard was largely consistent and unwavering.

[99] Ms. Nkwazi's evidence with respect to the rest period issue is also indirectly corroborated by the evidence of Joyce Jackson, whose testimony was not challenged by counsel for the respondent. Although the witnesses called by the respondent disagreed with those called by Ms. Nkwazi on many points, one issue on which there was complete agreement was that Ms. Nkwazi was always ready and willing to work whatever shifts she could at the RPC. According to Ms. Jackson, on or around October 29, Ms. Nkwazi initially refused to come in to work when asked to do so by Ms. Jackson. Ms. Nkwazi told Ms. Jackson that she had been told not to come in to work. Ms. Jackson understood that this was because Ms. Nkwazi had reached her 125 day limit. While this would provide a reasonable explanation for an employee's unwillingness to take a shift, in this case, it could not be the correct explanation for Ms. Nkwazi's reluctance. Ms. Nkwazi's anniversary date was October 23. On that date, she started a new year, for the purposes of the 125 day calculation. Not only had Ms. Nkwazi not reached her 125 day limit on October 29, 1997 - she had yet to work a single day in her new work year.

[100] It appears that Ms. Nkwazi was available to work on October 29. We know that Ms. Nkwazi would take whatever shifts she was offered. She was nowhere near her 125 day limit for the operative twelve month period. Why, then, was she reluctant to come in to work when asked to do so by Ms. Jackson? In all of the circumstances, the only reasonable inference is that it was because she had been told not to come to work by Ms. Neufeld.

[101] Counsel for CSC pointed out that Ms. Nkwazi was going to be off of work from October 9 to October 23, in any event. If Ms. Neufeld was intent on excluding Ms. Nkwazi from the competition, it would have been a simple matter for Ms. Neufeld simply to schedule the notice period for the competition to coincide with Ms. Nkwazi's absence from the workplace. No one would have been able to question Ms. Neufeld's conduct, had it happened this way. Why, then, counsel says, would Ms. Neufeld risk exposing herself to complaint by making up the fiction of the rest period requirement?

[102] The problem with this argument is that, not only is there no evidence that the competition could have been held any sooner, what evidence we do have suggests just the opposite: Ms.

Neufeld herself testified that the competition was held very quickly after the decision was made to hire additional staff.

[103] Counsel for CSC also suggested that Ms. Nkwazi made up the story of her rest period discussion with Ms. Neufeld in an effort to explain her subsequent lack of success in the nursing competition. Once again, this theory does not accord with the evidence: Both Ms. Gibney and Ms. Kosmas report having discussed the rest period issue with Ms. Nkwazi before the results of the nursing competition were known. (8) There was some question with respect to the timing of the discussion between Ms. Nkwazi and Ms. Kosmas - counsel for CSC pointing out that Ms. Kosmas was not at work during the period in which the conversation was supposed to have taken place. While this is true, Ms. Kosmas was at the RPC in early November to participate in the interviews associated with the nursing competition, and thus could have had the conversation in question with Ms. Nkwazi before the competitive process was complete. Even if Ms. Kosmas' discussion with Ms. Nkwazi did not take place until after the results of the competition were known, Ms. Gibney was clear that her discussion with Ms. Nkwazi took place shortly after Ms. Nkwazi was called at home by Ms. Roth - well before the competition results were known. Her evidence in this regard was unshaken in cross-examination, and I found Ms. Gibney to be a credible witness.

[104] In contrast, the position taken by Ms. Neufeld with respect to events surrounding the rest period question has varied over time. On the witness stand, Ms. Neufeld was very clear that she had not told Ms. Nkwazi about the nursing competition, but that she understood that Ms. Stevens had notified her. However, according to Carol Smith, another of the respondent's witnesses, not long after the events in question, Ms. Neufeld assured Ms. Smith that she had personally told Ms. Nkwazi about the competition, and thus could not see what Ms. Nkwazi's problem was. I accept the evidence of Carol Smith in this regard.

[105] I also reject the evidence of Dolores Stevens that she asked Bonnie Roth to tell Ms. Nkwazi about the competition. I found Bonnie Roth to be a solid and credible witness. Ms. Roth is still employed at the RPC, and has no apparent axe to grind with any of those involved in this complaint. She was clear that she called both Ms. Nkwazi and Ms. Kosmas to tell them about the competition, that she had done this on her own initiative, and had not been asked to do so. Both Ms. Nkwazi and Ms. Kosmas confirm that they were contacted by Ms. Roth.

[106] Finally, I am concerned by the respondent's decision not to call Ms. Pozniak to testify in this matter. Ms. Nkwazi's counsel submits that an inference should be drawn that Ms. Pozniak's evidence would not have been helpful to Ms. Neufeld. Counsel for CSC explained his decision not to call Ms. Pozniak, stating that, unbeknownst to him, Ms. Pozniak had attended a portion of the hearing, in breach of an order made at the outset of the hearing excluding witnesses. Ms. Pozniak's attendance at the hearing was purportedly done on the advice of counsel for Ms. Nkwazi. Given the breach of the exclusion order, as an officer of the court, Mr. Bonthoux says that he felt compelled not to call Ms. Pozniak as a witness.

[107] If there was an inadvertent breach of the exclusion order, it was still open to counsel to advise the Tribunal of that fact, and to seek leave to call Ms. Pozniak, notwithstanding her having observed a portion of the proceedings. This course of action would have been quite in

accord with counsel's professional obligations. I should note that there is no evidence before me that counsel for Ms. Nkwazi condoned the attendance of Ms. Pozniak at the hearing. If that were indeed the case, however, all the more reason for CSC to argue that it should not be precluded from calling Ms. Pozniak if it wanted to do so. In all of the circumstances, I am prepared to infer that Ms. Pozniak's evidence would not have assisted the respondent.

[108] Why then did Ms. Neufeld tell Ms. Nkwazi to stay away from work until October 30, 1997? We know that the dates for applications for the competition coincided precisely with the last couple of days leading up to Ms. Nkwazi's anniversary date, when she was unable to work, and the first week after her anniversary date, when she was told not to come to work. We also know that an unusually short time was allowed for applications in this particular competition. The only reasonable conclusion to draw from Ms. Neufeld's actions was that Ms. Neufeld told Ms. Nkwazi to stay away from work until October 30, 1997 in an effort to exclude Ms. Nkwazi from participation in the nursing competition.

[109] The final issue to be determined, then, is whether Ms. Nkwazi's race or colour were factors in Ms. Neufeld's conduct. There is no dispute that Ms. Nkwazi possessed the necessary credentials for the position. As of October, 1997, no concerns had been raised with respect to Ms. Nkwazi's performance. Ms. Neufeld herself said that Ms. Nkwazi met the expectations for the position of casual nurse. I have found that Ms. Neufeld actively tried to prevent Ms. Nkwazi from finding out about the competition, in an effort to exclude her from participating in it. No Caucasian employee was treated this way by Ms. Neufeld, and no explanation has been offered to justify Ms. Neufeld's behaviour, beyond the blanket denial that the conduct ever occurred. On all of the evidence, I am satisfied, on a balance of probabilities, that Ms. Nkwazi's race and her colour played a role in Ms. Neufeld's actions, and accordingly this aspect of Ms. Nkwazi's complaint is sustained.

I. The Staff Nurse Competition

[110] Ms. Nkwazi testified that she did not think that the competition was fair, as insufficient weight was given to her experience. Ms. Nkwazi also stated her perception that favouritism played a role in the results of the competition. Ms. Nkwazi's complaint refers to Ms. Neufeld's attempt to exclude her from the competition for the Staff Nurse position, but does not make any allegations with respect to the competition itself. The Statement of Particulars filed by counsel for Ms. Nkwazi in advance of the hearing refers to Ms. Nkwazi being extremely nervous during the competition because of Ms. Neufeld's presence during the interview, but also makes no specific allegation as to any deficiencies in the competition process itself. The issue of the fairness of the competition was, however, canvassed thoroughly in the evidence and argument, and accordingly, I will consider it here.

[111] Ms. Nkwazi described a competitive process involving an application, the provision of the Statement of Qualifications and job description to the candidates, an initial screening to ensure candidates had the necessary qualifications, an interview and a written exercise. Ms. Nkwazi had the requisite qualifications for the position, and was screened into the competition. On November 7, 1997, she was interviewed by Diane Neufeld, Heather Thompson, the Associate Program Director on Churchill Unit and Adele MacInnis-Meagher, the Associate Program Director on

Bow Unit. Ms. Nkwazi initially said that the interview questions, which tested nursing knowledge, were not fair, although she later qualified her answer, saying that the questions were fair, but were not what she had expected. Ms. Nkwazi acknowledged that she would have had an advantage over other candidates insofar as at least one question was concerned. The second question in the interview related specifically to borderline personalities. The majority of the women on Churchill Unit suffered to some extent from borderline personalities, and Ms. Nkwazi had received extensive training in this particular psychiatric disorder.

[112] A number of witnesses called by Ms. Nkwazi testified with respect to their perceptions of favouritism in the competitive process, and rumours circulating that Ms. Neufeld provided advance notice of the interview questions to Bonnie Roth. Others expressed surprise at the results, and in particular with the fact that Ms. Nkwazi had not been successful.

[113] The competitive process described by Ms. Nkwazi was virtually identical to that described by those administering the competition, and by the other participants who testified in this hearing.

[114] Diane Neufeld, Heather Thompson and Adele MacInnis-Meagher all testified that the interview questions were derived from the Statement of Qualifications, and that the same questions were asked of all of the candidates. The candidates' answers were then scored against a rating guide, that had been developed in advance of the interviews. They stated that the competition was run fairly, and in accordance with all of the relevant Public Service staffing legislation and policies. Carol Smith also confirmed that the competition was administered in accordance with all of the relevant Public Service staffing legislation and policies.

[115] Diane Neufeld, Heather Thompson and Adele MacInnis-Meagher all described Ms. Nkwazi as being extremely nervous during the interview. Although attempts were made to put her at ease, throughout the interview, Ms. Nkwazi appeared to have difficulty focussing on the questions and formulating her answers.

[116] Ms. Nkwazi failed the knowledge portion of the interview, and as a result, was found not to be qualified for the staff nurse position.

(i) Analysis

[117] I am satisfied that the competition for the staff nurse position was run in a fair manner. Interview questions were developed based upon the Statement of Qualifications for the position in question. The same questions were asked of all of the candidates, and were marked in a consistent fashion. It appears that the appropriate Public Service policies and legislation were followed throughout the process.

[118] There is insufficient evidence to support the perceptions of various employees with respect to favouritism in the competitive process. Similarly, the rumours with respect to Diane Neufeld supposedly providing advance information with respect to the interview questions to Bonnie Roth appear to be just that - rumours. Both Ms. Neufeld and Ms. Roth deny that any such thing

ever occurred. While I have noted concerns with respect to the credibility of Ms. Neufeld, I found Ms. Roth to be a very credible witness.

[119] Having said this, I do not think that Beryl Nkwazi had a fair opportunity to compete in this competition. She was obviously very rattled by Ms. Neufeld's attempt to exclude her from the competition, and was understandably uncomfortable having to then face Ms. Neufeld, now the senior member of the selection board, in the interview. I accept the evidence of Ms. Nkwazi, Heather Thompson and Adele MacInnis-Meagher that Ms. Nkwazi was extremely nervous during the interview, and that her nervousness caused her to have difficulty focussing on the questions and formulating her answers.

[120] How Ms. Nkwazi would have done in the competition, had she been competing on a level playing field, is an issue to consider in relation to the question of remedy. I am satisfied, however, that the actions of Ms. Neufeld in October of 1997 denied Ms. Nkwazi that opportunity.

J. The November 7, 1997 Incident

[121] At approximately 2 o'clock in the afternoon of November 7, 1997, Ms. Nkwazi was involved in an incident involving an inmate. Ms. Nkwazi says that she was not provided with an appropriate level of support following the incident and that this is a further example of adverse differential treatment on the part of CSC.

[122] It is uncontroverted that the staff on Churchill Unit strip-searched an inmate, after a fight between inmates. In and of itself, this was a routine event on Churchill Unit. Institutional policy requires that strip-searches be videotaped, in order that there be a record of precisely what occurred in the course of the search. Ms. Nkwazi was operating the video camera when the inmate being searched suddenly lunged at her. Ms. Nkwazi moved out of the way, and the inmate was restrained by Correctional Officers. Ms. Nkwazi was very shaken by the incident.

[123] Following the incident, Ms. Nkwazi prepared a written report of the events. Ms. Nkwazi says that she was not offered any emotional support by Cynthia MacDonald, who was in charge of the Unit that afternoon. The only person who expressed any concern with respect to Ms. Nkwazi's well-being was Jackie Kemp, who had also been involved in the incident. Ms. Nkwazi says that she told Ms. Kemp that she was all right, because she was afraid to admit that she was not coping very well. Given the vulnerability of Ms. Nkwazi's position as a casual employee, she did not want to be perceived as not strong enough to work at the RPC.

[124] Ms. Nkwazi says that she was not aware of any support services available within the RPC to assist employees in dealing with incidents of this nature.

[125] The incident occurred on a Friday. The following Monday, Ms. Nkwazi says that Ms. MacDonald asked her if she wanted assistance in helping her deal with the incident. When Ms. Nkwazi answered in the affirmative, Ms. MacDonald reportedly said that Ms. Nkwazi would have to learn to speak up. Ms. MacDonald noted that the availability of such support had been publicized on the RPC internal electronic communications system, known as Team Links, and

suggested that Ms. Nkwazi should have asked for the briefing. Ms. Nkwazi responded that she did not have access to Team Links, and was not aware of the availability of such support. (9) Ms. MacDonald subsequently arranged for Ms. Nkwazi to see a Staff Psychologist, who provided Ms. Nkwazi with counselling.

[126] According to Ms. Nkwazi, Marcel Chiasson, the Executive Director of the RPC, later asked that all employees involved in the incident be provided with a critical incident debriefing. The purpose of such a debriefing, according to Ms. Nkwazi, was to allow the employees involved to discuss their feelings surrounding the event, and to obtain support. The process also allowed institutional staff to identify possible ways of improving procedures so as to avoid a repetition of the incident.

[127] In December, 1997, Ms. Nkwazi attended a critical incident debriefing session with Ms. Neufeld, Heather Thompson and Cynthia MacDonald, amongst others. Ms. Nkwazi said that she talked about how she felt when Ms. MacDonald told her that she had to learn to speak up. Ms. Nkwazi also mentioned that she felt at a considerable disadvantage by not having Team Links.

[128] Jackie Kemp confirms both Ms. Nkwazi's version of the incident itself and the fact that, after the incident was over, Ms. Nkwazi told Ms. Kemp that she was all right. Ms. Kemp says that it was obvious that Ms. Nkwazi was not all right, that she was shaking and was not her usual calm self. Ms. Kemp did not see Ms. MacDonald ask Ms. Nkwazi how she was doing. The next day, Ms. Kemp told Ms. MacDonald that Ms. Nkwazi had been shaken by the incident.

[129] A CSC manual entitled 'Critical Incident Stress Management' was introduced into evidence. This document advises employees on how to deal with the stress that they may suffer as a consequence of being involved in a 'Critical Incident'. A 'Critical Incident' is defined as "... a traumatic event outside the range of usual human experience that may cause unusual distress reactions ... and has sufficient emotional power to affect a person's ability to cope with the consequences of the event." (10) The manual goes on to identify examples of critical incidents, including "witnessing another person being assaulted", "receipt of a serious threat to the physical well-being of a staff member..." and "suffering physical violence at the hands of inmate(s)". According to the manual, the CSC Critical Incident Stress Management Program is intended to minimize the stress suffered by employees involved in critical incidents. As a consequence, the program is designed to ensure that staff who need help receive it without having to ask for it - recognizing that requiring an employee to request assistance may itself cause further stress.

[130] Several witnesses, including Anita Uwiera and Diane Neufeld testified that, in their opinion, the event described by Ms. Nkwazi would properly be characterized as a critical incident. Others were of the view that the incident was not necessarily a 'critical incident' within the meaning of the policy. Tim Leis, the current Executive Director of the RPC, said that in his view, the incident fell into a borderline area, involving the exercise of judgement by the supervisor in question. Mr. Leis also noted that it has been empirically established that the efficacy of the Critical Incident Stress Management Program is diminished if it is administered too often.

[131] Witnesses called by Ms. Nkwazi testified with respect to the way in which incidents of this nature were handled within the RPC. In particular, Ms. Kushniruk described having witnessed assaults, including one occasion when a staff member was punched by an inmate. According to Ms. Kushniruk, she was never provided with any management support following these incidents. Lorraine Gibney described life on Churchill Unit as being very stressful. In Ms. Gibney's experience, Unit staff were threatened and abused, and were constantly concerned about their physical well-being. She did not feel that management supported the nurses in dealing with these conditions.

[132] Cynthia MacDonald testified that she did not think that the incident Ms. Nkwazi was involved in was a 'critical incident', as the term is used within CSC. There was no physical contact between the inmate and Ms. Nkwazi, and there were Correctional Officers right there, who responded appropriately. According to Ms. MacDonald, the patients on Churchill Unit were largely aggressive, anti-social individuals. Violent incidents were very common - including fighting, kicking doors, slashing and other forms of self-mutilation, tables being thrown over, and so on. In Ms. MacDonald's view, while the incident Ms. Nkwazi was involved in might be outside the norm in a non-correctional environment, it was not one outside the range of usual human experience on Churchill Unit.

[133] Ms. MacDonald says that once the incident was over, she asked if everyone was okay. The staff, including Ms. Nkwazi, responded in the affirmative. Ms. MacDonald then discussed the event with the employees - why the incident took place, what people had observed, and so on.

[134] On Monday, November 10, Ms. MacDonald says that she became aware that Ms. Nkwazi was not coping well in regard to the incident of the previous Friday. As a result, Ms. MacDonald approached Ms. Nkwazi and asked her if she wanted assistance in managing her stress. When Ms. Nkwazi responded in the affirmative, Ms. MacDonald made arrangements for Ms. Nkwazi to see the psychologist. Ms. MacDonald acknowledges telling Ms. Nkwazi that she needed to let Ms. MacDonald know that she was not coping well, in order for Ms. MacDonald to provide the necessary support.

(i) Analysis

[135] I am not persuaded that Ms. Nkwazi was subjected to differential treatment with respect to the way in which RPC management responded to the November 7 incident. Cynthia MacDonald concluded that the incident did not amount to a critical incident within the meaning of the CSC policy. When one considers the volatile environment within the correctional system as a whole, and in particular, within Churchill Unit, I am not persuaded that her conclusion in this regard was unreasonable in all of the circumstances. The fact that Marcel Chiasson later called for a critical incident debriefing does suggest that he may have viewed the gravity of the incident in a different light than Ms. MacDonald. On all of the evidence, however, I am satisfied that the incident in question fell into the borderline category, and that reasonable people could come to differing conclusions with respect to the way in which the incident should properly be characterized.

[136] It is noteworthy that Ms. MacDonald did arrange for Ms. Nkwazi to receive psychological counselling just as soon as she became aware that Ms. Nkwazi was in distress.

[137] Even if I were to find that the incident was indeed a 'critical incident' within the meaning of the policy, the evidence of Ms. Nkwazi's own witnesses, namely Ms. Kushniruk and Ms. Gibney (both of whom are Caucasian) establishes that management's response to concerns with respect to employee security was not always viewed as sufficient by the staff within the RPC.

[138] As a result, whether or not Ms. MacDonald's handling of the matter was appropriate in all of the circumstances, I cannot find that either Ms. Nkwazi's race or her colour played any role in the way in which the event was dealt with.

K. Access to Team Links

[139] As was mentioned in the preceding section, Ms. Nkwazi says that, for most of the time that she was employed at the RPC, she was denied access to Team Links, the RPC's internal electronic messaging system. Team Links was one means of providing RPC employees with information with respect to job opportunities, routine orders, RPC policies and so on. One witness described Team Links as 'the life line of the institution'.

[140] According to Ms. Nkwazi, Team Links was introduced some time in 1996. At some point after that, Ms. Nkwazi realized that a number of her casual colleagues had access to the system. Ms. Nkwazi felt that she was being treated differently, but did not say anything at first. Sometime in 1996 or 1997, Ms. Nkwazi was offered access to Team Links by Ray Tkatch, an employee in Informatics. Mr. Tkatch's offer was evidently made in the presence of Lynn Young, who was in charge of employee training at the RPC. Ms. Young reportedly told Mr. Tkatch, in Ms. Nkwazi's presence, that casual employees were not entitled to access to Team Links.

[141] Ms. Nkwazi says she then spoke to Winnie Church, who was Ms. Nkwazi's Head Nurse at the time. Ms. Church also told Ms. Nkwazi that casual employees were not entitled to Team Links. Ms. Nkwazi says she also raised the issue with Diane Neufeld, Heather Thompson and Cynthia MacDonald, but that nothing ever happened.

[142] According to Ms. Nkwazi, not having access to Team Links put her at a disadvantage in her employment at the RPC, as she did not have access to the same information that her colleagues did. She was also denied information with respect to job opportunities within the institution.

[143] On the 13th or 14th of January, 1998, Ms. Nkwazi did finally get access to Team Links. Ms. Nkwazi does not know why she got it then, although she speculated that her supervisors may have become tired of hearing complaints about her lack of access. Two other casual employees were also provided with Team Links access at the same time as Ms. Nkwazi: namely Bart Jensen and Heather Keene. Mr. Jensen started working at the RPC before Ms. Nkwazi did, whereas Ms. Keene started at the RPC in August of 1997. Both are Caucasian.

[144] Ms. Nkwazi says that during a meeting that she had with Ms. Neufeld on January 20, Ms. Neufeld told her that the reason Ms. Nkwazi had not had access to Team Links for so long was that Informatics had been unable to put Ms. Nkwazi's name in the computer. Ms. Nkwazi understood this to be a reference to the ethnicity of her name. According to Ms. Nkwazi, she was mortified by Ms. Neufeld's comment. This was a decisive moment for Ms. Nkwazi and was 'the last straw' in her dealings with Ms. Neufeld.

[145] Several witnesses, including Lorraine Gibney and Diane Neufeld, testified that casual employees were not initially provided with access to the Team Links system. Ms. Neufeld stated that some employees would get Team Links access when they became term employees, and would then keep the account when they reverted to casual status.

[146] A number of Ms. Nkwazi's colleagues testified with respect to the Team Links issue. It appears that for several of these individuals, their access to the Team Links systems was tied to their status as term employees: Gordon Hirschfeld and Jackie Kemp stated that they got Team Links around the time they became term employees. While Tracy Kushniruk says that she got Team Links access soon after she started at the RPC as a casual employee in late 1994, her evidence has to be considered in light of Ms. Nkwazi's evidence that the Team Links system was only introduced in 1996. By 1996, Ms. Kushniruk was a term employee.

[147] Bonnie Roth, however, was clear that she got access to Team Links soon after she started at the RPC as a casual employee in May of 1996. Ms. Roth did not become a term employee until late 1997.

[148] Bart Jensen says that he worked at the RPC as a casual employee from January of 1995 until the Spring or early Summer of 2000. According to Mr. Jensen, he was not interested in having access to the system, and was never provided with Team Links during his tenure at the RPC.

[149] Heather Thompson does not recall Ms. Nkwazi asking for access to Team Links. Ms. Thompson says that had Ms. Nkwazi asked, she would have made the necessary arrangements. Similarly, Cynthia MacDonald does not recall Ms. Nkwazi mentioning the issue to her, although she was prepared to concede that Ms. Nkwazi may have mentioned it in the aftermath of the November 7, 1997 incident.

[150] Diane Neufeld testified that Ms. Nkwazi did mention her concern that she did not have access to Team Links at some point, although she was unable to pinpoint when that discussion took place. Ms. Neufeld says that she had been aware that there was a policy that casual employees were not provided with Team Links. When she received Ms. Nkwazi's request, Ms. Neufeld took the request to the RPC's Human Resources Committee to see if the policy could be changed. The decision was made that casual employees would henceforth be given access to the Team Links system. This occurred in early January of 1998. Ms. Neufeld then determined that there were three casual employees, including Ms. Nkwazi, who did not have Team Links. She made the necessary arrangements with Informatics for accounts to be set up for the employees in question. Ms. Neufeld produced a copy of an e-mail dated January 13, 1998 from Tristan

Rawlings of the RPC Informatics section, confirming that Team Links accounts had been activated for Ms. Nkwazi, Bart Jensen and Heather Keene.

[151] Ms. Neufeld states that she had no reason to deny Ms. Nkwazi access to Team Links. As soon as Ms. Nkwazi made it known that she wanted access to the system, Ms. Neufeld took the necessary steps to get it for her. Had Ms. Nkwazi asked earlier, Ms. Neufeld says, she would have acted sooner.

[152] With respect to the comment relating to Ms. Nkwazi's name, Ms. Neufeld says that at the time that the accounts were being established, she received a call from Mr. Rawlings, who was seeking to confirm the spelling of Ms. Nkwazi's name. Ms. Neufeld happened to see Ms. Nkwazi right after the telephone call, and told her that Informatics had just verified the spelling of Ms. Nkwazi's name, and that Ms. Nkwazi's Team Links account would be up and running soon. Mr. Rawlings did not testify.

(i) Analysis

[153] I accept that the RPC policy initially was that casual employees were not provided with access to Team Links, although it appears that there was some confusion surrounding the question. I find that only Bonnie Roth has established that she was provided with Team Links access while still a casual. It may well be that Ms. Roth benefitted from the confusion regarding the policy. Most of the employees who testified with respect to the issue appear only to have received access to the system when they became term employees.

[154] It is reasonable to conclude that Ms. Neufeld became aware of Ms. Nkwazi's desire for access to the Team Links system in the course of the critical incident debriefing in December, 1997. Once Ms. Neufeld was aware of Ms. Nkwazi's wish, she took the necessary steps to arrange for access.

[155] Ms. Neufeld was successful in having the Team Links policy changed in January of 1998, whereupon Ms. Nkwazi was provided access to the system. System accounts were also set up for Heather Keene and Bart Jensen, although it seems that Mr. Jensen may not have been advised of the fact. Heather Keene had been a casual employee for several months before she got Team Links access. Mr. Jensen had been at the RPC even longer than Ms. Nkwazi by the time that a Team Links account was established for him. Both Ms. Keene and Mr. Jensen are Caucasian.

[156] In light of the foregoing, I cannot conclude that Ms. Nkwazi was subjected to either race or colour-based differential treatment in connection with her access to Team Links.

[157] Ms. Nkwazi recalls Ms. Neufeld's comment with respect to her name as occurring in the course of a discussion between the two on January 20. Ms. Neufeld recalls making a comment in this regard a week earlier. I am satisfied that at some point in mid-January of 1998, Diane Neufeld made a comment to Ms. Nkwazi, suggesting that her name was the cause of the difficulties associated with providing her with access to Team Links. As previously noted, I found Ms. Nkwazi to be a generally more reliable witness than Ms. Neufeld. Ms. Nkwazi's subsequent actions are also more consistent with her version of the comment than with that of

Ms. Neufeld. Although Ms. Nkwazi had concerns with respect to the treatment that she was experiencing at the RPC for some time, she had not, to that point, attempted to bring her concerns forward to management through any kind of complaint. On January 27, 1998, however, Ms. Nkwazi took her complaints with respect to Ms. Neufeld's conduct to Tim Leis, who was then the Director of Programs and Operations at the RPC and Ms. Neufeld's supervisor. Having regard to the timing of Ms. Nkwazi's initial discussion with Mr. Leis, it is reasonable to conclude that Ms. Neufeld's comment to Ms. Nkwazi with respect to Ms. Nkwazi's name was indeed the final, galvanizing impetus for Ms. Nkwazi's complaint.

L. Ms. Nkwazi's Complaint and the Non-Renewal of her Contract

[158] On January 27, 1998, Ms. Nkwazi met with Tim Leis. Ms. Nkwazi discussed some of her concerns regarding the actions of Diane Neufeld, specifically, Ms. Nkwazi's allegation that Ms. Neufeld had told her that she was required to take a rest period, and the allegation that Ms. Neufeld had told Ms. Nkwazi to stay home before she had reached her 125 day limit. Mr. Leis asked Ms. Smith to join the meeting, and Ms. Nkwazi repeated her allegations in the presence of Ms. Smith.

[159] Ms. Nkwazi says that she was extremely uncomfortable in the meeting, and finally asked Mr. Leis and Ms. Smith if she could leave. Before she left, Ms. Nkwazi was told that she should discuss her concerns directly with Ms. Neufeld. Ms. Nkwazi told Mr. Leis and Ms. Smith that she did not think that she would be able to do that because Ms. Neufeld intimidated her.

[160] Mr. Leis' and Ms. Smith's versions of this meeting do not differ appreciably from that of Ms. Nkwazi. Both Mr. Leis and Ms. Smith recall encouraging Ms. Nkwazi to speak directly to Ms. Neufeld with respect to her concerns. Ms. Smith remembers Ms. Nkwazi saying that she did not feel comfortable meeting face to face with Diane Neufeld.

[161] Mr. Leis testified that some time after his initial meeting with Ms. Nkwazi, Ms. Neufeld was advised about Ms. Nkwazi's concerns. It was in the course of this meeting that Ms. Neufeld reportedly claimed to have personally told Ms. Nkwazi about the nursing competition, professing, as a result, not to understand Ms. Nkwazi's concerns with respect to the competition.

[162] On January 30, Mr. Leis sent Ms. Nkwazi a letter confirming their discussion. The letter refers to Ms. Nkwazi's contract of employment, and confirms that casual employees cannot work more than 125 days in a twelve month period. The letter closes by referring Ms. Nkwazi to Ms. Smith for further information with respect to casual employment. In Ms. Nkwazi's view, the letter was not responsive to the concerns that she had identified in her discussion with Mr. Leis and Ms. Smith.

[163] Ms. Nkwazi says she realized that she had forgotten to mention 'the crucial thing' during her initial meeting with Mr. Leis and Ms. Smith, that is, her belief that Ms. Neufeld's comments with respect to the rest period were made in an attempt to exclude her from participation in the nursing competition. As a consequence, she asked to have a second meeting with Mr. Leis, which meeting occurred on February 6, 1998.

[164] Ms. Smith was again in attendance during Ms. Nkwazi's February 6 meeting with Mr. Leis, during which Ms. Nkwazi went into her allegations against Ms. Neufeld in greater detail. According to Ms. Nkwazi, Mr. Leis cautioned Ms. Nkwazi to be careful about making allegations of discrimination. Ms. Nkwazi also says that she was told that there was to be another competition, and that Mr. Leis and Ms. Smith would see what they could do to help Ms. Nkwazi qualify as a visible minority. Ms. Nkwazi says that she felt humiliated by this comment, as she felt that she was as good at her job as anyone, and did not need any help as long as competitions were run fairly.

[165] According to Ms. Nkwazi, Mr. Leis and Ms. Smith asked Ms. Nkwazi if she had spoken directly to Ms. Neufeld about her concerns. Mr. Leis offered to accompany Ms. Nkwazi to a meeting with Ms. Neufeld. Ms. Nkwazi again told Mr. Leis and Ms. Smith that she was too intimidated by Ms. Neufeld to meet directly with her.

[166] Mr. Leis and Ms. Smith both deny telling Ms. Nkwazi to be careful about making allegations of discrimination. Mr. Leis recalls Ms. Nkwazi indicating that she felt intimidated by Ms. Neufeld in the course of this meeting. He says that he suggested that Ms. Nkwazi consider bringing a third party with her to a meeting with Ms. Neufeld. Ms. Smith's contemporaneous written summary of the meeting makes no mention, however, of any such suggestion. Ms. Smith says that she sensed Ms. Nkwazi's reluctance to meet with Ms. Neufeld, but that Ms. Nkwazi did not suggest any other kind of workable solution during the meeting.

[167] Both Mr. Leis and Ms. Smith deny saying anything about assisting Ms. Nkwazi in the competitive process, in light of her status as a visible minority, although Mr. Leis says that he did encourage Ms. Nkwazi to try the competitive process again.

[168] Mr. Leis acknowledged the vulnerability of the casual employee, and noted that he did not recall any other instance of a casual employee complaining about a supervisor. He said that Ms. Nkwazi, however, had 'no hesitation' in bringing forward her complaint against Ms. Neufeld. In Mr. Leis' view, it was reasonable to expect Ms. Nkwazi to resolve the matter directly with Ms. Neufeld, noting that the RPC harassment policy contemplates a face to face discussion of the allegations. Mr. Leis was prepared to concede that there may be cases where an employee's fear of the supervisor is such that direct confrontation may not be a realistic solution, and that other alternatives would have to be considered. In this case, however, Mr. Leis testified that Ms. Nkwazi agreed to work with Mr. Leis to resolve the matter directly with Ms. Neufeld.

[169] The Redress Guidelines on Harassment and Other Forms of Discrimination that accompany the RPC harassment policy encourage employees to discuss their concerns directly with the person whose behaviour is in issue, where such communication is possible. The Guidelines provide that, where circumstances make it difficult for an employee to communicate directly with the person allegedly responsible for the discriminatory conduct, the employee should raise the matter with a supervisor or manager. The Guidelines encourage the use of informal problem solving processes, in advance of the filing of formal complaints, although such processes are not mandatory. Nothing in either the Policy or the Guidelines requires a face to face meeting between the person complaining of discrimination and the person allegedly responsible for the discriminatory conduct.

[170] Ms. Nkwazi spoke again to Carol Smith sometime around February 11, telling Ms. Smith that she still felt too afraid to take her concerns directly to Ms. Neufeld, given her position of authority. Ms. Smith again stressed the need for Ms. Nkwazi to resolve the matter directly with Ms. Neufeld.

[171] Mr. Leis was aware that Ms. Nkwazi had again expressed her fear of meeting directly with Ms. Neufeld to Ms. Smith. Mr. Leis and Ms. Smith both acknowledge that there were alternatives to a face to face confrontation, including an exchange of written communications, a facilitated meeting, a formal complaint under the harassment policy and the involvement of outside mediators. Both say that a face to face discussion was the simplest option, and the one they considered.

[172] Ms. Nkwazi also spoke to Doug Altenberg around this time. Mr. Altenberg was the Acting Co-ordinator of Correctional Operations. Ms. Nkwazi called Mr. Altenberg to ask whether he would be prepared to accompany her to a meeting with Ms. Neufeld. Mr. Altenberg asked Ms. Nkwazi to come down to his office to discuss the matter. Ms. Nkwazi says that Mr. Altenberg's office was near to Mr. Leis' office, and that she did not feel comfortable going back to that area of the RPC, having declined Mr. Leis' offer to accompany her to meet with Ms. Neufeld. As a result, she did not pursue the issue with Mr. Altenberg.

[173] Unbeknownst to Ms. Nkwazi, following these discussions, Ms. Smith prepared a written summary of Ms. Nkwazi's concerns, which was sent to Regional Headquarters under cover of Mr. Chiasson's signature, on February 17, 1998. Ms. Smith's summary notes that Mr. Altenberg told Mr. Leis about his discussion with Ms. Nkwazi with respect to Ms. Neufeld. According to Ms. Smith's notes, it was decided to refer Ms. Nkwazi to her supervisor. At this point, Ms. Nkwazi's immediate supervisor was Heather Thompson, the Associate Program Director on Churchill Unit.

[174] Ms. Nkwazi spoke to Ms. Thompson on February 24. Ms. Nkwazi told Ms. Thompson about Ms. Neufeld's actions concerning the rest period, and asked Ms. Thompson not to tell anyone else about their discussion. Ms. Thompson told Ms. Nkwazi that she felt obligated to take the matter up with Mr. Leis. Ms. Thompson confirms that, throughout her discussion with Ms. Nkwazi, Ms. Thompson reinforced the need for Ms. Nkwazi to address her concerns directly with Ms. Neufeld.

[175] Later that day, Ms. Thompson called Ms. Nkwazi into her office. Reg Brecknell was also present in Ms. Thompson's office. At this point, Mr. Brecknell was the Associate Program Director on Clearwater Unit. Ms. Nkwazi says that Mr. Brecknell berated Ms. Nkwazi for being unprofessional and for talking about people behind their backs, referring to Ms. Nkwazi's discussions with Ms. Thompson, Mr. Leis and Ms. Smith. Mr. Brecknell reportedly told Ms. Nkwazi that the RPC wanted people who were able to resolve conflict directly with the people involved. Ms. Nkwazi told Mr. Brecknell that she was intimidated by Ms. Neufeld, and was not emotionally ready to meet with her. Ms. Nkwazi says that she was asked to leave and that was the end of the meeting.

[176] Both Mr. Brecknell and Ms. Thompson testified with respect to this discussion. Mr. Brecknell's recollection of the meeting was limited, but was aided by a memo Ms. Thompson prepared shortly after the discussion in question. Ms. Thompson's memo notes that, after her first discussion with Ms. Nkwazi on February 24, Ms. Thompson discovered that Ms. Nkwazi had mentioned her concerns to Mr. Leis and Ms. Smith, and "had been advised to resolve the issue with Diane". The memo goes on to say: "Beryl was counselled that she is to stop talking to people regarding Diane and to actively take steps to resolve the issue with Diane. Beryl stated she is not prepared at this time to talk with Diane. Reg counselled Beryl that talking negatively to others about a staff member is against the Code of Professional Standards." Although Mr. Brecknell tried to suggest that his concern was that Ms. Nkwazi had been talking to other staff members about Ms. Neufeld, Ms. Thompson's memo specifically identifies Tim Leis and Carol Smith as the people Ms. Nkwazi had spoken to.

[177] During this period Ms. Nkwazi also made several calls to Lillian Comeau, the Regional Chief, Anti-Harassment, Official Languages, Employment Equity and Rewards Programs. Ms. Nkwazi reviewed her concerns with Ms. Comeau, but declined to give her name, indicating that she was not ready to file a formal complaint. Ms. Comeau testified that she knew that the calls were from Ms. Nkwazi, as she recognized her voice. Ms. Comeau says that she encouraged Ms. Nkwazi to speak directly to the person responsible for the conduct in question, or to Mr. Leis. She also offered to assist Ms. Nkwazi if she wanted to file a formal complaint, however, Ms. Nkwazi was unwilling to take such a step at that time.

[178] Ms. Comeau testified that there are a number of avenues that could be pursued where an employee is reluctant to confront the alleged discriminator, including a referral to the Employee Assistance Program, the provision of counselling to the employee and the use of an outside mediator. Ms. Comeau did refer Ms. Nkwazi to an EAP referral agent. Ms. Nkwazi subsequently advised Ms. Comeau that the agent had advised Ms. Nkwazi to meet with Ms. Neufeld to discuss the problem.

[179] Ms. Nkwazi finally got up the nerve to meet with Ms. Neufeld. A meeting was arranged by Carol Smith, at Ms. Nkwazi's request, which meeting took place on April 6, 1998. A shop steward named Arlene Eckert agreed to accompany Ms. Nkwazi to the meeting, even though Ms. Nkwazi was not a member of the union. Ms. Neufeld attended the meeting accompanied by Dolores Stevens. At the meeting, Ms. Nkwazi reviewed her concerns with respect to Ms. Neufeld's actions, using a written text that she had prepared. Ms. Nkwazi also mentioned that she had noticed that her name did not appear on the duty roster for April, and asked Ms. Neufeld what that meant. Ms. Neufeld said that she did not know, and referred Ms. Nkwazi to Heather Thompson and Cynthia MacDonald, who were now the managers of Churchill Unit. (11)

[180] Ms. Nkwazi says that this meeting ended with her extending an 'olive branch' to Ms. Neufeld, suggesting that they should both try to establish a new relationship. Ms. Nkwazi says that Ms. Neufeld accepted her offer. Ms. Nkwazi left the meeting hopeful that she would be able to continue to work at the RPC in a better environment than she had experienced to that point.

[181] Ms. Neufeld says that she was prepared to try to resolve issues with Ms. Nkwazi at the meeting, and that she tried to respond to Ms. Nkwazi's concerns. However, every time she

attempted to respond to one of Ms. Nkwazi's allegations, more allegations would come out. Ms. Neufeld does not feel that the meeting was productive, but acknowledges Ms. Nkwazi's attempt to extend an olive branch to her at the conclusion of the meeting. Ms. Stevens did not say anything about the meeting in her testimony.

[182] Ms. Nkwazi says that starting in early March, she stopped getting calls from managers on Churchill Unit to come in to work, although she was still called from time to time by Correctional Officers. After the meeting of April 6, Ms. Nkwazi found herself getting fewer and fewer shifts. Ms. Nkwazi was not called at all after April 14, 1998. On April 26, she called Stuart Doell, one of the Correctional Officers who had previously offered her shifts. Ms. Nkwazi noted that she had not heard from Mr. Doell, and asked if there was a memo telling people not to call her. Mr. Doell confirmed that he had received just such a memo from Cynthia MacDonald. According to Ms. Nkwazi, this was the first indication she received that her contract with the RPC was not being renewed.

[183] The following day, Ms. Nkwazi called Ms. Thompson to ask if she could come to the RPC to pick up some personal property. Ms. Thompson says that she told Ms. Nkwazi that she would leave Ms. Nkwazi's property at the RPC gate, and that she could pick it up there. Ms. Nkwazi says that nothing was said about her items being left at the gate. Ms. Nkwazi's actions on arrival at the RPC are more consistent with Ms. Nkwazi's version of the discussion: when Ms. Nkwazi got to the RPC, she did not ask for her things at the gate, but instead headed to Churchill Unit. On the way there, Ms. Nkwazi ran into Mr. Leis and Ms. Smith, both of whom greeted her in a friendly manner, chatting with her about the weather. When Ms. Nkwazi got to Churchill Unit, Ms. Thompson told her that Ms. Nkwazi's property was at the main gate. A guard named Doug McKie then arrived and told Ms. Nkwazi that he had been instructed to escort Ms. Nkwazi to the office of his supervisor, a Mr. Bob Brooks. Mr. Brooks told Ms. Nkwazi that he had instructions from Mr. Leis to have Ms. Nkwazi leave her RPC identification and keys at the gate. Mr. McKie then escorted Ms. Nkwazi to the gate, whereupon Ms. Nkwazi handed in her identification and keys, and left the RPC, never to return.

[184] Ms. Nkwazi called Ms. Smith the next day to find out what all of this meant. Ms. Smith referred Ms. Nkwazi to Heather Thompson. When Ms. Nkwazi called Ms. Thompson, Ms. Thompson was busy, and told Ms. Nkwazi that she would call Ms. Nkwazi back to discuss the matter with her. Ms. Nkwazi waited by the phone until Ms. Thompson called back, some two hours later, whereupon Ms. Thompson told Ms. Nkwazi that the decision had been made not to renew her contract. When Ms. Nkwazi asked why she had not been told, Ms. Thompson reportedly told Ms. Nkwazi that the casual contract was clear that there was no renewal obligation on the RPC. Only then, Ms. Nkwazi says, did she know for sure that she was no longer employed at the RPC.

[185] Ms. Nkwazi became very emotional when describing the effect that CSC's actions had on her, describing the circumstances surrounding the non-renewal of her contract as 'heinous'. According to Ms. Nkwazi, she was humiliated by the way in which her employment ended. In her view, a Caucasian employee would never have been treated the way that she was.

[186] Although Ms. Thompson insists that she told Ms. Nkwazi that her contract had not been renewed during their initial discussion on April 27, a review of Ms. Thompson's own e-mails to Carol Smith following each of the telephone discussions with Ms. Nkwazi confirms Ms. Nkwazi's version of the sequence of events. Ms. Thompson acknowledges that Ms. Nkwazi was never told why her contract was not renewed. (12)

(i) Analysis

[187] As a casual employee, Ms. Nkwazi was in an extremely vulnerable position in relation to her complaints regarding Ms. Neufeld. Not only did she not have the protection that union membership would have afforded, being employed on an 'as needed basis', she had absolutely no job security. Even though Mr. Leis acknowledged that it was very unusual for a casual employee to bring a complaint against a manager, there does not appear to have been any real appreciation of or sensitivity to the precariousness of Ms. Nkwazi's position on the part of RPC management in their handling of Ms. Nkwazi's complaints.

[188] Ms. Nkwazi had serious, and what I have found to be well-founded, concerns with respect to the treatment she had suffered at the hands of Diane Neufeld. In accordance with CSC policy, she communicated her concerns to management on a number of occasions. Each time, management simply bounced the ball back into Ms. Nkwazi's court, insisting that Ms. Nkwazi confront Ms. Neufeld directly with her allegations. Even though Ms. Nkwazi repeatedly expressed her reluctance to meet face to face with Ms. Neufeld, no attempt appears to have been made to identify an alternative method of dealing with the issue, notwithstanding the existence of a number of alternate avenues that were open to management.

[189] Mr. Brecknell's actions in the course of his meeting with Ms. Nkwazi and Ms. Thompson on February 24 also require comment. It is uncontroverted that, in the course of this meeting, Ms. Nkwazi was reprimanded for having discussed her concerns with respect to Ms. Neufeld with other people. Although Mr. Brecknell tried to suggest that Ms. Nkwazi was 'bad-mouthing' Ms. Neufeld around the RPC, Ms. Thompson's memo summarizing the meeting makes it clear that Ms. Nkwazi was reprimanded for taking her concerns with respect to Ms. Neufeld to Mr. Leis, Ms. Smith and Ms. Thompson. Mr. Leis himself acknowledged that there was absolutely nothing inappropriate about Ms. Nkwazi's actions. I cannot but conclude that what Mr. Brecknell hoped to achieve was to intimidate Ms. Nkwazi into backing down from her allegations with respect to Ms. Neufeld.

[190] I will deal with the circumstances surrounding the non-renewal of Ms. Nkwazi's casual contract in the next section of this decision.

M. Who Made the Decision not to Renew Ms. Nkwazi's Contract, When was that Decision Made and Why?

[191] CSC's position is that it did not renew Ms. Nkwazi's casual contract in April of 1998 because of problems with her performance. CSC further notes that it had no legal obligation to renew Ms. Nkwazi's contract, as the contract was for a fixed term, and specifically noted that it should not be construed as an offer of indeterminate employment.

[192] Ms. Neufeld testified that the RPC always needed casual employees, and that the renewal of a casual employee's contract would be almost automatic, unless there were performance concerns. Ms. Neufeld also stated that she monitored the performance of casual employees on an ongoing basis, and that it was her practice to bring any concerns that she may have with respect to the performance of a casual employee to that employee's attention, in order that the concerns could be addressed. Although Ms. Neufeld says that Ms. Nkwazi was timid and did not participate in discussions to any extent, Ms. Neufeld never mentioned any performance concerns to Ms. Nkwazi, as Ms. Nkwazi met the expectations for the job during the time that Ms. Neufeld supervised her.

[193] Tim Leis agrees that casual employees are entitled to be treated fairly, and that fairness requires that such employees be told about problems with their performance soon after such problems come to light, in order that the employee can take the necessary steps to improve their performance. Mr. Leis assumes that this would be done by the employee's supervisor.

[194] The first written record of any concern with respect to Ms. Nkwazi's performance is an e-mail memo authored by Reg Brecknell on February 16, 1998, wherein he notes that Ms. Nkwazi had very poor communication with patients and that she spent most of her time at the nursing station. The memo also notes that Ms. Nkwazi did very little charting, asked few questions about patients, and had little involvement in group sessions. Mr. Brecknell observed that Ms. Nkwazi's morale was poor, noting that she was "always complaining" about her entitlement to benefits and the number of shifts that she was getting. It is not clear who Mr. Brecknell's e-mail was directed to, although he believes that he sent it to Carol Smith. Mr. Brecknell says that he thinks he discussed his concerns with respect to Ms. Nkwazi with Ms. Smith, and that she asked him to give her something in writing.

[195] Mr. Brecknell acknowledges that he may have taken the leadership role in seeing that Ms. Nkwazi's contract was not renewed. As the Associate Program Director on Clearwater Unit, he had the opportunity to observe Ms. Nkwazi's work performance "two or three times, maybe more, maybe less." Mr. Brecknell says that he thinks that he got some feedback about Ms. Nkwazi from patients, although his recollection about this was "pretty fuzzy". Mr. Brecknell testified that he may have documented the complaints that he received from patients, although no such documentation was produced at the hearing. Mr. Brecknell was unable to provide any further information with respect to his concerns regarding Ms. Nkwazi's performance. He did, however, offer his opinion with respect to Ms. Nkwazi's attitude, observing that Ms. Nkwazi appeared to be "more interested in what her benefits were than in her job as a nurse."

[196] According to Mr. Brecknell, at the time in question, there was no obligation on management to conduct performance appraisals of casual employees. Nevertheless, fairness required that concerns with respect to an individual's employment be communicated to the individual in question. As a result, Mr. Brecknell would often sit down with casual employees assigned to his unit and discuss his expectations and the individuals' performance with them.

[197] Mr. Brecknell suggested that he may have discussed some of his concerns with respect to Ms. Nkwazi's performance with her when she was working on Clearwater Unit. He has no notes

of any such discussion, however, and indeed, no specific recollection of a discussion actually occurring. Ms. Nkwazi denies that any such discussion ever took place.

[198] "In a perfect world", Mr. Brecknell says, Ms. Nkwazi's Program Director or Associate Program Director on Churchill Unit should have discussed with her any concerns that they may have had with respect to Ms. Nkwazi's performance. There is nothing in the evidence to suggest that any such discussions ever occurred.

[199] Adele MacInnis-Meagher supervised Ms. Nkwazi for a period of approximately seven months when Ms. MacInnis-Meagher was the Program Director on Churchill Unit in 1996-7. During the period in which Ms. MacInnis-Meagher supervised Ms. Nkwazi, Ms. Nkwazi's casual contact was renewed twice. Ms. MacInnis-Meagher did not have a great deal of interaction with Ms. Nkwazi after Ms. MacInnis-Meagher left Churchill Unit in February of 1997. Ms. MacInnis-Meagher says that during the time that she supervised Ms. Nkwazi, Ms. Nkwazi asked lots of questions with respect to the care of patients, and provided Ms. MacInnis-Meagher with feedback regarding patients. Ms. MacInnis-Meagher says that Ms. Nkwazi was respectful of the patients, but that she spent a little more time in the office than Ms. MacInnis-Meagher would have liked. She also recalls that Ms. Nkwazi had a "bit of a nervous disposition". Ms. MacInnis-Meagher does not recall any problems with Ms. Nkwazi's charting.

[200] Ms. MacInnis-Meagher was not directly involved in the decision not to renew Ms. Nkwazi's contract. She says that Mr. Brecknell did ask her for her views with respect to Ms. Nkwazi's performance, although she was unable to say when this occurred. Ms. MacInnis-Meagher had some concerns with respect to Ms. Nkwazi's performance, which stemmed, in part, from Ms. Nkwazi's poor results in the November, 1997 competition. Ms. MacInnis-Meagher acknowledged, however, that the fact that an employee may have performed poorly in a competition for a nursing position does not necessarily mean that the employee is not qualified to work as a nurse. Ms. MacInnis-Meagher conceded that some people simply do not do well in competitions, even though they may be very good at the job in question.

[201] Cynthia MacDonald worked on Churchill Unit from the time it became the Women's Unit in August of 1997 until after Ms. Nkwazi left the RPC. From October of 1997 to March of 1998, Ms. MacDonald worked as the Group Co-ordinator on Churchill Unit. As such, she was responsible for group scheduling and delivery. In March of 1998, Ms. MacDonald became the Acting Associate Program Director for the Unit.

[202] According to Ms. MacDonald, she began having discussions with Heather Thompson with respect to Ms. Nkwazi's performance sometime in February of 1998. Ms. MacDonald had observed that Ms. Nkwazi was spending a lot of time in the nursing station, that she appeared timid, and often did not make eye contact. Ms. MacDonald did not observe any problems with Ms. Nkwazi's attitude or morale. Ms. MacDonald testified that casual nurses were not involved in group programs at the RPC: The role of the casual employee was to cover for the indeterminate and term staff so that they could be involved in the groups. Thus Ms. MacDonald did not perceive any problem with the extent of Ms. Nkwazi's involvement in group programs. Ms. MacDonald's evidence with respect to the role of casual employees with respect to group sessions is confirmed by the testimony of Diane Neufeld.

[203] Ms. MacDonald acknowledges that she never brought any of her concerns with respect to Ms. Nkwazi's performance to her attention. Ms. MacDonald expects that this would have been done by Ms. Nkwazi's supervisor, and that Ms. Nkwazi would have been provided with an opportunity to remedy any deficiencies in her performance.

[204] Heather Thompson was Ms. Nkwazi's direct supervisor in the last few months of her employment at the RPC. Ms. Thompson says that during a meeting with Reg Brecknell in December of 1997, Mr. Brecknell raised concerns with respect to Ms. Nkwazi's performance. Ms. Thompson shared many of these concerns. It was agreed that a more formal discussion was required, and the matter was deferred until February of 1998. In January of 1998, Ms. Nkwazi's contract was again renewed for a further three months. Ms. Thompson says that her principle concern with respect to Ms. Nkwazi's performance was her inability to communicate and interact with patients. Once again, these concerns are expressed in very general terms, without concrete examples. Ms. Thompson says that she did record some of her observations with respect to Ms. Nkwazi's performance in a personal notebook, however, no such notes were produced at the hearing.

[205] Ms. Thompson acknowledges that she never discussed any of her concerns with respect to Ms. Nkwazi's performance with her. Not only were managers not obliged to conduct formal performance appraisals for casual employees, says Ms. Thompson, in fact managers were told not to communicate with casual employees with respect to their performance on the job. Ms. Thompson testified that Reg Brecknell told her that it was RPC practice to not provide casual employees with feedback regarding their performance. Ms. Thompson says that Mr. Brecknell had years of personnel experience, and she never thought to question this advice.

[206] According to Ms. Thompson, she met with Mr. Brecknell on February 13, 1998, at which time Mr. Brecknell advised her that he had already discussed the matter of Ms. Nkwazi's performance with the other Associate Program Directors, and that they agreed with him. Ms. Thompson asked Mr. Brecknell to put his concerns into writing, which led to Mr. Brecknell's February 16 e-mail.

[207] Ms. Neufeld denies any involvement in the decision not to renew Ms. Nkwazi's contract. According to Ms. Neufeld, Heather Thompson approached her to discuss the issue of the renewal of Ms. Nkwazi's casual contract, at which point Ms. Neufeld told Ms. Thompson that she did not want to have anything to do with the decision, in light of Ms. Nkwazi's complaints against her. Ms. MacDonald and Ms. Thompson agree that they jointly made the decision not to renew Ms. Nkwazi's casual contract, and that the decision not to renew Ms. Nkwazi's casual contract was made shortly before Ms. Nkwazi's contract was to expire in April of 1998.

[208] Many witnesses, other than those involved in the decision not to renew Ms. Nkwazi's casual contract, testified with respect to Ms. Nkwazi's performance on the job. These witnesses included Ms. Nkwazi's supervisors and colleagues, several fellow nurses, a physician, and a correctional officer. These witnesses testified that Ms. Nkwazi was a good employee, well liked by patients and co-workers, hardworking, conscientious, and professional in her conduct.

(i) Analysis

[209] I do not accept CSC's position that the decision not to renew Ms. Nkwazi's casual contract was taken as a consequence of concerns with respect to her performance. I find that Ms. Nkwazi's casual contract was not renewed because she had complained to RPC management about Ms. Neufeld's discriminatory actions.

[210] In examining the decision not to renew Ms. Nkwazi's contract, it is important to keep in mind that by the spring of 1998, Ms. Nkwazi had been working at the RPC for approximately 2 ½ years. Over this time, her casual contract was renewed some nine times. At no time prior to February, 1998 was Ms. Nkwazi ever given any reason to believe that there was any problem with her performance on the job.

[211] Ms. Thompson suggests that Mr. Brecknell first voiced his concerns with respect to Ms. Nkwazi's performance in December of 1997, that is, before Ms. Nkwazi's first meeting with Mr. Leis and Ms. Smith. There is no record of any such discussion, however, and although Mr. Brecknell says that he may have discussed Ms. Nkwazi's performance with Heather Thompson at some point, there is no mention of a December discussion in his testimony. Ms. Nkwazi's contract was renewed again in January of 1998. On all of the evidence, I find that the first time that concerns with respect to Ms. Nkwazi's job performance were articulated was in Mr. Brecknell's e-mail of February 16, 1998.

[212] By his own admission, Mr. Brecknell took the leadership role in ensuring that Ms. Nkwazi's casual contract was not renewed. Ms. Nkwazi was not assigned to Mr. Brecknell's unit: Indeed, he says that he only observed Ms. Nkwazi's work "two or three times - maybe more, maybe less". Mr. Brecknell's exposure to Ms. Nkwazi's job performance was clearly limited, yet he appears to have suddenly taken it upon himself to mount a crusade to ensure Ms. Nkwazi's removal from the RPC.

[213] We know that Ms. Nkwazi met with Mr. Leis and Ms. Smith on January 27 and February 6. Ms. Smith's written chronology suggests that at some point between the two meetings, Ms. Neufeld was made aware that Ms. Nkwazi had complained about her to senior management. Within a matter of days, concerns are suddenly voiced with respect to Ms. Nkwazi's competence. The timing of Mr. Brecknell's e-mail is highly suspicious.

[214] I must also consider whether there is any substance to the purported deficiencies in Ms. Nkwazi's performance. I should note at the outset the allegations with respect to Ms. Nkwazi's performance problems were very general in nature: virtually no particulars were provided. I will endeavour, however, to examine each of the areas of concern in turn.

[215] Mr. Brecknell says that there were problems with Ms. Nkwazi's charting. It would presumably have been a very simple matter for Mr. Brecknell to produce specific patient charts in order to illustrate the nature of his concerns in this regard. No charts were produced, however, and Mr. Brecknell was unable to identify a single instance where Ms. Nkwazi's charting was less than adequate. None of the other witnesses testifying on behalf of CSC voiced any concerns with respect to Ms. Nkwazi's charting. Ms. Nkwazi's fellow nurses were reliant on Ms. Nkwazi's charting for information with respect to patients. Ms. Kushniruk, Ms. Kemp, Ms. Roth, Ms.

Uwiera and Ms. Gibney all testified that Ms. Nkwazi's charting was completely satisfactory. I reject this allegation in its entirety.

[216] Similarly, no details were provided with respect to the patient complaints that Mr. Brecknell says that he received, beyond the amorphous allegation that there were problems with Ms. Nkwazi's interaction. When challenged, Mr. Brecknell was unable to provide the name of a single patient who complained to him about Ms. Nkwazi. Ms. Thompson's allegations with respect to Ms. Nkwazi's purported difficulties interacting with patients were equally lacking in specificity.

[217] Mr. Brecknell alleges that Ms. Nkwazi had little involvement in group sessions. In the course of her employment at the RPC, Cynthia MacDonald had responsibility for the delivery of group programs. I accept the evidence of Ms. MacDonald and Ms. Neufeld that it was not the role of casual employees to participate in group sessions.

[218] Although Mr. Brecknell says Ms. Nkwazi asked very few questions with respect to patients, his observation must be considered in light of his very limited opportunity to observe Ms. Nkwazi. Adele MacInnis-Meagher supervised Ms. Nkwazi for a number of months. Ms. MacInnis-Meagher says that Ms. Nkwazi asked her lots of questions with respect to patient care, and provided Ms. MacInnis-Meagher with good feedback concerning her patients.

[219] The next area of concern identified by Mr. Brecknell was Ms. Nkwazi's attitude and the fact that Ms. Nkwazi was purportedly "more interested in what her benefits were than in her job as a nurse." Mr. Brecknell's experience with Ms. Nkwazi in relation to the question of benefits was limited to one, or possibly two, conversations with Ms. Nkwazi regarding her entitlement to 'call-back' pay. This occurred some eighteen months before, when Mr. Brecknell was Chief of Personnel at the RPC. I have already found that the policy with respect to call-back pay was confusing and had not been clearly explained to the employees, and that it was entirely understandable that Ms. Nkwazi did not understand her rights in this regard. Mr. Brecknell was the appropriate individual for her to go to to seek clarification regarding the policy. For Mr. Brecknell to raise the issue some eighteen months later, in an attempt to undermine Ms. Nkwazi's position with the RPC, is nothing more than a mean spirited and gratuitous attack on her professional integrity.

[220] The final concern raised by Mr. Brecknell with respect to Ms. Nkwazi's performance was the suggestion that she spent too much time in the nursing station. In this regard, Mr. Brecknell's concerns appear to have been shared by Ms. MacInnis-Meagher, and to a lesser extent, by Ms. Neufeld. Ms. Nkwazi and her co-workers dispute the allegation, indicating that Ms. Nkwazi did not spend any more time in the nursing station than any of the other nurses. In light of my findings that all of the other allegations regarding alleged deficiencies in Ms. Nkwazi's performance are entirely unsubstantiated, I am very sceptical with respect to this allegation. Even if it were true, however, the evidence of CSC's own witnesses is clear that no one ever mentioned any concern in this regard to Ms. Nkwazi. Most of the CSC witnesses were prepared to concede that, even though the policy regarding performance appraisals did not extend to casual employees, there was nonetheless an obligation on management to advise casual employees of deficiencies in their performance and to provide an opportunity to remedy the situation. The one

exception to this was Heather Thompson. In an attempt to justify the fact that she never mentioned any of her concerns with respect to Ms. Nkwazi's performance to Ms. Nkwazi herself, Ms. Thompson insisted that she had been told by Reg Brecknell that RPC policy was that supervisors should not mention performance concerns to casual employees. Not only does Mr. Brecknell say the opposite in his evidence, Ms. Thompson's evidence in this regard defies reason.

[221] In argument it was suggested that the fact that Ms. Nkwazi performed poorly in the November competition was a further basis for concern with respect to her competence. This argument must be considered in the light of the evidence of CSC witnesses such as Ms. MacInnis-Meagher and Ms. Thompson, both of whom noted that some people do not do well on competitions, but that this did not mean that they were not good at their jobs. Tim Leis noted that casual employees often did not succeed in their first competition. Theresa Kosmos and Tracy Kushniruk also did poorly in competitions, Ms. Kushniruk faring even worse than Ms. Nkwazi in the November, 1997 competition. Their casual contracts continued to be renewed.

[222] To paraphrase the Basi decision, there is nothing subtle about the scent surrounding the decision not to renew Ms. Nkwazi's contract. I find that there is no merit to the claim that Ms. Nkwazi's casual contract was not renewed because of legitimate concerns with respect to her competence. Ms. Nkwazi's casual contract was not renewed because she complained to senior management about Ms. Neufeld's discriminatory actions. Ms. Neufeld's colleagues then closed ranks, and concerns with respect to performance were manufactured.

[223] Although Ms. Thompson and Ms. MacDonald both say that the decision not to renew Ms. Nkwazi's casual contract was made in April of 1998, the documentary evidence suggests that in all likelihood, the decision had already been made by the middle of March. I was provided with copies of "Duty Roster" forms for Churchill Unit for the months of March and April, 1998. According to Ms. MacDonald, these forms are completed on the fifteenth of the month preceding the month to which the Roster form relates. In other words, the Roster for March must be prepared by February 15, and the Roster for April, by March 15. The Roster for March lists indeterminate and term employees assigned to Churchill Unit on the top of the form. Further down the page, the names of Beryl Nkwazi and Tracy Houk (Kushniruk), the casual employees assigned to Churchill Unit, are printed on the form. The names of casual employees from other Units who worked on Churchill Unit in the course of the month are handwritten near Ms. Nkwazi's and Ms. Kushniruk's names, with their shifts noted. Also appearing on the March form is the name of Brenda Hoffman, a casual employee who appears to have started work at the RPC after the form for March would have been prepared. Ms. Hoffman was assigned to Churchill Unit.

[224] In contrast, the Roster form for April has Ms. Kushniruk and Ms. Hoffman's names pre-printed on it. Ms. Nkwazi's name does not appear anywhere on the form. I am satisfied that the most probable explanation for the omission of Ms. Nkwazi's name from the April Duty Roster is that, by the time that the form was prepared on March 15, 1998, the decision had already been made not to renew her contract.

[225] The actions of CSC after the decision was made not to renew Ms. Nkwazi's contract are shocking. Ms. Nkwazi was allowed to go through the stressful and humiliating charade of her April 6 meeting with Ms. Neufeld. She was not extended the basic human courtesy of so much as a telephone call to tell her that her contract had not been renewed. (13) Ms. Nkwazi was invited to return to the RPC to collect her property, only to be unceremoniously escorted out of the institution by security guards, in full view of her colleagues. This is conduct so insensitive that it borders on intentional cruelty.

[226] Throughout this hearing, CSC insisted that it had no legal obligation to renew Ms. Nkwazi's contract. As a contract for a fixed term, Ms. Nkwazi was provided with notice of termination at the time the contract was entered into. This is, of course, true, from a contractual perspective. Ms. Nkwazi would not have been entitled to sue for damages for wrongful dismissal when her contract was not renewed. It does not mean, however, that it is lawful to refuse to renew a term contract when such a decision is taken because of discriminatory considerations.

N. The Thompson Reference

[227] Ms. Nkwazi says that after leaving the RPC, she endeavoured to find new employment. Amongst other efforts, Ms. Nkwazi applied to the University Hospital. On August 5, 1998, Ms. Nkwazi received a call from a Patti Wonsiak, a hospital employee, who told Ms. Nkwazi that she had been prepared to offer Ms. Nkwazi a position, but was not able to do so as a consequence of the reference that Ms. Nkwazi had been given by Heather Thompson. Ms. Nkwazi understood from Ms. Wonsiak that Ms. Thompson's reference was 'scalding'. Ms. Nkwazi offered Ms. Uwiera's name as a second reference. Although Ms. Nkwazi understood that Ms. Uwiera was contacted, Ms. Nkwazi was never offered a position at the Hospital.

[228] Ms. Thompson confirmed providing Ms. Wonsiak with a reference regarding Ms. Nkwazi. Ms. Thompson says, however, that her reference was generally positive. Ms. Thompson's notes of her discussion with Ms. Wonsiak were produced during the hearing. The notes indicate that Ms. Thompson advised Ms. Wonsiak that Ms. Nkwazi was organized, that she was effective giving medication and was able to manage her workload. Ms. Wonsiak evidently asked Ms. Thompson if she would hire Ms. Nkwazi back, to which Ms. Thompson responded "We did not renew her casual status." According to Ms. Thompson, Ms. Wonsiak then abruptly ended the call. Ms. Wonsiak did not testify.

(i) Analysis

[229] Ms. Nkwazi's knowledge of the discussion between Ms. Thompson and Ms. Wonsiak is based entirely on hearsay information derived from Ms. Wonsiak. In contrast, Ms. Thompson's direct evidence with respect to the content of the reference is corroborated by her contemporaneous notes regarding the call. I accept that the information provided to Ms. Wonsiak by Ms. Thompson with respect to Ms. Nkwazi corresponds to that recorded in Ms. Thompson's notes.

[230] There is nothing in the reference that is not accurate: when asked whether Ms. Thompson would hire Ms. Nkwazi again, Ms. Thompson quite truthfully advised Ms. Wonsiak that Ms.

Nkwazi's casual contract had not been extended. That said, telling a prospective employer that a candidate's previous employer elected not to continue the person's casual contract is hardly a ringing endorsement of the candidate's abilities. I have already concluded that the decision not to renew Ms. Nkwazi's contract was taken because Ms. Nkwazi complained about Ms. Neufeld's discriminatory conduct.

[231] We know that Ms. Nkwazi was not offered the position at the University Hospital, and it is reasonable to conclude that Ms. Thompson's reference was a factor in the decision not to offer Ms. Nkwazi a job.

O. Conclusion on Liability

[232] Ms. Neufeld's attempt to exclude Ms. Nkwazi from participation in the November, 1997 competition and the comment relating to ethnicity of Ms. Nkwazi's name constitute differential race and colour based treatment in the course of Ms. Nkwazi's employment, contrary to Section 7 of the Canadian Human Rights Act. Pursuant to Section 65 of the Act, CSC is liable for the actions of Ms. Neufeld, unless it can establish that it did not consent to the commission of the acts, that it exercised all due diligence to prevent the acts from being committed, and subsequently, that it took appropriate steps to mitigate or avoid the effect thereof. It is not necessary for me to consider the first two elements of the tripartite due diligence test: the evidence is overwhelming that CSC not only failed to mitigate or avoid the effects of Ms. Neufeld's actions on Ms. Nkwazi, but that the way in which CSC dealt with Ms. Nkwazi's complaint, the circumstances surrounding the decision not to renew Ms. Nkwazi's contract, and Ms. Thompson's reference actually aggravated the injuries sustained by Ms. Nkwazi.

[233] I have found that Ms. Nkwazi's casual contract was not renewed because Ms. Nkwazi had complained about Ms. Neufeld's actions. As it currently stands, Section 14.1 of the Canadian Human Rights Act makes an act of retaliation itself an independent discriminatory practice. (14) This was not the case under the Act as it stood during the time that Ms. Nkwazi was employed at the RPC. In my view, to apply the new retaliation provision of the Act to events occurring before the section came into force, to find that CSC's retaliatory actions towards Ms. Nkwazi constitute a discrete breach of the Act would be to attach new consequences to events that took place before the enactment. This would be giving the legislation retrospective effect, which is not generally permissible, and is not supported by the wording of the legislation. (15)

[234] Although I cannot consider CSC's retaliatory acts as an independent basis for liability under the Act as it stood at the time in issue, CSC's conduct after Ms. Nkwazi raised her complaints about Ms. Neufeld is relevant with respect to the issue of damages. In cases of discrimination, the goal of compensation is to make the victim whole, subject to principles of foreseeability, remoteness and mitigation. (16) In this case, I am satisfied that there is a causal connection between the original discriminatory practices and the loss of Ms. Nkwazi's job: had Ms. Neufeld not treated Ms. Nkwazi in a discriminatory fashion, Ms. Nkwazi would not have complained about her to RPC management, and the retaliation would not have occurred. In other words, the damages that result from the non-renewal of Ms. Nkwazi's casual contract are damages flowing from Ms. Neufeld's original breach of the Act, and may be considered from the perspective of remedy.

IV. REMEDY

A. Instatement/Reinstatement

[235] At the hearing, both counsel for Ms. Nkwazi and Ms. Nkwazi herself submitted that the appropriate remedy for the discriminatory actions of CSC should include an order reinstating Ms. Nkwazi into her casual position at the RPC. This was also the remedy requested in Ms. Nkwazi's pre-hearing Statement of Particulars. In response to a question from the Tribunal during final argument, however, counsel for Ms. Nkwazi suggested that if I were to find that Ms. Neufeld attempted to exclude Ms. Nkwazi from the November, 1997 competition, consideration should be given to instating Ms. Nkwazi in a term or indeterminate nursing position. To establish her entitlement to such a remedy, Ms. Nkwazi must demonstrate that, but for the actions of Ms. Neufeld, there was a serious possibility that she would have succeeded in obtaining such a position. (17) That is, Ms. Nkwazi has to establish not only that there is a serious possibility that she would have obtained a passing score on the knowledge portion of the interview, but on the ability and personal suitability elements as well, in order to earn a place on the eligibility list. Ms. Nkwazi would also have to establish that there is a serious possibility that she would have been offered a position with CSC during the currency of the eligibility list.

[236] I have already found that Ms. Nkwazi was denied an equal opportunity to compete in the November, 1997 nursing competition as a result of the actions of Ms. Neufeld. What remains to be determined is how Ms. Nkwazi would have fared in that competition, had it not been for Ms. Neufeld's discriminatory conduct. Such an exercise is necessarily speculative in nature.

[237] Ms. Nkwazi scored 16 out of a possible 33 on the knowledge portion of the interview. A minimum of 19.8 was required to proceed to the next stage. As a consequence of her failure in the first portion of the interview, Ms. Nkwazi did not participate in the ability and personal suitability segments. We know that Ms. Nkwazi was well educated, had prior nursing experience, and had worked at the RPC for approximately 2 years at the time of the competition in question, thus gaining experience with nursing in the correctional context. We also know that Ms. Nkwazi had both training in and experience with borderline personalities, and thus should have been well situated to respond to the interview question dealing with that particular disorder. Ms. Nkwazi was clearly very nervous during the interview, and this undoubtedly had a negative effect on her performance. It is reasonable to assume that at least some of Ms. Nkwazi's nervousness is attributable to the presence of Ms. Neufeld on the Selection Board.

[238] We also know, however, that Ms. Nkwazi had limited experience with the competitive process. It is clear from the evidence, including the testimony of some of Ms. Nkwazi's own witnesses, that casual employees often have to compete in a number of competitions before succeeding in being placed on an eligibility list. Ms. Nkwazi herself acknowledged that she was surprised by some of the questions asked in the competition, acknowledging that while the questions may have been fair, they were not what she had anticipated.

[239] Eleven people participated in the competition, of whom five were found to be qualified. I was not provided with information concerning the qualifications of several of these individuals,

and thus have no way of comparing their qualifications and experience to that of Ms. Nkwazi. The evidence establishes that the top three individuals on the eligibility list obtained full or part time term positions. Two of the three went on to obtain indeterminate positions. There is no evidence that the fourth and fifth people on the list obtained positions of any kind.

[240] The onus is on Ms. Nkwazi to establish that there is a serious possibility that she would have obtained a nursing position, but for the actions of Ms. Neufeld. On all of the evidence, I cannot conclude that this onus has been met.

[241] That said, I am satisfied that Ms. Nkwazi is entitled to be reinstated into a casual position at the RPC. While Ms. Nkwazi was concerned about other forms of treatment she had encountered at the RPC involving individuals other than Ms. Neufeld, she kept these concerns largely to herself. Ms. Nkwazi's evidence is clear that she was very reluctant to complain about perceived differential treatment, because of the precariousness of her position as a casual employee. Subsequent events confirm that this was a reasonable concern on Ms. Nkwazi's part. It is clear that it was the actions of Ms. Neufeld in attempting to exclude Ms. Nkwazi from the November, 1997 competition, and in commenting negatively about Ms. Nkwazi's name, that drove Ms. Nkwazi to complain to senior management. But for the actions of Ms. Neufeld, which I have found to have been discriminatory, it is unlikely that Ms. Nkwazi would have complained.

[242] I have found that Ms. Nkwazi's casual contract was not renewed as a direct consequence of her having complained about Ms. Neufeld. In my view, the loss of Ms. Nkwazi's casual employment can properly be characterized as a loss flowing, albeit indirectly, from the original discriminatory conduct. The issue of lack of foreseeability should not arise here. The requirement of foreseeability is intended to protect a respondent from losses sustained by a victim of discrimination that the respondent could not have reasonably anticipated. Surely it is not open to CSC to argue that it could not have reasonably foreseen its own actions?

[243] As noted above, where a complaint of discrimination is found to be substantiated, it is the duty of a human rights tribunal to attempt to restore the complainant to the position that she would have been in, but for the discrimination. In this case, Ms. Neufeld testified that the RPC always needed casual employees, and that the renewal of a casual employee's contract was almost automatic, unless there were performance concerns. This testimony is borne out by Ms. Nkwazi's own experience with nine contract renewals, as well as by the experience of other RPC employees. I am satisfied that, had Ms. Neufeld not acted in a discriminatory fashion towards Ms. Nkwazi, Ms. Nkwazi would still be employed at the RPC. As a result, I order CSC to reinstate Ms. Nkwazi to a position of casual nurse at the RPC at the first reasonable opportunity. Given all that has gone on in this case, I have concerns with respect to the implementation of this remedy. I can only hope that the parties will approach the reintegration of Ms. Nkwazi into the RPC in good faith.

[244] Throughout her employment at the RPC, Ms. Nkwazi had a succession of three month contracts. At the first reasonable opportunity, Ms. Nkwazi must be provided with a three month contract. Ms. Nkwazi's casual contract shall thereafter be renewed from time to time, for as long as Ms. Nkwazi's services are required. It will be up to CSC to determine its on-going need for

Ms. Nkwazi's services: however, discriminatory considerations must not play any role in any future decision not to renew her contract.

[245] As a casual employee, Ms. Nkwazi was called in to work on an as-needed basis. Ms. Nkwazi should be provided with the same access to shifts as other casual employees at the RPC. In addition, Ms. Nkwazi should be provided with whatever training, benefits and other opportunities as may be provided to casual employees at the RPC.

B. Lost Wages

[246] Ms. Nkwazi asks that she be compensated for the wages that she says that she lost as a consequence of her casual contract at the RPC not having been renewed.

[247] Ms. Nkwazi had been looking for another job for some time prior to April of 1998. She testified that her goal had been either to obtain a full-time position at the RPC, or to obtain a second casual position elsewhere, enabling her to work the equivalent of full-time hours. To this end, she had approached a number of health care facilities in the Saskatoon area, succeeding in obtaining a casual position at the Saskatoon Correctional Centre. Ms. Nkwazi started at the SCC on May 12, 1998. Ms. Nkwazi had applied for this job before she left the RPC, and had anticipated working at the SCC while continuing to work at the RPC.

[248] Ms. Nkwazi's efforts to obtain additional employment continued after April of 1998, with applications being made to the City Hospital and the Royal University Hospital. According to Ms. Nkwazi, after the incident involving Ms. Wonsiak and the reference from Ms. Thompson, she stopped looking for work. As I understand Ms. Nkwazi's evidence in this regard, this was an attempt on her part at 'damage control'. Family commitments limited Ms. Nkwazi's job search to the Saskatoon area. The health care community in Saskatoon was small, and much of the hiring was done on a centralized basis. Ms. Nkwazi was concerned that her reputation with the health care community would be irreparably damaged if negative references from the RPC continued to spread. Although Ms. Nkwazi continued to work at the SCC, she did not look for additional work after the summer of 1998.

[249] Any award of damages under the Canadian Human Rights Act must take into account the sufficiency of the complainant's efforts to mitigate her damages. (18) CSC led evidence from Beverly Crossman, the Executive Director of the Saskatchewan Union of Nurses, whose testimony establishes that there were jobs available in the health care field in Saskatoon during this period. CSC says that Ms. Nkwazi's efforts to obtain alternate employment were inadequate, and that she failed to properly mitigate her losses. As a consequence, any award made to Ms. Nkwazi should be discounted in order to reflect this fact. I do not agree. With the benefit of hindsight, one might conclude that it might have been better for Ms. Nkwazi to have continued to look for additional work, perhaps using someone at the SCC as a reference. However, in all of the circumstances, I cannot conclude that Ms. Nkwazi was acting unreasonably in her attempts to salvage her reputation.

[250] I also do not think that it would be equitable for CSC to benefit financially from a reduction to the damages to be paid to Ms. Nkwazi for lost wages, where Ms. Nkwazi's decision

to stop applying for jobs resulted from CSC's own conduct in creating an unjustifiably negative impression about Ms. Nkwazi's competence in the health care community.

[251] CSC also submits that any award of damages to Ms. Nkwazi on account of lost wages should be reduced to take into account the delay in bringing this matter to a hearing. Specifically, CSC points to the fact that this case was originally scheduled to be heard in May of 2000, but was adjourned to September, 2000 to allow Ms. Nkwazi to retain counsel. I do not agree that Ms. Nkwazi's entitlement to lost wages should be reduced for this reason. Ms. Nkwazi did not originally have legal counsel in this matter. She understood that her interests were coincident with those of the Canadian Human Rights Commission, and that the Commission would be represented by counsel at the hearing. A couple of days before the hearing was scheduled to begin, counsel for the Commission advised the Tribunal and the parties that the Commission was withdrawing from the case. Ms. Nkwazi then sought and obtained an adjournment of the proceedings to September in order that she be able to retain counsel. While it is indeed most unfortunate that this proceeding was delayed, the delay was entirely attributable to the unexpected withdrawal of the Commission. In these circumstances, I do not believe that it would be fair to penalize Ms. Nkwazi by reducing her compensation for lost wages.

[252] For these reasons, I am of the view that Ms. Nkwazi is entitled to be indemnified for the wages that she lost from April of 1998 until such time as she is provided with a new casual contract at the RPC. How then should this loss be calculated? Ms. Nkwazi says that she should simply be awarded the equivalent of the wages that she earned at the RPC in 1997 for 1998 and after. Given Ms. Nkwazi's desire to accumulate full-time hours out of two casual positions, counsel for Ms. Nkwazi says that it is reasonable to assume that Ms. Nkwazi could have continued to work at the same rate at the RPC, notwithstanding her new position at the SCC. I do not agree. The evidence establishes that Ms. Nkwazi worked approximately 125 days a year at the RPC, or a little more than 10 shifts a month. Ms. Nkwazi now works an average of 10-15 shifts a month at the SCC. Ms. Nkwazi works day and evening shifts at the SCC. In contrast, most of Ms. Nkwazi's time at the RPC was spent on evening and night shifts. It is reasonable to assume that there would have been occasions when Ms. Nkwazi would have been called in to work at the RPC when she was already scheduled to work at the SCC, and times where she would have been called to work at the SCC when she was already working at the RPC. Some adjustment to the award for lost wages is necessary to reflect this reality. In my view, the award for lost wages to Ms. Nkwazi should be reduced by 10% to take this into account.

[253] The parties are in agreement that I should set out the general principles that should govern the assessment of Ms. Nkwazi's wage loss, and that they will then endeavour to calculate the precise amount of the loss. This appears a sensible way to proceed. We know that Ms. Nkwazi worked approximately 125 days in 1997. Some shifts were longer than others, and on some occasions, Ms. Nkwazi worked more than a regular shift, earning overtime as a result. 1997 was the last full year that Ms. Nkwazi worked at the RPC, and should be used as a model or template. The number of shifts Ms. Nkwazi actually worked in 1997, the length of these shifts, and the amount of overtime should be calculated. Ms. Nkwazi's potential earnings for each successive year should then be calculated, assuming that she worked the same amount in each successive year as she did in 1997. The rates of pay in effect for each successive year should be applied. This should generate a gross wage loss figure for each year from April 23, 1998 until Ms.

Nkwazi is reinstated. This gross figure shall then be discounted by 10% to take into account the contingency of overlapping shifts with the SCC.

[254] Ms. Nkwazi will now be entitled to a lump sum payment on account of wages that she would have otherwise earned over a period of several years. This will obviously have negative consequences for Ms. Nkwazi from the point of view of income tax. In my view, it would unfairly penalize Ms. Nkwazi if she were to suffer a more onerous income tax burden by reason of receiving several years' worth of income in a lump sum than she would have incurred had the monies been paid to her as salary over the intervening period. This would be inconsistent with the remedial goal of making Ms. Nkwazi whole. Accordingly, CSC shall pay to Ms. Nkwazi an additional amount sufficient to cover the additional income tax liability that she will incur as a consequence of receiving the monies in this fashion.

[255] CSC notes that Ms. Nkwazi has received Employment Insurance benefits since leaving the RPC. The Employment Insurance Act makes specific provision for the repayment of benefits in circumstances such as these. As a result, I do not think that it is necessary to make any order in this regard.

C. Apology

[256] Ms. Nkwazi asks that the Tribunal order that CSC provide her with an apology. In cases where the conduct of a respondent has been marked by insensitivity, human rights Tribunals have ordered that apologies be provided. (19) I have found conduct on the part of CSC so insensitive that it borders on intentional cruelty. I therefore order that the Commissioner of Correctional Services provide a formal written apology to Ms. Nkwazi within thirty days of this decision.

D. Non-Pecuniary Damages

[257] Ms. Nkwazi seeks damages for her pain and suffering in the amount of \$20,000. Ms. Nkwazi asks for a further \$20,000 for the wilful and reckless conduct of CSC. These requests raise a preliminary question with respect to the jurisdiction of the Tribunal.

[258] As it stood prior to June 30, 1998, the Canadian Human Rights Act provided for awards for reckless or wilful conduct as well as for injuries to feelings or self-respect, to a maximum of \$5,000. (20) With the Bill S-5 amendments, the Act now allows for awards of up to \$20,000 for pain and suffering, and a further \$20,000 where the discriminatory practice is engaged in wilfully or recklessly. (21) With the exception of Ms. Thompson's reference, all of the events surrounding Ms. Nkwazi's complaint occurred before the proclamation of Bill S-5, including both incidents that I have found constituted discriminatory practices. Which Act governs the remedial jurisdiction of this Tribunal?

[259] CSC submits that to apply the amendments to the Act to the circumstances giving rise to Ms. Nkwazi's complaint would be to attach new consequences to events that took place prior to the enactment of the amendments. This would give the amending enactment retrospective effect, which is not generally permitted, absent express authorizing language in the statute itself.

[260] Ms. Nkwazi says that the amendments to the Act do not affect any vested rights on the part of CSC. CSC is not losing any possible defence to an allegation of discrimination, but rather faces a potential increase in the compensation payable for violating Ms. Nkwazi's human rights. This, Ms. Nkwazi says, is a procedural rather than a substantive matter.

[261] I do not agree that exposure to a potential increase in damages is procedural rather than substantive. To be considered procedural, a legislative provision must be exclusively procedural. That is, its application must affect only the means of exercising a right: (22) it must not interfere with any substantive rights or liabilities of the parties. (23) That is not the case here.

[262] My finding that Ms. Nkwazi's complaint is substantiated is based upon my conclusion that certain conduct on the part of CSC constituted discrimination. This conduct took place prior to the coming into force of the amendments to the Canadian Human Rights Act. To find that legislative change alters the future consequences of past acts by imposing new liabilities or obligations requires a finding that the legislation is retrospective in effect. There is a strong presumption against retrospectivity. (24)

[263] In *Brousseau v. Alberta (Securities Commission)*, (25) the Supreme Court of Canada accepted the following classification of retrospective statutes as described in Dreidger's *Construction of Statutes*:

... there are three kinds of statutes that can properly be said to be retrospective, but there is only one that attracts the presumption [against retrospectivity]. First, there are the statutes that attach benevolent consequences to a prior event; they do not attract the presumption. Second, there are those that attach prejudicial consequences to a prior event; they attract the presumption. Third, there are those that impose a penalty on a person who is described by reference to a prior event, but the penalty is not intended as further punishment for the event; these do not attract the presumption. (26)

[264] In *Dupuis v. British Columbia (Ministry of Forests)* (27), the British Columbia Council of Human Rights was faced with a similar issue arising out of amendments to the British Columbia Human Rights Act governing the Council's jurisdiction with respect to remedy. The Council considered the remedial nature of human rights legislation, and concluded that the amendment in issue fell into Dreidger's third category of retrospective statutes. The Council found that the monetary penalty was intended not to punish, but to compensate. To this end, the legislative provision under scrutiny in *Dupuis* focussed entirely on the effect of the wrongdoer's actions on the victim. (28) As a result, the Council concluded that the amendment did not attract the presumption against retrospectivity.

[265] With the greatest of respect, I do not agree that the remedial provisions such as those under consideration in *Dupuis* and in this case, properly fall within the third of Professor Dreidger's three categories, thus avoiding the presumption against retrospectivity. In my opinion, Sections 53 (2) (e) and 53 (3) of the Canadian Human Rights Act more properly fall within the second category: that is, statutory provisions that attach prejudicial consequences to prior events. As a result, I am of the view that the presumption against retrospectivity is engaged.

[266] In coming to this conclusion, I have taken into account the admonitions of the Supreme Court of Canada that human rights legislation is intended to be remedial and not punitive. (29) While that is indeed the case, it cannot be said that requiring CSC to pay up to \$20,000 as compensation for the pain and suffering of a victim of discrimination pursuant to Section 53 (2) (e) of the Act is not a 'prejudicial consequence' to CSC, which consequence arises out of discriminatory practices occurring before the coming into force of the Section in issue.

[267] The argument favouring the invocation of the presumption against retrospectivity is all the stronger when it comes to the provisions of Section 53 (3) of the Act. An examination of the wording of that Section discloses that the focus of the provision is entirely on the conduct of the respondent, and not at all on the effect that the respondent's actions may have had on the victim in question. It is clearly intended as a sanction for reckless or wilful discriminatory conduct.

[268] The presumption against retrospectivity is a rebuttable one, and can be rebutted by express words or by necessary implication. (30) To rebut the presumption, some sufficient indication is required that Parliament intended that the legislation apply to facts in the past as well as to ongoing and future facts. My review of the legislation reveals no indication of any such intent on the part of the legislator.

[269] Ultimately, the issue is one of fairness: to change the law governing an event, after the fact, violates the rule of law. It is inherently arbitrary and unfair to impose prejudicial consequences or disadvantages on a party, without fair warning. (31) For all of these reasons, I am of the view that I am bound to apply the provisions of Section 53 of the Canadian Human Rights Act as it stood at the time that the discriminatory practices took place. (32)

[270] That said, I am satisfied that Ms. Nkwazi is entitled to the maximum award of \$5,000 under Section 53 (3) of the pre-amendment Act. I have found that Ms. Neufeld wilfully attempted to exclude Ms. Nkwazi from participation in the November 1997 competition, and that she subsequently suggested that Ms. Nkwazi's name was somehow responsible for the delay in providing Ms. Nkwazi with access to the Team Links system. I have also found that CSC's actions following Ms. Nkwazi's complaint were insensitive in the extreme. While I am not persuaded that all of the health problems that Ms. Nkwazi has suffered over the years are attributable to her problems at the RPC, it is clear that Ms. Nkwazi is a proud individual, and that the actions of the respondent have caused Ms. Nkwazi much pain, and serious injury to her feelings and self respect. In my view, the maximum award permissible under the statute is more than warranted in this case.

E. Reference

[271] Ms. Nkwazi asks that CSC provide her with a letter of reference that truly reflects her performance as a nurse at the RPC, and that CSC be directed to respond to verbal inquiries concerning Ms. Nkwazi in a manner consistent with the terms of the letter of reference. I agree that Ms. Nkwazi was denied a fair employment reference as a consequence of discriminatory considerations, and that this is an appropriate remedy in this case. I direct the parties to endeavour to agree on a mutually acceptable letter of reference. In the event that the parties are unable to agree, the Tribunal may be spoken to. I further order CSC to ensure that any verbal

references relating to Ms. Nkwazi are provided in terms that correspond to the wording of the letter of reference.

F. Interest

[272] Interest is payable on awards for damages for special compensation as well as on awards for lost wages. (33) With respect to awards for special compensation, however, the payment of interest must not bring an award for special compensation over the \$5,000 limit prescribed in the legislation. (34) Having already awarded Ms. Nkwazi the maximum permissible under the legislation, I make no order for the payment of interest on the award of special compensation. With respect to the award for lost wages, I order interest be paid on the monies awarded pursuant to this decision. Interest on the lost wages is payable in accordance with Rule 9 (12) of the Canadian Human Rights Tribunal Interim Rules of Procedure. Interest should start to run from April 23, 1998, that is the date upon which Ms. Nkwazi's last casual contract expired, and shall be calculated as the wages would have become payable to Ms. Nkwazi.

G. Costs

[273] Counsel were in agreement that the question of costs should be dealt with after the issue of liability was determined. The Tribunal Registry will contact the parties in order to establish a mechanism for dealing with this issue.

H. Systemic Remedies

[274] Ms. Nkwazi seeks an order that CSC take measures, in consultation with the Canadian Human Rights Commission, to prevent such discriminatory practices from occurring in the future. While CSC does have policies and procedures in place which are designed to address workplace discrimination and harassment, it is evident from the way in which Ms. Nkwazi's complaints were dealt with by RPC management that there is work to be done in this area. As a result, I order CSC to consult with the Commission with respect to its anti-discrimination and harassment policies, procedures and employee education programs, and to take measures to prevent the same or similar practices from occurring in the future.

[275] The Canadian Human Rights Commission is no longer a party to this proceeding, having withdrawn from the case on the eve of the hearing. It will be up to the Canadian Human Rights Commission to decide whether or not it wishes to work with CSC in an effort to develop systemic solutions to the problems identified in this decision. I would certainly encourage the Commission to do so.

I. Retention of Jurisdiction

[276] I will retain jurisdiction in the event that the parties are unable to agree with respect to the implementation of any of the remedies awarded under this decision.

V. ORDER

[277] For the foregoing reasons, I declare that Ms. Nkwazi's rights under the Canadian Human Rights Act have been contravened by CSC, and order that:

- i) Ms. Nkwazi be provided, at the first reasonable opportunity, with a contract for casual employment at the RPC for an initial three month term, which contract shall be renewed from time to time, for as long as Ms. Nkwazi's services are required. It will be up to CSC to determine its on-going need for Ms. Nkwazi's services: however, discriminatory considerations must not play any role in any future decision not to renew her contract. Ms. Nkwazi should be provided with the same access to shifts as other casual employees at the RPC. Ms. Nkwazi should also be provided with whatever training and other opportunities as may be provided to casual employees at the RPC;
- ii) Ms. Nkwazi shall be awarded compensation for lost wages, calculated in accordance with this decision;
- iii) The Commissioner of Correctional Services shall provide a formal written apology to Ms. Nkwazi within thirty days of this decision;
- iv) CSC pay to Ms. Nkwazi the sum of \$5,000 as special compensation;
- v) CSC shall provide Ms. Nkwazi with a letter of reference that truly reflects her performance as a nurse at the RPC. In the event that the parties are unable to agree as to the appropriate wording of such a letter, the Tribunal may be spoken to. CSC shall further ensure that any verbal references relating to Ms. Nkwazi are provided in terms that correspond to the wording of the letter of reference;
- vi) Interest shall be paid on the lost wages awarded pursuant to this decision, in accordance with Rule 9 (12) of the Canadian Human Rights Tribunal Interim Rules of Procedure. Interest should start to run from April 23, 1998, and shall be calculated as the wages would have become payable to Ms. Nkwazi;
- vii) The parties may make submissions with respect to the issue of costs in accordance with the directions of the Tribunal; and
- viii) CSC shall consult with the Canadian Human Rights Commission with respect to its anti-discrimination and harassment policies, procedures and employee education programs, and take measures to prevent the same or similar practices from occurring in the future.

Anne L. Mactavish

OTTAWA, Ontario
February 5, 2001

1. Ontario Human Rights Commission v. Etobicoke, [1982] 1 S.C.R. 202 at 208 and Ontario Human Rights Commission and O'Malley v. Simpson Sears Limited, [1985] 2 S.C.R. 536 at 558

2. O'Malley, supra, p. 558

3. Singh v. Statistics Canada, [1998] C.H.R.D. No. 7, aff'd [2000] F.C.J. No. 417 (T.D.), and Dhanjal v. Air Canada, [1997] F.C.J. No. 1599, (1997) 139 F.T.R. 37

4. Israeli v. Canadian Human Rights Commission, 4 C.H.R.R. D/1616 at p. 1617 (aff'd 5 C.H.R.R. D/2147 (Rev. Trib.)), and Basi v. Canadian National Railway Company, (1988), 9 C.H.R.R. D/5029 (C.H.R.T.)

5. Basi, supra, at p. D/5038

6. B. Vizkelety, Proving Discrimination in Canada, (Toronto), Carswell, 1987 at p. 142

7. Holden v. Canadian National Railway (1990), 14 C.H.R.R. D/12 (F.C.A.)

8. While Ms. Nkwazi's recounting of her discussions with Ms. Neufeld to third parties is clearly hearsay evidence with respect to what was said by Ms. Neufeld, its relevance here is not in relation to the truth of Ms. Nkwazi's version of events, but with respect to the timing of the discussions with Ms. Kosmas and Ms. Gibney.

9. The issue of Ms. Nkwazi's lack of access to Team Links forms a separate ground of her complaint, and will be dealt with in greater detail in the next section of this decision.

10. Exhibit C-10.

11. By this time, Mr. Leis had replaced Marcel Chiasson as Executive Director of the RPC, and Ms. Neufeld had taken over Mr. Leis' responsibilities as Director of Programs and Operations.

12. Subsequent to her departure from the RPC, Ms. Nkwazi was provided with a Record of Employment for Employment Insurance purposes, which Record indicated that Ms. Nkwazi's term had ended, and cited 'Shortage of Work' as the reason for the issuance of the Record. The evidence is clear that there was no shortage of work for casual nurses at the RPC in April of 1998, and that this notation was very misleading. It appears, however, that the notation was made on the basis of advice from the Employment Insurance authorities, and had no effect on Ms. Nkwazi's entitlement to benefits. A similar notation was used for other employees in similar circumstances. I am satisfied that neither Ms. Nkwazi's race nor her colour were factors in the way in which the Record of Employment was completed.

13. Quite apart from any legal considerations that may arise from the non-renewal of Ms. Nkwazi's contract, the failure to notify Ms. Nkwazi that her contract was not being renewed raises both human resource management and moral issues. Even Mr. Brecknell - clearly no friend of Ms. Nkwazi - was prepared to concede that there was an ethical obligation on CSC to

advise casual employees at the earliest possible time when their contract was not being renewed.

14. See An Act to Amend the Canada Evidence Act and the Criminal Code in respect of persons with disabilities, to amend the Canadian Human Rights Act in respect of persons with disabilities and other matters and to make consequential amendments to other Acts, S.C. 1998, c. 9

15. See *Marinaki v. Canada (Human Resources Development)*, [2000] C.H.R.D. No. 2 (C.H.R.T.)

16. See *Canada (Attorney General) v. Morgan*, [1992] 2 F.C. 401, and *Canada (Attorney General) v. McAlpine*, [1989] 3 F.C. 530

17. For the 'serious possibility' test see *Morgan*, supra., and *Canada (Attorney General) v. Uzoaba*, [1995] 2 F.C. 569 (T.D.).

18. *Morgan*, supra.

19. See, for example, *Uzoaba*, supra, *Hinds v. Canada (Employment and Immigration Commission)*, (1988), 24 C.C.E.L. 65, 10 C.H.R.R. D/5935 (C.H.R.T.), and *Grover v. Canada (National Research Council)* (1992) 18 C.H.R.R. D/1, aff'd (1994) 80 F.T.R. 256.

20. R.S., 1985, c-H-6, Section 53 (3)

21. Canadian Human Rights Act, Section 53 (2) (e) and 53 (3)

22. Pierre-André Côté, *The Interpretation of Legislation in Canada*, (3rd Ed.), (Scarborough) Carswell, at p. 182

23. Sullivan, *Dreidger on the Construction of Statutes*, (3rd Ed.), (Toronto) Butterworths, at p. 545

24. Sullivan, supra., at p. 512. See also *Gustavson Drilling (1964) Ltd. v. Canada (Minister of National Revenue)*, [1977] 1 S.C.R. 271 and *Latif v. Canadian Human Rights Commission and Fairweather*, [1980] 1 F.C. 687 (F.C.A.)

25. [1989] 1 S.C.R. 301, at para 49.

26. (2d Ed.), at p. 198

27. 20 C.H.R.R. D/87

28. The wording of the section in the B.C. legislation under consideration in *Dupuis* was akin to that of Section 53 (2) (e) of the Canadian Human Rights Act. The Council was careful to distinguish this type of remedial provision from the exemplary type of damages payable under some human rights statutes.

29. Canada (Treasury Board) v. Robichaud, (1987), 8 C.H.R.R. D/4326 (S.C.C.) at para. 33940

30. Sullivan, supra., at p. 522

31. Sullivan, supra., at p. 513

32. Both parties made reference to the Tribunal decision in Carter v. Canada (Canadian Armed Forces), [2000] C.H.R.D. No. 1, with respect to the retrospective application of statutory provisions. In my view, the decision in Carter is distinguishable from the present situation: Carter dealt with the determination of the appropriate time period for compensation for the victim of a discriminatory practice, in light of an intervening statutory change, whereas in this case, what is under consideration is the appropriate statutory monetary limit on compensation.

33. Morgan, supra.

34. See Hebert v. Canada (Canadian Armed Forces), (1993), 23 C.H.R.R. D/ 107

CANADIAN HUMAN RIGHTS TRIBUNAL

COUNSEL OF RECORD

TRIBUNAL FILE NO.: T538/3399

STYLE OF CAUSE: Beryl Nkwazi v. Correctional Service Canada

PLACE OF HEARING: Saskatoon, Saskatchewan (September 11-15, 2000; September 25-29, 2000; November 6-9, 2000)

DECISION OF THE TRIBUNAL DATED: February 5, 2001

APPEARANCES:

Christine Glazer For the complainant

Denis Bonthoux

Chris Bernier For the Correctional Service Canada