

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

CECIL BROOKS

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

DEPARTMENT OF FISHERIES AND OCEANS

Respondent

RULING WITH REGARD TO THE ISSUES
THAT SHOULD BE CONSIDERED IN DEALING WITH REMEDY

MEMBER: Dr. Paul Groarke

2005 CHRT 6
2005/02/03

[1] There is a dispute between the parties as to the issues that should be considered in dealing with remedy. They have requested direction from the Tribunal.

[2] I think I have to start by saying, as a general rule, that an adjudicator should decline to elaborate on a legal decision. It merely complicates the matter. There may nevertheless be cases where it is helpful to clarify a particular point. This is one of those cases.

[3] The factual issue between the parties is relatively simple. The Complainant submitted that he would have received a permanent position, if there had been a fair competition. In my decision on liability, I found that this theory of the case was not supported by the evidence. I nevertheless went on to find, in the absence of an explanation from the Respondent, that there was a discriminatory element in the competition. It does not follow that he would have received a permanent position.

[4] In his written submissions, Mr. Bagambiire lists a number of considerations that militate in favour of a finding that Mr. Brooks would have received a permanent position. I found this recitation of the evidence selective, however. The most troubling fact is that it fails to recognize the simple poverty of the evidence. This is a product of the passage of time. Many of the documents relating to the competition have been destroyed and the record is incomplete. There is nothing like the information needed to form a reliable opinion as to what would have happened in a fair competition.

[5] Mr. Brooks should appreciate that I am restricted to the evidence that was put before me. When I confine myself to this evidence, and avoid speculation, I am satisfied that he finished too far down the list for me to realistically find that he would have received a permanent position. The jurisprudence from the Tribunal and the Federal Court on the question of lost wages are of no assistance here. The evidence does not suggest, seriously or otherwise, that Mr. Brooks would have received a permanent position. It suggests that he would not have received such a position.

[6] There is a statement in the written submissions that the evidence "pointed to the fact" that Richard Starr was an alcoholic. This goes to Mr. Starr's character rather than the

merits of his participation in the competition. I think it is tinged with unfairness. It neglects the fact that Mr. Starr did not testify and had no opportunity to defend himself. The evidence was merely that other individuals, who finished behind him in the competition, felt that he had a drinking problem.

[7] I see no reason to go into the deficiencies in the testimony of the Complainant. In the circumstances, however, I have to point out that he must take some of the blame for his poor relations with his employer. The reality is that he has stubbornly insisted on a permanent position, almost from the beginning of the long series of events that led to the complaint. He apparently refuses to accept any finding that goes against this cherished view.

[8] The real unfairness in the case is that the winning candidates retained their permanent positions. From Mr. Brooks' perspective, the competition was fixed. And at the end of the day, Mr. Savoury simply got away with it. None of this establishes however that Mr. Brooks would have been entitled to a permanent position. It is simply too late to go back, 13 years later, and hold the competition again.

[9] On the request for direction, I think the Tribunal has to send a clear message that it will not be swayed by the Complainant's rather stubborn refusal to accept its decision on liability. My position remains firmly as it was, and I am satisfied, on the evidence before me, that Mr. Brooks would not have received a permanent position. The facts have been decided; the finding has been made; and the doctrine of *functus officio* applies. There is nothing more for me to say on the matter.

[10] I have already asked the parties to provide the Tribunal with an agenda of the issues that need to be canvassed when the hearing resumes.

_____ "*Signed by*" _____
Dr. Paul Groarke

OTTAWA, Ontario

February 3, 2005

PARTIES OF RECORD

TRIBUNAL FILE:	T838/8803
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RULING OF THE TRIBUNAL DATED:	February 3, 2005

APPEARANCES:

Davies Bagambiire Stephen Flaherty	On behalf of the Complainant
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Scott McCrossin
Melissa Cameron

On behalf of the Respondent