TD-9/84
Decision rendered August 2, 1984

CANADIAN HUMAN RIGHTS ACT
HUMAN RIGHTS REVIEW TRIBUNAL

IN THE MATTER OF the appeal filed by EMILDA SHAFFER dated October 11, 1983, against the Human Rights Tribunal Decision pronounced on September 14, 1983,

BETWEEN:
EMILDA SHAFFER
Appellant
- and -
TREASURY BOARD OF CANADA
as represented by Department of Veterans Affairs

Respondent

DECISION OF REVIEW TRIBUNAL
BEFORE: Paul L. Mullins, Chairman
Shelley Acheson
Simone Joanisse

Counsel: For the Appellant: G. Grenville-Wood
For the Respondent: L. Leduc and assistant
Wayne Cunneyworth

For the Canadian
Human Rights Commission: Russell Juriansz

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This is an appeal by the complainant, Emilda Shaffer, against a decision dismissing her complaint of racial harassment against the Treasury Board of Canada. No complaint was laid against the individual co-worker who actually perpetrated the incident.

On August 9, 1981 a heated exchange of words took place at the Nursing Home run by the Treasury Board of Canada between the complainant, Mrs. Shaffer, and her co-worker, Mr. Cote. This exchange included disparaging comments by Mr. Cote concerning Mrs. Shaffer’s racial origin and colour.

On August 10, 1981 there was an assault which took place when Mr. Cote slapped Mrs. Shaffer on the side of her face. Whether or not there was provocation for the slapping was never clearly determined by the evidence, but Mr. Cote was convicted of assault in Provincial Court.

When Mr. McGovern, the highest Administrator at the Home, was advised on
August 10th of the events of August 9th and 10th, he immediately took steps
to have the matter investigated by his acting Director of Nurses, Mrs. Knox.
Individuals were interviewed, incident reports were filed and the situation
communicated to Mr. McGovern. On the 18th and 19th of August, meetings were
held with Mrs. Shaffer and also with Mr. Cote in an effort to resolve the
matter among the individuals themselves. Mr. Cote denied the slapping but
agreed to work in harmony with Mrs. Shaffer from that moment on. Mrs. Shaffer

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- 2 requested
time to consider the matter further, and quite justifiably refused
to let the incident pass.

Mr. McGovern was still uncertain as to whether the assault took place
and consequently reprimanded Cote because he was dealing, in his view, with
only the racial slur incident. The criminal prosecution and other hearings
and Mr. Cote himself have now shown Mr. McGovern to be in error. However,
the Tribunal below found that no discriminatory motivation or intent by Mr.
McGovern was established. Mr. McGovern was hopeful the matter would be
resolved between the co-workers themselves and expended considerable efforts
to this end. When this wasn't successful, he placed a letter of reprimand in
Cote's file but this action was not made public.

This Tribunal must decide whether the employer, Treasury Board of
Canada, has a duty to provide a work place free of racial harassment by
virtue of Section 7(b) of the Canadian Human Rights Act, and whether in fact
it failed in this duty.

Section 7(b) of the Act states as follows:
"It is a discriminatory practice, directly or indirectly, in the
course of employment to differentiate adversely in relation to an
employee on a prohibited ground of discrimination."

Section 3 of the Act defines prohibited grounds of discrimination to
include "race and colour", the grounds alleged in the complaint.

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We agree that Mrs. Shaffer was the victim of racial harassment at the

hands of Cote. Does this fact create a liability on the part of their employer?

A number of authorities were presented for our consideration including the following:

Ontario Human Rights Commission v. Simpsons Sears (1982), 3 C.H.R.R., D/796

Sucha Singh Dhillon v. S.W. Woolworth Company Limited, (1982), 3

C.H.R.R., D/743
Canadian Employment and Immigration Commission and Jack Chuba, April, 1983 (not yet reported)

Brennan v. Robichaud, (1982) 3 C.H.R.R., D/977
Although considerable argument was raised on this point, we find there is nothing to be gained by analysing whether the incidents involved constituted one continuous incident or two separate incidents. There is no question that the first incident involved the mutual exchange of insults and that those of Mr. Cote were clearly racial in nature. The slapping incident the following day was not clearly characterized as racial even by Mrs. Shaffer, either when she filed her union grievance or when she testified before the Tribunal.

We find the investigation conducted by Mr. McGovern was, at best, anemic. It was not pursued with the vigor that the incidents warranted. The employer persisted in trying to have both employees work it out between themselves beyond what was

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- 4 reasonable in the circumstances. The employee should, at the very least, have been reprimanded in a public forum. Whether racially motivated or not, the incidents called for clear, decisive action by management.

However, we are prepared to distinguish between the liability of the employer arising from the conduct of supervisory personnel, as opposed to that arising from the conduct between co-workers. All of the authorities provided to us involved prohibited conduct by people in authority to personnel under them as a primary factor.

If this same conduct had been done by supervisory personnel rather than by a co-worker, we would have found a contravention of the Act by the employer and held him liable.

This is not to say that the employer could not be liable for discriminatory conduct between co-workers. It is merely to point out that the response required by the employer must be in proportion to the seriousness of the incident itself. By its very nature, prohibited conduct by a supervisory officer is more serious. This factor cannot be ignored in determining liability. Nevertheless, employers must learn that incidents which have a racial aspect belong in a special category which demand a firm response from them. Although we make no finding of liability by this employer on the facts of this case, employers must be put on notice that they have a special responsibility

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- 5 to ensure that the principals imbedded in the Human Rights Act are achieved. This is so even though in racial incidents between coworkers, the law is a poor substitute for a mutual labour/management effort to create a non-discriminatory work environment.

We wish to again express our regret to Mrs. Shaffer that she was

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subjected to this reprehensible conduct by her co-worker.
The appeal is hereby dismissed.

Windsor, Ontario July 29, 1984.

PAUL L. MULLINS, Chairman
SHELLEY ACHESON
SIMONE JOANISSE