TD 8/90
Decision rendered on June 18,1990

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

HUMAN RIGHTS TRIBUNAL

BETWEEN:

INA LANG

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

CANADA EMPLOYMENT AND IMMIGRATION COMMISSION

Respondent

TRIBUNAL

WILLIAM KUSHNERYK, Q.C. - Chairman
KRISTIAN EGGUM, Q.C. - Member
NORMA McLEOD - Member

DECISION OF TRIBUNAL

APPEARANCES:

Harry Glinter
Counsel for the Respondent

James Hendry
Counsel for the Commission

DATE AND PLACE OF HEARING:
March 21, 22, 1989
WINNIPEG, Manitoba

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NATURE OF COMPLAINT

The complaint in this case is against the Canada Employment and Immigration Commission. ("Canada Employment and Immigration")

The action complained of is particularized in the complaint filed with the Canadian Human Rights Commission by the Complainant, Ina Lang:

"The Canada Employment and Immigration Commission has discriminated against me by denying my application for funds under a programme customarily available to the general public, in contravention of section 5(a) of the Canadian Human Rights Act.

I applied for a wage subsidy under the Challenge 86 programme. I intended to hire my daughter to work in my family day care, for which work she is experienced and has training, but my application was denied. The programme denies eligibility of members of an employer's immediate family and this policy discriminates against me and other employers on the ground of family status."

MANDATE OF TRIBUNAL

The mandate of the Tribunal appointed to hear the complaint was to inquire into the complaint and to determine whether the action complained of constitutes a discriminatory practice on the ground of family status, in the provision of services under section 5(a) of the Canadian Human Rights Act. (the "Act")

ACT

The relevant provisions of the Act are:

3(1) - For all purposes of this Act, race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability and conviction for which a pardon has been granted are prohibited grounds of discrimination.

5. It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public

(a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or

(b) to differentiate adversely in relation to any individual, on a prohibited ground of discrimination.

15. It is not a discriminatory practice if

(g) in the circumstances described in section 5 or 6, an individual is denied any goods, services, facilities or accommodation or access thereto or occupancy of any commercial premises or residential accommodation or is a victim of any adverse differentiation and there is a bona fide justification for that denial or differentiation.

66.(1) This Act is binding on Her Majesty in right of Canada, exceptin matters respecting the Government of the Yukon Territory or the Northwest Territories.

Section 2 states the purpose of the Act:

"The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that every individual should have an equal opportunity with other individuals to make for himself or herself the life that he or she is able and wishes to have, consistent with his or her duties and obligations as a member of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin,

colour, religion, age, sex, marital status, family status, disability or conviction for an offence for which a pardon has been granted."

The words "family status" are not defined in the Act.

The meaning of these words was exhaustively reviewed in Schapp v. Canada (Department of National Defence) (1988), C.H.R.R. D/4890 which concluded on page D/4910:

"The natural and ordinary meaning of the word 'family status' I believe would include the inter-relationship that arise from bonds of marriage, consanguinity, legal adoption and including to use the words of Professor Tarnopolsky, the ancestral relationship whether legitimate, illegitimate or by adoption as well as the relationships between spouses, siblings, in-laws, uncles or aunts and nephews or nieces, cousins, etc."

The Tribunal is of the view the words "family status" include the relationship of parent and child.

BACKGROUND FACTS

The Complainant, Ina Lang ran a family day care business for six years until the business was closed in the summer of 1987. Mrs. Lang was allowed to have up to eight children, five of them pre-schoolers and no more than three infants at a time. She stated in her evidence it was important for the day care centre to have a safe, cheerful and happy environment. The children being cared for by the Complainant were mostly from low income families or single parents. All of the children were subsidized by the government. Three of them were the children of the Complainant's daughter, Terry McKenzie, a single parent who had gone back to school.

For a period of time the Complainant carried on the operation of a group day care home with her daughter. A group day care home

required two people to operate and allowed for twelve children. The group day care home was opened at the beginning of 1983. The Complainant ran it with her daughter until June, 1985. This group home was closed in June, 1985 since it was felt the daughter needed more training. As a single parent with three children the daughter thought she should go back to College. The daughter enrolled in a two (2) year child care worker course at Assiniboine Community College in Brandon, Manitoba. This course was paid for by student grants, loans and a bursary. Successful completion of the course would result in a Class 2 Certificate after the first year and a Class 3 Certificate on completion of the second year of the course.

The Complainant stated the aim of training people to be child care workers was to improve day care and the quality of the worker who would be providing care to the children.

The Complainant's daughter was the only one taking the course from the Minnedosa area where the Complainant and her daughter resided.

The Complainant hoped to hire her daughter while she was off school during the summer months of 1986 to work with the Complainant in what was now the Complainant's family day care business.

The Class 3 Certificate requires that you have 350 hours of practical day care experience. The Complainant felt the employment of her daughter at the Complainant's family day care during the summer months would assist the daughter in this regard and also provide an opportunity for the daughter to improve her reporting, record keeping and bookkeeping skills, all areas in which the daughter needed improvement and which are an important part of any day care business. Also, it was the Complainant's hope her daughter would incorporate some of what she had learned over the year into the Complainant's family day care program and that the

presence of her daughter would allow the Complainant the opportunity to do some renovations to her basement, thus enhancing it as a suitable play area for the children.

The Complainant heard about the Challenge' 86 program and felt she could manage with the financial assistance provided by the program.

CHALLENGE 86 PROGRAM

A description of the Challenge' 86 Program is found in a document published by Canada Employment and Immigration marked as Exhibit C-3 which states in part as follows:

"CHALLENGE '86 - Summer Employment/
Experience Development (SEED)
Interested in Hiring a Student for the Summer?

Challenge '86 is providing subsidies to employers to create jobs for students.

Applications that propose to create employment opportunities for students that would not otherwise be available are eligible for consideration.

All applications to the Program will be assessed according to their potential to prepare a student or students for future labour market participation, the benefit(s) to be derived by the student(s) from doing the job(s) and the usefulness of the work proposed.

Any subsidy, however, is subject to the availability of funds.

If you can create a summer job for one student, or for several students, please complete the attached Application/Agreement form and send it to the office nearest you as indicated on the Provincial Territorial Insert Sheet ....

Program Guidelines...

EMPLOYEES ELIGIBLE TO BE PAID WITH PROGRAM FUNDS.

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Students who:...

are not members of the employer's immediate family. Important - see the Terms and Conditions for definition ....

TERMS AND CONDITIONS...

7.(1) Unless otherwise agreed to in writing by the COMMISSION, no contribution may be paid by the COMMISSION in respect of the wages, mandatory employer costs and other costs to an employee who:

(a) was not referred to the EMPLOYER by a Canada Employment Centre before being hired by the EMPLOYER; or

(b) who is a member of the immediate family of:

(i) the EMPLOYER, where the EMPLOYER is an individual;

(ii) a senior officer or director of the corporation or an association, where the EMPLOYER is a corporation or an unincorporated association.

(2) For the purposes of this section, "immediate family" means, in relation to the EMPLOYER who is an individual, or to a senior officer or director of a corporation or association, the father, mother, step-father, step-mother, foster parent, brother, sister, spouse (including common law spouse), child (including child of common law spouse), step-child, ward, father-in-law and mother-in-law of such person, and includes any relative permanently residing in the household of the said individual, senior officer or director or any relative with whom the said individual, senior officer or director permanently resides."

A further document published by Employment and Immigration Canada entitled Employment Manual was filed as Exhibit R-2. This document states in part:

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"CHALLENGE '86

SUMMER EMPLOYMENT/EXPERIENCE DEVELOPMENT

50.01 INTRODUCTION

1)a) The purpose of the Summer Employment/Experience Development (SEED) element of Challenge '86, the Student Summer Employment Program, is to provide incremental, career/study related and practical work experience to in-school youth during the summer months through the provision of subsidies to employers.

b) In some regions, the SEED initiative has been harmonized with provincial programs. As such, the program may have a different name in those provinces.

2) Two types of jobs are supported under the program: Career/Study Related and Practical Work Experience. Career/Study Related jobs are those which relate to a field of study, discipline, future career or training program, while practical work experience jobs are those which would benefit a student's future employability but have no direct link to a field of study, discipline, etc."

NEPOTISM CLAUSES

A paper prepared by Robert Van Tongerloo, Director General of Operations For The Canadian Job Strategy (which includes a job entry program under which the Challenge '86 Program was run) on Canadian Job Strategy was filed as Exhibit R-1. In this paper dated March 10, 1989 Mr. Van Tongerloo states at page 9:

"Since its inception, the emphasis of the strategy has been on the client and helping those most in need. As a result of this emphasis, and to ensure equity and equal access to all Canadians, the continuing provision was made within the programs to deal with nepotism. Nepotism clauses were included, where applicable, within program forms, manual instructions, guidelines and in the terms and conditions of the programs submitted to Treasury Board."

COMPLAINANT'S CASE

The Complainant completed an application for funding under the Challenge '86 Program.

In making application under the Program the Complainant was seeking a financial subsidy for eleven weeks at forty hours per week for a total of four hundred and forty hours at $2.40/hour.

The maximum subsidy available to the Complainant was $1,000.00.

The following letter was attached to the Complainant's application:

"Re: Challenge '86 Rule #7

I would like to request that the Commission give me permission in writing to hire a relative.

My business is located in my home and I must have complete trust in my employee to care for the children and respect my home and my families privacy. She must also be approved by my day care coordinator.

The person I wish to hire worked with me as a partner for two and one half years running a group day care home in Minnedosa.

She then decided to go to college and take her child care training. She is taking her CCW II at present and plans to return in the fall for her CCW III. I have faith in her abilities and honesty

and because she has held a license the coordinator would approve her.

The duties and responsibilities of the employee would be to care for children within a family day care setting, abiding by all day care rules and regulations.

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She would be expected to help plan and carry out a program of activities for the children as well as planning and preparing meals and helping with general household duties relating to the day care.

This would give a person taking the child care course some practical on the job experience. It may also help them qualify for their diploma since the regulations are different for anyone employed before Oct. 31/88 and anyone employed after that date."

The Complainant was asked at the hearing to describe this letter. She responded stating that in reading the regulations she learned you could not hire a relative without written permission. The complainant wrote the letter asking for this permission.

Subsequent to the filing of her application for funding the Complainant received a telephone inquiry from a Shirley Conlin of Canada Employment and Immigration who inquired as to the relationship between the Complainant and the relative described in the Complainant's letter.

The Complainant informed Ms. Conlin the relative was her daughter. Ms. Conlin commented words to the effect the community would not understand.

In further discussion with the Complainant Ms. Conlin indicated she did not expect the Complainant to receive funding.

Subsequently the Complainant received a form letter from the Respondent rejecting her application for funding. This letter stated if further program funds became available the Complainant's application would receive further consideration and that the Complainant would be notified accordingly.

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In fact, the Complainant received no further notification and received no funds from the program.

The Complainant was quite angry at not receiving funding. She expressed this anger as follows:

"I didn't feel that they looked at the program at all or looked at what I was trying to do. It was based as far as I felt, it was based strictly on the fact that I wanted to hire a relative, even though that person, in my opinion, was the best qualified person for the job, and the only one I could hire under the circumstances .... nobody checked out anything. Nobody looked into even whether I had a day care. Nobody looked into Terry's qualifications. Nobody looked into anything. It was just rejected because this was a relative I wanted to hire."

RESPONDENT'S CASE

The Respondent called two (2) witnesses in response to the complaint.

Robert Van Tongerloo

Mr. Van Tongerloo is the Director General of Operations for Canadian Job Stategy and was the Senior Official responsible for the Challenge '86 Program.

It was Mr. Van Tongerloo's evidence the Challenge '86 Program was essentially a wage subsidy program available to provide employment to all full time students intending to return to academic studies the following academic year and existed for those most in need.

The focus of the program was on those students with the highest unemployment rates and the greatest need for developing skills. The intent of the program was to equip students still in academic studies in making the transition into the world of work. The prime target of the program, according to Mr. Van Tongerloo, were students least likely to get work on their own. The purpose of the program was to subsidize jobs for these students.

Mr. Van Tongerloo was not personally involved in the assessment of Mrs. Lang's application. Mr. Van Tongerloo was however, familiar with the application. Mr. Van Tongerloo questioned the advisability of Mrs. Lang's

daughter working for her mother. In doing so Mr. Van Tongerloo acknowledged:

"...As was indicated in the project officer's notes, it was considered to be an exemplary job opportunity. In fact, they had noted in the application form up until the time Ina Lang had been contacted that, in fact, it looked like a prime candidate for funding.....

With respect to the section 7 prohibited class, Mr. Van Tongerloo confirmed there are circumstances in which a family member may be considered for an exemption which would only be granted on the recommendation of the project officer. Such a recommendation would in turn require the approval of the local Canada Employment and Immigration Commission Manager. The facts of a particular case would require investigation prior to any such recommendation and approval.

Mr. Van Tongerloo stated Mrs. Lang's application was a highly unusual case in that Canada Employment and Immigration was forewarned there was a normally prohibited candidate for the job.

It was Mr. Van Tongerloo's evidence no investigation was carried out to qualify Mrs. Lang's application for a section 7

prohibited class exemption. In Mr. Van Tongerloo's words:

"...Unfortunately, the system ground to a halt."

Mr. Van Tongerloo made the following acknowledgement on cross-examination by Counsel for the Commission:

"Q. As a person who sort of is in charge of all of this, of this particular program, at the time. Would you expect that if Mrs. Lang had not mentioned that she wanted to hire her daughter and had not included that letter that was attached to the application requesting the exemption, would you think it would be probable that would have been funded?

A. If Mrs. Lang had not advised at any time up to the point of our signing the document that this person, in fact, did have a family relationship with her, I'm quite certain it would have been funded."

Notwithstanding this acknowledgement Mr. Van Tongerloo stated it was his understanding Mrs. Lang was denied support under the program because of her refusal to consider other qualified or potentially qualified candidates for the position.

This was at odds with the Canada Employment and Immigration letters stating Mrs. Lang's application was not being rejected but simply given a low priority.

It was also at odds with the submission of Counsel for the Respondent that this case was about the section 7 anti-nepotism clause.

With respect to these discrepancies Counsel for the Respondent stated:

"There is a problem."

Mr. Van Tongerloo acknowledged:

(a) There were no rules in place which an employment officer would be required to follow in assessing an applicant's qualification for a section 7 prohibited class exemption.

(b) No consideration was given to the granting of an exemption in this case.

(c) He did not know of any person in the same child care worker course as Mrs. Lang's daughter who could have matched the qualifications of Mrs. Lang's daughter.

Linda Sangster

Linda Sangster, a Program Consultant with Canada Employment and Immigration was called as part of the Respondent's case.
Ms. Sangster was a project officer working with Canadian Job Strategy in the south unit of the Employment and Development Branch at the time of Mrs. Lang's application for subsidy.

The geographical area of the south unit included Brandon and Minnedosa.

Involvement with the Challenge '86 Program was not part of Ms. Sangster's regular duties but because of the demand at the time she was asked to assist in the assessment of the applications.

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This assessment took place in Brandon, Manitoba.

Ms. Sangster reviewed the application filed by Mrs. Lang. it was Ms. Sangster's evidence:

1. Mrs. Lang's application met the basic terms and conditions of the Challenge '86 Program.

2. She regarded Mrs. Lang's application as a good career related application.

3. She in fact was the person who contacted Mrs. Lang to determine who the relative was and to ascertain whether an exemption was necessary.

4. She determined Mrs. Lang wished to hire her daughter and would not accept other referrals.

5. Requests for exemptions were rare.

6. She agreed with Mr. Van Tongerloo that Mrs. Lang's application would likely have been funded but for the indicated family relationship.

7. Career opportunities were given a high priority under the Challenge '86 Program.

8. Mrs. Lang's application was a private sector application which was also a priority for funding.

9. There was no investigation of Mrs. Lang's request for exemption.

10. She had no prior experience in dealing with a request for exemption pursuant to clause 7.

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11. Despite this Ms. Sangster marked Mrs. Lang's application "not recommended".

12. This designation was subsequently changed by Ms. Conlin to "low priority".

13. Ms. Sangster did not know why this was done by Ms. Conlin.

ARGUMENT

Counsel for the Respondent

Counsel for the Respondent submitted this case presented a unique fact situation for which he was unable to find any precedent and that the matter was one of first instance.

Counsel acknowledged the Respondent was not as candid as it might have been in dealing with Mrs. Lang's application.

Counsel conceded in argument the purpose of the Challenge '86 Program was to create a job that would not otherwise exist for a needy student and that it was a joint undertaking by employers and government to create benefits for students.

It was submitted in argument being single and having three children did not in itself qualify one as a needy person in the context of the program.

It was further submitted that from a business point of view there was really little to be said in favour of Mrs. Lang's wish to hire her daughter in the summer of 1986.

Counsel suggested that if Mrs. Lang was to be put in the position she would have been if she had qualified for the subsidy, she would actually owe money to Canada Employment and Immigration.

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It was submitted on behalf of the Respondent the purpose and intent of the Challenge '86 Program was to encourage employers to create jobs in partnership with the government so that students could get the kind of work experience that would help facilitate their movement from school to the work sector. It was a make-work program funded by taxpayers dollars to help under qualified students. The purpose of having an anti-nepotism

provision in such a program was to prevent collusion or conflict of interest. The Respondent's policy of not funding jobs where the employee being hired was a member of the immediate family of the employer is simply to ensure there is no favouritism or preference given to relatives in the hiring of students under the program.

The Respondent, in administering public funds, has an obligation to ensure that the persons who are intended to benefit from its job creation programs have a fair and equal opportunity to apply for the jobs the government is funding.

Counsel for the Respondent stated the anti-nepotism policy is an integral part of that purpose.

Argument was advanced Mrs. Lang's application did not meet the purpose and intent of the program.

As for Mrs. Lang's complaint she was discriminated against on the basis of family status because her application for an exemption was not fairly considered, Counsel for the Respondent submitted that when confronted with Mrs. Lang's expressed desire to hire her daughter and Mrs. Lang's insistence she would not accept any other referrals from Canada Employment and Immigration, Ms. Sangster really did not know what to do but she did what she thought was fair.

The Respondent acknowledged, in writing and at the hearing of Mrs. Lang's complaint, no input was received from the Canada Employment and Immigration Commission on this decision.

In this regard Counsel for the Respondent acknowledged:

"C.E.C. never got the application. I'm not disputing that. I can't. Mrs. Sangster, in effect, made the decision not to grant the exemption by not forwarding the application to the C.E.C. because it didn't come within the guidelines which required Mrs. Lang to hire somebody referred to her by C.E.C.

There is no question that there is a problem in this regard. I can't disguise it ..."

In summary, it was submitted on behalf of the Respondent:

(a) Mrs. Lang was not discriminated against based on family status.

(b) Alternatively, if she was discriminated against, it was done fairly to achieve the overriding objectives of the Challenge '86 Program.

(c) Mrs. Lang has not in any event suffered any damages, monetary or otherwise.

Counsel for the Commission

Counsel for the Commission advanced a number of points in argument. A day care was a special environment where trust and safety of the children are of paramount concern.

There was much government regulation and the Government of Manitoba was pressing for more education creating further classifications of day care workers, namely Class 1, Class 2, Class 3 and so on.

Mrs. Lang's daughter needed experience to qualify as a Class 3 Child Care Worker.

Mrs. Lang could not afford to hire a student for the summer without a subsidy and so she applied for a Challenge '86 Program subsidy stating quite candidly she wanted to hire a relative.

Notwithstanding the exemption provisions which allowed for the hiring of a relative Mrs. Lang was told this would not be acceptable to the community and in an Employment and Immigration Canada form letter was advised other applications from her area were being assigned a higher priority. This form letter further advised Mrs. Lang her application could not be funded "at this time" but that if additional program funds became available, her application would receive further consideration and she would be notified accordingly.

Mrs. Lang did not receive funding from the program.

The form letter Mrs. Lang received from Canada Employment and Immigration made no mention of Mrs. Lang's request for exemption.

Further, the statements contained in this letter contradict the "not recommended" notation on the assessment check list completed in respect to

Mrs. Lang's application and the admission by Counsel for the Respondent that Mrs. Lang's application was in fact rejected by being given a low priority.

The witnesses called by the Respondent confirmed Mrs. Lang's application would have been given a high priority and would have been funded but for the fact Mrs. Lang wished to hire a relative.

No instructions of any kind were given to Mrs. Lang or to the officers of Canada Employment and Immigration on how to deal with a

request for exemption.

There was no criteria as to how an officer charged with administering the program should deal with a request for an exemption for a relative. This is borne out by Mr. Van Tongerloo's evidence that unfortunately, the system ground to a halt on receipt of Mrs. Lang's application. The concern of Canada Employment and Immigration was at all times the participation of a member of Mrs. Lang's family in the program. It was clear from the evidence Mrs. Lang's application for funding was rejected due to her insistance on hiring her daughter which rejection was clearly connected to family status.

The "no relative" prohibition allowed for exemptions but provided no criteria for dealing with a request for exemption.

Mrs. Lang did not know when to make the request for exemption. She was not told. She received no assistance in this regard from the application form. Upon receipt of Mrs. Lang's request for exemption Ms. Sangster was equally in a quandary about what to do with Mrs. Lang's request.

Canada Employment and Immigration did not establish any bona fide justification for the denial of funding to Mrs. Lang in this case. on the issue of remedy Counsel for the Commission relied on Section 53, subsections (2) and (3) of the Act which provide:

"53(2) If, at the conclusion of its inquiry, a Tribunal finds that the complaint to which the inquiry relates is substantiated, it may, subject to subsection (4) and section 54, make an order against the person found to be engaging or to have engaged in the

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discriminatory practice and include in that order any of the following terms that it considers appropriate:

(a) that the person cease the discriminatory practice and, in order to prevent the same or a similiar practice from occurring in the future, take measures, including

(i) adoption of a special program, plan or arrangement referred to in subsection 16(1), or

(ii) the making of an application for approval and the implementing of a plan pursuant to section 17,
in consultation with the Commission on the general purposes of those measures;

(b) 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;

(c) that the person compensate the victim, as the Tribunal may consider proper, for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice; and

(d) that the person compensate the victim, as the Tribunal may consider proper, for any or all additional cost of obtaining alternative goods, services, facilities or accommodation and for any expenses incurred by the victim as a result of the discriminatory practice.

53(3) In addition to any order that the Tribunal may make pursuant to subsection (2), if the Tribunal finds that

(a) a person is engaging or has engaged in a discriminatory practice wilfully or recklessly, or

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general application. it should be recognized for what it is, a fundamental law." This principle of interpretation was further articulated by McIntyre J., for a unanimous Court, in Winnipeg School Division No. 1 v. Craton, [1985] 2 S.C.R. 150, at p. 156:

Human rights legislation is of a special nature and declares public policy regarding matters of general concern. It is not constitutional in nature in the sense that it may not be altered, amended, or repealed by the Legislature. It is, however, of such nature that it may not be altered, amended, or repealed, nor may exceptions be created to its provisions, save by clear legislative pronouncement ... In Ontario Human Rights Commission v. Simpson's Sears Ltd. [1985] 2 S.C.R. 536, the Court set out explicitly the governing principles in the interpretation of human rights statutes. Again writing for a unanimous Court, McIntyre J. held, at pp. 546-47:

... Legislation of this type, is of a special nature, not quite constitutional but certainly more than the ordinary -- and it is for the courts to seek out its purpose and give it effect. The Code aims at the removal of discrimination."

In this case, the Court ordered a special program to meet the problem of systematic discrimination to prevent the same or a similar practice occurring in the future.

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2. Robichaud v. The Queen (1987) 2 S.C.R. 84.

In this case a woman was sexually harrassed by a male supervisor in the course of her employment and the question was whether the Crown was liable for the actions of the supervisor. The Court held the Crown was liable. In delivering the Judgment of the Court La Forest J. states at p. 90:

" ... the Act is directed to redressing socially undesirable conditions quite apart from the reasons for their existence. O'Malley makes it clear that "an intention to discriminate is not a necessary element of the discrimination generally forbidden in Canadian human rights legislation" (at p. 547). This legislation creates what are "essentially civil remedies" (p. 549). McIntyre J. there explains that to require intention would make the Act unworkable."

And at p. 92:

" ... the Act, we saw, is not aimed at determining fault or punishing conduct. 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."

3. Ontario Human Rights Commission v. 'The Borough of Etobicoke (1982) 1 S.C.R. 202.

This case provides guidance on the manner in which a human rights complaint proceeds.

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See McIntyre J. at p. 208:

"Once a complainant has established before a board of inquiry a prima facie case of discrimination, in this case proof of a mandatory retirement at age sixty or a condition of employment, he is entitled to relief in the absence of justification by the employer. The only justification which can avail the employer in the case at bar, is the proof, the burden of which lies upon him, that such compulsory retirement is a bona fide occupational qualification and requirement for the employment concerned. The proof, in my view must be made according to the ordinary civil standard of proof, that is upon a balance of probabilities .... to be a bona fide occupational qualification and requirement a limitation, such as a mandatory retirement at a fixed age, must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the Code. In addition it must be related in an objective sense to the performance of the employment concerned in that it is reasonably necessary to assure the efficient and economical performance of the job, his fellow employees and the general public."

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5 of the Canadian Human Rights Act has been violated. Canada Employment and Immigration Commission is ordered to pay to each complainant the benefits the complainant would have received had she not been improperly disentitled, compensation for expenses incurred because of the discrimination, and $1,000.00 for injury to feelings and self-respect."

The case held the provision of unemployment insurance benefits was a service customarily available to the general public and further at p. D/4382:

"...with regards to the matter of "family status" my review of the case law leads me to support the broader interpretation of relationship to another particular family member including one's spouse."

The Tribunal awarded compensation in favour of the complainant and ordered that the Canada Employment and Immigration Commission cease the discriminatory practice of applying certain sections of the Unemployment Insurance Act and regulations.

5. Attorney General of Canada v. Druken (1988) 9 C.H.R.R. D/5359 (F.C.A.) (leave to appeal to S.C.C. dismissed March 9, 1989).

This case is a judicial review of the Canadian Human Rights Tribunal Decision in Druken in which the Federal Court of Appeal upheld the decision of the Tribunal. As to the issue of service Mahoney, J. refers to Singh (Re) (1988) 86 N.R. 69 in which it was said by Hugessen, J. delivering the judgment of the Federal Court of Appeal:

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The Supreme Court of Canada found the Town's hiring policy was in fact discriminatory and that such discrimination could not be justified.

7. Foster Wheeler Ltd. v. Ontario Human Rights Commission (1987) 8 C.H.R.R. D/4179.

This case was cited by counsel for the Commission to establish that where a discriminatory factor is one of the reasons for refusal to employ, a violation of the Human Rights Code occurs notwithstanding other legitimate considerations may be involved in the refusal.

8. Butterill v. Via Rail Canada Inc. (1980) 1 C.H.R.R. D/233.

This Review Tribunal Decision was cited as authority for the proposition an aggrieved party should be put back in the position that he or she would have enjoyed had the discrimination not occurred.

See Tribunal Decision at paragraph 2059:

"In our view the use of the language of "compensation" by the Canadian Act implies that tribunals are to apply the principles employed by Courts when awarding compensatory damages in civil legislation. The root principle of the civil law of damages is "restitutio in integrum": the injured party should be put back into the position he or she would have enjoyed had the wrong not occurred, to the extent that money is capable of doing so, subject to the injured party's obligation to take

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reasonable steps to mitigate his or her losses."

9. Via Rail Canada Inc. v. Butterill (1982) 2 F.C. 830 (CA).

This case was a Section 28 Federal Court Act application to review and set aside the decision of the Review Tribunal. The application was allowed in part. The case involved a refusal by Via Rail to hire the respondents because of eyesight deficiencies. At p. 844 Thurlow, C.J., states:

"Their case, as I see it, was made out when they proved that they were refused employment as a result of the application to them of an unlawful discriminatory practice. On such evidence, and the other facts in evidence relating to each of the complainants, it could be inferred by the Tribunal that they had lost wages that they otherwise would have earned. If, in this situation, the applicant VIA could resist such an inference by establishing facts showing that the complainants, or any of them, could not meet any "bona fide occupational requirement" as to their eyesight (see paragraph 14(a) of the Act) it was for VIA to put the evidence of such facts before the Tribunal. Not having done so, its objection cannot succeed."

10. Morgan v. Canadian Armed Forces T.D. 5/89 - Decision rendered March 17, 1989.

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This case was cited as authority in support of an award of interest.

DECISION

For the reasons hereinbefore outlined the Tribunal finds the action complained of in this case constitutes a discriminatory practice on the ground of family status, in the provision of services under Section 5(a) of the Act and that no bona fide justification existed for the denial of funding to Mrs. Lang.

The complaint is therefore allowed.

ORDERS

1. The Respondent shall compensate the complainant in the amount of $1,566.24 for loss incurred because of the discrimination.

2. The Respondent shall compensate the complainant a further amount of $1,000.00 for hurt feelings and loss of self-respect.

3. The Respondent shall pay the complainant interest on the said $1,566.24 and $1,000.00 amounts at the rate of 11% calculated as and from June 27, 1986 to date of payment.

The Tribunal recommends that to prevent the same or a similar discriminatory practice from occurring in the future consideration should be given to the establishing of criteria and guidelines for purposes of dealing with a request for exemption to the anti-nepotism provisions in the Canada Employment and Immigration policy guidelines taking into account the anti-discrimination prohibitions in Human Rights legislation so as to ensure proper consideration is given to requests which are made for exemptions.

Such criteria and guidelines might include:

1. A determination as to whether the application meets the program requirements and qualifies for funding in all other respects.

2 . The qualification of the person for whom the exemption is sought i.e. is such person qualified?

3. That each request for exemption be considered individually on its own merits and on a timely basis.

4. That monitoring and inspection procedures be established to ensure compliance with these criteria and guidelines once established.

DATED this of ? of ?, 1990.

Kushneryk, Q.C.

Kristin Eggum, Q.C.

Norma McLeod