

**CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN  
DES DROITS DE LA PERSONNE**

**ROGER VIRK**

**Complainant**

**- and -**

**CANADIAN HUMAN RIGHTS COMMISSION**

**Commission**

**- and -**

**BELL CANADA (ONTARIO)**

**Respondent**

**REASONS FOR DECISION**

MEMBER: Pierre Deschamps

2005 CHRT 2  
2005/01/20

**I. INTRODUCTION**

[1] The Tribunal is called upon to decide if Bell Canada discriminated against the complainant, Mr. Roger Virk, in the course of his employment at Bell on the ground of national or ethnic origin, contrary to section 7 of the *Canadian Human Rights Act*. The Tribunal is also asked to decide if the complainant was the object of retaliation on the part of Bell Canada, contrary to section 14.1 of the *Act*.

[2] Mr. Virk alleges that Bell Canada, in general, and Mr. Ted Weich, in particular, discriminated against him in January 2002 by not confirming him as

manager on the Globe and Mail project because he is of South Asian descent and that Mr. Penno Makdessian retaliated against him, at the end of 2003, by terminating his employment because he had filed a human rights complaint.

[3] At the hearing, the complainant was not represented by counsel. The respondent was. The Commission did not appear. Three witnesses were heard: the complainant, Mr. Virk, as well as Mr. Ted Weich and Mr. Penno Makdessian, for the Respondent.

[4] Mr. Weich testified that he was made aware of Mr. Virk's human rights complaint by Ms. Incognito, Bell's Industrial Relations Director, on May 9, 2002. As for Mr. Makdessian, he testified that he learned about the complaint in January 2003.

## **II. BACKGROUND**

### **A. Mr. Virk's employment history at Bell prior to the Globe and Mail project**

[5] Mr. Virk started working at Bell Canada on October 12, 1993 as a Direct Marketing Sales Associate. Before joining Bell, Mr. Virk worked as a district supervisor for an electronics retail store chain.

[6] On July 7, 1995, Mr. Virk advanced to a support associate function. Subsequently, he was promoted to the position of a support supervisor (Senior Associate 8). As of January 9, 1998, this designation was changed to that of Resource Associate.

[7] In December 1998, Mr. Ted Weich became Associate Director for the Vendor Management Team that is part of the Direct Marketing Centre (DMC). At the time, Mr. Virk was a Resource Associate with the Vendor Management Team. The Vendor Management Team was composed of Mr. Weich, three Sales Managers and five Resource Associates who reported to the Sales Managers. Resource Associates are unionized employees. Sales Managers are management employees.

[8] The record shows that Mr. Virk was at the time and until he left Bell Canada covered by the CTEA Clerical collective agreement as opposed to the CTEA Sales collective agreement. The record also shows that in the Direct Marketing Centre, there are two types of unionized employees that can be promoted, clerical employees, under the Clerical Collective Agreement, and sales employees, under the Sales Collective Agreement.

[9] According to the evidence, clerical employees, such as Resource Associates and Associates are mainly support functions. Sales employees, such as Direct Marketing Associates, are telemarketers. Mr. Virk testified that all Resource Associates are former Direct Marketing Associates and that he had been in the past a Direct Marketing Associate.

[10] On May 2, 2000, a canvass for a DMC Strategic Partnering Manager CP-2 was posted. Mr. Virk applied for the position. In an e-mail sent to Mr. Weich a few days before sending in his application, Mr. Virk raised his concern about a possible perception on Mr. Weich's part that he might not have the required sales background and skills for the management position. In his e-mail, Mr. Virk highlighted his past sales and management experience at Bell as well as prior to joining Bell.

[11] Mr. John Chung, a confirmed Sales Manager in the Direct Marketing Centre, was selected for the job. According to Mr. Weich, better candidates than Mr. Virk applied for the job.

[12] The evidence shows that in the course of his employment at Bell, Mr. Virk held a few acting assignments. What constitutes an acting assignment is specified in Exhibit R-1.

[13] An acting assignment is when an employee assumes the responsibilities of a higher position requiring greater professional responsibility and competence. A typical example of this is when an employee replaces another employee (on a higher position) who is on maternity/ parental leave. If the assignment is not of a temporary nature, the employee should be promoted to the position. According to Exhibit R-1, acting assignments are used when the assignment is for more than three weeks.

[14] Asked to explain the purpose of acting assignments in the case of unionized employees, Mr. Weich stated that the purpose is to fulfill a need of the required business unit, that in most cases those given an acting position are individuals identified as having the potential to move in their career development. Mr. Weich testified that the people asked to fill an acting position will normally be selected by the person in charge of a particular business unit depending on the needs of that particular unit.

[15] According to Mr. Weich, an acting assignment will vary in time depending on the needs of the business unit. In his testimony, Mr. Virk acknowledged that acting assignments are quite frequent in the Direct Marketing Centre, that they can be from anywhere between a few days to a few months and that they provide unionized employees with an opportunity to get experience in a management role.

[16] For his part, Mr. Makdessian testified that acting assignments can last up to 14 months, that people are put into acting positions based on the business need of that moment and that in the event the business needs change, the employee goes back to his substantive position. According to Mr. Makdessian, it is very common for employees holding an acting assignment to revert to their substantive position at the end of the assignment.

[17] Asked how frequent it is for employees to revert to their substantive position after an acting assignment versus being confirmed right away as a manager, Mr. Weich stated that there is no formal policy that exists at Bell, that it all depends on the needs of a particular business unit. Furthermore, Mr. Weich stated that he knew of no policy existing at Bell to confirm acting managers after a specific period of time. He acknowledged, however, in his testimony that an acting manager is a potential confirmed manager.

[18] For his part, Mr. Virk acknowledged that once an acting assignment is over, it is not unusual in usual circumstances for the unionized employee to revert to his former position. However, Mr. Virk holds the view that, in his case, it was rather odd, extremely odd.

[19] The evidence shows that, in July 2001, Mr. Virk got an acting assignment as a Sales Manager in the Consumer section of the Direct Marketing Centre and another one in September 2001. This last acting assignment did not entail the supervision of any staff. According to Mr. Virk, this position involved working with an improvement process with the reporting section that looked after the reports and the revenue capturing of the entire Direct Marketing Centre.

#### **B. Mr. Virk's employment history in relation to the Globe and Mail project**

[20] The evidence shows that in July 2001, the Globe and Mail approached Bell to set up a call centre to solicit potential Globe and Mail subscribers. A first meeting was held in August 2001 with the Globe and Mail people. The decision was made to set up the call centre within the Vendor Management Group in the Direct Marketing Centre because of its expertise in that area. Mr. Ted Weich took charge of the project.

[21] Under the terms of the agreement reached with the Globe and Mail, the latter would provide Bell Canada with calling lists of approximately 135 000 to 150 000 phone numbers per month. Bell Canada was to be paid on a per contact basis. Initially, the Globe and Mail project was considered a pilot project that was to last two months.

[22] The months of September and October 2001 were spent on setting up the project, which started in November 2001. The evidence shows that Mr. Weich was instrumental in creating the infrastructure for the Globe and Mail project. In his testimony, Mr. Virk acknowledged that Mr. Weich was involved in launching the Globe and Mail project, that he was in fact the one who put it together.

[23] According to Mr. Weich, temporary employees and not permanent employees were hired for the project because of the restructuring that was going on at that time at Bell Canada. The number of employees hired ranged from twelve to fourteen.

[24] In October 2001, Mr. Virk was offered by Mr. Weich, his supervisor, an acting management position on the Globe and Mail project. There was no posting for the position. Mr. Virk accepted the offer and became the acting manager on the project effective October 22, 2001. The evidence shows that Mr. Virk was to report to Mr. Weich.

[25] Asked to explain why he decided to choose an acting manager for the project rather than a confirmed manager, Mr. Weich stated that because it was a trial, he thought that an acting manager would be best. Asked to explain why he chose Mr. Virk, Mr. Weich stated that it was because he wanted to provide Mr. Virk with an opportunity to develop his skills given the fact that Mr. Virk had expressed in the past his desire to have management opportunities for his own development and growth.

[26] Asked how much time he spent on the Globe and Mail project during the months of September, October, November and December 2001, Mr. Weich testified that the Globe and Mail project consumed about 80 percent of his time during the first two months and probably between 60 and 65 percent of his time in the months of November and December 2001.

[27] In his testimony, Mr. Weich acknowledged that Mr. Virk played a role in the setting up of the Globe and Mail project, notably in setting up some of the workstations, in making sure the configuration was working and in participating in conference calls.

[28] According to Mr. Weich, Mr. Virk's role on the Globe and Mail project was to maintain the activities on the floor, participate in group meetings and prepare reports. Mr. Virk listed as part of his functions managing potential subscribers' lists, liaising with other groups, setting up the computers. Mr. Weich acknowledged in his testimony that on the Globe and Mail project, Mr. Virk assumed more responsibilities than a Sales Manager in the Direct Marketing Centre would ordinarily have.

[29] The evidence shows that Mr. Virk saw himself, and not Mr. Weich, as the project manager. In his testimony, Mr. Weich strongly disputed the allegation made by Mr. Virk that he, not Mr. Weich, was the project manager. Mr. Virk did however acknowledge in his testimony that Mr. Weich was the architect of the project.

[30] On this point, the evidence clearly shows that, during the months of November and December 2001, Mr. Virk was at all times the acting Sales Manager on the Globe and Mail project, that Mr. Weich remained the project manager and that it was under his supervision and direction that Mr. Virk worked.

[31] On November 30, 2001, Mr. Virk was informed by Mr. Weich that a reorganization was being implemented in his group (Vendor Management) effective January 1, 2002 and that starting January 2, 2002, the project would fall under Mr. Charlie Latino's group (Consumer Sales). The evidence shows that on that day, Mr. Weich told Mr. Virk that, as of January 1, 2002, he would remain on the Globe and Mail project but would revert to his status of Resource Associate, replacing Mr. Simon Shim as Resource Associate on the project.

[32] Asked to explain the reason of this transfer, Mr. Weich stated that given the content of the project and what was involved, it had been decided that it fitted better under Mr. Latino's group.

[33] In his testimony, Mr. Virk stated that Mr. Weich told him that the decision to revert him back to his Resource Associate position was in no way related to his performance. According to Mr. Weich, Mr. Virk never expressed at the time the desire to leave the Globe and Mail project once he had been told that he would be going back to his Resource Associate status or to be assigned to another position in the Vendor Management Group.

[34] The evidence shows that Mr. Weich also informed Mr. Virk that a confirmed manager from the Consumer Group would become the manager of the Globe and Mail project as of January 1, 2002, that person being Mr. Penno Makdessian. Mr. Virk was to stay on the project to provide assistance to Mr. Makdessian.

[35] According to Mr. Weich, given the fact that Mr. Latino would be taking over the project as of January 1, 2002, the decision to choose Mr. Makdessian was that of Mr. Latino and not his even though the decision was made in November 2001. Mr. Weich testified that his opinion was sought by Mr. Latino.

[36] Asked to explain why Mr. Virk was sent back to his Resource Associate position effective January 1, 2002, Mr. Weich offered the following explanation: since the project was going under Mr. Latino's organization and since the

company was rightsizing its operations in the Direct Marketing Centre and some Sales Managers stood to lose their jobs while employees like Mr. Virk were not confronted with that prospect since they were going back to their previously held position, the decision was made to bring a confirmed Sales Manager from the consumer floor to manage the project. According to Mr. Weich, this was a sound business decision and had nothing to do with Mr. Virk's performance on the Globe and Mail project.

[37] According to the evidence, rightsizing entails the elimination of certain positions within an organization or a department, positions that the organization or the department can do without.

[38] In his testimony, Mr. Weich stated that even though an organization is rightsizing, it will still fill jobs that it considers a crucial part of the operations of the organization. Thus, it is not unusual for an organization to canvass a specific job in those circumstances to replace the departing incumbent. Mr. Virk acknowledged in his testimony that it was normal for an organization to fill a key position, a position that the company cannot do without, when an incumbent leaves this position vacant even if the company is in a rightsizing mode.

[39] The evidence shows that, in December 2001, a canvass for a Sales Manager in the Business Unit in the Direct Marketing Centre was posted when the confirmed Sales Manager who held that position left.

[40] Asked to explain why the Direct Marketing Centre was hiring while the company was rightsizing, Mr. Weich stated that this Sales Manager position was a crucial part of the operations of the Business Unit and had to be filled by a confirmed Sales Manager because of the high level of expertise required. The person chosen was a confirmed Sales Manager from the Consumer Direct Marketing Centre.

[41] Finally, at the November 30, 2001 meeting, Mr. Weich told Mr. Virk that because of the right sizing that was taking place in the company, there would be no more acting manager assignments as of November 2001.

[42] Asked to explain that decision, Mr. Weich stated in his testimony that at the time, the priority was given to securing the jobs of confirmed Sales Managers who faced the possibility of losing their jobs in a rightsizing environment before giving out acting assignments. Time and again, Mr. Weich stated that when a confirmed manager stands to lose his job, the company will try to protect that person's job. Thus, it will terminate an acting manager's assignment, however good his performance is, so as to secure a confirmed manager's job knowing that the acting manager will go back to his previous unionized job.

[43] Mr. Virk testified that, at first, he believed the explanation provided to him by Mr. Weich as to why he was being replaced as acting manager on the Globe and Mail project. His feelings changed, according to his testimony, when he saw in mid-December that two unionized employees had been given acting manager assignments as of January 2, 2002, Ms. Debbie Vieira and Mr. Ernesto Imbrogno. Both were Direct Marketing Associates in the Consumer group of the Direct Marketing Centre. Both were appointed acting Consumer Sales Manager.

[44] It is suggested by the evidence that Ms. Vieira got eight acting assignments in 2002 and that after each assignment, she reverted to her previously held position. In January 2003, she got a new acting management assignment and was eventually confirmed as manager. In his testimony, Mr. Virk acknowledged that it is logical for a person who has been on acting assignment to get confirmed in the position if the position becomes available for a promotion.

[45] As for Mr. Imbrogno, the evidence shows that at the end of the acting assignment referred to above, he reverted to his Direct Marketing Associate position.

[46] Asked to explain why Ms. Debbie Vieira and Mr. Ernesto Imbrogno, both Caucasian, were given acting assignments effective January 2, 2002, Mr. Weich stated that these occurred in the Consumer Division under Mr. Latino and that he was not aware of the reasons why these two acting assignments were given out. He, however, stated that, on November 30, 2001, when he met with Mr. Virk, the information he had at the time was that there would be no opportunities for acting managers.

[47] On December 6, 2001, Mr. Virk sent Mr. Weich a memo in which he expressed his disappointment in reverting to the position of a Resource Associate on the same project he had assisted in launching and managing from its inception. He stated in his e-mail that he would continue his ongoing support and assistance to the project but that given the circumstances, he would explore other opportunities within Bell in 2002.

[48] In his response to Mr. Virk's e-mail, Mr. Weich offered the latter his assistance to find another Resource Associate job within Bell. The evidence shows that Mr. Virk never asked for Mr. Weich's assistance.

[49] At the hearing, Mr. Virk alluded to the fact that, at the time, he had asked Mr. Weich to be moved back to the Vendor Management Team as a Resource Associate so as to have another person from the Vendor Management Team take over the Resource Associate position on the Globe and Mail project. According to



Mr. Virk, this would have saved him from a lot of anguish. Mr. Weich testified that Mr. Virk never expressed this desire.

[50] The evidence shows that the Globe and Mail project, as of January 1, 2002, was transferred from the Vendor Management Group to the Consumer Sales Group within the Direct Marketing Centre. The evidence also shows that Mr. Weich officially stopped being responsible for the Globe and Mail project as of January 1, 2002.

[51] As for Mr. Virk, on January 2, 2002, he resumed working on the Globe and Mail project, this time as a Resource Associate and not as acting manager. The evidence shows that Mr. Virk reported to Mr. Makdessian who in turn reported to Mr. Latino. Mr. Virk replaced Mr. Simon Shim who had been working on the Globe and Mail project as Resource Associate. Mr. Shim, according to Mr. Virk, was reassigned somewhere else.

[52] Asked what his involvement was with the Globe and Mail project after January 2, 2002, Mr. Weich stated in his testimony that he still provided advice to those in charge of the project for about three months given his knowledge and expertise. However, during that period, he had no involvement in the day-to-day activities that were handled by Mr. Makdessian and had no authority on the hiring process.

[53] In his testimony, Mr. Virk expressed the view that he did not think that Mr. Makdessian could do the job as well as he did. Mr. Virk alluded to the fact that when Mr. Makdessian took charge of the Globe and Mail project, he had no previous experience on the project. This fact was acknowledged by Mr. Makdessian who stated in his testimony that when he took charge of the project, he was not familiar with all of its aspects but learned as he went along.

[54] Asked to explain the context in which he joined the project, Mr. Makdessian indicated that in late November or early December 2001, he was informed by his Associate Director, Mr. Charlie Latino, that the strategy of the Consumer Sales Group in the Direct Marketing Centre for 2002 would change, that they would be doing less work and that this meant that there would be a reduction of the number of managers. According to Mr. Makdessian, Mr. Latino informed him of the rightsizing exercise that the company would be doing and that he would secure a position for him as a confirmed manager.

[55] Asked what happened to his former Sales Manager position in the Consumer Sales Group after he took over the Globe and Mail position, Mr. Makdessian stated that his former team was dismantled, that the employees on that team were

distributed to the remaining Sales Managers on the sales floor and that in fact his position was eliminated.

[56] In his testimony, Mr. Makdessian stated that when he took over the Globe and Mail project, Mr. Virk was a little bit disappointed at first and that he shared this disappointment with him. According to Mr. Makdessian, Mr. Virk assured him that he was going to give one hundred percent while he was there and would not let him down. Mr. Virk also informed Mr. Makdessian that he would probably be pursuing other opportunities within the Bell environment. Mr. Makdessian stated in his testimony that he offered to help Mr. Virk but that the latter never asked for his help.

[57] Asked to comment on how he advanced the Globe and Mail project, Mr. Makdessian testified that one of his achievements was to design and implement an Incentive and Recognition Program. He also stated that he brought with him a wealth of sales expertise that helped him coach his team.

[58] The evidence shows that Mr. Makdessian managed the Globe and Mail project from January 2, 2002 to April 25, 2002. According to Mr. Virk, during that period, the sales objectives were not met for every month.

[59] In April 2002, Mr. Makdessian became an Acting Senior Team Leader in the Consumer Sales Group in Mr. Charlie Latino's organization. This left the Sales Manager position on the Globe and Mail project vacant.

[60] In his new role as Senior Team Leader, Mr. Makdessian had responsibility for the Globe and Mail project as well as other projects. In his testimony, Mr. Makdessian acknowledged that as Senior Team Leader, he was less involved in the day-to-day management of the Globe and Mail project. He further acknowledged that when he stopped managing the Globe and Mail project, Mr. Virk was left to himself to manage the project.

[61] On April 25, 2002, an e-mail was sent out announcing that Mr. Virk would be acting Sales Manager on the Globe and Mail project as of April 23, 2002. The e-mail indicates that the assignment was scheduled to end on June 30, 2002. The evidence shows however that, at the end of June 2002, Mr. Virk's assignment was extended to October 3, 2002. The record shows that on April 25, 2002, Mr. Weich sent an e-mail to Mr. Virk congratulating him on his new acting assignment.

[62] Mr. Makdessian testified that it was Mr. Latino who made the decision to give the Sales Manager assignment to Mr. Virk. Mr. Makdessian stated in his testimony that he supported Mr. Latino's decision having worked with Mr. Virk since January.

[63] According to Mr. Makdessian, Mr. Virk was not given the Sales Manager position at the time but rather an acting assignment because he wanted to have the opportunity to observe Mr. Virk on a day-to-day basis, notably the leadership qualities he would be looking for in a Sales Manager.

[64] The evidence shows that in September 2002, Mr. Makdessian was confirmed in this role of Senior Team Leader that he held until September 2003 when he took on the role of Associate Director in the Sales Department for the Consumer Direct Marketing Centre in an acting capacity.

[65] For the period running from April 23, 2002 to October 3, 2002, Mr. Virk, as Acting Manager and Ms. Madeline Young, an Associate, were the only two people involved on a day-to-day basis on the Globe and Mail project. Mr. Virk testified that, during that period, he met all of his sales and contact objectives. This was confirmed by Mr. Makdessian in his testimony.

[66] At the end of the period, Mr. Virk reverted to his usual Resource Associate position and Mr. Ron Singh, a Confirmed Manager, who is of South Asian descent, was appointed to the Sales Manager position on the Globe and Mail project, a position which he held until October 2003 when the Globe and Mail project folded. Mr. Virk acknowledged in his testimony that Mr. Singh was like himself of South Asian descent. According to Mr. Virk, Mr. Singh was able to do the job properly.

[67] Asked why Mr. Singh, a confirmed manager, was preferred to Mr. Virk to manage the Globe and Mail project in October 2002, Mr. Makdessian explained that as the Globe and Mail project was evolving, the Globe partners were asking his group to have more aggressive sales targets; more complicated campaigns were on the horizon which required a lot of attention and detail.

[68] Mr. Makdessian stated in his testimony that in order to meet these needs, he preferred to go ahead with Mr. Ron Singh rather than Mr. Virk, being of the view that Mr. Singh was better suited than Mr. Virk to do the job because he had a strong sales background. According to Mr. Makdessian, it was Mr. Latino who made the decision after having solicited his advice.

[69] The evidence shows that, in August 2003, Mr. Virk got a new acting assignment on the Globe and Mail project, replacing Mr. Ron Singh as acting manager while the latter was on vacation. This assignment lasted until the end of October 2003.

[70] In October 2003, Mr. Makdessian's group received notification from the Globe partners that they were going to be dramatically reducing the call volumes,

by 50 percent in the month of November and 75 percent in the month of December.

[71] Considering the Globe and Mail's notification, Bell Canada reviewed the overall profitability of the relationship with its Globe partners and concluded that from a financial perspective, it did not make business sense to continue positioning the Globe and Mail, unless the Globe could guarantee a higher call volume and agree to set new prices per contact. As the Globe and Mail was not prepared to change the terms of the agreement, the decision was made to shut down the Globe and Mail project permanently.

[72] The evidence shows that the project shut down on October 31, 2003. Mr. Makdessian testified that the Globe and Mail people were shocked by the decision and asked if they could come back with a counter-offer.

[73] Asked to explain the announcement that went out on November 4, 2003 to the effect that the project would be shutting down for the remainder of 2003 rather than permanently, Mr. Makdessian stated that, given that the Globe and Mail people had said that they would come back with a counter-offer, Bell wanted to position itself in case the Globe and Mail did in fact come back with a counter-offer. Bell did not think at the time that the project would resume but was ready to leave the door open.

[74] On November 5, 2003, Mr. Penno Makdessian held a meeting with a number of Direct Marketing Centre employees to announce that, given the reorganization that was taking place at Bell, there would be some positions, in fact seven, that would be declared surplus.

[75] In attendance at the meeting, according to Mr. Makdessian, were three of the four First Call resolution employees, Mr. Virk, Ms. Young, Ms. Karen Anderson, as well as Ms. Anna Paolella from the Direct Marketing Centre and Ms. Sonia Bell, a union representative from the CTEA Sales bargaining unit. In his testimony, Mr. Virk was not able to recall precisely who was in attendance.

[76] The evidence shows that the people in attendance were told that the First Call Resolution function was going to be terminated as well as the Globe and Mail project. They were also told that the E-Contact position, which was a temporary position, held by Ms. Karen Anderson, was being declared surplus, its future being however uncertain. Contrary to the First Call Resolution and the Globe and Mail positions, which were being eliminated immediately, the company required someone to remain in the E-Contact position for the time being. Mr. Virk stated in his testimony that this meeting was a bombshell for him.

[77] According to Mr. Makdessian, those attending the November 5, 2003 meeting were told that all those having more than eight years of service had, under the collective agreement, the opportunity to exercise their displacement right and that if they wished to do so, they could contact the union or the management team to further get explanation on the displacement option. The CTEA Clerical and Associated Employees collective agreement specifically deals with the issue of displacement.

[78] The evidence shows that the employees were also told that they would have until November 12, 2003 to exercise their displacement right. This period was later extended to November 19, 2003. They were finally told that if they chose to exercise their displacement right, they would need to integrate into the chosen position within 21 days without any formal training.

[79] At the hearing, Mr. Virk was unable to recall Mr. Makdessian explaining to the employees present on November 5, 2003, that employees, such as himself, who had eight years of service or more, could use their displacement right on a position held by employees who had less than eight years, that employees had one week from November, 5, 2003 to exercise their displacement right and that if they wanted to exercise their displacement rights, they would have to advise their manager.

[80] The evidence shows that Mr. Virk could have displaced four Resource Associates, who had not been declared surplus, in the Vendor Management Group. In his testimony, Mr. Virk acknowledged that he had more service than these four individuals and that he would have been qualified to do their job. He, however, stated that it was never specifically put to him by Mr. Makdessian that he could have displaced them. In his testimony, Mr. Virk stated that had he known about this fact, he would have exercised his displacement right.

[81] The evidence shows that none of the employees declared surplus on November 5, 2003 did in fact exercise their displacement right. Asked to provide an explanation, Mr. Makdessian stated that it was not surprising given that a lot of people felt uncomfortable in putting somebody else out of a job. According to Mr. Makdessian, historically few employees had ever exercised their displacement right.

[82] After the November 5, 2003 meeting, Mr. Makdessian sent a letter to Mr. Virk confirming that his employment with Bell Canada would end on January 11, 2004. In the letter, Mr. Virk is informed of the opportunity for redeployment within Bell and apprised of the rules pertaining to salary continuance, benefits and pension plan, etc. The letter contains however no information on displacement rights.

[83] The evidence shows that on November 11, 2003, Mr. Makdessian met with Mr. Virk. In his testimony, Mr. Virk acknowledged that, in the course of the meeting, Mr. Makdessian reviewed with him the various options that he had, given the fact that he had been declared surplus. Mr. Virk also acknowledged that Mr. Makdessian inquired as to how his job search was progressing and told him that both he and Mr. Singh would be of assistance to him throughout this ordeal.

[84] Mr. Virk testified that, at the time, he informed Mr. Makdessian that he wished to look for other opportunities and that he had applied for a Resource Associate position in the Direct Marketing Centre Business group and was looking forward to a response. The evidence shows that he never received one.

[85] In his testimony, Mr. Makdessian stated that he identified to Mr. Virk that the E-Contact position, albeit temporary, was available and that he was qualified to move into that job if he so desired. According to Mr. Virk, the E-Contact job was the only job that Mr. Makdessian mentioned. Mr. Makdessian never spoke of Mr. Virk's displacement right with respect to the other Resource Associates of the Vendor Management Group.

[86] Mr. Makdessian testified that, at the meeting, Mr. Virk mentioned to him that he did not want to pursue the Resource Associate position in E-Contact further because it was temporary in nature. This is acknowledged by Mr. Virk. According to Mr. Makdessian, Mr. Virk was quite passionate about the fact that he would not feel comfortable pushing someone else out of a position.

[87] According to Mr. Makdessian, the surplus tag on the E-Contact position held by Ms. Anderson was removed after November 11, 2003. It appears from the evidence that Ms. Anderson had been able to convince both the respondent and the union that it made no sense to declare her position, albeit temporary, surplus given the fact that the position was not at that stage being eliminated. The status of Ms. Anderson was thus changed.

[88] Asked what impact this decision had on Ms. Anderson, Mr. Makdessian stated that it had a major impact on her for if Bell had not done so, she would have lost her job in January 2002. But given that no one was prepared to exercise his or her displacement right, the company and the union concluded that it was the fair thing to do to leave her in her temporary position. According to Mr. Makdessian, this decision was seen both by the respondent and the union as having no impact on other employees' displacement rights because any employee could still have exercised his displacement right regardless of that decision.

[89] Mr. Makdessian acknowledged in his testimony that he did not inform Mr. Virk of the removal of the surplus status on the E-Contact position held by Ms.

Anderson. Asked why he did not do so after November 11, 2003, Mr. Makdessian stated that the decision had no impact on Mr. Virk's status, that the latter still had the option, as did any employee having eight years of service, to exercise his displacement right if he chose to do so. Given the fact that Mr. Virk had made it clear to him that he would feel uncomfortable in doing so, Mr. Makdessian did not see any need to go back to Mr. Virk.

[90] The evidence shows that, on November 27, 2003, Mr. Virk approached Mr. Makdessian seeking to understand the rationale as to why Ms. Anderson's E-Contact job was no longer declared surplus. Mr. Makdessian explained to Mr. Virk that whether or not Ms. Anderson was declared surplus had no impact on his ability to transition into the Resource Associate role she held, a thing he could have done when the window of opportunity was available. In his testimony, Mr. Makdessian acknowledged that on November 27, 2003, it was too late for Mr. Virk to exercise his displacement right.

[91] Mr. Makdessian further explained to Mr. Virk that not declaring the E-Contact position as surplus did not in any way imply that the E-Contact role was permanent, the future of the E-Contact role still being uncertain at that point.

[92] The record shows that on December 4, 2003, Mr. Virk sent to Mr. Makdessian, as well as to Mr. Charlie Latino and Mr. Ron Singh, an e-mail regarding misinformation about the E-Contact surplus. On December 8, 2003, as well as on December 10 and 11, 2003, Mr. Makdessian tried to locate Mr. Virk without success.

[93] On December 11, 2003, Mr. Virk sent an e-mail to Mr. Makdessian indicating that he would be available to meet with him the following day. Mr. Makdessian confirmed that he was available.

[94] On December 12, 2003, Mr. Virk called Mr. Makdessian to inform him that he could not attend the meeting. A new meeting was scheduled for December 15, 2003. However, on the morning of December 15, 2003, Mr. Virk called Mr. Makdessian telling him that he was no longer available but that he might be able to meet with him on December 17, 2003.

[95] The record shows that, on December 12, 2003, Mr. Virk filed a grievance against the respondent alleging that its failure to give him correct information had resulted in him missing an opportunity to displace a more junior Resource Associate in the E-Contact Group.

[96] At the hearing, Mr. Virk acknowledged that he also filed a grievance against his union for having misrepresented him. Mr. Virk stated that he holds the union

partly responsible for not having informed him of the removal of the surplus tag on Ms. Anderson's position.

[97] On December 17, 2003, a meeting was held between Ms. Sonia Bell, a union representative from the CTEA, Mr. Makdessian and Mr. Virk to discuss the grievance regarding the company's failure to inform Mr. Virk of the change in surplus status for Ms. Anderson.

[98] The record shows that Ms. Bell explained to Mr. Makdessian that Mr. Virk felt misled about the company's position regarding the E-Contact position. According to Mr. Makdessian, Ms. Bell, who was not called as a witness, stated that had Mr. Virk been informed of the decision to remove the surplus tag on Ms. Anderson, Mr. Virk might have wanted to exercise his displacement right.

[99] Mr. Makdessian testified that he told Ms. Bell that removing the surplus tag from Karen Anderson did not influence Mr. Virk's ability to exercise his displacement right if he had chosen to do so. Nor did the removal of the tag change the temporary nature of the job.

[100] On December 23, 2003, Mr. Makdessian denied the grievance after meeting with Ms. Sonia Bell. Mr. Makdessian testified that with Ms. Bell, he went over the reasons as to why Mr. Virk wanted to displace Ms. Anderson, as well as what was said at the meeting held on November 5, 2003, a meeting attended by Ms. Bell. According to Mr. Makdessian, Ms. Bell fully agreed with what had been said by Mr. Makdessian at the meeting. The evidence shows that on January 13, 2004, Mr. Virk's grievance was presented to Ms. Maria Arpino and was denied.

[101] Mr. Virk's employment with Bell ended on January 11, 2004. The evidence shows that the status of the E-Contact position had not changed at the time of the hearing. It was still temporary.

[102] The Globe and Mail project resumed on February 1, 2004. Asked why the Globe and Mail project was revived in 2004, Mr. Makdessian testified that in January 2004, the Globe and Mail consultants contacted Ms. Arpino, saying that they wanted to re-open the issue of the price point. A meeting was held during which a new price point structure was proposed.

[103] According to Mr. Makdessian, the decision to revive the project was taken the same day or the day after the meeting. Asked to comment on why the project was so quick in running again in the latter part of January 2004, Mr. Makdessian stated that none of the applications had been removed given that no other project had been planned to replace it.



[104] The evidence shows that the resumption of the Globe and Mail project was accompanied by changes to the structure of the Globe and Mail team. The positions of Resource Associate held by Mr. Virk as well as that of Associate held by Ms. Young were abolished. A Team Coordinator position was created in order to assist the Sales Manager, Mr. Ron Singh who had previously been the Sales manager on the project. According to the evidence, Mr. Rakesh Sharma, already a team leader, was given the job. The evidence shows that the Team Coordinator position is one covered by the CTEA Sales Collective Agreement as opposed to the Clerical Collective Agreement that applied to Mr. Virk.

[105] Furthermore, a lot of the processes were streamlined and automated. According to Mr. Makdessian, a lot less administrative work was required with the new structure, the focus being put on coaching people to sales success. In this context, the position of Team Coordinator was more in tune with the new structure than that of Resource Associate.

### **III. ANALYSIS**

[106] There are two issues before the Tribunal. The first one pertains to the allegation that Mr. Virk was discriminated against by Bell in the course of employment through the acts of Mr. Weich on the ground that Mr. Virk is of South Asian descent (discrimination issue). The second one pertains to the allegation that Mr. Makdessian retaliated against Mr. Virk for filing his human rights complaint (retaliation issue).

[107] As for the first issue, Mr. Virk alleges that the discrimination occurred when he was demoted, as stated by Mr. Virk, from an Acting Manager position to his previously held Resource Associate position as of January 2, 2002 rather than being confirmed as a Sales Manager effective January 2, 2002, this occurring because he is of South Asian descent.

[108] In this regard, Mr. Virk seeks, amongst other things, that the respondent provide him with a management position based on his performance and on the opportunity that he had in January 2002 of becoming a manager. It is Mr. Virk's view that he was at the time ready for a management position, that he should have become then a confirmed manager. In support of his claim, Mr. Virk relies on the fact that two unionized employees who are Caucasian got acting assignments in January 2002 and were later confirmed as managers.

[109] As for the second issue, Mr. Virk's main allegation is that the retaliation occurred when he was not told by Mr. Makdessian that the employee who had been declared surplus, Ms. Karen Anderson, was no longer surplus as of mid-

November 2003. Mr. Virk also identified as an act of retaliation the fact that in November 2003, Mr. Makdessian never identified, apart from Ms. Karen Anderson, who the other Resource Associates were that he could have displaced. Mr. Virk went as far as saying that he considered as part of the retaliation events of 2002 leading to it without identifying these events.

## **A. THE DISCRIMINATION ISSUE**

[110] It is one thing to allege discrimination. It is another to prove it. Discrimination is generally subtle and thus often hard to prove. Still the person alleging discrimination in an employment context must present evidence that will bring a Tribunal to conclude that discrimination played a role in that person not getting a position.

[111] Here, Mr. Virk had the burden of proving that, on January 2, 2002, he was discriminated against because he is of South Asian descent. Mr. Virk had to prove facts that would lead the Tribunal to conclude that one of the reasons why he was not kept as a manager on the Globe and Mail project as of January 2, 2002 was because of his ethnic origin.

[112] To support his allegations that Mr. Weich discriminated against him, Mr. Virk referred to an array of situations, firstly, that Mr. Weich used South Asians only in support functions, secondly that most of the support staff in Mr. Weich's section is of South Asian origin and none of his managers are of South Asian descent, a fact that is highlighted by Exhibit R-4, thirdly that, since 1998, Mr. Weich never hired a South Asian as a manager and, fourthly that, in 1998, the only South Asian manager working when Mr. Weich joined the Vendor Management section left within a year.

[113] Mr. Virk also relied on an e-mail dated October 22, 2001 to show that all five Associate Directors whose names appear on the e-mail are Caucasian and that the managers were mainly Caucasian. Mr. Virk confirmed however that amongst the people he identified as Caucasian were people from Italian, Portuguese, Irish, Greek descent.

[114] To further buttress his allegation that Bell discriminated against him, Mr. Virk relied on the fact that Bell has failed to keep up with the changes relating to visible minorities in the Canadian workforce and that the people in the upper management in the Ontario Direct Marketing Centre Organization are all Caucasians.

[115] At the hearing, Mr. Weich strongly denied having discriminated against Mr. Virk in November 2001 because he is of South Asian descent. He acknowledged

that Mr. Virk did qualify to retain the Globe and Mail management position based on performance as of January 1, 2002. However, he stated that the sole reason why Mr. Virk reverted to his Resource Associate position in January 2002 was because it had been decided that the position of manager on the Globe and Mail project, in a context of rightsizing, should be filled by a confirmed manager so as to protect that person's job.

[116] In response to Mr. Virk's claim that Mr. Weich discriminated against him on January 2, 2002, the respondent relied, firstly, on the fact that Mr. Weich had, in the past, filled managerial positions within his group with people from visible minorities, secondly, that the composition of his group in March 2003 reflected a diversity of cultural backgrounds: Jamaican, Armenian, Indian, Afghan, South American, South Asian, Black, Arab, Mediterranean, Filipino, Asian. Thirdly, the respondent put in evidence a picture taken in the summer of 2003 of Mr. Weich's Vendor Management Team to illustrate its claim that the employees working in the Direct Marketing Centre came from different cultural backgrounds. At the hearing, Mr. Virk made the point that in the picture, there are three individuals of South Asian descent but none of them are Sales Managers. Mr. Weich acknowledged that fact in his testimony.

[117] Asked why he had not hired a person of South Asian descent as a manager from 1998 onward, Mr. Weich stated that when he is hiring, he is looking for the best possible candidate.

**(i) State of the law**

[118] In a human rights case, the burden of proof lies with the complainant. This said, the case law requires that the complainant, in order to be successful, imperatively make from the outset a *prima facie* case of discrimination.

[119] In *Lincoln v. Bay Ferries Ltd.*, [2004] F.C.J. No. 941, the Federal Court of Appeal stated that the decisions in *O'Malley v. Simpson Sears Ltd.*, [1985] 2 S.C.R. 536 and *Ontario (Human Rights Commission) v. Etobicoke (Borough)*, [1985] 2 S.C.R. 536, provide the basic guidance for what is required of a complainant to establish a *prima facie* case of discrimination under the *Canadian Human Rights Act*.

[120] According to *O'Malley*, a *prima facie* case is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a finding in the complainant's favour in the absence of an answer from the respondent. According to *Etobicoke*, once a complainant has established a *prima facie* case of discrimination, he is entitled to relief in the absence of a justification

by the respondent. The justification provided by the respondent must not be a mere pretext or a disguise for the respondent's otherwise discriminatory conduct.

[121] Thus, if the respondent is able to prove conclusively that the decision reached in relation to the complainant was not based on a prohibited ground of discrimination, the complaint must be dismissed.

[122] With respect to the establishment of a *prima facie* case of discrimination in an employment context, tribunals have generally referred to the *Shakes v. Rex Pak Limited*, (1981) 3 C.H.R.R. D/1001 and *Israeli v. Canadian Human Rights Commission and Public Service Commission*, (1983) 4 C.H.R.R. D/1001 decisions. In *Lincoln*, the Federal Court of Appeal stated, however, that the decisions in *Shakes* and *Israeli* are but illustrations of the application of the guidance referred to above.

[123] In the case at hand, the respondent is of the view that the complainant has failed to even make a *prima facie* case of discrimination and that if he did, the respondent provided an explanation which is not a mere pretext.

#### **(ii) Review of the evidence**

[124] The evidence shows that Mr. Virk strongly believed that he should have continued managing the Globe and Mail project on January 2, 2002 because of his skills and experience and given the fact that he was more qualified than the confirmed manager who replaced him. According to Mr. Virk, it would have made prudent business sense for Bell Canada to retain the most qualified employee as manager on the Globe and Mail project.

[125] Mr. Virk testified that he felt that, on January 2, 2002, all of his accomplishments and capabilities were overlooked, that he was deprived of immediate and future potential opportunities of being confirmed as a manager. The decision not to let him continue to manage the Globe and Mail project took away the prospect of his career growth as a manager at Bell Canada. The evidence shows that Mr. Virk found it humiliating and hurtful to go back to his Resource Associate position after having been Acting Manager.

[126] Time and again in the present proceedings, Mr. Virk referred to the fact that, on January 2, 2002, he was demoted from Acting Manager to Resource Associate on the Globe and Mail project and asserted that this demotion was related to the fact that he is of South Asian descent and not Caucasian.

[127] For example, in his complaint, Mr. Virk asserts that the respondent discriminated against him by **demoting** him, that he was told on November 30, 2001 by his Associate Director, Mr. Ted Weich, that he was going to be **demoted** from his position as acting manager and placed in a position of Resource Associate on the same project, that the **demotion** was not related to his performance, that his **demotion** would be effective January 1, 2002, and that he believed that he was **demoted** because of his national or ethnic origin. (Emphasis added)

[128] In his final submissions, Mr. Virk again reiterated that Bell Canada discriminated against him in the course of his employment on the grounds of national or ethnic origin, by demoting him contrary to section 7 of the *Act*. According to Mr. Virk, the only reason why he was demoted to a non-management Resource Associate position on January 2, 2002, was because of his national or ethnic origin, i.e. South Asian.

[129] Mr. Virk argued that the reasons provided by Bell to support its decision to return him to his unionized Resource Associate position on January 2, 2002 are implausible. According to Mr. Virk, at the time of his demotion, there was no rightsizing going on at Bell and acting managers were still being appointed. That confirmed managers were at risk of losing their jobs is strongly disputed by Mr. Virk.

[130] The Tribunal finds that the evidence does not support Mr. Virk's allegation that he was demoted on January 1, 2002. The evidence shows that Mr. Virk was given in October 2001 an acting manager position on the Globe and Mail project that ended when the Globe and Mail project was temporarily shut down in November 2001. The fact of reverting to one's previous unionized position cannot be interpreted by any stretch of the imagination as a demotion.

[131] On this point, the evidence clearly establishes that, at the time he was given an acting manager assignment on the Globe and Mail project, in November 2001, Mr. Virk was a Resource Associate in the Vendor Management Group of Mr. Ted Weich in the Direct Marketing Centre and a unionized employee governed by the CTEA Clerical and Associated Employees Collective Agreement.

[132] As the evidence shows, the fact of being given an acting assignment does not in itself guarantee that at the end of the assignment, the person will be confirmed as a manager.

[133] The Tribunal finds that Mr. Virk's acting manager assignment on the Globe and Mail project in the fall of 2002 was temporary in nature and that once the

acting assignment was over, it was not unusual, contrary to what Mr. Virk asserts, for him to revert to his former position, that of Resource Associate.

[134] The evidence shows that prior to his acting assignment on the Globe and Mail project, Mr. Virk had had only two other acting assignments, one of which was not in a managerial context. The evidence also suggests that Ms. Debbie Vieira had eight acting assignments in 2002 and only became a confirmed manager in 2003. Thus, no matter how many acting manager positions one has held in the past, being confirmed as a manager at the end of an acting assignment is not automatic.

[135] After a careful review of the evidence, the Tribunal finds that the respondent provided a reasonable explanation as to why Mr. Penno Makdessian, a confirmed manager, was asked to take over the Globe and Mail project in January 2002 and Mr. Virk's acting assignment was not extended beyond December 2001.

[136] The evidence shows that Mr. Makdessian had the sales experience that the job required, that given the impetus that Bell wanted to give to the Globe and Mail project, Mr. Makdessian was seen as the right candidate for the job. In addition, because of the rightsizing context prevailing in the Direct Marketing Centre, priority was given to confirmed managers in order to secure their job.

[137] The Tribunal shares the view that, in any organization, the employer has the right to determine which employee will be assigned to perform a certain job. Many elements can come into play when making such a decision. As stated in *Hill v. Air Canada*, 2003 CHRT 9, it is not the role of the Tribunal to fine-tune these kinds of decisions that are beyond its expertise. The role of the Tribunal is to inquire if the decision was in part based on a prohibited ground of discrimination.

[138] As to the representations made by Mr. Weich to Mr. Virk on November 30, 2001 that there would be no more acting managers or new manager assignments in his department as of November 2001 and the fact that two acting managers were subsequently appointed, given the evidence, the Tribunal cannot find or infer that Mr. Virk was not chosen because he is of South Asian descent or that he had been lied to by Mr. Weich.

[139] The fact of the matter is that in April 2002, Mr. Virk was given a new acting position on the Globe and Mail project that lasted until October 2002. He was again appointed acting Sales Manager on the project in August 2003.

[140] The fact that Mr. Weich has since 1998 never hired a person of South Asian descent as manager does not in itself prove or give rise to a presumption that Mr.

Weich is someone who discriminates against individuals of South Asian descent. As mentioned previously, asked by Mr. Virk why he had not hired a manager of South Asian descent since 1998, Mr. Weich answered that when he is hiring, he is looking for the best possible candidate for the job irrespective of the person's ethnic background.

[141] The evidence shows also that Mr. Weich has on his Vendor Management Team individuals of South Asian descent who do not seem to have complained of any discrimination on his part. No evidence to that effect was put before the Tribunal. In addition, the evidence shows that Mr. Singh, the confirmed manager in charge of the Globe and Mail project from October 2002 to August 2003 is of South Asian descent.

[142] That a list of names contains more names of people who are Caucasian (Italian, Portuguese, Irish, Spanish) than of any other ethnic origin, such as people from South Asian, African, Middle Eastern or Far Eastern descent, does not in itself give rise to an inference of discrimination against people having a specific cultural background.

[143] Nor does the fact that an organization such as Bell does not meet the national profile for the number of managers from visible minorities at large employed at Bell. This type of information will usually be useful to prove that the working environment supports an inference, based on the *prima facie* test, that there was, in all probability, discrimination.

[144] In any event, there is a further reason for dismissing Mr. Virk's discrimination complaint. Part of Mr. Virk's case is based on the fact that it is Mr. Weich who discriminated against him when, in January 2, 2002 he was reverted to his Resource Associate position and was not asked to continue managing the Globe and Mail project.

[145] The evidence shows that it was Mr. Latino who decided to hire Mr. Makdessian as Sales Manager on the Globe and Mail project in November 2001 and to revert Mr. Virk to his former Resource Associate position. Thus, the allegation made by Mr. Virk against Mr. Weich that the latter discriminated against him because he is of South Asian descent when he was not hired or confirmed as manager on the Globe and Mail project in January 2002 lacks any evidentiary basis.

[146] As stated above, a *prima facie* case is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a finding in the complainant's favour in the absence of an answer from the respondent.

[147] After having carefully reviewed the evidence, the Tribunal finds no basis for Mr. Virk's allegation that he was discriminated against when he was not confirmed as a manager or given a new acting manager assignment on the Globe and Mail project because he is of South Asian descent.

[148] The Tribunal finds that the explanation provided by the respondent as to why Mr. Virk was not confirmed as a manager in January 2002 on the Globe and Mail project is not pretextual but wholly credible in view of the evidence and that it cannot reasonably be inferred from the evidence that the failure to offer Mr. Virk a management position on the Globe and Mail project in the fall of 2001 was at least in part due to the fact that Mr. Virk is of South Asian descent.

[149] Hence, given the allegations found in Mr. Virk's complaint, the evidence and the criteria set out in *Etobicoke* and *O'Malley*, the explanation provided by the respondent, the Tribunal rules that Mr. Virk has not established a *prima facie* case of discrimination.

## **B. THE ISSUE OF RETALIATION**

[150] On March 5, 2004, Mr. Virk amended his complaint to allege that Bell Canada retaliated against him by terminating his employment for having filed a human rights complaint.

[151] In his amended complaint, Mr. Virk alleges that Bell brought an end in November 2003 to the Globe and Mail project to which he had been assigned and utilized this situation to disguise its retaliation against him.

[152] Mr. Virk blames Bell and, more specifically, Mr. Makdessian for having misled him when, firstly, the latter did not inform him that the surplus tag on Ms. Anderson's position, the E-Contact position, had been removed, thus preventing him from exercising his displacement right at the time. Mr. Virk also blames Mr. Makdessian for having failed to inform him that he could have displaced, in addition to Ms. Anderson, other Resource Associates with less seniority in the Vendor Management Group. Mr. Virk sees these failures as negligence as well as acts of retaliation on the part of Mr. Makdessian and states that had he been informed of these facts, he would have exercised his displacement right and would still be working at Bell Canada today.

[153] Mr. Makdessian strongly denies that he retaliated against Mr. Virk when he did not inform the latter of the change of status of the E-Contact position, being of the view that this information was not pertinent to the exercise of Mr. Virk's displacement right. Furthermore, repeatedly in his testimony, Mr. Makdessian stated that, given that Mr. Virk had clearly identified to him that he felt



uncomfortable in bumping anyone out of a position and was very emotional and passionate about it, he did not feel that it was pertinent for him to inform Mr. Virk of that change.

[154] On the whole, Bell denies having retaliated against Mr. Virk because the latter had brought a human rights complaint against it, that all the decisions that were taken in relation to the Globe and Mail project and Mr. Virk's employment at Bell were strictly business based.

**(i) State of the law**

[155] Under section 14.1 of the *Act*, it is a discriminatory practice for a person against whom a complaint has been filed under Part III, or any person acting on their behalf, to retaliate or threaten retaliation against the individual who filed the complaint or the alleged victim.

[156] Retaliation implies some form of willful conduct meant to harm or hurt the person who filed a human rights complaint for having filed the complaint. This view departs in part from those expressed in previous decisions of this Tribunal on the issue of retaliation (*Wong v. Royal Bank of Canada*, [2001] CHRT 11; *Bressette v. Kettle and Stony Point First Nation Band Council*, 2004 CHRT 40).

[157] In *Wong* and *Bressette*, the views expressed are to the effect that a complainant does not have to prove an intention to retaliate and that if a complainant *reasonably perceived* the impugned conduct by the respondent to be in retaliation to the human rights complaint, this could amount to retaliation quite apart from any proven intention of the respondent. (Italics added)

[158] The burden of proving retaliation rests with the complainant who must prove, on a balance of probabilities, that the person against whom he or she alleges retaliation knew of the existence of the complaint, that the person acted in an inopportune way and that the person's misbehaviour was motivated by the filing of a human rights complaint by the complainant. Retaliation being a form of discrimination under the *Act*, the same evidentiary burden should apply to allegations of discrimination and retaliation.

[159] Thus, proof on the part of the complainant that the person who is alleged to have retaliated knew of the existence of the complaint and that he or she acted in an inopportune way may give rise to a *prima facie* case of retaliation requiring the alleged retaliator to come forth with a reasonable explanation as to the reasons for his actions. If the explanation given is not credible, the Tribunal should find the allegation of retaliation substantiated.

## **(ii) Review of the evidence**

[160] In his testimony, Mr. Makdessian stated that he only became aware of Mr. Virk's complaint in January 2003. This statement was never proven false. The claim made by Mr. Virk that the retaliation started in 2002 must thus be dismissed. Thus remains to be examined events that took place after January 2003 which Mr. Virk considers as retaliatory measures.

[161] Firstly, Mr. Virk considers as an act of retaliation the fact the Mr. Makdessian did not inform him of the removal of the surplus tag on Ms. Karen Anderson's E-Contact position. The evidence indicates that the surplus tag on the E-Contact position was removed after November 11, 2003.

[162] There is undisputed evidence that Mr. Makdessian did not inform Mr. Virk of the removal of the surplus tag on the E-Contact position. Asked repeatedly why he had not convey that information to Mr. Virk, Mr. Makdessian stated that, given that Mr. Virk had clearly made it known to him previously that he felt uncomfortable in displacing a fellow employee, Mr. Makdessian saw no need to inform him of the change. Furthermore, Mr. Makdessian felt that the change of status had no bearing on Mr. Virk's right of displacement.

[163] The fact that Mr. Virk was not informed that Ms. Anderson's position was not being eliminated does not by itself prove retaliation on the part of the respondent. Given that the change in status of the position had no impact on Mr. Virk's right of displacement, the Tribunal finds that this fact did not constitute pertinent information in the circumstances. Had the evidence shown otherwise, an inference could have been drawn that this inopportune behaviour constituted retaliation on the part of Mr. Makdessian.

[164] Secondly, Mr. Virk considers as an act of retaliation the fact that Mr. Makdessian did not specifically advise him that he could displace four Resource Associates working in the Direct Marketing Centre, as well as Ms. Anderson.

[165] The evidence shows that on November 5, 2003, the people attending the meeting called by Mr. Makdessian were clearly informed of the displacement procedure and told that if they wanted details on the procedure, they could go see their Union Representative or their Manager.

[166] It however stems from the evidence that Mr. Makdessian never specifically identified to Mr. Virk the four Resource Associates within the Direct Marketing Centre that the latter could have displaced apart from Ms. Karen Anderson. Did Mr. Makdessian have to be that specific?

[167] The Tribunal finds that there is nothing in the evidence that indicates that Mr. Makdessian should have identified by name the individuals Mr. Virk could have displaced and that by not doing so Mr. Makdessian acted improperly and tried to mislead Mr. Virk with respect to his different options. It was open to Mr. Virk to enquire as to whom he could displace.

[168] Aware of the fact that he could lose his job, Mr. Virk should have sought from his union as well as management additional information as to the exercise of his displacement right. The fact of the matter is that Mr. Virk is blaming not only Bell Canada but also the CTEA for not having provided him with the information he felt was relevant to his decision whether to exercise his right of displacement and alleges negligence on their part. In this context, the Tribunal finds no wrongdoing on the part of Mr. Makdessian, let alone any form of retaliation.

[169] Hence, the Tribunal rules that the complainant has not conclusively, on a balance of probabilities, established a *prima facie* case of retaliation.

#### **IV. CONCLUSION**

[170] The Tribunal rules that the Complainant failed to establish a *prima facie* case of discrimination on the ground of ethnic origin and that, in any event, the respondent provided a reasonable explanation as to why the Complainant was not confirmed as Manager on the Globe and Mail project in January 2002.

[171] The Tribunal also rules that the Complainant failed to establish that he was retaliated against for having filed a human rights complaint when Mr. Makdessian failed to inform him of the change of status of the E-Contact position and of the possibility for him to displace Resource Associates other than Ms. Anderson.

[172] For the foregoing reasons, the Complaint is dismissed.

"Signed by"  
Pierre Deschamps

OTTAWA, Ontario

January 20, 2005

PARTIES OF RECORD

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APPEARANCES:	
Roger Virk	On his own behalf
Johanne Cavé	On behalf of the Respondent