T.D. 8/82
Decision rendered on July 26, 1982

CANADIAN HUMAN RIGHTS ACT
HUMAN RIGHTS TRIBUNAL

BETWEEN:
DENISE MARCOTTE
Complainant
-and-
RIO ALGOM LIMITED
Respondent

DECISION OF THE TRIBUNAL

BEFORE: Andre Lacroix, Q.C. Tribunal Member
COUNSEL FOR THE
COMPLAINANT: Mr. Yvon Tarte

COUNSEL FOR THE
RESPONDENT: Mrs. Sharon Dowdall

DATE: July 12th, 1982

French version to follow
Version française à suivre

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The complaint expressed by Denise Marcotte alleges that:
'Rio Algom Limited the Respondent is discriminating on the ground of sex in that job classifications not entitled to housing are mainly occupied by women.'

The Complainant relies on Sections 7 & 10 of the Canadian Human Rights Act.

The facts presented in evidence by both the Complainant and the Respondent do not reveal any significant conflicts and it can be said that
the parties could have agreed to stated facts.

These facts may be summarized as follows:
Denise Marcotte is an employee of Rio Algom Limited of Elliot Lake and has been since September 1977 performing a number of occupations; She is
presently a Department Clerk. She first applied for Company subsidized housing early in her employment and was advised it was not available to her.
She applied again for housing while she was a Clerk-typist

on or about April, 1980 at which time she was advised that her employment classification excluded her from eligibility in the company housing plan. She then filed the complaint herein.

The Complainant does in fact reside in Company subsidized housing since June, 1980 by reason of the fact that she has resided with her spouse who qualified at that time for such housing.

The Housing Assistance Policy of the Respondent is set out in a manual and memorandum posted in different areas of the Respondent’s work places and communicated to Union representatives.

The evidence discloses that in 1975 Rio Algom Limited faced a significant expansion program whereby its work force would increase by some 2500 additional employees in the period 1975 to 1983. Housing accommodation in Elliot Lake or the near area was not available and literally prevented the successful hiring of skilled employees for its operations.

The company recognizing this fact intensified its housing program with a view to provide housing to most if not all of

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the employees required to carry out its operations. In fact from 200 housing units in 1975, the company had erected some 1850 units at the time of the Hearing with a work force of some 2500 employees.

The company further recognized that it could not provide housing for all of its employees and developed a housing policy aimed at serving some 80% of its work force with the assumption that the remaining 20% could be hired among already housed residents of Elliot Lake and the area.

To achieve this result the Company did by practice, and subsequently through a written and published statement of Housing Policy, establish classifications of employee eligible for Housing Assistance and those which would not qualify for such a program.

The Complainant Denise Marcotte at the time of her application for housing assistance in 1980 belonged to one of the excluded classification,

and as a result of her investigation realized that some 73% of the employees
in the 'excluded classification group' were female employees. On that basis
she filed the complaint herein mentioned with the Human Rights Commission.

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On the basis of the facts as I have summarized them, the issues to be determined were addressed by Counsel for the Complainant and the Respondent
and subsequently each of them presented arguments in support of their positions.

I. Are the classifications excluded from housing
assistance mainly occupied by women?

The evidence admitted by both sides clearly indicated that approximately
73% of the employees comprised in the excluded classifications were female
employees.

It is further conceded that conversely the proportion of female
employees in the classifications eligible for housing is minimal.

II. Does the policy or practice constitute discrimination?
Counsel for the Complainant presented arguments and quoted a number of precedents supporting the theory of 'adverse impact discrimination, or 'indirect discrimination' resulting from the application of criterias, policies, or

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requirements having an unjustifiable effect or disproportionate effect on a
group of employees protected by this legislation.

This Tribunal accepts in principle that discrimination can be indirect; non-intentional; by adverse impact or result; and that theory has been supported in many previous decisions referred to.

I do not propose to review the references provided by Counsel for the Complainant on that subject largely because Counsel for the Respondent in her
argument at page 91 of the transcript stated:

'I agree with many of the comments made by Mr. Tarte in terms of
the law applicable to this case. The Commission's obligation in a
case of this kind is to show a discriminatory result. Once that

discriminatory result is shown, the onus shifts to the Respondent
to show a defence to the facts. The facts in this case show

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that the percentage of women in ineligible housing classifications
is some 73% . That is a discriminatory result on the bare facts

I share the view of both Counsels to this point.
On the subject of indirect discrimination it is of interest to me that
unlike the American jurisprudence and a growing number of tribunal and board
of inquiries decisions, the Canadian Courts have tended to give a narrower
interpretation of the wording of the Act and of discrimination per se.

I refer to a recent decision of the Divisional Court of Ontario heard in
March of 1982. Ontario Human Rights Commission et al vs Simpson-Sears Ltd.,
1982 Ontario Reports 36 O.R. 2nd Ed. Part 1, Page 59.

Two of the three judges dealing with the provisions of the Ontario Human
Rights Code maintained that:

’proof of an intention to discriminate on a prohibited ground is an
essential element of a contravention of the Act.

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An employer who imposes a neutral employment requirement, for
legitimate business purposes and with no intention to discriminate
is not guilty of a contravention of the Ontario Human Rights Code
provisions in that respect.’

The third Judge did accept the indirect discrimination theory in his
dissenting judgment and refers to the decision of the Supreme Court of Canada
in ’Ontario Human Rights Commission et al vs Borough of Etobicoke, 1982, 132
D.L.R. 3rd Page 14’.

I make these comments to point out the concern of Judges and arbitrators
in attempting to give effect to the intent and objectives of the Act;
preserve the rights of individuals; and retain a fair interpretation of the
wording of the Statute as it exists.

III. Having found indirect discrimination, was the employer justified in implementing the practice?

Since there appeared to be very little disagreement otherwise the third question above constitutes the real issue to be determined in this hearing.

The evidence in that respect may be summarized as follows:

The Respondent Company could not provide housing for all of its employees and faced a selection process.

Housing was provided as an incentive and a necessity to attract employees, as residential facilities did not exist in sufficient quantity and variety to accommodate the workers in the Community.

The Housing Assistance Plan was neutral in character, not related to work performance, to hiring practices, promotions or other working conditions. Housing was provided in order of application for the type of housing requested, and lists of applicants in order of priority were posted regularly.

The Housing Assistance Plan by practice and subsequently by a written policy which existed at the relevant times of this complaint did exclude certain classifications of employees described in the policy document filed. As previously indicated 73% of the employees in the excluded classifications were female employees at the time of the complaint.

The Respondent employer states that the basis for exclusion of the employee classifications referred to, is one of skills and training. In other words the excluded categories were comprised largely of unskilled workers, while the eligible classifications involved the skilled workers and those required to enrol in a training programs. There are approximately one hundred classifications in the eligible group.

The Respondent freely admits that it hoped that the workers required in the excluded classifications could be recruited from persons already

housed in Elliot Lake or the near area and were more easily replaceable.

The respondent further excluded those applicants with accommodation within a radius of 40 miles of Elliot Lake.

Since it is admitted that the Respondent had to make a selection; is the policy in effect a reasonable and justifiable one that would excuse the indirect discrimination apparent in this case?

In considering this aspect which is critical to this case reference was made by both Counsel to prior

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decisions on that issue in an attempt to establish a standard to be met by the employer.

We are not here dealing with a criteria or requirements for employement, as the Complainant was and is still employed by the Respondent. No condition

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of her employment or standard of performance was affected which would require justification on the part of the employer or accommodation on the part of the employer.

We are dealing with a policy or practice of the employer which has the effect of providing a benefit to some employees already hired by the employer, a benefit which is not contractual as between the employer and employees or employee representatives or unions. It is conceded that the benefit could not be granted to all employees. What therefore amounts to a reasonable selection policy?

Counsel for the Complainant alleges that the Respondent should have selected those employees eligible for housing assistance on the basis of need which implies an individual

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decision for each applicant regardless of job classification. From the employer’s point of view this method could lead to other problems of

favoritism and uncertainty among employees waiting for housing accommodations.

It was also suggested that the geographical limitations be the sole criteria. The Respondent states that such a policy would result and has resulted in creating other problems such as preventing a prospective employee already residing in Elliot Lake to acquire his or her own residence, or prospective applicants would simply temporarily move out of the radius defined at the time of application, so that this criteria alone was not sufficient. Counsel for the Complainant in effect submits that the employer should adopt a policy which does not result in discrimination affecting a particular group of employees.

What constitutes the proper standard required of an employer in the establishment of policies or practices potentially discriminating in result?

The decisions quoted in effect point to a ’general standard of reasonableness’ both subjective and objective in the circumstances of each case and it falls upon the Courts and Tribunals to establish this standard in each case.

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In the case before us the policy or practice adopted by the employer appears reasonable and fair on the face of it as it provides employees with a clear statement relative to the Employer’s housing policy. The employer maintains that the excluded classifications are founded on the degree of skills and training required from employees, and the policy relating to the eligible classifications best answers the needs of the employer in what was recognized as a business necessity (i.e. housing had to be offered to attract skilled workers).

The suggestions made by the Commission and Counsel for the Complainant to alter the policy to meet the need of the employer do not in our view offer alternatives which would produce the desired objectives, in fact they might create greater problems of unfairness or perceived unfairness among the employees of the Respondent.

Accordingly we have come to the conclusion that:
a) A legitimate business necessity existed requiring the employer to make
a selection among employees eligible for Housing Assistance.

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b) The policy adopted by the employer to meet this necessity is in our view
reasonable, both subjectively and objectively.

c) That a proper defence to the complaint has been made by the Respondent.

The complaint is therefore dismissed.

Andre Lacroix