T.D. 15/94
Decision rendered on October 18, 1994

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

HUMAN RIGHTS TRIBUNAL

BETWEEN:

MELVIN A. SWAN

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

CANADIAN ARMED FORCES

Respondent

TRIBUNAL DECISION

TRIBUNAL: JAMES D. TURNER, Chairperson
MURTHY GHANDIKOTA, Member
JOSEPH A. SANDERS, Member

APPEARANCES: Helen Beck, Counsel for the Commission

Kenneth Young, Counsel for the Complainant

Harry Glinter, Sidney Restall and Lt.Col. Weatherston, Counsel for the Respondent

DATES AND LOCATION OF HEARING: April 5, 1993 Winnipeg, Manitoba
Sept. 27-30, 1993 Winnipeg, Manitoba
Nov. 1-5, 1993 Winnipeg, Manitoba
Jan. 12-14, 1994 Comox, British Columbia
Jan. 24-28, 1994 Winnipeg, Manitoba
Feb. 7-8, 1994 Winnipeg, Manitoba

Apr. 27-30, 1994 Winnipeg, Manitoba
May 24-27, 1994 Winnipeg, Manitoba

BACKGROUND

Melvin Andrew Swan is a native (Saulteaux) Canadian born February 27, 1959 and raised on the lake Manitoba Reserve, Manitoba. He received his schooling on the Reserve and at a Residential School at Dauphin, Manitoba.

While at the Residential School he become involved with Cadets and later as a member of the Militia (1976). He then joined the Regular Canadian Armed Forces in October of 1978 at Winnipeg, Manitoba.

From Winnipeg he went to Cornwallis for basic training (1978) for about six months and then to Wainwright, Alberta for trades training (1979) for about 18 weeks. He was stationed in Winnipeg for about four years until 1982.

In 1982 Mr. Swan applied for a change of military occupation to that of military policeman and was subsequently sent to Borden, Ontario for qualification training for about four or five months. After qualification training he was posted to Comox, B.C. as a Military Policeman and remained there for approximately five years. During this period Mr. Swan had applied for a voluntary release (September 1984) pending an employment opportunity with the R.C.M.P. This release was later withdrawn. He was then posted to Shilo, Manitoba until he obtained his voluntary release in October, 1988.

COMPLAINT

The complaint form as amended is filed as HRC-1 in the proceedings and after much argument and discussion between counsel formed the basis of these proceedings.

At the commencement of the case the Tribunal was advised that the specific complaints in relation to S.7 and 10 of the C.H.R.A. (as amended) would not be proceeded with.

The case therefore proceeded on the basis of S.14(1) of the Act which reads as follows:

Section 14(1). It is a discriminatory practice,

(a) in the provision of goods, services, facilities or accommodation generally 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.

In relation to that section the prohibited grounds from S.3(1):

Section 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.

Also at the commencement of the hearings Counsel for the Respondent objected on the grounds that the Commission was going to introduce evidence on points that went outside the "four corners" of the complaint as amended and the particulars provided. The Tribunal ruled at that time that the

Commission could proceed with its evidence on the basis that the Respondent was not being prejudiced in the presentation of their case. Due to the inherent delays in the process there would be ample time for the Respondent to prepare its case.

The complaint as it was presented to the Tribunal essentially covered eight specific instances of harassing behaviour and one general complaint of "continual" harassment.

The eight specific instances were as follows:

1. Lieutenant Lancey's alleged comment while on a run at Wainwright during training - the "would you rather carry a bow and arrow or the rifle, Swan?" comment. (1979).

2. M/Cpl. Quibble's alleged comment - at TQ 5 course (1985) when he was dressing down the class ". . . and fucking Indians".

3. Sgt. Wedge's alleged comments (1987) - the Comox bar incident investigation - regarding "the big Indian" who allegedly flashed an MP Badge inappropriately.

4. Cst. Wilkinson's alleged comment (1986) - "Indians aren't so bright, eh Swan?" during the first aid course at Comox.

5. Cpl. Skinner's alleged comment (1987) - "Drunken Indians (or Indians) aren't roadside objects" during the accident investigation course at Comox.

6. W/O Ross - alleged memorandum in Swan's file regarding "cultural problems" at the TQ 5 course Borden (1985).

7. Denial of compassionate leaves - nephew's funeral - July of 1988 at Shilo.

8. Poster from CFB Portage LaPrairie, Manitoba advertising "Chiefs and Indians" night at mess (1989).

In addition to the specific instances there were general allegations of racial comments, jokes and slurs. Mr. Swan alleges that he encountered them throughout his military career.

SPECIFIC INCIDENTS REFERRED TO IN THE COMPLAINT

1. Lieutenant Lancey's - alleged comment made while on a run at Wainwright, Alberta, 1979 during training. The Complainant alleges that during a training run Lieutenant Lancey was running beside him and at some point proffered the following comment to him, "Would you rather carry a bow and arrow or the rifle, Swan?"

Lieutenant Lancey in his testimony categorically denies making the statement and goes into some detail as to why it would be improbable given that he was running with Swan at that time.

With respect to this incident the Tribunal is not prepared to rule that it did or did not occur. We find the evidence presented to be inconclusive. This event was not further considered in our decision.

2. M/Corporal Quibble's alleged comment at TQ 5 course, Borden when he was dressing down the class. "I don't give a damn if you're a split ass, an airborne trooper, a crewman or a fucking Indian." Mr. Swan indicated in his testimony that he was very disturbed by this comment and that Quibble later apologized to him about it.

M/Cpl Quibble's version of the event is somewhat different in several details. The point he reiterates is that he did not use the adjective "fucking" with the word "Indian" and thus in his view the comment was not objectionable and he goes into detail on what his intentions were in making the comment.

The Tribunal in this instance accepts Mr. Swan's version of the events. Even if the word "Indian" was used alone the context in which it was used was inappropriate and would of itself constitute grounds for a complaint of harassment whether or not an apology was proffered. The fact that an apology was given and there are no further complaints in relation to this individual would be properly considered in relation to the remedy awarded.

We find that Quibble's testimony corroborates Swan in that an incident occurred and we accept Swan's version.

3. Sgt. Wedge's alleged references to "big Indian" and the Comox bar incident allegations that a big Indian MP had improperly flashed his credentials in bar. Mr. Swan alleges that he was investigated in relation to this incident solely because he was an Indian.

A great deal of evidence was put before the Tribunal in relation to this event and we do not intend to repeat it here as part of our ruling. The Tribunal finds that the complaint as received at the base referred to a "big Indian" as the perpetrator. The evidence establishes that Mr. Swan was the only First Nations MP serving at the base and that he otherwise fit the description. The fact that he was investigated on this basis does not lead the Tribunal to the conclusion that this was intentional or unintentional harassment of Mr. Swan by his superiors.

4. Cst. Wilkinson - alleged comments at CPR/First Aid Course "Indians aren't so bright, eh Swan?" Mr. Swan alleges that this comment was made to him by Wilkinson in the context of an error he made during a CPR training course. Wilkinson denies making the statement and several others present at the course do not recollect the statement being made to Swan.
The Tribunal finds that the Complainant has not proved that this event occurred on a balance of probabilities. There is no corroboration of his version of the event.

5. Cpl. Skinner's alleged comment at the accident investigation course at Comox, "No, Indians are not roadside objects." Mr. Swan alleges the

comment was made during an explanation of the triangulation of objects at an accident scene. Skinner denies making the statement. M/Seaman Lamorie who was also present at the course indicated in his testimony that he couldn't recall the statement being made and draws the conclusion that it didn't occur. With respect to M/Seaman Lamorie's testimony the Tribunal is not prepared to accept his conclusion that the statement wasn't made because he couldn't recall it.

The Tribunal accepts Mr. Swan's version of this event and finds that it is corroborated in the testimony of Heather Swan. Her testimony, while differing somewhat in detail, is in our view referring to the same event.

6. W/O Ross - alleged memorandum in Swan's file regarding "cultural problems" at TQ 5 course, Borden. Mr. Swan alleges that, while waiting in Ross's office for an interview, he looked in his file and alleges it said, "This man has a cultural problem". He has no recollection of the context in which it was used. Ross denies having written words to that effect in Swan's file and also denies speaking these words.

The Tribunal finds that the Complainant has not proved that this event occurred on the balance of probabilities. There is no corroboration of his version of the event. The Tribunal further notes that even if it was established conclusively that the words were in the file it would be necessary to know the context in which they were used before any ruling on whether or not they constituted harassment would follow.

7. Denial of compassionate leave to attend nephew's funeral. The Tribunal found a significant number of discrepancies and inconsistencies in the testimony of the witnesses that dealt with this issue. The most obvious inconsistency is that Devlin does not recall speaking to Fr. Roy or to Cpt. Piper contemporaneously with the incident. We find it plausible that Cpt. Piper was not initially aware that Swan had requested compassionate leave and only became aware after Fr. Roy's phone call. Our understanding of the military hierarchy is that the request would normally have been handled at Devlin's level.

We find it plausible that Sgt.Maj. Devlin handled Swan's request in the manner in which he indicated. He reviewed the request and subsequently denied it because a nephew was not considered to be an

immediate family member for the purposes of granting compassionate leave.

At this time Swan was given the option of using annual leave to attend the nephew's wake and funeral which he chose not to take as it would have further extended his release date from the CAF.

It is evident on the testimony of Cpt. Piper and Sgt.Maj. Devlin and to a lesser extent from Cpt. Drover and Sgt. Ruff that at this particular time in his military career there was resentment present against Mr. Swan because of his requests for extra time off to deal with his family tragedies and his impending release date.

The Tribunal accepts that much of this resentment would have resulted

from the additional pressures in the areas of staffing and manpower shortages. We are, however, left with an impression that in this particular incident no effort was made to accommodate Mr. Swan's request within the system and furthermore that race might have been a factor in this regard. If one is not looking to give any slack to an individual one can always interpret rules and guidelines in a restrictive manner.

The Tribunal is of the view that the CAF policy in this area should be amended to allow for compassionate leave in extended family relationship situations. It should cause no great difficulty to accommodate other cultural values in this area.

8. Poster at CFB Portage LaPrairie, December 1989, advertising "Chiefs and Indians" night. This exhibit (HRC-4) was tendered through the Complainant as an example of continuing stereotypical attitudes within the CAF subsequent to his departure from the CAF. Counsel for the Respondent objected to its reception at the time of tendering on the basis that it was prejudicial and of no probative value. The Tribunal ruled that it would receive the document at that time. The Tribunal is of the view that it does not have jurisdiction to consider the poster in relation to the complaint. The Tribunal cannot rule that the poster was harassment of Mr. Swan by the CAF as he was not employed by them at that time.

In the event that the Tribunal is not correct in our view that we lack jurisdiction to deal with the poster we would find that the poster,

while of questionable taste, was not in of itself harassing.

GENERAL ALLEGATIONS OF RACIAL SLURS, JOKES AND HARASSMENT

In the complaint form and through the testimony the Complainant makes general allegations that throughout his military career he was subjected to racial slurs, jokes and comments. The Complainant was non-specific as to times, places and actors. Mr. Swan also makes an important distinction in his examination in chief. He says that his reactions to the comments made depended upon the context in which the comments were made. Specifically, as to whether they were joking around between his friends or whether they were intended to demean him as a native. The Complainant indicates that he was subjected to the slurs, jokes and comments on a continuing basis and that it was acceptable with the CAF.

The Complainant in his testimony attempted to paint a very bleak picture of his existence in the CAF and on many occasions alleged he had few friends and no close working relationship with his co-workers. Other witnesses do not paint such a bleak picture and indicate that there was a significant amount of back-and-forth ribbing-joking and comments made by them and by the Complainant.

The Tribunal finds that the Complainant's general allegations are true on a balance of probabilities. The Tribunal finds that Mr. Swan's allegations are corroborated by the testimony of:

Weekes - in his testimony he corroborates that the term "spearchucker" was used in relation to Swan in the TQ 5 course and further

corroborates that the terms "wagonburner, BFI/FBI" were used in the mess. (p 914, 195, 922, 923)

Styres - in his testimony "Sure I've heard racist comments but" rationalizes their intent. (p 976 - 982,83)

Ross - admits that racist comments, jokes, etc., were heard in mess as a matter of course - but not directed at individuals. (Therefore implying they were acceptable.)

Gauthier -comments made in passing are okay as long as they don't impinge upon one's dignity.

Wedge - heard racist terms but not directed at an individual (implying that they are acceptable).

Lamorie - p 1405 Q: "Master Seaman have you ever heard members of the CAF utilize racist comments when they were around Mr. Swan?"

A: "In a joking manner yes."

Lamorie then goes on to say that the comments, jokes, etc., were used in a spirit of fun between friends and in his view no offense was meant or taken. (our emphasis)

The testimony of these witnesses indicate that in essence Swan's general allegations are true - racist and racial jokes, slurs and comments do occur. In almost all cases, however, the rationalization is that this is okay if the parties consent to it and if they are intended in a joking manner or are not directed at an individual.

The Tribunal, however, does not find that the context or intention of the perpetrator is the issue - the issue is the perception of the individual who is victimized. Lack of objection and even participation in the activity do not imply consent or cloak otherwise objectionable behaviour with propriety. This will be touched upon later in relation to the CAF "zero tolerance" policy.

SIMILAR FACT EVIDENCE

Counsel for the Commission and the Complainant brought forward a number of witnesses who were proffered to the Tribunal as providing "similar fact" evidence in support of Mr. Swan's case. Counsel for the Respondent strenuously objected on the basis that the evidence was irrelevant and that its receipt would be prejudicial to the Respondent.

The Tribunal decided to receive the evidence over the Respondent's objections on the understanding that the evidence would be given appropriate weight.

After hearing the evidence the Tribunal finds that the similar fact evidence adduced by the Commission in this matter has no nexus to the complaint before the Tribunal.

The similar fact evidence proffered to the Tribunal came from individuals who either made general allegations or had specific allegations involving actors and times that were in no way connected to the complaint

before this Tribunal. There is no proof of these allegations before this Tribunal.

The Tribunal is not prepared to accept as a fact that the

Complainant's allegations in the case before us are more likely to be true because there are other allegations involving other actors in the CAF at other times and places.

In order to have any probative value there must be more than "similar allegations" and there must be a nexus to the case before the Tribunal.

The Tribunal wishes to make the same comments in relation to the reply evidence adduced by the Respondent. Simply because others have had positive experiences in the CAF does not make it more likely that Mr. Swan's negative experiences did not occur.

The Tribunal wishes to clearly and unequivocally state that in our opinion the "similar fact" evidence led by both sides in this matter had no nexus to our case and was of no probative value. We have attached no weight to this evidence in terms of its bearing on our findings in this case.

EVIDENCE OF DR. JOHN CROSS

Dr. Cross was accepted as an expert witness by the Tribunal for the purpose of giving rebuttal evidence by the Commission. The Commission felt obliged to respond to a perception that the Respondent was pursuing a line of defence that the Complainant in this matter had, in many instances, not objected to the use of racial slurs, jokes, nicknames and the like and had in many instances instigated or participated in such behaviour and therefore was not and could not be offended by the conduct.

In his cross-examination Mr. Swan in fact admits to the preceding, although he qualifies his participation as being "not with an open mind". Swan's testimony is that he was not offended by comments from his friends but was offended by comments from others.

The essence of Dr. Cross's testimony was that individuals may acquiesce, and participate, in activities that they find objectionable and demeaning because they feel powerless to stop it and as an ego defense mechanism. In his opinion all objectionable comments by the "power group"

are at all times objectionable and unacceptable in any context. He qualified this by saying that the use of slurs, jokes, etc., by members of the subordinate group with other members of the subordinate group is acceptable.

Much time was expended in cross-examination on whether or not otherwise objectionable comments could be made by friends and not be seen as demeaning or whether joking around could occur within peer groups and be acceptable and as to whether or not this always led to negative stereotyping.

Dr. Cross was unshakable in his personal opinion that certain stereotypical comments and racial terms could only be used with the intention to harm. Furthermore the individual may appear to be consenting to the activity but actually is not. In his view the participation by the individual in the behaviour is always a form of coping. In his view it is possible to attribute different meaning to the same words depending on who

utters them.

The Tribunal is not prepared to accept Dr. Cross's opinion in its entirety on this point. Mr. Swan clearly states in his own testimony that he did not find such conduct to be objectionable in all circumstances. In this instance we must accept the evidence of the individual's actual reaction as opposed to the theoretical reaction.

The Tribunal for the most part accepts Dr. Cross's opinions as to the possible reasons why an individual may participate in certain forms of objectionable behaviour and tolerate other behaviour. We find that this is consistent with Swan's testimony in relation to consenting to certain forms of conduct by his friends and not accepting the same conduct from others whom he did not consider to be his friends.

The Tribunal also acknowledges that this creates an extremely difficult situation for an employer. If individuals can turn their consent "on and off" it makes it extremely difficult for the peer group (who may not all be close friends and therefore acceptable) to react accordingly if the individual appears to accept and participate in what would be otherwise objectionable conduct. The Tribunal accepts that individuals may feel powerless to do anything but accept the behaviour because of their desire to fit into the peer group.

The evidence before the Tribunal indicates that Swan often initiated comments such as "F.B.I." and the use of the nickname "Chief". Several witnesses have testified that they would not otherwise have used these terms. Eventually the use of these terms (and others) resulted in the complaint before this Tribunal.

The Canadian Human Rights Act does not take into consideration the conduct of the Complainant and even though Complainants may participate in or instigate objectionable conduct they may still file a complaint and succeed in their claim.

The Tribunal has had the benefit of a wide range of evidence on the issue of racial comments and jokes and their potentially detrimental effects on the individual. We have had the benefit of evidence and insight into cultural ethics and differences. We have been asked by the Commission to then take the next step and draw the conclusion that Mr. Swan was therefore hurt and harassed within the meaning of S.14 of the Act. The Tribunal finds that on a balance of probabilities this did indeed occur.

The question the Tribunal is then left with is what obligation is there on the CAF to proscribe behaviour when they do not know what is or is not acceptable to the individual. We think that this places an unreasonable burden upon an employer. There must be some indication from the individual that the conduct, etc., is not acceptable when the Act places the onus on the employer to provide a workplace free from harassment or discrimination and places no onus on the victim to do anything but lay a complaint under the Act.

It then follows that if particular events occurred they can constitute harassment without any requirement that the individual complain to the

employer that the harassment was occurring. The victims need not attempt to resolve the issue through the employer if they choose not to. They may seek their remedy through the Act.

ZERO TOLERANCE POLICY

Throughout the testimony of the Respondent's witnesses there was continual reference to the CAF policy of "zero tolerance" towards harassment.

The Tribunal is of the opinion that this is the only safe approach for an employer to take with respect to the issue of harassment. Given the discussion in the preceding section with regard to the potential for complaints to be laid by an individual in an "on and off" consent situation a "zero tolerance" policy is virtually the only way employers can protect themselves from complaints. In order for the policy to be effective, however, it must be scrupulously enforced.

The "zero tolerance" policy must be promoted as applying to all forms of harassment and not just towards sexual harassment.

The Tribunal also noted from the testimony of the Respondent's witnesses on this issue that while they were aware of the "zero tolerance" policy they were of the view that it didn't apply if the participants in the activity consented or participated in the activity or if there was "no intent" to harm.

The Tribunal is of the view that if this is the prevailing attitude amongst the members of the CAF, the "zero tolerance" policy is of little effect and will not serve to protect the CAF, as employer, from potential complaints under the Act. "Zero tolerance" should mean exactly what it says. There can be no circumstances where proscribed behaviour is acceptable and there can be no consent to it.

EVIDENCE OF DR. ARJUN P. AGGARWAL

The evidence given by Dr. Aggarwal was in relation to deficiencies he perceived in the draft CAF harassment policies and procedures. In summary, his objections centred on the issues of the perception of impartiality and confidentiality.

This matter of a policy remedy was placed before the Tribunal on the basis that it was an appropriate remedy to be dealt with in this case.

The Tribunal notes that, during the period of Mr. Swan's service in the CAF, there were no clear and specific harassment policies and procedures in place. Indeed, the first orders dealing with this issue were disseminated in 1988 after his departure from the CAF. These orders have since been amended and new policies promulgated.

The CAF, at the time of this hearing, was engaged in a major overhaul of the policy and procedure to be followed in dealing with harassment complaints. This policy had not yet been adopted at the time of the conclusion of our hearing and obviously not been put into practice.

Much evidence was put before the Tribunal by the Respondent on this issue. The Respondent has indicated that a substantial amount of time, effort and money had been expended in dealing with the matter of harassment within the CAF.

The Commission, while commending the Respondent for their efforts in this area, perceived a number of flaws in the procedure to be followed under the draft policy and called Dr. Aggarwal to put these concerns before the Tribunal and in turn has asked the Tribunal to grant a pro-active policy remedy to correct the perceived flaws.

The Respondent has, through its witnesses on this issue, adduced evidence as to why their procedures have been set up in the manner in which they are proposed.

The Tribunal does not propose to go through a lengthy review of the CAF's reasons nor of Dr. Aggarwal's concerns.

We acknowledge that the CAF has set up its systems and procedures from the perspective that it is a military organization and must have policies and procedures appropriate to that role. This has been referred to in prior cases as the "soldier first" approach. The use of investigators appointed by commanding officers within a given unit to investigate complaints within that unit (and its chain of command) is a result of that perspective. In the view of the CAF there must be a method of dealing with complaints quickly and concisely within the parameters of the unit because of the potential for the unit to be in an isolated, combat-type deployment. In their view it is not possible to provide the degree of perception of impartially that the Commission, through Dr. Aggarwal, feels is essential to the system because the procedure must be within the chain of command in order for it to function in all potential circumstances.

Dr. Aggarwal has indicated in his testimony why the perception of impartiality is, in his opinion, critical to the acceptance of the policy by the members of the CAF and to the effectiveness of the policy in dealing with the issue of harassment. In his opinion as long as the complaints are dealt with through the "chain of command" structure there will be no confidence in the system.

The position of the CAF is that the procedure must fit within the chain of command because of the nature of the military "soldier first" policy.

The Commission envisions a complaint procedure and system separate from the chain of command.

There is quite obviously a fundamental difference in the way the Commission and the CAF view what would be an appropriate response to the issue of handling harassment complaints in the CAF. We believe that each has the same ultimate objective in mind, that of a harassment free workplace.

The Tribunal is of the opinion that the proposed policy and procedures

that the CAF is developing are a step in the right direction. We do, however, have the distinct impression that the policy and procedures were drafted in response to problems with sexual harassment within the CAF and it deals with racial and other forms of harassment only as a secondary issue. We are of the view that the policy must clearly specify that it refers to all forms of harassment and treats all with the same degree of seriousness.

The Tribunal is of the opinion that the CAF is being myopic in its approach to this issue. The CAF is of course a military establishment and consideration must be given to the fact that its units may be engaged in combat and other extraordinary circumstances for varying periods of time in varying situations throughout the world.

We find that the procedures envisioned by the CAF in their draft harassment policy are predicated upon the premise that it is in a "combat scenario" at all times.

The Tribunal is of the opinion that the draft harassment policy and procedures proposed by the CAF do not reflect the reality of the CAF in that they ignore the fact that the CAF does not operate in a "combat scenario" as a matter of course. This later scenario is the exception rather than the rule and the proposed harassment policy and procedures should reflect this fact.

THE LAW

Mr. Swan's complaint must be examined in the light of Section 2 of the C.H.R.A. which sets out the purpose of the legislation. The relevant Section under which the written complaint falls is Subjection 14(1)(c) of the Act which reads:

S.14(1)(c) It is a discriminatory practice 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, S.3(1).

STANDARD AND BURDEN OF PROOF

It is well established in the case law that the burden of proof is on the Complainant to establish a prima facie case of discrimination.

A prime facie case is one which covers the allegations made, and which, if believed, is sufficient to justify a ruling in favour of the Complainant in the absence of an answer from the Respondent. We find that this test has been met in the instant case.

Once a prima facie case is made out, the onus shifts to the Respondent to establish a justification for the discrimination upon a balance of probabilities. (See Ontario Human Rights Commission and O'Malley v. Simpson-Sears Limited, [1985], S.C.R. 536 at 538). We find that the Respondent has not done so with regard to all incidents complained of.

The Standard of Proof in harassment cases is the ordinary civil

standard of the balance of probabilities.

ROLE OF HARASSMENT

It is well established in case law that it is not necessary for harassment to be the sole reason for the actions complained of for a complainant to succeed. The harassment need not even be intentional by the perpetrator of the harassment.

In this case the Tribunal accepts the Complainant's evidence that in at least some of the instances on which his complaint is founded he did express his concerns to his immediate superiors. We are of the view that this was done in an informal manner and this factor explains why the Respondent's witnesses have no recollection of the complaints. It was well established by the Respondent's witnesses that in their view if a formal

written complaint or request for Redress of Grievance was not filed the matter complained of did not exist.

Neither the Tribunal nor Mr. Swan have any way of knowing how the CAF would have responded to this issue had a formal complaint been lodged. The system was never triggered. That being said, the Tribunal is of the view that, if the evidence does not conclusively indicate that the victim made a complaint either to the perpetrator or his employer in order to give an opportunity for remedial action to be taken, this factor must be considered in awarding the remedy sought in the action brought by the Complainant.

EMPLOYER LIABILITY

The question of whether or not an employer is liable for the actions of its employees or agents is covered in S.65 of the Canadian Human Rights Act which provided as follows:

S.65(1) Subject to subsection (2) any act or omission committed by an officer, director, an employee or 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.

The issue of whether or not the CAF would be liable for conduct of employees of the R.C.M.P. while they were employed in carrying out training activities for the CAF was raised in these proceedings in relation to two specific incidents.

The Tribunal has found that one of these incidents (that involving Skinner) did occur. It is our view that Skinner was acting as an agent of the CAF during the presentation of his course and thus the CAF is liable for his actions based on S.65 of the Act.

In the event that the Tribunal is incorrect in its application of the preceding section, we alternatively find that the CAF would be liable for the incident based on the line of "third party" liability cases typified by Mohammed v. Mariposa Stores Limited Partnership (1990), 14 C.H.R.R. C/215

and Toth v. Sassy Cuts (1987), 8 C.H.R.R. C/4376.

The case law in our view clearly supports the contention that the CAF is liable for the actions of its employees and this point was not seriously disputed before us.

Section 65 of the Canadian Human Rights Act also provides in subsection (2) exculpation for the employer in certain circumstances. That subsection reads as follows:

S.65(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.

The Tribunal finds that in the circumstances of the instant case S.65(2) does not assist the CAF in escaping liability. While it certainly cannot be said that the CAF consented to the actions the Complainant has raised in his complaint, the Tribunal finds that, during the period of time covered by the complaint, the CAF did not exercise all due diligence to ensure that the actions complained of by Mr. Swan did not occur.

It appears from the evidence that serious efforts to deal with the issue of discrimination and harassment within the CAF did not commence until late 1988 which was subsequent to Mr. Swan's departure from the CAF.

The CAF is to be commended for their efforts to address this issue in recent years and it may well be that those efforts could allow them to escape liability in some circumstances by exercising all due diligence through application and enforcement of its policies.

The conduct of the CAF subsequent to Mr. Swan's departure is a factor that should and will be dealt with in relation to the issues of remedy.

DUTY OF AN EMPLOYER

The Act imposes liability on an employer (S.65(1)) unless the employer can demonstrate that the exculpation provided for in SS.65(2) applies. The extent of an employer's obligation to respond to acts of racial harassment has been considered in Hinds v. Canada C.E.I.C., (1988), 24 C.C.E.L. 65, at pp 77-78 and in Pitawanakwat v. Department of Secretary of State, (1992) 19 C.H.R.R. C/10 appealed on other grounds).

In both of these cases the Tribunals considered the failure of the employer to conduct a meaningful investigation of matters complained of and the lack of sensitivity with which the employer treated the complainant in finding the employer liable.

In our view it is clear that when a complaint of harassment is received by an employer, no matter whether the perpetrator is an employee

or agent, the employer is obligated to respond promptly and effectively with a thorough investigation, as well as with sensitivity to the victim.

It is not good enough to respond by "glossing over"the complaint or insisting that the complaint must be formalized in order for it to exist. It may be necessary to pursue formalization if the matter is found to be serious enough to warrant it. There must be at least some support of the complainant prior to the formalization of the process.

In our view, this is what was lacking in the CAF's response to Mr. Swan's complaints of harassment. Rather than support him and see whether there was any basis to his complaints the CAF response was to either "gloss over" his concerns or to insist that they be formalized before any action was taken.

APPLICATION OF LAW TO THE FACTS

On the basis of the foregoing the Tribunal finds that the Respondent is liable for:

(1) Harassing the Complainant by reason of race with respect to the denial of compassionate leave for his nephew's funerals and wake; and

(2) Failing to provide the Complainant with a harassment free workplace by virtue of failing to respond in an appropriate fashion to Mr. Swan's complaints of harassment and by not exercising all due diligence to ensure that the workplace was harassment free.

In reaching these conclusions, the Tribunal accepts that an employer is not required to maintain a pristine work environment and that some work environments are difficult to control. The employer is left with no alternative but to adopt and enforce a "zero tolerance" policy in relation to harassment issues such as the CAF has done, albeit subsequent to the time period covered in this case.

It is evident to the Tribunal that the CAF treated the issue of harassment in a more cavalier fashion in earlier years and up to the late 1980's. Since that time they have made commendable efforts to address these issues. It can only be hoped that the situation that Mr. Swan experienced during his time in the CAF could not occur in today's environment.

REMEDY

In awarding a remedy the Tribunal has taken note of the objects of human rights legislation as set out in O'Malley (supra) at p 547:

The code aims at the removal of discrimination. This is to state the obvious. Its main approach, however, is not to punish the discriminator, but rather to provide relief for the victims of discrimination.

and in Robichaud (supra) at p 582:

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.

Having considered the foregoing and 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. We find that such is the case herein.

The Tribunal orders that a written apology be provided to the Complainant by the Commanding General in charge of Mr. Swan's former branch of Service.

B) LOST WAGES

As indicated above, the Complainant did not pursue the complaints originally filed in relation to Ss. 7 and 10 of the Act. The Complainant, however, in his prayer for relief has requested an award of lost wages for

a period of 4 years. In view of the preceding, the Tribunal is of the view that it does not have the jurisdiction to make an award for lost wages as the issue is not before us.

In the event that there is an appeal on this point and it is determined that the Tribunal did have the jurisdiction to deal with this issue, the Tribunal would rule as follows.

The determination of this issue must take into account whether or not the harassment that Mr. Swan experienced was a factor in his decision to leave the CAF. In our view we have determined that it was a factor in his decision, albeit not the sole factor in his decision to leave. In our view the issue of harassment may have hastened his decision to leave, but ultimately he would have left.

In the course of testimony the Tribunal noted that reference was made to "re-mustering" and "re-enlisting". It is our understanding that members of the CAF sign employment contracts for periods of three years or five years or whatever from time to time.

In the event that Mr. Swan terminated his employment with the CAF prior to the normal term of his last employment contract with the CAF, the Tribunal awards him lost wages for the remaining time on that employment contract to a maximum of four years (per his request). Mr. Swan's effective release date from the CAF and his entitlement to pension, benefits, etc. are to be amended accordingly.

The award for wages shall be reduced by any employment earnings Mr. Swan received during the time period and he is hereby directed to provide the CAF with all appropriate records during the relevant time period. No order is made in relation to reimbursement of U.I.C. benefits but the parties shall be governed by the applicable sections of the Unemployment Insurance Act.

In the event that Mr. Swan had no remaining time on his employment contract with the CAF the Tribunal makes no award as to lost wages. It is our view that in the circumstance an award for lost wages for a period of four years would be inappropriate as there is no issue of re-instatement or re-employment to be dealt with.

C) SPECIAL COMPENSATION

The Tribunal finds that the Complainant has suffered hurt feelings and some diminishment to his self respect as a result of the harassment he experienced and accordingly orders the Respondent to pay the Complainant the sum of $2,500.00.

In making the award at this level, the Tribunal has noted the applicable criteria from the case of Julius H. E. Uzoaba v. Correctional Service of Canada T.D. 7/94 (unreported) at P 94.95, and the reference therein to Morgan v. Canadian Armed Forces (1989), 10 C.H.R.R. D/6386 at D/6403. In the case at hand we find that there is evidence of hurt feelings and diminishment of self respect. We do not find that this is of the severity envisioned in the cases cited to warrant a payment at the high end of the monetary scale.

D) INTEREST

It is well established in the case law that interest is payable both on awards for lost wages and on awards for special compensation.

The Tribunal orders that interest be paid on the monies awarded herein in accordance with the pre-judgment interest provisions in effect in Manitoba.

Interest shall be paid to Mr. Swan on the monies awarded herein from his effective release date in October of 1988. In the event that lost wages are awarded as previously indicated herein, we would award interest on the lost wages from the same date.

E) COSTS

Section 53(2)(d) empowers the Tribunal to compensate the victim for any expenses incurred by the victim as a result of the discriminatory practice. When this provision is viewed in relation to the objects of the human rights legislation referred to above the Tribunal finds that it is within its jurisdiction to award legal costs to the victim as in our view they are an expense incurred by the victim as a result of the discriminatory practice. Obviously the victim would not be engaging the services of counsel in a vacuum. We find support for this position in the Thwaites case (Attorney General of Canada v. Thwaites, March 25, 1994, F.C.T.D. No T-1629-93 (unreported)).

We therefore order the Respondent to pay to the Complainant the costs of his legal counsel to be taxed as applicable under the Rules of Court for the Province of Manitoba.

F) COUNSELLING

In observing the Complainant and reviewing his testimony the Tribunal did not observe any indication or manifestations of personal problems such as to warrant an order directing that the Respondent pay for counselling

for the Complainant. The Tribunal therefore declines to make such an order.

G) LIAISON PROGRAM (BOLD EAGLE) AND INTERNAL TRAINING

The Tribunal finds that the evidence submitted to the Tribunal clearly indicates that the CAF views the issue of racial harassment seriously and has and is taking appropriate steps to deal with these issues. The Tribunal makes no order in relation to these issues. We commend the CAF for their efforts in this area and would encourage them to continue to allocate resources to this area. There is much to be gained from actively taking steps to know other cultures and learn from them.

H) HONORARY RANK

The Tribunal does not find that an order under this head would be appropriate having regard to all of the circumstances of the case.

I) POLICY REMEDY

The Tribunal has had the benefit of a great deal of testimony in regard to the revised Harassment Policy that is in the process of being adopted by the CAF. It has been explained in great detail by the CAF as to why it has been drafted in the manner in which it appears. A great deal of time, effort and expense has gone into this process and the Tribunal certainly commends the CAF for expending scarce resources on this issue, for it is certainly an important issue which is nevertheless all too often ignored until problems arise.

It appears to the Tribunal, however, that the CAF harassment policy has been driven by the issue of sexual harassment and the drafting of the policy reflects this emphasis. Other forms of harassment are dealt with in the draft policy but one is left with the distinct impression that they are secondary. In our view the policy should not subordinate one form of harassment to another.

The Human Rights Commission through Dr. Aggarwal has indicated that they have certain reservations with the approach the CAF is taking with their draft policy namely in the areas of the definition of harassment and

in the appearance of impartiality in the system. The Commission has requested that the Tribunal issue specific orders to deal with these policy concerns and the CAF objects on the basis that the Tribunal has no jurisdiction. The CAF further objects on the basis that if the Tribunal has jurisdiction we should decline to make an order because the new policy is untested in practice and because the policy as drafted reflects the unique circumstances of a military organization.

With respect to the issue of jurisdiction the Tribunal is of the view that the remedial provisions of the Act are sufficiently wide to allow for an order in this area and furthermore as pointed out by the counsel for the Commission in her argument, the issue of the policy is squarely before this Tribunal and thus properly considered by it. We rely on the Robichaud, ATF and Pitawanakwat cases in support of this approach.

With respect to the argument that the Tribunal should not make an order in relation to the draft policy until it is challenged, we respectfully disagree. It is well settled in the case law that the Act is

to be applied in a preventative fashion if possible and if appropriate. We find that both of those circumstances apply to this case.

The final rationale for not amending the policy is that the policy is the way it is because the CAF is what it is - a military organization. The Respondent has extrapolated this position from those cases dealing with "bona fide occupational requirements" or the "soldier first" approach. With respect, the Tribunal is of the view that the issue of harassment policies and procedures is clearly distinguishable from the cases dealing with " bona fide occupational requirements".

The Tribunal, having regard to the preceding, orders the Respondent to make the following changes in relation to its draft harassment policy, received before us as Exhibit R-60:

1) Revise the definitions of harassment in paragraphs 3 and 8 to reflect the Commission's concerns.

2) Revise the policy to allow for a greater appearance of impartiality by making provisions for the investigation of a complaint to occur outside the Complainant's chain of command wherever possible and practical having regard to the unit's posting.

3) Revise the policy to remove the commanding officer's ability to, or the perception of his ability to, influence whether or not a complaint is investigated, how it is investigated or the results of an investigation.

4) Revise the policy to clearly state the consequences to a commanding officer if appropriate action is not taken as a result of an investigation and remove his power to veto an investigator's conclusions.

5) Revise the policy to allow for an appeal or bring forward a mechanism similar to the redress of grievance procedure.

The revisions to the policy referred to above are to be completed within 90 days of issuance of the ruling in this matter.

In further dealing with this issue of policy remedies the Tribunal orders the Respondent to amend its compassionate leave policy to situations including extended family members.

CONCLUSION

For the foregoing reasons the Tribunal finds that Mr. Swan's rights under the Canadian Human Rights Act have been constrained by the Respondent and orders as follows:

1) That the CAF provide Mr. Swan with a written apology signed by the Commanding General in charge of Mr. Swan's former branch of Service within 30 days of this decision.

2) That the Respondent pay to Mr. Swan the sum of $2,500.00 for injury to Mr. Swan's feelings and self respect.

3) That the Respondent pay interest on the monies awarded herein in accordance with the provisions of the Manitoba Pre-Judgment Interest Act (or equivalent) from Mr. Swan's release date in October of 1988.

4) That the Respondent pay Mr. Swan the costs of his legal counsel to be taxed as applicable under the relevant Manitoba legislation.

5) That the Respondent amend its draft Harassment Policy as set out above within 90 days of the date of this decision.

6) That the Respondent amend its compassionate leave eligibility criteria to include extended family members within 90 days of the date of this decision.

DATED _____, 1994.

_____
James D. Turner - Chairman

_____
Murthy Ghandikota - Member

_____
Joseph A. Sanders - Member