CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES DROITS DE LA PERSONNE

CECIL BROOKS

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

DEPARTMENT OF FISHERIES AND OCEANS

Respondent

REASONS FOR DECISION

MEMBER: Dr. Paul Groarke

2004 CHRT 36
2004/12/03

I. INTRODUCTION

A. The positions of the parties

[1] Cecil Brooks is black. He makes three allegations, all of them under section 7 of the *Canadian Human Rights Act*. His first allegation is simply that he was treated unfairly in the course of his employment.

[2] The second allegation relates to an eligibility list that was drawn up in 1989. The Complainant alleges that the Respondent appointed two stewards from the list, after it had expired. Both of them were white.

[3] The third allegation relates to a competition that was held in 1992 and 1993. The Complainant placed thirteen. He submits that there were serious irregularities in the process. He was discriminated against.

[4] The Respondent submits that Mr. Brooks was treated fairly throughout the course of his employment. It also submits that competitions in the Coast Guard are subject to regulation. Promotions are based on merit. Although there may have been irregularities in the 1992 competition, there is no evidence of discrimination.

B. The record

[5] The major difficulty with the case lies in its historical character. The complaint was filed in 1996. The events that gave rise to the hearing took place as early as 1988, sixteen years ago. The delay is abusive.

[6] The record is deficient. Most of the relevant documents have been destroyed. I have only heard from a few of the individuals who played a role in the events before me. In the circumstances, I do not think it is possible to establish anything more than the main features of the case. These are nevertheless sufficient to establish, in at least one instance, that something was seriously amiss.

II. FACTS

A. General background

[7] Some matters are not in dispute. Mr. Brooks first applied for the Coast Guard in 1988. He went down to the Coast Guard Building, entered a competition, and was hired as a steward on a temporary basis. He later discovered that he had been hired under the employment equity program.

[8] As a steward, Mr. Brooks' responsibilities were to maintain the mess, clean the dishes, serve the meals and keep the cabins. He was also responsible for ordering the necessary supplies. He was good at his job. He taught other stewards how to drain and clean the dish machine, how to make a hospital bed, and other points of practice.

[9] The Complainant called character evidence. Tim Clayton and Tyrone Saunders, both cooks, testified that Mr. Brooks was good-natured, did extra work, and "got on great" with others. Charles Roy Hamilton, a deckhand, stated that Mr. Brooks "was loved on the ships". He was happy go lucky and convivial, exactly the kind of person that you need at sea.

[10] This deserves some elaboration. As supply officers, stewards have a special responsibility for observing and maintaining the morale of the crew. I accept Mr. Brooks' evidence that he was "very good" at this. He had a talent for lifting the spirits of others.

[11] There was a darker side, however. Mr. Brooks had conflicts with his supervisors. He liked things his own way. There was an incident, for example, with respect to the stripping and polishing of floors on the Henry Larsen. There were problems much later, at the library. He resented his subordinate position and had difficulty accepting the normal lines of authority.

[12] Mr. Brooks filed two complaints. The second was apparently a complaint with regard to the general hiring and personnel practices of the Respondent. It was never referred to the Tribunal.

[13] Counsel for the Complainant submitted that evidence with regard to the general employment environment nevertheless in the Coast Guard was admissible on the inquiry into Mr. Brooks' complaint. After hearing from both sides, I allowed a limited amount of evidence on the issue, on the basis that it helped to establish the context in which the complaint arose.

[14] The caselaw also establishes that this evidence may be relevant on the substantive issue of discrimination. In *Canada (Canadian Human Rights Commission) v. Canada (Department of National Health and Welfare) (re Chopra),* [1998] F.C.J. No. 432 (QL), at para. 22, Justice Richard ruled that a previous Tribunal erred in refusing to let the applicants lead "general evidence of a systemic problem as circumstantial evidence to infer that discrimination probably occurred in this particular case as well." Although the decision in *Chopra* dealt with statistical evidence, I think the same principle applies in the case before me.

[15] The general environment relating to minorities at the Coast Guard during the relevant time was not particularly good. The Coast Guard was aware of this and wanted to deal with the matter. In 1991, its regional director asked Joan Jones, a community activist, to write a report on racism in the Coast Guard. James Francois, the equity officer, was assigned to assist her.

[16] The Complaint tendered the report. The Respondent objected that there was no real methodology behind it. The report is basically a collection of unsubstantiated allegations. I agree with this assessment of the report.

[17] I cannot see that it matters. Ms. Jones testified that her report was only intended to prove that minority employees felt there were systemic issues in the Coast Guard. This was exemplified, on the stand, by the testimony of Mr. Books. He testified that permanent positions were at least implicitly reserved for members of the white majority.

[18] I allowed the report into evidence. If nothing else, it establishes that some employees believed that race was a factor in the decisions made within the Coast Guard. There was evidence from other witnesses to support this.

B. The first allegation: general unfairness

[19] Mr. Brooks feels that he was continually discriminated against in the course of his employment. An enormous amount of evidence was presented with respect to Mr. Brooks' work history. At times, the hearing served more as a discovery than a trial process.

[20] As it turns out, most of the evidence presented by the Complainant was based on a misunderstanding of the staffing process. The best evidence was given by Brenda DeBaie, a human resources assistant, who testified for the Respondent. She has extensive experience in the area.

[21] Ms. DeBaie testified that there were three kinds of appointments in the Coast Guard. Some appointments made through an open competition process. Some appointments were made under the exclusion order. And there were emergency appointments.

[22] Mr. Brooks was originally hired under an "exclusion order" issued by the Public Service Commission under section 41(1) of the *Public Service Employment Act*, RSC 1985, C. P-33. This section permits the Commission to exclude employees from the application of the *Act*. The relevant order came into effect in 1988, under order-in-council SOR/90-198.

[23] The use of exclusion order appointments allowed the Coast Guard to meet the seasonal and short-term needs of the fleet. These appointments were limited however, and could not be extended beyond six months. This was reduced to three months in 1992.

[24] Since employees could only be hired under the exclusion order for a limited period, it was necessary to keep a record of the length of time that they had worked under the exclusion order. This explains the time cards kept by Ms. DeBaie, which figured so prominently in the evidence. These cards should not be treated as an official record of employment.

[25] Then there were the appointments made by means of a competitive process. These could either be "specified period appointments" or indeterminate, i.e. permanent appointments. These appointments were made in accordance with the current eligibility list. This was drawn up under the provisions of the *Public Service Employment Act*.

[26] The specified period appointments were known as "term appointments". Term appointments over six months were referred to as "term plus six" or "term over six." The Complainant's letters of appointments change in February, 1990, and no longer refer to the exclusion order. These letters provide him with term employment.

[27] There was a history of bitterness relating to the appointments. The exclusion order appointments appear to have had different pay scales. A term plus six brought an employee into the collective agreement. This came with health and dental benefits. It brought the right to ask for a revision of an employee's grade and status, if the employee was carrying extra duties. It brought the right to compete in closed competitions.

[28] Mr. Fox, the union representative, testified that the appointments process had been "historically abused" by the Coast Guard. He seemed to feel that the exclusion order appointments were used to staff positions that needed to be filled on a more regular basis. He also felt that some employees were given preferential treatment. They were repeatedly given contracts, with few breaks, and were occasionally given acting positions. These positions were desirable from a financial perspective. They also gave employees valuable experience, which would allow them to advance.

[29] Ms. DeBaie maintained a list of regular employees, who would be contacted when exclusion order appointments became available. This list was taken from previous eligibility lists and the employment equity list. This was as much a matter of convenience as anything else, since these employees had been cleared for employment and did not require training.

[30] The process of awarding the exclusion order contracts was extremely internal. Time was short, there were many demands and, Ms. DeBaie simply worked her lists until she found someone who was willing to take the appointment. She acknowledged that she took the location of the employee and the ship into account, in placing her calls. She also avoided assigning someone to a commander, if the commander didn't want him. This was common sense, however, and she was simply happy to find someone who wanted an appointment.

[31] Ms. DeBaie testified that she dealt with Mr. Brooks "fairly" and "cordially". He was "a very likeable person" and was one of the most dependable employees. In spite of this, he would come into the office and "vent" about the employment he was getting. He was no different than 40 or 50 other employees in this respect. He didn't like the arctic assignments and complained that other employees were getting employment closer to home.

[32] I have to say that there was a lot of room for favouritism in the system. In spite of this, I do not have any evidence that suggests Ms. DeBaie exercised her discretion in a discriminatory fashion. These issues do not arise with respect to the term appointments, since these appointments were awarded in accordance with an eligibility list.

[33] I should mention some of the more specific allegations. Mr. Brooks submitted, that he went over six months on November 26, 1988 and should have been given a term over six for five days. I cannot see that it matters. Under the payroll regulations, any deductions would have had to be returned to him.

[34] Mr. Brooks seemed to think that term appointments should be included within the calculations under the exclusion order. He also submitted that the exclusion order appointments awarded to some employees were "converted" to term plus six after the employee had served six months. He was wrong on both counts.

[35] Mr. Brooks thought he was being treated unfairly and became increasingly bitter about the fact that he did not have permanent employment. This began to take its toll on him. By 1990, certainly, he felt that his peers thought there was something wrong with him. People were starting to look at him "strange". This became part of the problem.

[36] Mr. Brooks went for lunch in 1991 with the crew from the Henry Larsen, and was told that two stewards had been hired. He was also told that the office had been unable to reach him. He found this suspicious and eventually went to see Ms. Mahar, the crewing officer, about the term appointments. She said that they were hiring from "the lists". He demanded to see the lists. There was a heated exchange. Mr. Brooks felt that he was subsequently punished for raising the issue. He only received eight weeks of employment on a de-commissioned ship for the rest of the year.

[37] There were other allegations. Mr. Brooks was provided with an emergency notice of appointment in 1992, as a result of repairs to the Henry Larsen, which had apparently backed into an ice floe. This took him beyond the contract he had signed and the 182 days under the exclusion order. He still seems to feel that the emergency appointment was a way of denying him a term plus six appointment.

[38] I think this says more about the deterioration in the relations between the parties than anything else. The real problem was that Mr. Brooks desperately wanted an indeterminate position. There was nothing in the exclusion order or term appointments however, that gave him a right to such a position. This does not mean the system was particularly equitable. It was inevitable that the use of exclusion order appointments, alongside term and indeterminate appointments, would arouse the suspicions of those who failed to obtain permanent employment.

[39] There is no reason to go further. Whatever inequities existed at the time, the evidence in support of these allegations is not sufficient to establish a *prima facie*

case. I accept the submissions of Ms. Cameron, for the Respondent, on this aspect of his complaint.

C. The second allegation: the 1989 eligibility list

[40] The second allegation relates to an eligibility list from 1989. There is a letter to Mr. Brooks, in August, 1989, which informs him that he is eighth on the list. There are also letters from January, 1992, offering indeterminate positions to two persons on the list.

[41] The allegation of discrimination is rather vague. It is nevertheless based on the fact that the life of the eligibility list limited for two years. The Complainant accordingly submits that the list must have expired before these appointments were made. Both of the persons who were appointed in 1992 were white.

[42] The Respondent relies on the fact that both of these candidates were ahead of Mr. Books on the list. It also submits that the list would have been finalized after Mr. Books received his letter. There was evidence that would support such a conclusion. The Complainant's case is entirely conjectural. Nor is there any evidence of wrongdoing. The competition was held some fifteen years ago and I do not believe that it is possible to reconstruct what happened on the record of the case. The evidence is simply too weak to support any findings of fact.

D. The third allegation: the 1992 competition

[43] The third allegation concerns a competition to establish an eligibility list for stewards in 1992. This is where the real issue in the case lies.

(i) The competition board

[44] The person responsible for the 1992 competition was Steve Savoury, a Supervisor in logistics. He testified that he appointed Don Smith and Rose Lucas to the competition board. He asked Ms. Lucas to sit on the board because she was a black woman. This would address the concerns of minorities.

[45] Mr. Smith had major managerial experience and was appointed as chairperson of the competition board. He described a five or six stage process:

(1) The board determined what qualifications were required.

(2) It screened out the candidates who were not qualified.

(3) It agreed on a list of questions, which tested the knowledge, ability and personal suitability of each candidate. It agreed on the answers.

(4) The board then conducted the interviews.

(5) The references were checked. The score from the references was added to the score from the interview.

(6) Finally, the board ranked the applicants in accordance with their score and prepared an eligibility list.

The entire process proceeded by consensus.

(ii) The statement of qualifications

[46] The parties entered two Statements of Qualifications into evidence. They are very similar. Each of them contains a list of qualifications, which are marked (S) or (R) to indicate whether they were part of the "screening" or "rating" process. Those candidates who did not possess the qualifications marked (S), should have been screened out of the competition.

[47] The first Statement of Qualifications states that the candidates must have:

> (S) Work experience **as a steward/stewardess** onboard a sea going vessel.

[48] The second stated that candidates must have:

> (S) Work experience **relating to steward/ stewardess** working onboard a sea going vessel.

This is significant because the candidate who finished first in the competition had never worked as a steward on a sea going vessel. The same is true of the second place candidate.

[49] Mr. Bagambiire and Mr. Flaherty argued for the first Statement of Qualifications. They referred me to the report from the Public Service investigator, which states:

> Mr. Savoury agreed that the Statement of Qualifications on the competition file read "*work experience as a Steward/Stewardess onboard a seagoing vessel."* [In spite of this, he originally stated that:] The screening board was looking for seagoing experience or stewards duties. A combination of both was not required. Ms. Boggs was screened [in] as she had seagoing experience as a clerk and worked as a waitress. It was [then] brought to his attention that a candidate who had DND experience as a food service attendant was screened out of the process. He amended his original statement saying experience both on a seagoing vessel and as a steward/stewardess were required. The candidate with the DND experience had no seagoing experience. (17)

I think this is in keeping with Mr. Savoury's testimony at the hearing, which was tailored The real force of the report however, lies in the suggestion that the first Statement of Qualifications was taken from the competition file.

[50] Mr. McCrossin argued for the second statement. He relied on a routing slip from Ms. Mahar to Mr. Savoury, dated May 12, 1992. The slip contains a list of points. One is: "Should redo S. of Q. to cut down applications." Another is: "I have info. for S. of Q." . The slip suggests that the first Statement of Qualifications is a revision of the second.

[51] The real issue is when the revision took place. Mr. Savoury was emphatic that it did not refer to the June competition. This merely serves his own interests. The contents of the slip strongly suggest that it was a response to a series of questions regarding the upcoming competitions. It is best described as a set of directions. The tone is imperative. Even Mr. Savoury agreed that staffing officers had the final say in the competition.

[52] I find that the first Statement of Qualifications is the right one. The logic of the routing slip favours this. If there were enough applicants with experience as stewards, why would one want applications from other individuals?

(iii) The closing date of the competition

[53] The closing date of the competition is also significant. Although we do not have the job posting, the screening report states that Stephen Aubut's application was rejected on June 15th, on the basis that it was received after the post had closed. The applications that were received earlier in the day were accepted. The closing date of the competition was accordingly June 15th.

[54] It is true that a number of applicants were accepted on the 16th. There is another explanation for this, however. The Canada Employment and Immigration Centre was also receiving applications. They clearly collected the applications they had received by the close of post on the 15th, and sent them over to the Coast Guard on the 16th.

(iv) Screening

[55] The screening was done by Mr. Savoury, rather than the competition board. Mr. Smith merely signed off the sheets. Ms. Lucas did not participate in the process.

[56] The application form from Ms. Boggs is dated Dec. 8th, 1992, six months after the close of the competition. Mr. Savoury stated that he found Ms. Boggs' application on his desk one or two days after the screening closed. He asked the staffing officer if her application should be processed and was told to screen her into the competition. He neglected to say that Ms. Boggs was working for him at the time.

[57] There was no record of any of this on the screening sheets and I do not believe that she was ever screened. I find as a fact that she entered the competition late. It is clear that Ms. Boggs should have been screened out, like Mr. Aubut, who simply missed the post.

[58] Danny Greenough, who finished second in the competition, may have received the same kind of favour. I have already mentioned the list of applications at the end of the screening sheets that came in from the Canada Employment and Immigration Centre. This is followed by three applications, which must have come in independently. The last name on the list is "Greenough, Daniel" and a "Date Rec'd" of June 23. It follows that Mr. Greenough's application was late.

[59] It is telling that Mr. Smith would not accept any responsibility for the decision to include Ms. Boggs and Mr. Greenough in the interviews. He pointed out that Mr. Greenough's name was added to the screening sheet after he had signed off on the screening. There was a considerable period of time between the screening and the interviews. As a result, he was not aware that the application of Ms. Boggs and Mr. Greenough were late. This is a lame excuse.

[60] Mr. Smith was not alone in trying to distance himself from what had happened. I think it is significant that Mr. Savoury would not accept any responsibility either. He put the blame on the staffing officer, who never testified. Other witnesses side-stepped the issue.

[61] There are also a number of substantive issues. I have already made it clear that Ms. Boggs did not meet the requirements in the Statement of Qualifications. She had no experience as a steward on a seagoing vessel. Mr. Savoury tried to argue his way around this by saying that she had experience as a waitress and experience on a seagoing vessel. In my view, this was a rather transparent attempt to stretch the requirements of the position beyond their legal limits. Close is not the same as being there.

[62] The same issue arises with respect to the second place candidate. Mr. Greenough had onboard experience as an oiler, who is responsible for the repair and maintenance of ships. He did not have experience as a steward on a seagoing vessel.

[63] The Complainant raised a number of other issues. He took the position, for example, that Mr. Greenough's schooling was deficient. There was a similar issue with respect to Mr. Strickland, who finished in 11th place. This led to a debate as to whether he had "PSC approved alternatives". I do not see how I can decide these kinds of issues on the evidence before me. The evidence nevertheless suggests that there were many problems with the competition.

(v) The interview process

[64] Rose Lucas came back into the competition during the interviews. She assumed that the candidates had been properly screened. Mr. Smith had written up the questions and answers. They were of the nature: how do you clean a cabin? How do you set the mess for dinner? The candidates were scored on their answers.

[65] Mr. Smith and Ms. Lucas testified that they tried to make the candidates comfortable. They took turns asking questions. The answers were marked immediately after the interview, on the basis of the scripted answers. Ms. Lucas stated that she and Mr. Smith participated equally in the scoring. They came to a consensus.

[66] Mr. Smith and Ms. Lucas were willing to acknowledge that there may have been a problem with the interview process. They suggested that candidates who had studied the manual extensively may have had an advantage over candidates with actual experience, who may have given answers that took them outside the manual. This points up the deficiencies in the process.

[67] Ms. Boggs had an excellent interview, which was reflected in her score. There are problems here. Even if she met the requirements in the Statement of Qualifications, her success in the interview process is hard to explain. She did not

have the experience that one would expect of a winning candidate. I think the rest of the evidence suggests that some improper motive was at play.

[68] The fact that Ms. Boggs used Mr. Savoury as a reference adds to the air of impropriety that surrounds the process. I realize that Ms. DeBaie saw nothing improper in this fact, since Mr. Savoury only did the screening. This neglects the obvious fact that he should have screened her out.

(vi) Mr. Brooks

[69] Mr. Smith phoned Mr. Brooks and asked him to participate in the competition. I accept Mr. Books' evidence, that they were looking for minority candidates. He received a letter in November, advising him that an interview had been scheduled. This took place on December 7, 1992, at the Coast Guard building. It took 45 minutes to an hour. Mr. Brooks says that Don Smith asked all the questions. Rose Lucas wrote down the answers.

[70] Mr. Smith and Ms. Lucas testified that Mr. Brooks' interview went well. It was friendly, he was comfortable with the questions, and presented himself well. Mr. Brooks was asked if he got on well with other people. He said yes. His references were insufficient however. They wanted three references from his immediate superiors. Mr. Brooks suggested Karen Jewett and Murray McLean. Don Smith suggested Perry West.

[71] Mr. West said Mr. Brooks was a hard worker. There was a "small problem up north", however, which was described as "drinking". This apparently led to an accusation that Mr. Brooks had urinated in someone's sink. Mr. Smith was understanding. He said that these kinds of things happen on extended voyages and made a small deduction for the reference. This did not affect Mr. Brook's rating, Very Good, which was the highest that was available.

[72] Mr. Brooks disputed Mr. West's account, and took issue with the score that he received for the interview. In his view, the score for interpersonal skills was particularly unfair. He feels that he should have received 20 points out of 20.

(vii) Ms. Howe

[73] Lisa Howe is also black. She participated in the 1992 competition and stated that it took her 14 years to get her indeterminate status. Although she has some bitterness over the issue, I found her evidence convincing.

[74] Ms. Howe testified that your application had to be on time. If your application was late coming in, you should have been disqualified from the competition. You also needed experience.

[75] Ms. Howe placed fifth in the competition. She knew some of the other candidates and was surprised by the results. She felt that she should have ranked first. Mr. Brooks should have ranked in the first three. I do not think she was in a position to judge exactly where Mr. Brooks should have ranked. The point is that she thought the competition was a travesty. She still feels that there was racism at the bottom of it.

[76] Ms. Howe stated that Ms. Boggs never worked as a steward, once she had her full time status. It was just a matter of getting her a full time job, so that she could work her way in a better position. She also knew that Mr. Savoury was Terry Boggs' supervisor. He was running the competition. Ms. Howe concluded the process was fixed. It left her "ticked off". Someone "from the office" was getting her job.

(viii) The eligibility list

[77] On February 25, 1993, the successful candidates--Terry Boggs, Danny Greenough, and Rick Starr--were offered indeterminate positions. All of them went on to other jobs. Mr. Greenough ended up in the engine room. Mr. Starr became a mate on deck.

[78] Mr. Brooks was "grossly insulted" by the eligibility list. He had placed 8^{th} in the 1989 competition; he had another 3 years of seniority; and now he found himself 13^{th}, against individuals who had no experience. He was particularly indignant that Ms. Boggs had received a higher score for her knowledge of the duties and responsibilities of a steward. She hadn't even run a dish machine.

[79] Mr. Brooks criticized Mr. Greenough's attitude. He stated that Mr. Starr had a drinking problem. Ms. Howe confirmed this. I think it would be unfair to comment on this aspect of the case without hearing from Mr. Greenough and Mr. Starr. There is evidence that Mr. Starr had more experience than Mr. Brooks.

[80] Mr. Brooks was unfair to some of the candidates. He was insulted, for example, that Graeme Garrett was ranked ahead of him on the eligibility list. He testified that Mr. Garrett had less than a year of service and was ranked sixth in the competition. This is not a fair assessment of the situation. Mr. Garrett had 18 years of experience as a steward in the navy and had worked himself up to Steward Level (6). He had certificates. He had completed training as a flight steward. He had owned and managed a restaurant.

[81] I am not in a position to determine the exact ranking of the candidates. The evidence does not however support Mr. Brooks' contention that he would have finished high enough on the eligibility list to receive an indeterminate appointment.

(ix) The evidence of Mr. Fox

[82] Mr. Fox is now the union President. He feels that the winners of the 1992 competition were "cherry-picked". The competition was "fixed". His reasons were straight forward. The process was partial. There was a very superficial assessment process. There were no proper references. The Coast Guard evaluations were not provided. The whole thing was a mess.

(x) Subsequent events

[83] Mr. Brooks suggested that he lost some status when he was placed 13th on the eligibility list. He stated that his co-workers would not listen to him. He could not "teach" them things. He nevertheless continued to work as a steward. He was a term plus six between 1994 and 1996. In February of 1996, he received a form letter advising him that his employment would be terminated on March 31st, as a result of down sizing. The letter was sent to all term employees.

[84] Mr. Brooks was now a member of the union and decided to file a grievance. He was told a few weeks later that Kelly Carvery, the equity officer for the Coast Guard, would be dealing with the grievance. At some point, there was a meeting with John Thomas, the Commissioner for the Coast Guard to address the concerns of minorities. The meeting was chaired by Ms. Carvery. After the meeting, Mr. Brooks met with her personally. She had no knowledge of his grievance. She said something, which suggested that he would be "rolled over" into indeterminate status.

[85] I am convinced that Mr. Brooks filed the original grievance. In any event, nothing happened. He eventually wrote up another grievance, which was entered as an exhibit. This grievance form is dated March 29, 1996 and states:

> I grive [*sic*] that under the collective agreement I have been desecrated [*sic*, discrinated] against by job threats, by unfair staffing or staffing practices, also promise a permanent position by Kelly Carvey.

He asked for "a permanent position as promised by Kelly Carvey".

[86] The problem was that Mr. Brooks was no longer a term employee. He was accordingly out of the union. There appears to have been some disagreement as to whether the grievance could go forward.

[87] On April 25, 1996, the Director of Maritime Services wrote Mr. Brooks a letter advising him that he was not entitled to grieve, since he was no longer an employee. The letter stated that hirings were done on merit, there was a surplus of stewards and the Coast Guard was down-sizing. It then stated that the Coast Guard would investigate his allegations regarding general staffing practices. The grievance may have been taken further, but nothing came of it.

[88] The Director subsequently wrote Mr. Brooks a letter stating that the Public Service Commission would conduct a review of the staffing procedures within the Coast Guard.

(xi) The Public Service investigation

[89] The Public Service Commission appointed Ella Coffill to investigate the allegations of improper staffing processes. Her report was issued on July 9, 1997 and does not deal directly with racial issues. It nevertheless contains a record of Ms. Coffill's conversations with a variety of witnesses and provided the basis of considerable cross-examination. It also contained a set of conclusions. These go both ways. Mr. Brooks was not satisfied with the report and filed a human rights complaint in August.

[90] Ms. Coffill found serious irregularities in the 1992 competition. She upheld some of Mr. Brooks' allegations. There was some follow-up. There was a meeting to discuss the report. The Coast Guard also proposed "corrective action" in a letter to the investigator. This included a new competition and eligibility list.

[91] Mr. Fox kindly wrote a letter, which Mr. Brooks signed, suggesting a resolution of the matter. The Coast Guard suggested measures of its own. The two parties drafted a conciliation agreement on September 22, 1997. The Coast Guard signed it. Mr. Fox witnessed the document, in anticipation of Mr. Brooks' signature. Mr. Brooks then balked and refused to sign.

[92] There were a few consequences. Mr. Savoury, Mr. Smith and Ms. Lucas were required to take a 3 day course on staffing. They were not allowed to participate in staffing actions until they had completed it. Ms. Lucas was upset by the hostility aroused by the competition and she chose not to take the course. There seems to have been a further investigation of the allegation of racial discrimination, which merely delayed the human rights complaint.

[93] The Acting Regional Director of the Coast Guard sent Mr. Brooks a letter of apology in April 1998. This had little effect. Mr. Brooks found the apology, without the offer of a job, insulting. I do not think that this was justified. It is not clear that he was entitled to an indeterminate appointment, ahead of the other candidates in the competition. I realize that the candidates who won the 1992 competition retained their positions. This must have rankled Mr. Brooks. Mr. Savoury played favourites and got away with it.

(xii) Denouement

[94] By this time, Mr. Brooks was working as a library support clerk, in merging two department libraries. The base salary was similar to that of a steward, but there was no overtime. Maureen Martin worked with Mr. Brooks. She testified that they were moving the periodicals into a new compact shelving system. They had sets from two libraries and would retain the best set. The final responsibility for deciding where the periodicals would go rested with a Mr. Oxley.

[95] Mr. Brooks and Ms. Martin were both smokers and shared many cigarette breaks. They made fun of Mr. Oxley. Things went badly. Mr. Brooks complained that he had to take over the project and figure out a way to do it on his own. I think by now he simply resented authority.

[96] Mr. Brooks left the library in August of 1997, without notice. He felt that he was going nowhere. There were a number of issues in his life, and everything came apart. There was a "mental fracture". He became "unglued".

III. LEGAL ISSUES

A. *Prima Facie* case

[97] The caselaw sets out a two-stage approach to the adjudication of a human rights complaint. The Complainant must establish a *prima facie* case of discrimination. The burden then shifts to the Respondent to provide a reasonable explanation for what occurred. This analysis provides the methodology that should be used in scrutinizing the evidence before the Tribunal.

[98] There is a major qualification. As I understand it, this does not affect the fundamental burden of proof in the case, which remains with the Complainant. It would seem to follow that the burden on the Respondent is a rhetorical or explicatory burden, rather than a strictly evidentiary one.

[99] The nature of a *prima facie* case was described in *Ont. Human Rights Comm. v. Simpsons -Sears Ltd.*, [1985] 2 S.C.R. 536, at para. 28, as a case that covers the allegations made and which, if believed, is sufficient to justify a verdict in the complainant's favour. This description seems to have been taken from the test for a non-suit, since it suggests that the evidence should not be weighed.

[100] This is a simple way of looking at the matter. The question on the *prima facie* test is whether there is evidence, taken by itself, which would establish on a balance of probabilities that the Complainant was a victim of discrimination. This was the way it was presented by the Respondent, which submitted that there is no positive evidence of discrimination before me. There is accordingly no case to meet. The complaint should simply be dismissed.

[101] The Respondent cited *Kibale v. Transport Canada* (1985), 6 C.H.R.R. D/3033, at para. 24369, in support of its position. The Tribunal in that case held that it is not possible to draw an inference of discrimination from "an irregularity or outright illegality in the administration of the staffing process of the Public Service of Canada" without some evidence linking the irregularity to a ground of discrimination. This principle has been followed in other cases, notably *Chopra v. Canada (Dept. of National Health and Welfare) (No. 5)* (2001), 40 C.H.R.R. D/396, at para. 268, (CHRT) and *Singh v. Statistics Canada* (1998) 34 C.H.R.R. D/203 (CHRT), at para. 241.

[102] The Complainant, for his part, relied on the decision of the Board of Inquiry in *Shakes v. Rex Pak Limited* (1981), 3 CHHR D/1001 (Ont. B. of Inq.), which holds, at para. 8918, that discrimination is "almost invariably" proved by circumstantial evidence. The complainant merely needs to establish that he was as qualified as the other candidates. This is enough to meet the *prima facie* test and shift the burden to the Respondent.

[103] Mr. McCrossin was visibly uncomfortable with the Complainant's position. I think he felt that the Respondent has a right to choose between equally qualified candidates. He also tried to restrict *Shakes* to the facts of the case. In his submissions, he took the position that Mr. Brooks was not as well qualified as the other candidates. This is apparent in the results of the competition. Mr. Brooks finished well down the eligibility list. The evidence also establishes that some of the other candidates had better qualifications.

[104] There is still the fact that the Complainant was better qualified than the candidates who finished first and second. Mr. McCrossin has an answer for this however. He says that the same can be said of other candidates in the competition, who were white. It follows that there is nothing racial in such a fact. This is resourceful but misses the point. The question for the Tribunal is whether Mr.

Brooks and Ms. Howe were victimized because they were black. The fact that other candidates were victimized does not decide the matter.

[105] There is a sense at least in which I agree with the Respondent. I do not believe that the line of reasoning in *Shakes* is all that helpful in resolving the question before me. The central issue in *Shakes* was whether the competition was unfair. Here the competition was manifestly unfair. The only question is whether there was a discriminatory component in the wrongdoing. This calls for a different kind of analysis.

[106] The Complainant submits that there is evidence before me that would support an inference of discrimination. Some of this consists of the perceptions of Mr. Brooks, Ms. Howe and a number of minority employees, who believed that racism had permeated the workplace. The Respondent argues that there is little objective evidence to substantiate their beliefs. Some of this is attributable to the fact that the events in the present case occurred many years ago. The matter goes deeper than this, however.

[107] The proof of discrimination has its own set of difficulties. Foremost among these is the fact that the same set of circumstances may be open to a variety of interpretations. It could be said that the act of discrimination lies in differentiation. The problem is that this differentiation does not exist independently of the actions of the parties. It must be inferred. It follows that here is an element of judgement in any assessment of the circumstances that give rise to a complaint of discrimination.

[108] This brings in the impressions of the parties. I think there is an important point here for the Complainant. The problem is not that discrimination is difficult to see. The Complainant states that people who are discriminated against have no difficulty seeing it. They confront it at every turn. The problem is that their perceptions are routinely discarded as illegitimate.

[109] This goes to the nature of discrimination. It is widely accepted that discrimination has an invisible face. Those who discriminate usually fail to see that they are discriminating. This does not mean that it is invisible to others: indeed, the suggestion is that the racism in the Coast Guard was readily apparent to those who were discriminated against.

[110] There are legitimate concerns on the other side. The Board in *Shakes* recognizes the limits on this kind of impressionistic evidence, at para. 8918, when it quotes Professor Borins, in *Kennedy v. Mohawk College* (1973):

> It should also be added that the Board must view the conduct complained of in an objective manner and not from the subjective viewpoint of the person alleging discrimination whose interpretation of the impugned conduct may well be distorted because of innate personality characteristics, such as a high degree of sensitivity or defensiveness.

The word "innate" seems unfortunate. The point in the immediate instance is that a Tribunal should be cautious, in relying on the perceptions of the parties.

[111] There is something to both positions. It would be a mistake to reduce the process of adjudication to a contest between the perceptions on either side of the case. I nevertheless think that impressions, even mere impressions, may have some probative value. The beliefs of Ms. Howe, in particular, are entitled to some weight. Ms. Howe is not a party to the case and still works at the Coast Guard. She has not let her feelings interfere with her relations with her employer. I found her evidence credible and convincing.

[112] I think Ms. Howe's testimony provides some evidence of discrimination. There is the testimony of Mr. Brooks and a number of other minority employees to support it. There is a context in which the competition occurred, and that context is full of an apprehension that race was a factor in the employment decisions of the Respondent. No one suggested that this was particularly explicit. It was nevertheless an integral part of the sociology of the situation. There was a general recognition that there were legitimate grievances in this area.

[113] The Coast Guard shared these concerns. This explains why there was an equity list and an equity officer. This explains why the Jones' Report was commissioned. This explains why Rose Lucas was appointed to the competition board. This explains why Mr. Brooks was invited to participate in the competition. This explains the meeting that Mr. Brooks described, where the Director of the Coast Guard addressed the concerns of minorities. I think that this kind of circumstantial evidence adds credibility to Mr. Brooks' contention that he and Ms. Howe were discriminated against.

[114] There is a rule regarding circumstantial evidence. As I understand it, it is not enough if circumstantial evidence is consistent with an inference of discrimination. This merely establishes the possibility of discrimination, which is not enough to prove the case. The evidence must be inconsistent with other possibilities.

[115] I realize that the rule has been formulated somewhat differently in some of the caselaw. This is not the place to discuss the matter. The point is simply that

the Respondent says here is another possibility. That possibility is that the process was corrupted by favouritism. I have already suggested that this kind of submission misses the point. There is nothing in the fact of favouritism that negates the possibility of discrimination. Indeed, it is in the nature of favouritism to favour some and disadvantage others.

B. The case as a whole

[116] The evidence before me is more than sufficient to meet the *prima facie* test. There is accordingly a burden on the Respondent to provide a plausible explanation for what occurred. It is apparent that the Tribunal should look at the totality of the evidence, in deciding such an issue.

[117] The decision in *O'Malley v. Simpsons Sears*, *supra*, at para. 28, recognizes that there is an aspect of strict liability in the Supreme Court's decision to place the explanatory burden on the Respondent. For the most part, the Complainant was a spectator to events that occurred outside his control. It is the Respondent that is in the best position to explain what happened. It was responsible for the 1992 competition and has full access to the sources of information needed to determine what occurred.

[118] The Respondent is in the best position to provide an explanation for what occurred. It has simply failed to do so. The only explanation I have really heard is that there was favouritism in the department. This simply shifts the focus of the inquiry. If there was favouritism, as there clearly was, the question is whether there was a racial element in that favouritism. I think this is where the burden falls on the Respondent.

[119] The evidence supports the Complainant's submission that race had entered the employment process. It may not have been the primary factor, but it was there, in the background. The caselaw has held, since *Holden v. Canadian National Railway Co.* (1990) 14 C.H.R.R. D/12 (F.C.A.), at p. 397, that this is sufficient to establish discrimination.

[120] The Respondent did not provide any real explanation of the circumstances before me. The case on the Respondent's side consisted essentially of denials. The witnesses for the Respondent rejected the allegations of racism. But of course they also rejected the idea that the 1992 competition was corrupted by the politics within the department. Mr. Savoury kept his motivations to himself.

[121] The Respondent has failed to meet its burden in the case. The complaint has accordingly been substantiated.

IV. RULING

[122] Mr. Brooks has waited a long time for some recognition of the problems that existed in the 1992 period. There may still be differences regarding his account of what occurred. The fundamental point is nevertheless clear. The Complainant has established that he was a victim of discrimination.

[123] I should add that the allegation regarding the 1992 competition was not specific to Mr. Brooks. It was that the black candidates in the competition were discriminated against. It follows that Ms. Howe was a victim of the same discrimination. In point of fact, she had more to complain about than Mr. Brooks, since she finished fifth in the competition.

[124] The parties are invited to make submissions on remedy. It may be of assistance to say that I am satisfied, on the evidence before me, that Mr. Brooks would not have obtained an indeterminate position, even if the competition was properly conducted. It is also clear that he refused to sign the proposed conciliation agreement. I would accordingly think that the major issue relates to pain and suffering. There is also the question of costs.

Signed

by
Dr. Paul Groarke

OTTAWA, Ontario

December 3, 2004

PARTIES OF RECORD

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APPEARANCES:

Davies Bagambiire Stephen Flaherty	For the Complainant
Scott McCrossin Melissa Cameron	For the Respondent