

T.D. 4/90
Decision rendered on March 5, 1990

IN THE MATTER OF THE CANADIAN HUMAN RIGHTS ACT,
R.S.C. 1985, c. H-6, AS AMENDED

AND IN THE MATTER of a Hearing before a Human
Rights Tribunal appointed under subsection 49(1.1)
of the Canadian Human Rights Act.

BETWEEN:

SAFI SYED

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

DEPARTMENT OF NATIONAL REVENUE
(CUSTOMS AND EXCISE)

Respondent

TRIBUNAL:

SIDNEY N. LEDERMAN Chairman
MARVIN N. STARK Member
JENNY C. WONG Member

DECISION OF TRIBUNAL

APPEARANCES:

PETER C. ENGELMANN Counsel for the Commission

MARY A. HUMPHRIES Counsel for the Respondent

DATES AND PLACE

OF HEARING December 4, 5 and 6, 1989
 Vancouver, British Columbia

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1) The Complaint

Mr. Safi Syed, ("Syed") an Indo-Canadian, was a term employee who held a period appointment as a junior management consultant in Revenue Canada (Customs and Excise). His contract expired on May 31, 1985. He alleges that his contract was not extended so as to make him ineligible for a pending internal competition for an indeterminate position because of his race, colour and national or ethnic origin contrary to Section 7(a) of the Canadian Human Rights Act.

2) The Hiring of Syed

In 1984 a work measurement project was under way in the Department of National Revenue (Customs and Excise). This was in response to the Auditor General's criticism of inefficiency in the Department and his recommendation that work measurement standards be established.

Mr. Romeo Poirier ("Poirier") headed up the project in the Department. He had set up multiple teams of management consultants to conduct studies of the operations of the Department in the Toronto, Montreal, Niagara, Eastern and Vancouver regions. His plan was to utilize 22 people for the developmental work and when the studies had been completed, to cut back to approximately 10 people to maintain the programme.

In June of 1984, Poirier had one opening in Montreal for which Syed made application. Capability in the French language at the highest level was an essential, basic requirement. Without it, a candidate would not even be "screened in". Although Syed had indicated in his

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application that he could speak French, it became apparent in his interview with Poirier that his fluency was not at the level necessary for the posting. In ordinary circumstances that would have ended the matter. However, Poirier had been impressed with Syed's educational and practical background as an industrial engineer and, fortuitously, Poirier was in need of manpower for his Vancouver region team where he was one man short. Accordingly, he inquired of Syed whether he would consider a possible job in Vancouver to

which he responded positively. Poirier cautioned him that he could not guarantee it because this was a field in which the competition was closed and Poirier would first have to obtain dispensation from the Public Service Commission.

Poirier proceeded to interview Syed and his conclusion was that he was not "as good as expected" mainly because of a communication problem. Syed had passed the interview but "was not great". Nevertheless, the Vancouver region group was just starting up and Poirier needed help particularly since he was facing a relatively short deadline to complete his tasks.

Poirier then took the trouble of obtaining a waiver from the Public Service Commission with respect to the position in Vancouver. He had to establish that he could not staff his full complement with suitable candidates who resided in the Vancouver area. The dispensation was granted.

He discussed with Syed the nature of term employment. It is an insecure position to say the least as there is no assurance that there will be employment beyond the fixed term. Moreover, Syed would be responsible for his own expenses in moving himself and his family to Vancouver.

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Syed also faced one further hurdle, an interview with Mr. Bill Adamson ("Adamson"). Poirier thought very highly of Adamson and when he started the programme up in Vancouver, he asked Adamson if he would transfer there to set up the team. Poirier called Adamson in Vancouver and said that he might have a candidate about whom he had some reservation, but, generally thought was good. He asked Adamson if he would meet and interview Syed. Poirier testified that he was in no way imposing Syed on Adamson. Adamson came back to Toronto for that purpose. Poirier paid Syed's expenses to go and meet with Adamson in Toronto. It was most unusual for such expenses to be covered. Independently of Poirier, Adamson, after meeting with Syed, decided to hire him.

A written offer of employment was sent to Syed on or about August 20, 1984. It read in part:

"Should you accept this offer, your employment will terminate on May 31, 1985. Your reporting date is to be confirmed upon your arrival in Vancouver. During this time, your employment will be probationary and subject to satisfactory service.

This period of employment may be redefined for a shorter period depending upon the availability of work and the continuance of the

duties to be performed. Please note that nothing in this letter should be construed as an offer of indeterminate appointment, nor should you anticipate continuing employment in the public service as a result of this letter." (Ex. HR-3)

Syed thought that his term would be from August 1984 to November 1985. However, when he received a letter from Revenue Canada dated September 4, 1984 confirming his employment, he realized the term was somewhat shorter, expiring on May 31, 1985. He found this disappointing but nevertheless signed his acceptance to the letter and returned it to Ottawa.

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(3) Employment History

What follows is an outline of Syed's 9 month employment history and the various incidents upon which, he relies as evidence that he was the victim of racial discrimination by Adamson.

Syed reported for work on August 28, 1984 and rather than receiving a warm welcome he was told by an employee to leave and return the next day. This instruction was given to the employee after a telephone consultation with Adamson who was away from the office that day. As referred to earlier in these Reasons, the letter from Revenue Canada offering the position to Syed stated:

"Your reporting date is to be confirmed upon your arrival in Vancouver."

The fact that Adamson decided Syed should start the next day after he first appeared at the office is, in our minds, of no significance. Syed's upset over this seems to have arisen from some misunderstanding on his part and nothing more.

Syed did report the next day and was immediately assigned to work with Nadir Amarshi, ("Amarshi") who was in the process of conducting a study of air passenger traffic through customs at the Vancouver airport. Syed ran into some difficulty right at the start. Adamson testified that Amarshi had complained that Syed was impeding his programme by unnecessarily handling goods that had been seized. In cross-examination, Amarshi conceded that he may have criticized Syed for asking too many questions and raised this matter with Adamson early in the project. Whatever its precise nature, obviously some problem had arisen with Syed.

Amarshi and Jack Sterling ("Sterling") were also junior management consultants who had been hired earlier and

had started work in late July 1984. Their contracts were to expire on April 1, 1985. After two weeks of assisting Amarshi, Syed was transferred to work with Sterling who was conducting work performance studies at the air cargo section of Vancouver airport. He did this for a period of four weeks. The work measurement studies in which he was involved were simple and for the most part amounted to the collection of statistics through the use of a stop watch. The study ultimately would also entail the writing of a description of the job in question and developing time standards for the performance of that job.

On October 25, 1984 Syed was assigned to do work measurement of the customs and excise employees at the post office in Vancouver. Essentially his job again was merely to observe and collect statistics. However, Syed went beyond that and he prepared an organizational chart for the processing and review by customs and excise employees for dutiable items in international mail. Although it was not part of the work measurement task, Syed thought that it would be appropriate to prepare such a chart as it would be useful from an industrial engineering view point. His impression was that the department was over-staffed but he did not raise it as an issue since it was the pre-Christmas period and it was anticipated that the workload would increase substantially in a short time.

After being at the post office for less than a week, he was taken aside by Adamson who indicated that a problem had arisen. He told Syed that his communication was bad and that there had been some complaint to that effect. Syed was accordingly pulled off the job and ultimately the job was completed by another consultant. Adamson testified that he received a few complaints from others-about Syed bothering staff by asking too many questions.

Syed indicated in his evidence that staff personnel do not like having management consultants around. That was true at the post office and it is true generally since there is a natural concern and suspicion when work measurement studies are conducted. Employees fear that for the sake of efficiency there could well be a reduction of staff and accordingly, there is a sense of vulnerability. Therefore, management consultants must be sensitive to this particularly when they are seeking information and questioning personnel so as not to upset staff and cause them needless worry. Adamson testified that the purpose of the study was not to reduce staff and they advised staff that their study would have no effect on person years.

They had no authority to recommend a cut back on person years and their mission was solely to gather information for management.

Adamson advised Poirier about Syed's problem at the post office and Poirier requested that he put it in writing. Adamson was reluctant to do so but sent a letter to Poirier. In it, he said:

"On October 24th 1984 a Work Measurement Project was presented to Line Management at Vancouver Postal Operations, Project No. 6783. The analyst assigned to the project was Mr. Syed who commenced his planning phase of the project October 25th 1984.

Mr. G. MacLaine, A/Metro Manager generated a telephone call to myself on the 31st October complaining of Mr. Syed's ability to conduct such a project, as he had received complaints from his Line Manager regarding Mr. Syed's abilities to communicate with Supervisors or operators performing their assigned duties.

I agreed to meet with local management at Postal to try and resolve this crisis. Upon consultation with the Line Manager and (2) of his supervisors, it was strongly suggested to me that Mr. Syed was having great difficulty in understanding information being related to him, although this

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same information had been given on more than one occasion previously. Therefore if Mr. Syed could not grasp this information, what type of results might he produce on the project.

It was indicated to me that supervisors at Postal were not prepared to accept Mr. Syed's presence in conducting this project. To avoid any detrimental effect on the acceptance and credibility of the Project Group and the Department, I decided to cancel this project in the interim period.

Mr. Syed was totally informed of my decision and the concerns of local management.

I personally interviewed Mr. Syed to discuss where I felt his performance as a consultant was perhaps weak. I feel as though it should be mentioned at this point in time, this is the second such occasion since Mr. Syed came on board, I have had occasion to hi-lite some of his apparent weaknesses to allow him every opportunity to correct these shortcomings.

The areas of concern discussed with Mr. Syed where improvement is necessary, are as follows:

- a) Time Study Technique
- b) Responsibility as a Consultant
- c) Communication abilities
- d) Decision making (initiative)
- e) Personal suitability" (Ex R-1, Tab 5)

Although it was usual for an employee to get a copy of a supervisor's criticism, both Adamson and Poirier neglected to provide Syed with a copy. Adamson, however, did advise him personally of the matters contained in the letter. Syed testified that he thought this criticism was unwarranted as he felt he had performed well at the post office.

Another incident involving Adamson related to Syed's need to attend a Muslim mosque on Fridays for sabbath prayers. The mosque was ten minutes away from his place of

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work and he wanted to utilize his lunch hour to attend for prayers. Syed testified that he asked for permission to go in his first week of employment but that Adamson refused. Syed testified that he then secured a memorandum from the Department of Justice which he showed to Adamson and about which he spoke to Poirier and thereafter was allowed to go to the mosque. Adamson and Poirier's evidence is different. Adamson stated that Syed had only one-half hour, not one hour, for lunch and thus could not complete his religious observance within his free time. The matter was negotiated between Syed and Adamson and an arrangement was struck whereby Syed could take one hour for his observance but would make up the balance of the time utilized at the end of the day. After this was resolved, no further problem arose with respect to this matter. It should be noted that Poirier's position on this matter seemed tougher. He testified:

"He was hired to work a full week and he's going to have to work a full week, and meet his religious obligations after hours." (Transcript, Vol. 3, p. 476)

Apparently, Adamson nevertheless made this accommodation to Syed on his own authority.

In November 1984, Syed was sent to conduct studies at the Customs and Excise office at United Terminal in Burnaby. That task took about three months and Adamson seemed pleased with his work there. Syed had a complaint about the fact that he did not receive a travelling advance to cover his expenses. He felt it was a matter of discrimination since he thought that every consultant with Customs and Excise got \$1,500.00 as a travelling advance. Sterling and Amarshi received it. He stated that he asked Adamson for it but it was refused. It should be noted that Amarshi is an Indo-Canadian as well.

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Adamson, on the other hand, testified that travel allowance was granted to employees travelling a distance of greater than 10 miles from their home location. He said that Syed was paid his mileage to United Terminal and was also paid lunch money. The latter allowance was generally not given, but Adamson did so on this occasion because he knew Syed had some financial difficulties.

As for travel advances, they were granted to employees who were flying to locations outside of British Columbia for extended 3 week stays and Syed was not assigned to such a project.

A further problem arose with Adamson over travelling expenses on a subsequent occasion when Adamson asked him to go to Port Coquitlam to collect statistics for another colleague. It wasn't Syed's job but he drove there and collected the statistics. He asked Adamson if he could be reimbursed for his mileage expense but it was never forthcoming.

Syed repeatedly asked Adamson for external projects such as those that would be conducted in Victoria, Calgary etc. Syed testified that he liked to travel but Adamson always appointed other individuals to do those jobs.

Moreover, according to Syed, Adamson had a decided preference for Sterling, the lone Caucasian of the 3 consultants. When Adamson went on holiday he appointed Sterling as acting supervisor even though at the time he was performing studies in Calgary. Syed, on the other hand, was in Vancouver and he felt that there was no reason why he shouldn't be appointed to that position. Syed did not receive any explanation for this from Adamson. Adamson testified that he designated Sterling as being in charge for a two-week period. Sterling received no extra compensation

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for this and his role was limited to dealing with any questions that might arise from line management. Syed and Amarshi were specifically advised that if they had any difficulties they were free to take them up directly with Poirier.

After his initial problems, Syed performed his work well. He even received some high praise from Adamson who said, according to Syed, that he was "a genius" when he discovered a mathematical error in the manual used to assist consultants in their work measurement studies. As a result of Syed's solution to the problem, the manual was revised.

In March 1985, Syed wrote to Perrin Beatty, the then Minister of National Revenue and he also wrote to his own member of Parliament about his insecurity as a term employee and his desire to obtain a permanent position in the maintenance phase. He was apprehensive that the permanent positions would be filled not by the local work measurement staff but by hiring candidates from other provinces and relocating them to Vancouver at taxpayers' expense. He also feared that the hiring decision would be based on seniority. On May 24, 1985 Beatty responded and gave him some assurance that he would be given full consideration in any selection process for which he was eligible to apply and that seniority would not be a factor in the process.

Syed testified that Adamson told him that he would be kept on until November 1985 and that he would be sent to Victoria. That pleased Syed. Adamson's evidence was that he had been hopeful all along that he would get extensions for all of his analysts but unfortunately, it did not work out that way.

Amarshi's term expired in April of 1985 and was not

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extended. At the time, Amarshi told Syed that Syed would be the next to go.

In the Spring of 1985, Poirier sent a number of consultants from Toronto to assist Adamson in the Vancouver region. Upon their arrival, Syed was assigned to assist one or two of them in certain projects. It was clear that the consultant from Toronto was in charge and Syed was placed in a secondary role.

Syed's hopes that his contract would be extended came to an end when he received a letter dated April 29, 1985 from Lucien Lacasse, a senior management consultant who was Poirier's assistant. He advised him that his term would expire on May 31, 1985 and stated:

"Because of a reduction in the scope of the Work Measurement Program for which you were hired and the ensuing reduction in resources dedicated to the program, we are unable to extend our contract past May 31, 1985."
(Ex. HR-7)

Syed spoke to Lucien Lacasse and asked him whether his contract could be extended at least until the competition took place so that he would be eligible to participate in it. Lacasse indicated to him that the contract could not be extended for a few months. Ironically, posting for the competition in fact came up on June 12, 1985, a short time after the termination of Syed's contract.

Just before he departed he received a performance appraisal completed by Adamson. The overall ranking was "satisfactory". That did not please Syed. He felt he should have been rated higher at "fully satisfactory" or "superior". Both Adamson and Poirier testified that a 'satisfactory' rating was quite normal for an inexperienced term employee and it was acknowledged to be good performance.

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Throughout, Syed felt that Adamson showed favouritism towards Sterling. He was the one who was sent to the Winnipeg airport job which in effect allowed him to extend his term and, therefore, provided him with the chance to compete for a permanent position. Sterling was also chosen for the Winnipeg airport assignment over Amarshi who started work at Customs and Excise at the same time as Sterling. Syed's view was that Amarshi had more experience at airports than Sterling and yet it was Sterling who was assigned to the Winnipeg airport and not Amarshi. The implication is that although both Amarshi and Syed were available for and capable to do this job, Adamson chose the Caucasian over the East Indians and by posting Sterling to Winnipeg, he was guaranteed a contract extension and eligibility to compete for the indeterminate position. By way of explanation, Adamson testified that Sterling had prior experience at the Calgary airport and was available to go to Winnipeg. Syed's airport experience had been minimal and limited to an assistant's role. Although Amarashi had airport experience, Adamson thought that Amarashi was reluctant to travel and to be away from his family for extended periods.

4) Statements of Adamson

Two instances of alleged direct evidence of racial discrimination came out of the testimony of witnesses.

While under cross-examination by Ms. Humphries, Syed testified that Adamson made a direct racial slur towards him. He testified that Adamson said that he didn't like East Indians in the office. Strangely, this evidence was not adduced in his examination-in-chief; nor did Syed mention it in his complaint to the Canadian Human Rights Commission; nor is it found in the statements that he gave

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to human rights investigators. This evidence was not relied on in any strong fashion by Mr. Engelmann in his argument. One can only conclude that this evidence is just not credible.

The second instance can be found in the testimony of Man Mohan Khanna ("Khanna"). He was posted to the Vancouver region office in the summer of 1985 thereby bumping Adamson from his acting chief's position. This was at a time after Syed had departed, although Khanna had known Syed in 1982 when they both worked at Canadair. Khanna gave evidence of a discussion that he had with Adamson a year after his arrival in Vancouver in the summer of 1986. Khanna was advised by Adamson that Syed had filed a complaint against him with the Canadian Human Rights Commission and he told Khanna that Syed did not stand a chance of winning the case. Khanna inquired of Adamson as to the nature of the problem since Khanna's knowledge of the function of the Human Rights Commission was very limited. He then testified:

"I said, I've worked with the guy and I can't see any reason of him taking that extreme action", you know.

And he said, oh, you know, 'I didn't like him, and I didn't want him working over here', whatever it was. And then he said something which made me very upset. He said he preferred to work with his own kind over here.

And I said, 'what do you mean, working with other consultants?' You know, like he's also a consultant. And he said, 'no, no, I don't mean that', you know, 'he's different'. And then I lost my temper; I said, 'what do you mean, he's different; so am I different. Am I no different?'

And then, you know, he just got all flabbergasted and everything else, and I really got angry. And I said, 'listen, get out, just leave me alone, okay; don't try and bring this kind of nonsense in front of me, because I'll take very strict action against

you, you know; I don't like this attitude; I never indulge in these things, don't ever talk to me.'

And he left, you know. And after that he never brought the matter up with me after that." (Transcript, Vol. 2, p. 249)

Even before we heard the evidence of Adamson with respect to this matter, certain facts were elicited from Khanna which militates against the logic of Adamson making such a statement and which places the veracity of Khanna's evidence in doubt. For one thing Khanna is East Indian himself and Adamson was aware of that. He was also aware that a Canadian Human Rights inquiry was under way at the time. Furthermore, Khanna was Adamson's immediate supervisor and was in a position to take disciplinary action against him for such remarks. For his part, Khanna, though shocked and upset over the comment, took no disciplinary or any reactive steps whatsoever. Moreover, in the written appraisals provided by Khanna in respect of Adamson he indicated that Adamson's overall performance rating on one occasion was 'satisfactory' and on another 'fully satisfactory' although the latter rating was somewhat artificial and generous according to Khanna.

In addition, it would appear that there was some animosity by Khanna towards Adamson since Adamson had testified against him earlier at a disciplinary hearing held before the Public Service Staff Relations Board. Khanna was initially dismissed because of an alleged misrepresentation respect to hours of work on a form that he filled out but was reinstated with a suspension after the hearing of an appeal before the Public Service Staff Relations Board. In any event, it is clear that Khanna accused Adamson of lying when he gave his evidence against him before the Board and certainly that to some degree must colour his feelings towards Adamson now.

In his testimony, Adamson agreed that he told Khanna that he preferred to work with his own kind but that what was meant was that he preferred to work with his own local staff rather than having consultants from Toronto brought in. He stated that his preference was to keep and extend the contracts of his own staff by 6 months rather than to use analysts from Toronto but that he was advised by Poirier that people were available in the East and they should be used by Adamson. Poirier confirmed that Adamson had expressed to him his desire to use his own people and that Adamson accepted with reluctance the consultants from the East.

In view of the inherent weaknesses in Khanna's testimony, the animus that he has towards Adamson, and Adamson's explanation of his comment, we believe that Adamson's statement was devoid of any racial consideration. Moreover, it makes no sense that it could have such an overtone particularly when Adamson was instrumental in hiring East Indians such as Syed and Amarshi in the first place.

5) Nature Of The Circumstantial Evidence

We are then left with whether there is any probative circumstantial evidence of racial discrimination. The singular fact which was highlighted by counsel for the Commission is that, of the three junior management consultants whose contracts could be extended namely, Syed and Amarshi who are East Indian and Sterling who was Caucasian, only Sterling's contract was extended. It was Mr. Engelmann's contention that both Syed and Amarshi were better qualified than Sterling and that accordingly, racial motivation must have been a factor, even if it may not have been the primary one, in the decision that was taken.

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The problem with this theory is that Poirier had to either be a collaborator with Adamson or at the least was an unwitting dupe to Adamson's scheme. Mr. Engelmann in his argument made it clear that he was not suggesting that Poirier did anything to discriminate on a proscribed ground or that the system that Poirier set up could have been better or fairer. So, no collaboration on the part of Poirier was involved.

Poirier had been hired as project manager to overcome the delays that the programme had been experiencing. He hired a lot more junior work measurement consultants and set new schedules for completion. Poirier testified that the national project was targeted for completion in the Fall of 1985. In the Spring of 1985, he realized that it was unnecessary to keep everyone on staff for the duration. It became apparent to Poirier that-as most of the work in central Canada had already been completed or was near completion, the remaining workload in the West did not justify the retention of the full complement of consultants. The work was reducing as the individual projects became completed and he, therefore, felt that he had to start downsizing.

Once standards were developed, his plan was to go into the maintenance phase which would require only 10 consultants across the country: - 4 in Toronto, 3 in Montreal and 3 in Vancouver to serve Western Canada.

It should be kept in mind that it was Poirier's and not Adamson's decision to let contracts expire. Poirier decided to start letting some of the consultants go and the method that he employed was to use a reverse order of merit. In the result, Poirier felt that Amarshi and Syed, although good, were lesser performers than the other consultants that

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he had available across the country and their contracts were not renewed. As well in the Toronto area, he let go a Mr. William Surphlis who was not of East Indian origin.

As we stated earlier, Poirier testified and confirmed that Adamson initially would have preferred to keep all of his people on stream by having their contracts extended. Adamson wanted to keep both Amarshi and Syed in addition to Sterling and was not pleased about the prospect of consultants from other regions coming into his area and completing his work for him. Adamson's first choice was to keep his own people; but Poirier's evidence was that he explained to Adamson that because of person year restrictions and because of limited funds, he had to start cutting back on his staff and dismissing some individuals. In the final analysis, this was a decision imposed on Adamson by Poirier.

Poirier relied greatly on Adamson in terms of rating Sterling above Syed and Amarshi. However, Poirier had his own preconceived notion of Sterling having sat on his selection board in the first place. He thought well of his abilities. Moreover, in the competition that took place for the indeterminate positions in Vancouver later in 1985, Sterling ultimately placed second and Adamson placed as low as fifth or sixth. So obviously Sterling had considerable ability.

It was Poirier, not Adamson, who felt that a reduction of staff was necessary because of decreased workload, person year restrictions and limited funds. Although Mr. Engelmann argued that these reasons were specious, it must be kept in mind that they were advanced by Poirier against whom no complaint of discrimination is made. Poirier knew of Syed's communication difficulty having experienced it first hand in the initial selection

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board exercise and having heard of the problem that manifested itself when Syed was performing his duties at the post office. Indeed, Syed's earlier employer references had also advised Poirier of this weakness. Poirier, therefore, had a reasonable basis for accepting the suggestion by Adamson

that Syed, although a satisfactory performer, was not quite as good as Sterling. Moreover, on the basis of the evidence, we are unable to say that Poirier and Adamson were definitely incorrect in that conclusion.

Essentially, it was known to all the term management consultants in the Vancouver region that there would be forthcoming a competition for two indeterminate positions in that area. It was a constant topic of discussion among them. This, of course, would be of vital interest to Syed, Amarshi and Sterling. In addition, it was of considerable importance to Adamson himself since he knew he was to be replaced by Khanna who would be exercising certain bumping rights over Adamson who was in an acting position. Thus, Adamson knew he would have to compete against the other three local management consultants for one of the two available positions. The thesis advanced by Mr. Engelmann was that Adamson took advantage of Poirier's decision to downsize his consulting staff in order to eliminate the direct local competition. He goes further and submits that the failure to assign Syed and Amarshi to projects which would in effect extend their terms was in part racially motivated.

It is true that Adamson was obviously in a conflict position. It was within his power to post Syed and Amarshi to projects which by their nature would extend their terms and thus make them eligible to compete for the indeterminate positions if the competition was announced while they were so engaged in projects. In fact, by assigning Sterling to the Winnipeg airport project, Adamson knowingly permitted

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him to become eligible to compete for the position. It may have been that Adamson viewed Amarshi and Syed as much better qualified candidates than either himself or Sterling and, therefore, chose not to place them in an advantageous position and did so in order to eliminate two serious contenders for the position that he himself coveted. Even at that, Adamson almost outsmarted himself since Sterling placed well ahead of him in the competition as did two or three others and it was only by good fortune that these other candidates declined the position. These actions, if they in fact can be attributed to Adamson, may have been unfair or improper on his part. But that alone does not constitute a contravention of Section 7 of the Canadian Human Rights Act. As stated by Chairman John D. McCamus sitting as an Ontario Board of Inquiry in *Ingram v. Natural Footwear* (1980) 1 C.H.R.R. D/59 at D/61:

"Such a dismissal, even though it be harsh and even though it be one which could not be upheld under the terms of a typical collective agreement, would be immune from attack under the Human Rights Code,

provided that the reasons for the dismissal were completely unrelated to the grounds of discrimination prohibited by the Code. To accede to counsel for the commission's suggestion, would convert the Ontario Human Rights Code from an anti-discrimination statute to one which generally prohibits harsh or unwarranted dismissal of employees. This is a construction, in my view, which the Ontario Human Rights Code cannot reasonably be expected to bear."

Also in *Bremer v. Board of School Trustees, School District No. 62 (Sooke)* and *Pullinger* (Unreported June 10, 1977), a British Columbia Board of Inquiry stated at page 10:

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"There are, of necessity, further limitations upon the scope of the Code. The equality the Code seeks to provide is in no sense an abstract, perfect form of equality. For example, a person who in every respect is representative of a community norm and thus immune from discrimination on the basis of race or religion or political belief, etc. may fail in an employment competition because the interviewer has a headache and is unimpressed by the applicant's tendency to talk too loudly and too long. The applicant may otherwise be the superior candidate for the position sought. With or without the element of the interviewer's headache, it is manifestly clear that the Human Rights Code cannot hope to regulate unfair treatment suffered by that unsuccessful candidate. The point is, however, that the candidate was accorded an individual assessment of his or her qualifications and in those circumstances the Code is not operative simply because of an arguably unfair result suffered by the applicant."

Mr. Engelmann conceded that if the sole purpose and objective of Mr. Adamson was just to eliminate superior competition without racial motivation then his case fails. We have examined the evidence carefully and we are hard pressed to find any facts whether singly or cumulatively which could give rise to the conclusion that there was any racial motivation whatsoever in the manner with which Adamson treated Syed. We in fact have serious doubt that even a prima facie case in this regard has been made out. Even if it had, we are satisfied that the respondent has met the necessary burden of proof to convince us that there has been no contravention of the Canadian Human Rights Act in this case. And that is so whether the burden of proof upon the respondent is merely to come up with an explanation which is not pretextual (See *Ingram v. Natural Footwear*

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supra; Almeida v. Chubb Fire Security (1984) 5 C.H.R.R. D/2104) or to prove on the balance of probabilities that there has been no discrimination (See, for example, Kearns v. P. Dickson Trucking Limited (1989) 10 C.H.R.R. D/5700; Pelletier v. Brazeau Transport (1987) 8 C.H.R.R. D/4045; Morissette v. CEIC (1987) 8 C.H.R.R. D/4390; Thiffault v. Quebecair (July 28, 1989, TD 11/89).

For all of these reasons, we are of the view that the complaint must be dismissed.

Dated this 5th day of February, 1990.

Sidney N. Lederman

Marvin N. Stark

Jenny C. Wong