

TD 17/ 89

Decision rendered on December 8, 1989

IN THE MATTER OF THE CANADIAN HUMAN RIGHTS ACT, S. C. 1976 - 77, C. 33 as amended; AND IN THE MATTER OF a hearing before a Human Rights Tribunal Appointed under Subsection 39(1.1) of the Canadian Human Rights Act.

BETWEEN:

AVTAR (TERRY) DHAMI Complainant

- and

CANADA EMPLOYMENT AND IMMIGRATION COMMISSION Respondent

- and

CANADIAN HUMAN RIGHTS COMMISSION Commission

BEFORE: NORMAN FETTERLY, Chairman

BETTY SMITH

BARRY SHEPPARD

DECISION OF THE TRIBUNAL

APPEARANCES:

RENE DUVAL Counsel for the Canadian Human Rights Commission

PETER ENGELMANN Counsel for the Respondent

DATES/ LOCATION: March 20 - 22, 1989 June 12 - 15, 1989 Vancouver

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INTRODUCTION

The Complaints are brought by Avtar (Terry) Dhami, who is of East Indian origin, against the Canada Employment and Immigration Commission. There are two written complaints dated March 28, 1985 and September 30th, 1985 respectively. Both allege that the Respondent Commission has engaged in a discriminatory practice by terminating Mr. Dhami's employment

and by refusing to re-employ him because of his race, colour and national or ethnic origin contrary to Section 7(a) of the Canadian Human Rights Act.

The wording of the written complaints entered as Exhibits "HR- 3" and "HR- 4" are similar with one significant difference. The earlier complaint refers to Mr. Dhami's employment ceasing as of March 31, 1984 "along with two other term employees". The later complaint of September 30, 1985 refers to the three individuals whose employment ceased as of March 31, 1984 and then adds "two of us are Indo- Canadian".

Section 7(a) of the Canadian Human Rights Act provides, inter alia, as follows:

"S. 7. It is a discriminatory practice, directly or indirectly, (a) to refuse to employ or continue to employ any individual . . . on a prohibited ground of discrimination."

1 > Section 3(1) of the Act provides inter alia, as follows:

"3(1) For all purposes of this Act, race, national or ethnic origin, colour . . . are prohibited grounds of discrimination".

In their opening remarks Counsel agreed that this was a factual case and credibility was going to be a major concern of the Tribunal. A great deal of evidence was introduced during the seven days of the hearings, much of it dealt with facts not seriously disputed by either party. It would seem to this Tribunal that some benefit would be achieved and some appreciation of the issues would flow from a brief factual resume of the circumstances existing during the period from the commencement of Mr. Dhami's employment with the Canada Employment and Immigration Commission (hereinafter referred to as the "Respondent") until the termination of his employment and for a period of time thereafter. Accordingly, we propose to outline in a general way the circumstances and the evolution of the relationship between Mr. Dhami and the Respondent in that context before dealing with those areas of the evidence where there is conflict and where the issue of racial discrimination is either directly or indirectly involved.

THE FACTS

Mr. Dhami, who became a Canadian citizen in 1969, emigrated from the Punjab in India where he was born. He attended high school in Vancouver and received post secondary schooling at Vancouver Community College having completed the bookkeeping program. Shortly after graduating he successfully competed for an entry level position with the Respondent. He was employed at their offices in Regional Headquarters in downtown Vancouver as a 'term' employee with a CR- 3 ranking commencing September 30, 1981.

The job description for the "general accounts clerk" position held by Mr. Dhami was classified at the CR - 3 level.

A "term" employee is one whose contract of employment is renewable on a periodic basis. Renewals would occur quarterly, semi- annually and in some cases annually. Term employees lack the assurance of permanent employment accorded to the so- called "indeterminate"

employee who has obtained indeterminate status through the competitive process. Customarily the term employees, including Mr. Dhami, found their employment contracts renewed on a quarterly basis.

When Mr. Dhami commenced his employment with the Respondent, he was assigned to Program Accounts within Accounting Operations. He was required to process three computerized programs, namely, Diagnostic Services, Canada Farm Labour Pool and Immigration Settlement Adaption Program. The latter program was apparently later superseded by Manpower Consultative Services.

The Chief of Accounting Operations during Mr. Dhami's employment with the Respondent was Mr. Steve Enos and under him there were four unit heads or supervisors who were responsible for the functioning of their respective units. Program accounts, to which Mr. Dhami was assigned, accounting control, revenue accounting and general accounts are the four accounting functions for which the Chief of Accounting Operations, Mr. Enos, was responsible. His immediate superior was Mr. Robert S. Coleman, the Manager of Financial Services.

Prior to the commencement of Mr. Dhami's employment with the Respondent there had occurred in the late seventies and continuing into the early eighties an integration between Canada Manpower and Immigration and the Unemployment Insurance Commission which then became the Canada Employment and Immigration Commission. Major organizational changes occurred during this process.

The Respondent, it seems, is "politically volatile" and funding is uncertain which leads to the proportionately high ratio of term employees as opposed to indeterminate or permanent employees. New programs are created from time to time by Government to meet unforeseen exigencies, as for example, the influx of political refugees which has occurred in recent years. This plus seasonal factors results in a variable workload which necessitates flexibility in staffing.

There is some uncertainty, not to mention conflict, between Mr. Dhami's recollection of who was his immediate superior when he commenced employment in September of 1981 and the recollection of the several witnesses for the Respondent. Suffice it to say that at one time during his career with the Respondent, Mr. Dhami's immediate superior was one Veronica Walters, since retired. His last supervisor in point of time was Ms. Rose Kozak, the unit head for Program Accounts.

In the course of his employment Mr. Dhami, as is the custom, was evaluated by his immediate supervisor who at that time was Veronica Walters. The results are contained in the formal written report dated June 9, 1983 signed by her and counter-signed by Mr. Dhami. It is reproduced as Exhibit "HR- 2" at Tab 3.

In February of 1984 Mr. Dhami, while employed by the Respondent competed with twenty- six other candidates for an upgrading to "financial expenditure clerk" with a CR- 4 rating. In preparation for the CR- 4 competition it was customary for term employees to gain knowledge and experience by "rotating" or working in other sections of Accounting Operations.

There were five successful candidates and the remainder, including Mr. Dhami failed to qualify. At that time Mr. Dhami's supervisor was Ms. Rose Kozak.

The fiscal year of the Financial Services Branch ended March 31 and several weeks prior to that the Manager, Mr. Coleman, was notified of significant budget cuts affecting his branch. In a memo of March 2, 1984, Exhibit "R- 1" at Tab 1 -- Mr. Coleman formally notified Mr. Enos of the necessity for reducing staff to forty- nine person years from the then current fifty- nine person years in order to meet the budget cutbacks. A person year is a means of identifying and quantifying the available manpower resource. For example four persons working for three months would constitute one person year.

The memo from Mr. Coleman does indicate the possibility that additional funding might be forthcoming but insists that

" you cannot budget for what you do not have".

In order to effect staff reductions a procedure described as the reverse order of merit was adopted on the recommendation of the Chief of Human Resources, Mr. Terence McMullen and his personnel advisor, Ms. Bonnie Smith. This procedure had never been invoked before as there had never been an occasion when budgetary constraints had required a substantial reduction in staff and lower person years. The procedure is based entirely on merit, neither knowledge -- which is assumed -- or seniority, being factors. The procedure requires an evaluation of the personnel who are being affected. There were seventeen CR- 3 term employees including Mr. Dhami in Accounting Operations whose employment by the Respondent would be terminated in order to achieve the necessary reduction in staff.

The reverse order of merit procedure required that those employees who were deemed to be the least qualified would be the first to be let go and eventually all seventeen would be let go in a staggered fashion over a period of several months in order to accomplish the reduction in person years imposed by the budget constraints, on the one hand, and to minimize the impact that their departure would have on the functioning of accounting operations, on the other. A so- called "person year plan" was drawn up and submitted by Mr. Enos to Mr. Coleman for his approval (see Exhibit "R- 1" at Tab 1). It provided for a gradual reduction in staff spread over a period of approximately ten months from March 31, 1984.

It was felt necessary that those employees whose terms were not to be renewed as of March 31, 1984 be given two weeks notice of termination.

Accordingly, the evaluation process involving all four unit heads or supervisors proceeded apace. Several meetings of unit heads were held in order to evaluate the term employees in each of the units. The unit head or supervisor directly responsible would, after input from the others, make the final evaluation. These meetings culminated in a meeting with the Chief of Accounting Operations, Mr. Enos, on March 7 at which time the evaluations of their respective employees by the unit heads were made known to him. The results of that meeting are contained in a memo from Mr. Enos to Mr. Coleman dated March 12, 1984 in which he names the three individuals, including Mr. Dhami, who are to be released as of March 31.

This memo was accompanied by the "person year plan" referred to earlier and by Mr. Enos's evaluation of the three employees who were deemed least qualified. In addition, there was attached to the memo a priority list of all term employees affected which set out the order in which their employment by the Respondent would cease. That documentation is reproduced in Exhibit "R- I" at Tab 3.

Mr. Dhami was one of three term employees who was not to be renewed as of March 31, 1984. He ranked fifteenth out of the seventeen who were affected. The other two employees, whose terms were not be renewed after March 31, 1984, were Jean Coventry who ranked sixteenth and Gulab Dass who ranked seventeenth. Mr. Dass is also of East Indian origin.

Following Mr. Enos's memo to Mr. Coleman, the three employees, including Mr. Dhami, were interviewed and were given notice of the non- renewal of their terms effective as of March 31, 1984. Mr. Dhami's interview took place on March 14, 1984 in Mr. Enos's office. The discussion which took place will be referred to later when dealing with evidence involving the racial issue in which there is conflict or differing versions as to what was said.

Following his release by the Respondent, Mr. Dhami lodged a complaint with the Public Service Anti- Discrimination Branch and an investigation took place which resulted in a report sought to be introduced by Counsel for the Respondent over the objections of Counsel for the Canadian Human Rights Commission. This Tribunal initially deferred ruling on the admissibility of the report when it was introduced for the purpose of establishing, according to Counsel, that all procedural matters involving the non- renewal of Mr. Dhami's employment had been correctly followed. It was felt at that stage of the hearing that there was no issue to be tried on procedural matters affecting Mr. Dhami.

The report admittedly dealt with an allegation of racial discrimination by Mr. Dhami and it was felt it would not be appropriate to permit the introduction of a report which might be prejudicial to Mr. Dhami on an issue which this Tribunal would decide on the evidence before it. At the conclusion of the case for the Respondent, Counsel advised the Tribunal that he would not be seeking to introduce the report for the stated purpose of demonstrating that procedures followed by the Respondent were correct. Accordingly, the findings of the Anti- Discrimination Branch on all issues dealt with by it and their reasons for so finding are not and do not constitute evidence in these proceedings.

Shortly after the non- renewal by the Respondent of Mr. Dhami's employment as a term employee and that of the two other employees, additional funding was forthcoming and it was not necessary to proceed with the planned retirement of the remaining term employees on the priority list. On April 17, 1984, Mr. Coleman in a written memo to Ms. Bonnie Smith of personnel recommended Mr. Dhami for re- hire (see Exhibit "R- I" at Tab 8). This recommendation was made on the advice and with the concurrence of Mr. Enos. This occurred at about the same time as Mr. Coleman was advised that there was, after all, resources or funds available for additional staffing.

There followed in the summer of 1984 a Public Service competition for the position of General Accounts Clerk but there was no evidence as to what candidates, if any, competed for that

competition nor was there any evidence as to the results. However, in October of 1984, the Public Service competition for the position of General Accounts Clerk with a CR- 3 rating did occur. This competition was for the same entry level position with the Respondent that had been previously held by Mr. Dhami. As a term employee, Mr. Dhami could qualify for re- hire only after successfully competing against other candidates in an open competition for the position being offered.

Accordingly, Mr. Dhami applied, through the Canada Employment Centre in Surrey, for that position. His application, together with several others, was processed in the normal manner by issuance of a referral slip from the Employment Centre to the Selection Board before which the candidate must appear. Mr. Dhami was referred on October 15, 1984 and he then contacted Mr. Andy Netzel who was a member of the Selection Board already constituted regarding arrangements for an interview.

The Selection Board was composed of Mr. Netzel who was then head of Accounting Control in Accounting Operations, Ms. Rose Kozak, head of Program Accounts, who had been Mr. Dhami's immediate supervisor the previous March when his term employment ceased and Mr. Steve Enos, Chief of Accounting Operations. All three had previous experience as members of selection boards and in particular was this true of Mr. Enos.

Their appointment as members of the Selection Board occurred on October 11, 1984. Until Mr. Dhami's phone call to Mr. Netzel, which occurred sometime after October 15, 1984, no member of the Board was aware that Mr. Dhami would be a candidate. It was an open competition, ie. not limited to employees with the civil service. There were ten candidates altogether competing for one CR- 3 entry level position.

The candidates would be rated according to knowledge, ability and personal suitability. The ratings were weighted twenty percent for knowledge, forty percent for ability and forty percent for personal suitability. The Statement of Qualifications for General Accounts Clerk, CR- 3, is reproduced at Tab 13 of Exhibit "R- 2". The sequence for the rated requirements in the order set forth are, first, knowledge; second, ability; and third, personal suitability.

Typical questions appear at page two of Tab 15, Exhibit "R- 2" and include under item 8 a hand-out which requires either a written or verbal response by the candidate to a fairly simple reconciliation of bank statement to cash account. The answer to this question is considered critical, since the position involves ability to perform reconciliations as described in the "Rationale" for the testing as set forth on the first page of Tab 15.

During the interview, members of the Selection Board may make notes which are considered their personal property and which do not form part of the permanent files or records of the Respondent and are not available this Tribunal.

Following the interview, the members of the Selection Board attempt to reach a consensus on the acceptability or otherwise of the candidate and each candidate is individually rated on a grid under the three criteria of knowledge, ability and personal suitability. Those results are then tabulated on the Selection Boards' report which is signed and certified by the members. The

individual ratings in grid form and the Selection Board report in the competition for which Mr. Dhami was a candidate are reproduced and entered as Exhibit "HR- 19".

The three candidates who qualified in order of ranking appear on the Selection Board report dated November 7, 1984-- Exhibit "HR- 19"-- and they do not include Mr. Dhami. He is shown as having failed the rated requirement for ability "as demonstrated by a poor response to question no. 8". In passing it should be noted that Mr. Netzel, who prepared the Selection Board report, admitted to a typing error in relation to one of the three candidates who qualified in the October, 1984 competition, namely, Sherril McIlveen. She is mistakenly shown, in contradiction to her grid rating, as having failed "ability".

The foregoing outlines in a general way the situation which prevailed during Mr. Dhami's employment with the Respondent and the events which occurred prior to and following the non-renewal of his employment contract.

SIMILAR ACT EVIDENCE

Apart from any documentary evidence and admissions elicited through cross-examination, Counsel for The Canadian Human Rights Commission relies on the evidence of Mr. Dhami himself and on the evidence of two witnesses whose evidence was admissible, it was argued, under the umbrella of "similar acts". That concept permits the admission of evidence which is otherwise inadmissible if a special nexus between the fact in issue, ie. racial discrimination, is shown to exist between that fact and the evidence sought to be introduced beyond mere similarity (which is to paraphrase Sopinka and Lederman on the Law of Civil Evidence at page 19). Counsel for the Respondent did not call upon the Tribunal to rule on the admissibility of such evidence, although he did question whether there existed a special nexus between the facts in issue and the evidence tendered in this case. He simply accepted that evidence of this nature was admissible in these proceedings and in other similar Tribunal proceedings. He then confined his comments to the weight to be attached to this type of evidence.

The witnesses whose evidence was presented under the umbrella of "similar acts" were Mr. Gulab Dass and Mr. Rajesh Pratap, both of whom were at one time employed by the Respondent and who are both of East Indian origin. Their evidence will be examined and evaluated when examining evidence presented to the Tribunal in support of the allegation of racial discrimination.

THE ISSUES

The issues involve firstly; the non-renewal of Mr. Dhami's term employment in March, 1984 and secondly; the failure to qualify in a CR- 3 competition in October, 1984.

The question is whether these two incidents were the result of discriminatory conduct or practices by the Respondent, its' agents or servants based on race, colour and national or ethnic origin.

BURDEN OF PROOF - PRIMA FACIE CASE

Counsel for the Canadian Human Rights Commission and Counsel for the Respondent advanced conflicting views as to the nature of the burden that rests with the Respondent when the Complainant has established a prima facie case of discrimination based on a balance of probabilities.

Counsel for the Canadian Human Rights Commission argued that once a prima facie case is established the burden of proof is reversed.

Counsel for the Respondent argued that the burden was an evidentiary burden as distinguished from a legal burden and that it was met by the employer providing a reasonable explanation for the alleged discriminatory behaviour.

There are cases in which an employer invoking the provisions of Section 15(a) of the Canadian Human Rights Act clearly has the legal burden of proving that it falls within the exemption of a bona fide occupational requirement. See Ontario Human Rights Commission v. the Borough of Etobicoke (1982) 1 S. C. R. per McIntyre, J. There are other cases involving refusal to employ based on age, see Pelletier v. Brazeau Transport Inc. T. D. 4/ 87 February 20, 1987, a decision of Mr. Claude Marleau; denial of services based on sex, see Morissette v. Canada Employment and Immigration Commission, 8 C. H. R. R., D/ 4390; refusal to employ based on race, colour and national or ethnic origin, B. Basi v. Canadian National Railway Company, 9 C. H. R. R., D/ 5029.

It is important, in our opinion, to bear in mind that the alleged discriminatory conduct in this case consisted of the non- renewal of the Complainant's term employment as opposed to firing or dismissal in the first instance and failure to compete successfully against other candidates in a competition in the second instance.

In a 1987 text entitled "Proving Discrimination in Canada", Madame Beatrice Vizekety refers to a line of cases at page 123 which appear to support the view of Counsel for the Commission viz., that once a prima facie case is established, the burden of proof is reversed and the Respondent must then prove there is no discrimination.

The author then makes a distinction between the evidential burden of proof and the legal burden and refers to Ingram v. National Footwear, 1 C. H. R. R. D/ 59, a decision of the Ontario Board of Inquiry where the Board said at p. d/ 60:

"In short, the establishment of a prima facie case of discrimination is useful in shifting a burden to the employer to come forward and offer an explanation for the dismissal, which is not based on discriminatory considerations. Once the employer has come forward, however, the burden rests with the Complainant to prove, on the balance of probabilities, that the explanation put forward is false and pretextual".

She concludes from this case and other interpretations by Boards of Inquiry in British Columbia, Ontario, Nova Scotia, Alberta and at the Federal level that the employer does not have the legal burden of showing that the reasons for the denial were legitimate; at most, he carries a secondary or evidential burden.

In support of that proposition she refers to *Israeli v. Canada Human Rights Commission*, 1983, 4 C. H. R. R., D/ 1616 at 617 and (1984) 5 C. H. R. R., D/ 2147. In the Israeli case the Tribunal summarized the shift of the burden of proof as follows:

"The burden of proof in discrimination cases is important, as is the order of presentation of the evidence. Cases of refusal of employment on discriminatory grounds before boards of inquiry in Canada, whether at the federal or provincial level, all seem to employ the same burden and order of proof. The complainant must first establish a prima facie case of discrimination. Once this is done, the burden of proof shifts to the employer to provide a reasonable explanation for the otherwise discriminatory behaviour. Finally, the burden shifts back to the Complainant to prove that this explanation was merely a 'pretext' and that the true motivation behind the employer's actions was in fact discriminatory".

This description of the shift of burden of proof was quoted with approval in the *Morissette* case, supra.

Without addressing the question of whether the onus 20 >on the Respondent is a legal burden or an evidentiary burden, this Tribunal deems it appropriate to adopt the concept of the shifting of the burden of proof enunciated in the Israeli case, supra, and approved in *Morissette*. The Complainant, Dhami, having established a prima facie case the burden then shifts to the Respondent to provide a reasonable explanation for the otherwise discriminatory behaviour. That being done the burden then shifts back to the Complainant to prove that the explanation was merely a pretext.

THE POLICY OF THE RESPONDENT

The Respondent Commission is subject to the provisions of the Public Service Employment Act which provides, inter alia, in Section 10 as follows:

"Appointments to or from within the Public Service shall be based on selection according to merit . . ."

This is followed by Section 12(3) which provides as follows: "12(3) The Commission, in prescribing or applying selection standards under Subsection (1), shall not discriminate against any person by reason of 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".

There was no attempt to demonstrate an overall policy of discrimination targetted at visible minorities by the Respondent, on the contrary there was evidence which demonstrated, that in practical terms, the percentage of members of visible minorities employed in the Accounting Operations of the Respondent increased significantly from 5.7% in 1980 to 27.9% in 1986. See Exhibit "R- 1" at Tab 6. The policy mandated by Parliament of non-discrimination appears therefore to have been implemented by the Respondent pursuant to the provisions of the Public Service Employment Act.

THE EVIDENCE

We propose to deal with the so- called "similar act" evidence introduced through Mr. Gulab Dass and Mr. Rajesh Pratap before examining Mr. Dhami's evidence.

Mr. Dass, as mentioned earlier, is of East Indian origin. He was employed by the Respondent as a General Accounts Clerk with a CR- 3 rating from September, 1982 until his term employment ceased as of March 31, 1984.

He was last on the list of seventeen employees whose employment was not to be renewed as a result of budget cutbacks and was one of the three who, with Mr. Dhami and Jean Coventry, were let go as of March 31, 1984.

Mr. Dass claimed he was in his third year toward a Certified General Accountant designation and had had some ten years' practical accounting experience in other parts of the world before commencing employment with the Respondent. He was evaluated by Jennifer Able, his immediate superior, on July 19, 1983, and rated as "fully satisfactory". This evaluation was later described by Mr. Enos in his testimony as "overly generous". The evaluation report on Mr. Dass appears at Tab 2 of Exhibit "HR- 2".

Mr. Dass was then in general accounts but later transferred to program accounts where he received assistance from time to time from Mr. Dhami, with whom he apparently felt more comfortable seeking assistance than he did with his supervisor.

Mr. Dass was critical of Ronnie Walters, his supervisor, whose attitude towards him "was kind of negative- like", and "she didn't talk to me" until he was moved to her unit when "she started being very nice to me".

Ronnie Walters retired in 1983 and was not privy to the events leading up to Mr. Dass's release in March of 1984. She was, according to Mr. Dass, his supervisor for a very short period of time, one week to be exact, and it appears she was absent for health reasons and on holidays for a good deal of the time prior to her retirement in September of 1983.

In any case, a careful review of Mr. Dass's testimony does not reveal any specific incidents, apart perhaps from a certain aloofness towards him prior to his transfer to Mrs. Walters' unit, when she apparently was in a more receptive mood, which justifies the description by Mr. Dass given to the Human Rights Commission Investigator, namely, "Ronnie Walters was a bitch, a total racist".

When faced with this statement on cross- examination, Mr. Dass's response at page 261 of the transcript was:

"Well, this was -- this was just made when I went to -- Human Rights, here you know".

Mr. Dass, shortly after the non- renewal of his term employment with the Respondent in March of 1984 made a complaint to the Public Service Commission Anti- Discrimination Directorate and advised Mr. Dhami of that fact. Mr. Dass was vague if not evasive about the results of the

Directorate's investigation. on being pressed, he agreed that his complaint of racial discrimination had been dismissed.

He claimed a close relationship existed between Ronnie Walters and Steve Enos, who he described as "old folks for a number of years in that department ... Ronnie Walters and Steve Enos were good buddies in the office". Since Ronnie Walters had retired and took no part in Mr. Dass's evaluation by his then supervisor, Ms. Kozak, during the reverse order of merit process in March of 1984, it is difficult to understand, assuming she in fact differentiated between Mr. Dass and other employees on racial grounds, how Mrs. Walters influenced or affected his poor standing, compared to the other term employees in the evaluation process.

The only link, and it is a tenuous one, is that Ronnie Walters and Steve Enos were "good buddies". More will be said regarding Mr. Enos's participation in the evaluation process when examining the evidence of the other witnesses.

We think one can sum up Mr. Dass's evidence on the racial issue by referring to the following excerpts from his examination- in- chief at page 229 of the transcript:

"Q. And I'm asking you, were there incidents, facts, things that you saw, that you were told, that led you to believe that it was because of your colour that you would not be retained?

A. No, I don't have any facts like, you know. There was -- there was nothing shown to us that this was a racial discrimination or nothing, but it came to my mind that, you know, that there was so many of other people around that supposed to go with us yet. And because of the -- only three of was chosen from that. And thinking that we were only -- we were all three coloured people and -- and the rest of the people are still there.

Q. Yes.

A. That thing -- that thing -- from that thing, you know -- it's from the selection, like, from 13 or 14 people in a group, right? And in that group, we were the two -- only two of us is East Indians, you know.

Q. Okay.

A. Now, that's the only thing that I can say that I -- we were picked up on a racial basis. But they didn't show me or Terry that, you know, they didn't like our colour or nothing like that. That's -- that's the fact I'm basing. I may be wrong or I may be right.

Q. Yes.

A. I don't know.

Q. Now, from your daily experience in this workplace, did you feel

that in some circumstances you were not treated the same as other people?

A. No.

Q. No? Okay. Now, were you ever made negative comments by Ronnie Walters?

A. No.

Q. On your work?

A. No". From the foregoing it is evident that Mr. Dass was not able to furnish any facts or describe any incidents either from his own experience or from observations he made with respect to Mr. Dhami which would lead him to conclude that either he or Mr. Dhami were subjected to racial discrimination in the workplace. He seems to have based his conclusion that he was being discriminated against on the mistaken belief that the three employees in Accounting Operations who were not renewed, were coloured. Actually, the third employee was Jean Coventry, who was not a member of a visible minority.

It is evident that Mr. Dass was upset about his contract not being renewed and he felt that the alleged cutbacks in the budget were an excuse to get rid of him. In fact, it was not until the very last day of his employment when he was told by Mr. Enos that his employment would not be renewed that it occurred to him that he was being treated differently from other employees. He agreed, however, that he had been found sleeping on the job from time to time and that when he was transferred from general accounts to program accounts, he was told he should eliminate his errors and spend more time on follow-up of outstanding invoices and commitments.

The Tribunal does not think Mr. Dass was a credible witness. It is apparent from his own testimony and that of other witnesses, whose evidence the Tribunal accepts, that Mr. Dass's work habits were woefully lacking and that he committed errors which required continuous supervision and correction. Mr. Andrew Netzel, one of the unit heads who gave evidence on behalf of the Respondent, was familiar with Mr. Dass's work performance and made the following comments in that regard at page 594 of the transcript:

"Q. "now, these people who came in I guess 16 and 17, Coventry and Dass, do you recall the discussions that took place with respect to them?

A. I recall Gulab Dass. To be honest, I don't think Gulab would have been extended even if we didn't have this budget reduction. He really was a terrible worker. I spent an awful lot of my time going to see Gulab to get errors corrected that he wouldn't make just once, but he would make over and over and over. He was a very, very frustrating person that way. His work was not good."

In giving his evidence, Mr. Dass gave the impression of extreme caution in his choice of words as though concerned about possible repercussions. Many answers were qualified by the Caveat "I don't know if that was true or not. That was just what I felt". His memory of certain events was vague and uncertain and in some respects he appeared to be evasive. We therefore attached little or no weight to Mr. Dass's evidence as it relates to the issue before this Tribunal.

With regard to Mr. Raiesh Pratap, also of East Indian origin, he commenced his employment with the Accounting Operations branch of the Respondent in June of 1980. He was accepted for employment as a General Accounts clerk with a CR 3 rating as a term employee. This is an entry level position and Mr. Pratep is still employed by the Federal Government as a Customs and Excise Inspector at the Vancouver International Airport. His sojourn with the accounting operations of the Respondent was a relatively brief eight months.

He says that when he reported for work in June of 1980, it was his first job with the Federal Government and that he was "kind of nervous and tense of course". He then described in some detail the reception he received when he reported for work and was kept waiting for twenty or thirty minutes. He noticed the receptionist announcing his presence to Mr. Enos and he got the impression from what he observed from Mr. Enos's facial expression and conduct, that he was not pleased to see him. Eventually Mr. Enos shook his hand and took him into his office and told him he didn't need anybody right then and asked "who told you to come over and start your job today". Mr. Pratap says he told Mr. Enos that personnel had phoned him to report for work that day and he then inquired "is there something wrong?". Mr. Enos denied there was but said he would make a phone call to personnel "and just see what happened here. Anyway since you are here, I'll tell you quickly what we're all about".

The witness claims that Accounting operations was in fact short- staffed at that time and he complained that he was not introduced to his immediate superior, and was "cordoned- off" to a small desk in the corner of the office and told to just sit there and observe what went on. He says he felt livery uneasy and like I shouldn't be there".

When cross- examined on the initial meeting with Mr. Enos he agreed it was obvious that Mr. Enos wasn't expecting any new employee that day and that Mr. Enos was not at any time his direct supervisor. On questioning by the Tribunal, he made comparisons between his current work conditions as an Inspector at Customs and Excise under Revenue Canada which he describes as "so organized" and the conditions which prevailed when he was with the Respondent and the following excerpt from the transcript at page 305 describes Mr. Pratap's feelings about his first job with the Respondent:

"Q. Okay. And are you happy in your present position with Revenue Canada, in the Customs Branch?

A. Yes, I am. The -- it's very hard for me to explain the feeling that I have right now. When the feeling I had when I started out, being my first job, I thought: How the hell -- excuse the expression -- the Government of Canada operates their affairs in this manner? Looking at this department, it was total chaos. I didn't know who to report -- for and so forth.

Looking at Revenue Canada, it is so organized. You have your superintendent you report to. Any problems, you go to your superintendent. Inspectors are rotated. They have a list published and they go by the list. It is a great department to work for and I'm very happy with this department".

It is significant that during this period when Mr. Pratap commenced his employment with the Respondent, the integration of Canada Manpower and Immigration with the Unemployment

Insurance Commission was taking place. Mr. Pratap's testimony as well that of other witnesses suggests that the

integration of the two branches produced confusion if not chaos. Mr. Enos, who testified that he was unable to recall this particular incident and a further incident which he was involved in with Mr. Pratap, presents a rather severe if not forbidding image. He suffers from a slight speech impediment. He was, of course, involved in the re-organization taking place when Mr. Pratap appeared for work in September of 1980.

The second incident involving Mr. Enos occurred during a staff training lecture when, according to Mr. Pratap, he was singled out by Mr. Enos who "bent over towards me and said 'some of us are new and some of us are awfully green around here'". This remark, according to Mr. Pratap, was made by Mr. Enos while looking directly at him. When asked by Counsel for the Respondent on examination- in- chief how he felt about that remark, his response was at page 276 of the transcript as follows:

"A. I -- it's very hard to describe. I did not know some of the people around me, of course. Being a coloured person, a remark like that kind of made me uneasy. And as I was looking around the room, I seen some people laughing or smirking. I didn't make a issue of it. I just left it at that, and I thought to myself maybe it's just one of those remarks off the cuff. And I just left it at that and that was all".

On cross- examination Mr. Pratap agreed that the word "green" is used for a new employee or rookie and that this was the first lecture he had attended. When asked whether that term was apt in the circumstance his response at page 298 of the transcript is as follows:

"A. Maybe to you, sir, but I didn't take it that way. You have to consider the -- the facts in full: the demeanor of the boardroom; me being coloured; and there were other new employees.

The reason -- at first I was thinking along the lines that you are thinking right now. That's why I did not make a issue of it or did not discuss it with anybody. And just like I've testified, I did feel uneasy. But deep down inside, I -- I have this feeling that it was directed to the colour of my skin. That's what my testimony is.

Q. Would you agree with me as to the other definition of green, not just being a colour but meaning you're new?

A. I have to agree with you because it does -- it is true. There is other definitions of green".

Apart from these two incidents there were some minor occurrences in which Mr. Pratap apparently concluded that he was the object of discrimination by his superiors in the Accounting branch of the Respondent. One of these occurred during the Christmas holidays, not long after he had commenced his employment, when he was asked to work a full shift when other co- workers were given time off. He says he was told to work by Ronnie Walters but there is evidence that it was Gertie Holmes, since deceased, who was his supervisor at that time. Mr. Pratap had some difficulty recalling which of the two it was. In any event, the incident was understandable from

the point of view of a new employee not enjoying the same benefits and privileges as senior co-workers.

There was, although denied by the witness, an innuendo of racial discrimination arising out of a competition in December of 1980 which Mr. Pratap entered for a CR- 4 position in Accounting Operations. He related his background in accounting courses at Langara College and then described how he failed a competition while a "white person" in his first job with the Federal Government, he being a taxi driver with a language difficulty, was accepted.

There was testimony which indicated that when Mr. Pratap competed for the CR- 4 rating in December of 1980 his immediate supervisor was Gertie Holmes who had recommended him to the Selection Board which was chaired by Mr. Jim Hayre, himself of East Indian origin.

Mr. Arvind Reddy, of East Indian origin, who was called to testify on behalf of the Respondent, was employed in the Accounting Operations Branch in 1980 in the same entry level position as Mr. Pratap. Mr. Reddy, who has achieved the status of a financial management advisor with the Respondent, having advanced through a number of competitive levels to that senior position, was supervised at various times by Gertie Holmes, Ronnie Walters and Steve Enos. When he was questioned regarding his work experience in Accounting Operations, the following questions and answers appear at page 961 of the transcript:

"Q. Sir, were you familiar with Mr. Pratap?

A. Yes, I was familiar.

Q. Did you work in Accounting Operations at the same time as he did?

A. Yes, I did.

Q. Did you ever experience any racial discrimination while you were working in Accounting Operations?

A. I have not. If I did, I don't think I would be where I am right now, in this position".

Assessing Mr. Pratap's evidence, one must bear in mind that every insensitive remark or disgruntled comment is not necessarily racially inspired. Nor is every sour look or apparent discourteous conduct necessarily targetted at the recipient. There may well be, and often is, a general malaise or discontent permeating office staff, including managers, when faced with unexpected events which disturb normal office routine. Those events or circumstances may range from the pressures of reorganization and integration to unwelcome budget cuts to the arrival of a new employee whose presence represents an additional responsibility requiring adjustments in physical accommodation and the provision of on- the- job training.

Even if one assumes the incidents described by Mr. Pratap involving Mr. Enos were racially motivated can it be inferred these incidents, occurring some four years before Mr. Dhami's complaint, necessarily demonstrate a pattern of conduct on his part from which one must

conclude he acted with animus towards Mr. Dhami? We think not. Ingram v. Natural Footwear Volume 1 C. H. R. R. p. D/ 59 is a case decided by the Ontario Human Rights Commission. The Complainant, Ms. Ingram, alleged discrimination by reason of race or colour in imposing unfairly burdensome work conditions, etc. leading to her dismissal. Her immediate supervisor, a Mr. Kowalewski, was alleged to have discriminated against her on racial grounds. In that case, evidence was led in support of Ms. Ingram's allegation of a pattern of discriminatory activity by the employer and a number of coloured former employees were called to testify as to those activities.

Professor John D. McCamus at paragraph 532 commenting on that type of evidence makes this comment:

"Again, presuming that the evidence of a pattern of discriminatory practices was established on the evidence, it would then be necessary to take the next step of drawing a connecting link between the existence of the general practice and the particular incident in question".

We do not think that the evidence in this case demonstrates a nexus or connecting link between the incidents described by Mr. Pratap and what occurred some three to four years later in the case of Mr. Dhami. By so saying, we do not wish to convey the impression that the incidents described by Mr. Pratap involving Mr. Enos were racially motivated. We are not persuaded that such was the case and in fact we are of the opinion that a perfectly innocent interpretation can and should be placed on those incidents.

TESTIMONY OF THE COMPLAINANT MR. DHAMI ON THE RACIAL ISSUE

Mr. Dhami's evidence on the issue of racial discrimination focused on two individuals. They were, in relationship to him, his immediate superior, Veronica Walters, one-time unit head of Program Accounts and Mr. Steve Enos., Chief of Accounting Operations.

As mentioned earlier, Mrs. Veronica Walters retired from the Federal Civil Service in September of 1983. She had apparently been experiencing health problems prior to her retirement and was absent from work for health reasons on a number of occasions. She did not appear to give evidence in these proceedings.

Mr. Dhami was asked by Mrs. Walters to work on a program which she said would be a change for him and which was then being processed by a co-worker, Kathy Prince. However, according to Mr. Dhami he was reluctant to do so because he had already worked on that program and besides the program was "in a mess". "All the books were not up to date". He was then advised by Mrs. Walters that his reluctance to comply with her request would be reflected in his formal evaluation.

After discussing with Mr. Dhami, on two occasions, her concerns about his work performance, Mrs. Walters authored an evaluation report dated June, 1986 which was approved by Mr. Enos and counter-signed by Mr. Dhami -- see Exhibit "HR- 21' at Tab 3.

In her report, Mr. Walters rated Mr. Dhami's work performance as "fully satisfactory". This assessment is, however, not without qualification and under "reasons for rating" there appears the following comment:

"Terry presently processes all accounts for payment, claims for C. T. S. T., Diagnostic and Settlement Services, also C. F. L. P. He has shown no interest in learning other or different duties. The interview, re this assessment, has pointed out to Terry the areas which have to be improved. He has promised the improvements necessary".

The underlining is mine. The assessment also contains these comments under the heading "Performance Strengths and Areas for Improvement", namely:

"Until Terry is able to show that he is more interested in the Section responsibilities as a whole it will be impossible to detect any latent potential".

It appears that when Mr. Dhami first commenced to work for the Respondent he was supervised by someone other than Veronica Walters and she, perhaps, was not aware that he had already worked on the program he objected to. Mr. Dhami agreed that his supervisor had the right to require him to work on any program within his section. On cross-examination the following questions and responses appear at page 140 of the transcript:

"Q. Mr. Dhami, I put it to you that a supervisor in Program Accounts could tell you, as a term employee, to work on any program within Program Accounts.

A. Yes.

Q. Do you dispute that?

A. No, I do not. Mr. Dhami, however, denied that it was part of the duties of a CR- 3 employee to "rotate" or accept different assignments within Program Accounts at the request of the supervisor. The evidence of witnesses appearing for the Respondent Commission and one of the witnesses for the Complainant, Mr. Pratap, confirms that it was expected of and encouraged by unit heads for term employees to "rotate" so as to gain on the job experience in other areas. Mr. Dhami himself agreed that it would be helpful to have knowledge of other programs in order to advance to a CR- 4 indeterminate position within the Respondent.

Although Mr. Dhami was not pleased with Mrs. Walters evaluation report he made no complaints, either formal or informal to anyone at that time about it. He agreed on cross-examination that the evaluation report by Mrs. Walters in June, 1983 was a more satisfactory and better assessment from his point of view, than the one he received during the reverse order of merit process from Ms. Kozak in March of 1984.

Mr. Dhami claims he made improvements to the Diagnostic Service Program after returning from his holidays and that he so informed Mrs. Walters. He said he helped his co-workers who were having difficulties with their work. In comparing himself to others in his unit he said at page 28 of the transcript:

"I worked just as hard and there was never any complaints about my work, so, I feel that I was as good, if not better, than the other people there".

Mr. Dhami's opinion of his work habits are not shared by Ms. Kozak who was his last supervisor and who Mr. Dhami exonerated from any racially inspired motivation.

Mr. Dhami claims that Mrs. Walters evidenced discrimination based on race in her relationship with Mr. Dass and himself. In support of these allegations he relies on the comments in his evaluation by Mrs. Walters pertaining to his reluctance to take on other duties. He claims that his contributions to the improvement of the Diagnostic Services Program, his efforts at self-improvement and his helpfulness to his co-workers did not receive proper recognition.

The improvement he claims to have made to the Diagnostic Services Program were, in effect, to correct changes made by some other person while he was on holidays and to make up new forms so that the program was easier to work with and more up-to-date. In a statement made to the Investigator for the Human Rights Commission, Mr. Dhami is reported to have stated in respect to that program "Kozak asked me to take out some of the old entries that shouldn't be there, it had nothing to do with my re-organizing it". When it was suggested by Counsel after his departure the program was found to be in a mess, Mr. Dhami inferred (if such was the case) that Mr. Dass was responsible, he having taken it over a month before the non-renewal of their term employment.

The self-improvement consisted of a course at Langara College entitled "Fundamentals of Accounting". Mr. Dhami did not produce any documentary evidence to verify that he had in fact taken the course or that he achieved the marks he claimed when requested to do so by the Tribunal.

Apart from the circumstances outlined above, the only other evidence one can glean from Mr. Dhami's testimony of alleged racial discrimination by Mrs. Walters concerns her brief relationship with Mr. Dass. According to Mr. Dhami, Mr. Dass during the one month period when he was supervised by Mrs. Walters did not receive proper training from her nor was he given the assistance that he required in order to straighten out his problems. This was in contrast to other employees who, according to Mr. Dhami, were given better treatment by Mrs. Walters.

When pressed, Mr. Dhami agreed that Mr. Dass had problems with reconciliations when he was transferred from General Accounts to Program Accounts. Also that he observed Mr. Dass dozing off a couple of times.

Veronica Walters was not privy to any of the meetings of the unit heads in March of 1984 and there is no evidence that Mr. Enos actively participated in the deliberations of his unit heads before he was presented with their respective evaluations. It is quite likely Mr. Enos was aware of the evaluation of Mr. Dhami which was done by Mrs. Walters in June of 1983 since he signed the report. There is no doubt he concurred in the independent evaluation of Mr. Dhami and the other employees undertaken by Ms. Rose Kozak in the early part of March, 1984 which in turn led to his memo of March 12, 1984 to Mr. Coleman.

Since Mrs. Walters had retired and Mr. Enos took no active part in the evaluations of March, 1984 it is difficult to understand the basis for Mr. Dhami's belief, even if one assumes that either or both of them were racially motivated, they were in some way responsible for his low ranking in the reverse order of merit process which resulted in the non-renewal of his term employment.

The evidence was that Mrs. Walters chaired the Selection Board which accepted Mr. Dhami's application for employment in 1981. That fact is not consistent with the accusation made against her by Mr. Dhami. Mr. Dass, who made a similar accusation against Mrs. Walters, agreed he was not treated differently from other employees and that she did not make negative comments about him or his work.

As regards Mr. Enos, he discriminated according to Mr. Dhami "by listening quite a bit to Ronnie Walters" and by agreeing with the assessment made of him by Ms. Rose Kozak in the reverse order of merit process in March of 1984. It would be strange if a Manager did not listen to and be guided by the opinions and advice of those to whom supervisory duties and powers are conferred, who are in direct personal contact with the employees and thus in a better position to form opinions. This Tribunal is unable to read into Mr. Enos's relationship with Mr. Dhami, discrimination based on race because he listened to and was guided by those opinions. On the other hand, the evidence reveals that when Mr. Dhami requested an extended leave of absence in order to travel to India and arrange for his marriage, Mr. Enos approved and authorized it. Mr. Enos also participated in and concurred with the decision by Mr. Coleman that Mr. Dhami be considered for re-hire in accordance with the memo of April 12, 1984, Exhibit "R- 1" at Tab 8.

In describing his relationship with Mr. Dhami, Mr. Enos testified as follows at page 691 of the Transcript:

"A. Well actually I think Mr. Dhami got along with everybody fairly well. I got along with Terry quite well. Actually, we always had a basically good rapport in regards to a personal type -- I guess not personal, but an overall relationship. He was a very personable type".

In his testimony and in his conduct toward Mr. Dhami, Mr. Enos displayed no animus and one is hard put to find any trace of racial overtones. On the contrary, it appears Mr. Enos acted properly and fairly in his dealings with Mr. Dhami. It is true he did not hold Mr. Dhami's work performance in high regard, based not only on Mrs. Walters and Ms. Kozak's opinions, but also on his own observations. As Chief of Accounting Operations, Mr. Enos's concerns in that regard were legitimate. It is also true that Mr. Enos chaired a selection board in October of 1984 in which Mr. Dhami competed and failed. The circumstances of that competition will later be described in more detail.

This Tribunal concludes that there is no direct evidence of discrimination by either Mrs. Walters or Mr. Enos of such weight and of so compelling a character as to cause a reasonable person to have no choice but to decide the issue in Mr. Dhami's favour in the absence of a reasonable explanation. The Tribunal is aware in cases of this nature, proof of overt conduct which would support an allegation of racial discrimination is difficult and that there exists subtle and undefinable attitudes, feelings or conduct which manifest themselves in certain situations and which are racially motivated.

There is evidence on which a reasonable man might find in the Complainant's favour but we are not persuaded to so find because the Respondent has provided a reasonable explanation for the otherwise discriminatory behaviour.

It is necessary then to examine in some detail the procedures followed in Mr. Dhami's case in order to ascertain, if these procedures were tainted to such a degree as to compel the conclusion he was unfairly discriminated against because of his race, colour and national or ethnic origin.

PROCEDURAL DISCRIMINATION

(a) March, 1984 - Reverse Order of Merit Procedure

The procedure adopted by the Respondent on the advice of its personnel director was intended to meet a unique situation not previously experienced until the 1984 budget cuts. It was adopted again in 1985 when a similar situation occurred as a result of severe budget cuts. The procedure was designed to accomplish two things, namely, (a) to establish a priority list for laying off over a period of time, term employees who did not measure up with their co-workers on a merit basis; and, (b), to maintain as nearly as possible the same standard of service as had prevailed before the reductions in staff by keeping the best to the last.

The concept is based on the merit principle and in practice neither knowledge, which is assumed, nor seniority are factors to be taken into account.

After Mrs. Walters' retirement in September of 1983 and for several months thereafter there was no unit head or supervisor to fill her position. In December of 1983, Ms. Rose Kozak was appointed supervisor of Program Accounts. Her uncontradicted evidence, which is accepted by this Tribunal, was that when she assumed her new duties she did not refer to prior evaluations either written or oral of any of the employees under her supervision. She preferred instead to rely on her own assessment of the individuals concerned. It was also her evidence and of several witnesses testifying on behalf of the Respondent that she assessed each individual's ability and suitability in the reverse order of merit process in consultation with other supervisors or unit heads. The evaluation or assessment process consisted of a series of meetings which took place amongst the four unit heads and culminated in a meeting with Mr. Enos on March 7, 1984.

When Ms. Rose Kozak assumed her supervisory duties there were seven term employees in Program Accounts and they included both Mr. Dhami and Mr. Dass.

Ms. Kozak testified she assessed the employees in her unit over the same period of time from her own observations of how well they performed their jobs. She used as a criteria for her evaluations the individual's ability and personal suitability. She denies that she was influenced or received any negative comments regarding either Mr. Dhami or Mr. Dass from Mr. Enos, the Chief of Accounting Operations.

According to Ms. Kozak, Mr. Dhami was then working with three programs which she described as Portable Wage Subsidy, Diagnostic Services and Canada Farm Labour Pool. These programs were fairly simple to do and left the employee with time on his hands. Mr. Dhami, according to

Ms. Kozak, spent much of his spare time on the telephone, more than did other employees, and she found it necessary on occasion to leave notes to see her "when you're off the phone".

Mr. Dhami did not show as much initiative as other employees and when he had free time he didn't ask for other kinds of work in order to learn more. In her testimony Ms. Kozak said that he did not accept work willingly and that she found it easier to give work to others who accepted their assignments readily and happily.

On one occasion Ms. Kozak asked Mr. Dhami to assist one Kathy Prince, a co-worker. He at first refused to do so saying it wasn't his program. After some further urging by Ms. Kozak he finally complied with her request.

She evaluated Mr. Dass as well as Mr. Dhami in the reverse order of merit process. With regard to Mr. Dass, she noted that he was not performing in a satisfactory manner and that she had found him sleeping on the job.

With regard to the reverse order of merit process, she and other unit heads who participated in that process maintained that Mr. Enos was not present and took no active part in the meetings that were taking place in early March, 1984 between the four unit heads. Under cross-examination, Ms. Kozak described in response to a question by Counsel how she undertook the evaluation of the employees in her unit as follows at page 925:

"Q. I see. You found it difficult, did you -not, to assess your employees as you had only worked for three months with them?

A. It was difficult, I agree, but I did my best to evaluate them and they were all evaluated fairly because they were all evaluated over the same period. I wasn't influenced by the supervisor that had been there because she was retired, she was gone. I didn't have an opportunity even to speak with her.

I wanted to assess them on my own. They were my employees and I wanted to keep the employees that would work and that I could process the documents for the units; I could keep the unit running for as long as possible. I wanted the best ones.

We had thought that all our terms would be -- or we couldn't extend their terms. So we were anticipating being without our term employees. We needed them desperately".

In evaluating Mr. Dhami, Ms. Kozak testified that he was satisfactory in regard to ability and inter-personal relationships but that he was lacking in flexibility, initiative, and maturity; also in neatness, thoroughness and alertness. These are items included in the basic requirements for a general accounts clerk under the general heading of personal suitability -- see Exhibit "R- 2" at Tab 13. Ms. Kozak gave it as her opinion that Mr. Dhami's abilities were greater than the effort he put out.

Prior to the CR- 4 competition in February of 1984 in which Mr. Dhami competed, Ms. Kozak arranged for him to prepare for it by going through with him the material he should be studying

and arranging for him to spend one half a day for a period of one week familiarizing himself with the functions in other sections of Accounting Operations. Mr. Dhama devoted exactly one-half day, by his own admission in familiarizing himself with the work of employees in other sections. Ms. Kozak took note of this and to use her words, "I was a little bit disappointed at that time because going through, arranging for him to go over there, and then only for a short period of time".

There was general agreement by all of the witnesses including Mr. Dhama that in order to graduate to an indeterminate CR- 4 position with the Respondent it would be helpful to have knowledge of various different programs within Accounting Operations.

Mr. Dhama's failure to take advantage of the opportunity offered to him by Ms. Kozak to familiarize himself with other programs very probably had something to do with his failure in the CR- 4 competition in February of 1984.

In rating their employees, the unit heads used a system based on the eight categories contained in the Statement of Qualifications and Requirements for General Accounts Clerks under the headings of "Abilities" and "Personal Suitability", see Exhibit "R- 2" at Tab 13.

When an employee met the requirements under a particular category, he or she was assigned a code which signified "high meets" or "low meets" or "failed", see Exhibit "R- 1" Tab 3 at page 4. In Mr. Dhama's case he scored seven points in this rating system and tied with Jean Coventry. Mr. Dass failed completely and was not subsequently recommended for re-hire as were Mr. Dhama and Jean Coventry.

The remaining thirteen term employees were rated and the results are tabulated on a grid prepared by Mr. Netzel with scores varying from eight to ten and a half points.

Mr. Enos wrote when commenting on Mr. Dhama's "personal suitability" as follows:

"lacks initiative in that he does not readily demonstrate desire to learn or improve the system he is working with . . . content to work in same position without demonstrating initiative to learn new things or offer new ideas. Lacks maturity in fact that he fails to put forth a full effort towards his own self- development which is indicated by his failure to qualify on two CR- 4 Financial Expenditure Clerk competitions".

These comments are reproduced in Exhibit "R- 1", Tab 3, page 4. They form the basis for Mr. Enos's typed memo of March 12 to Mr. Coleman. This documentation according to Mr. Enos was based on his discussions with the unit heads.

Counsel pointed out that failure to pass the CR- 4 competition should not have been a factor in the evaluations for the reverse order of merit process. There were other employees rated higher than Mr. Dhama who had also failed the CR- 4 competition. Mr. Enos agreed that mentioning Mr. Dhama's failure to pass the CR- 4 competition was "a poor choice of words". When he was pressed by Counsel about that comment (which appears in a slightly different context in the typed memo to Mr. Coleman) the following question and Mr. Enos's response appear at page

712 of the transcript: "Q. You could, at the time, because this is what you wrote in the assessment. 'Terry has had opportunities and has competed on CR- 4 Financial Expenditure Clerk Boards but has been unable to qualify as a successful candidate. '

A. Yeah, I can explain that, though -

Q. I am asking you if -

A. Yeah, but could I please explain exactly what that meant. Terry Dhami, in regard to him as a general accounts clerk, as I said, he was very personable and well liked. He was -- it was suggested by his supervisor that he work in general accounts and have an opportunity to gain more experience in other areas, okay, in order to allow him to better compete on a board.

His failure on the CR- 4 board, of course, spelled out to me that, and in confirmation with Rose Kozak, that there wasn't the effort put forth and the initiative, and that's why that comment was referred to in that context. It stuck out in my mind. It was appropriate at the time".

It was therefore Mr. Dhami's lack of initiative as evidenced by his failure to take advantage of the opportunity offered him by Ms. Kozak to prepare for the CR- 4 competition which was the reason it was mentioned in Mr. Enos's assessment.

In his March 12 memo to Mr. Coleman, Mr. Enos stated: ". . . we have selected initially three employees whose term will not be renewed as of March 31, 1984. We will have subsequent reductions in staff on the 13th of each month as the year progresses".

As earlier mentioned, further reductions in staff did not occur. The only staff assessments made by Mr. Enos accompanied the memo of March 12 to Mr. Coleman. The evaluations for the remaining fourteen term employees remained in the hands of the respective unit heads and were used as the basis for subsequent formal evaluations.

When questioned by the Tribunal as to why assessments made during the reverse order of merit process and written up by him were confined to the first three employees, Mr. Enos's explanation appears at page 872 of the Transcript as follows:

"MR. SHEPPARD: -- by the written evaluations, but you didn't feel it was necessary to do that for the next three, and then subsequently after that the next two.

A. No, because that was immediate. That would happen immediately. There had to be action taken immediately, letters and meetings with these people to let them know that this was happening. That's the reason".

As a result of the evaluations by the unit heads, Mr. Enos proceeded to implement the person year plan by meeting with the first three employees affected in the presence of their respective unit heads. In Mr. Dhami's case, he was interviewed by Mr. Enos in the presence of his unit head, Ms. Rose Kozak.

Mr. Dhami was unable to recollect Ms. Kozak being present at the meeting although both she and Mr. Enos confirmed that she was. According to Mr. Dhami, he was told by Mr. Enos during this interview that he was not to be renewed and "I didn't make any improvements with the program I was working on" and as a consequence he was in a state of shock. In response to questions by Counsel, Mr. Dhami described his state of mind at page 37 of the Transcript as follows:

"Q. At the time you had this meeting with Mr. Enos, when he informed you that your contract would not be renewed, did you argue with him at all?

A. No, I did not.

Q. Why did you not?

A. Because I was shocked by the whole thing. I didn't think I'd be the one to go".

There had of course been rumours of lay-offs circulating with the Accounting Operations for some weeks prior to this interview. Mr. Dhami had seniority over some of those employees who were retained and it is quite probable he assumed for that reason he would not be, among the first to be let go. This is borne out by a conversation Mr. Dhami had with his friend and confidant, Mr. Reddy, who had reassured him his job was safe by reason of his seniority. Seniority was not a factor, however, in the procedure the Respondent adopted in the circumstances.

A different version of what occurred during the March interview is obtained from a reading of the testimony of Mr. Enos which appears at pages 674, 675 and 676 of the Transcript reproduced as follows:

"Q. Let's go back to Mr. Dhami. What did you say to him, do you remember, or do you remember what happened in that interview?

A. Yes, we explained that we were not expecting additional resources for the coming fiscal year and as a result there were certain staff reductions that we had to make. As a result of that, we made through a reverse order of merit process in order to obtain the best qualified people within Accounting Operations, considering the overwhelming workload that we expected to have to contend with.

I then went on to identify that in this reverse order of merit assessment; we did identify a certain lack of effort as well as a lack of interest that were evident in performing his duties.

Q. Okay. Sir, did you remember who did most of the talking, whether that was you or Ms. Kozak?

A. It was me who did most of the talking.

Q. Okay. How did Mr. Dhami react during that interview?

A. Well, he did not seem overly concerned. He, in fact, during that interview, I recall him mentioning that he was pursuing work with the police force. I am not sure if it was the Vancouver City Police, but it was the police force, to obtain other employment; and he basically admitted his lack of interest in that particular area.

Q. In what particular area?

A. In the duties he was doing and in processing accounts and so on.

Q. Were you surprised by his reaction?

A. No, I was not surprised because it was evident in his overall work habits. Like, I mean, he displayed the lack of interest. He did not go out and seek additional work like the other employees would do. When he finished a task, he would basically rather sit and talk to, either other employees or whatever, rather than him trying to obtain additional work from other employees who may be busy, and help them".

Interestingly, although Mr. Dhami denies telling Mr. Enos he was contemplating joining the police force, he agreed when questioned by Counsel that at some point "after the middle of March" he considered joining the police force and did apparently apply to the Vancouver City Police Department for a position.

Ms. Kozak's testimony with regard to what occurred at the interview with Mr. Dhami, appears at page 834 - 835 of the Transcript as follows:

"Q. And who was present?

A. Steve Enos, myself and Mr. Dhami.

Q. And do you recall some of the discussion that took place?

A. Yes.

Q. What happened?

A. Well, we explained to him about the budget cuts and that we would not be extending his term, and we told him that we felt that he could have done better in his job duties, he didn't put out as much effort as some of the other employees and he agreed with us. He says, 'yeah, I know. I could have been doing better. I know I don't do as well as I can. I know I can do better'".

One is left with the impression both from Mr. Dhami's appearance before this Tribunal and from the evidence of the witnesses, including the evidence of Mr. Reddy, a former school mate and friend, of a personable young man with an outgoing friendly manner who put out less effort than he might have, was content with the status quo and somewhat reluctant to learn or to take on new responsibilities when given the opportunity to do so by his supervisors.

Both Mr. Enos and Ms. Kozak came to the conclusion after reviewing Mr. Dhami's work performance that he lacked a desire to learn and was wanting in initiative and maturity compared to other term employees.

Mr. Netzel had the most direct experience with Mr. Dhami's work performance after Ms. Kozak and in his opinion he was an average and mediocre type of clerk. To quote Mr. Netzel at page 567 of the Transcript:

"A. He didn't excel and he wasn't to me really bad either. He didn't really stick out too much I think he enjoyed in a way what he was doing in that it maybe wasn't real high pressure. You know, he never appeared to be too nervous or excited about what he was doing. He just was there. He did it".

It is not for this Tribunal to substitute its' opinions for that of Mr. Dhami's supervisor, Ms. Kozak, Mr. Netzel and Mr. Enos, the Chief of Accounting Operations. All of these individuals are qualified and are in a better position to evaluate Mr. Dhami's abilities and suitability as compared to the other term employees. We accept their conclusions in that respect.

We find there was nothing in the system or procedures adopted by the Respondent and implemented by Mr. Enos and the unit heads that was manifestly unfair to the term employees in general or to Mr. Dhami in particular. On the contrary, given the conditions that prevailed and the apparent urgency of reducing staff, the measures adopted were appropriate in our opinion. They were undertaken reluctantly in a spirit of genuine concern for the individuals affected and with a view to maintaining a proper level of service.

There were perhaps some minor irregularities and it would have been helpful, in our opinion, had written assessments by the unit heads made during the reverse order of merit process been available to the Tribunal.

In *Kibale and Transport Canada*, September 5, 1985, approved on Appeal to a Review Tribunal on January 27, 1987, the Chairman, Stanley H. Hartt, had to decide whether irregularities and failure to follow staffing procedures in a number of respects formed the basis for a presumption which would have enabled the Tribunal to conclude that the irregularities and failure to follow the staffing procedures were motivated by discrimination. In rejecting that presumption, the Tribunal commented at page 7:

"It seems very dangerous to me to establish a rule whereby if there is an irregularity, or outright illegality in the administration of the staffing process of the Public Service of Canada, a Human Rights Tribunal must presume that the irregularity or illegality arises from a discriminatory practice, without other evidence linking this irregularity or illegality to a prohibited ground of discrimination".

Again, Mr. Hartt, commenting on the role of the Tribunal makes these comments at page 8:

"The Human Rights Tribunal does not have the power to monitor and supervise the operation of the staffing process under the Public Service Employment Act and the regulations made by virtue of the Act . . .

Although the Human Rights Tribunal found irregularities in the hiring process, its powers are limited to stating whether or not these irregularities were motivated by a prohibited ground of discrimination".

With respect therefore to the reverse order of merit process, including the evaluations of the term employees in Program Accounts, this Tribunal is of the opinion and finds no or insufficient evidence of procedural irregularities, illegalities or unfairness to support Mr. Dhami's allegation that he was unfairly discriminated against by reason of race, colour or national or ethnic origin.

(b) October, 1984 - The CR- 3 Competition

After non- renewal of his term employment, Mr. Dhami applied some few months later on October 17, 1984 for a position with the Respondent as a General Accounts Clerk CR- 3. He was one of ten applicants for that position. The competition was open to anyone who could meet the basic requirements and was not confined to employees or former employees of the Respondent or members of the civil service.

In his application for employment, Mr. Dhami gives as his reason for leaving in March, 1984 "laid off due to cutbacks within Government budget", see Exhibit "R- 2" at Tab 12. This of course is inconsistent with the action he had instituted against the Respondent through the Anti-Discrimination Directorate and which was then in progress.

The candidates for the CR- 3 position included some with excellent academic and job experience qualifications. There was, for example, a graduate in Commerce from U. B. C., Mr. Litke; a graduate of Douglas College with a Diploma as Associate in Accounting, Mr. McLean; and Sherril McIlveen, a payroll clerk with eleven years experience who was enrolled in an accounting course at night school, to name but a few. The quality of candidates seeking employment was significantly higher, perhaps due to the recession, than it had been in 1981 when Mr. Dhami qualified for that position. After fulfilling the basic requirements, see Exhibit "R- 2" Tab 13, the candidates were issued a referral slip by the employment centre and were then expected to make their own arrangements for an appearance before the Selection Board.

In Mr. Dhami's case, he arranged with Mr. Netzel of General Accounts and a member of the Selection Board for his interview.

It is not clear exactly when the interview took place, but it is certain that it occurred after the appointment of the Selection Board which was composed of Mr. Enos, as Chairman, Ms. Kozak and Mr. Netzel as members.

The Tribunal expressed some concern over the fact that two members of the Board had previously been involved in the non- renewal of Mr. Dhami's employment with the Respondent.

The function of the Selection Board is not comparable to Boards which exercise judicial or quasi-judicial powers. It is of course required to be fair in its consideration of the merits of the candidates who appear before it. Prior knowledge of a candidate's record of employment or work habits do not constitute an impediment in the selection process of the Board but may enable it to perform its duties more effectively. It would, in the circumstances of this competition, have been impractical to reconvene a new Board in any event. The candidates were rated on knowledge, ability and personal suitability. If a candidate failed in either or both of the first two categories it would not be necessary to rate that person in the last category, namely, personal suitability.

The testing procedure adopted by the Selection Board is based on a series of questions, some of which are critical. The questions and the weighting of the answers are reproduced and explained in Exhibit "R- 2" at Tab 15.

A correct answer to question 8 which is in the form of a hand-out is considered critical under the category of "abilities".

The conduct of the interview by the Selection Board is somewhat informal. The members of the Board make notes during the interview, compare them after its conclusion and then, it appears, reach a consensus on the merits of the individual candidates. The results are tabulated on a grid and transferred to a report which is certified by each of the Board members in the following terms:

"CERTIFICATE: I, the undersigned, promise that I will faithfully and honestly fulfill the duties which devolve upon me in connection with this board and that I will not reveal to any person or persons except those authorized by the Public Service Commission, the deliberations of the board, or the nature of its report. Having been made aware of the list of candidates, I declare that to the best of my knowledge I am not related to any of these candidates, and the nature of association, if any, with these candidates is such that I can render decisions in an impartial manner".

Mr. Dhimi failed to qualify for the CR- 3 position in the October, 1984 competition. The reason given for his failure was that he did not correctly answer question 8 which entailed the reconciliation of a cash account to bank statement. Unfortunately, the written answer to that question was not available to this Tribunal. The question was capable of being answered either orally or in writing.

Under questioning by the Tribunal, Ms. Bonnie Smith of Personnel indicated it is an oral interview unless the question calls for a written response, as for example question 11 which requires a short written paragraph as to why the candidate wishes to work for the Federal Government.

With regard to question 8, Ms. Smith testifying as to the practice with respect to hand-outs said at page 1044 of the Transcript:

"A. A handout of that nature, if it isn't expected as a written response, wouldn't necessarily be kept on the file because they would be asking the candidate to have a look at it. The normal practice in an interview for any of the questions, even without handouts, is to tell the candidates that they can take their time, offer them some paper, they can write notes to themselves to help formulate the answers . . .

But, anything that they would mark down during the interview to help themselves answer, or any handout that was being reviewed, wouldn't be kept as part of the file because they are being asked, after looking at that, to give an oral response and explanation. They are given the option of writing it down and looking at it to help them answer. That wouldn't be kept".

Mr. Dhami testified question 8 was a simple reconciliation of cash account to bank statement and that he had previous training and experience in this type of accounting operation. He recalled that it was a written question but could not recall clearly whether his answer was written or oral. He related that at the conclusion of the interview, Mr. Enos put this question to him, "how would you feel about coming back?" to which he replied "it's fine with me".

Sometime later after he complained to the Human Rights Commission, Mr. Dhami was interviewed by the Investigator, Mrs. Penny Goldrick. She asked him to do a similar reconciliation problem which he claimed he did successfully. When questioned about this by the Tribunal his responses at pages 194, 195 and 196 of the Transcript were as follows:

"Q. I wondered -- you failed to do the reconciliation when you were before the Board.

A. Yes.

Q. And that was in the fall of 1984.

A. That's correct.

Q. And then you were interviewed by Mrs. Goldrick of the Human Rights Commission about a year later.

A. That's correct.

Q. And you did the reconciliation.

A. Yes.

Q. What's your explanation for that?

A. well, she asked me -- at that time, she says 'Is this the way you did the reconciliation while you were in front of the board?' And I says, 'Yes, I did.' And I didn't know that I failed that question. It was pointed out later by Penny that I -- I didn't -- I didn't do it right. That's what they said. But they -- the CEIC couldn't find any record of me not doing it right, not answering --

giving the right answer to that question. As far as I'm concerned, I did it right at that time while I was -- being interviewed by the Board.

Q. Are you disputing

A. Yes, I am.

Q. -- that the reconciliation was wrong? Are you saying that's not correct?

A. I'm saying, if they're saying I didn't do well on the reconciliation, on Question number 8, in front of the Board, but, I did it right when I was in front of Penny -- I'm saying that I did the reconciliation the same way that I did it in front of the Board as with Penny because I -- I'm saying that -- if I did it right in front of Penny, I did it right in front of the Board".

In essence, Mr. Dhami is saying that the Selection Board failed him on a simple question which he was able to answer correctly at a later date while denying that he answered it incorrectly in the first instance. Since neither answer was produced in written form, the Tribunal must perforce compare Mr. Dhami's version of the circumstances with that of the Selection Board. Credibility is in issue and it is important therefore to bear in mind the composition of the Selection Board and their relationship to Mr. Dhami.

Both Mr. Netzel and Ms. Kozak were explicitly exonerated by Mr. Dhami of harbouring any racial prejudice towards him. He in fact appears to have enjoyed a friendly work relationship with Mr. Netzel and to some extent they shared an equally friendly social contact. Mr. Netzel was asked whether Mr. Dhami's failure to answer question 8 correctly was his decision or that of the Board. His response at page 619 of the Transcript was:

"A. That's always the consensus of the board. You decide normally in advance what is going to constitute a pass to each particular question, which, if you can put it in writing basically, the criteria you're using, we normally submit that to Staffing as well in advance, along with the rationale page that shows what is an overall pass.

We normally make this question critical to the board in that reconciliation is a very important part of this job".

He stated that the three Board members must be in concurrence and if they are not, the Board Report would not be in the format it was in this case.

When questioned as to why Mr. Dhami was unsuccessful and failed this particular question, Mr. Netzel's response at page 620 was:

"A. On this particular question he failed mainly in that he gave us almost no information. He answered the question very quickly and handed it back. The answer he gave us was not correct in any way. If he had written -- there's two ways basically to get a pass to this.

The first is to actually analyze all the differences, list them out on the form, which is acceptable. It's not the preferred answer, but we would accept that. The second one is if someone actually performs a reconciliation in good format on here and actually makes the two sets of statements come into agreement. Either way it identifies the differences between the two sets.

Terry chose the first method and he simply didn't put anywhere near enough information down. He literally did it in a minute and handed it back".

When asked by Counsel if his failure to answer the question correctly surprised him, the response at page 621 was:

"A. I did in that he had bookkeeping and held worked for us for a couple of years. Doing a reconciliation this simple should normally be fairly easy. What I have found is in the pressure of a competition or a board, a lot of people do tend to make a mistake on this question. People who are even far better qualified than Terry was will often make a mistake on this question and I normally attribute it to nervousness on a board".

Mr. Netzel had some considerable experience on Selection Boards and his evidence was that this Board was no different than others he had participated in. At page 623 of the Transcript, when asked if it was any different, his response was:

A. It was no different, no. We followed all the procedures I believe that we should, that are laid out to ensure that the results are fair, that everyone who applies gets an equal opportunity to answer the questions, and that we choose the person who demonstrates the most knowledge, abilities and personal suitability on the board. That's sort of the point in having this competitive process".

Mr. Netzel stated again at page 626 of the Transcript:

"A. . . . I honestly believe we went out of our way to make the board as fair as possible. I think we always do. All three people who sat on the board, I'm sure I can speak for them because they signed it, we were all in concurrence at the time with the results. We did not choose based on race. I have never chosen someone to work for me on the basis of race".

Mr. Netzel testified that in 1984 the Respondent had a choice of better qualified people than they had in 1981.

The Tribunal was impressed by Mr. Netzel, the manner in which he gave his evidence and we find him to be an entirely credible witness.

His evidence is corroborated by Ms. Kozak who remembers that Mr. Dhami's answer was very brief and that there was not much there. She remembers specifically asking him after he had passed back the answer if he could remember anything else to which he replied "no". When questioned further, Ms. Kozak testified at page 838 as follows:

"A. Yes, I remember that specifically because of his answer and I thought that he should be able to do better, so I asked him if there was anything else that he could add.

Q. Were you surprised that he answered the question in the way he did?

A. Yes.

Q. Did you think his answer was a pass or a fail with respect to that question?

A. It was a fail because it didn't tell us anything if he could do it". The recollection of Ms. Kozak and Mr. Netzel is corroborated by Mr. Enos who said that Mr. Dhami answered question 8 "quickly and abruptly" although he was no more nervous than the other candidates. According to Mr. Enos there were a number of candidates who had trouble with that question.

When questioned by the Tribunal as to why he felt it necessary to ask Mr. Dhami whether he would feel comfortable coming back to work for the Respondent, in view of his complaint to the Anti-Discrimination Directorate, Mr. Enos said it was appropriate to ask him that question before he left the interview to determine whether or not it would have an effect on his work performance.

The Selection Board consisting of three experienced individuals, one of whom, Mr. Netzel, was on friendly terms with Mr. Dhami, one of whom, Ms. Kozak, tried to assist him in answering the questions correctly and Mr. Enos who knowing of the accusation of racial discrimination was concerned how that would affect his work performance, agreed he had failed to answer a critical question correctly. It strikes us as surprising, Mr. Dhami having made the accusation, would nevertheless wish to return to the very same work environment.

The Tribunal finds that Mr. Dhami's conduct was inconsistent with the allegations of racial discrimination and his version of the interview for the CR-4 competition is not credible. We accept the testimony of Mr. Netzel, Ms. Kozak and Mr. Enos as to Mr. Dhami's failure to correctly answer a critical question and for that reason, not for reasons based on his colour, race, national or ethnic origin we find he was not chosen to fill the position applied for.

CONCLUSION

For the reasons given we conclude that the non-renewal of Mr. Dhami's term employment and failure to succeed in the CR-3 competition were the result of appropriate measures and procedures adopted by the Respondent. These measures and procedures were not racially inspired, were conducted fairly and were free of prejudice.

The complaints of discrimination based on colour, race and national or ethnic origin against the Respondent and the two individuals named by Mr. Dhami are not proven and are therefore dismissed.

Dated this 18 day of September, 1989

Norman Fetterly, Tribunal Chairperson

Betty Smith, Tribunal Member

Barry Sheppard, Tribunal Member