TD-5/84
Decision rendered on April 4, 1984

IN THE MATTER OF THE CANADIAN HUMAN RIGHTS ACT
S.C. 1976-77, C.33, as amended.

AND IN THE MATTER of the appeal filed by Dr. Julius Israeli dated August 25, 1983, against the Human Rights Tribunal Decision pronounced August 8, 1983.

BETWEEN:
DR. JULIUS ISRAELI
Complainant
(Appellant)

- AND -
CANADIAN HUMAN RIGHTS COMMISSION
and PUBLIC SERVICE COMMISSION

Respondents

This is a complaint that the Canadian Human Rights Commission and the Public Service Commission of Canada discriminated against the Complainant, Dr. Julius Israeli, on the basis of his religion, disability and/or national origin when they rejected his application for employment as a Regional Investigator for the Human Rights Commission. Because of the small size of the Human Rights Commission's staff, the Public Service Commission has operating responsibility for the selection of staff for the Human Rights Commission. The Human Rights Commission, because of its obvious interest in the matter, is also closely involved in the selection process. Consequently, both respondents were appropriately parties to this complaint.

The relevant events occurred in 1979 during what was, in fact, the Human Rights Commission's first selection process for the position of Regional Investigator. This process involved a separate competition for each of the regional divisions that the Human Rights Commission was establishing at the time. Dr. Israeli applied in the competition for the Halifax office which was to serve the four Atlantic provinces.

THE SELECTION PROCESS

The selection process involved a number of steps. For purposes of clarity, we would note that, when first referring to the various documents used in the selection process in this outline of the facts, we will mention both the words of description, if any, used in the Public Service Employment

Regulations and the terms by which these documents were labeled in this case

---

by those engaged in the selection process. Once the documents have been first mentioned in this manner, we will then refer to them by the terms actually used in this case since these are the terms with which anyone interested in the process are more likely to be familiar.

There was initially produced, in relation to the decision to create a position, a relatively detailed job description which, in the language being used by those engaged in the selection process, was called a "position analysis schedule". After authorization was given to go forward with the appointment procedures, a summary was prepared of the qualifications necessary to fill the position. This is referred to as a "summary of qualifications" by the Public Service Employment Regulations, s. 4(1), and was called, in the language of those engaged in the selection process, a "selection profile".

The selection profile had two basic parts. First, there was a list of "the minimum qualifications necessary for the position, referred to by the Public Service Employment Regulations, ss. 2, 4(2), as "essential qualifications" and listed on the selection profile in this case as "basic requirements". Secondly, there was a list of additional factors to be taken into account in assessing candidates for the position, referred to by the Public Service Employment Regulations, ss. 2, 4(2), as "desirable qualifications" and listed on the selection profile in this case as "rated requirements".

There was also drawn up at this stage a notice of the competition for the position. Considering that the competition was open to persons outside the Public Service and the notice would be published in the public media, this notice included a summary of the qualifications for the position which, for practical reasons, was briefer than that contained in the selection profile. To be more specific, the advertisement of the position contained an abbreviated summary of the basic requirements. The Public Service Employment Regulations, s. 4(1), entitled anyone interested to the full list of qualifications in the selection profile, upon request.

Applications were then received on a form prescribed by the Public Service Commission. After the deadline for applications had passed, the applications were subjected to a screening process. For this purpose a document called a "screening profile" was prepared. This was actually a duplicate of the basic requirements from the selection profile. The objective at this stage was to screen from the pool of applicants, purely on the basis of the basic requirements, those who were not sufficiently qualified to justify being processed to the next, more elaborate, stage of the rating of applicants.

We would observe here that, in any selection process for a position where there are more applicants than there are positions available, the process must of necessity be a competitive one. This is openly acknowledged by the use of the word "competition" to designate a selection process in the federal Public Service. It is impossible to know in advance the ratio of applicants to available positions and, certainly in the case of a competition

---

open to the general public, it would seem impractical even to estimate the number of potential applicants. Therefore, the selection process inevitably must operate in a somewhat flexible manner at the screening stage. The next stage of actually rating candidates involves considerable cost, both to the government for the use of staff resources and expenses involved and to the applicants for the time in preparing for and submitting to the interview which takes place at the rating stage. It would be irresponsible if the screening stage were not used to remove from the applicant pool persons who have no real possibility of being selected. To some extent this process must be affected by the size and qualifications of the pool of applicants. If a large pool of highly qualified applicants is available, the basic requirements can be expected to be applied quite strictly in screening the applicants. If only a small pool of marginally qualified applicants is available, on the other hand, the basic requirements can be expected to be applied with much less rigidity at the screening stage. There will, of course, be limits to this. There may be a large number of applicants who clearly have the basic requirements for the position and who cannot, therefore, be rejected at the screening stage. There may, on the other hand, be so few applicants who can satisfy the basic requirements, even on a generous reading of their

applications, as to make it apparent at the screening stage that the available positions cannot be filled.

In other words, it is in the nature of the screening process that it cannot be a simple or purely scientific application of the criteria set out in the basic requirements to the information set out in the applications received. It involves an exercise of judgment, all the more so because the actual backgrounds of the applicants are unlikely to provide direct certification of many of the specific qualifications required for a position. While the subjectivity that this introduces into the selection process may provide a cover for discrimination, it has been the experience of the human rights movement that there are equally great dangers in screening procedures involving what might appear to be more objective and scientific procedures for differentiating applicants on a qualitative basis. The use of objective tests and written examinations, for example, might seem to provide a fair and scientific measure. However, it is now widely realized that, not only are tests and examinations often a poorer measure of a person's qualifications than observation based on experience, but also there is a considerable risk that any test or examination may be culturally biased and, therefore, tend to discriminate against the very groups that human rights legislation seeks to protect.

Since Dr. Israeli's application was rejected at the screening stage, evidence with respect to subsequent stages in the selection process had limited relevance to the complaint and such evidence was not extensive. It appears that the applicants who were found to satisfy the basic requirements at the screening stage were invited to an interview and each was then assessed on the basis of the rating requirements set out in the selection profile. As a result of this rating assessment, the applicants were ranked and the available positions were offered to applicants on the

---

basis of this ranking.

With this general overview of the selection process in mind, a slightly more detailed review of what happened at the screening stage in general, and with reference to Dr. Israeli's application in particular,

is
appropriate. The screening was carried out by a board of three people, Brenda Hudson, now Firth, Lucille Finsten and Hugh W. McKervill, Ms. Firth
was an employee of the Public Service Commission and, as such, was the officer responsible for carrying out the responsibilities of that Commission
at this stage of the selection process. Ms. Finsten was a consultant under
contract to the Human Rights Commission to advise them in the selection of
personnel and to ensure consistency in the selection of investigators for the
different regional offices. Mr. McKervill was the Regional Director for the
Halifax office of the Human Rights Commission and was present in his capacity
as the person who would be the immediate superior of the persons hired.

There were 218 applications received prior to the application deadline, with 2 positions to be filled. The board held a preliminary discussion of the criteria with a view, in particular, to clarifying and
agreeing upon their interpretation of the basic requirements related to experience. It may be observed that it was this portion of the basic requirements which would involve the greatest exercise of judgment by the
members of the board and, consequently, this sort of preliminary discussion
was highly desirable. They then reviewed the 218 applications. Each file
was read individually by each member of the board.

As a result of their first reading of each file, the three members might arrive at a consensus that the applicant clearly met or did not meet
the basic requirements. For a number of files, including that of Dr. Israeli, there was no such initial consensus. Such files were reviewed a
second or more times until a consensus was reached on whether to reject the
application or pass it on to the rating stage. In order to facilitate this
process, members of the board noted their comments with respect to the applicant on a copy of the screening profile which was used for this purpose
in conjunction with each particular application. After a second or perhaps
third review, a consensus was reached that Dr. Israeli did not satisfy the
basic requirements in accordance with the agreed interpretation of the members of the board.

One other significant fact related to the process needs to be noted. Prior to submitting his application, Dr. Israeli requested a copy of

the statement of qualifications from Adrian L. Poirier of the Public Service Commission in Halifax. Mr. Poirier was identified in the advertisement for the competition as the person to whom applications should be directed. Dr. Israeli received a document entitled "Statement of Qualifications, Regional Investigator, Halifax Regional Office". This document bore considerable resemblance to the selection profile, but also contained significant differences. Mr. Poirier was not called as a witness by either side. Ms. Firth, the witness most likely to be in a position to explain this document, could only speculate that it might have been a draft.
The advertisement for the position reflected the selection profile.

Consequently, albeit at a different level of detail, the advertisement and the selection profile used in screening applicants both differed from the document received by Dr. Israeli in the same ways. Dr. Israeli noted this discrepancy between the advertisement and the document he received when preparing his application and based his application on the advertisement.

THE HISTORY OF THE COMPLAINT

Dr. Israeli's complaint was dated March 20, 1979 and filed with the Human Rights Commission. It appears that, in recognition of the inappropriateness of the Commission purporting to investigate itself, efforts were made to enlist the services of a provincial human rights commission to investigate. Ultimately the Quebec Human Rights Commission undertook the investigation and it completed its report back to the Canadian Commission in January of 1982. On February 3, 1983, the Canadian Human Rights Commission appointed William Tetley as a Tribunal to hear the matter. By his decision on August 8, 1983, the Tribunal found that the complaint was not substantiated: (1983), 4 C.H.R.R. D/1616. Dr. Israeli filed an appeal on August 25, 1983, and the Review Tribunal was appointed on September 7, 1983. This Review Tribunal heard the matter on January 19, 1984.

Dr. Israeli's notice of appeal is a rather lengthy document which raises a number of points of varying importance. Dr. Israeli made an extensive and detailed oral presentation to us dealing with these issues and perhaps raising some others. Dr. Israeli also indicated during the course of the hearing that there were some errors in the drafting of his grounds

of
appeal. Considering that Dr. Israeli was representing himself without legal
counsel and considering our wide powers of review, we do not intend to take
any technical approach in relation to the grounds of appeal. We so advised
the parties during the course of the hearing.

By the same token, however, we do not intend to go through each of
the points raised by Dr. Israeli in his notice of appeal or oral argument.
Instead it is our intention to deal with what we perceive to be the main
issues. To the extent that our decision does not address some of the points
raised by Dr. Israeli, it is because we do not find such points to have any
bearing on our decision.

Dr. Israeli was not represented by counsel. Since we were
concerned about the fact that, unlike the situation in most such proceedings,
counsel for the Human Rights Commission would not be supporting
the complaint, we asked Dr. Israeli if he wished to have counsel to represent
him. He advised us that he wished to represent himself.

THE PROCEDURAL ISSUES
Dr. Israeli's appeal raises both points of procedure with respect
to the proceedings of the initial Tribunal and issues with respect to the
merits of the decision. We will deal first with the procedural issues.

Dr. Israeli applied at the hearing to have witnesses excluded
during the giving of evidence by other witnesses. Initially the Tribunal
rejected this application because it seemed likely that Dr. Israeli would be
a witness and it would be unfair to exclude him. Clearly the Tribunal
misdirected himself at this point since a party to the proceedings is always
exempted from such an exclusion. The Tribunal acknowledged his own error at
the commencement of the second day of the hearing, but indicated that in any
event he thought it preferable to have the witnesses present and would
exercise his discretion in the matter accordingly.

In so far as the Tribunal exercised his discretion in the matter, it is
our view that it would be inappropriate for us to interfere. The Act clearly
contemplates that a Review Tribunal should proceed on the basis of the
record

of the hearing before the initial Tribunal.
This necessarily means that the initial Tribunal has charge of the proceedings by which the record is produced. As a practical matter, a Review Tribunal is not in a position to undo the proceedings, although it might, of course, attempt to reassess the evidence in light of an error. However, unless a Review Tribunal is persuaded that a miscarriage of justice resulted from an exercise of procedural discretion by the initial Tribunal, it ought not to interfere.

The purpose of exclusion of witnesses relates to situations in which two or more witnesses will be testifying as to the same events. In this case, this would only involve the testimony of Ms. Firth, Ms. Finsten and Mr. McKervill who sat together as the Board in the screening process. We find nothing in the evidence of these three which gives us the slightest suspicion that it was tainted by the opportunity to hear prior testimony. On the contrary, this greatly facilitated the hearing by allowing Mr. Finsten and Mr. McKervill to simply confirm the evidence of Ms. Firth as to many non-controversial facts about the way the Board proceeded. Thus, we find no basis to even suggest that a miscarriage of justice might have occurred. In light of this, it would be inappropriate for us to even comment on how we would have exercised our discretion if we had been the initial Tribunal since we would simply be second-guessing the proper exercise of the initial Tribunal’s discretion.

In so far as the initial Tribunal misdirected himself at the commencement of the hearing, he was in a position to fully correct the error when he recognized it. At that point Ms. Firth, the first of the three witnesses who were testifying to common events, was about two-thirds of the way through her examination in chief. The possibility that the evidence might be tainted by the opportunity of the other two witnesses to hear her testimony did not become critical until the commencement of her cross-examination. It is only at this stage that the witness is likely to be faced with unanticipated questions which will tend to reveal any discrepancies. Consequently, we are satisfied that the initial Tribunal’s exercise of discretion in favour of allowing the witnesses to remain was not

prejudiced by his earlier misdirection. When he properly directed himself

---

and decided in favour of allowing the witnesses to remain at the opening of the second day of the hearing, he was still exercising a discretion which was properly his and with which we see no grounds to interfere.

Dr. Israeli has also raised questions about the extent to which his presentation of his case was interfered with by the Tribunal, while in similar circumstances the other parties were allowed to do things which were ruled out of order when done by Dr. Israeli. Among other things, Dr. Israeli referred to rulings which restrained him from asking leading questions and to alleged pressure by the Tribunal to compel him to become a witness. While the initial Tribunal occasionally made comments which in our view were inappropriate, for example, concerning the cost of the proceedings, it is our view that on the whole of the record Dr. Israeli received a full and fair hearing.

Most of what Dr. Israeli regarded as interference with his presentation of the case was an invitation by the Tribunal to present evidence which was necessary to establish his case. On occasion the Tribunal appears to have gone as far as he could consistently with fairness to the respondents to suggest what sort of evidence was needed. With reference to the alleged pressure upon Dr. Israeli to become a witness, the Tribunal's remarks can only be so interpreted when read out of context. Most of these references really involve no more than a realistic acceptance of the likelihood that Dr. Israeli would in fact need to testify to establish certain important parts of his case. Otherwise they seem merely a genuine query as to whether Dr. Israeli intended to testify, something which Dr. Israeli admits that he had no reluctance to do in any event.

Where the initial Tribunal's remarks appear inappropriate with hindsight, they reflect no more than an understandable loss of patience with Dr. Israeli's apparent inability or unwillingness to appreciate that he was wasting the time of the Tribunal with irrelevancies. A Tribunal does have an obligation to see that proceedings move forward in an orderly fashion and

sometimes the only way to get this point across is by an overt loss of patience.

It is true that counsel for the Respondents were permitted to ask leading questions of their own witnesses, while at some times Dr. Israeli's questioning was held under a close rein. However, it is a practice which is usually tolerated in the interest of expedition to allow leading questions in order to get necessary facts on the record where there is no real doubt as to what the evidence of the witness is. Since counsel with their legal training are in the best position to know precisely what is and what is not relevant, it is convenient to allow counsel to recite what is relevant and allow the witness to simply affirm it as long as there is no objection. This was the nature of the leading of witnesses by counsel for the Respondents which the Tribunal allowed. On the other hand, while the calling of Dr. Israeli to order was sometimes put on the basis that he was leading the witness, the real basis for most of the control that the Tribunal exercised over Dr. Israeli was to keep him on the path of relevancy and to prevent him from entering into argument during the presentation of evidence.

We can see no impairment of Dr. Israeli's right to a full and fair hearing.

Dr. Israeli also raised an issue over the exclusion of certain evidence relating to other applications he made for employment with the Human Rights Commission. It appears that his other applications for employment were also unsuccessful. Some of this evidence was received under reserve by the Tribunal at the hearing with the question of whether it would actually be accepted as evidence being left for determination in the decision of the Tribunal. Other such evidence was not received, but it was studied by the Tribunal prior to this decision. With respect to the documents that were received under reserve, the Tribunal indicated at the hearing that he would not necessarily be accepting such material for purposes of his decision. In his decision, the Tribunal concluded that he found no evidence of discrimination in the material which he received under reserve, and observed that he also found no such evidence in the

related material which he studied, but did not receive even under reserve.

While this was not an issue raised by Dr. Israeli, we are of the view that the procedure followed by the Tribunal in studying this evidence before ruling on its reception was undesirable. While the legally trained mind is qualified to recognize the difference between material it has seen which is in evidence and material it has seen which is not in evidence, and to carry out the obligation to disregard the latter, it is preferable to minimize the extent to which this is necessary.

In most cases a general description of the nature of the evidence being tendered is sufficient for the Tribunal to rule upon its admissibility. Such a description is much less likely to have a lasting effect on the mind of the Tribunal than is the actual evidence itself. In some cases, of course, it may not be possible to determine the admissibility of the evidence without actually examining it. However, in our view this should not have been necessary in this case, and the Tribunal should have ruled on admissibility prior to studying the evidence.

We find the Tribunal's approach particularly unfortunate in so far as he noted in his decision that, after studying the evidence which was not admitted, he found no evidence of discrimination. We are now faced with the task of reviewing his decision on the basis of a record which does not include this very evidence. Moreover, since the initial Tribunal had seen the excluded evidence, the discussion of its admissibility on the record relies to a considerable extent on the Tribunal's konwledge of it, rather than on recorded submissions by counsel. As a result we are left with a record which does not provide us with as much information as we would like in order to rule on admissibility of the evidence.

With respect to the question of whether this evidence was in fact admissible, we have some reservations concerning the ruling of the initial Tribunal. Since the evidence involved other applications to the Respondents by Dr. Israeli, we are not convinced that the usual concerns with respect to the prejudicial effect of similar fact evidence are as serious as the

Respondents claimed. An important factor in the normal objections to such evidence is the onerous burden it places on the party against which it is produced to bring evidence vindicating its conduct on other occasions. In part this is because such other occasions involve other parties and would thus greatly broaden the scope of the inquiry. Where the entire course of conduct in question is between the same parties, this factor, at least, would seem less significant. Counsel for the Respondents raised the difficulty that would be faced in bringing in the particular individuals who processed Dr. Israeli's other applications. However, they would all have been servants or agents of the Respondents. We doubt whether a corporate structure can rely on its own size and diversity to object that it is too onerous to produce evidence from its own representatives.

Although the initial Tribunal seems to lean in favour of admission of similar fact evidence in his decision, the record indicates that the material rejected included screening profiles containing comments on Dr. Israeli's other applications for employment which presumably would indicate the reasons why these applications were unsuccessful. Since discrimination, if there was any, would have had to occur at a stage such as the screening process, this would mean that the excluded material was the most cogent of the similar fact evidence offered by Dr. Israeli.

On the other hand, a corporate structure does not have a single mind. In so far as the probative value of similar fact evidence may involve establishing a pattern from which intention can be inferred, evidence involving different agents of the corporate structure would lack probative force unless there was some evidence of a common mind which coordinated these events. Thus, the evidence might have been rejected due to lack of probative value, rather than because of the burden it would place upon the Respondents to answer it.

Dr. Israeli did not press the issue by seeking to actually introduce the excluded evidence as additional evidence before us. In so far as related evidence is on the record because it was received under

reserve,
we concur in the finding of the initial Tribunal that there is no evidence of
discrimination. In the final analysis, we find it unnecessary to rule on
whether the excluded evidence ought to have been admitted since we are satisfied that the facts with respect to the complaint
before us are quite clear. Whatever the similar fact evidence
might show, therefore, it could not affect our decision on this complaint.

In summary, while we do find that the initial Tribunal made some minor procedural errors, viewing the record as a whole we conclude that these
did not deprive Dr. Israeli of a full and fair hearing and did not affect the
final decision of the Tribunal. If Dr. Israeli believes otherwise, it must
surely be because he did not understand the extent to which the Tribunal
endeavoured to assist him to ensure that his case was properly presented. We
cannot fault the Tribunal for any such misunderstanding since the Tribunal
made every reasonable effort to advise Dr. Israeli as to what was needed.

This misunderstanding was perhaps increased by the fact that the

---

initial Tribunal used terminology drawn from the civil law while it appears
that Dr. Israeli has concentrated his considerable legal research in materials relating to the common law. Understanding was not helped by Dr.
Israeli’s apparent concentration of his research upon the law of the United
States which, although it is based on the common law, can be as strange to
any Canadian lawyer, whether common lawyer or civilian, as the common law and
civil law are sometimes strange to each other. Again, viewing the record as
a whole, we are satisfied that any such misunderstanding was ultimately removed to the extent that it was possible for the Tribunal to remove it and
that no denial of a full and fair hearing resulted.

THE QUESTION OF DISCRIMINATION

We turn now to the merits of the case and the question of whether Dr. Israeli’s complaint of discrimination was substantiated. Essentially,
Dr. Israeli supported his claim on three different bases. He submitted that
there was direct evidence of discrimination in certain comments on the screening profile relating to his application and in the testimony of

one of
the persons who participated in the screening process. He submitted that
irregularities in the way in which he was dealt with in the application process and in the assessment of his application gave rise to an inference of
discrimination in the absence of an adequate alternative explanation which
had not been provided. He also submitted that some of the requirements for
the job had a tendency to exclude members of minority or disadvantaged groups
and were not justified as bona fide occupational requirements.

Two items of evidence were drawn to our attention by Dr. Israeli which might constitute direct evidence of discrimination. First, following
a reference by the Tribunal to the qualifications of those persons who passed
the screening stage, Ms. Firth said: "Would it suffice to say that some that
went on in the ten, there was one black person, there was somebody who was
handicapped and I believe there were others in terms of special interest".
Secondly, Ms. Finsten wrote on the screening profile relating to Dr. Israeli's application: "personally aware and active in fighting discriminatory issues, mainly anti-semitism (single issue)".

If read as a description of the qualifications of the applicants who passed screening, Ms. Firth's reference to "black person" and "handicapped" might indeed suggest that she made a decision based on discriminatory factors. However, such a reading is only possible if one takes this statement out of context. The question which had been put to her
shortly before this by the Tribunal, and which she had yet to answer, was
"who were the four, or the ten?", meaning the persons who passed the screening. This was followed by a suggestion from counsel for the Public
Service Commission that the questioning was getting into an area beyond the
witness' knowledge since she had not been involved in later stages of the
hiring process. The Tribunal then brought in the question of qualifications
to explain the purpose of the line of questioning that he was pursuing. This
was followed by Ms. Finsten's testimony quoted above.

In context it seems clear that Ms. Firth was still directing her answer to the actual question which was to identify the individuals in some

way, rather than to describe their qualifications. Her answer was an obvious attempt to provide information in this regard which she thought might be useful to the Tribunal in light of the complaint, while avoiding if possible a breach of the privacy of these individuals. This is confirmed by the Tribunal's immediate impression of her reply which is recorded: "You're trying to show good faith, but". In short, we are satisfied that Ms. Firth's answer cannot properly be interpreted as indicating that she regarded the characteristics she mentioned as job qualifications.

Ms. Finsten's note that Dr. Israeli was primarily concerned about anti-Semitism is similarly explained by the context. This comment was made in relation to the experience of the applicant in relation to "affirmative action, civil rights or special awareness". The Human Rights Commission is involved in a great variety of human rights issues and the position to be filled could involve investigating complaints across the entire spectrum of these issues. It was, therefore, an entirely reasonable interpretation of the basic experience requirement that an applicant's experience in relation to such issues be both varied and balanced among a number of areas. While Dr. Israeli argued forcefully that his application showed experience in other areas, the assessment that his main interest had been anti-Semitism, or at least that this interest outweighed the others, was one a reasonable person could draw from his application. In this context, we are satisfied that Ms. Finsten's note did not mean that she was making any distinction on grounds prohibited by the Canadian Human Rights Act. Dr. Israeli also raised questions as to whether this experience requirement was a bona fide requirement, but we will defer that issue until our discussion of the issue of bona fides as a whole.

The irregularities that Dr. Israeli argued gave rise to an inference of discrimination involved the fact that he received a document purporting to be a statement of qualifications for the position and the disagreement that he had with the assessment of his application. It should be emphasized at the outset that a Human Rights Tribunal is not a general body of appeal against

mistakes or even illegal practices by those subject to the Canadian Human Rights Act. We are only interested in such occurences where they involve discrimination based on one of the prohibited grounds listed in the Act.

At the same time we do accept Dr. Israeli's submission that, if members of a minority or disadvantaged group can show that they have been the victims of irregularities, it can give rise to an inference that they have been discriminated against in the absence of some more credible alternative explanation. Whether this inference should be drawn, however, involves weighing all of the evidence. Moreover, the weight to be given to evidence of irregularities will be greatly enhanced if the party alleging discrimination can present evidence that no similar irregularities were encountered by persons who do not belong to a minority or disadvantaged group.

There was no real explanation offered of why Dr. Israeli was sent a statement of qualifications which was different from the advertisement for

---

the position and the selection profile which was to be used in assessing applicants. Ms. Firth's suggestion that it might have been a draft was purely speculative. It seems rather unlikely to us that any responsible official would have been sending out a mere draft. Ms. Firth's testimony also indicated that the selection profile was the same thing as the statement of qualifications, required by the Public Service Employment Regulations. We find it noteworthy, however, that the document Dr. Israeli received was entitled "Statement of Qualifications", rather than "Selection Profile". Since "Statement of Qualifications" is the term used by the Regulations, it seem more likely to us, considering normal bureaucratic practice, that the document entitled "Statement of Qualifications" was the document being provided to interested persons as required by the Regulations.

It must be remembered that Ms. Firth, who was the only witness knowledgeable in procedures prior to the screening stage, was an officer of the Public Service Commission and as such would be regularly involved with the hiring process. Her evidence on these preliminary stages related more to the way in which the procedures normally operate than to the specifics of this particular competition. The evidence did suggest that in this competition the effort to ensure consistency between the competitions

in
different regions began after the process was underway. Since the document
Dr. Israeli received is sub-titled "Halifax Regional Office", the most probable explanation is that this document was generated before the decision
to ensure national consistency was implemented and, perhaps through some
breakdown in the chain of command, it was never modified in accordance with
the decision to ensure consistency. Of course, we also can only speculate.
The real issue is whether, in the absence of a clear explanation from the
Respondents, any inference of discrimination can be drawn.

We simply do not find it possible to believe that any discrimination was involved in the sending of the document entitled "Statement of Qualifications" to Dr. Israeli in the absence of any evidence
that other persons received a different document. Instead, all common sense and logic inclines us to the view that everyone who made the same request probably received the same document. Moreover, it is clear that
Dr. Israeli noticed the discrepancies between this document and the advertisement and based his application on the latter. Thus, even if he had
been sent the wrong document for a discriminatory purpose, which we do not
for one minute believe, his application was not adversely affected as a result.

With respect to the assessment of his application by the screening board, Dr. Israeli repeatedly submitted that his application had been subject
to different criteria than other applications. He appeared to base this submission on the fact that specific comments had been written on his application which, in his submission, did not follow exactly the criteria set
out on the screening profile.

The criteria on the screening profile were stated in broad terms which

---

necessarily involved possible ambiguity. As noted in the description of the
procedures above, the screening board discussed the criteria before reviewing
the applications in order to be sure they were agreed on the interpretation
of the criteria. To the extent that the comments on Dr. Israeli’s screening
profile differ from his interpretation of the criteria, the difference is
fully explained by the interpretation agreed upon by the members of the screening board. The evidence is clear that this interpretation was

applied to all the applications, not just that of Dr. Israeli. Thus, he was treated no differently from anyone else and there was no discrimination, even if this procedure was irregular. As indicated in our initial description of the procedure, we are satisfied in any event that it was entirely proper.

Like any applicant for a position, Dr. Israeli would have preferred that the criteria be interpreted in a way most favourable to himself. However, the interpretation adopted by the screening board was an entirely reasonable one. No applicant has a right to have their own interpretation of the criteria adopted. Indeed if that were the case, presumably every applicant would have this right and there would be little use for a screening process since presumably few people will apply for a position for which they consider themselves unqualified.

To some extent, Dr. Israeli's claim that his application was treated differently may have involved the fact that any specific comments were made at all on his application which probably differed from comments on other applications. However, this was simply a necessary part of the process of making a decision on the application. A judgment had to be made as to how his application fared under the criteria applicable to everyone. The elements that make up the decision will obviously vary from application to application because the applicants are different. This is not discrimination as long as the elements are based on the criteria and the criteria themselves are not discriminatory. We are satisfied that the decision was based on the same criteria applied to all applicants. The criteria were not, on their face, discriminatory, although we will return later to the question of whether the criteria were discriminatory in their effects.

Dr. Israeli also submitted that the screening board's assessment did not give proper consideration to various factors on his application. As with the question of interpretation of the criteria, the consideration to be given to such factors is something on which opinions can differ. We have already dealt with Ms. Finsten's comment that he was mainly interested in anti-Semitism and overly oriented to one issue. Another example of Dr.

Israeli's disagreement with the assessment involved a comment that he displayed a lack of understanding of affirmative action. This was written on the screening profile by Mr. McKervill. Dr. Israeli referred us to section 15(1) of the Canadian Human Rights Act which states the purpose of affirmative action to eliminate disadvantages suffered by minorities. Dr. Israeli then cited, as evidence of his understanding of affirmative action, his own fight against discrimination which has indeed been laudable. However, Dr. Israeli's argument missed the point we understand Mr. McKervill to have been making, that is, Mr. McKervill read Dr. Israeli's application as indicating that the applicant viewed affirmative action as an adversarial

---

process, a fight to eliminate discrimination, rather than as a process of seeking to eliminate discrimination by cooperative efforts.

We could multiply the examples of Dr. Israeli's disagreement with the assessment of his application, but we see no purpose to be served thereby. We see nothing in the consideration given to the factors set out in Dr. Israeli's application that could even remotely be associated with an intent to discriminate. On the contrary, we find the assessment of his application to have been entirely reasonable.

This brings us finally to the question of whether the criteria themselves were discriminatory in their impact upon minorities or disadvantaged groups. We would note at the outset that basing a finding of discrimination on the fact that certain criteria tend to exclude members of particular groups can only be done with caution in Canada. Recently it was held in Canadian National Railway Company v. Canadian Human Rights Commission and Bhinder (1983), 4 C.H.R.R. D/1404 (Fed. C.A.), that the Canadian Human Rights Act does not extend to discrimination where there is neither a discriminatory intention or motivation nor a difference in treatment directly related to one of the grounds listed in the Act. This would mean, in light of our finding that there was no actual intention to discriminate, the mere fact that some criterion, neutral on its face, had an adverse impact on minorities or disadvantaged groups was not contrary to the Act. As noted by the Review Tribunal in Carson et al. v. Air Canada (October 26, 1982), at

21-23, an argument can be made that the Federal Court of Appeal's decision is
inconsistent with the objective branch of the test of a bona fide occupational qualification adopted in Ontario Human Rights Commission et al.
v. Borough of Etobicoke (1982), 132 D.L.R. (3d) 14 (S.C.C.), at 19-20.

In the event that this is not the type of case where the holding of the Federal Court of Appeal in the Bhinder case would apply, or in the event
that the Court's decision may be overturned by the Supreme Court, we will
consider whether Dr. Israeli has made out any showing that the criteria tended to discriminate and were not bona fide occupational qualifications.

The criteria in question were those that resulted in the rejection of Dr. Israeli's application. As stated on the screening profile against
which the application was assessed, the relevant criteria were:

1) "Experience in investigating complaints, researching and compiling relevant information, analysing and assessing administrative/legal
implications, and recommending solutions." These criteria were interpreted
by the screening board as placing emphasis on experience with statutory investigations.

2) "Experience in negotiating terms of dispute settlement." This criterion was interpreted by the screening board as referring to experience
in a mediative role, rather than as a negotiating party.

3) "Experience in affirmative action, civil rights or special awareness programs in the region for which application is made."

The assessment that Dr. Israeli did not meet the requirements in relation to these criteria involved conclusions that the investigations in
which he had been engaged were not under the type of regimen that statutory
investigations would entail, his experience in negotiation was as an interested party, he did not appreciate the nature of affirmative action
programs, and his civil rights experience was overly oriented to one issue.
We have already stated our finding that the assessment of Dr. Israeli's application was reasonable and non-discriminatory on the basis of the criteria being applied. Our purpose in setting out the actual conclusions at
this stage is not, therefore, to question whether they were proper findings,

but it is it elucidate the argument of Dr. Israeli that the criteria themselves tended to discriminate.

The only evidence that Dr. Israeli offered that these criteria would in fact tend to exclude minorities or disadvantaged groups was in the form of statements in the annual reports of the Human Rights Commission and other published material which state that members of the Jewish faith, members of some ethnic groups, and the handicapped have been under-represented among employees of the federal government. He contended that the criteria tended to favour federal government employees and hence to discriminate against those groups under-represented in that employment. In the ordinary case, a Tribunal would require much stronger and clearer evidence than this to demonstrate the discriminatory impact of criteria which appear neutral on their face. In view of the difficulty which faced Dr. Israeli as a private individual without the resources available to most complainants through investigation by the Human Rights Commission, we are inclined to take judicial notice of the publications to which he referred as the best evidence available on the question of whether the criteria had a discriminatory impact. However, even a generous interpretation of this evidence in Dr. Israeli's favour does not persuade us that the criteria had a discriminatory impact. While certain groups may be under-represented in the Public Service, it does not follow that a competition limited to government employees is a violation of the Canadian Human Rights Act. The purpose of the Act was to eradicate discriminatory practices from occurring in the future, not to wipe out the accrued job rights of individuals already employed to which the closed competition system is related. Moreover, there was no evidence that minority groups were under-represented in the pool of applicants within the Public Service who might possess the actual criteria involved in the hiring of regional investigators for the Human Rights Commission. In any event the competition in this case was open to the public, and there is certainly no evidence that minority or disadvantaged groups generally would be unable to meet these criteria. Dr. Israeli argued that the emphasis on experience in statutory investigations would tend to exclude persons outside the government service. However, there are a

number
of other occupations in which such experience can be gained.

We are also satisfied that the criteria applied were reasonably necessary to the job. The Canadian Human Rights Act creates statutory powers
of investigation. The exercise of such powers requires a certain knowledge
of the legal approach and a sensitivity to legal issues which experience in
other forms of investigation might not provide. It is clear that the

---

investigator may be called upon to mediate since section 37(1)(a) of the Act
contemplates some attempt at settlement during the investigative stage. Mediation, therefore, would not be exclusively the responsibility of the
Commission's conciliation staff as Dr. Israeli contended. Similarly, although the Commission employs specialists in affirmative action at its
Ottawa office, field work in developing proposals for affirmative action
might easily involve the regional investigator who first encounters the situation calling for such action. Moreover, initial exploration of possible
settlement of a complaint could involve proposals of an affirmative action
nature. We have already indicated how a varied and balanced experience in
civil rights issues could be reasonably required in view of the range of
human rights problems
to be dealt with by the Commission. In short, we find no basis for inferring a discriminatory intent in any of the basic requirements applied to
Dr. Israeli's application, either as those criteria were set out in the screening profile or as they were interpreted by the screening board.

Dr. Israeli also raised another issue of the discriminatory impact
of a job criterion which was not included in the basic requirements. He submitted evidence that at the relevant time the position of Regional Investigator required a security clearance and that this would tend to exclude persons of East European origin because of security concerns respecting persons with relatives living in Eastern Bloc countries. While
Dr. Israeli apparently received a form to be completed for security clearance
purposes in relation to one of his other applications for employment with the
Human Rights Commission, it appears that this was purely a mistake and security guidelines were never used in processing his application. In any
event, it is quite clear that there was no consideration of the security
clearance question at the screening stage when his application for the

position of Regional Investigator was rejected. The question of security clearance is not relevant to Dr. Israeli's case, therefore, and we see no need to comment on whether such clearances involve discrimination under the Canadian Human Rights Act.

CONCLUSION

In conclusion, we find that Dr. Israeli's complaint has not been substantiated on any basis. We affirm the decision of the initial Tribunal that the complaint be dismissed.

DATED the 4 day of April, 1984.
Robert W. Kerr, Tribunal Chairperson

Susan Ashley, Tribunal Member
Claude Pensa, Tribunal Member