

T.D. 16/95  
Decision rendered on December 13, 1995

CANADIAN HUMAN RIGHTS ACT  
R.S.C., 1985, c. H-6

HUMAN RIGHTS TRIBUNAL

BETWEEN:

SATISH CHANDER  
NARENDRA NATH JOSHI  
Complainants

- and -

CANADIAN HUMAN RIGHTS COMMISSION  
Commission

- and -

DEPARTMENT OF NATIONAL HEALTH AND WELFARE  
Respondent

TRIBUNAL DECISION

TRIBUNAL: Keith C. Norton, Q.C. - Chairperson  
Janet Ellis - Member  
Subhas Ramcharan - Member

APPEARANCES: Prakash Diar and - Counsel for the  
Eddie Taylor Commission  
Arnold Fradkin - Counsel for the  
Respondent

DATES AND LOCATION: December 6 - 8, 1994  
OF HEARING January 24, 1995  
February 6 - 9, 1995  
April 10, 1995  
May 8 - 9, 1995  
Ottawa, Ontario

MAJORITY DECISION BY: Janet Ellis (with Subhas Ramcharan concurring)

DISSENTING OPINION BY: Keith C. Norton, Q.C.

## INTRODUCTION

This case arises out of two complaints against the respondent Department of National Health and Welfare. Satish Chander's complaint under section 7 of the Canadian Human Rights Act, (the Act), alleges that the respondent discriminated against him by treating him differently and refusing to continue to employ him because of his race, colour, ethnic or national origin and religion. Narendra Nath Joshi's complaint under section 7 of the Act alleges that the respondent discriminated against him by treating him differently and refusing to continue to employ him on the grounds of race, colour and ethnic or national origin.

## THE FACTS

Dr. Chander was born in what is now Pakistan and was raised in India. He achieved his Bachelor of Veterinary Science degree and his Masters in Veterinary Science degree in India. He went to West Germany for his Ph.D. in Veterinary Science. He wrote his first Ph.D. thesis in the German language. He came to Canada in 1968 where he obtained his second Ph.D., this one in Biomedical Sciences at the Ontario Veterinary College at Guelph, Ontario. In addition to being the author of three theses, Dr. Chander's resumé highlights a lengthy list of publications in the area of viral infection and disease.

After finishing his formal education, Dr. Chander worked as a research scientist for just under ten years at Agriculture Canada. He then joined the Department of National Health and Welfare first as a term employee then as a permanent employee in the Medical Devices Division in July, 1983. His classification at the respondent was Biologist Level 2 (BI-02).

Dr. Chander learned from his friend, Dr. Robert Kapitany, that there was a need for personnel in the respondent's Infection and Immunology Division (hereinafter referred to as "I and I"). Dr. Chander's Chief in Medical Devices was unhappy that Dr. Chander might leave as he felt he couldn't spare him but Dr. Chander pointed out that his motivation was promotion. Those employed at I and I were either Biologist Level 4 (BI-04) scientists or medical officers. His boss agreed to allow him to go on a part-time secondment.

Dr. Joshi was born in India and achieved his Bachelor of Veterinary Science in India. He achieved his M.Sc in Microbiology and his Ph.D. at McGill University. Dr. Joshi's Ph.D. in Microbiology was in the area of animal virology and he was a Post Doctorate Fellow in immunology at the Ontario Veterinary College, Guelph, in 1963.

After his formal education, Dr. Joshi worked in two corporations, first at Frank W. Horner Ltd. in Montreal where he worked ten years. Twelve personnel reported to him in this position which involved research and experimentation, and during his employ he isolated an organism categorized as "variety Joshi". He also identified an antiviral substance produced by this organism which substance became the subject of a patent.

Dr. Joshi switched to ICN Canada Ltd. where he was employed for six

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years as the scientific director. Thirty-two technical personnel reported to him and one of his main duties was to develop clinical protocols and prepare submissions to regulatory authorities. He was the regulatory and technical liason with the Health Protection Branch of National Health and Welfare Canada and the United States Food and Drug Administration.

Dr. Joshi worked as a private consultant after that, and he prepared pre-clinical and clinical portions on Investigational New Drug and New Drug Submissions for clients. As a private consultant he performed the same type of work that he was performing for ICN Canada Ltd. Dr. Joshi was hired by I and I for a six-month term position in April 1988. Dr. Joshi was hired as a senior drug safety and efficacy evaluator, BI-04. This term was renewed twice.

As of August 1988 on a full-time basis for Dr. Chander, and as of April 1988 for Dr. Joshi, the complainants reviewed drug submissions for the respondent. Manufacturers make submissions to the Bureau of Human Prescription Drugs and some submissions are assigned to I and I Division. In I and I during the relevant period there were about eight persons performing the role of evaluating drug submissions. Drug submissions took the form of Investigational New Drug Submissions (IND), New Drug Submissions (NDS), or Supplemental New Drug Submission (S/ND). An IND submission would be prompted by a manufacturer's desire to do clinical studies of a drug on human beings. An S/ND would be prompted by a desire for approval to change the indication of an already approved new drug. NDS and S/ND were evaluated during the relevant period on a first come first serve basis and at the time of the complainants' employ the respondent had

a backlog of submissions to be evaluated measured as five and one half years.

Drug reviews were assigned to individual evaluators who would return the review when complete to their Division Chief. The Chief would customarily have a second review of major submissions and a third review might on occasion be assigned. The process was designed to be flexible and might involve external advice or follow up information sessions with manufacturers. The process of review involves safety evaluation and opinion as to risk/benefit. The process appears to be designed to encourage differences of opinion amongst evaluators.

The Division Chief as of August 1987 was Dr. Joseph Valadares and he was in this position in an "Acting" capacity. His concern was the backlog and he recruited personnel to join the Division. He was particularly interested in virologists. He encouraged Dr. Chander's boss to allow the secondment. Dr. Joshi was hired through the competition process and was chosen by a panel which included Dr. Valadares and he was chosen over four or five other applicants. The competition process included written and oral technical questions related to the job. Dr. Valadares offered Dr. Joshi the term position on the understanding that if Dr. Joshi was considered satisfactory and got a rating of very satisfactory there was no reason why he could not be absorbed as a virologist within the Division.

The reason Dr. Valadares was particularly interested in scientists

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with a virology background was because of the increasing awareness of AIDS in Canada. During the relevant period, information and knowledge about HIV and AIDS was expanding and many drug manufacturers were motivated to make drug submissions directed toward treatment for persons suffering from AIDS.

Dr. Valadares was extremely pleased with the contribution of each of the complainants to his Division. The evidence shows that both Dr. Chander and Dr. Joshi received recognition from their Chief and others.

Dr. Khan wrote a memorandum to Dr. Valadares dated October 13, 1988 entitled: Interim Appraisal and Work Performance, Dr. Satish Chander [HR-2 tab 6]. The memo is quite lengthy and detailed and begins with an introduction setting out the details of the secondment arrangement. Dr. Khan then linked what in his view was the link between Dr. Chander's education and his contribution to the team:

"..His background in Retrovirology should help us in evaluation of preclinical data respecting Antiviral Agents.

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"..Dr. Chander's training in veterinary medicine should help in evaluation of animal pathology/toxicology data contained in Preclinical and New Drug Submissions."

The memorandum continues with specific reference to important drug submissions reviewed by Dr. Chander including one which won him the respect of the submission sponsor. The memorandum points to criticisms including an inability to communicate his thoughts precisely on paper and the requirement to strengthen his scientific knowledge by ongoing literature review. The memorandum called for continuing supervision but concluded with:

"..In the final evaluation, Dr. Chander's professional judgment and productivity might not be comparable to a few select members of our Division; it is definitely equivalent or even superior to many of the others. I recommend your serious consideration of Dr. Chander's candidacy for indeterminate employment with our Division".

The memorandum when read in its entirety, is a very strong, very positive recommendation which points to areas for improvement but concludes that Dr. Chander was already performing at a level equivalent or even superior in the view of Dr. Khan, to other members of the Division, even though Dr. Chander was working under conditions described in the memo as "subjecting him to an inordinate degree of discomfort and stress."

Dr. Joshi, like Dr. Chander, received recognition for his job performance with the respondent. In February 1989 Dr. Johnson, who had joined the respondent three months earlier in the position of Director of the Bureau of Human Prescription Drugs, put forward a proposal to reduce the NDS and S/NDS backlog in the entire Bureau of Human Prescription Drugs before the target date of April 1, 1989. The proposal was that selective overtime hours for "some of our most experienced and reliable evaluators" be approved. In the I and I Division two drug evaluators were chosen one of whom was Dr. Joshi.

The respondent posted a notice of competition for indeterminate appointments for BI-04 senior drug safety and efficacy evaluator. Dr. Joshi testified that there were a total of four positions available at the respondent. The application deadline for employees within the civil service

was January 31, 1989. The complainants were the two internal candidates for I and I. At some point the respondent decided to invite external candidates to apply as well and this may have been the reason that interviews for this competition were not held until May 1989.

Dr. Chander received a Performance Review and Employee Appraisal (PREA) for the twelve month period between April 1988 and March 31, 1989. This appraisal was made by the Chief, Dr. Valadares and acknowledged without comment by Dr. Chander. This document sets out the expectations during the period as: complete review of ten INDs, one NDS, one S/ND, additional data letters assigned, and any additional tasks assigned. Dr. Chander completed twenty-four INDs, two NDS, and two S/NDS, was in the

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process of other reviews, and completed all additional duties. The comments included:

"Dr. Chander's work is of good quality and exceeded the expectations to assist in reducing the backlog of work in the I & I Division."

"Dr. Chander is responsible and capable of accomplishing time-limited tasks within assigned time-frames."

"Dr. Chander is cooperative, keen to learn and do a good job. He is loyal to his supervisor and gets on well with his colleagues and support staff."

Dr. Chander was assigned the summary rating of "fully satisfactory."

Dr. Joshi, like Dr. Chander, received a very strong PREA. Dr. Joshi's PREA covered the same period as Dr. Chander's being April 1988 until March 31, 1989 and was made by the Chief, Dr. Valadares. The expectations of Dr. Joshi were the completion of reviews of: six INDs, two NDS, and four S/NDS along with responding to inquiries and other duties. Dr. Joshi completed nine INDs, four NDS, and five S/NDS, presented a paper, collaborated in a briefing regarding new AIDS drugs, and responded to manufacturers' inquiries. The comments included:

"Dr. Joshi has been diligent in his work, loyal to the Division Chief and dedicated to the Division. He has provided his unstinting assistance towards the improvement of productivity. He accepts responsibilities and is open to new challenges."

"Dr. Joshi is attentive, responsible, conceptual and keen to learn. He is a conscientious worker and performs well. Coming from the pharmaceutical industry, he is receptive to the needs of drug manufacturers and their problems. He is tactful when handling representatives of industry, investigators, health care professionals and commands their respect. His contribution, attitude and unstinting loyalty have been much appreciated by the Division Chief. He is very cooperative with his colleagues and the support staff."

Dr. Joshi's summary rating was "fully satisfactory."

A great deal of evidence presented in this case pertained to one particular IND concerning the important drug known as "fluconazole". This drug was one of the drugs intended for HIV disease related therapies being evaluated by the respondent. Drs. Joshi and Chander were chosen to review the IND submission for this drug.

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There was a memorandum from the Director General of the Drugs Directorate dated October 27, 1988, a copy of which was also tendered for identification purposes, that as part of the fast-track policy for all submissions on AIDS drugs, fluconazole could be accepted in the current form of its submission for evaluation.

Dr. Chander testified that he was aware of the drugs directorate policy issued November 1988 respecting drugs used in the prevention and treatment of HIV infections and AIDS related diseases and a copy of this policy was entered as an exhibit for identification purposes. Dr. Chander stated that he was aware that in Canada, submitted protocols, provided they are of acceptable standard and include adequate safety data, were to be accepted without modification if they had been approved in the United States.

The deadline for the review of the ten clinical protocols for the Investigational New Drug submission for fluconazole was April 3, 1989. The memo to Drs. Joshi and Chander from Dr. Johnson made clear that the Department policy was that all drugs intended for HIV disease related therapies be evaluated as quickly as possible and that Dr. Johnson had placed special emphasis on fluconazole. The memo required that an updated status report be submitted each week until the completion of review and final comments.

At one meeting on March 23, 1989 concerns were discussed about the fluconazole submission. It was not clear how many persons were present at that meeting but Drs. Joshi and Chander were present as were Drs. Khan and Gadd. Drs. Joshi and Chander produced a summary of the meeting discussion listing thirteen concerns [HR-2 tab 7 insert]. Dr. Joshi wrote the list and Dr. Chander stated that it was a group discussion and his input into the document itself was to agree with it and initial it. This was not a review summary. Dr. Chander testified that when a review is completed a summary of the review is produced which includes comments and recommendations. A summary of the review for the fluconazole submission was not produced by Dr. Chander nor by Dr. Joshi because they were in the discussion stage and were expecting further instructions from the Division Chief or the Director.

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The meeting took place from 10:00 a.m. to 11:30 a.m. and the list of concerns was produced that day. That afternoon Dr. Joshi was in Dr. Chander's office going over the list when they were visited by two other reviewers present at the early meeting: Drs. Gadd and Khan. According to Dr. Joshi, both Dr. Gadd and Dr. Khan would not listen to any of the concerns and were badgering him about his list. Dr. Joshi stated that neither Dr. Gadd nor Dr. Khan had raised any problems with Dr. Joshi's concerns about fluconazole in the early morning meeting. Dr. Joshi stated that by badgering he meant that when he pointed to some of the scientific evidence, he felt that Drs. Gadd and Khan were not listening and almost trying not to understand. Drs. Gadd and Khan suddenly walked out of the office and walked toward Dr. Johnson's office.

Much of the cross-examination of Dr. Joshi on the subject of the fluconazole matter pertained to the science of the concerns. On cross-examination Dr. Joshi agreed that on one of the protocols, Drs. Gadd and Khan had received medical opinion and had information for Dr. Joshi. Dr. Joshi pointed out that it was not clear what information Drs. Khan and Gadd had provided to the medical expert and Dr. Joshi was not therefore instantly satisfied. The respondent provided no evidence of any science that directly refuted the concerns. Many of the concerns in the list were not the subject of cross-examination. Each complainant vigorously responded to each scientific challenge that was raised on cross-examination.

After that morning meeting, there was no further discussion about any of the thirteen concerns in the memo and Drs. Joshi and Chander were not involved further in evaluating the fluconazole submission.



Dr. Valadares was notified that the position of Division Chief was to be "rotated" and on April 1, 1989 Dr. Valadares was replaced in this position by Dr. Gadd.

Dr. Chander's PREA was signed by Dr. Johnson on April 12, 1989 and his rating was confirmed as fully satisfactory. Dr. Johnson made the written comment on the PREA:

"Dr. Chander has been seconded to the Bureau of Human Prescription Drugs as a drug evaluator. He has completed all the reviews given to him within the timeframe and as a BI2---I consider his performance to be FULLY SATISFACTORY"

Dr. Joshi's PREA was signed the same date but Dr. Johnson recommended a "satisfactory" rating instead of "fully satisfactory" with the comment:

"Dr. Joshi has worked in the Bureau of Human Prescription Drugs for one year. He has completed the review of all submissions within the timeframe allowed. Unfortunately, I have had reason to question the clinical relevance of some of his comments on INDs"

Dr. Joshi commented on the employee remarks section that the only IND of which Dr. Johnson had direct knowledge was fluconazole and for that IND

Dr. Joshi had not made clinical comments.

Dr. Joshi requested a meeting to discuss his PREA with Dr. Johnson. That meeting took place around May 12, 1989. Present at that meeting were Dr. Johnson and Dr. Brill-Edwards. Dr. Joshi tried to clear up the matter and pointed out to Dr. Johnson and Dr. Brill-Edwards that he could back up his concerns about the fluconazole submission scientifically but according to Dr. Joshi, he was told by Dr. Johnson in reference to his concerns about the drug submission: "these people are going to die anyway." Dr. Joshi also spoke to Dr. Johnson at that meeting about the upcoming job competition and was informed: "You are a candidate in the internal competition for BI-04 and we will select the candidate who can best work with Dr. Ed Gadd and Ed Gadd likes them and thats it."

Dr. Joshi testified that Dr. Kapitany informed him that a few days before this conversation with Dr. Joshi, Dr. Kapitany had had a conversation with Dr. Gadd. Dr. Kapitany said, according to Dr. Joshi, that Dr. Gadd said: "these two browns will not be in."

Dr. Joshi testified that he contacted the union representative Michael Ryan, to seek advice after being given information that he wouldn't "get in". Mr. Ryan advised Dr. Joshi to proceed to the interview and deal with the downgrading of his PREA after the interview.

It also came to Dr. Chander's attention just prior to the interview that he and Dr. Joshi would not be selected at the competition. He heard this from both Dr. Kapitany and Dr. Joshi. He could not remember Dr. Kapitany's words but he remembered that Dr. Kapitany was interested in Dr. Chander's future prospects so that Dr. Kapitany had spoken with the new Acting Chief, Dr. Gadd about Dr. Chander's prospects. Dr. Kapitany said he was not hopeful of Dr. Chander's chances. After that, Dr. Joshi told Dr. Chander that Bob (Kapitany) had told him Dr. Gadd said: "those two browns won't be selected." Dr. Chander decided despite this information to simply concentrate his energies on performing well at the job interview.

Dr. Kapitany testified under subpoena by the Commission. Dr. Kapitany is a scientist who worked at the Bureau of Medical Devices in 1983 for eighteen months with Dr. Chander and then was hired by I and I in a BI-04 position. He stated that his work in the two positions was "similar in the sense that I was reviewing medical device submissions in the Bureau of Medical Devices and in the Division of Infection and Immunology I was reviewing anti-infective submissions."

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Dr. Kapitany recalled that he had a very brief discussion with Dr. Gadd about the professional composition of the Division. He recalled Dr. Gadd asking him, "are these the kind of people we wish to have in the Division?", and he assumed that Dr. Gadd was referring to Drs. Chander and Joshi because he couldn't think of anyone else Dr. Gadd was referring to. Dr. Kapitany did not think that the conversation had anything to do with the job competition at all but was a general discussion. Dr. Kapitany also believed that the reference was that the composition of I and I should be changed to include qualified infectious diseases specialists, qualified physicians and paediatricians.

Dr. Kapitany did not recall reporting to Dr. Joshi that Dr. Gadd said: "these two browns will not be in". Dr. Kapitany did not have a specific recollection of having said: "you two will not be in", but he was unable to deny making that statement. Dr. Kapitany was pessimistic about the complainant's chances and he was sure he made that clear to them prior to the job interview but testified that his pessimism was likely due to the general discussion he had had with Dr. Gadd. This explanation for his pessimism is inconsistent with the evidence. The competition notice did not

seek physicians; Dr. Valadares was looking for virologists and was happy to hire the complainants only a year before; and Dr. Kapitany's job experience was remarkably similar to Dr. Chander. We did not believe that Drs. Gadd and Kapitany were discussing the composition of I and I without discussing the upcoming job competition. We did not believe that Dr. Gadd was discussing with Dr. Kapitany changing the composition of I and I to reflect persons with qualifications Dr. Kapitany did not possess.

Dr. Kapitany showed obvious signs of being under a great deal of emotional stress. He was called as a witness by the Commission and stated that he felt he had been abused and threatened by Commission counsel. He attended at the hearing with his own lawyer who made submissions to us about his attendance and about the manner in which he was being questioned. Through counsel Dr. Kapitany made it clear and then testified without being asked that he did not wish to avoid being a witness at the hearing in any way, but that he felt he was being pressured to testify in a certain manner, namely in a manner helpful to the Commission. He went on to testify that upon receipt of his subpoena that he telephoned Dr. Chander and asked Dr. Chander to think about the consequences to Dr. Kapitany's career if he was required to testify.

The Commission and the respondent made a great deal of Dr. Kapitany's evidence on the two statements which Dr. Kapitany allegedly repeated to Dr. Joshi. The respondent argued that without corroboration of the statement including the word "browns", there was nothing to connect these complaints with race. The Commission argued that Dr. Kapitany did not deny either statement and that this was somehow evidence that either statement or both statements were made by Dr. Gadd.

The respondent argued that Dr. Joshi is an incredible witness because Dr. Kapitany did not recall making the statement, "these two browns will not be in" to Dr. Joshi. The respondent also argued that Dr. Joshi did not repeat the identical statement to Michael Ryan or to the Canadian Human

Rights Investigator. Dr. Joshi stated that he did repeat the identical statement to the Investigator and he did repeat the identical statement to Michael Ryan. We find that each complainant heard prior to the job interview that he would not succeed in the job competition.

The job interview was held on May 30, 1989 at a suite in a local hotel. The interview was conducted by Drs. Johnson, Gadd, Khan and Krupa. Dr. Chander was interviewed first with his interview scheduled for 9:00 a.m. and Dr. Joshi's interview scheduled for 10:30 a.m.

Dr. Chander's interview lasted from approximately 9:30 a.m. until 11:00 a.m. All four members of the selection board took part in the interview by asking questions in turn. Some questions were read from a prepared question sheet and others were supplemental questions. Dr. Chander observed that the only selection board member taking notes was Dr. Johnson. Dr. Chander recalled that Dr. Johnson left the sitting room area to speak on the phone while Dr. Chander was answering a question from Dr. Khan. Dr. Chander received a written letter signed by Dan Demers and dated May 30, 1989 which read:

"...the Selection Board has determined that none of the candidates have qualified for the position"

and he received that letter a couple of days after the interview.

Dr. Joshi's interview lasted from approximately 11:00 a.m. until 12:20 p.m. He was escorted to the interview room by Dr. Krupa who was escorting Dr. Chander from his interview. There was no time between the interviews for the four board members to discuss Dr. Chander's interview.

Dr. Joshi was asked questions by each member in turn and observed only Dr. Johnson taking notes. During Dr. Joshi's interview, Dr. Johnson was required to take more than one telephone call.

In the middle of Dr. Joshi's interview someone was heard fumbling at the door. Dr. Johnson answered the door and let in Dan Demers who went to the hotel room bedroom and remained there for the duration of the interview.

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Dr. Joshi received a letter dated May 30, 1989 signed by Dan Demers identical to the letter received by Dr. Chander. Dr. Joshi believed he received the letter so quickly that it must have been mailed before May 30th.

Dr. Joshi returned immediately to work after the interview and noticed all four selection board members return before 1:30 p.m. Dr. Joshi testified that he had arrived back at work by 1:00 p.m. Dr. Joshi worked with Dr. Khan all afternoon on their joint presentation to the upcoming AIDS conference. The evidence of the complainants is that the four board members could not have been together for more than thirty minutes to discuss the two interviews. The respondent offered no evidence about the conduct of the interviews or the length of time available to discuss the interviews. We find as a fact that the four selection board members were

together to discuss the two interviews for a maximum period of one-half hour.

After the results of the job competition were known, Michael Ryan, on June 6, 1989 attended at the office of the respondent and informed the available representative at the respondent that in Michael Ryan's view Drs. Chander and Joshi should be made permanent without competition because the process might have been tainted with racism. Mr. Ryan indicated that in the alternative he would be considering a Public Service Investigation for abuse of authority and a complaint to the Commission.

Two days later, on June 8, 1989, Dr. Joshi received a letter from Dr. Johnson which informed him that his term employment would end June 10, 1989. The following day Dr. Joshi was asked for his keys and I.D. card.

On June 9, 1989 Dr. Joshi filed a grievance with respect to the downgrading of his PREA by Dr. Johnson. That grievance was allowed by Dr. Johnson at the first step. Dr. Johnson's comments were deleted from Dr. Joshi's PREA and his rating was returned to fully satisfactory.

On June 13, 1989 Dr. Joshi made a statement to the Commission and on June 15, 1989 Drs. Chander and Joshi sent a joint letter to the Public Service Commission. This letter set out their position that they were the victims of subtle racial discrimination and requested an investigation.

Dr. Chander continued to work at I and I until July, 1989 and he met with Dr. Johnson to ask about his secondment. He was told that as his secondment was up in July, he would be going back to his home bureau. At Medical Devices there was a term employee replacing Dr. Chander and that term employee had three more months left to work until the end of the term. Despite the I and I backlog Dr. Johnson ended Dr. Chander's secondment and agreed to pay the Medical Devices Division three months salary for the replacement employee.

During the rest of the summer and early Fall, Mr. Ryan assisted the complainants in the search for information and during that search events which form a part of the circumstantial evidence occurred. We found the manner of Mr. Ryan to be forthright and sincere. This witness was an

important witness for the Commission because he confirmed that the response from the respondent to the challenge by the union representative and to the complainants was evasive at best.

Mr. Ryan telephoned the staff relations representative for the respondent and then followed up his call with a letter on June 26, 1989 requesting, among other items, the notes of each selection board member taken during the interviews of the complainants. He did not get the information and he arranged a meeting on July 27, 1989.

At that meeting in the presence of Dr. Chander, Dr. Khan, Dr. Johnson, a staff relations officer and others, Mr. Ryan was presented with information as to the marks assigned by the Board to Dr. Chander's answers at the interview. He was told that four sets of notes were taken at the interview, that exhaustive notes were placed on file but that Dr. Krupa had possession of the notes. He was informed that Dr. Krupa was out of the country until August but the notes would be available after his return.

A few days later Mr. Ryan wrote a confirming letter to the Public Service Commission Investigations Officer confirming the statements made that four sets of notes were taken during the interview and that exhaustive notes were in the possession of Dr. Krupa. He also confirmed the statement that Dr. Krupa had arranged for a typed candidate assessment sheet and that the typed candidate assessment sheet was based on consensus of the board members and the sheet was typed and signed on May 30, 1989. Dr. Chander eventually received one set of notes, being Dr. Johnson's notes and he received those notes from Access to Information (ATI). No notes other than those made available by ATI were presented as evidence and we have concluded that no selection board member other than Dr. Johnson bothered to take notes during either interview.

## RESPONDENT'S POSITION

At the conclusion of the Commission's presentation of the evidence, the respondent announced its intention to call no evidence taking the position that there was no case to answer. The respondent vigorously responded by argument through counsel to the complaints from the beginning until the end of the hearing. The respondent's response took the form of plain denial with no witness to provide direct evidence of explanation or different version of the facts.

The answer of the respondent to the facts presented by the Commission was set out in written submissions:

"It is submitted that the evidence led in this case does not lead to only a conclusion of discrimination. There is uncontradicted evidence of reasons why the complainants were not selected by the competition board or for their performance appraisal. For

example, the disagreement respecting the fluconazole submissions, their inability to communicate thoughts precisely, their lack of knowledge, and their evasiveness and tendency of making extreme

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and inconsistent allegations as displayed during cross-examination."

A consideration of these points follows:

1. the disagreement respecting the fluconazole submissions

The first possible inference from this event is that the thirteen concerns of the complainants about the drug submission were scientifically ridiculous. No evidence was led to show that the concerns were scientifically ridiculous.

The second possible inference was that the concerns of the complainants were nit-picking, meaning correct but so minor that given the need for the drug, the concerns were outrageous. There was insufficient evidence for us to decide whether the concerns were minor versus major because no scientific evidence was led to rebut the science of the complainants. Dr. Johnson's comment noted on Dr. Joshi's performance appraisal was not clear enough for us to establish that Dr. Johnson believed that Dr. Joshi was nit-picking. There was no similar comment made on Dr. Chander's performance appraisal in any event.

The third inference is that dispute about scientific opinion was not allowed. In fact, according to the evidence of Dr. Kapitany, differences of scientific opinion was good and common in the Division. There was no evidence that discussion or differences of scientific opinion about the fluconazole submission could delay the clinical trials of this important drug. The complainants were hired to perform the specific function of providing their scientific opinion and that is exactly what they did.

2. their inability to communicate thoughts precisely

We conducted our inquiry into the complaint of each complainant as a separate complaint heard simultaneously having common questions of fact. With respect to this explanation we found this explanation to be incredible and bordering on offensive. It was not apparent to us that either Dr. Chander or Dr. Joshi had any difficulty communicating his thoughts precisely. Dr. Chander received a glowing appraisal from Dr. Khan referred to above which included the statement: "Dr. Chander is attempting

to overcome his present inability to communicate his thoughts precisely on paper." There was no evidence that this two line sentence in an appraisal that concluded: "I recommend your serious consideration of Dr. Chander's candidacy for indeterminate employment with our Division" was considered when deciding whether to continue Dr. Chander's employment. In fact, it is clear that this appraisal was not considered.

### 3. their lack of knowledge

This was a very difficult argument for the respondent to make given that the complainants were employed by the respondent. The marks assigned to each complainant on the basis of the questions answered at the interview were low marks which constituted a fail grade. We are of the view that

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circumstantial evidence led by the Commission established that the interview process was subjective not objective. Although it appeared as if scientific questions were asked of the complainants, and it seemed that answers were set out which a candidate must answer and those answers were available to the interviewers for comparison, it's also true that only one person took notes at the interview and the analysis of the answers was subjective. It is clear from the PREAs of each complainant that their direct supervisor thought highly of their knowledge. Dr. Joshi passed an oral and written examination to begin work at I and I one year earlier and both complainants received performance recognition.

### 4. their evasiveness and tendency of making extreme and inconsistent allegations

A common theme running through cross-examination and argument by the respondent was that the complainants made allegations of discrimination loosely. This allegation was raised partly because the respondent argued that the allegation of discrimination was raised long after the decision not to continue to employ the complainants. The evidence does not show that at all. In fact, the complainants have proven that discrimination was an immediate perception.

We found the complainants credible. We did not believe that Dr. Chander made his allegation loosely and maintained that "loose" allegation over the past six years while working in a different division of the respondent Department. We generally found this part of the respondent's explanation unhelpful to the inquiry.



We find that Dr. Joshi was a credible witness who repeated the statement "those two browns will not get in" to Dr. Chander and repeated the statement "those two will not get in" to Mr. Ryan and to the Human Rights Investigator. Given Dr. Kapitany's problems with recall, we are not able to find simply on the basis of selective repetition that Dr. Joshi did not hear the word "browns" from Dr Kapitany. We find that Dr. Joshi did not raise the allegation of discrimination prior to the job interview because Mr. Ryan told him not to raise any issues.

We find that a statement to the effect that the complainants would not succeed in the job interview was made to them by Dr. Kapitany. We also find that Dr. Kapitany's statement was based on information Dr. Kapitany obtained which supports the allegations of the complainants and is unrelated to some conversation about the complainants being scientists rather than physicians.

## THE LAW

The purpose of the Act is set out in section 2:

"The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that every individual should have an equal opportunity with other individuals to make for himself or herself the life that he or

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she is able and wishes to have, consistent with his or her duties and obligations as a member of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability or conviction for an offence for which a pardon has been granted."

The complaints of Dr. Joshi and Dr. Chander were brought under section 7 of the Act:

"It is a discriminatory practice, directly or indirectly,

a) to refuse to employ or continue to employ any individual,  
or

b) in the course of employment, to differentiate adversely in relation to an employee,

on a prohibited ground of discrimination.

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In a case such as this the complainant must establish a prima facie case of discrimination. If the complainant establishes a prima facie case the evidentiary burden shifts to the respondent to establish a justification for discrimination. (Ontario Human Rights Commission v. Etobicoke, [1982] 1 S.C.R. 202 at 208.)

If the respondent does provide a reasonable explanation for otherwise discriminatory behaviour, the complainant then has the burden of showing that the explanation is merely pretext. (Basi v. Canadian National Railway Company, (1988) 9 C.H.R.R. D/5029.)

A Tribunal must carefully examine all of the circumstantial evidence. As was noted in Basi, there is rarely direct evidence of discrimination.

Discrimination is not a practice which one would expect to see displayed overtly. In fact, rarely are there cases where one can show by direct evidence that discrimination is purposely practised. (at D/5038)

The standard of proof in discrimination cases is the civil standard being a balance of probabilities. The test in cases involving circumstantial evidence may be formulated as follows:

an inference of discrimination may be drawn where the evidence offered in support of it renders such an inference more probable than the other possible inferences or hypotheses. (B. Vizkelety, Proving Discrimination in Canada (1987) at 142.)

It is well established that complainants need not prove that discrimination was the only factor influencing the conduct which is the subject of the complaint. It is sufficient that a complainant prove that discrimination is a factor in the conduct. (Basi)

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A prima facie case is one which covers the allegations made and if the allegations are believed is complete and sufficient to justify a finding in

favour of the complainants in the absence of an answer from the respondent. (Ontario Human Rights Commission and O'Malley v. Simpson-Sears Limited, [1985] 2 S.C.R. 536 at 558.

In *Shakes v. Rex Pak Ltd.* (1982), 3 C.H.R.R. D/1001 the prima facie case was described as follows:

In an employment complaint, the Commission usually establishes a prima facie case by proving:

- a) that the complainant was qualified for the particular employment;
- b) that the complainant was not hired; and,
- c) that someone no better qualified but lacking the distinguishing feature which is the gravamen of the human rights complaint subsequently obtained the position.

In *Israeli v. Canadian Human Rights and Public Service Commission*, (1983), 4 C.H.R.R.D/1616, proving the prima facie case was described as requiring proof:

- a) that the complainant belongs to one of the groups which are subject to discrimination under the Act, e.g., religious, handicapped or racial groups;
- b) that the complainant applied and was qualified for a job the employer wished to fill;
- c) that, although qualified, the complainant was rejected; and
- d) that, thereafter, the employer continued to seek applicants with the complainant's qualifications.

The respondent argued that the Commission failed to prove part (c) of the prima facie case as set out in *Shakes*. Then the respondent specifically argued that it is "not, therefore, for the respondent to start off by showing that the person who was chosen was more qualified, not without some evidence from the complainant showing that the person who was chosen was not as qualified,..." The respondent argued that the Commission must prove that the persons hired to replace Dr. Joshi and Dr. Chander were no better qualified and could have done so by calling one of the selection board members to give evidence.

The evidence is that there were no other candidates to compare to Drs. Joshi and Chander. Dr. Joshi and Dr. Chander competed in the closed or

internal competition and were the only two candidates for positions in that competition. The complainants were qualified for the position sought and after notifying the complainants by letter dated the day of the interview that they were not qualified, the respondent went on to interview

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candidates with the same qualifications as the complainants in an open or external competition. Drs. Joshi and Chander were not compared with the open competition candidates.

No evidence was led by either side as to who was hired instead of Drs. Chander and Joshi. All we know is that the successful candidates very likely had impressive academic qualifications because the job competition called for scientists who had achieved superior academic credentials as in the case of each complainant. Dr. Joshi stated that he thought that someone who started working in I and I after Dr. Joshi was not chosen might have been a member of a visible minority group. We did not dismiss this information despite how sketchy it was. We accepted that it was very likely that important professionals one or even more of whom might have been visible minority group members, replaced the complainants.

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## CONCLUSION

A prima facie case cannot be defined in every employment situation as exactly as the test in either Israeli or Shakes . In this case, the complainants were essentially competing for promotion as opposed to competing for the chance to join the respondent. The complainants were first refused promotion and then refused continued employment. In Dr. Chander's case, the respondent refused him continued employment in I and I.

We conclude that ample evidence was provided to establish a prima facie case of discrimination. Each complainant was qualified for the job but neither were hired. The respondent continued to seek applicants with the qualifications presented by the complainants. The complainants were subjected to differential treatment in their work concerning the fluconazole submission. The decision not to hire the complainants was made prior to the job interviews, the job interviews were subjective and perfunctory and the respondent's representatives later lied about the conduct of the interviews to the union. The job interviews were not real

and the respondent showed bias toward the complainants after the job interviews.

No reasonable explanation was provided by the respondent. The explanations which were provided are inconsistent with the evidence. The complainants have made out a prima facie case which

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has not been rebutted by the respondent.

We are satisfied that the reasons for the conduct of the respondent toward each complainant included discrimination on the grounds of the complainants' race, colour and national or ethnic origin.

The Tribunal retains the jurisdiction to decide the issue of remedy. The Tribunal Registry will contact all parties and schedule a date for the hearing on the issue of remedy.

Dated this 6th day of November, 1995.

JANET ELLIS

Dr. SUBHAS RAMCHARAN

CANADIAN HUMAN RIGHTS ACT  
R.S.C., 1985, c. H-6

HUMAN RIGHTS TRIBUNAL

BETWEEN:

SATISH CHANDER  
NARENDRA NATH JOSHI

Complainants

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

DEPARTMENT OF NATIONAL HEALTH AND WELFARE

Respondent

DISSENTING OPINION BY KEITH NORTON, Q.C.

I have had the opportunity to read the decision of my colleagues and I am in substantial agreement with respect to both the facts and the applicable law in this case. I shall, therefore, avoid being repetitious, and refer only to the facts and law necessary to illustrate where and how I come to a different conclusion.

This is a particularly difficult case. As has often been observed, the type of discrimination alleged in these complaints is rarely practised in our society in an overt way - thus one must look carefully at the circumstances and come to a conclusion based upon very subtle indicators. In this instance, it is made more difficult, in my opinion, by the fact that there are two alternative explanations which must be weighed in coming to a conclusion.

It is understandable that the complainants, when faced with the circumstances of this case - both being highly qualified scientists; both being of the same racial and ethnic background; both having performed for some time essentially the very job for which they were applying; and both being denied the positions for which they competed under very unusual conditions - would question whether the decision to deny them the positions resulted from discrimination based upon the prohibited grounds alleged.

A finding would have been simpler if there had been any independent corroboration of the one piece of evidence suggesting an overt indication of such discrimination - namely, the statement attributed to Dr. Gadd allegedly reported by Dr. Kapitan to Dr. Joshi that "those two browns" won't be selected.

Dr. Joshi's recollection was that he had reported this to the union representative, Mr. Michael Ryan, and the investigator from the Commission.

However, Dr. Kapitany was unable to recall any such statement; Michael Ryan had no recollection of such words being reported; and there was no indication that any such report was made to the Commission until much later.

If the remark had been of a less flagrant and offensive nature, I could imagine that time might have obliterated the memory. However, given the highly offensive nature and the fact that it would be key evidence suggesting race or colour as a factor in the hiring environment, I find it difficult to believe that the person reporting it, Dr. Kapitany, a friend of the complainants, and the union representative who already suspected race as a factor, would have no recollection. On the contrary, I would expect that to be entirely memorable.

Thus, I can only conclude that any evidence of such a statement is of no value in making a finding in this case. I do however, have no difficulty in finding on the evidence presented that Dr. Kapitany did report to Dr. Joshi that he was not optimistic about their chances of success in the job competition.

Anyone reviewing the evidence of the conduct of the job competition and more particularly the interview process, could only conclude that the complainants were treated unfairly and in a discriminatory manner. It is shocking that in what they would have the public believe is a highly

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professional public service, senior public servants would conduct an employment interview while the chairman interrupts to accept telephone calls, permits a person not involved in the interview to walk into the area distracting those involved, and fails to maintain adequate records of the interview.

At the very least, such conduct suggests that the process was not being treated seriously. It also leads easily to the conclusion that the decision not to hire the two complainants had already been made prior to the interviews and that the process was merely perfunctory.

This then begs the question, why? Was this discriminatory treatment a result of the race, colour or ethnic origin of the complainants as they believe or was it for some other reason?

The evidence indicates that prior to the meeting on March 23, 1989, at which the drug fluconazole was discussed, the complainants' employment

record was almost exemplary. There is also no evidence of and no suggestion of any racial tension or any differential treatment.

In fact, as summarized in the decision of my colleagues, the appraisals of the work performance of the complainants were very positive. When, in an effort to address the problem of the backlog, the Bureau Director, Dr. Johnson called upon the "most experienced and reliable evaluators" to take on special overtime assignments, Drs. Chander and Joshi were selected.

All indications were that during that period they were on track for "indeterminate" or permanent employment within the Division.

Then occurred the "fluconazole" meeting on March 23, 1989. My view of the evidence is that this was not just a polite, professional meeting of highly skilled scientists gathered to discuss the progress of the review of the submissions on what was regarded as a very important drug in the fight against AIDS.

The meeting was pursuant to a schedule established by the Director, Dr. Johnson, to expedite the process of review of critically important submissions. He had taken this step under circumstances where the whole Branch was under tremendous pressure to address the problem and make new drugs available without delay. In the evidence of one witness, the news media was constantly on the issue.

At this meeting the Complainants raised concerns - largely clinical in nature - about the drug as a result of their literature review. Whatever the exchange in the meeting, Drs. Joshi and Chander went back to the office and found it necessary to prepare a memo setting out their concerns in writing. This seems to suggest that they did not regard the matters resolved at that point.

When Drs. Gadd and Khan visited them later the same day in what appears to have been an effort to change their views, clearly tempers

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flared. Dr. Joshi testified that he shouted or raised his voice - attributing it to a mild diabetes problem.

In any event, Drs. Gadd and Khan left abruptly and headed to the office of the Director, Dr. Johnson.

From that day onward, things did change.



On April 12, 1989, the performance reviews of the complainants were completed by the Director. Dr. Johnson for the first time in writing questioned the "clinical relevance" of Dr. Joshi's comments on his reviews. It was also after the fluconazole meeting that Dr. Kapitan reported his pessimism about their chances of succeeding in the job competition.

From that point onward the complainants became more concerned that they were targeted not to succeed in the competition and began to take action.

It is possible that the decision to rotate Dr. Valadares out of the position of acting chief was related. It was known that he was very supportive of the complainants and if a decision had been made for any reason to make sure that they did not succeed in the competition, removing him from the equation could help to engineer that result.

The overall evidence is strongly suggestive of a conspiracy to get the complainants out of the Division. Given that this is a case of a complaint of covert discrimination, in the absence of any evidence of an alternative explanation, race, colour and ethnic origin are obvious candidates. My colleagues deal with this aspect of the case very thoroughly.

However, I find that the pivotal incident in this case is the dispute over fluconazole on March 23, 1989. As indicated above, prior to that incident, there was no suggestion of the slightest problem - the complainants were respected for their professional performance and appeared to be headed towards permanent employment in the Division.

However well founded the concerns they raised that day, one might speculate that, in the intensely pressurized work environment, they were seen as frustrating the efforts of others to expedite the review process of very important AIDS drugs. Tempers flared, angry words were exchanged and the whole attitude towards the complainants altered.

I agree with my colleagues application of the test in *Shakes v. Rex Pak Ltd.* (1982), 3 C.H.R.R.D/1001. However, that decision does go on to describe the shift in onus as follows at p. D/1002, para. 8918:

"...If these elements are proved, there is an evidentiary onus on the respondent to provide an explanation of events equally consistent with the conclusion that discrimination on the basis prohibited by the Code is not the correct explanation for what occurred. If the respondent does proffer an equally consistent explanation, the complaint of discrimination must fail for the onus of proving discrimination ultimately rests on the

Commission."

In this case, the respondent elected to call no evidence, which is their right. This did not make the work of the Tribunal any easier.

However, I find that it was not necessary for them to call evidence since the equally consistent explanation - the fluconazole incident - was already in evidence through the testimony of the complainants and their witnesses. While testimony from others present at the meetings that day, and involved in subsequent decisions and events would have been helpful in providing a more complete picture, it was not essential.

I find that it is much more probable that the events giving rise to these complaints were a direct result of the conflict and anger which arose from the fluconazole incident than discrimination based on a prohibited ground of race, colour, ethnic or national origin or religion.

For these reasons I would dismiss the complaints.

DATED this 2nd day of November, 1995.

Keith C. Norton