

T. D. 13/ 88

Decision Rendered on October 11, 1988

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 Section 39 of the Canadian Human Rights Act.

BETWEEN:

LEON HINDS COMPLAINANT

- and

CANADA EMPLOYMENT AND IMMIGRATION COMMISSION RESPONDENT

TRIBUNAL: SIDNEY N. LEDERMAN Chairman  
DOROTHY BICKERTON Member  
ROBERT BRADLEY Member

DECISION OF TRIBUNAL

APPEARANCES: ANNE L. MACTAVISH Counsel for the Complainant  
JUDITH McCANN Counsel for the Respondent  
RENE DUVAL Counsel for the Canadian Human Rights Commission

DATES AND PLACE OF HEARING: August 17 and August 18, 1988 Ottawa, Ontario

REASONS RE: HINDS v. C. E. I. C.

THE EVIDENCE

The complainant, Leon Hinds, is black and was born in Guyana in 1922. He emigrated to Canada in 1964 to improve his education and in the belief that Canada was a country free of racism. He became a Canadian citizen five years later. In 1969 he obtained employment with Canada Employment Immigration Commission (" C. E. I. C.") and continued there for eighteen years, a period of considerable longevity. To a large extent he attributes his departure to the events which form the basis of his complaint against the C. E. I. C.

The sequence of these events commenced on March 21, 1986. At that time Mr. Hinds was 64 years of age, held the classification of CR- 4, and worked as a clerk in the Public Rights section which was located on the fourth floor of a building in a government complex in Hull, Quebec, designated as "Hull 4" or "H4". The physical layout was generally an open concept with dividers

segregating the various work areas. On that day, upon returning to his desk in one of the work areas, he found a sealed envelope addressed to:

"L. C. Hinds Hull 4"

It was the form of envelope commonly used by Employment and Immigration Canada for external mail and sometimes for internal mail. The envelope was clearly delivered through the internal process since it did not bear any stamp. Upon opening the envelope, Mr. Hinds discovered a photocopied questionnaire headed "Employment Application for Niggers". The text that followed and the racially derogatory innuendos contained therein were even more repulsive and disgusting.

Mr. Hinds testified that he was deeply disturbed, shocked and angry. When he regained his composure he showed the document to some of his colleagues in his section. Mr. Hinds also sought out the mail clerk, Margaret Cousineau, who confirmed that she picked up the letter in the internal mailing system and that she deposited it on Mr. Hinds' desk. She, however, could not determine its origin.

Mr. Hinds then went to see the Director of the Department, Jeremiah Walsh. Mr. Hinds recounted the events and showed the form to Mr. Walsh who displayed and expressed genuine concern over the problem. He suggested that this matter should be reported to Keith Williamson, Director of Security for C. E. I. C. since Mr. Walsh viewed the issue as a security matter. Mr. Walsh immediately called Mr. Williamson in Mr. Hinds' presence and arranged an appointment later that day for Mr. Hinds to meet with Mr. Williamson. Still very much disturbed and prior to that meeting, Mr. Hinds wrote and delivered a letter to the Minister responsible for the Employment and Immigration Commission, namely the Honourable Flora MacDonald, in which he enclosed a copy of the form that he received at his desk that morning. He stated in that letter:

"I view the matter seriously and do bring this affair directly to your attention for the necessary action consistent with the aims and objectives of the Commission, and Canada as a whole."

He then met with Mr. Williamson at his office at the appointed time. Mr. Hinds testified that Mr. Williamson appeared visibly shocked when he learned of the events that had taken place. The testimony of Mr. Hinds and Mr. Williamson (who also gave evidence) then diverge in a serious way with respect to the nature of the discussion that ensued between them.

Mr. Hinds' testimony was to the effect that he gave the original envelope and document to Mr. Williamson and only kept a copy for himself. According to Mr. Hinds, Mr. Williamson told him that an investigation would be held and that he would report back to Mr. Hinds and provide him with a copy of the report. He asked Mr. Hinds whether he had been the victim of other harassments and if so whether he could provide any documentation in respect of those incidents. Mr. Williamson also said that since the matter occurred within Quebec jurisdiction that he would call the Quebec police. In his view, the matter was not criminal and, therefore, the R. C. M. P. had no jurisdiction. He asked Mr. Hinds whether he knew who the perpetrator was and Mr. Hinds indicated that he did not; nor did he have any suspicion about any particular individual. A few days later, Mr. Hinds provided Mr. Williamson with the documentation of prior incidents

that Mr. Williamson had requested. Mr. Williamson's version of this discussion which is quite different, will be set out later in these Reasons.

With respect to his communication to the Minister, Mr. Hinds did receive a copy of a memorandum dated March 21, 1986 from the Minister's Executive Assistant, Bill Musgrove, to the Deputy Minister which contained the following note:

"You will realize how seriously the Minister views this type of behaviour and- how shocked she would be that it could happen in this Department.

Could you please investigate immediately and report to the minister as soon as possible on this matter."

Apart from a copy of this memorandum, Mr. Hinds did not receive any direct written communication from the minister or anyone in her Department.

Mr. Hinds testified that he assumed that C. E. I. C. was conducting its own investigation and that he would hear in due course from Mr. Williamson.

In May 1986 Mr. Hinds was transferred from the Public Rights Section to the Human Resources Planning Section of Personnel Services for an initial period of one year. He retained his present classification and continued to be paid at his present rate of pay. It was understood that Mr. Hinds would reach 65 years of age on May 27, 1987 but that he did not wish to make a commitment upon his transfer to Personnel Services to retire when he turned 65. There was no mandatory retirement age at C. E. I. C. However, he had the option to elect to retire on that day. It was further understood that should he elect not to retire, Personnel Services would become responsible for his status beyond that date.

Mr. Jacques Lefebvre is the Director of Personnel Services at C. E. I. C. He was made aware of the Hinds incident in the fall of 1986 when an officer in the Public Rights Section brought the matter to his attention as a result of the inquiries being made by the Canadian Human Rights Commission ("C. H. R. C."). Mr. Lefebvre was requested to find out the status of the matter and where it rested as far as Mr. Hinds was concerned. On October 14, 1986 Mr. Lefebvre met with Mr. Hinds and asked him what was happening and asked him what could be done. According to Mr. Lefebvre, Mr. Hinds indicated that it was "water under the bridge" and that he was pursuing the matter with the C. H. R. C. Mr. Hinds advised him that it appeared that C. E. I. C. could not investigate any further and that the matter from a personnel perspective could be dropped. Mr. Lefebvre testified that he had talked to Mr. Williamson and found that indeed the matter could not be pursued further. It would have been different had the perpetrator been identified as disciplinary measures could have been taken against him or her. Mr. Hinds was requested to write a memorandum to Mr. Lefebvre saying that he understood the situation and confirm that the matter was indeed at an end. On October 16, 1986 Mr. Hinds did write such a memorandum. In it, he stated:

"From our conversation on October 14, 1986, I understood that [C. E. I. C. 's] investigation turned up no clue( s) as to whom any blame may be attached. I am, by this opportunity,

requesting a copy of the report to this effect. As a consequence, I am of the view that, for the time being, no useful purpose can be served in any continuing process in the [C. E. I. C.]. As a distinct possibility of helping to prevent similar incidents recurring in the future, I would, therefore, continue with the C. H. R. C. investigation.

I am reassured that the [C. E. I. C. 's] officials did what was possible in the difficult- toprove circumstances ...

Thank you for the information which currently closes this chapter of events."

Mr. Hinds testified that in writing this memorandum he had assumed that Mr. Williamson had conducted a full investigation to attempt to determine the identity of the perpetrator but that it had led to a dead end. Mr. Hinds never did receive a copy of the report as requested in his memorandum and that is because there had been no investigation and, therefore, no report.

Mr. Hinds testified that he learned for the first time that in fact no investigation had been conducted when he was so advised by a representative of the C. H. R. C. that had been pursuing his complaint into the incident. His reaction upon learning of this was the feeling that the C. E. I. C. did not regard the matter as one of importance and was totally inconsiderate to him as a human being. He felt hurt and humiliated that C. E. I. C. did not even bother to investigate the matter at all.

As indicated earlier, Mr. Hinds had not committed himself in his mind to retiring when he reached the age of 65 in May of 1987. His long- term plan was to continue to work in public service for two years thereafter and to retire at age 67. He testified that the lack of action and response by C. E. I. C. into a matter that he considered fundamentally important to his own sense of human worth served as a catalyst in coming to the decision that he should take advantage of a retirement cash- out option that was made available to him which would allow him to leave the employment of C. E. I. C. in the fall of 1987 but receive remuneration for a six- month period thereafter.

There is no dispute that the incident played no role in C. E. I. C. making the option available to Mr. Hinds. It would result in his obtaining six months' salary and benefits upon his resignation. The option was made available as part of an overall plan within the department to down- size certain areas. It was made clear to Mr. Hinds that if he did not accept the option, he would not be pressured in any way to resign and could clearly stay on.

Mr. Hinds was frank to admit that other factors in addition to the incident and the manner of handling the problem by C. E. I. C. persuaded him to exercise his election to retire. Retirement would provide him with an opportunity to pursue certain educational courses in which he was interested and it seemed to him like an opportune time to leave in view of the fact that his work tenure would last no more than two years at most. There was a certain attractiveness to Mr. Hinds in accepting the cash- out option that was first offered to him on or about May 1987.

After his departure from C. E. I. C., Mr. Hinds did not make any effort to seek new employment. Rather he went back to school to work on a Master's Degree and to do part time research. He

supported himself since, entirely from his pension and the various social benefits that he receives.

Keith Williamson is the Director of Security for C. E. I. C. As such, he has responsibility for dealing with hostile telephone calls and correspondence, criminal investigations of employees, security clearances, release of information to police and security of communications. He has held that position since May of 1983. He has had police experience and is trained and experienced in interviewing and investigative techniques.

His testimony about the interview with Mr. Hinds is as follows. Mr. Williams sensed that Mr. Hinds viewed the incident as a serious one. Upon hearing the description of the incident and examining the document presented by Mr. Hinds, Mr. Williamson concluded that the document probably came from a C. E. I. C. employee. It would be no easy task to find the individual since there are some 2500 to 3000 employees in their building alone. Mr. Williamson stated that he discussed with Mr. Hinds that this was an isolated incident and had not occurred before (and indeed there is no evidence it occurred subsequently). Moreover, because many individuals had handled the document, it would be virtually impossible to make use of any fingerprints found thereon even if tracings could be obtained. Accordingly, without more Mr. Williamson felt that there was no basis to give the investigation any focus. He testified that Mr. Hinds left him with the impression that he understood the predicament. Mr. Hinds also advised Mr. Williamson of various and different racial incidents that had taken place against him in the past. Mr. Williamson was emphatic that both he and Mr. Hinds clearly understood at the meeting that there was no basis for an investigation of this particular anonymous letter. Mr. Williamson had testified definitely that he had told Mr. Hinds that there was nothing to be done and that he would not be conducting any investigation. Mr. Williamson was under the clear impression that Mr. Hinds understood that fact. Mr. Williamson also gave evidence that he did not call in the police because he knew the impossibility of either obtaining fingerprints from the documentation or even if obtainable, they could not identify the individual responsible since so many people had handled the paper. Mr. Williamson ended the meeting by telling Mr. Hinds that if there was any recurrence that he was certainly free to come and see him again.

Mr. Williamson testified that afterwards he prepared a draft memorandum for the consideration of Gaetan Lussier, the Deputy Minister, to be sent over his signature to the Minister. A draft was ultimately put in final form and sent to the Minister on April 4, 1988. Among other things, it referred to the meeting that had taken place between Mr. Hinds and Mr. Williamson and it stated as follows:

"During this meeting it was ascertained that this document is, so far, an isolated occurrence. The Director of Security assured Mr. Hinds that such "correspondence" was viewed very seriously by the department. However, it was also explained that there was virtually no hope of identifying the perpetrator. Mr. Hinds had shown the document to other persons who, in addition to himself, had handled it, thus removing any remote possibility of tracing the culprit through fingerprints.

Mr. Hinds has been requested to immediately report any further such incident to the Director of Security, not to react in a manner to encourage the person responsible.

Under the circumstances, however unfortunate, there is no investigative action that can be taken at this time."

As far as Mr. Williamson is concerned one thing is certain. There was to be no investigation and that fact was communicated to the Minister. An issue of credibility has arisen as between Mr. Hinds and Mr. Williamson as to whether Mr. Hinds was aware of this fact. Mr. Williamson testified that he explicitly advised Mr. Hinds on March 21, 1986 that no investigation would take place as it would be futile and that was confirmed to some extent by the advice in the memorandum that he drafted for Mr. Lussier's signature. Mr. Hinds, on the other hand, testified that he was in fact told the exact opposite i. e. that there would be a full investigation and that he would ultimately receive a report.

Mr. Williamson made no note of the meeting that he had with Mr. Hinds. He denies that he ever told Mr. Hinds that the police would be called in as he saw no basis upon which a police investigation could proceed. He did not consider whether the incident amounted to a crime; nor did he consult with lawyers at C. E. I. C. to obtain their judgment whether this was a criminal matter. In the final analysis, whether it was or not, Mr. Williamson concluded that since there were no identifying features to the document which would provide a starting point for an investigation leading to the identity of the culprit, it would be fruitless to involve the police or indeed to conduct any kind of investigation himself into the matter. He just let the matter drop without more.

The conduct of the parties following the March 26, 1988 meeting may shed some light on this issue. Mention has already been made of the April 4 memorandum by Mr. Lussier to the Minister, as drafted by Mr. Williamson. For his part, following the meeting, Mr. Hinds wrote a letter dated March 24, 1986 to Mr. Gordon Fairweather, the Chief Commissioner of the Canadian Human Rights Commission making the Commission aware of the derogatory form that he received. He concluded his letter by saying:

"I understand that there is to be some official investigation. I am of the view that the investigation would be thorough. If it is not satisfactory, then I will have no other option than to refer the matter for your official action."

That is some indication that Mr. Hinds, some three days after his meeting with Mr. Williamson, felt that a thorough investigation would take place and communicated this belief to Mr. Fairweather.

Of further interest on this point is the testimony of Jeremiah Walsh who was called as a witness by C. E. I. C. He stated that two weeks to one month following the incident he asked Mr. Williamson about the status of the matter. Mr. Williamson told him that they were still doing an active investigation. Mr. Walsh thought that was appropriate and he was assured by Mr. Williamson that he had the matter in hand. Mr. Walsh was unequivocal about this. Mr. Williamson clearly left Mr. Walsh with the impression that he was conducting a full investigation. Mr. Williamson did advise him that it would be difficult to ascertain the identity of the person responsible in the circumstances of an anonymous letter and the inability to either trace or identify fingerprints. In direct contradiction, Mr. Williamson testified that he specifically

remembers advising Mr. Walsh that he had decided not to investigate the matter and gave him the reasons for that decision. His evidence was that Mr. Walsh must be mistaken. Accordingly, Mr. Williamson's testimony is at odds with both Mr. Walsh and Mr. Hinds in two important respects.

## FINDINGS

Although Mr. Williamson maintains that it was never his intention to carry on any investigation and that he communicated that fact along with the reasons for not proceeding with an investigation to Mr. Hinds on March 21, 1986 and although his memorandum was prepared for Mr. Lussier on or about the same day, we believe that the conduct and recollections of the relevant individuals are consistent only with the conclusion that Mr. Hinds was advised that an investigation was taking place. That was the distinct recollection of Mr. Hinds. It should be remembered that this was a matter of fundamental importance to him whereas this instance was merely one of many matters that Mr. Williamson (and at that with a shortened staff) was dealing with and, therefore, Mr. Hinds' impressions of the discussion understandably would likely be more lasting.

Strangely, Mr. Williamson took no notes of the conversation that he had with Mr. Hinds and must, therefore, rely on his own memory of the conversation. At best, that memory is faulty in other respects. In particular, Mr. Williamson cannot recall what happened with the original note and envelope. He surmises that he returned them to Mr. Hinds but cannot be sure. Mr. Hinds on the other hand, is definite that he left the originals with Mr. Williamson. If Mr. Williamson is uncertain about this matter, one can draw the inference that his certainty about his recollection with respect to other aspects of the discussion is suspect. More important is the fact that a few days following the meeting, Mr. Hinds wrote a letter to Mr. Fairweather which clearly indicates that he had assumed that a thorough investigation was going to be conducted.

Most telling of all is the evidence of Mr. Walsh who emphatically testified that two to four weeks after the Hinds- Williamson meeting, Mr. Williamson told him that the matter was still under active investigation. Thus, a conflict has arisen between the evidence of two witnesses called by the Respondent. We prefer the evidence of Mr. Walsh.

Even in the fall of 1986 in the encounter with Mr. Lefebvre one has the impression from Mr. Hinds' memorandum to Mr. Lefebvre that Mr. Hinds was led to believe that an investigation had been conducted but that the results were inconclusive. From that memorandum Mr. Hinds was still seeking a copy of the report of the investigation.

Although Mr. Lefebvre testified that he told Mr. Hinds that there was no report, Mr. Hinds' memorandum suggests otherwise. All of this leads to the inescapable conclusion that Mr. Hinds rightly assumed that the matter had not been dropped from the outset but rather that a full investigation was under way. His disappointment upon learning from the C. H. R. C. in the spring of 1987, over one year after the incident had occurred, that such an investigation never even got off the ground is quite understandable.

## LIABILITY OF C. E. I. C.

What we are left with is the fact of a humiliating and insulting incident directed at Mr. Hinds by some unknown perpetrator. The sole question that remains is whether the response by C. E. I. C. was appropriate in the circumstances.

The complaint of Mr. Hinds alleges that there has been a contravention of Section 13.1(1)(c) of the Canadian Human Rights Act ("C. H. R. A.") which reads as follows:

"It is a discriminatory practice, (c) in matters related to employment, to harass an individual on a prohibited ground of discrimination."

It is common ground that the act of the unknown > - 14 perpetrator constituted harassment of Mr. Hinds by reason of his race.

Since it is alleged that the act of harassment was committed by an unknown co-employee of Mr. Hinds, the complainant and the C. H. R. C. rely upon Section 48(5) of the C. H. R. A. to fix responsibility upon the employer, the C. E. I. C. It reads as follows:

"Subject to subsection (6), any act or omission committed by an officer, a director, an employee or an agent of any person, association or organization in the course of the employment of the officer, director, employee or agent shall, for the purposes of this Act, be deemed to be an act or omission committed by that person, association or organization."

Liability under the subsection arises only if the evidence establishes that the forwarding of the offensive form to Mr. Hinds was an act of an employee of the C. E. I. C. Counsel for C. E. I. C. argued that since the identity of the perpetrator was unknown, one cannot conclude with certainty that the act in question was that of a coworker of Mr. Hinds. The circumstantial evidence, however, overwhelmingly shows that in fact it must have been an act of another employee. It is clear that the individual in question was someone who had access to C. E. I. C. stationery, was familiar with the location of Mr. Hinds within the government complex, knew the mode of address for the purpose of directing a letter to him and also was familiar with and had access to the internal mail system within C. E. I. C. Given those features, it is difficult to believe that the responsible individual was anyone other than an employee of C. E. I. C. In fact, that was the view of Mr. Williamson, as well.

The act committed must be "in the course of the employment ... of the employee." This phrase, in another section of the C. H. R. A. has been given a purposive interpretation by the Supreme Court of Canada. In *Robichaud v. Canada Treasury Board* (1987) 8 C. H. R. R. D/ 4326. LaForest J. stated:

"It would appear more sensible and consonant with the purpose of the [C. H. R. A.] to interpret the phrase 'in the course of employment' as meaning work or job-related... '(D/ 4331)

....



"Hence, I would conclude that the statute contemplates the imposition of liability on employers for all acts of their employees 'in the course of employment' interpreted in the purposive fashion outlined earlier as being in some way related or associated with the employment." (D/ 4333).

There is no question that the act here was committed in the course of employment of the perpetrator since all of the circumstances of the harassment were employment related in the sense of it occurring in the work environment.

Even if prima facie liability of an employer is established under Section 48(5), a defence is available if the employer can come within Section 48(6) which reads as follows:

"An act or omission shall not, by virtue of subsection (5), be deemed to be an act or omission committed by a person, association or organization if it is established that the person, association or organization did not consent to the commission of the act or omission and exercised all due diligence to prevent the act or omission from being committed and, subsequently, to mitigate or avoid the effect thereof."

The only Canadian authority to date which has considered s. 48(6) is *Francois v. C. P. Rail* (1985) 9 C. H. R. R. D/ 4724, a decision of a Canadian Human Rights Tribunal. The Chairman (Kevin W. Hope) pointed out at D/ 4732 the three basic elements to be satisfied by an employer to avoid liability under s. 48(5):

- "1) that the employer did not consent to the commission of the act or omission complained of;
- 2) that the employer exercised all due diligence to prevent the act or omission from being committed; and,
- 3) that the employer exercised all due diligence subsequently to mitigate or avoid the effect of the act or omission."

He then considered whether in the circumstances of the racial harassment that occurred there, the employer had satisfied these tests. He said that it had. Interestingly, one of the aspects of the employer's response that led to this conclusion was that it had undertaken a thorough investigation although it did not result in the identification of the perpetrator.

In considering whether an employer has "exercised all due diligence ... to mitigate or avoid the effect" of the act of the co-employee, one must examine the nature of the employer's response. Although the C. H. R. A. does not impose a duty on an employer to maintain a pristine working environment, there is a duty upon an employer to take prompt and effectual action when it knows or should know of coemployees' conduct in the workplace amounting to racial harassment. (See *Continental of Canada Co. v. State of Minnesota* (1980) 297 N. W. 2d 241). To satisfy the burden upon it, the employer's response should bear some relationship to the seriousness of the incident itself. (See *Shaffer v. Treasury Board* (1984) 5 C. H. R. R. D/ 2315 at D2316). To avoid liability, the employer is obliged to take reasonable steps to alleviate, as best as it can, the distress arising within the work environment and to reassure those concerned that it is committed to the maintenance of a workplace free of racial harassment. A response that is both timely and

corrective is called for and its degree must turn upon the circumstances of the harassment in each case.

Counsel for the complainant and the C. H. R. C. argued that the conduct (more precisely, the lack of conduct) of C. E. I. C. resulted in a failure to mitigate the effects of the harassment. More than that, its failure to exercise due diligence, it was argued, only served to aggravate the harm suffered by Mr. Hinds.

There is no dispute that once the matter was put in the hands of Mr. Williamson, he did nothing. His explanation was that nothing could be done given the lack of evidence. We appreciate the problem he faced but we find it quite astonishing that anyone responsible for security, let alone someone as experienced in investigation techniques as Mr. Williamson, would not even make the most rudimentary of inquiries into the matter. It goes without saying that one would expect that he would have at least interviewed individuals in the mailroom to determine whether they had any recollection of how this letter was processed. He did not even speak to Mrs. Margaret Cousineau who was the mail courier who put the letter on Mr. Hinds' desk.

Mr. Williamson assumed this had been an isolated incident and no follow-up was required. Yet he did not question any of the other individuals who belong to visible minority groups who may well have been the recipients of similar offensive material but had decided to endure it quietly.

Mr. Williamson did not see fit to call the police and put the matter in their hands even though the act in question may well have constituted the crimes of defamatory libel, public incitement of hatred and the mailing of obscene or scurrilous documents. Nor did he even consider whether the act was criminal in nature at all or seek any legal advice on these matters. He simply did not address the issue.

Although Mr. Hinds, at Mr. Williamson's own request, presented him with documented evidence of previous racial harassments stretching over a period of many years, he did not take into account whether any pattern had been developing and whether the act in question fit within it in any way.

In our view, the incident was a despicable one and warranted a meaningful investigation by C. E. I. C. That would have been the expected and appropriate response to demonstrate to all concerned that this type of harassment was not only intolerable but that serious attempts would be made to root out the offender to deal with him appropriately. It would, at the least, have been a statement of disapproval of the incident and perhaps have served as a deterrent to others from engaging in such acts. But there was no response at all here.

We cannot accept as an excuse the lack of available evidence. One cannot come to this conclusion until one investigates. In *Munford v. James T. Barnes & Co.* (1977) 441 F. Supp. 441, the U. S. District Court commented on an employer's failure to investigate a sexual harassment incident as follows at p. 466:

"An employer may be liable for the discriminatory acts of its agents or supervisory personnel if it fails to investigate complaints of such discrimination. The failure to investigate gives tacit

support to the discrimination because the absence of sanctions encourages abusive behavior ... [T]he court does hold that an employer has an affirmative duty to investigate complaints of sexual harassment and deal appropriately with the offending personnel."

In the matter before us, there was a failure to exercise any kind of diligence in this respect to mitigate the effects of the harassment. Unfortunately, C. E. I. C.'s inaction did more damage since it left the impression with those concerned that this form of harassment was not even worthy of the commitment of investigative resources in the absence of any readily apparent clues. One gets the sense that the matter was treated as though it was considered a harmless joke to which Mr. Hinds' overreacted and that it would be best if the whole thing was simply forgotten.

Most perplexing is Mr. Williamson's conduct in leading Mr. Hinds and even Mr. Walsh to believe that he was carrying on some kind of investigation. It may have been that he wished to avoid any kind of confrontation over this issue if they knew the true situation. It, however, just served to exacerbate the harm.

Responsibility for this sad affair rests not only with Mr. Williamson. The Minister and Deputy Minister's manner of handling the issue lacked sensitivity and failed to deal with Mr. Hinds with basic decency. When faced with a letter from one of her employees indicating that he has been the victim of a racially abusive act, the Minister did not show basic courtesy in sending some direct communication to Mr. Hinds providing him with some solace and encouragement. Rather he was sent a copy of a memorandum from the Minister's Executive Assistant to the Deputy Minister. In fact, the only direct response that Mr. Hinds ever received from C. E. I. C. in this matter was from Mr. Lefebvre some six months after the incident when Mr. Lefebvre spoke to him orally and even then that had been initiated only because of the on-going C. H. R. C. investigation. Even at that point Mr. Hinds was left with the understanding that C. E. I. C. had completed its investigation but could not identify the offender. He was told nothing in writing, but again, without any regard to the sensitivity of the matter he was directed to write a memorandum to Mr. Lefebvre outlining his understanding and acceptance of the situation.

One can readily imagine Mr. Hinds' disillusionment upon learning in March 1987 from the C. H. R. C. that an investigation by C. E. I. C. had never even commenced.

With these facts in mind, we must conclude that C. E. I. C. cannot avail itself of the defence under section 48(6) of the C. H. R. A. From the Minister down to the Director of Security, C. E. I. C.'s mishandling of the harassment aggravated the initial humiliation.

C. E. I. C. has in place procedures for dealing with personal harassment. A Code of Conduct pamphlet and Personnel Management Manual touch on the subject of personal harassment. Moreover, time is allotted during training sessions with managers and supervisors on the subject of personal harassment. Anti-harassment policies have been established and evidence was given that C. E. I. C. in an ongoing way reviews and revises these policies and makes employees and managerial staff aware of these issues. Notwithstanding these policies and attempts to make individuals sensitive to the issues, there was an abject failure to deal appropriately with the matter in the Hinds affair. As was stated in *Katz v. Dole* (1983) 709 F. 2d 251 at 256 (U. S.

Court of Appeals) in considering employer liability for the sexual harassment of an employee by her supervisor:

"... to avoid liability under Title VII [Civil Rights' Act], an employer on notice of sexual harassment must do more than indicate the existence of an official policy against such harassment."

## REMEDY

### (a) COMPENSATION FOR LOSS OF INCOME

Mr. Hinds, in his testimony, frankly admitted that the racist incident and the lack of response by C. E. I. C. was only one of a number of factors causing him to leave the civil service on October 2, 1987. In May of 1987 he had been approached and was told of the opportunity to take the advantage of a cash-out incentive policy. The Department had embarked upon a program of down-sizing and as part of that, individuals such as Mr. Hinds were offered six months' salary and benefits if they were prepared to elect for retirement. It was made clear to Mr. Hinds that if he did not so elect, then his position would not be impaired but rather someone else would be declared a surplus. His position was not in jeopardy as a result of the cash-out incentive program. He considered the matter carefully, took into account the fact that he was 66 years of age and that his further working tenure would by his own desire be no more than another two years in any event and that he was interested in enhancing his university education and perhaps pursuing part-time research. These factors militated in favour of opting for the cash-out. Mr. Hinds testified that, in addition, the occurrence of the letter and the lack of response by C. E. I. C. played an important factor in making his decision to elect for the cash-out. He stated that if the incident had not occurred he probably would have stayed on for two more years. It is difficult for us to weigh the various contributing factors to Mr. Hinds' decision to retire. We do feel, however, that the events in question did play some role, and not an inconsequential one at that, in causing him to leave his employment earlier than he had originally anticipated. That being so, his departure is akin to a constructive dismissal (See *Olarte et al. v. De Fillippis and Commodore Brewers Machines Ltd.* (1983) 4 C. H. R. R. D/ 1705 at D/ 1735). We, therefore, feel that he is entitled to some recovery for lost income as a consequence of the discriminatory act but feel it should be discounted since other factors were at play in Mr. Hinds' decision to accept retirement.

Since his departure from the C. E. I. C. in October 1987, Mr. Hinds has not worked or made any efforts to obtain employment. Given his age, that is most understandable. Indeed, he returned to school and has obtained a Master's Degree and is in fact doing part-time research. He supports himself on the pension and social benefits that he receives. A statement of income loss was filed in the course of Mr. Hinds' testimony showing annual loss of \$19,406.88 as a consequence of leaving his employment. That was determined by taking into account Mr. Hinds' annual salary for 1986 with C. E. I. C. at \$24,588.00 and deducting from that amount the benefits that he in fact received by reason of Public Service Superannuation, Canada Pension Plan and Old Age Security during the first year of his retirement. No dispute was taken with respect to the accuracy of the figures set out in the statement of income loss.

Ms. Mactavish submitted that Mr. Hinds should be compensated for actual loss over a two- year period since he had planned to continue with his employment for that period of time. As we have indicated, we feel there should be a discount for the period of actual loss because of the other prevailing factors which affected Mr. Hinds' decision to leave C. E. I. C. We believe a period of one year of lost income rather than two years is justifiable. As indicated, actual loss over a one- year period would be \$19,406.88. However, Mr. Hinds did receive a cash- out of \$12,252.53 that he would not have otherwise obtained had he continued with his employment. After deduction for this amount, we believe that a compensatory award in the amount of \$7,154.35 for lost wages is appropriate and we so order.

#### (b) COMPENSATION FOR THE EFFECT UPON THE COMPLAINANT

Section 41(3) of the C. H. R. A. reads as follows: "(3) In addition to any order that the Tribunal may make pursuant to subsection (2), if the Tribunal finds that

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

(b) the victim of the discriminatory practice has suffered in respect of feelings or selfrespect as a result of the practice, the Tribunal may order the person to pay such compensation to the victim, not exceeding five thousand dollars, as the Tribunal may determine."

There is no reason to believe that the lack of response by C. E. I. C. to the act of harassment was wilful. Rather it is better characterized as gross negligence. Without doubt, however, is the profound effect upon Mr. Hinds. The testimony of both Mr. Walsh and Mr. Williamson indicated clearly that Mr. Hinds was most upset and disturbed by the initial act of harassment. The effect of this kind of racial slur can never adequately be understood by any one who has not experienced it first hand. It strips away a person's dignity and destroys his sense of selfworth in a way that may be irreparable. Our observation of Mr. Hinds in the witness box made it patently clear to us that this offensive act seriously affected his self- respect and went to the core of his very wellbeing. It is clear that Mr. Hinds is a sensitive individual and this kind of harassment perhaps affects him in a deeper way than other victims of discrimination. His sensitive nature and indeed the past acts of harassment and discrimination about which he expressed concern over the years should have made his superiors at C. E. I. C. acutely aware of the necessity of dealing with this particular degrading act as responsibly and effectively as possible. He had worked for C. E. I. C. for 18 years and had come to Canada initially because he thought it was relatively free of racism. His employer's conduct in the manner of treatment of both the incident and Mr. Hinds personally was unacceptable and affected the complainant terribly. He felt that C. E. I. C. had been heartless, uncaring and had shown little or no respect for human values with respect to these issues. He felt that the values espoused by C. E. I. C. with respect to its anti- harassment policy was hypocritical and a facade at best. There is no doubt that C. E. I. C. had let Mr. Hinds down and compounded the dehumanizing and humiliating consequences of the racist incident. Considering the damage to Mr. Hinds' dignity and the relative indifference demonstrated by C. E. I. C. over the incident, we feel an award of \$4,000.00 is justified in the circumstances and we so order.

#### (c) INTEREST

Under Section 41(1)(c) of the C. H. R. A. the Tribunal is empowered to "compensate the victim" for lost wages and under subsection (3) to order payment of special "compensation to the victim" in certain circumstances. In our opinion, the concept of "compensation" includes an interest value component (To the same effect see *Olarte v. De Filippis and Commodore Business Machines- Limited* (1983) 4 C. H. R. R. D/ 1705; *Scott v. Foster Wheeler Ltd.* (1986) 7 C. H. R. R. D/ 3193; *Cameron v. Nel- Gor Castle Nursing Home* (1984) 5 C. H. R. R. D/ 2170; *Chapdelaine and Gravel v. Air Canada* (1988) 9 C. H. R. R. D/ 4449). Although the Boards of Inquiry which have considered the interest issue under the Ontario Human Rights Code have indicated that the commencement date for interest is the time of service of the complaint upon the respondents, in the circumstances of this case where the gravamen of the imputation against C. E. I. C. relates to its conduct following the incident referred to in the formal complaint, we believe that the appropriate time for the commencement of interest is the date of the appointment of the Tribunal namely, May 4, 1988. Interest on the amounts awarded to the complainant will run from that date until the date of this Order at the applicable Bank of Canada interest rate of 10%.

#### (d) APOLOGY

Given the breakdown in communication that occurred in this case, we feel that it would be fitting, even at this late date, and we order that a senior representative of C. E. I. C. provide Mr. Hinds with a formal written apology for their failure to take appropriate steps in dealing with the incident and reassuring him that in the future the necessary attention to these matters will be given if and when employees are victimized by harassing behaviour.

#### (e) COSTS

Ms. Mactavish has argued that Mr. Hinds should be paid his legal costs by the Respondent. There is no question that it was necessary for Mr. Hinds to retain separate and independent counsel to act for him in this proceeding. Evidence was adduced showing that a legal opinion within the C. H. R. C. concluded that Mr. Hinds' complaint was without merit and Mr. Hinds was made aware of that opinion. After this Tribunal was appointed, Mr. Hinds learned that the lawyer who had prepared the legal opinion for the C. H. R. C. was going to represent him at the proceeding. That caused Mr. Hinds justifiably to lose confidence in the C. H. R. C. with respect to properly representing his interests. Even though he learned shortly before the hearing that a different counsel would be acting for the C. H. R. C., he had lost the necessary confidence in the C. H. R. C. generally that it would advance his interests. Furthermore, he was advised that the C. H. R. C. would not support his claim for loss of income. This necessitated his retaining Ms. Mactavish to act for him at this hearing. In fact, Ms. Mactavish took the major carriage of Mr. Hinds' cause and counsel for C. H. R. C. played only a minor and secondary role throughout. We believe that in the circumstances it was only because Mr. Hinds was represented by his own counsel that he was able to achieve the success that he did before this Tribunal.

Mr. Duval, on behalf of C. H. R. C., argued that there is no jurisdiction in the Tribunal to award costs in any event and, therefore, opposed it. Ms. McCann on behalf of C. E. I. C. argued that there was nothing arising out of the Respondent's conduct which warranted Mr. Hinds retaining outside counsel. If anything, it is the conduct of the C. H. R. C. which necessitated this extra

expense. We do not feel that C. E. I. C. is responsible here for the costs of separate counsel and, therefore, it is not necessary to decide whether we have the jurisdiction to make an order of costs. We would, however, as the Tribunals in *Potapczyk v. McBain* (1984) 5 C. H. R. R. D/ 2285 reversed on other grounds (1985) 6 C. H. R. R. D/ 3064 (F. C. A.), and *Cashin v. C. B. C.* (1986) 7 C. H. R. R. D/ 3203 reversed (1987) 8 C. H. R. R. D3699 (Review Tribunal) reversed F. C. A., May 13, 1988 (unreported) did, urge the C. H. R. C. to indemnify Mr. Hinds for his legal costs. Given the degree of responsibility that Ms. McTavish took of the proceedings and her effectiveness, fairness by the C. H. R. C. would dictate no less.

Dated at Toronto, Ontario this 30th day of September, 1988.

Sidney N. Lederman (Chairman)

Dorothy Bickerton (Member)

Robert Bradley (Member)