

T.D. 20/93  
Decision rendered on October 29, 1993

CANADIAN HUMAN RIGHTS ACT  
R.S.C. 1985, c. H-6 (as amended)

HUMAN RIGHTS TRIBUNAL

BETWEEN:

SHAINUL KAMANI

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

CANADA POST CORPORATION

Respondent

DECISION OF TRIBUNAL

TRIBUNAL:

Sidney N. Lederman, Q.C.  
Chairman

APPEARANCES:

Odette Lalumiere  
Counsel for Canadian Human Rights Commission

Zygmunt Machelak  
Counsel for Canada Post Corporation

DATES & PLACE April 13 and 14, 1993 - Ottawa, Ontario  
OF HEARING: August 11, 12 and 13, 1993 - Toronto, Ontario

NATURE OF THE COMPLAINT

The Complainant, Shainul Kamani, was forced to resign from her position as a secretary with the Respondent, Canada Post, on June 5, 1987 by the Director of Finance and Administration, Maurice Bruce. The Complainant filed a Complaint with the Canadian Human Rights Commission as a result thereof.

The grounds upon which the Complainant initially alleged discriminatory conduct against Canada Post and Maurice Bruce were quite different from those which were advanced before this Tribunal. On March 1,

1988 she signed a Complaint in which she alleged that she was terminated from her employment by the Respondent because of sex discrimination in that she was let go because she was pregnant. On January 16, 1989, the Complaint was amended to include the additional ground of disability, attributing the termination of employment to the fact that she had sustained a back injury. On August 18, 1989, the Complaint was further amended to also assert discrimination on the grounds of race, colour and national or ethnic origin in contravention of sections 7 and 14 of the Canadian Human Rights Act. At the outset of the hearing, the grounds of sex and disability were abandoned and thus only the allegation of racial discrimination was put forth.

- 2 -

## BACKGROUND FACTS

The Complainant was born in Tanzania and immigrated to Canada in 1975. After working as a legal secretary for a time, she commenced employment with Canada Post in 1982 and had advanced to the Secretary 2 level (known in its abbreviated form as "Scy 2".) As such, she performed general secretarial services for approximately five managers and supervisors, and when necessary, filled in as the secretary for the Director of Finance and Administration. Maurice Bruce ("Bruce") became the Director in August 1985. The Complainant worked as his secretary when his regular secretary, Nancy Kemp, was absent. Usually, these occasions were for short periods of time and she apparently had a good working relationship with him.

However, after she had substituted for Ms. Kemp for a period of three weeks in October and November, 1986, she was advised by Bruce that he had received several complaints about her performance. Since the Complainant was filling in for a higher level secretary, she would be entitled to the higher rate of pay only so long as her work performance was satisfactory and an acting pay authorization was signed by her supervisor. Bruce, however, declined to sign her acting pay authorization until her work was reviewed by his regular secretary.

- 3 -

The Complainant testified that she felt that thereafter Bruce was always watching her.

On January 23, 1987, there was a further review of the Complainant's job performance by Bruce. He was critical of her poor proof reading of letters, her use of the telephone for personal reasons and her excessive absenteeism.

On February 4, 1987, Bruce wrote to the Complainant reiterating the criticisms and indicating that she would have sixty days to improve or otherwise face termination.

On February 18, 1987, the Complainant wrote to Bruce and attempted to respond to his criticisms. She stated that she had not

received complaints from her managers directly; that any proof reading problems had arisen because of the high volume of work assigned to her; and that there had been some improvement in her attendance record.

Earlier, on January 31, 1987, the Complainant had injured herself at work and was unable to work on a full-time basis thereafter. She worked intermittently over the next two months and returned to work part-time on April 6, 1987. On that date Bruce called her in and said her new supervisor would be Allen Hanlon and he would be monitoring her job performance.

- 4 -

On June 5, 1987, the Complainant was called to a meeting with Bruce and Hanlon at which she was told that since there had been no improvement, she would either have to resign or be fired. She signed a letter of resignation and took the severance package that had been offered to her.

#### REASON FOR DISMISAL

A significant amount of the evidence was directed towards the competence of the Complainant as a Scy. 2. There is no question that she had a work performance problem which stretched back to 1985 and continued up until the time of her termination. Her performance was never satisfactory either working at the level of Scy. 2 or while filling in as a Scy. 3. Moreover, the criticisms of her work performance were not limited to Bruce. The other managers for whom she worked on a more regular basis (namely, John Freeman, John Adams, Len Gilmore and Roy Baxter) all testified that they had complaints about her work, particularly her inability to manage her time and to determine the priority of work, her typing competence and the degree of socializing and personal calls that she engaged in. Not only did they have these criticisms but they spoke to her on various occasions about these matters. Moreover, both Len Gilmore and Roy Baxter testified that they would not hire the Complainant as their secretary today.

There seems to have been an abject failure on the part of the Complainant to acknowledge that there was a work performance problem not

- 5 -

only experienced by Bruce but also by virtually everyone for whom she did work. When she was dismissed, she felt the blame had to lie elsewhere - namely, that it must have been because she was pregnant or alternatively because she had suffered a back injury. These were the grounds that formed the basis of her first complaints but the Commission did not feel an inquiry into these matters was warranted.

Race did not become an issue in this matter until the Commission investigator, Linda Visser (Mariconda), made it one. The Complainant herself had not raised the question of racial discrimination

until Ms. Mariconda suggested it. Ms. Mariconda testified that she acknowledged that the Complainant was not a fully satisfactory employee. However, the reason that Ms. Mariconda suspected that the Complainant was terminated because of her race was based on a selective interpretation of events that occurred within the Finance Department. She noted that a number of visible minority employees had left the Finance Department and that suggested to her that Bruce was on some sort of campaign to cleanse the Department of visible minorities. Eight names were suggested to the investigator by the Complainant as visible minorities who were dismissed by Bruce. The investigator interviewed four of them namely, Messrs. John Freeman, John Adams, Peter Wright and Ted Santos. Three of those individuals testified before this Tribunal.

With respect to John Adams, it was apparent there were a number of factors which gave rise to his departure. There was a clear difference of

- 6 -

opinion between Bruce and Adams about reporting lines. Adams thought he should be able to by-pass Bruce and report directly to head office in Ottawa notwithstanding that the organizational restructuring required him to report to a manager and in turn to Bruce. Adams' work performance was below standard and it was obvious that he did not fit in well with the new team approach that was being taken within the Department. The evidence was that there was an amicable parting of the ways and that Adams chose the incentive buy-out package that was offered to him. Adams also testified that his preference at the time was to resign since he thought that his state of unemployment would assist him in a pending divorce dispute with his wife. Most significantly, Adams testified that although Bruce may not have liked him, Bruce never exhibited any racial discrimination towards him. Adams stated that race was not a ground for his leaving the Department.

Adams was able to testify about the Complainant's work performance as she did most of his work for a period of time and he effectively supervised her prior to his leaving Canada Post. He stated that when she first worked for him, her work was not of good quality and that she committed too many errors. In addition, there were problems with her punctuality in that she would arrive late in the morning. He was also critical of her absenteeism and the fact that she spent too much time reading books. He noted that others including Bruce also observed these problems. He, however, felt there was some improvement particularly with respect to typing errors at the time that he left Canada Post.

- 7 -

Peter Wright also gave testimony. He spoke very complimentary of Bruce and their working relationship within the Finance Department. He chose to move on to another position because he felt his job was getting too administrative and he wanted to develop experience in the internal audit area. His testimony was unequivocal to the effect that he left of his own free volition and that race never played any role in this decision. Ms. Mariconda interviewed Wright and he specifically told

her that he had been one of Bruce's favourite employees and that he left the job of his own accord because it was becoming too administrative. Ms. Mariconda ignored Wright's remarks and chose to be influenced by her own preconceived view of the circumstances.

John Freeman also testified that although there were differences in style between himself and Bruce, he never for a moment thought that race posed a problem. His reasons for resigning and accepting the buy-out package were personal to him and were not motivated in any way by any racial animus towards him. He thought that he was more suited to working in a manufacturing rather than a service industry. As for the Complainant, Freeman stated that the quality of her work was average but thought that she had a problem with her time management skills. He made this criticism in her formal appraisal dated April 19, 1985 and had spoken to her about this informally as well.

Ted Santos did not testify but the evidence of other witnesses indicated that the sole reason for his dismissal was his inappropriate display of

- 8 -

temper and threatening behaviour towards his immediate supervisor. Ms. Mariconda learned of Santos' temper and threats but did not investigate this issue to determine whether this was the real reason for his dismissal.

Therefore, when the allegation that other visible minorities were terminated because of their race or colour was examined, it was shown to be of no substance.

So what remains of the Commission's case that the termination of the Complainant was based on race? Apparently, two factors are said to demonstrate differentiation in treatment towards the Complainant:

(1) It is alleged that Bruce treated the Complainant differently than he did Nancy Kemp with respect to the bereavement leaves that they both took because of the unfortunate deaths of their fathers. They apparently both took one month off to deal with their respective situations and yet it was only the Complainant who was criticized for excessive absenteeism.

The evidence indicates that there is a solid basis for the distinction. Nancy Kemp testified that there were a number of deaths in her family in the course of that one year and in total she took one month off including various single days to take her father to the hospital or to deal with a particular emergency that had arisen. She did not take one month off in a block. Moreover, she obtained permission on each occasion to take the time

- 9 -

off and her supervisors knew at all times the reason for her absence and when she would be returning. On the other hand, the Complainant took one month off in a block. More importantly, neither Bruce nor Kemp was aware

of the fact that she had departed for this reason; nor did she leave word as to how long she would be gone. The Complainant did testify that she had so advised Ed Caswell, one of her managers, who did not testify because he has since passed away. What is clear though is that neither Ed Caswell nor the Complainant advised anyone else of these matters. It is highly unlikely that Caswell would not have informed any of the other managers about the absence of their secretary. Furthermore, a secretary was not in a position to take her leave and then merely advise her supervisor of what she was doing. It required permission in advance and the Complainant never sought it.

(2) Commission counsel attempted to make something of the fact that the person who replaced the Complainant was another visible minority, Judith Samuels, who apparently left her position in the Finance Department two years later. The suggestion that is made is that perhaps she was forced out because she was a visible minority. Ms. Samuels did not testify so it is difficult to assess why it is that she left. In any event, there was evidence that Ms. Samuels' position had been abolished as a result of organizational changes across the country in Canada Post and Ms. Samuels was retained as long as possible so that she would have the opportunity to take the incentive financial buy-out that was offered to her and which she ultimately accepted. More importantly, the issue is not the reason for Ms. Samuels' departure. What is

- 10 -

of note is that Bruce authorized the hiring of Ms. Samuels in the first place, i.e. he replaced one visible minority with another. If Bruce was trying to rid the Finance Department of minorities as the Commission suggests, why would he have hired Ms. Samuels?

Accordingly, there is nothing to the allegation being made that the Complainant was terminated because of race, colour or national or ethnic origin. The allegation has been shown to be totally specious.

This case for the most part took on the characteristics of a wrongful dismissal case. Much evidence was adduced as to the question of the competence of the Complainant as a secretary. It is not the jurisdiction of this Tribunal nor indeed of the Commission to determine whether an employee was terminated for just cause or not. It became very obvious that the Complainant obviously took issue with the criticisms that have been advanced against her, but there is just no basis for the suggestion that she was discriminated against because of racial or ethnic grounds.

It is appreciated that in other cases there is often a subtle scent of discrimination and it is only in the examination of the totality of circumstantial evidence by a Tribunal that discrimination can be discerned. Nevertheless, there has not been any circumstantial evidence which could remotely give rise to even a hint of discrimination on the part of Bruce. In fact, other indicia suggest quite the opposite:

(a) Bruce had the power to prevent the Complainant from filling in as his secretary on numerous instances but never did;

(b) He signed the Complainant's acting pay authorization on the first occasion she worked for him. Only when Kemp left for a lengthy period in October/November 1986 and came back and reported on the Complainant's poor work performance did Bruce refuse to sign the acting pay authorization at that time;

(c) He hired another visible minority person to replace the Complainant;

(d) Other minority employees who have since left the Department testified that they perceived no racial discrimination emanating from Bruce. Moreover, under his stewardship the percentage of visible minorities in the Finance Department increased from 40% (a substantially high number in its own right) to 55%. There are probably few work forces in the country that have such a high percentage of visible minority employees.

- 12 -

(e) Ms. Mariconda acknowledged in her evidence that the statement in the Complaint to the effect that Bruce was the first and only person to criticize the Complainant's work performance was not true since a number of supervisors made critical comments to the Complainant prior to Bruce's action.

Bruce's actions were most reasonable in the circumstances. When faults were found in the Complainant's performance, informal criticisms were made to her so as not to cause a serious blemish to her record. She was advised of the miscues in the hope that they would not be repeated. Only when she failed to recognize the seriousness of those comments was a more formal mechanism put into place. The Complainant was formally advised that her performance was below standard after she had filled in for Ms. Kemp and her acting pay authorization was denied by Bruce. At that time, Bruce gave her two and one-half months to improve.

When no improvement occurred, an interview was held in January of 1987 and she was given another sixty days to demonstrate improvement. Because she had suffered an injury to her back and was absent from work, the time period did not commence until she had returned to work on a part-time basis. Thereafter, since there had been no significant improvement during the sixty-day period, she was let go. There was nothing sinister about this pattern of events. Indeed, if Bruce was the racist that the Commission has portrayed him to be, he would have used every

- 13 -

pretext to dismiss the Complainant at an early point rather than giving her ample opportunity to show improvement in her work performance. She chose not to take the opportunity to improve during any of those periods and accordingly, Bruce's actions were completely justified.

For all of these reasons, the Complaint is dismissed.

## ROLE OF THE COMMISSION IN ASSESSING THE COMPLAINT

It is unfortunate that these serious allegations have been hanging over the heads of Bruce and of Canada Post for the last five years. Any diligent review of this case would have led to a conclusion that none of the prohibited grounds in the Canadian Human Rights Act played a part in the dismissal of the Complainant from her employment. The Commission failed to make out even a prima facie case or anything close to it at the hearing. Why wasn't this case weeded out either by the Commission or at a later stage by Commission counsel in preparation for the hearing?

The Commission has a positive obligation under section 41 (d) of the Canadian Human Rights Act not to deal with a complaint if it appears to the Commission that the complaint is trivial, frivolous, vexatious or made in bad faith. On the receipt of a report from its investigator, the Commission has a mandatory duty under section 44(3)(b) of the Canadian Human Rights Act to dismiss the complaint if it is satisfied that having regard to all the

- 14 -

circumstances of the complaint, an inquiry into the complaint is not warranted or that the complaint should be dismissed on any ground mentioned in sections 41 (c) to (e).

The role of the Canadian Human Rights Commission in exercising its discretion to refer a complaint to a Tribunal was considered in *Syndicat des employes de production du Quebec et de l'Acadie v. Canada* (Human Rights Comm.) (1990), 11 C.H.R.R. D/1. There, the Supreme Court of Canada was concerned with the question of whether the Canadian Human Rights Commission was making a judicial or quasi-judicial decision in deciding to dismiss a complaint. In considering the role of the Commission in this respect, Sopinka J. stated at D/1 3 that:

"Section 36(3) [now s. 44(3)] provides for two alternative courses of action upon receipt of the report... The other course of action is to dismiss the complaint. In my opinion, it is the intention of s. 36(3)(b) that this occur where there is insufficient evidence to warrant appointment of a tribunal under s. 39. It is not intended that this be a determination where the evidence be weighed as in a judicial proceeding but rather the Commission must determine whether there is a reasonable basis in the evidence for proceeding to the next stage." (emphasis added)

A proper and diligent review of the evidence in the instant case should have led to the conclusion that there was no reasonable basis for sending this case on to a Tribunal. Moreover, the duty of the Commission to

- 15 -

scrutinize the evidence does not end with a review of the investigator's report.

There is a continuing duty to assess whether a Tribunal hearing is warranted.

In *Pham v. Beach Industries Ltd.* (1987) 8 C.H.R.R.D/4008 this on going role of the Commission was stated by the Board in an Ontario case as follows:

"It should be noted ... that the Commission does have an obligation to assess complaints when they are made, during the course of investigating them, and as the result of that investigation, in order to determine whether there are grounds for the exercise of discretion under section 33 of the [Ontario Human Rights] Code to "decide to not deal with the complaint.'

This duty of human rights commissions continues even into the hearing stage. This was explored in *Nimako v. Canadian National Hotels* (1987), 8 C.H.R.R. D/3985 (Ontario Board of Inquiry). There, the complainant alleged that he had been dismissed from his position with the respondent on the basis of his race. The respondent's position was that the complaint was dismissed because he was unable to fulfil the requirements of the job, and tendered evidence to this effect. The Board found the respondent's evidence more credible than that put forth by the complainant, and dismissed the complaint. It is important to note that the Board did not feel that the Commission acted in bad faith, nor that the complaint was trivial or vexatious. Nonetheless, the Board was of the opinion that the investigation into the

- 16 -

complaint was inadequate, and offered the following words as to the Commission's role in putting forth complaints:

"...it seems to me that a point may be reached in the course of a hearing at which it is apparent to the Commission that the complaint is indeed trivial, frivolous, vexatious, or pursued by the complainant in bad faith. If that were so (and I do not mean to suggest that it was so in this case), then I should think that it would be possible for the Commission to exercise its discretion under section 33(1)(b) of the 1981 Code in such circumstances. Surely, the discretion 'not to deal with the complaint' includes the discretion to withdraw it at any stage. subject to the complainant's right to have that decision reconsidered, and subject to the approval of the Board appointed to hear and decide the matter. If, for instance, the complainant's bad faith became apparent to the Commission only after the hearing had commenced, surely the Commission is not required to proceed inexorably to pursue what it to be a specious claim," (emphasis added)

The Commission has extraordinary powers and must exercise those powers responsibly in the public interest. The mere making of an allegation of racial discrimination against an individual and a corporation is disparaging and adversely affects their reputation. The harm is

obviously greater when those allegations continue over a span of five years. There is an obligation on the Commission to review with care the evidence which gives rise to the allegation of racial discrimination at all stages of the process.

When confronted with the fact that there was not a scintilla of evidence to support the Commission's case, Commission's counsel response

- 17 -

was: "I agree that there is not much." This is not an acceptable position given the power and responsibility of the Commission and of Commission counsel.

When it became apparent to counsel that the investigator had without justification refused to accept what the witnesses had said to her both about the Complainant's lack of competence and their own working relationship with Bruce, it should have been obvious that there was just no probative evidence to substantiate the Complaint. The circumstances did not warrant an inquiry and the Commission should not have pursued this matter to the bitter end. It is unfortunate that there is no jurisdiction under the Canadian Human Rights Act for a Tribunal to impose costs against the Commission upon a dismissal of the Complaint for this would have been an appropriate case to do so.

DATED THIS 30th DAY OF SEPTEMBER 1993.

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SIDNEY N. LEDERMAN  
CHAIRMAN