T.D. 7/94
Decision rendered on April 28, 1994

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

HUMAN RIGHTS TRIBUNAL

BETWEEN:

JULIUS H.E. UZOABA

Complainant

and

CANADIAN HUMAN RIGHTS COMMISSION

Commission

and

CORRECTIONAL SERVICE OF CANADA

Respondent

DECISION

TRIBUNAL: Anne L. Mactavish Chairman
Ross Robinson Member
Lino Sa Pessoa Member

APPEARANCES: Michael Gottheil
Counsel for the Canadian Human
Rights Commission

Ian McCowan
Counsel for Correctional Services of Canada

DATES AND PLACE
OF HEARING: March 8, 9, 10, 1993
May 3, 4, 5, 1993
July 26, 27, 28, 1993
August 9, 10, 11, 1993
Kingston, Ontario
September 20, 21, 22, 1993
Ottawa, Ontario

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This case arises out of a complaint alleging discrimination and harassment on the basis of race, colour and national or ethnic origin contrary to sections 7 and 14 of the Canadian Human Rights Act (the "Act").

I BACKGROUND

Julius H.E. Uzoaba was born in Nigeria in 1939. Dr. Uzoaba obtained a Diploma in Education in Nigeria, in 1958. He was employed from 1959 to 1966 as an Intake Officer at a prison in Eastern Nigeria, and as a High School teacher. In 1966 he emigrated to Canada. From 1966 to 1970, Dr. Uzoaba was a student at St. Mary's University in Halifax, where he graduated in 1970 with an Honours B.A. in Economics and Statistics. From 1970 to 1972, he attended the University of Ottawa, receiving his Master's Degree in Criminology in June of 1972. For the next two years Dr. Uzoaba was employed at the University of Ottawa as a part-time researcher in the University's Department of Criminology.

On November 12, 1974 Dr. Uzoaba commenced employment with the Correctional Services of Canada (the "Respondent" or "CSC"), then known as the Canadian Penitentiary Service. In the following years, Dr. Uzoaba worked either as a Classification Officer, or in the related position of Living Unit Development Officer. He was one of the first black Classification Officers in Ontario.

A Classification Officer works with inmates. The position involves assessing individual inmates, including analyzing the individual's social and criminal history. The Classification Officer develops and recommends programs for each inmate, having regard to both the inmate's needs and the requirement to protect society. Perhaps most importantly, the Classification Officer prepares reports for the National Parole Board and Temporary Absence Boards, analyzing the suitability of inmates for temporary or permanent release from the institution in question.

From 1974 until November 1978, Dr. Uzoaba worked at a variety of institutions in the CSC system, as well as serving a brief secondment to National Headquarters in Ottawa. In November 1978 he commenced employment as a Classification Officer at Collins Bay Institution ("CBI"). Dr. Uzoaba's complaint relates to events which occurred at CBI, and events following his departure from that institution.

II THE COMPLAINT

Dr. Uzoaba originally filed a complaint against CSC with the Canadian Human Rights Commission (the "Commission") on November 23, 1988. This complaint was subsequently amended 3 times, on December 12, 1988, December 23, 1988, and finally, on April 26, 1989. The final text of the complaint is as follows:

> The Correctional Service of Canada discriminated against me by treating me differently in the course of employment and harassing me because of my race, colour (black) and ethnic or national origin contrary to sections 7 and 14 of the Canadian Human Rights Act.
>
> I began working for the Correctional Service of Canada at Warkworth, Ontario in 1974. I was the first black Classification Officer in the

Correctional Service of Canada in Ontario.

I believe that the following acts were committed because of my race, colour and ethnic or national origins:

1. In 1980, while I was working at Collins Bay Institution in Kingston, Ontario as a WP-03 Correctional Officer, I was given a negative Performance Evaluation Report which did not reflect the quality of my work. White colleagues who did not have as much formal training or experience as I did received good appraisals.

2. My working conditions at Collins Bay Institution were not the same as those of my white colleagues. I was subjected to harassing phone calls and racial slurs from January to March 17, 1980. I believe these came from staff.

3. I was assaulted by an inmate on March 14, 1980, I believe with the consent of management. The following working day, March 17, 1980, I was removed from the institution under the guise of protecting me.

4. A petition against my return, signed by 247 inmates, I believe with the involvement of management, was put on my file on June 6, 1980 without an investigation or hearing. I was forced into a written agreement not to work with inmates in institutional setting as

the price of getting it removed on July 10, 1980.

5. When I returned from a two-year educational leave of absence in the fall of 1982, my resume was withheld from the Public Service Commission for many months. This reduced my employment opportunities

as when my resume was eventually forwarded, the staffing freeze had begun and I was unable to get a job.

6. The Correctional Service of Canada, did not at first extend my priority entitlement when it expired on September 30, 1983 to make up for their having withheld my resume. Eventually, however, management did extend my priority entitlement, but only for four months from October 15, 1984 to February 14, 1985.

7. Although appropriate jobs were available, the Correctional Service of Canada offered me only inappropriate ones. By offering me a position in Millhaven Institution on January 20, 1983, they unilaterally abrogated the agreement that I not work with inmates. I was offered only positions at the same or a lower level as my previous one, despite the fact that I had my Ph.D. Despite management's ability to do so, I was not offered either of two positions at the WP-04 level at Regional Headquarters without competition in April 1983.

8. The Correctional Service of Canada blocked my re-entry into the Public Service by giving me bad references and putting pressure on individuals who knew my work was competent to say the contrary. I therefore could not obtain other jobs either in the Correctional Service of Canada or other federal government departments.

a) In early August 1983, I was referred to Statistics Canada in Ottawa by the Public Service Commission and interviewed for a position as ES-04 Assessment Officer. A few days later,

I was told I had not been offered the job based on an interview with a reference.

b) On February 19, 1985, I was interviewed by the Secretary of State in Hamilton for a WP-04 Social Development Officer position in Toronto. Two weeks later, I got a letter saying I was not suitable.

c) On February 25, 1985, I was interviewed for a position as Investigator, Inmate Affairs WP-03 in Ottawa, Solicitor General Secretariat. On March 15, 1985, I was told I was not suitable for the job.

9. I am still an employee of the Correctional Service of Canada, on "Other leave". The Correctional Service of Canada has done nothing to find me a suitable position

since 1985. In January and in February 1989, I was pressured by the Correctional Service of Canada to resign. When I refused, I was advised that steps would be taken to release me.

III EVENTS IN THE 1970s

At the commencement of the hearing, counsel for the Commission indicated his intention to lead evidence regarding a number of incidents involving Dr. Uzoaba which occurred at various times during the 1970s. Commission counsel indicated that he was not seeking a remedy for anything that may have occurred prior to 1980. Rather, the evidence was intended to provide background, and as well, to put the events which form the subject matter of the complaint into context. As the case unfolded, it became clear that the Commission's position was that Dr. Uzoaba's reaction to the incidents that form the subject matter of the complaint could only be properly understood if his entire employment history was before the Tribunal.

Counsel for the Respondent vigorously opposed the admission of such evidence. The Respondent argued firstly, that the incidents were outside the four corners of the complaint. Secondly, the Respondent argued that the events were irrelevant, as they involve incidents which occurred at institutions which are not implicated in the complaint itself, and which occurred up to six years prior to the earliest date mentioned in the complaint. Thirdly, the Respondent argued that it would be unfair and a breach of natural justice to allow the Tribunal to effectively broaden the

scope of the complaint to encompass events going back until 1974. The Respondent pointed to the difficulty it would encounter in identifying and locating witnesses, as well as to the fact that any available witnesses' recollections regarding the events in issue would likely have been impaired by the passage of time. Finally, the Respondent argued that, insofar as certain of the events occurred prior to March 1, 1978, that is, prior to the date on which the Canadian Human Rights Act came into force, it was beyond the jurisdiction of this Tribunal to consider acts occurring before the proclamation of the Act.

Following the completion of counsel's argument on the preliminary objection, the Tribunal ruled that the parties would be able to

lead evidence regarding events which occurred during the 1970's. The Tribunal reserved its decision, however, on the question of whether the evidence would ultimately be admitted into evidence, and if so admitted, what weight would be attributed to it. The hearing proceeded on that basis. It should be noted that counsel for the Respondent had been made aware of the allegations from the 1970's approximately three months prior to the commencement of the hearing, and had previously been provided with copies of the majority of the documents on which the Commission sought to rely.

Without reviewing the nature of the evidence in detail, suffice it to say that there were a number of different incidents taking place at several institutions within CSC over a six year period. Some, if proven, would clearly constitute discrimination against the complainant or harassment of Dr. Uzoaba on the basis of race, colour, national or ethnic origin. Other alleged incidents were not, on their face, discriminatory in nature, although Commission counsel argued that these incidents were either motivated by racist considerations, or were the product of unconscious racial discrimination against the Complainant.

a) The Law:

Counsel for the Commission relied on several cases in support of it's position that the evidence regarding the events of the 1970's should be admitted. Counsel referred to the decisions in Re Latif and the Human Rights Commission, (1979), 105 D.L.R. (3d) 609 and Dalton v. Canadian Human Rights Commission et al., [1985] 1 F.C. 37 as authority for the proposition that discriminatory practices which commence before the coming in to force of the Act, but continue thereafter, may be subject to the Act. In support of the argument that the acts alleged to have occurred during the 1970's form a part of a continuing pattern of discrimination, the Commission points to the fact that all of the incidents occurred in the course of Dr. Uzoaba's employment with the Respondent, notwithstanding the fact that the events may have occurred at various institutions while the Complainant was supervised by a number of different individuals.

In response to the Respondent's argument that the Commission is seeking to broaden the scope of the complaint, the Commission relies upon the cases of Cousens v. The Canadian Nurses Association, (1981), 2 C.H.R.R. D/365 and Barnard v. Fort Francis Board of Police Commissioners, (1986), 7 C.H.R.R. D/3167 as authority for the proposition that a human rights complaint is not like a criminal information, rather it is intended to provide the Respondent with notice of the allegations to be dealt with

at the hearing. The essential issue is whether the Respondent has been provided with adequate notice of the case that it has to meet, so as to comply with the requirements of procedural fairness.

The Respondent also relies upon the decision in Latif (supra) in support of its argument that, by seeking to introduce evidence of events which took place in the 1970's, the Commission is seeking to give the Act retrospective effect. The Respondent contends that the incidents in question commenced and were completed prior to the Act coming into force, and that, therefore, the Act has no application.

The Respondent also contends that under subsection 50(1) of the Act, a Tribunal may only inquire into the complaint, and cannot consider evidence of events predating the matters referred to in a complaint unless the Commission has first granted a waiver pursuant to the provisions of subsection 41(e) of the Act. Subsection 41(e) provides:

> 41 Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that ...
>
> (e) the complaint is based on acts or omissions the last of which occurred more than one year or such longer period of time as the Commission considers appropriate in the circumstances, before receipt of the complaint.

b) Analysis:

It is clear that a human rights complaint is not analogous to a criminal indictment, and that a certain amount of discretion vests in the Tribunal to amend the complaint. (Cousens, supra, at p.365, Barnard, supra, at p.3171), provided that sufficient notice is provided to the Respondent. In this case, a formal amendment to the complaint is not being sought - indeed the Commission was very clear that no remedy was being sought for the events occurring in the 1970's. Rather the evidence was sought to be introduced in order to put the impact of the events which form the subject matter of the complaint into perspective, from the point of the view of the Complainant.

Under paragraph 50(2)(c) of the Act, a Tribunal may:

receive and accept such evidence and other information, whether on oath or by affidavit or otherwise, as the Tribunal sees fit, whether or not such evidence or information is or would be admissible in a court of law.

While this paragraph grants broad powers to the Tribunal to receive evidence, that evidence must, obviously, be relevant to the matters in issue before it.

Human Rights Tribunals have recognized that, particularly in harassment cases, different complainants will have different sensitivities and different levels of tolerance, and that, therefore, acts of harassment have to be considered from the point of view of the victim. (See for example, Stadnyk v. Canada Employment Immigration Commission, T.D. 13/93).

In order to be able to understand the victim's perspective, past experiences, and in particular, past experiences in the workplace may be relevant to the inquiry. In addition, in cases of harassment, the appropriateness of the employer's efforts to prevent harassment or its response to acts of harassment will frequently be in issue. In determining whether an employer has acted promptly and properly in all of the circumstances of a given case, the previous knowledge of an employer as to the vulnerability of a particular employee may well be germane. In the Tribunal's view, therefore, the evidence which the Commission sought to lead was relevant to the issues before the Tribunal.

With respect to the Respondent's argument that the Commission is seeking to give the Act retrospective effect, the nature of retrospectivity must be considered.A statute is given retrospective effect where it:

... attach[es] a new duty, penalty or disability to an event that took place before the enactment.

(Driedger, The Construction of Statutes, (2d Ed.) at p.701)

In this case, the Commission is not asking to have new consequences attached to the events of the 1970's, rather it is asking that these events be considered in the determination of what, if any,

consequences should be attached to events occurring after proclamation of the Act.

For the Tribunal to consider events occurring prior to March 1, 1978 in assessing or interpreting the impact or effect of events which occurred after that date does not, in the Tribunal's view, result in the Act being given retrospective effect.

The final argument advanced by the Respondent was one of prejudice - that is, that the Respondent was unfairly disadvantaged by now being required to adduce evidence on events occurring, in some cases, almost twenty years ago. In the Tribunal's view, there is merit to the Respondent's position in this regard. It was apparent throughout the testimony of the Respondent's witnesses called to respond to the allegations relating to the 1970's that their recollections were hazy and sometimes non-existent. This is not surprising, given the passage of time, and the nature of the events that they were testifying in relation to.

Accordingly, the Tribunal has concluded that it would be unfair to the Respondent to admit the evidence relating to the 1970's into evidence (with the exception noted below), and that evidence has not formed any part of this decision.

The one exception to this ruling relates to an event which occurred at at Collins Bay Institution in late 1978, which is dealt with in greater detail below:

c) The Garage Incident:

CSC Institutions offer academic and vocational training to inmates, including training in automotive repair. It is common ground that CSC employees generally have access to automotive repairs at institutional garages. The employee vehicles are used as part of the training process, and the employee, in turn, receives automotive repairs at a nominal fee.

According to Dr. Uzoaba, within about a week of starting at CBI in late 1978, he made an appointment to bring his car in to the garage for repair. Before he actually brought the car in, Dr. Uzoaba was contacted by Mr. Kenneth Payne, the Assistant Director of Occupational Development at CBI, and was advised not to bring his vehicle to the garage.

The explanation given was that a staff member had overheard inmates discussing their intention to damage Dr. Uzoaba's car, if it was brought into the garage.

Mr. Payne was called as a witness by the Respondent. He confirmed the evidence of Dr. Uzoaba in all essential respects. Mr. Payne also testified that his information was that the reason the inmates were intending to damage Dr. Uzoaba's car was because Dr. Uzoaba was black. Mr. Payne confirmed that this explanation was communicated to Dr. Uzoaba.

Mr. Payne stated that the normal practice, when a threat of this nature is received, is to file a "situation report", which is then reviewed at the morning operational meeting of senior prison staff. The matter may then be referred to the Institutional Preventative Security Officer, known as the IPSO, for further investigation.

It is not at all clear from the evidence that a situation report was filed in this case. There is no suggestion that the matter was referred to the IPSO for investigation. Insofar as CBI management's response to the threat was concerned, Mr. Payne testified as follows:

Q. ... What was the reaction of the management staff to that? If there is an indication of racism by the inmates against one of the staff, how is that dealt with?

A. Probably at the time I think it is safe to say nothing. I don't say that with any indifference or smugness. It was quite simply the fact that there was an issue. You dealt with it. The employee did not bring in the vehicle and it was not damaged.

(Transcript, Vol. 7, at p.1680)

The Tribunal is satisfied that evidence regarding this incident should be admitted into evidence. The incident took place at CBI, approximately one year before the earliest incidents covered by the Complaint. While the garage incident was not specifically mentioned in the Complaint, it is clear that the requirements of procedural fairness have been met. The incident was evidently drawn to the Respondent's attention while this case was before the CHRC. The Respondent has admittedly not suffered any prejudice in being called upon to respond to it. It should be

recalled that no remedy is being sought with respect to the garage incident. Rather, it is being relied upon to show the state of mind of the Complainant, as well as to demonstrate the state of the Respondent's knowledge of the difficulties Dr. Uzoaba was encountering in the workplace. To this extent it is relevant to the issues before this Tribunal.

IV INCIDENTS REFERRED TO IN THE COMPLAINT

a) 1980 Performance Evaluation:

Dr. Uzoaba complains that in 1980, he received a negative performance evaluation, which did not reflect the quality of his work. Dr. Uzoaba further alleges that white colleagues, with less formal training or experience than he, received good appraisals.

The appraisal of Dr. Uzoaba's performance was carried out by his then supervisor, Robert Markowski, in early 1980. This appraisal reviewed Dr. Uzoaba's performance for the period from February, 1979 to February, 1980. The appraisal was a fairly lengthy and detailed assessment of Dr. Uzoaba's performance for the period in question.

Subsection 2(a) of the appraisal contains an assessment of the major work objectives assigned to Dr. Uzoaba for the preceding year.

Dr. Uzoaba's performance was stated to be "fully satisfactory" with respect to each of the four major work objectives identified in this section.

Subsection 2(b) of the appraisal contains an evaluation of the employee's overall performance. While the form itself states that the evaluation contained in subsection 2(b) is to be consistent with that contained in subsection 2(a), in Dr. Uzoaba's case, notwithstanding that the assessments contained in subsection 2(a) were uniformly "fully satisfactory", in subsection 2(b) Mr. Markowski rated Dr. Uzoaba's overall performance as "room for improvement: achieved most but not all of the mutually agreed upon major goals for the review period."

The appraisal goes on to assess Dr. Uzoaba's demonstrated skills, including recommendations to address identified weaknesses, and contains a forecast of the employee's eligibility for promotion.

It is clear from Dr. Uzoaba's evidence that he viewed this appraisal as negative. The appraisal certainly contains criticisms

levelled at Dr. Uzoaba's performance, although the majority of the entries reflect Dr. Uzoaba's performance as being fully satisfactory.

In addition to his characterization of the appraisal as negative, Dr. Uzoaba is also of the view that the appraisal was unfair. In Dr. Uzoaba's opinion, his performance was better than any of the other classification officers at CBI, and that, in comparison to his peers, there were no areas in which he required improvement (Transcript, Vol. 3, pp.512-513). Dr. Uzoaba appears to take particular issue with the criticisms contained in subsection 3(b) of the appraisal, which subsection contains specific behaviourial examples of situations used to support ratings given earlier in the appraisal. The specific examples used by Mr. Markowski were as follows:

> Mr. Uzoaba has presented cases to the TA [Temporary Absence] Board which were either based on incomplete data or information that has not been investigated thoroughly.

> Mr. Uzoaba does not utilize the experience and expertise of fellow institutional workers. He has a minimum amount of contact with fellow workers as well as other institutional personnel.
>
> Over the past year a relatively large number of inmates have made official requests for removal of Dr. Uzoaba's case load due either to a language difficulty, mannerisms, or attitude.

Each of these items will be dealt with in turn.

With respect to the first criticism, that is the allegation that Dr. Uzoaba presented cases to Temporary Absence Boards based upon incomplete data or information that had not been investigated thoroughly, Dr. Uzoaba testified that his Temporary Absence Reports were always submitted on time, and accompanied by the relevant supporting documentation. According to Dr. Uzoaba, when he met with Mr. Markowski in 1980 in order to review his performance appraisal, he asked Mr. Markowski for specific examples of situations where he had failed to provide the necessary information. Dr. Uzoaba stated that Mr. Markowski was unable to

identify any specific instances, and advised Dr. Uzoaba that he would change this portion of the appraisal.

Mr. Markowski was called to testify by the Respondent.

Under cross-examination, he indicated that he was unable at this time to identify what the deficiencies were with respect to the presentation of cases to the Temporary Absence Board, although he had a general recollection that there had been cases where the Board was unable to make a final decision because certain information was lacking. Mr. Markowski acknowledged that other Classification Officers had similar difficulties.

The Respondent also called Mr. Larry Stebbins as a witness.

Mr. Stebbins is presently the Warden of the Pittsburgh Institution. In early 1980, he was the Acting Warden of Collins Bay Institution. Prior to that time, Mr. Stebbins was the Assistant Warden of Socialization at Collins Bay. Part of Mr. Stebbins' responsibilities as Assistant Warden included chairing the weekly meetings of the Temporary Absence Board. Mr. Stebbins testified that, as a general rule, Dr. Uzoaba was able to present cases to the Temporary Absence Board as well as most of the other Classification Officers. Mr. Stebbins indicated, however, that in or around September of 1979, a problem arose with respect to one of Dr. Uzoaba's cases. Specifically, according to Mr. Stebbins, Dr. Uzoaba had neglected to file a request on behalf of an inmate for an unescorted Temporary Absence Pass for the Christmas holidays with the National Parole Board within the requisite time period. Mr. Stebbins testified that he was quite upset by this omission, as the failure to make timely application to the Parole Board could result in the inmate being denied a pass. According to Mr. Stebbins, the matter was resolved, although he was unable to recall the specifics of how such resolution was achieved.

Insofar as the appraisal suggests that Dr. Uzoaba did not utilize the experience and expertise of fellow institutional workers is concerned, Mr. Markowski was very clear in his evidence that he viewed the

position of Classification Officer as an "open door" type of job. He described a collegial atmosphere within CBI, where Classification Officers consulted with each other on an ongoing basis. Mr. Markowski felt that Dr. Uzoaba was not consulting with co-workers with regard to specific cases.

In addition, Mr. Markowski felt that Dr. Uzoaba did not interact sufficiently with his co-workers on an informal basis, whether "...

discussing a ball game, a movie or whatever ..." (Transcript, Vol. 10, p.2382). In short, Dr. Uzoaba "did not fit in" (Transcript, Vol. 10, p.2345). Mr. Markowski did concede under cross-examination that it was possible that some of the distance between Dr. Uzoaba and the other members of the staff at CBI may have resulted from cultural differences.

Dr. Uzoaba appears to have a very different perception of the nature of the position. He viewed the position as a "closed door" one.

In Dr. Uzoaba's opinion, the job required confidentiality and discretion on the part of the Classification Officers, so as to enable the Classification Officer to gain the inmates' trust. In his view, it would be inappropriate to discuss specific inmate cases with his co-workers. Further, Dr. Uzoaba testified that he was one of the more senior Classification Officers, as well as the best educated. He felt that he knew his job, and that it was not, therefore, necessary for him to consult with colleagues.

The final criticism of Dr. Uzoaba's performance related to the number of inmates who had made official requests to be removed from Dr. Uzoaba's case load, "due either to a language difficulty, mannerisms or attitude".

Mr. Markowski testified that Dr. Uzoaba had difficulty in interacting with the men on his case load. According to Mr. Markowski, the men perceived Dr. Uzoaba as "negative", and that Dr. Uzoaba did not care about them. Mr. Markowski also testified that the inmates did not like Dr. Uzoaba's attitude. Mr. Markowski stated that he received a number of requests from inmates to change Classification Officers from Dr. Uzoaba to another Officer. Mr. Markowski indicated that he did not know how many such requests would have been received in the year preceding the performance appraisal, but estimated that number at between 12 and 15. In cross-examination, Mr. Markowski indicated that he was prepared to accept Dr. Uzoaba's testimony that the actual number of inmates was 5, although he preferred his estimate of 12 - 15. Mr. Markowski testified that other Classification Officers would, on average, have one inmate per year asking to be removed from their case load. All of the inmates requesting a change of Classification Officer were white. Mr. Markowski testified variously that "one or two" or, "at least two" of the inmates requesting a change of Classification Officer specifically told Mr. Markowski that the reason for their request was because of Dr. Uzoaba's race. Mr. Markowski conceded that Dr. Uzoaba's race may have played a role in the decision of the other inmates to request a change in Classification Officer. Mr. Markowski testified that it was possible that some of the inmates requesting a change of Classification Officer may have done so without ever having actually met Dr. Uzoaba. According to Mr. Markowski, he did not agree to assign any of the individuals in question to a different Classification Officer.

Dr. Uzoaba testified that he was not made aware of the inmate requests at the time the requests were received. According to Dr. Uzoaba, when he received a copy of the performance appraisal from Mr.

Markowski, he asked him for specific information regarding the inmate requests, and that Mr. Markowski told him that there had been five such requests. Dr. Uzoaba was able to identify several of these inmates by name, and indicated that, in at least some cases, the requests for change came after the inmate had been assigned to his case load, but before Dr. Uzoaba had actually met with the inmate for the first time. Dr. Uzoaba also indicated his understanding that race played a role in at least some of the inmate requests.

Dr. Uzoaba stated that as a result of his dissatisfaction with the performance appraisal, he asked that it be reviewed by the institutional Appraisal Review Committee, chaired by Mr.Stebbins. This review was carried out in February, 1980. The Review Committee commented that:

> The Committee noted the discrepancy in 2(a) and (b). The supervisor's rating of the employee under 2(b) shows room for improvement as his evaluation of the overall performance and is shown as fully satisfactory under 2(a) in the major work objectives. We concur with the supervisor's training recommendations.

The evidence with respect to the criticism of Dr. Uzoaba's performance before the Temporary Absence Board is inconclusive. The Tribunal is not prepared to draw any inference from Mr. Markowski's inability at this time to identify any specific instances of problems encountered with respect to Dr. Uzoaba's presentation of cases to that Board. A performance appraisal is a relatively routine task in the life of a manager. This particular performance appraisal was completed in 1980.

While Mr. Markowski would be aware that this appraisal was in issue at this hearing, nevertheless, he is now being asked to reconstruct events occurring some 13 years ago. Mr. Stebbins' evidence was clear and unequivocal that, on at least one occasion, there was a difficulty with respect to one of Dr. Uzoaba's cases before the Temporary Absence Board, although the difficulty described by Mr. Stebbins was not a difficulty

resulting from "incomplete data or information that has not been investigated thoroughly", as set out in the performance appraisal.

The second criticism of Dr. Uzoaba's performance, that is, his failure to utilize the experience of co-workers is similarly inconclusive. It is clear that Dr. Uzoaba and Mr. Markowski had fundamentally different perceptions of what the job entailed. It is equally clear that Dr. Uzoaba felt himself superior to his co-workers, both in his experience and in his education, and felt that they could be of little assistance to him. Mr. Markowski was also critical, however, of Dr. Uzoaba's perceived failure to "fit in" with his co-workers. In this regard, the testimony is troubling, and there is a concern on the part of the Tribunal that cultural differences may have played a role in this assessment. The evidence before the Tribunal, however, does not support a finding in this regard.

The final criticism relates to the number of inmates requesting a change of Classification Officer. In this regard, the

Tribunal has no hesitation in finding that it was both unfair and inappropriate to simply rely on these requests as a measure of Dr. Uzoaba's performance. The Tribunal accepts Dr. Uzoaba's estimate of the number of inmates reported to have requested a change in Classification Officer. His evidence in this regard was both detailed and specific, whereas the evidence of Mr. Markowski was vague. In addition, this issue was obviously of greater significance to Dr. Uzoaba than it would have been to Mr. Markowski, and his recollection more likely, therefore, to be accurate. Mr. Markowski testified that at least two of the inmates specifically cited Dr. Uzoaba's race or skin colour as the reason for their request. Mr. Markowski conceded that race may have motivated some of the other requests, and that he had considered this possibility at the time. The Tribunal further accepts Dr. Uzoaba's testimony that some of the inmates requesting a transfer did so without even having met him. While it may well be that some of the inmates requesting a change did so for reasons that do not reflect well on Dr. Uzoaba's performance, it is clear that a significant number of the inmates did so for reasons of intolerance and bigotry. In the Tribunal's view, for the CSC to blindly accept these actions, without qualification, as a legitimate measure of Dr. Uzoaba's performance, amounts to racial discrimination on the part of the employer.

In his complaint, Dr. Uzoaba further alleges that white colleagues who did not have as much formal training or experience as he did

received good appraisals. There was insufficient evidence before this Tribunal for any finding to be made in this regard.

b) The Telephone Calls:
Paragraph 2 of the Complaint alleges that Dr. Uzoaba's working conditions at CBI were not the same as those of his white colleagues. He alleges that he was subject to harassing telephone calls and racial slurs. The Complaint states that it is Dr. Uzoaba's belief that these calls came from staff.

In his testimony, Dr. Uzoaba stated that, commencing in January 1980, he received a series of anonymous telephone calls while at work. During these calls, the caller would use profanity, and would refer to Dr. Uzoaba as a "nigger". Dr. Uzoaba estimated that in the period from January to March 17, 1980, he received between 80 and 120 such calls. According to Dr. Uzoaba, he reported the calls to Mr. Markowski, his then supervisor. Mr. Markowski suggested that Dr. Uzoaba check to see whether the telephone calls were coming through the institutional switchboard, so as to determine whether the calls were originating inside or outside the institution. Upon checking with the switchboard operator, Dr. Uzoaba determined that the calls were originating within the institution.

The matter was then brought to the attention of Mr. Robert Frankovich, the Institutional Preventative Security Officer. According to Dr. Uzoaba, Mr. Frankovich then gave Dr. Uzoaba a tape recording device, which was to be attached by a wire to the telephone. Dr. Uzoaba stated that he hid the recorder under his desk and concealed it with newspaper, to prevent inmates from seeing it. Dr. Uzoaba testified that Mr. Frankovich would, from time to time, ask to get the tape recorder back. According to Dr. Uzoaba, whenever the recorder was in place, the telephone calls would

cease. Whenever Mr. Frankovich removed the recording device, the calls would immediately resume. This on-again/off-again process repeated itself seven or eight times, leading Dr. Uzoaba to believe that the caller was aware of the movement of the tape recorder.

In June of 1980, Dr. Uzoaba wrote a memo to Mr. Arthur Trono, the Regional Director General for the Ontario Region of CSC. In this memo, Dr. Uzoaba stated his belief that the Inmate Committee at CBI was "probably behind all the harassing telephone calls I received".

Before the Tribunal, Dr. Uzoaba stated that it was his belief that the calls were made either by CSC staff, or with the complicity of CSC employees. Dr. Uzoaba indicated that his belief was based upon the on-again/off-again nature of the calls, consistent with the movement of the recording device. In addition, he testified that inmates were not allowed unrestricted access to telephones at CBI. Evidently, if an inmate wanted to make a telephone call, he was obliged to ask a Classification Officer or Living Unit Officer to place the call for him. While Dr. Uzoaba conceded in cross-examination that inmates were, on occasion, able to access telephones without the assistance of CSC employees, he denied that inmates would have had sufficiently unrestricted access so as to be able to place between 80 and 120 calls over the time period in issue.

Dr. Uzoaba testified that he was not aware of any other employee at CBI who was subject to similar calls.

Mr. Markowski confirmed that Dr. Uzoaba did complain to him regarding the telephone calls. According to Mr. Markowski's recollection, he or someone else then approached the IPSO to see what could be done to identify the caller. Neither Mr. Markowski nor any of the Respondent's witnesses were able to provide satisfactory evidence as to exactly what was done to try to identify the perpetrator or perpetrators. No details were provided of any investigation that may have been carried out. Mr. Frankovich was not called as a witness, nor was any explanation offered regarding his failure to testify.

According to Mr. Markowski, it was common for CBI staff to receive threats against themselves and their families. In his view, it was part of the job. This view was echoed by a number of the Respondent's witnesses.

Mr. Markowski disagreed with Dr. Uzoaba's evidence regarding the issue of inmate access to telephones. According to Mr. Markowski, any one of a number of inmates working within the institution in clerical positions, could have had sufficient access to telephones to make the number of calls reported to have been received by Dr. Uzoaba.

Mr. Markowski further testified that the classification offices were cleaned by inmate cleaners. The cleaning generally took place during the day, from Monday to Friday.

Mr. Stebbins also confirmed that he was made aware by Mr. Markowski that Dr. Uzoaba was receiving harassing telephone calls. Mr. Stebbins denied any involvement dealing with the situation, stating that it was dealt with by the Assistant Director of Security and the IPSO. The

Assistant Director of Security was also not called as a witness by the Respondent.

The Respondent did call Ms. Janet Ethier to testify with respect to this issue. Ms. Ethier is currently a Case Management Officer

at Frontenac Institution. In the early 1980's, she was employed at CBI as a Case Management Officer. Ms. Ethier testified that, in the early 1980's, she received a series of telephone calls of a sexually harassing nature while she was at work. Ms. Ethier estimated the number of calls at between 4 and 6 over a period of approximately one month.

Ms. Ethier stated that, by checking with the switchboard, she was able to determine that the calls were originating from within the institution. Ms. Ethier contacted Mr. Frankovich, who provided her with a tape recorder. According to Ms. Ethier, she was unable to get the tape recorder to work properly. In Ms. Ethier's case, the perpetrator was never identified.

Ms. Ethier indicated that she was aware of other CSC employees receiving harassing telephone calls. She further testified that it was not uncommon for CSC employees to be threatened by inmates. By way of example, she recounted an incident where she received a death threat at her home from one of her inmates, who was unlawfully at large at the time.

Ms. Ethier was also of the view that it was certainly conceivable that inmates could have obtained sufficient access to telephones within CBI to make between 80 and 120 calls over a period of between 2 1/2 and 3 months.

In argument, counsel for the Respondent did not challenge the fact that Dr. Uzoaba received a number of anonymous telephone calls, nor did he dispute that the calls were racially derogatory in nature.

Counsel took issue, however, with Dr. Uzoaba's estimate of the frequency of the calls, pointing to Dr. Uzoaba's testimony that he generally received between 2 and 3 calls per day, typically every other day, when the recorder was not in place. He also pointed to Dr. Uzoaba's testimony that the recorder was in his office during most of the period from January to March 17, 1980. By counsel's estimate, it was more likely that the actual number of calls was between 20 and 30.

Counsel for the Respondent also challenges the bona fides of Dr. Uzoaba's stated belief that CSC management was involved in the calls, pointing to Dr. Uzoaba's memo of June 9, 1980, where he stated his belief that it was the Inmate Committee that was behind the calls. In counsel's submission, nothing happened after June 9, 1980 that would reasonably have given Dr. Uzoaba grounds to change his mind. Indeed, counsel relies on Dr. Uzoaba's statement in this memo to challenge Dr. Uzoaba's evidence regarding the on-again/off-again nature of the calls timed to coincide with the removal of the tape recorder. In counsel's submission, if this had really occurred, Dr. Uzoaba would have had grounds to suspect management's complicity in June of 1980 and would, presumably, have so stated in his memo of June 9th.

There is no dispute, however, on the evidence, that in the first three months of 1980, Dr. Uzoaba did receive a significant number of anonymous telephone calls of a racially derogatory nature. The Tribunal accepts the Respondent's contention that the estimate of 80 to 120 telephone calls may be somewhat of an overstatement, given Dr. Uzoaba's testimony regarding the movement of the tape recorder, and his estimate of the number of calls received on a daily basis when the recorder was not in place. The precise number of calls is, however, somewhat beside the point.

By counsel's own estimate, Dr. Uzoaba would have received between 20 and 30 calls during this time - a quite intolerable situation.

The circumstances surrounding the calls, their frequency and, in particular, the allegation that the calls would resume whenever the tape recorder was removed, certainly suggest that management may possibly have had some involvement in this matter. The Tribunal is concerned, however, by Dr. Uzoaba's failure to allude to these concerns in his memo of June 9, 1980. Further the Tribunal accepts that inmate cleaners did have access to Classification Officers' offices, and would, therefore, have potentially been able to track the movement of the tape recorder. The Tribunal accepts the evidence of the Respondents' witnesses on the issue of inmate access to telephones, and finds that it was indeed possible that inmates could have had sufficient access to telephones within the institution to have made the calls. For these reasons, the Tribunal cannot, therefore, conclude that CSC management had any direct involvement in the making of the telephone calls.

The question remains, however, as to what, if any, responsibility there is on an employer such as CSC where an employee is receiving racially harassing telephone calls in the workplace, not from co-

workers, but from inmates. There is also an issue as to the adequacy of CSC's response in this case. These issues will be dealt with in Parts V and VI of this decision.

c) Inmate Assault:

Dr. Uzoaba complains that he was assaulted by an inmate on March 14, 1980. He alleges that this assault took place with the consent of management. Dr. Uzoaba further complains that on the following working day, March 17, 1980, he was removed from CBI under the guise of protecting him.

Dr. Uzoaba testified that on Friday, March 14, 1980 he met with inmate R.L., who was seeking Dr. Uzoaba's assistance in placing a long distance telephone call. Dr. Uzoaba placed the call to a number in Alberta, and was advised that the party R.L. wished to speak with was no longer at that number. Dr. Uzoaba then tried another number at R.L.'s request, again without success. This process repeated itself several times. Eventually, another inmate arrived for his appointment with Dr. Uzoaba. Accordingly, Dr. Uzoaba advised R.L. that they would have to try to place the call another day.

R.L. stood up, picked up an ashtray off Dr. Uzoaba's desk, and poured the contents over Dr. Uzoaba's head. R.L. then grabbed Dr. Uzoaba, pushed him to the wall, and then, to use Dr. Uzoaba's words, "seriously hammered [him]". (Transcript, Vol. 2, p.251)

During the altercation, another CSC employee entered the room and removed R.L.

According to Dr. Uzoaba, he was physically and psychologically distraught, and left the institution. He returned to work the following Monday, and was asked to go up and meet with Mr. Stebbins.

According to Dr. Uzoaba, Mr. Stebbins told him that, because of the assault, Dr. Uzoaba would not be able to stay at CBI any longer. Mr. Stebbins reportedly said that he had discussed the matter with Mr. Trono, the Regional Director, and that Dr. Uzoaba was being transferred to

Regional Headquarters. Dr. Uzoaba understood this to mean a permanent transfer.

Dr. Uzoaba then reported to Regional Headquarters, where he subsequently discovered that there was no job for him to do - he was "simply shovelling papers". (Transcript, Vol. 2, p.255)

On April 9, 1980, Dr. Uzoaba was asked to meet with Mr. Trono, Mr. Brian Yealland, the Manager of Offender Programs, Mr. Patrick Quinn, another employee at Regional Headquarters, and Mr. Stebbins.

According to Dr. Uzoaba, Mr. Trono opened the meeting by telling Dr. Uzoaba that he was to return to CBI by April 14th. Dr. Uzoaba testified that he was astounded by this, as it was, in Dr. Uzoaba's view, a well established principle in criminology that if an officer has been threatened in one institution, that officer should not be returned to that institution unless the threat is of a specific and temporary origin. Dr. Uzoaba did not accept Mr. Trono's suggestion that there had been a sufficient "cooling off" period and that it was now appropriate for him to return to CBI.

According to Dr. Uzoaba, he argued forcefully that he should not be required to return to the institution. Mr. Trono evidently explained that there were no positions available for Dr. Uzoaba at Regional Headquarters. Dr. Uzoaba testified that this was the first indication that he had that his relocation from CBI was not permanent. Mr. Trono evidently asked Dr. Uzoaba to write him a letter to assist Mr. Trono in finding Dr. Uzoaba a job that did not involve working with inmates, as Mr. Trono perceived that Dr. Uzoaba had difficulty with inmate work. On April 10, 1980, Dr. Uzoaba wrote the following letter to Mr. Trono:

Dear Mr. Trono:

I am writing this letter to you in order to solicit your help in finding me another job in other departments of the government. As you are probably aware, since I came to Collins Bay Institution as a Classification Officer in November 1978, I have had to put up with an unbearable amount of racial prejudices and insults from the inmates almost on a daily basis. The recent incident of March 14, 1980 in which an inmate came to my office and assaulted me is only the beginning of organized violence aimed at my person, I was told. An investigation into this incident by the Acting Warden, Mr. L. Stebbins, clearly indicates that it is "only a tip of the

ice-berg," to use his exact words. It is now crystal clear to me and to all concerned, I presume, that my life is far from being safe in this institution. I find my situation very depressing.

I am currently employed at WP-3 level and would like to get a position in the same group and level. On the other hand, I am keenly interested in jobs in other groups such as SI, AS, PM, etc. In fact, I am prepared to accept any job at my present level from any department just to get out of this inferno. I do not enjoy the peace of mind and job satisfaction which people usually find in their jobs.

I hold a B.A. (Hons) in Economics and MA in Correctional Administration. I shall greatly appreciate any effort on your part to help me find a job in the Ottawa area. For reasons of family consideration, I would prefer a job located in the Ottawa-Hull area.

I would humbly pray you to regard this request as a matter of life and death. Being situated in Kingston and working five days a week, I have virtually no time of my own to make contacts for a job.

Thanking you in anticipation, I remain,

Yours sincerely,
Julius F. Uzoaba.

Dr. Uzoaba met again with Mr. Trono on April 11th, and repeated his concerns regarding his return to CBI. Mr. Trono evidently agreed not to send Dr. Uzoaba back to CBI, and Dr. Uzoaba was subsequently assigned to Frontenac Institution, a minimum security institution adjacent

to CBI. He was to be involved in the accreditation of CBI, which assignment did not require inmate contact.

The evidence has established that R.L. was subsequently sentenced to 25 days punitive dissociation. According to Dr. Uzoaba, this sentence was "a joke". (Transcript, Vol. 3, p.592) Such an offence, in Dr. Uzoaba's estimation, would normally merit the offender being transferred to Millhaven, a maximum security institution.

Dr. Uzoaba testified that he did not originally suspect that CBI management was involved in the assault, but, according to his testimony, "subsequent events left no room for doubt". (Transcript, Vol. 3, p.597) As to identifying the subsequent events, Dr. Uzoaba pointed to his own removal from CBI and the temporary nature of his new assignment, as well as to other matters (specifically the petition and the "agreement" of July 10, 1980, both of which will be dealt with in greater detail further on in this decision). In terms of who in management Dr. Uzoaba believed to

be involved in the assault, Dr. Uzoaba identified Mr. Stebbins as the "prime mover".

Mr. Stebbins also testified with respect to this issue.

According to Mr. Stebbins, during the month of March, 1980, Mr. Markowski advised him that complaints had been received relating to Dr. Uzoaba. Mr. Stebbins stated that, prior to March 14, 1980, T.F., the Chairman of the Inmate Committee had, on several occasions, brought inmate concerns regarding Dr. Uzoaba to Mr. Markowski's attention. These concerns included the perception that Dr. Uzoaba did not appear to care about the inmates on his case load and that he was insensitive to their needs. Mr. Stebbins was of the view that racism was one of several factors behind the discontent regarding Dr. Uzoaba.

Mr. Markowski confirmed having received these complaints from T.F. There is no suggestion that these complaints were communicated to Dr. Uzoaba while he was still at CBI.

In considering the role of the Inmate Committee in this matter, it is important to understand the role of motorcycle gang members or "Bikers" within CBI. According to Mr. Stebbins, in 1980, the institution contained the National President of the Satan's Choice, the Local President of the Vagabonds, and other members of various motorcycle gangs. There were approximately 27 Bikers out of a prison population of

400. According to Mr. Stebbins, the Bikers controlled the rest of the inmate population by intimidation. Mr. Stebbins testified that Bikers were known to be racist, and that they did not like blacks or members of other ethnic groups. T.F., the Chairman of the Inmate Committee, was himself a Biker, being a member of the Vagabond motorcycle organization. T.F. and Mr. Stebbins had had discussions regarding T.F.'s views on racial matters during which T.F. had clearly stated his own racist views.

Mr. Stebbins was the eleventh of twelve witnesses called by the Respondent, most of whom worked in the Kingston area, within CSC. Mr. Stebbins was the only one of the Respondent's witnesses to mention the pervasive influence that a group known to be racist had within CBI. While not all of the Respondent's witnesses would necessarily have been aware of this fact, as indeed Dr. Uzoaba was not aware of it prior to Mr. Stebbins' testimony, Mr. Stebbins himself confirmed that certain of the Respondent's witnesses, specifically Mr. Markowski (Transcript, Vol. 12, p.2725), and Mr. Trono (Transcript, Vol. 13, p.2799) would certainly have been aware of this. It is surprising, therefore, that no mention of this issue was made when these individuals were asked detailed questions regarding possible racism within CBI, as well as with respect to the activities of the Inmate Committee.

Mr. Stebbins testified that on March 13, 1980, he was approached by T.F. T.F. evidently advised Mr. Stebbins that there might be a problem in the "back end" of the institution, that is, the area where the inmates lived. T.F. advised Mr. Stebbins that the inmates were discussing "putting a contract out on Dr. Uzoaba". (Transcript, Vol. 11, p.2573)

According to Mr. Stebbins, it was unusual for T.F. to provide him with information of this nature, as it was contrary to the inmate "code" for him to do so. Mr. Stebbins testified that this was the only time during his lengthy career with CSC that he was advised that a contract had been taken out on an employee.

Mr. Stebbins stated that he understood the term "contract", in the prison context, to mean that someone might try to assault Dr. Uzoaba.

Mr. Stebbins testified that he telephoned Mr. Trono, and brought the matter to his attention. The following morning, Mr. Stebbins discussed the issue with the Assistant Warden of Security, Mr. Don Patterson. Mr. Stebbins did not tell Dr. Uzoaba of the threat that had been made against him. According to Mr. Stebbins, the normal practice

would be to go through the chain of command, which would have involved him telling Mr. Markowski of the threat, who in turn would have been responsible for advising Dr. Uzoaba. Mr. Markowski was not, however, in the institution on March 14th. Mr. Stebbins knew that Mr. Markowski was away, and this would result in a delay in Dr. Uzoaba being informed, but took no steps to advise him directly.

Mr. Stebbins testified that he assumed that the assault which occurred on March 14th was very likely the "contract" that T.F. had referred to on the previous day. Mr. Stebbins stated that, after becoming aware of the assault, he contacted Mr. Trono, who suggested that Dr. Uzoaba report to Regional Headquarters for his own safety. Mr. Stebbins met with Dr. Uzoaba on the Monday following the assault, and advised him accordingly. According to Mr. Stebbins, Dr. Uzoaba thanked him for having made the arrangements.

Mr. Stebbins stated that approximately three weeks after Dr. Uzoaba left the institution, Mr. Trono advised him that Dr. Uzoaba was going to return to CBI. Mr. Stebbins did not recall specifically what he said to Mr. Trono, but indicated that he probably would have said, "You make the decisions, but this might not be a good idea." (Transcript, Vol. 13, p.2777)

While Mr. Stebbins did not specifically recall a meeting on April 9, 1980, he did recall being present at a meeting in Mr. Trono's office at which Mr. Quinn, Mr. Trono and Dr. Uzoaba were also present.

According to Mr. Stebbins, Mr. Trono was considering returning Dr. Uzoaba back to CBI. Mr. Stebbins testified that Dr. Uzoaba clearly did not want to return to CBI, and, in fact, threatened Mr. Trono with legal action if he was returned to what he perceived to be a dangerous work situation.

Mr. Stebbins confirmed that, as Acting Warden at CBI, he presided over the disciplinary hearing where R.L. was sentenced to 25 days punitive dissociation. Mr. Stebbins explained that, in addition to being required to serve the time in segregation, having been convicted of an offence of this nature, no Case Management Officer would recommend R.L. for temporary absences, transfer to reduced security, or privileges. In addition, the conviction would affect his eligibility for parole. In Mr. Stebbins' words, "this would set him back years." (Transcript, Vol. 12, p.2753)

Mr. Stebbins disagrees with Dr. Uzoaba's suggestion that R.L. should automatically have been transferred to Millhaven. By way of an example, Mr. Stebbins testified that a couple of years prior to the assault on Dr. Uzoaba, an inmate murdered two staff members at CBI. That inmate

was segregated at CBI, but remained at that institution for a lengthy period of time following the murders.

Mr. Trono testified that he was advised of the assault by Mr. Stebbins. According to Mr. Trono, Mr. Stebbins told him that this was just the start, and that if Dr. Uzoaba was to remain at CBI, and to continue operating in the manner that he had been, that serious harm or perhaps death would occur. As a result, he removed Dr. Uzoaba from the institution, transferring him to Regional Headquarters as a "stop-gap" measure.

Mr. Trono testified that it was his understanding that while there may have been an element of racism involved in the inmates' views regarding Dr. Uzoaba, they resulted primarily from Dr. Uzoaba's intolerance, his arrogance and his absolute inability to relate to them. While Mr. Trono recalls meeting with Dr. Uzoaba on a number of occasions following the assault, he does not recall suggesting to Dr. Uzoaba that he returned to CBI, although he acknowledged that he might have done so.

Mr. Trono testified that, in his opinion, where an acting warden knows that there is growing inmate resentment directed towards a CSC employee, and that a contract is out on that employee, the employee should have been warned, for his own protection.

Mr. Trono does not specifically recall receiving Dr. Uzoaba's letter of April 10, 1980, but acknowledges that he must have received it. With respect to the allegations of racism made by Dr. Uzoaba in his letter, Mr. Trono testified as follows:

Q. You will see there that he talks about ... that since he came to Collins Bay in November 1978, he has had to put up with an unbearable amount of racial prejudice and insults from the inmates almost on a daily basis. Now, I think we have already established that racism by the inmates is, perhaps, understandable. We know that it exists. Wouldn't you agree with me that the staff should not have to put up with racism and racial threats by inmates?

A. I certainly would.

Q. You would?

A. I would agree, yes. Sure.

Q. So, he is telling you here that he has had to put up with that since 1978. Then he talks about the incident of the assault and that it is only the beginning of organized violence aimed against his person. He was told by Mr. Stebbins that it was only the tip of the iceberg, and he goes on to say that his life is far from safe in the

institution. So, at least, on April 10th, sir, you knew about the allegations of racism that Dr. Uzoaba was making?

A. Yes.

Q. Is that fair to say?

A. Yes.

Q. Now, let me ask you: Did you do any investigation about that?

A. The only investigation that I had anything to do with was through the Warden at Collins Bay. How do you investigate that with a group of inmates?

Q. I am sorry?

A. I say, I don't know how you investigate that with a group of inmates. I don't know how ...
(Transcript, Vol. 8, pp.1778-1779)
Further on, Mr. Trono stated:

Q. ... at least on April 10, 1980, you knew about his ... at that point, at least, you knew about his allegations ...

A. That's right.

Q. ... that he was being subjected to racial harassment by the inmates.

A. Yes, I guess so.

Q. Fair enough?

A. Yes.

Q. And you would agree with me that you didn't pursue an investigation of that.

A. I didn't pursue it, no.

Q. Then he goes on and explains that he is employed at the WP-3 level and that he would like to get a position in the

same group and level, but he ... that he would like to get another job where he does not work with the inmates. Now let me ask you this: Did you do anything? Did you get in touch with Mr. Weck, [the CSC Regional Staffing Officer] for instance, or anyone else, to try to find him a permanent position ... a permanent transfer ... out of the institutional setting?

A. No.

Q. You did not?

A. Not that I recall. (Transcript, Vol. 8, pp.1781 - 82)

Mr. Trono subsequently testified that the Warden at the institution in question or the Director of the Parole Office would ordinarily investigate the threats made against employees. Mr.Stebbins testified that he reported the existence of the contract to the Assistant Warden, Security. There is no evidence before the Tribunal that any investigation of the matter was ever carried out.

Finally, Mr. Trono confirmed that ordinarily, prior to deciding to send an individual back to an institution where there might be danger, he would meet with the individual, to obtain their input, and to decide whether or not it was appropriate in all of the circumstances. In his evidence, Mr. Trono testified:

Q. ... I take it, sir, that before you would make such a decision to send somebody back into an institution where there might be danger, you would meet with the individual to hear their side of the story and sort of just try to get a sense of whether it was a good idea. Is that fair?

A. That's fair.

Q. I mean, you wouldn't just send somebody back where there was a possibility of danger.

A. I wouldn't think so, no.

Q. You would meet with the person. You would discuss the possibilities, as you said. It would make sense to hear their side of the story, to hear their impressions about what was being contemplated. Isn't that fair?

A. It is fair, sure. (Transcript, Vol. 8, pp.1834-35)

There was no evidence put before the Tribunal that would lead to the conclusion that, in April of 1980, the generalized inmate resentment against Dr. Uzoaba, and the resulting threat to his safety that

existed in CBI in March of 1980, had abated, or had otherwise been dealt with. It is, therefore, reasonable to conclude on all of the evidence before the Tribunal that Dr. Uzoaba would have continued to be in danger, had he been returned to the institution.

There is clearly no evidence before this Tribunal on which to base a finding that CSC management played an active role in the assault on Dr. Uzoaba. It is certainly regrettable that neither Mr. Stebbins nor Mr. Markowski told Dr. Uzoaba about the growing inmate resentment within CBI in early 1980. In particular, it is most unfortunate that Mr. Stebbins did not make the necessary effort to ensure that Dr. Uzoaba was made aware of the contract on him in a timely fashion. While many of the Respondent's witnesses testified that threats were made against Correctional Services employees with some regularity, by Mr. Stebbins' own admission, a report of the existence of a contract of this nature was an exceptional event.

However, given that the information only came to Mr. Stebbins' attention less than 24 hours before the assault, the Tribunal is not prepared to find that, in failing to tell Dr. Uzoaba of the contract in a timely fashion, CSC management either condoned or tacitly approved the assault.

It is, on all the evidence, a reasonable inference that the assault by R.L. on March 14th was the execution of the contract referred to by Mr. Stebbins. The assault occurred less than 24 hours after Mr. Stebbins was alerted to its existence. While assaults on CSC employees did occur from time to time, there was no suggestion that they occurred with such regularity as to render it likely that the proximity in time of the two events was merely coincidental.

As to the motivation for the assault, the Tribunal is satisfied that the assault was the physical manifestation of the inmate resentment against Dr. Uzoaba that had been building within CBI for some time. The Tribunal finds that there were a number of reasons for that resentment, some of which related to the perception that Dr. Uzoaba was arrogant and insensitive to the needs of the men on his case load. The Tribunal recognizes that Dr. Uzoaba is both angry and frustrated by the events which occurred at CBI, and that this anger and frustration undoubtedly contributed to Dr. Uzoaba's demeanour while testifying.

However, having had the opportunity to observe Dr. Uzoaba on the witness stand for several days, the Tribunal is satisfied that there was some basis for the inmates' perception in this regard. The Tribunal is, however, also satisfied that one of the proximate causes of this resentment related to Dr. Uzoaba's race or colour. The Tribunal finds that the assault was also probably motivated, in part, by considerations of race and colour.

In the view of the Tribunal, it was entirely reasonable and proper for CSC to remove Dr. Uzoaba from CBI following the assault and to assign him to Regional Headquarters. While there may have been some misunderstanding between Dr. Uzoaba and Mr. Stebbins as to the nature of his assignment to Regional Headquarters, the Tribunal finds that this was a reasonable method of dealing with a situation that had suddenly become

acute. This step was taken honestly, and with the bona fide intention of protecting Dr. Uzoaba.

Having quite properly removed Dr. Uzoaba from CBI, the next issue relates to the efforts made to return Dr. Uzoaba to that institution. In this regard, the Tribunal has no hesitation in accepting Dr. Uzoaba's evidence that he was told by Mr. Trono that he was to return to CBI in the near future. The Tribunal finds that Dr. Uzoaba was not consulted with respect to this decision, and that no effort was made to ascertain his views prior to the decision having been made to return him to CBI. In this regard, the Tribunal relies, in particular, on Mr. Stebbins' testimony that Mr. Trono had informed him that Dr. Uzoaba would be returning to CBI. This statement appears to have been made prior to Dr. Uzoaba's meeting with Mr. Trono of April 9, 1980.

Apart from any legal obligations which may be imposed on an employer in a situation such as this, it is necessary to consider the ordinary correctional practice regarding returning an employee to an institution following an assault. In this regard, the Tribunal accepts the evidence of the Respondent's witness, Kenneth Payne, as a fair summary of the normal practice.

Mr. Payne testified as follows:

Q. Let me ask you this in general terms: If an employee is removed after being assaulted by an inmate, would that employee normally be sent back to the same institution or how would that be handled?

A. The reasons he is pausing (sic) is that that is a problem. That is one of the most difficult ones that we have to deal with as an organization. I will try to summarize it as best I can.

Q. Sure. Please.

A. I can't give you a definitive "yes" or "no" on that one and that is the opening comment. It depends on the gravity of the situation. It depends on the position that the incumbent is in. It depends on the type of physical assault.

I am dealing with cases as of today where we are actually removing an officer who was badly beaten a year ago from our facility to another facility. We have cases where people have been taken hostage and we have reintegrated them right back into the workforce the next day.

So a lot of it is really driven by, I guess, the strength, the attitude of the staff member at the receiving end of the threat.

If the person is strong enough that they can go to work in that environment, we encourage them as best as we can to stay working in that environment because if you ultimately keep moving a person to get them away from the source of the problem, in my experience -- and I will use the jargon of the jail -- I think you create some type of personal problem. You have a guy who simply cannot get back on the horse or the bike.

There is enough documentation there with police forces and law enforcement agencies that you peer group counsel people and we do a lot of that now. You try to get the person back to work the

next day because the longer you drag it, the worse it gets.

Q. So it is fair to say that approaches to this kind of problem have been developing over the years within the institution.

A. That's right.

Q. But I take it, though, the decision whether or not to send somebody back would be a decision that would be made jointly with the management of the institution and the individual who had suffered the assault.

A. I would like to think that that is the way it should be done, yes, again, depending on all of those other environmental factors that I have talked about.

Q. Sure, but the individual who was assaulted should at least be, one would think, contacted and have some input as to how his replacement would be dealt with.

A. That sounds reasonable.
(Transcript, Vol.7, pp.1675 - 1678)

Mr. Trono himself conceded that normal practice within CSC would be to consult with the employee in question.

As noted, the Tribunal is satisfied that in this case, no efforts were made by Mr. Trono to obtain Dr. Uzoaba's input prior to the decision being made to return Dr. Uzoaba to CBI. There is no reason to believe that Mr. Trono's failure to consult with Dr. Uzoaba regarding the advisability of his return to CBI resulted from Dr. Uzoaba's race, colour or ethnic background. However, Mr. Trono's failure to do so, under all of the circumstances, is yet another example of the insensitivity which has characterized CSC's handling of this matter throughout.

The final point to be dealt with relates to the sufficiency of the penalty imposed on R.L. for the assault on Dr. Uzoaba. Dr. Uzoaba is clearly of the view that the penalty was significantly lighter than that which would ordinarily have been imposed for an assault such as this. Dr. Uzoaba appears to be suggesting that this is further evidence of CSC management's failure to treat the assault on him with sufficient seriousness. The Tribunal was not provided with any evidence as to penalties imposed on other inmates for similar acts, and accordingly cannot make any finding as to the appropriateness of the penalty in this case.

d) The Petition:

Dr. Uzoaba complains that a petition against his return to CBI was placed on his file, without an investigation or hearing. Dr. Uzoaba alleges that CSC management was involved in the preparation of the petition. Dr. Uzoaba further complains that he was forced into a written agreement not to work with inmates in an institutional setting as the price of having the petition removed from his personnel file.

According to Dr. Uzoaba, on June 6, 1980, while he was working at the Frontenac Institution, he received a memo from Mr. Trono.

The memo, which was dated June 2, 1980, reads:

Petition by Inmates:

i) Attached is a self explanatory petition presented to the administration at the CBI.

ii) Although it is understood you have already received a copy directly from the inmate population, this is forwarded to ensure you are aware of their petition.

iii) A copy is also being forwarded to the Regional Manager, Personnel for placement on your personnel file. (Exhibit HR-2, Tab 5)

The memorandum was copied to the Regional Manager, Personnel.

Despite the wording of Mr. Trono's memo, Dr. Uzoaba denies having previously received a copy of the petition.

Attached to the memorandum was a copy of the petition referred to, which petition was signed by 247 inmates. The petition states:

> We the undersigned would like to bring to the attention of this administration the concern that we have over Mr. Uzoaba coming back to Collins Bay. He is not the type of person that anyone can sit and understand. He also has more personal problems than anyone who goes on his case load. For this reason, and others, we are afraid that there will be trouble for him in this institution with the men on his case load. (Exhibit HR-2, Tab 6)

According to Dr. Uzoaba, he had never met most of the signatories to the petition.

Dr. Uzoaba testified that the petition did not make sense to him as, as far as he was aware, there was no consideration being given, in June of 1980, to his return to CBI. Dr. Uzoaba described his reaction to the petition as follows:

> It humiliated me. It portrayed me as someone who should be shunned; someone in whose company nobody should, in fact, be in. It attacked my reputation. It attacked my integrity. It attacked my honour, and it breached a certain section of the Human Rights Code. I saw it as a hate message. (Transcript, Vol. 2, pp.278)

By placing the petition on his personnel file, Dr. Uzoaba felt that Mr. Trono was adopting the attitudes of the inmates.

Dr. Uzoaba testified that he was not aware of any other petition having been circulated within CSC institutions during his employment with the Correction Services.

In Dr. Uzoaba's view, CBI inmates could not have put this kind of a petition together without assistance. He therefore concluded that the administration at CBI must have had a hand in it. He conceded, however, in cross-examination, that CBI inmates could have had access to both typewriters and photocopiers.

Dr. Uzoaba testified that he felt that the placing of the petition on his personnel file was being done to punish him. He stated that he was given no opportunity to respond to the petition prior to it actually being placed on his file. Accordingly, on June 9, 1980, Dr. Uzoaba wrote Mr. Trono, stating, in part:

... I am stunned by your decision to put this tortious paper on my file and

wonder what your reasons or motives are in doing this! Is the petition a part of my performance appraisal, and if it is, is it my popularity or my substantive performance that is being appraised?

I would challenge anyone to point to any part of my job that I did not discharge well. It has always been easy for people to use my accent as a whipping boy to mask their true feelings. Written evidence of this does exist at CBI in the case of at least two inmates who confessed openly that they thought using my accent would make a more impact for their request because they did not like me. Is the petition a kind of disciplinary action? And if so, what is the specific offence with which I am charged? And have I been given a hearing? ...

... As I stated in my letter of April 10, it is my consuming desire to leave your institutional setting as soon as it is possible. I see no future in institutional work. My family and I deserve a peace of mind. I have nothing to gain by remaining longer than is necessary. Nearly three months after leaving CBI, I am still being saddled with the affairs of that inferno, and treachery and conspiracy continue to rear their ugly heads against me. I request that this defamatory material be removed from my file if it is already placed there. ...

... If a copy of this petition is to be placed on my personnel file, the principles of natural justice demand and the rules and regulations that govern employment in the Public Service in Canada require that I be given a fair and impartial hearing before an impartial tribunal where I can present my own side of the case to determine the justification of placing this material on my file. ... (Exhibit HR-2, Tab 7)

On July 4th, Mr. Trono responded stating, inter alia:

... The document, in my opinion, reflects the position of the inmates who were signators of the petition. The placement of the paper on your personal file does not indicate that the CSC agrees with the assessment levied by the inmates. The document does indicate, however, that for whatever reasons, the inmates at Collins Bay Institution were not able to accept you as a classification officer. ...

... The petition, in my view, demonstrates the inadvisability of your returning to Collins Bay Institution - this from the point of view of your own safety and from the point of view of the inmates who indicate that they cannot relate to you. I therefore believe that it is an appropriate document to have placed on your file. ...

... I think we both agree that you would be more comfortable in employment that does not involve direct contact with inmates. I would therefore support you making an application for such a position within CSC. As no vacancy presently exists at this RHQ I would suggest that you also consider employment opportunities outside the CSC. ... (Exhibit HR-2, Tab 8)

Mr. Trono went on to offer to meet with Dr. Uzoaba to discuss his future with CSC.

Dr. Uzoaba met with Mr. Trono on July 10, 1980. Also present at that meeting was Brian Yealland, the Manager of Offender Programs at Regional Headquarters. Mr. Yealland was not called as a witness in these proceedings.

According to Dr. Uzoaba, at the July 10th meeting, Mr. Trono told him in no uncertain terms that he would not remove the petition unless an agreement was struck between them. Upon being asked what kind of an agreement he was referring to, Mr. Trono reportedly said that, effective immediately, Dr. Uzoaba was no longer to work with inmates. Dr. Uzoaba testified that he initially asked for a hearing to determine the appropriateness of the petition being placed on his file. He ultimately agreed, however, to entering into an agreement of the nature contemplated by Mr. Trono as a means of having the petition removed from his file.

The document signed on July 10th, which is in the form of a memo to file, reads as follows:

1. This is to explain and document the circumstances of Julius Uzoaba's

reassignment from Collins Bay Institution to RHQ and the circumstances of his present assignment in accreditation.

2. In March 1980, Julius Uzoaba was reassigned from Collins Bay Institution to RHQ on a secondment basis, using a Collins Bay person/year because of the possible threat to his personal safety which resulted from the strength of negative feelings toward him by certain inmates of Collins Bay Institution. This reassignment continues because it is believed by the undersigned that to place Julius in an institution at this or any future time, in a position where he would be in close contact with and responsible for the case work of inmates would be inappropriate and irresponsible.

3. In the present assignment on accreditation, the undersigned are all very pleased with the assignment and the work which Julius is doing.

4. Presently, efforts are being made to work with Julius in finding alternate suitable employment in corrections or a related field, for which his skills would be most suited.

Signed: Julius Uzoaba, A.M. Trono and Brian Yealland (Exhibit HR-2, Tab 9)

Dr. Uzoaba testified that there were no WP-3 jobs within CSC that did not require inmate contact. He stated that sometime after July 10th, he realized that the effect of this agreement was to shut him out of future employment with CSC. He did, however, continue to be employed on the accreditation project at Frontenac Institution following the execution of the agreement.

Mr. Trono testified that Mr. Stebbins had provided him with a copy of the petition. According to Mr. Trono, he had never seen a petition like this before. Mr. Trono explained that he had placed the petition on Dr. Uzoaba's personnel file:

I think because I regarded it as a very ... as something very tangible with respect to the way Dr. Uzoaba or Mr. Uzoaba was being perceived by the inmates. The conversations that had been taking place with respect to Mr.

Uzoaba coming out of the institution had been met on a large part with some resistance and I think it was our intention at the time to say, 'If we have to insist that you come out of the institution, this would be evidence to help us with this.' (Transcript, Vol. 8, pp.1719-20)

According to Mr. Trono, he did not consider racism as being a factor behind the petition. Rather, he viewed the petition as an indication of Dr. Uzoaba's inability to relate to inmates. Similarly, he viewed the telephone calls and the assault as further indications of Dr. Uzoaba's difficulties in relating to the inmates. Mr. Trono was not, in fact, prepared to consider that Dr. Uzoaba's race played a role in any of the difficulties he encountered at CBI. The following evidence summarizes Mr. Trono's view of Dr. Uzoaba's situation:

Q. I take it, sir, that through all of this, through all of your thoughts that Dr. Uzoaba was responsible, essentially, in a sense, was the author of his own misfortune because he was arrogant and had difficulties communicating, through all of this, you never considered the issue of race.

A. No, I didn't think it was a racial thing. We had a number of people of other races working in the system in similar jobs to Mr. Uzoaba at around

about the same time and we had no trouble with those people of that type.

Q. And you would agree with me that even after it had been brought to your attention that he had been subjected to racial harassment over the years, you still didn't consider that as a factor.

A. To my recollection of this, the only person who said it was a racial thing was Dr. Uzoaba and there was one instance at Warkworth where a lady had said that she had been told by inmates that such and such had occurred.

Again, I come back, I didn't consider it then a racial thing and I don't now personally.

Q. Mr. Stebbins told you about the harassing phone calls.

A. Yes.

Q. Correct?

A. He told me there were phone calls to Mr. Uzoaba's office from inside, yes.

Q. And they were of a racially-harassing nature.

A. I don't think those were motivated by race. I think those were calls by inmates who didn't like the way Mr. Uzoaba was dealing with them and they may have made racial remarks because of it. But the motivating factor wasn't, in my view, then and now, that Mr. Uzoaba was black because we had several --

Q. You never did an investigation, sir. So you don't know whether they were racially motivated.

A. I didn't do an investigation, no. Mr. Stebbins was on the scene and it was the impression of everybody at the institution, senior staff at the institution, that this was not a racially-motivated thing.

Q. We heard Mr. Payne testify yesterday, sir, about the incident of Dr. Uzoaba not being able to bring his car in and he was quite certain from the information he had received that it was a racially-motivated threat.

A. I guess he had his opinion and I have mine.

(Transcript, Vol 8, pp.1857 - 1860)

Mr. Trono testified that the placement of the petition on Dr. Uzoaba's file was not intended as a disciplinary measure, although he acknowledged that he might have been able to rely upon the petition in proceedings to release Dr. Uzoaba for incapacity under s.31 of the Public Service Employment Act ("PSEA"). While acknowledging that this possibility existed, he denied that any consideration was given at this time to proceeding in this fashion.

With respect to the July 10th meeting, Mr. Trono states that the purpose of the meeting was to discuss Dr. Uzoaba's situation, and to

obtain some type of written documentation acknowledging that Dr. Uzoaba was not suited to be a Case Management Officer and to work closely with inmates. He felt that with an agreement of this nature signed, he would then be able to remove the petition from Dr. Uzoaba's file.

Mr. Trono explained that he needed to keep the petition on file in case he had to force Dr. Uzoaba out of the institution. In such a case, he would have been able to use the petition to "back him up". With

the signing of the July 10th agreement, this ammunition was no longer required.

Mr. Trono denied that the July 10th agreement was a move to try to force Dr. Uzoaba out of CSC. When he was asked where he would place Dr. Uzoaba if he could not work within institutions, Mr. Trono testified:

... from time to time positions came up. Man years became available for different things and we would have probably kept him at the Regional Headquarters for a period of time.

Q. I take it from what you have just said that you thought you could find a position for him somewhere.

A. Usually over a period of time, if you have enough time, you can find something. If it is not in our region, maybe in another one.

(Transcript, Vol. 8, pp.1724-5)

Mr. Trono subsequently confirmed that there were positions within CSC that would not have required Dr. Uzoaba to work with inmates. (Transcript, Vol. 8, p.1810)

Mr. Trono stated that he was not aware of any steps being taken at this time to identify a permanent position for Dr. Uzoaba within CSC. He stated that as far as he could see, CSC would be able to keep him employed in Regional Headquarters or the surrounding area.

Mr. Stebbins confirmed that he was aware of the petition, although he could not recall whether the petition was delivered to him, the Warden of CBI, or directly to Mr. Trono. Mr. Stebbins' assumption was that the Inmate Committee was behind the petition, as that Committee had prepared petitions in the past.

Mr. Markowski testified that he was aware of the petition.

He recalled T.F., the Chairman of the Inmate Committee, advising him that the prison population had, or were going to, organize a petition against Dr. Uzoaba, because they had heard that he might be returning to CBI.

In Mr. Markowski's view, prison staff would have had to have been aware that the petition was being circulated. According to Mr. Markowski, a petition was a relatively acceptable way for the inmate population to express themselves, and that it would not be appropriate to try to stop them.

Mr. Markowski testified that if he were to become aware of a petition such as this now, he would be more "pro-active". He stated that

he would now investigate the circumstances surrounding the petition to try and determine what was behind it, and whether there was any ulterior motivation for the petition.

Conrad Weck also testified for the Respondent. Mr. Weck was the Regional Chief of Staffing in the Kingston Region from 1975 until February of 1992.

Mr. Weck was asked when documents would be placed on employees personnel files:

> Well, a personnel file is a record of an employee's behaviour in the workplace. Any document ... any information that management considers to be relevant to the employee's behaviour, abilities, or what have you, can be placed on the personnel file. The current practice is that when that happens, that when the document is placed on a file, the employee must be informed thereof, in writing. If that is not done, any document placed on the personnel file of which the employee is not aware cannot be used in any further proceedings, be it disciplinary, or otherwise.
> (Transcript, Vol. 5, p.1098)

In Mr. Weck's view, it was appropriate to place this petition on Dr. Uzoaba's file as:

> ... It was a petition concerning Dr. Uzoaba's behaviour, or acceptance. It had to go on somebody's file, whose file

should it go on? Dr. Uzoaba's. It would be retained there for future use, if any use were ever to be made of it. (Transcript, Vol. 6, p.1344)

Mr. Weck acknowledged that the placement of a petition of this nature on Dr. Uzoaba's personal file could impact negatively on Dr. Uzoaba's career.

Mr. Weck rejected the idea that the agreement of July 10th would result in Dr. Uzoaba being rendered surplus. Mr. Weck stated that he was confident that alternate employment without inmate contact would be found for Dr. Uzoaba within the Kingston Region of CSC.

The Tribunal is satisfied on the evidence before it that CBI management did not play an active role in the circulation of the petition, although some CBI staff members may have been aware of its existence. The Tribunal is further satisfied that, given the apparent volatility of the environment within a penal institution such as CBI, and given the available alternatives, the circulation and delivery of a petition does, in fact, represent a relatively acceptable way for the inmates to express their views. Given the unique circumstances that exist within penal institutions, the Tribunal cannot conclude that there was an obligation on CSC management to intervene and try to stop the circulation of the petition.

Having considered the history of Dr. Uzoaba's employment at CBI, including the threat to damage his motor vehicle, the racist telephone calls, the contract and the inmate assault, the Tribunal is satisfied that the circulation and delivery of the petition was motivated, at least in part, by considerations of Dr. Uzoaba's race or colour.

In coming to this conclusion, the Tribunal has also considered the apparent involvement of the Inmate Committee in the generation of the petition, the fact that Dr. Uzoaba had never met the vast majority of the signatories to the petition, and the tenor and magnitude of the petition itself.

As previously noted, the Tribunal is satisfied that Dr. Uzoaba did, indeed, have difficulties in relating to some inmates, and that, independent of any considerations of race, some inmates found Dr. Uzoaba to be arrogant and insensitive. Dr. Uzoaba's dogmatism was evident in his adamant refusal, in his testimony before this Tribunal, to accept

any fault whatsoever on his part in his dealings with inmates. No one, as they say, is perfect.

In the context of all of the surrounding circumstances, however, the Tribunal is satisfied that, in addition to the legitimate complaints that the inmates may have had regarding Dr. Uzoaba, Dr. Uzoaba's race and colour were factors motivating the creation of the petition and its delivery to CSC management.

In the Tribunal's view, the response of CSC management to the petition, and, in particular, the response of Mr. Trono, was startling.

While there is no doubt that the existence of the petition was further confirmation of the volatility of the situation at CBI as regarded Dr. Uzoaba, Mr. Trono appears to have accepted the petition at face value as a bona fide reflection of Dr. Uzoaba's job performance.

Mr. Trono's refusal to consider whether racism played a role in the petition was not reasonable under all of the circumstances.

By June 10, 1980, Mr. Trono knew that, while working at CBI, Dr. Uzoaba had been subject to a series of racially harassing telephone calls. He knew that the inmates' resentment of Dr. Uzoaba had resulted in the inmates having purportedly taken a contract out on Dr. Uzoaba, and that, on Mr. Trono's own evidence, there may have been an element of racism involved in the inmates' views. Mr. Trono knew that Dr. Uzoaba had been assaulted by an inmate. He knew that Dr. Uzoaba, at least, perceived that while working at CBI, he had been subjected to repeated acts of persecution by reason of his race.

Despite all of this, however, Mr. Trono was not prepared to consider racism as a factor in Dr. Uzoaba's difficulties. Contrary to all of the evidence (including the evidence of the Respondent's own witness, Mr. Payne), and contrary to all reason, in his testimony before this Tribunal, Mr. Trono was not even prepared to concede that the threat made against Dr. Uzoaba's car was motivated by race.

The Tribunal finds that it was not, therefore, appropriate for Mr. Trono to place the petition on Dr. Uzoaba's file, without first investigating the matter, and determining to what extent the petition was tainted by considerations of race.

Similarly, it was unfair and improper for Mr. Trono to utilize the petition to coerce Dr. Uzoaba into signing the agreement of

July 10th. In this regard, the Tribunal rejects, in its entirety, Mr. Trono's explanation that he needed the petition, or alternately, a written agreement to "back him up" in the event that he had to force Dr. Uzoaba out of CBI. It is clear from the evidence before the Tribunal that Dr. Uzoaba was, in fact, desperate to stay away from CBI. Particular reference is made to Mr. Stebbins' testimony that Dr. Uzoaba threatened Mr. Trono with legal proceedings in the event that Mr. Trono were to attempt to return him to that institution, and to Dr. Uzoaba's written requests to be removed from what he described as an "inferno". Mr. Trono's explanation is simply not credible.

That said, the Tribunal is satisfied that by July 10, 1980, Dr. Uzoaba had no desire to continue working in an institutional setting.

Dr. Uzoaba was questioned at some length as to whether he agreed that it was no longer appropriate for him to work in direct contact with inmates. Suffice it to say that Dr. Uzoaba's evidence on this point was extremely unsatisfactory. The inconsistencies in his evidence are summarized at pages 71 through 76 of the Respondent's Memorandum of Argument. At some points in his testimony, Dr. Uzoaba insisted that he did wish to continue working with inmates, whereas at other points he acknowledged that he no longer wished to have inmate contact.

On all of the evidence, the Tribunal is satisfied that, by the summer of 1980, Dr. Uzoaba had decided that he no longer wished to work directly with inmates. In particular, the Tribunal relies upon Dr. Uzoaba's statement in his memo to Mr. Trono of June 9, 1980, wherein he stated:

"I see no future in institutional work."

The Tribunal does not fault Dr. Uzoaba for coming to this conclusion. Given the unpleasantness of the preceding six months and the evident lack of support he had received from CSC management, this desire to have no further contact with inmates was entirely understandable.

e) Evidence of Marc-Arthur Hyppolite:

At this juncture, the Tribunal would like to make brief reference to the evidence of Marc-Arthur Hyppolite, who was called as a witness by the Respondent.

Mr. Hyppolite is a black man, originally from Haiti. He has been employed by CSC in a variety of positions since 1984. Mr. Hyppolite has worked in a number of institutions within CSC, (not including CBI) and has, over the years, worked closed with inmates. It is evident from Mr. Hyppolite's testimony that he has achieved considerable success in his career within CSC.
The Respondent argues that the testimony of Mr. Hyppolite and his success within the organization confirms the Respondent's position that Dr. Uzoaba's difficulties resulted from problems of competence and personality, as opposed to problems relating to his race or colour.

Without detracting in any way from Mr. Hyppolite personally, or his achievements within CSC, the Tribunal is of the view that the evidence of Mr. Hyppolite is of negligible relevance to this inquiry. The fact that one individual has, at one time, in one environment, been able to achieve a measure of success, does not, in the Tribunal's view, have any relevance to the experiences of another individual, in a different

environment at a different time. In the Tribunal's view, to attribute any weight to the testimony of Mr. Hyppolite would require the Tribunal to make the sort of generalized and stereotypical assumptions about individuals, based upon personal characteristics, which are precisely the sort of assumptions that human rights legislation seeks to eliminate.

f) Withholding of Resumé:

Dr. Uzoaba complains that when he returned from a two year education leave in the fall of 1982, his resumé was withheld from the Public Service Commission ("the PSC") for many months. He alleges that this reduced his employment opportunities, as when his resumé was finally forwarded to the PSC, a staffing freeze was in place, and he was subsequently unable to obtain new employment.

Dr. Uzoaba testified that after signing the agreement on July 10th, he felt that his employment prospects at the WP-3 level within CSC were limited. Accordingly, he decided to upgrade his education in order to improve his career prospects. Dr. Uzoaba sought and obtained an unpaid leave from CSC to pursue a Doctorate in Criminology at the University of Edinburgh. Leave was granted to October 1, 1982.

Dr. Uzoaba was at the University of Edinburgh from October of 1980 to the end of September 1982. He returned to Canada in late October, 1982. Dr. Uzoaba testified that he met with Mr. Weck, the

Regional Chief of Staffing, at the end of October. He had not given Mr. Weck any prior notice of his return date. Dr. Uzoaba testified that in his meeting with Mr. Weck in late October, Mr. Weck requested that Dr. Uzoaba send him a letter confirming his desire to return to work. Dr. Uzoaba delivered such a letter to Mr. Weck on November 12, 1982. On that date, Mr. Weck reportedly advised Dr. Uzoaba that he would forward Dr. Uzoaba's request to the Regional Management Committee. Mr. Weck subsequently wrote to Dr. Uzoaba on November 20th requesting an up to date copy of his curriculum vitae to "facilitate [his] reemployment possibilities". Dr. Uzoaba delivered the curriculum vitae by hand on November 29, 1982.

Dr. Uzoaba next met with Mr. Weck on January 19, 1983. Dr. Uzoaba testified that at that meeting he requested that Mr. Weck forward a copy of his curriculum vitae to the PSC in Ottawa. According to Dr. Uzoaba, Mr. Weck declined to do so, stating that "[He did] not deal with Ottawa." (Transcript, Vol. 2, p.327)

Dr. Uzoaba testified that he continued to meet with Mr. Weck at least once a month to discuss his job prospects. He testified that in around June or July of 1983, he learned that Mr. Weck did, in fact, "deal with Ottawa", and spoke with him about it. Dr. Uzoaba stated that it was at this time that Mr. Weck forwarded his curriculum vitae to the PSC.

Dr. Uzoaba states that the hiring freeze was instituted sometime between October 1984 and sometime in 1985. Accordingly to Dr. Uzoaba, the freeze seriously restricted his reemployment prospects.

Mr. Weck testified that upon receiving Dr. Uzoaba's curriculum vitae, he forwarded it to National Headquarters on December 14, 1982. A memo of that date from Mr. Weck to the Director of Staffing at National Headquarters attaching Dr. Uzoaba's curriculum vitae was filed with the Tribunal. (Exhibit R-17)

Mr. Weck also testified that he also had various telephone discussions with Ms. Ann Gunther, the Priorities Administrator for the Ontario Region of the Public Service Commission. According to Mr. Weck, under cover of a letter dated January 14, 1983, he forwarded Dr. Uzoaba's curriculum vitae to Ms. Gunther, to assist her in finding suitable new employment for Dr. Uzoaba. A copy of Mr. Weck's letter in this regard was also marked as an exhibit in these proceedings (Exhibit R-18).

According to Mr. Weck, it was Ms. Gunther's responsibility to forward Dr. Uzoaba's curriculum vitae to the PSC National Priority

Inventory in Ottawa. Mr. Weck is not certain of when this took place, but believes it occurred in April of 1983. Neither the Commission nor the Respondent called anyone from the PSC to testify in this matter.

Dr. Uzoaba subsequently filed a complaint with the Anti-Discrimination Branch of the Public Service Commission alleging, amongst other things, that his curriculum vitae was deliberately blocked at Regional Headquarters. The Anti-Discrimination Branch found that there had been a four month delay in the forwarding of Dr. Uzoaba's curriculum vitae to the National Office of the Public Service Commission.

There is an issue between the parties as to what Dr. Uzoaba's priority rights were, upon his return from England in late 1982.

This issue will be dealt with further on in the decision. However, in terms of who, as between Mr. Weck's office and the Regional Office of the Public Service Commission, was responsible for forwarding Dr. Uzoaba's curriculum vitae to the National Priorities Registrar of the Public Service Commission, the Tribunal has only Mr. Weck's testimony that he forwarded the curriculum vitae to Ms. Gunther in January of 1983, and that it was her responsibility to ensure that the curriculum vitae was forwarded to Ottawa.

Therefore, on the evidence before the Tribunal, it has not been established that there was an undue delay on the party of CSC management in the forwarding of Dr. Uzoaba's curriculum vitae to the PSC.

The issue of the hiring freeze accordingly does not arise.

g) Dr. Uzoaba's Priority Rights:

Consideration should be given at this juncture to what Dr. Uzoaba's reappointment rights where upon his return from his education leave in October of 1982.

At the time that Dr. Uzoaba's leave was approved, he was advised by Mr. Weck that:

> Employees in leave of absence status enjoy the right to reappointment to a position in the Public Service for which they are qualified in priority to all others. However, there is no guarantee that the employee will return to the position formerly held by him. (Exhibit R-6)

Dr. Uzoaba testified that it was his understanding that he would have priority status with respect to all available positions administered by the PSC for which he was qualified.

In argument, counsel for the Commission pointed to subsection 30(1) of the Public Service Employment Act, which states:

> Where an employee is on a leave of absence and another person has been appointed for an indeterminate period to the position that was occupied by him, the employee is entitled, during his leave of his absence and for a period of one year thereafter, to be appointed, without competition and in priority to all other persons, to another position in the Public Service for which in the opinion of the Commission he is qualified.

Mr. Weck testified that, at the time of Dr. Uzoaba's return in 1982, an employee returning from a leave of absence was only entitled, as of right, to priority status with respect to positions within CSC.

Within CSC, the leave granting region had the first responsibility for reabsorbing the employee. According to Mr. Weck, as of 1982, it was only where the leave granting department was incapable of absorbing the employee, and where a compelling reason existed, which reason was accepted by the PSC, that the employee could be placed on the Public Service Priority Inventory List. It is Mr. Weck's opinion that Dr. Uzoaba had no automatic right to be placed on the Public Service Commission's Priority Status roster in late 1982. Mr. Weck testified that it was only after considerable effort on his part that he was able to persuade Ms. Gunther of the Ontario Region of the PSC to accept Dr. Uzoaba into the priority status inventory.

Mr. Weck explains the apparent contradiction in his testimony before the Tribunal, and his advice to Dr. Uzoaba at the time that leave was granted in 1980 on the basis that, in early 1982, the regulations to the PSEA were amended to modify the reappointment rights of returning employees. Specifically, Mr. Weck referred to subsection 27(2) of the Public Service Employment Regulations which states:

Where an appointment of a person is proposed to be made to the position of an employee who was on leave of absence, the appointment may be made for an indeterminate period, if

(a) the deputy head concerned is satisfied that another position of an appropriate occupational nature and level will be available in the organization under the jurisdiction of the deputy head to which the employee or other person, as the case may be, can be appointed upon the return of the employee from leave of absence; and

(b) the leave of absence of the employee was approved for a period of more than one year.

In the course of Mr. Weck's testimony, the Tribunal asked whether it was the Respondent's position that statutory rights could be modified by regulation, as Mr. Weck appeared to be suggesting. In argument, counsel for the Respondent's position was essentially that, regardless of whether or not the PSC's decision to effect the amendment in issue was legally sound, Mr. Weck was merely implementing a regulatory directive which he had received from the PSC and was not, in any fashion, discriminating against Dr. Uzoaba on the basis of his race, colour, national or ethnic background.

It is evident on a plain reading of the Regulation that the amendment does not affect the rights of the employee on leave but, rather, simply deals with the ability of the leave granting department to staff the employee's position in the interim.

It should be noted that the explanatory notes contained in the regulatory directive relied upon by the Respondent provide that:

The amended section provides all employees on leave with the same opportunity to be reinstated in their position or to be appointed to an appropriate position upon their return

to work, while enabling management to meet operational requirements in situations where leaves of absence are granted. (Emphasis added) (Exhibit R-12)

The Tribunal is, therefore, satisfied that at the time he returned from leave in late 1982, Dr. Uzoaba did have an absolute right to priority status with respect to positions throughout the PSC for which he was qualified. Although the Tribunal has suspicions that Mr. Weck's evident animosity towards Dr. Uzoaba may have influenced his interpretation of the legislation somewhat, we cannot conclude that the initial failure on the part of CSC to ensure that Dr. Uzoaba was afforded his statutory rights was motivated by considerations of race as opposed to an honest misunderstanding of the effect of the recent regulatory changes.

h) Extension of Priority Entitlement:

Dr. Uzoaba complains that CSC did not, at first, extend his priority entitlement to make up for their delay in having withheld his curriculum vitae, although such an extension was subsequently granted.

It is apparent from the evidence that Dr. Uzoaba had complained to CSC management regarding the delay in the forwarding of his resumé to the PSC, and that he was ultimately successful in negotiating a four month extension to his priority status.

Given the Tribunal's previous findings with respect to the issue of delay in the forwarding of the curriculum vitae, the Tribunal makes no finding with respect to this allegation.

i) Offers of Employment:

Dr. Uzoaba alleges that, although appropriate jobs were available, CSC offered him only inappropriate ones. Specifically, he alleges that by offering him a position at Millhaven Institution, CSC unilaterally abrogated the agreement of July 10, 1980. Dr. Uzoaba

complains he was offered only positions at or below his previous level, despite the fact that he now held a Ph.D. He alleges that, despite management's ability to make jobs available to him, he was not offered either of two positions with the WP-04 level at Regional Headquarters, without competition, in April of 1983.

According to Dr. Uzoaba, in his meeting with Mr. Weck on January 19, 1983, Mr. Weck advised him that CSC management had decided to put Dr. Uzoaba into one of the institutions to work with inmates. Mr. Weck did not identify a specific institution at that time, although the following day Mr. Weck wrote to Dr. Uzoaba indicating that he would be placed in Millhaven Institution.

Dr. Uzoaba testified that he was furious when Mr. Weck advised him that he would be expected to return to the institutional setting. He felt that this was an indication of how little regard CSC had for him. He raised the issue of the agreement of July 10, 1980 and told Mr. Weck that he would not, under any circumstances, accept a position which violated the agreement.

According to Dr. Uzoaba, as a maximum security prison, Millhaven would have represented an even more dangerous work environment than that would CBI.

Dr. Uzoaba testified that in April of 1983, he received a letter from Mr. Weck advising that the Parole Service had a vacancy in the Windsor/Hamilton area, and asking that, if Dr. Uzoaba was interested in the position, he contact the designated individual so that an interview could be arranged.

Dr. Uzoaba did not perceive this to be a job offer, but rather a referral. He indicated that, in any event, he was not interested in this position either, as it also involved working with inmates.

With respect to the allegation that he was not offered either of two positions at the WP-04 level at Regional Headquarters which were available in April 1983, Dr. Uzoaba was unable to provide any specific information with respect to the nature of these positions, other than that they did not have inmate contact. He indicated that he only became aware that these positions had been available approximately two years after the fact.

Dr. Uzoaba acknowledged that his only statutory entitlement was to reappointment to a position at the WP-3 level, where qualified. He states, however, that CSC could have given him a promotion to a position at the WP-4 level, without competition, something which has occurred on a number of occasions in the past.

Dr. Uzoaba testified that CSC had previously invited him to compete for positions at the WP-5 level. His position appears to be that CSC had, therefore, by implication, recognized that he was qualified for positions above the WP-3 level.

Dr. Uzoaba testified that in his various meetings with Mr. Weck over the next few months, Mr. Weck would threaten that if he did not accept a WP-3 position, CSC would take steps to release him. This never, in fact, took place.

According to Mr. Weck, upon his return from his education leave, Dr. Uzoaba told him that he had no intention of accepting a WP-3 position where he would be required to work with inmates. Dr. Uzoaba

reportedly stated that, with his additional academic qualifications, he expected to be appointed, without competition, to a position of a WP-4 or WP-5 level. Mr. Weck testified that he explained to Dr. Uzoaba what his reappointment rights were, and advised him that he would not be appointed to a higher position without competition.

Mr. Weck did not ask Dr. Uzoaba what skills he had acquired in pursuing his Ph.D. or what courses he had taken. In Mr. Weck's view, this was not relevant. From the staffing perspective, positions either require a specified degree or they do not. Questions relating to the particular course of study would be canvassed in the job interview itself.

Mr. Weck also gave evidence with respect to CSC's decision to offer Dr. Uzoaba a Classification Officer position in Millhaven Institution. Mr. Weck initially testified that, sometime after he spoke to Dr. Uzoaba in October of 1982, he was advised that CSC management had determined that the threats to Dr. Uzoaba's safety that had occurred in the past were no longer in issue. Mr. Weck was unable to identify who in CSC management had advised him of this. Mr. Weck testified that he did not think that there had been a formal meeting to consider the situation, but that there had been discussions where Dr. Uzoaba's situation was reviewed and the conclusion reached that the situation had changed, and that the tension in the penitentiaries had abated. Further, in Millhaven, inmate movement was much more restricted and controlled by reason of the fact that Millhaven was a maximum security institution. For these reasons, the conclusion of management was that Dr. Uzoaba could quite possibly function in that environment.

Mr. Weck subsequently testified that he was present at a meeting where Dr. Uzoaba's situation was reviewed. Mr. Weck was unable to recall who else was present at the meeting, although he indicated that Mr. Trono would ordinarily have chaired meetings of this nature. He confirmed that Dr. Uzoaba was not present at the meeting, and stated that:

It wouldn't have served a purpose at that point in time. (Transcript, Vol. 7, p.1447)

When asked why the Millhaven job was offered to Dr. Uzoaba, when Dr. Uzoaba had made it clear that he had no intention of working with inmates, Mr. Weck's evidence was that as Dr. Uzoaba had priority status for WP-3 positions within CSC, he was obliged to offer Dr. Uzoaba the Millhaven job when it became available, in order to get clearance to offer the position to others.

Further, Mr. Weck felt that it was appropriate to make the offer for the various reasons mentioned earlier. In his view, he felt that Dr. Uzoaba should be given another opportunity to "prove himself" on the job. Mr. Weck testified that the July 10, 1980 agreement related to the situation that existed within CBI at that time, and did not have any application to the current situation.

In cross-examination, Mr. Weck was asked why, if CSC had been able to find Dr. Uzoaba a position without inmate contact in the spring of 1980, such a position could not be found in late 1982. Mr. Weck testified that no such positions were available, and that:

... he first had to come back into the workforce. He had to become an employee again. (Transcript Vol. 6, p.1425)

Later on in his testimony, Mr. Weck stated that it was up to management to find him a temporary assignment in a non-institutional setting, and that an assignment of this nature was outside of his jurisdiction. (Transcript, Vol. 7, p.1440)

Mr. Weck testified that Dr. Uzoaba should have accepted the Millhaven offer and used the opportunity to prove to management that he was capable of working with inmates. Mr. Weck felt that Dr. Uzoaba was being intransigent in relying upon the July 10, 1980 agreement, and uncooperative in refusing to accept the Millhaven position.

In explaining what he understood the extent of his responsibilities to Dr. Uzoaba to be, Mr. Weck testified that, having offered Dr. Uzoaba the next available vacancy at his level, his responsibilities to Dr. Uzoaba had been fully discharged. As Mr. Weck put it:

... [I]t was not my job to scour and beat the bushes for a position that might have suited Dr. Uzoaba's wishes or aspirations. It was up to him to find a position that he felt he was capable of performing the duties of and apply for it. That was not my job ...
(Transcript, Vol. 6, p.1397)

Mr. Weck further stated:

Q. I don't understand. He was telling you that he didn't want to work with inmates.

A. In that case, sir, he should have quit his job.

Q. He should have quit the job?

A. Certainly. If I don't want to drive a bus, I quit my job. Many people have done that rather than trying to cope with a job; not in the correctional services, but anywhere else. If I can't cope with the job, or I don't like the job, I go somewhere else and find the job I want.

Q. So you were suggesting that if he didn't want to work with inmates, he should quit the job.

A. That is one solution ...
(Transcript, Vol. 7, pp.1458-1459)

And further on:

Q. ... Would you still agree that he should quit if the reason he did not want to work with inmates was because he had been assaulted and been subjected to racial attacks?

A. Yes, I hear you.

Q. Do you still maintain that he should have quit if that was the reason he didn't want to work with inmates?

A. It is one option, if there is nothing else available for him. (Transcript, Vol. 7, p.1465)

Mr. Weck was also asked whether, given the past history of Dr. Uzoaba's work experience within CSC, Mr. Weck felt that Dr. Uzoaba was not entitled to special consideration. He responded:

At that point in time, he had been an employee of the Correctional Service for some time. He knew what the ropes were. He knew what the jobs were and under the Public Service Employment Act merit principle provision, he could only go back to what he was when he left and anything else that he achieved or he wanted to achieve had to be done by the merit principle route.

The same consideration or lack of consideration, if you want, would have been given to any other employee in the same circumstances. (Transcript, Vol. 7, pp.1549-50)

According to Mr. Weck, the letter of April 12, 1982 with respect to the parole service position in the Windsor/Hamilton area represented an unqualified job offer. Where a vacant position is in a different geographical location, an interview is arranged to permit the employee to travel to the job site to meet the manager involved, to look at the work environment, the neighbourhood, schools etc. In other words, the interview is not a qualifying interview, and the employee has an absolute right to the position, if they so desire.

Mr. Weck stated that he had no discussions with Dr. Uzoaba concerning the Windsor/Hamilton position, and that his only communication with respect to the job was Dr. Uzoaba's written rejection of it.

With respect to the WP-4 positions, Mr. Weck stated that at his initial meeting with Dr. Uzoaba in October of 1982, he told Dr. Uzoaba

that a WP-4 position at Regional Headquarters was under competition at the time, and urged him to apply for it. Mr. Weck was unable to recall the specific details of the position. According to Mr. Weck, Dr. Uzoaba stated that it was beneath his dignity to compete with persons of obviously

inferior academic qualifications, and he refused to even consider it. Dr. Uzoaba reportedly indicated that he should be given the position as of right.

Mr. Weck also testified that, shortly thereafter, he may have mentioned that another WP-4 position was available to Dr. Uzoaba. He does not recall any specifics of the discussion, but believes that Dr. Uzoaba's response was negative.

Mr. Trono testified that he was on the periphery of the decision to offer Dr. Uzoaba the position at Millhaven, and that he could not recall if he was directly involved in the decision or not. He does recall a discussion regarding Dr. Uzoaba's having returned from leave, and the possibility that CSC would have to offer him a position of this nature, as nothing else was available. The hope was that with two years away, and Dr. Uzoaba's increased education, he may have "mellowed", and become better able to deal with inmates than he had previously been. Mr. Trono hoped that with Dr. Uzoaba now being a few years older, he might have changed his approach a little, and would not antagonize the inmates to the extent that he had done before.

Mr. Trono stated that if it had turned out that Dr. Uzoaba had not, in fact, "mellowed", management would then have to remove him from the institution. Mr. Trono acknowledged that returning Dr. Uzoaba to an institutional setting might have been a very dangerous solution, but explained that there were no alternatives available at the time.

Mr. Trono does not specifically recall a meeting at which Dr. Uzoaba's future was discussed, but he "imagines" such a meeting must have taken place. Mr. Trono did not contact Dr. Uzoaba prior to the decision being made to place him in Millhaven. He acknowledged that it was possible that the decision was made without anyone having spoken to Dr. Uzoaba about it, although he agreed that it would have been advisable to have someone consult with Dr. Uzoaba before making the decision that it was appropriate to return him to the institutional setting.

As noted previously, Mr. Trono rejects the idea that racism played any role in the difficulties that Dr. Uzoaba had encountered at CBI.

Mr. Trono attributed the problems to Dr. Uzoaba's arrogance and inability to relate to the inmates.

J.D. Clark was also called as a witness by the Respondent. Mr. Clark is currently a member of the National Parole Board. He was, in 1982, second in command in the Ontario Region of CSC, reporting to Mr. Trono.

Mr. Clark testified that he did not recall the specifics of the discussion with respect to Dr. Uzoaba returning to the institutional setting, but does generally recall the hope being expressed that Dr. Uzoaba might have learned from experience, and further expanded his abilities through education. Mr. Clark testified that the feeling was that if Dr. Uzoaba was prepared to take a chance, it was reasonable to try returning him to the institutional setting.

In cross-examination, Mr. Clark acknowledged that discussions should have taken place with Dr. Uzoaba before requiring him to return to the institutional setting.

Mr. Clark testified that he was not aware that Dr. Uzoaba had been subject to racial threats and harassment at CBI. If he had been

aware of this, Mr. Clark testified that this would have been a consideration in seeking alternatives for Dr. Uzoaba.

In the Tribunal's view, the conduct of CSC in dealing with Dr. Uzoaba on his return from educational leave was insensitive in the extreme. No effort was made to sit down with him face-to-face, in an effort to ascertain his feelings regarding the advisability of his returning to work in an institution, or to discuss the alternatives available to him.

Mr. Weck testified that he did have discussions with Dr. Uzoaba regarding the options available to him. Dr. Uzoaba is adamant that no effort was made to determine his feelings regarding the appropriateness of the Millhaven offer prior to it having been made. The Tribunal accepts Dr. Uzoaba's evidence that no one in CSC management communicated with him for the purposes of ascertaining his feelings about the appropriateness of working in an institutional setting, upon his return from the United Kingdom.

Considerable time was devoted in the course of the hearing to discussions of the significance of the July 10, 1980 agreement, and whether the agreement was an enforceable contract, precluding CSC from returning Dr. Uzoaba to the institutional setting. In the Tribunal's view, the agreement represented an acknowledgment by both parties that, under the prevailing circumstances, it was not appropriate for Dr. Uzoaba to work in an institutional setting. Having asked Dr. Uzoaba to sign an agreement stating that he should not "now or in the future" work in an institutional setting, it was incumbent upon CSC management to engage in a serious review of the situation, in conjunction with Dr. Uzoaba, in order to determine whether or not circumstances had changed sufficiently to permit his return to institutional work.

With respect to the parole officer position in the Windsor/Hamilton area, it is clear that this position would have also required Dr. Uzoaba to work with inmates, albeit outside of the institutional context. If the letter of April 12, 1983 was genuinely intended as an unqualified job offer, it is not surprising, given the wording of the letter, that Dr. Uzoaba did not perceive it as such. This is particularly so when the wording of this letter is contrasted with that of the letter offering the position at Millhaven.

The evidence regarding the two WP-4 positions at Regional Headquarters is entirely unsatisfactory. Neither Mr. Weck nor Dr. Uzoaba were able to provide any detailed information regarding the nature of either position. Accordingly, no determination can be made as to whether or not Dr. Uzoaba was, in fact, even qualified for the positions. The Tribunal is not, therefore, in a position to assess whether or not it would have been appropriate to appoint him to either of these positions, without competition, assuming that this option was, in fact, open to CSC.

Finally, the Tribunal rejects, in it's entirety, the testimony of the Respondent's witnesses, and specifically, that of Messrs. Weck and Trono, that in late 1982 there were no positions available for Dr. Uzoaba save the WP-3 position at Millhaven.

Both Mr. Weck and Mr. Trono were questioned about the availability of positions at the WP-3 level, without inmate contact, in the

context of considering the effect of the July 10, 1980 agreement on Dr. Uzoaba's career prospects.

Mr. Weck testified as follows:

Q. But, you would agree with me that if the assignment at Frontenac would expire and Dr. Uzoaba and, indeed, Mr. Trono did not think it was advisable to send Dr. Uzoaba back to Collins Bay, then there would have been no place to send him and he would have been declared surplus or released, is that not true?

A. No, I cannot agree with you there. There are numerous situations - and I believe that they can be traced throughout the history of the Corrections Service - where people who found themselves in dire straits due to, perhaps, inmate assaults or other situations, have been carried for long periods of time. It was not an open and shut situation. There was no reason whatsoever to assume or speculate at this time, even retroactively, that Dr. Uzoaba was about to be released. That was not true.

Q. In other words, you are saying that the CSC would have found him another suitable position, given the circumstances at the time.

A. I am confident of it, because there had been precedents of that nature before. (Transcript, Vol. 6, pp.1350-1351)

Similarly, Mr. Trono testified:

Q. Where would you have moved him to?

A. It was at this point in time - he was a person year supplied by Collins Bay for a period of time, and from time to time positions came up. Man years became available for different things and we would have probably kept him at the Regional Headquarters for a period of time.

Q. I take it then from what you have just said that you thought you could find a position for him somewhere.

A. Usually over a period of time, if you have enough time, you can find something. If it is not in our region, maybe in another one. (Transcript, Vol. 8, p.1724-25)

It is, therefore, apparent that where management was of the view that the circumstances warranted it, positions within CSC without inmate contact could be found.

In his testimony, Mr. Clark stated:

I guess, if you look at the Correction Service of Canada then, it's a big organization and there are jobs in some elements of services to the institutions, and in some functional lines, that either require no or very rare contact with inmates, and one concludes from that that an employee in this position could be considered for such positions, which would, of course, raise other things like collective agreements, pay levels to which there are usually accommodations on the part of all parties required. (Transcript, Vol. 8, pp.1919-20)

As noted previously, according to Mr. Clark, had he been aware that Dr. Uzoaba had been subject to a course of racial harassment, this would have influenced his efforts in seeking suitable alternate employment.

Having considered the evidence as a whole, the Tribunal is satisfied that, had the organizational will existed in late 1982, suitable alternate employment within CSC (albeit perhaps of a temporary nature) could have been found for Dr. Uzoaba. It is apparent that no such will existed. Both Mr. Weck and Mr. Trono perceived Dr. Uzoaba to be a difficult employee, placing unreasonable demands upon the organization. It

is apparent from their own testimony that neither considered that Dr. Uzoaba was entitled to any special consideration as a result of his past employment difficulties. Mr. Trono, in particular, viewed Dr. Uzoaba as entirely the author of his own misfortune. Neither individual, it seems, was prepared to make any kind of a meaningful attempt to locate alternate employment for Dr. Uzoaba. The prevailing attitude was succinctly summarized by Mr. Weck when he stated that Dr. Uzoaba's job was to work with inmates, and if he could not handle it, he should quit.

j) Negative References:

Dr. Uzoaba alleges that CSC blocked his reentry into the Public Service by providing him with negative references, and by exerting pressure on individuals who knew his work was competent to say otherwise.

He gives three specific examples of positions which were denied to him, allegedly because of negative references.

Dr. Uzoaba testified that he was interviewed for an ES-4 position with Statistics Canada. Dr. Uzoaba believed that the interview

had gone very well, and that he had the job. At the close of the interview, Dr. Uzoaba was asked for the names of his previous supervisors.

He gave the names of Mr. Murphy, who had supervised Dr. Uzoaba in the late 1970's, and in addition, gave the name of Robert Markowski.

Dr. Uzoaba testified that he subsequently contacted Mr. Markowski to advise him that his name had been given. According to Dr. Uzoaba, when he told this to Mr. Markowski, Mr. Markowski just laughed, leading Dr. Uzoaba to believe that he would not be helpful to Dr. Uzoaba's cause.

Dr. Uzoaba was subsequently advised that he did not receive the job, and that he had not been given a good reference by "the man in Kingston". Dr. Uzoaba testified that he subsequently determined that the individual referred to was Mr. Markowski.

Dr. Uzoaba testified that he was also interviewed for a WP-4 position with the Secretary of State in Hamilton. Again, he was optimistic after the interview that he would receive the job. Sometime later, he received a note advising him that he had been determined to be "not

suitable" for the position. He appears to believe that negative references prevented him from receiving this job as well.

Finally, in February, 1985, Dr. Uzoaba competed for a WP-3 position with CSC in Ottawa. The competition for this position was held during the time that Dr. Uzoaba enjoyed priority status. The position was "Investigator, Inmate Affairs", and involved investigating inmate grievances filed against the penitentiary system throughout Canada. He was interviewed for the position, and again had every reason to believe that he would be successful. Dr. Uzoaba testified that he was asked for references, and gave the names of Millard Beane and Al Murphy, both former supervisors.

Dr. Uzoaba testified that he subsequently contacted one of the individuals present during the interview, who advised him that it had been determined that he was not suitable for the position. Dr. Uzoaba was advised that four individuals had been contacted, including Mr. Markowski and a Mr. Kelly, and that only Mr. Beane had given Dr. Uzoaba a positive reference.

It was Dr. Uzoaba's view that CSC administration in Kingston, and in particular, Messrs. Trono and Weck were behind the campaign to keep him out of the Public Service.

Both Mr. Weck and Mr. Trono deny any involvement in the provision of references for Dr. Uzoaba.

Mr. Markowski testified that some years after Dr. Uzoaba left CBI, he received a call from Dr. Uzoaba regarding Mr. Markowski providing a reference. According to Mr. Markowski, he told Dr. Uzoaba that he would provide a reference, but cautioned him that his reference would be consistent with the performance appraisal prepared in 1980. That is, Mr. Markowski would confirm Dr. Uzoaba's strong analytical skills and talent for writing good reports. He would, however, also have to disclose Dr. Uzoaba's difficulties in working with inmates.

Mr. Markowski recalls being contacted with respect to one position which he believed to be the Statistics Canada position, and states that as well he may have been contacted with respect to a position within

CSC at National Headquarters. Mr. Markowski testified that the references he provided were, in fact, consistent with the performance appraisal.

Mr. Markowski denied that any pressure was exerted on him by anyone within CSC regarding the content of the references he provided on behalf of Dr. Uzoaba.

The Respondent also called Dr. Jean Garneau as a witness.

Dr. Garneau was a Director of Inmate Affairs at CSC Headquarters in Ottawa.

The Division of Inmate Affairs was responsible for ensuring that the duty to act fairly was followed within the CSC. The Division reviewed CSC policies in order to ensure that the rights of inmates were respected. More importantly, the Inmate Affairs section also dealt with inmate grievances and claims against the Crown from inmates, once these complaints had gone beyond the regional level.

According to Dr. Garneau, given the delicate nature of the investigations carried out by individuals in the investigator positions, considerable tactfulness was required.

Dr. Garneau sat on the Selection Board considering candidates for the position of Investigator of Inmate Affairs. He was present in Dr. Uzoaba's interview. According to Dr. Garneau, the interview commenced in a normal fashion, with the Staffing Officer explaining to Dr. Uzoaba the procedures that would be followed by the Selection Board. According to Dr. Garneau, in the course of this explanation, Dr. Uzoaba interrupted and essentially went on a tirade regarding the unfairness of the appraisals which had been conducted regarding his past performance.

This went on for approximately fifteen minutes. Dr. Garneau indicated that Dr. Uzoaba was then asked a number of questions, and that his responses where quite adequate. In the course of the interview, Dr. Uzoaba demonstrated a high intellectual capacity and analytical ability. However, given the behaviour exhibited during the interview, the Selection Board had serious doubts about Dr. Uzoaba's ability to handle the duties required of the position in a tactful, reserved, constructive and positive fashion.

The Board concluded that the "fairly explosive" behaviour which had been demonstrated by Dr. Uzoaba during the course of the interview indicated that he was not suitable for a sensitive position of this nature.

Dr. Garneau confirmed that the Staffing Officer contacted four references after the interview was completed. Evidently three of the four references contacted indicated that Dr. Uzoaba had difficulty with interpersonal relationships. Dr. Garneau was not directly involved in the discussion with the referees, nor was he aware of the difficulties that Dr. Uzoaba had encountered at CBI.

As far as Dr. Garneau can recall, Dr. Uzoaba was the only candidate for the position on priority status. Once it was determined that he was not suitable for the position, individuals without priority status would have been considered. Dr. Garneau has no present recollection of who ultimately received the position.

There is clearly no evidence before this Tribunal which would support Dr. Uzoaba's conspiracy theory regarding the involvement of CSC management in the issue of references.

As previously noted, the Tribunal has found that Dr. Uzoaba did, in fact, have difficulties in his interpersonal relationships, and that inmates did perceive Dr. Uzoaba as arrogant and insensitive to their

needs. The Tribunal has also found, however, that Mr. Markowski's assessment of Dr. Uzoaba's performance was influenced by his reliance upon the number of inmates asking to be removed from Dr. Uzoaba's case load, requests which were to some extent motivated by considerations of race. In accepting these requests, without reservation, as a valid measure of Dr. Uzoaba's performance, the Tribunal has found that Mr. Markowski's conduct to be racially discriminatory. To the extent that this assessment was communicated to third parties, again without qualification or explanation of the surrounding circumstances, Mr. Markowski was continuing to perpetuate the discrimination.

That said, the Tribunal cannot make any finding on the evidence before it as to the effect that the references given by Mr. Markowski may have had regarding the positions with Secretary of State and Statistics Canada. We have only Dr. Uzoaba's evidence with respect to the success of the interviews, and no evidence regarding the qualifications of the other candidates for the position. The Tribunal cannot, therefore, determine what effect, if any, the references given by Mr. Markowski may have had on Dr. Uzoaba's chances of obtaining either position.

With respect to the Inmate Affairs position, the Tribunal accepts the evidence of Dr. Garneau that Dr. Uzoaba's behaviour demonstrated that he was not suitable for the position, and that Mr. Markowski's reference played no role in the decision of the Selection Board to reject Dr. Uzoaba's candidacy.

k) Cash Out Offer:

Dr. Uzoaba testified that he was referred to several positions within the PSC while he enjoyed priority status. He was unsuccessful in obtaining alternate employment. Once his priority status ended, Dr. Uzoaba received no further job referrals from the PSC.

It is common ground that Dr. Uzoaba and Mr. Weck met on January 18, 1989. While there is some disagreement as to precisely what was said in this meeting, the parties agree that Dr. Uzoaba was offered six months salary as a "cash out". In order to accept this offer, it was necessary for Dr. Uzoaba to tender his resignation from the PSC. According to Mr. Weck, this cash out offer would ordinarily be available to employees who had been declared surplus, which was not the situation in Dr. Uzoaba's case.

After considering the offer, Dr. Uzoaba rejected it.

Mr. Weck testified that he was subsequently instructed not to proceed with release proceedings pending the outcome of this hearing.

V THE LAW

Dr. Uzoaba's complaint must be examined in the context of section 2 of the CHRA, which sets forth the purpose of the legislation. Also relevant are sections 7 and subsection 14(1) of the Act which provide:

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

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

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

14.(1) It is a discriminatory practice,

a) in the provision of goods, services, facilities or accommodation customarily available to the general public,

b) in the provision of commercial
premises or residential accommodation,
or

c) in matters related to employment,

to harass an individual on a prohibited
ground of discrimination.
Race, colour, and national or ethnic origin are prohibited
grounds of discrimination.

a) Standard and Burden of Proof:

The parties are in agreement that in a case of this nature,
the burden of proof is on the Complainant to establish a prima facie case
of discrimination. Once that is done, the onus shifts to the Respondent to
establish a justification for the discrimination, upon a balance of
probabilities. (Ontario Human Rights Commission v. Etobicoke, [1982] 1
S.C.R. 202 at 208, and Ontario Human Rights Commission and O'Malley v.
Simpsons-Sears Limited, [1985], 2 S.C.R. 536 at 558)
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.
(O'Malley, supra, pp.558)

If the Respondent does provide a reasonable explanation for
the otherwise discriminatory behaviour, the Complainant then has the burden
of demonstrating that the explanation was pretextual, and that the true
motivation behind the employer's actions were, in fact, discriminatory.
(Basi v. Canadian National Railway Company (1988), 9 C.H.R.R. D/5029)

The established jurisprudence recognizes the difficulty, in
cases of racial discrimination, of proving the allegations by way of direct
evidence. As was noted in Basi:

discrimination is not a practice which
one would expect to see displayed
overtly, in fact, there are rarely cases
where one can show by direct evidence
that discrimination is purposely
practised. (at p.D/5038)

Rather, it is the task of the Tribunal to view all of the circumstances to determine if there exists what was described in the Basi case as the "subtle scent of discrimination".

The standard of proof in discrimination cases is the ordinary civil standard of the balance of probabilities. In cases of circumstantial evidence, the test may be formulated as follows:

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

b) Role of Discrimination:

It is well established that 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 factor motivating the conduct under consideration. (Holden v. Canadian National Railway (1990), 14 C.H.R.R. D/12 at p.D-15)

c) Employer Liability for Inmate Harassment:

This case presents a rather novel issue, that is, to what extent should the employer be held accountable for the actions of inmates within the penitentiary system?

It is undisputed that employers may, in certain circumstances, be held accountable for acts of its employees. Section 65 of the current CHRA provides:

> 65.(1) Subject to subsection (2), any act or omission committed by an officer, a director, an employee or an agent of any person, association or organization in the course of the employment of the officer, director, employee or agent shall, for the purposes of this Act, be deemed to be an act or omission committed by that person, association or organization.

(2) An act or omission shall not, by virtue of subsection (1), be deemed to be an act or omission committed by a person, association or organization if it is established that the person, association or organization did not consent to the commission of the act or omission and exercised all due diligence to prevent the act or omission from being committed and, subsequently, to mitigate or avoid the effect thereof.

It should be noted that section 65 was enacted in 1983, and accordingly, has no application to the majority of events giving rise to this complaint.

The issue of employer liability under the previous legislation was given careful consideration by the Supreme Court of Canada in Robichaud et al. v. The Queen (1987), 40 D.L.R. (4th) 577 where Mr. Justice La Forest stated:

Hence, I would conclude that the statute contemplates the imposition of liability on employers for all acts of their employees "in the course of employment", interpreted in the purposive fashion outlined earlier as being in some way related or associated with the employment. It is unnecessary to attach any label to this type of liability; it is purely statutory. However, it serves a purpose somewhat similar to that of vicarious liability in tort, by placing responsibility for an organization on those who control it and are in a position to take effective remedial action to remove undesirable conditions. (at p.584)

And further stated:

I should perhaps add that while the conduct of an employer is theoretically

irrelevant to the imposition of liability in a case like this, it may nonetheless have important and practical implications for the employer. Its conduct may preclude or render redundant many of the contemplated remedies. For example, an employer who responds quickly and effectively to a complaint by instituting a scheme to remedy and prevent recurrence will not be liable to the same extent, if at all, as an employer who fails to adopt such steps. These matter, however, go to remedial consequences, not liability.

Thus, under Robichaud, "due diligence" on the part of the employer will not relieve the employer from liability, although it may reduce or eliminate the employer's exposure to damages. In contrast, under the new legislation, due diligence on the part of the employer may allow the employer to escape liability altogether. In both cases, however, the Respondent's conduct will be relevant to the ultimate findings in any given case.

Both the amended legislation and the comments of the Supreme Court of Canada in Robichaud only contemplate employer liability for acts of employees. Can there be liability on the part of an employer for acts of third parties, in this case, inmates?

Liability has been imposed on employers for the acts of third parties in a series of cases known as the "customer preference cases". These cases stand for the proposition that it is no defence to a complaint of discrimination that the employer was responding to the perceived or real preferences of customers. (See for example, P.G. Du Québec c. Service De Taxis Nord-Est (1978) Inc. (1986), 7 C.H.R.R. 3109; and Bueckert v. Base-Fort Patrol Ltd. (1982), 3 C.H.R.R. D\804)

In a similar vein, the decision in Mohammed v. Mariposa Stores Limited Partnership (1990), 14 C.H.R.R. D/215 exemplifies the approach taken by Tribunals in cases involving harassment originating from third parties. In Mariposa, a manager in a store was racially abused by a customer. The abuse contained racially derogatory insults. After tolerating the abuse for some time, the sales clerk responded by calling the customer a "fucking asshole" and telling him that his business was no longer appreciated.

The complainant reported the incident to her employer. The employer then terminated her employment on the basis that the Company could not tolerate an employee who spoke to customers in this fashion. The employer did not consider the context in which the complainant's comments were delivered to be an excuse for her behaviour.

In allowing the complaint, the Tribunal stated:

> The law clearly establishes that the responsibility for eliminating discriminatory conditions in the workplace and for maintaining a "healthy work environment" rests with the employer. While an employer may not be able to control the remarks of a customer, or for that matter, a co-worker or supervisor in the workplace, an employer does have control how it responds to discriminatory conduct in that workplace, regardless of how the conduct occurred. It seems to me that the "unwelcome conduct" should not be treated any differently because that conduct was perpetrated by a customer. Moreover, I view the reasoning in the cases on customer preference to be conclusive on that question ...
>
> ... In this case, I find that the complainant was provoked by racially abusive comments which were made directly to her. The evidence shows that the complainant had not previously responded to provocation under any other

> circumstances. Consequently, I find that there is a causal relationship between the racial harassment and the termination of the complainant's employment. Moreover, I find that, by disciplining an employee in such circumstances, an employer is in effect, condoning the discriminatory conduct and

allowing such conduct to invade the workplace. (Emphasis added, at pp.D/218-219)

The facts in the case of La Commission Des Droits De La Personne Du Québec c. La Commission Scolaire Deux-Montagnes (Unreported, April 8, 1993) are analogous to those in the present case. In Deux-Montagnes, a black teacher filed a complaint of racial harassment against the employer School Board. The harassment complained of originated from students. In finding the School Board liable for failing to respond properly to the students harassment, the Tribunal stated:

> The jurisprudence recognizes that an employer may not be in a position to actually control the actions of a third party or their instigator. However, there is no shadow of doubt as to the employer's capacity to make an appropriate response, again arising from the employer's primary responsibility for maintaining fair and reasonable working conditions free of discrimination and harassment. (at p.35)

The Tribunal further noted that:

> The responsibility incumbent upon an employer who fails to respond adequately to instances of discrimination and/or harassment of employees by persons not affiliated with the enterprise inclines us to take a comparable view in appraising the measures taken by a school board toward third parties who have behaved in a similar way toward one of its employees. This can be extrapolated to the institution's liability for misfeeds on the part of the students enrolled in its schools. (at p.36)

In the face of acts of racial harassment, the Tribunal concluded that the School Board had the responsibility to respond with diligence, and to take prompt, effective and reasonable steps to eliminate the problem.

It is noteworthy that in Deux-Montagnes, the Tribunal considered the nature of the school environment, and concluded that if there is anywhere in our society that tolerance should be taught, it is in the school system.

Finally, consideration should be given to the decision is Toth v. Sassy Cuts (1987), 8 C.H.R.R. D/4376. In Sassy Cuts, a Chinese hair dresser was terminated from her employment because of pressure from her co-workers. The co-workers had been subjecting the complainant to racial harassment for some time. The respondent's defence was that the termination was the result of poor performance. The assessment of the complainant's performance was based upon reports from her co-workers, which complaints the Tribunal found were based, in part, upon discriminatory attitudes. In relying upon these reports, the Tribunal found the employer had, itself, discriminated against the complainant.

d) Duty of Employer:

The final issue to consider is the extent of the duties and obligations imposed by the law on employers in cases where an employee has been subjected to harassment. As previously noted, the current Act imposes liability on an employer unless the employer can demonstrate that it did not consent to the harassment, that it exercised all due diligence to prevent the harassment from occurring, and subsequently to mitigate the effect of the harassment. A comparable duty is imposed by the decision in Robichaud.

The extent of the employer's obligation to respond to acts of racial harassment was considered by the Tribunal in Hinds v. Canada (C.E.I.C.) (1988), 24 C.C.E.L. 65, where the Tribunal stated:

> In considering whether an employer has "exercised all due diligence ... to mitigate or avoid the effect" of the act of the co-employee, one must examine the nature of the employer's response. Although the CHRA does not impose a duty on the employer to maintain a pristine working environment, there is a duty upon an employer to take prompt and effectual action where it knows or should know of co-employee's conduct in the workplace amounting to racial

harassment ... To satisfy the burden upon it, the employer's response should bear some relationship to the seriousness of the incident itself ... To avoid liability, the employer is obliged to take reasonable steps to alleviate, as best it can, the distress arising within the work environment and to reassure those concerned that it is committed to the maintenance of a workplace free of racial harassment. A response that is both timely and

corrective is called for and its degree must turn upon the circumstances of the harassment in each case. (p.77-78)

In Hinds, the complainant received an anonymous and racially insulting letter through the employer's inter-office mail system. The Tribunal found that the correspondence had emanated from a co-worker, although the identity of the co-worker could not be determined. In finding the employer liable, the Tribunal considered the failure of the employer to conduct a meaningful investigation of the incident, as well as the lack of sensitivity with which the employer treated the complainant. The Tribunal characterized the Respondent's lack of response not as wilful, but as "gross neglect". (See also Pitawanakwat v. Secretary of State (Unreported, Tribunal Decision 14/92, December 23, 1992)

It is clear, therefore, that when a complaint of harassment is received by an employer, whether the harassment is alleged to have originated from an employee or a third party, the employer is obliged to respond promptly and effectively with a thorough investigation, as well as with consideration for and sensitivity to the needs of the victim.

VI APPLYING THE LAW TO THE FACTS

On the basis of the foregoing law, the Tribunal concludes that the Respondent is liable both for discriminating directly against the Complainant by reason of his race and colour, and for failing to respond in an appropriate fashion to the racial harassment from inmates to which the Complainant was subjected.

In the Sassy Cuts case (supra), the reliance by an employer on complaints motivated in part by racism was found to amount to discrimination by the employer on the basis of race. Similarly, in this case, Mr. Markowski's unquestioning acceptance of the inmates' views of Dr. Uzoaba's performance, knowing as he did that at least some of these views were tainted by racism, amounts to racial discrimination by CSC.

This discrimination was perpetuated when Mr. Markowski provided employment references containing negative comments based upon the inmates' actions.

Similarly, Mr. Trono's actions, following on the receipt of the inmate petition, also constitute discrimination against Dr. Uzoaba by reason of his race and colour.

In reaching these conclusions, the Tribunal accepts the evidence of the Respondent's witnesses that Dr. Uzoaba did have some serious difficulties in relating to inmates, beyond those difficulties resulting from his race or the colour of his skin. It is clear, however, that racism on the part of the inmates was a proximate factor in Mr. Markowski formulating his assessment of Dr. Uzoaba's performance, as well as in Mr. Trono reaching the conclusion that Dr. Uzoaba should no longer work with inmates. Each of these findings is sufficient to create liability on the part of the employer. (Holden v. C.N.R. supra)

The Tribunal concludes on the evidence before it that CSC's response to the harassing telephone calls received by Dr. Uzoaba was wholly inadequate. The Respondent argued that threats are a regrettable incident of employment in the correctional system. Further, the Respondent argues

that the evidence of Janet Ethier establishes that Dr. Uzoaba was treated in the same fashion as anyone else at CSC who received threats.

It is not up to this Tribunal to determine the appropriateness of the employer's response to Ms. Ethier's sexual harassing telephone calls. However, if the response to Dr. Uzoaba's complaint was inadequate, the fact that someone else within the system may have been treated in a similarly inadequate fashion does not advance the Respondent's case. In any event, it is clear that, in Dr. Uzoaba's case, the calls were significantly more frequent, and continued over a longer period of time than was the case with Ms. Ethier.

The Tribunal accepts that an employer is not required to maintain a pristine work environment, and that some work environments may be more difficult to manage than others.The Tribunal further accepts that threats from inmates are an unfortunate part of employment in the corrections system. However, the fact that such threats are not uncommon does not relieve the employer from it's obligations under the law, although they may have some bearing on the assessment of the reasonableness and sufficiency of the Respondent's response.

There is no direct evidence before the Tribunal that any effort was made to track the calls to determine if a pattern could be detected, which could then be related to inmate movement and access to telephones within the institution. The employer was aware that Dr. Uzoaba had previously been subject to racial threats while employed at CBI (ie, the garage incident). There is no evidence that the Respondent made any effort to determine if the sets of circumstances were related. Similarly, there is no evidence that the police were ever contacted, or that the telephone company was asked to try to trace the calls.

The Respondent's response, or lack thereof, to the contract on Dr. Uzoaba, and the inmate assault, is shocking. In the case of the contract, there is no evidence that the Respondent made any effort to investigate what was a clear threat to the safety of an employee, and one which this Tribunal has found to be motivated, in part, by racial animosity.

In addition, there is no evidence of any effort being made by anyone within CSC management to provide any emotional support or reassurance to Dr. Uzoaba, nor is there any suggestion that anyone within CSC management ever recognized or acknowledged to Dr. Uzoaba that he had been subjected to unfair and discriminatory treatment.

Finally, and most disturbingly, no one within CSC appears to have done anything to try to communicate to the inmates that racist attitudes are wrong, and will not be tolerated in our society. Inmates are placed in penal institutions, inter alia, for the protection of society and for their rehabilitation. The rehabilitation process includes education. In this regard, the role of the penal institution can be likened to that of the school system in the Deux-Montagnes case.

Despite the fact that it is part of the express function of the prison system to teach inmates to be better citizens, throughout the entire period that Dr. Uzoaba was encountering difficulties at CBI, no one from CSC appears to have attempted to address the attitudinal problems amongst either the inmates or CSC staff contributing to Dr. Uzoaba's difficulties. While Mr. Trono was of the view that nothing could be done

under circumstances, it is apparent from one of the Respondent's own witnesses just how much could be done.

The Respondent called Andrew Graham as a witness. Mr. Graham is currently the Deputy Commissioner for the Ontario Region of CSC. Mr. Graham had supervised Dr. Uzoaba for a period in the 1970's, and much of his evidence related to that time period. He did, however, also testify, with evident pride, to the considerable efforts made by CSC within the last five years, to address racism in the correctional system. These efforts include attempts to recruit and keep employees of colour, training in racial awareness for staff, and the development of programs to deal with problems of harassment in the workplace, and to provide support for victims of harassment.

The efforts of CSC in this regard are commendable. In this case, however, they only serve to illustrate how very little was done for Dr. Uzoaba, and how much more could have been done.

The final issue to be considered is the extent of the employer's responsibility to find alternate employment for Dr. Uzoaba on his return from educational leave. The Respondent argues that what has been alleged in this case is direct discrimination, and not adverse effect discrimination, and that as a result, no duty on the part of the employer to accommodate Dr. Uzoaba's needs arises. In this regard, the Respondent relies upon the decision of the Supreme Court of Canada in Alberta Human Rights Commission v. Central Alberta Dairy Pool [1990], 2 S.C.R. 489.

The decision in Central Alberta Dairy Pool dealt with a case of adverse effect discrimination resulting from the imposition of an employer rule requiring work on Easter Monday. In considering whether the employer's rule could be upheld as a bona fide occupational requirement ("BFOR"), the majority of the Judges deciding the case concluded that, in cases of direct discrimination, the discriminatory requirement will either be justifiable or it will not. If an employer can demonstrate that the occupational requirement is valid, then no duty to accommodate arises. If the employer cannot establish that it is reasonable under all of the circumstances to discriminate against a particular class of individuals, then the employer rule falls in it's entirety. According to the majority, it is only in the situation where a rule is neutral or non-discriminatory on its face, yet has an adverse effect upon a particular group of individuals that the rule will be upheld, with the obligation imposed on the employer to accommodate the affected minority.

It should be noted that, in a concurring judgment written by Sopinka J., three Judges of the Supreme Court of Canada disagreed with this analysis. These judges held that, in cases of direct discrimination, before a BFOR defence will succeed, the employer should have to demonstrate that there was no reasonable alternative, short of undue hardship, to the discriminatory rule in question that could take into account the circumstances of the individuals so affected.

In other words, the concurring Judges found that the duty to accommodate exists as a prerequisite to the successful establishment of a BFOR defence.

In the Tribunal's view, the analyses contained in the two judgments in Central Alberta Dairy Pool are of limited application to the present case.

This case does not involve the imposition of an employer rule on the Complainant, and accordingly, there is no requirement to assess the appropriateness of such a rule.

Insofar as the acts of the Respondent constitute direct discrimination against the Complainant (for example, the performance appraisal, the employment references and the use of the petition), these acts have been found to infringe the Complainant's rights under the Act. Liability has also been imposed on the employer, not for discriminating directly against Dr. Uzoaba, but for failing to respond in an appropriate fashion to the instances of inmate harassment.

Where an employee has been subjected to harassment in the workplace, the decision of the Supreme Court of Canada in Robichaud imposes a clear obligation on the part of the employer to take reasonable steps to mitigate the effects of the discrimination. In this case, it was made apparent to Dr. Uzoaba on repeated occasions that the Respondent could not or would not protect him from harassment while he continued to work with inmates. Under the circumstances of this case, the Tribunal finds that, as a part of its duty to mitigate the effects of the harassment on Dr. Uzoaba, it was incumbent on the Respondent to make meaningful efforts to find him alternate employment where he could be protected from continued abuse. No such efforts were made in this case.

As noted previously, the Tribunal is satisfied that if such efforts had been made, alternate employment could have been found.

VII REMEDY

In fashioning a remedy, the Tribunal is mindful of the objects of human rights legislation. As was noted by the Supreme Court of Canada in O'Malley (supra):

> The code aims at the removal of discrimination. This is to state the obvious. It's main approach, however, is not to punish the discriminator, but rather to provide relief for the victims of discrimination.(at p. 547)

In Robichaud, (supra) the Supreme Court described the legislation as follows:

> It is remedial. Its aim is to identify and eliminate discrimination. If this is to be done, then the remedies must be effective, consistent with the "almost constitutional" nature of the rights protected. (p. 582)

Having considered all of the circumstances, the Tribunal orders the following:

a) Apology:

In cases where a respondent's behaviour has been marked by insensitivity, Tribunals have ordered that the respondent issue a formal written apology to the complainant. (See for example, Hinds, (supra), and

Grover, (supra)). This is such a case. Therefore the Tribunal orders that a written apology be provided to the Complainant by the Commissioner of Correctional Services within thirty days of this decision.

b) Reinstatement:

The Commission has asked that Dr. Uzoaba be reinstated in an appropriate position. The Commission argues that an appropriate level would be at least at the WP-5 level.

The Respondent does not challenge the Tribunal's power to reinstate the Complainant, but does dispute the Tribunal's jurisdiction to

effectively give Dr. Uzoaba a promotion without competition, thereby circumventing the provisions of the merit principle and the PSEA.

The Tribunal has given careful consideration to the issue of reinstatement. Given that the Complainant has been out of the work force for over 13 years, and also having regard to the evident anger and resentment that the Complainant feels towards his employer, the Tribunal has concerns about returning Dr. Uzoaba to the workforce. On the other hand, the Tribunal is cognizant of the devastating effect that these events have had upon the Complainant and his family. Having given the issue careful consideration, and keeping in mind the remedial nature of the legislation, the Tribunal has concluded that the only way that Dr. Uzoaba can be adequately compensated is to direct that he be reinstated into a position within CSC.

The Tribunal does so with reservations, and urges Dr. Uzoaba to endeavour, insofar as it may be possible, to put these regrettable events behind him, and to try and move forward with his career.

The determination of the appropriate level at which to place Dr. Uzoaba is an extremely difficult one. The Tribunal accepts that it does have the power to reinstate Dr. Uzoaba at a position above a WP-3 level. Specifically, paragraph 53(2)(b) of the CHRA provides that the Tribunal may order:

> That the person make available to the victim of the discriminatory practice, on the first reasonable occasion, such rights, opportunities or privileges as, in the opinion of the Tribunal, are being or were denied the victim as a result of the practice;

If one accepts that, at some point in the intervening thirteen years, Dr. Uzoaba could reasonably have been expected to receive one or more promotions, and that his failure to do so resulted in whole, or in part, from racial discrimination, then it follows that the Tribunal should be able to compensate him for that loss. Such a remedy was awarded in the Grover case.

In this case, it is clear that, independent of considerations of race or colour, there were serious problems with Dr. Uzoaba's performance. On the other hand, the Respondent's witnesses were unanimous in their recognition of Dr. Uzoaba's considerable strengths - specifically, his analytical skills, his intellectual capacity and his ability to prepare detailed and well thought out reports.

In the January 1980 performance appraisal prepared by Mr. Markowski, Mr. Markowski confirmed that Dr. Uzoaba could expect a promotion within one to two years if he were able to rectify the weakness identified in the appraisal. While it inevitably involves a certain amount of crystal ball gazing, the Tribunal is satisfied that, had Dr. Uzoaba remained working within CSC, in an environment less tainted by racial discrimination and racial harassment, he could reasonably have anticipated a promotion to the WP-4 level within approximately three years. The evidence suggests that positions at that level would have likely been more suited to someone with Dr. Uzoaba's particular skill set, and the Tribunal is satisfied that, without the stresses of constant inmate contact, Dr. Uzoaba would have likely succeeded in that position, enjoying further promotion at some future date. We are, therefore, satisfied that it would be appropriate to reinstate Dr. Uzoaba at the WP-5 level.

The Tribunal therefore orders the Respondent to provide Dr. Uzoaba, at the first reasonable opportunity, a position at the WP-5 level, without inmate contact.

c) Training:

It is apparent that had Dr. Uzoaba remained actively employed by the Respondent, he would have remained current with the Respondent's practices and procedures. This opportunity has been denied to him. Having regard, therefore, to Dr. Uzoaba's lengthy absence from the workplace, the Tribunal further orders that the Respondent provide Dr. Uzoaba with sufficient training in the current practices and procedures of CSC so as to enable Dr. Uzoaba to properly fulfil the responsibilities of his new position.

d) Wage Loss and Mitigation:

The Commission also asks that Dr. Uzoaba be compensated for lost wages at the WP-4 level from 1982 to 1985, and at the WP-5 level thereafter. The Respondent argues that a wage loss for a thirteen year period is not reasonably foreseeable, and further, that Dr. Uzoaba has failed to take reasonable steps to mitigate his losses.

Dr. Uzoaba gave evidence as to his efforts to mitigate his losses by obtaining new employment. The evidence was unclear as to precisely how many referrals Dr. Uzoaba received from the PSC up until the expiry of his priority status in 1985, but it appears that it was in the vicinity of 5 or 6. Dr. Uzoaba was unsuccessful in obtaining any of these positions. In his evidence in chief, Dr. Uzoaba stated that he had also

competed in 40 or 50 competitions within the PSC, and that he had been interviewed for 5 or 6 positions. In cross examination, he denied having given this testimony, and stated that he entered "several competitions" mostly within the Department of the Solicitor General. His last application was in 1991.

In addition, Dr. Uzoaba applied for teaching positions at Queens University, the University of Toronto, McMaster University, and at a university in Halifax. He also applied to the Ontario Government. The Tribunal was not provided with the dates of these applications.

The Commission argues that the onus of proving that Dr. Uzoaba failed to take reasonable steps to mitigate his damages is on the

Respondent. In this regard, the Commission relies upon the decision of the Supreme Court of Canada in Red Deer College v. Michaels et al. (1975), 57 D.L.R. (3d).

While this decision does place the onus of proof generally on the Respondent, that onus is not absolute. Laskin C.J. stated:

> In the ordinary course of litigation respecting wrongful dismissal, a plaintiff, in offering proof of damages, would lead evidence respecting the loss he claims to have suffered by reason of the dismissal. He may have obtained other employment at a lesser or greater remuneration than before and this fact would have a bearing on his damages. He may not have obtained other employment, and the question whether he has stood idly or unreasonably by, or has tried without success to obtain other employment would be part of the case on damages. If it is the defendant's position that the plaintiff could reasonably have avoided some part of the loss claimed, it is for the defendant to carry the burden of that issue, subject to the defendant being content to allow the matter to be disposed of on the trial Judge's assessment of the

plaintiff's evidence on avoidable consequences. (Emphasis added) (at pp.390-91)

It should be noted that the Red Deer College case was an action for wrongful dismissal. The measure of damages in human rights complaints is not governed by the contract principles used in cases of wrongful dismissal, where compensation is limited to a period of reasonable notice. (Re Piazza v. Airport Taxicab (Malton) Ass'n, (1989), 69 O.R. (2d) 281). That said, the principles relating to mitigation apply equally to human rights complaints and contract actions.

There is, in addition, the question of foreseeability. In Torres v. Royalty Kitchen Ware Limited (1982), 3 C.H.R.R. D/858, the Board of Inquiry stated:

I would express this as saying that a respondent is only liable for general damages for a reasonable period of time. A "reasonable" period of time being one that could be said to be reasonably foreseeable in the circumstances by a reasonable person if he had directed his mind to it. That is, what is the duration of time in which mitigation could reasonably be expected to have been achieved even though it could not

be in the particular situation given the unique, exceptional situation of the aggrieved complainants. (at p.D/872)

This approach has been followed by other Boards of Inquiry (see, for example, Gohm v. Domtar Inc. et al. (1990), 12 C.H.R.R. D/161 at p.180).

Considering all of the circumstances, including the considerable delay on the part of Dr. Uzoaba in filing the complaint, the Tribunal is satisfied that it was not reasonably foreseeable that Dr. Uzoaba would remain unemployed for thirteen years. The Tribunal has concluded that Dr. Uzoaba should receive three years of lost wages, calculated at the WP-3 level from December 1, 1982 to December 1, 1985.

In the event that the parties cannot agree on the dollar value of this award, the Tribunal may be spoken to.

e) Correction of the Personnel File:

The Commission has asked that the July 10th agreement, and any other decisions that flowed from or resulted from the discrimination or harassment be removed from Dr. Uzoaba's personnel file.

The Tribunal has found that the petition and the resultant agreement were tainted by considerations of race and colour. Accordingly, the Tribunal directs that the agreement be removed from Dr. Uzoaba's personnel file. If it transpires that there are other documents on Dr. Uzoaba's file, arising out of the petition or the agreement, and the parties cannot agree as to their appropriate disposition, the Tribunal may be spoken to.

f) Special Compensation:

Having found that the Respondent acted in an insensitive and grossly negligent fashion, and having regard to the devastating impact that these incidents have had on the Respondent, his self esteem, his health and his family life, the Tribunal orders the Respondent to pay the Complainant the sum of $5,000.00.

In making an award at the upper limit of the monetary scale, the Tribunal adopts the comments of the Tribunal in Morgan v. Canadian Armed Forces (1989), 10 C.H.R.R. D/6386:

> I do not think that the evidence of the Complainant's loss of self respect and hurt feelings is anywhere near the level of hurt feelings, humiliation and embarrassment that a person suffers who has been discriminated against in public on the basis of race, religion, colour or sex and particularly where there may have been repetitions of the prohibited practice and there is evidence of either physical or mental manifestations or stress, caused by the hurt feelings of (sic) loss of self respect. In my opinion, the high end of the monetary

scale is more appropriate for these latter types of cases. (at p.D/6403) This is clearly one of the cases referred to in Morgan.

g) Interest:

It is also well established in the jurisprudence that interest is payable on damages for loss of income as well as on monetary awards for hurt feelings. (Hinds, (supra), and Grover, (supra)) The Tribunal therefore orders that interest be paid on the monies awarded herein in accordance with the provisions of the Courts of Justice Act of Ontario, at the bank rate in effect on the first day of the last month of the quarter preceding the quarter in which the original complaint was filed.

Interest should be paid as follows:

i) On the lost wages, calculated on the total amount payable from June 1, 1984, being the mid-point of the period for which wages are being paid; and

ii) On the $5,000.00 for hurt feelings, from September 1, 1980, being the approximate date on which Dr. Uzoaba left active employment with CSC.

VIII CONCLUSION

For the foregoing reasons, the Tribunal declares that Dr. Uzoaba's rights under the CHRA have been contravened by the Respondent and orders:

i) That the Commissioner of Correctional Services provide Dr. Uzoaba with a written apology within 30 days of this decision;

ii) That the Respondent, at the first reasonable opportunity, offer Dr. Uzoaba a position at the WP-5 level, without inmate contact;

iii) That the Respondent provide Dr. Uzoaba with sufficient training in the current practices and procedures of CSC so as to enable Dr. Uzoaba to properly fulfil the responsibilities of his new position;

iv) That the Respondent pay to Dr. Uzoaba three years of lost wages, calculated at the WP-3 level, from December 1, 1982 to December 1, 1985;

v) That the agreement of July 10, 1980 be removed from Dr. Uzoaba's personnel file;

vi) That the Respondent pay Dr. Uzoaba the sum of $5,000.00 for injury to Dr. Uzoaba's feelings and self respect;

vii) That the Respondent pay interest on the monies awarded herein in accordance with the provisions of the Courts of Justice Act of Ontario:

a) On the lost wages calculated on the total amount payable from June 1, 1984, being the mid-point of the period for which wages are being paid; and

b) On the $5,000.00 for hurt feelings from September 1, 1980, being the approximate date on which Dr. Uzoaba left active employment with CSC.

DATED: March 15, 1994

Anne L. Mactavish, Chairman

Ross Robinson, Member

Lino Sa Pessoa, Member