Canadian Human Rights Tribunal **Tribunal canadien des droits de la personne**

BETWEEN:

YUL F. HILL

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

AIR CANADA

Respondent

REASONS FOR DECISION

2003 CHRT 9

2003/02/18

MEMBER: Paul Groarke

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I. INTRODUCTION

A. The Complaints

[1] I have two complaints before me. The first alleges that Canadian Airlines International Ltd. discriminated against Yul F. Hill on the basis of race under section 7 of the *Canadian Human Rights Act* by failing to provide him with technical on the job training, by undermining his work, by denying him a promotion, and by monitoring him more closely than other employees. The

discrimination is alleged to have occurred from June 1992 to the time of the hearing, though it began prior to that date. The second complaint alleges that Canadian failed to provide Mr. Hill with a harassment free workplace under section 14 of the *Canadian Human Rights Act*. The harassment is alleged to have occurred between January 1991 and October 1994, and consisted of racial graffiti, jokes and slurs.

[2] These complaints are personal rather than systemic. There was apparently a third complaint that dealt with larger issues in the workplace which was not referred to the Tribunal. The Complainant and the Commission nevertheless presented their case on the basis that there was a larger pattern of discrimination in the workplace. This is problematic, since there is no clear nexus between Mr. Hill's experiences and the general situation in the engine shop.

[3] As the successor to Canadian Airlines International Ltd., Air Canada accepted any liability that Canadian might have incurred under the *Canadian Human Rights Act*. The hearing into the complaints took place in Vancouver and lasted 25 days. There were 18 witnesses. I received oral and written submissions at the end of the hearing, which have been of considerable assistance. Although Mr. Ash and Mr. Fakirani, who acted for the Complainant and Commission, made a valiant attempt to sustain the complaint, the facts are simply against them.

[4] The Complainant and the Canadian Human Rights Commission took the position that he had been treated unfavourably because he was black. He was discriminated against by his foreman and was harassed by his foreman and other mechanics. The situation came to a tempestuous climax in the supervisors' office, when it erupted in an ugly and emotional exchange between Mr. Hill and his foreman on October 18, 1994. This incident led Mr. Hill to leave the workplace, for his own well-being.

[5] Air Canada took the position that Mr. Hill was a problem employee, who avoided work and displayed a conscious lack of respect for authority.

[6] The Respondent portrayed the Complainant as a person who was quick to blame his difficulties on race. In its written argument, it submitted:

> While the Complainant may have been treated differently than some of the other mechanics on the dash-80 with respect to job assignments, this had nothing to do with his race and everything to do with his abilities and attitude as a Mechanic.

And again:

> While the Complainant may have been monitored more closely than other employees, this was not because of his race, color, national or ethnic origin, but rather because he had a tendency to absent himself from his workstation more frequently than other employees . . .

The Respondent submits that the Complainant blamed other people for his problems. Rather than amend his work habits, or apply for advancement in the normal manner, he fell into the trap of assuming that those around him were treating him unfairly.

B. Preliminary Issues

[7] I took a view of the engine shop during the hearing, which has been dealt with in a separate ruling. In the present context, it is enough to say that the view was of considerable assistance in understanding the rest of the evidence. Although there were changes in the layout of the shop, the general scheme of the buildings remained as it was when Mr. Hill worked at Canadian. The offices for the supervisors and foremen had not changed and the work was organized in a similar fashion. The view gave me a better sense of the protocols that were followed in assembling the engines, clarified the nature of the work that was done in different areas, and gave me a sense of the overall dimensions of the work environment. It reinforced the idea that the engine shop was run in a capable way and may have implicitly supported the evidence of various witnesses, but is not a major consideration in my findings of fact.

[8] There is another legal issue, however, that should be addressed before dealing directly with the facts. One of the major difficulties in hearing the present case is that most of the testimony at the hearing dealt with events that occurred in the early 1990s. There were various estimates as to the number of people who worked in the engine shop, but the reality is that I heard from a relatively small number of witnesses, whose evidence was often vague and impressionistic. It would be difficult to gauge the emotional environment in a busy shop, so long after the fact, in any circumstances. It is much more difficult in the present case, where the company was on the verge of bankruptcy, the work environment was rife with uncertainty, and the situation was anything but normal.

[9] There were nevertheless a number of internal reports on the events before me. I was impressed with the tone of these reports, which show considerable impartiality and tact in dealing with a difficult situation. Although the statements made to the authors of these reports were generally given in a more informal venue, without oath, and were not subject to searching examination, they have a freshness that adds to their significance in determining what occurred on the shop floor. Although I received additional evidence, which clarified some of the issues, I think that these reports should generally be accepted.

[10] The evidence as a whole supports the early accounts of what happened. I think it makes sense to pay particular attention to the statements that were made before the participants had the opportunity to tailor their recitals to the needs of the case. This comes with certain qualifications. On the one hand, one should be careful not to read the reports too literally, since the notes made by the investigators were not *verbatim*. On the other hand, it is clear that the individuals interviewed by Laurie Ferguson and Hunter Rogers expressed themselves more freely than in the hearing.

II. FACTS

A. Credibility

(i) The Complainant

[11] I accept that the Complainant was presenting the facts as he saw them. This does not mean that I accept his account of what occurred. Mr. Hill was a partial witness, whose feelings often obscured his view of the facts. He had a tendency to reduce everything to a common denominator: that denominator was that he had not been treated fairly. The testimony of other witnesses, like Mr. Fletcher, supports this conclusion.

[12] I think the differences between the parties lies more in the interpretation of facts than anything else. I nevertheless found that Mr. Hill's behaviour in the hearing room was inherently aggressive. I understand his feelings of injustice, but he was clearly inaccurate or mistaken on a number of counts and was unwilling to recognize that there was a case on the other side. It will become evident that I have rejected some of his testimony.

[13] I accept the evidence of Doctor Pinkhasik, which established that Mr. Hill suffered from depression and anxiety. This does not in itself substantiate the complaints. There were a number of oblique references to other issues in the Complainant's life, which may have explained his psychological troubles.

[14] A number of witnesses also gave evidence that would support the employer's allegation that Mr. Hill was looking for a cash settlement in filing the complaints. I think Mr. Hill's comments to other mechanics in this regard were more a form of psychological bravado than anything else, however, and I think the situation is more complicated than this suggests. It would be wrong to question the sincerity of Mr. Hill's feelings that he had been unfairly treated.

(ii) Mr. Ryan

[15] I also feel obliged to comment on the testimony of Mr. Ryan, Mr. Hill's foreman, whose credibility was put in issue by some of the witnesses. There was reference, for example, to the "two faces of Ryan". Much of the present case is a story of the relations between Mr. Hill and Mr. Ryan. There is no doubt, in my mind, that Mr. Ryan had real enmity towards Mr. Hill. Mr. Kirby believed that Mr. Ryan intentionally provoked Mr. Hill, in a calculating and underhanded manner. I am not so sure of this, but the racial language that he appears to have used in speaking to Laurie Ferguson and Hunter Rogers strikes me as a more accurate reflection of the language used in the shop than the testimony at the hearing.

[16] I am nevertheless of the view that Mr. Ryan disliked Mr. Hill because he was a difficult and temperamental employee. Mr. Hill had ambitions, but he was unwilling to do more than an average mechanic and felt that most of his duties were beneath him. I do not believe that the issue between the two men was race. The real issue was that Mr. Hill did not accept his foreman's authority over him. Mr. Ryan was also resentful, in my view, of the fact that Mr. Hill had complained about him. Mr. Ryan was careful not to offend those in authority and must have seen this as an attempt to subvert his authority.

[17] There seems to have been a war of wills between Mr. Ryan and Mr. Hill. Whatever his personal faults, Mr. Ryan had a certain professional pride and was committed to the work in the shop. Mr. Hill, on the other hand, was determined to assert his independence. I have no desire to take part in the contest between the two men, but they clearly made it a point of honour to take exception to each other. There is no doubt that Mr. Hill, at least, was trying to "get at" Mr. Ryan.

[18] Mr. Hill had a talent for irking those with immediate authority over him, which he seems to have perfected while working in the engine shop. He was far more careful with those who were higher in the hierarchy. There was at least one incident on the line, where Mr. Hill and Mr. Ryan must have exchanged rather dangerous looks, with Mr. Hill getting the better of Mr. Ryan's emotions. This incident occurred when Mr. Hill was given a new service bulletin and asked to redo work that he had already completed.

[19] I have placed considerable reliance on the testimony of Margery Knorr, the equity officer, and Mr. Shelford, the director of the power plant. Both of these witnesses responded to questions from both sides in a thoughtful measured way. They were well informed and provided valuable evidence on company policy. I found their testimony to be eminently fair. I was also impressed with the evidence of Scott Hunter, who was impartial, precise and factual. Mr. Hunter was a member of the selection committee for the Planner III position and I accept his evidence in all respects.

[20] I found the testimony of most of the other witnesses credible. I think Mr. Kirby would agree that he had an ideological position, which was reflected in his testimony. He was nevertheless candid and well spoken. The other mechanics who testified were sincere and cooperative. The evidence of Mr. Ghuman, a member of a minority, was candid and factual. The evidence of Mr. Cavasin was helpful, but revealed a good deal about the attitudes on the shop floor. Much of the evidence of racial tensions at Canadian had little bearing, however, on the situation in which Mr. Hill found himself. The testimony of Mr. Hibbert, who felt he was discriminated against, is a case in point.

B. The Setting

[21] The background to the present complaints is straightforward. Canadian was one of Canada's major commercial airlines. As a major airline, it had a maintenance and engineering department, which operated a machine shop in Vancouver. This is where most of the relevant events occurred. The evidence established that the airline was in desperate financial straits during the period covered by the complaints. No one knew whether the airline would survive and employees were in a state of constant emotional and financial pressure.

(i) The Complainant

[22] Mr. Hill began his career as a jet engine technician in the U.S. Navy, where he spent six years on active and reserve duty. He was employed by Canadian in 1986 as an apprentice mechanic and worked for Canadian for about eight years. He later became a full mechanic. As an Aircraft Mechanic, he was a member of the International Association of Machinists and Aerospace Workers, known as the I.A.M. As is often the case, the allegations before me have

been the subject of the grievance process under the relevant collective agreements, as well as an internal human rights investigation.

[23] During his apprenticeship, the Complainant worked in maintenance and engineering. As a journeyman, he worked on the 737 line in the hangar. He was assigned to the engine shop from October of 1989 to December of 1990, and then returned to the 737 line. While Mr. Hill was in the engine shop, he worked on one of the crews on the Dash-80 line. He transferred back to the engine shop in June of 1992 and stayed there until May of 1994, when he was temporarily assigned to the wheel and brake shop. He returned to the Dash-80 line in August and stayed there until his last day of work, which was October 18, 1994. He was nevertheless paid until January of 1995.

[24] Canadian had a company-wide mechanics' license issued by the Ministry of Transportation. As a result, the mechanics working for Canadian did not need individual licenses. Instead, mechanics were required to obtain an Aircraft Certification Authority, known as an ACA, to work on a particular engine. Mr. Hill had a company endorsement for the CF6-50 and CF6-80 engines. Mechanics could also obtain individual Ministry of Transportation licenses, known as "M" licenses for different aircraft and engines. There was considerable disagreement between the parties as to whether there was any significance in the fact that Mr. Hill had such a licence, since it was not required. Although I do not believe that anything turns on this, it certainly demonstrates that Mr. Hill was a man with ambitions who wanted more credentials than many of the mechanics at Canadian.

(ii) The Dash-80 Line

[25] The maintenance and engineering department at Canadian operated a facility described as "the power plant". The director of the plant, Graeme Shelford, testified that the power plant contained a number of shops, which included the engine shop. There was a manager under Mr. Shelford, Bob Krause, who was responsible for the daily management of the plant and the engine shop. There were also supervisors in each of the individual shops, who reported directly to Mr. Krause and at least occasionally to Mr. Shelford. The supervisors in the engine shop during the relevant time were Don Strohmaier, Jerry Jureidin, and Al Hunger.

[26] There were a number of work areas within the engine shop. This included the "lines" where different types of engines were serviced. It took from six to ten days to disassemble an engine, and up to two weeks to reassemble it. The repairs to the engines, modules, and parts were done off the lines. The engines were then reassembled, signed off and tested in the "test cell", which was located in a large building on the same lot. There was also a "balancing" area and "Area H", which was known as "blade rework".

[27] There were crews in each of the work areas, with six or more mechanics in each crew. Up until the fall of 1994, each of these crews had a foreman and an inspector. Mr. Hill's foreman was Kerry Ryan. Although the foremen were more like lead hands, and remained members of the union, they were responsible for assigning the work to individual members of the crew. The role of the inspector was to approve and "sign off" the crews' work. The foremen and inspectors

reported to the supervisors in the engine shop. They did not have the authority to discipline the mechanics.

[28] There were three lines in the engine shop, which were dedicated to the CF6-50, CF6-80 and JD-8 engines. Mr. Hill was on one of the three crews assigned to the CF6-80 or Dash-80 line, which worked a rotating shift. Mr. Ryan was the foreman. The crew would work two weeks of days, followed by one week of afternoons. It may be helpful to say that the Dash-80 was the newest and most sophisticated engine in the engine shop. It was therefore considered, by some employees at least, as the most prestigious area in which a mechanic might work. Mr. Kirby stated that any reassignment from the Dash-80 line to the JD-8 line was considered a first stage of punishment.

[29] When an engine came into the shop, the "planners" in the engine shop would prepare a package of bulletins and service orders. The service package would be given to the foremen, who would distribute it to the crews. When the engines were disassembled, the mechanics would examine individual components and parts for abnormalities. This might require changes to the work orders. The supervisors would meet with the foremen in the mornings and give them worksheets listing the engines and the work that needed to be done. The foremen would then assign individual members of the crew to a particular engine.

[30] The foremen would also assign specific tasks to individuals, particularly when there was a difficult job that needed immediate attention. Some of the jobs on the line were more technical than others and presented more challenging work. This included the removal and reinstallation of the "HPT", the high-pressure turbine; the "LPT", the low pressure turbine; and the core of the engine. Some of the less challenging jobs consisted of caulking, reinstalling the fuel lines, and preparing the engine for the test cell.

[31] Once a mechanic was assigned to an engine, it was normal for the mechanic to continue work on the engine until the servicing was complete. Mechanics would also be given temporary assignments, however, to deal with shortages in other areas within the shop. If the supervisor needed another person in Area H, for example, he might ask a foreman to assign one of his mechanics to the relevant area. He might also assign a specific mechanic to the area. One of the witnesses, Ray Fletcher, testified that many mechanics would simply pick up the work where the last shift had left it. Mechanics who waited to be assigned to specific tasks would often end up with the jobs that no one else wanted.

(iii) Area H

[32] A jet engine contains fans, consisting of fan blades mounted on a central spoke, which push the air through the engine. The mechanics in Area H examined the fan blades for damage and irregularities, filed away nicks and scratches, and balanced the blades, so that they were properly balanced. Although the area was clean and well lit when we visited it, there was evidence that this left a fine dust on everything, which must have contained metal shavings and chemical residues. There was also evidence that hazardous chemicals like iodine and acetone were used in the process.

[33] There was debate between counsel as to whether the work in Area H was "menial" work. Mr. Rodominski, who was known for his mechanical skills, described it as "very repetitive work and quite boring at times." No one, he testified, really wanted to work there. This was borne out by the fact that the mechanics assigned to Area H did not have to serve a rotating shift. Mr. Shelford acknowledged that this was an incentive, which was necessary to keep the area fully staffed. There were nevertheless advantages to working in Area H, since it was a sit down job with substantial overtime and straight day shifts. As a result, there were senior mechanics who were permanently assigned to the area. Since these mechanics had their choice of holidays, Area H was understaffed during the summer.

[34] Counsel for the Respondent stressed the value of the fan blades, which were worth as much as seventeen thousand dollars apiece, in American funds. Another witness, Jay Ghuman, testified that the work on the blades was important work, which required skill and effort. If a blade was not re-contoured properly, a rough surface or hairline crack could cause the blade to fracture and break, with calamitous consequences for those on board the plane. While I accept all of these observations, they do not address Mr. Hill's fundamental complaint, which is merely that the work was extremely tedious. This made it menial.

[35] I have no doubt whatsoever that Area H was one of the least attractive assignments in the shop. Mr. Kirby suggested that an assignment to the area could be seen as a form of punishment and it is evident that many mechanics resented working there. I accept that the work in the area was menial and unrewarding. I think that I can take notice of the fact that the filing of metal blades, however expensive, did not excite the passions of the mechanics.

[36] Some of the witnesses believed that most if not all of the mechanics in the engine shop had been assigned to work in Area H. Others stated that some of the mechanics had never worked in the area. There was also evidence that the proportion of visible minorities in areas like blade rework was much higher than in other areas in the shop. Mr. Kirby suggested that this was a reflection of the unfairness in the workplace, which led minorities to resign themselves to the less interesting work in the shop. The evidence of Mr. Fletcher, however, was that the members of minorities preferred to work together. The situation is open to a variety of interpretations.

(iv) The Test Cell

[37] Before an engine left the engine shop, it was necessary to determine whether it met the standards set by the manufacturers and the federal Ministry of Transportation. This was done in the test cell. Individual engines were moved from the engine shop to the cell, where they were harnessed and connected to a housing that permitted the "testers" to start and run the engine. Once the engine was coupled to the housing, it was run by means of a computer that simulated flight conditions. This was a relatively dramatic task, which was psychologically rewarding, since it determined whether the work on the engine had been successfully completed. One tester would run and observe the engine, while another tester would monitor the information from the computer to determine whether the engine met the required standards.

[38] There were three mechanics who were designated as testers on the Dash-80 line. They received special training and were paid fifteen cents more per hour than the other mechanics.

When there were no engines to be tested, they worked with the rest of the crew. The mechanics who had been working on an engine would also go with the engine when it went to the test cell. These mechanics would assist the tester in hoisting and connecting the engine to the temporary housing. When the testing was completed, they would help the tester make any necessary repairs, uncouple the harness, and complete the final check of the engine. The yoking and unyoking of the engine constituted the more laborious and less responsible part of the process.

C. The Allegation of Discrimination

(i) Work Assignments

[39] Mr. Hill was well qualified as a mechanic. There is nevertheless no question that his attitude to his work at Canadian left a great deal to be desired. Mr. Hill was firmly convinced that he had talents that were never recognized by his employer. As a result, he seems to have developed the belief that some of the work to which he was assigned was beneath his dignity. This led his superiors to question his abilities and aptitude. This only added to his aversion to the work they were willing to assign him. There is evidence that he had tended to loiter and shirk his responsibilities.

[40] Mr. Hill testified that he found the work environment on the 737 line at Canadian overtly racial. He was almost always assigned to the more menial tasks, such as cleaning cables, greasing, and gear fittings. The hostility came to a head when other mechanics said they had "gotten rid of all the gooks and the pakis and there was just one more nigger to get rid of". Mr. Hill was the last person to be offered overtime, and was asked to work under the direction of less senior mechanics. Mr. Hill responded by requesting a transfer to the engine shop.

[41] The parties at the hearing focussed on Mr. Hill's time in the engine shop. The fundamental allegation is that Mr. Hill's foreman gave him the most menial tasks on the line. Mr. Kirby testified that Mr. Ryan, would assign him to blade rework, viewing, balancing, test cell prep, and the installation of fan blades, all of which was menial work. These jobs included changing filters and harnessing or unharnessing engines in the test cell. Some of this work was "dirty work". Mr. Ryan would not assign Mr. Hill to more complex tasks "unless there was nobody else around". Mr. Hill also testified that he was assigned to Area H on August 23rd and 24th, 1993. He suggested that these kinds of jobs should have been rotated among the different mechanics in the shop.

[42] In a letter of complaints, which was addressed to the Chairman of the union, Mr. Hill described the situation as follows:

> Recently, I have been discriminated against by the floor management in shop 750. The same management has systematically selected and groomed certain individuals described as glory boys, and they seemed to share a certain kinship amongst themselves. While these individuals are being groomed to further their careers, visible minorities are discouraged and pushed aside.

> The visible minorities are allocated menial tasks which stifle their drive and determination. They are not given the same opportunities to develop and further their careers. The select personnel are encouraged to stay on the problem solving and technical jobs. Their reward is advancement in the company. They are not assigned any menial tasks and on occasion, they are sent to relieve a visible minority worker who has began [sic] a technical job.

It was Mr. Ryan's treatment of Mr. Hill that apparently precipitated the complaint to the union.

[43] In his letter to the union chair, Mr. Hill stated that he had been assigned to Area H three times in two months, an allocation of duties that would raise some suspicions. When the Complainant and the Commission submit that Mr. Ryan assigned Mr. Hill to Area H "the majority of the time", however, they overstate the evidence. The oral evidence merely establishes that Mr. Hill was assigned to blade rework on three or four occasions while he was on the Dash-80 line. Mr. Ryan did not accept that Mr. Hill was sent to blade rework on a regular basis. On the two occasions where the matter came to a head, Mr. Hill went home sick and did not work his assigned shift.

[44] One of these situations occurred on August 23, 1993, when Mr. Hill allegedly arrived late. Mr. Ryan states that Mr. Hill was the last mechanic to report and was therefore assigned to blade rework. This seems to go against the account he gave to Laurie Ferguson and Hunter Rogers, which was that Mr. Hill was the second last person to arrive for work. It is always possible that the Ferguson-Rogers report is mistaken, but I think the more important factor is that the Complainant did not take issue with the fact that he was late. It is true that this may have simply given Mr. Ryan the reason that he needed to assign a particularly troublesome employee to someone else.

[45] Rather than go to Area H, as he was directed, Mr. Hill returned home sick, on the basis that he felt too "stressed" to work that day. When the supervisor was advised of the situation, he told Mr. Ryan to assign Mr. Hill to blade rework on the following day. The following day, when this occurred, Mr. Hill went home sick again and did not return for a week. Mr. Hill was indignant because he arrived early on the second day and suggested that Mr. Ryan was not following his own system in assigning him to blade rework. The last person in, he suggested, should have been sent to blade rework.

[46] Mr. Hill's attitude was disingenuous and ignores the larger picture. It is notable that the Complainant and Commission stubbornly ignored the obvious insubordination in his actions. I am of the view that management did not deal with the situation. The matter was not handled properly, since the supervisor and the foreman clearly thought that Mr. Hill was feigning sickness. They should have called him on the issue. In any event, the real issue between the Complainant and his superiors had progressed well beyond the assignment to Area H.

[47] The relations between Mr. Hill and Mr. Ryan were strained, to say the least, and Mr. Ryan may have been quick to assign Mr. Hill to Area H. If this was the case, however, it had more to do with the enmity between the two men than with the fact that Mr. Hill was black. The evidence

on the substantive issue is minimal at best, and the problems with the Complainant's evidence are sufficient to prevent me from accepting it without more support from other witnesses.

[48] The Complainant and Commission have argued that Mr. Ryan monitored Mr. Hill more closely than other employees. I have no doubt that this was the case, at least later in the process, when the two men had become adversaries. There was an allegation, for example, that he would be questioned when he returned from the washroom. If he was shirking his duties, of course, this was entirely justified. I do not accept that Mr. Ryan was malicious or fabricated events. There were limits to his enmity. There is no doubt that in Mr. Ryan's mind, Mr. Hill was an unreliable employee, who was not pulling his weight in the shop. There was evidence from almost all the witnesses that supported this view. Mr. Hill required monitoring.

[49] Mr. Hill alleges that he received more than his fair share of unattractive work assignments, both on the line and in the other areas of the shop. He also testified that he repeatedly asked for more technical jobs on the Dash-80 line. He gives examples of this in one of the complaint before me: on December 6, 1993, he states he was assigned to an engine when only the menial jobs remained. On September 6, 1994, while doing technical work, he was reassigned to more menial work. He provided a number of other examples, some of which were clearly refuted by the assignment sheets that were used to keep a record of who worked on specific engines, which were filed as exhibits.

[50] The passage of time has made the reconstruction of what occurred all that more difficult, however, the concrete facts that one would expect in substantiating such a charge was missing. Mr. Hill's recollection of what occurred was partial and impressionistic, and many of the circumstances of which he complained were open to interpretation. There is no question that he felt discriminated against, but the evidence presented by the Complainant and Commission consisted more of allegations than facts. The quality of the evidence was poor at best.

[51] Mr. Hill also states that Mr. Ryan gave him new service bulletins after he had completed a job and had him re-do the work. Mr. Hill felt that this was done on purpose, to make life difficult to him. There was bad blood between the men at this point in time because Mr. Hill had complained about Mr. Ryan. Mr. Hill also testified that after Mr. Ryan threw the pages on the work podium so violently that he instinctively backed away from him. There was real hostility between the two men by this point in time, and if Mr. Hill was suggesting that Mr. Ryan's conduct was unprovoked, I do not accept his testimony. It is obvious from the evidence that Mr. Hill had his own ways of challenging his immediate superiors.

[52] There were other incidents, such as Mr. Hill's exchange with Jeff Reimer, who had been given the responsibility for renewing licenses. Mr. Hill accosted Mr. Reimer on the shop floor, as if he was an underling, who could be imposed upon at will. Mr. Hill's application was already late and rather than apologize or acknowledge his tardiness, he goaded Mr. Reimer into an angry exchange. Although Mr. Reimer may not have conducted himself appropriately for a member of management, the reality is that Mr. Hill's attitude was provocative and high-handed. It is characteristic that Mr. Hill's response to the incident was to formally complain about Mr. Reimer's "attitude".

[53] There were other incidents. There was an exchange with Jerry Jureidin, one of the supervisors, when Mr. Hill was caught photocopying pages from a manual. Mechanics were expected to work from originals and there are serious policy reasons why this was not permitted. Mr. Hill was also using the photocopier without permission. Rather than apologize, he adopted an indifferent attitude, which must have confirmed the prevailing view that he did not accept the authority of his superiors. This kind of behaviour only exacerbated the situation. I recognize that Mr. Hill found himself in an unpleasant environment, but I am satisfied that his conduct was probably the most significant factor in creating the situation in which he found himself.

[54] Mr. Kirby provided the strongest evidence in support of Mr. Hill's allegations. In his testimony, he adopted the statement that he had made to Ms. Ferguson and Mr. Hunter, claiming that "anyone entering the shop will be aware of the preferential treatment within five minutes." Mr. Kirby testified that Mr. Ryan would only assign Mr. Hill to the more challenging jobs in the shop when there was no one else available. He also testified that the visible minorities in the shops were concentrated in the areas away from the actual lines, where the less challenging mechanical work was done. Mr. Kirby also stated that the visible minorities tended to be prominent in areas like blade rework, viewing and balancing. The testimony of Mr. Abbing and Mr. Fletcher supported such an observation. Mr. Fletcher suggested that the members of visible minorities wanted to be together, and therefore gravitated towards the same areas in the shop.

[55] Although I understand why Mr. Kirby reached the conclusions that he did, there is a speculative element in his views that I cannot adopt. Accusations of discrimination, however sincere, are not enough. It can certainly be inferred, from the comments of many of the witnesses, that there were racial communities within the engine shop. I am not prepared to go further, however, on the basis of accusations. It would be presumptuous to conclude that the distribution of employees in different areas of the shop was a result of overt discrimination.

[56] There was discord in the workplace without a doubt, and some of it had a racial signifier. The evidence of witnesses like Mr. Kirby, Mr. Hui and Mr. Panis established that minorities did not feel they had the same opportunities in Canadian as other mechanics. Mr. Kirby and Mr. Hibbert both testified that minorities were simply not in the running for the better positions in the shop. Mr. Hibbert was concerned enough to write a letter of complaint in 1988, raising issues similar to those of Mr. Hill. The complaints before me are personal complaints and the evidence of systemic discrimination is only relevant insofar as it provides a context in which to consider what happened to Mr. Hill. The Complainant and Commission described the more general testimony as "similar fact evidence", but Mr. Hill's situation seems to have developed independently of any pattern of discrimination in the shop.

(ii) The Application for the Planner III Position

[57] While he was assigned to the tire and brake shop, in 1993, Mr. Hill applied for the position of Aircraft Planner III. There was extensive evidence before me regarding the posting of this position, the process of choosing the final applicants, the interview process, the decision-making process and Mr. Hill's response to the decision. The evidence establishes two rather different propositions. The first is that the selection committee assumed that the successful applicant had the proper qualifications for the position. This included an "ACA", an Aircraft Certification

Authority. It is clear, in retrospect, that he did not have such an authority, or obtain it after receiving the position. This was in clear contravention of the posting.

[58] The second proposition is that the committee had good reasons to reject Mr. Hill's application for the position. Although he was more senior than the successful applicant, he was not familiar with the responsibilities of the Planner III position and did not fare well in the interview. I am of the view that the successful applicant should not have been awarded the position, and I suspect that politics was at work, somewhere. I do not accept, however, that this had any effect on Mr. Hill's candidacy. There is no convincing evidence that the committee had racial motives.

[59] I heard evidence from two members of the committee. The evidence of Mr. Clement, who was very frail, was problematic. Although Mr. Clement was a sincere witness, with a great deal of managerial experience, he clearly changed his scores in a misguided attempt to accommodate the other members of the committee. This was inappropriate, to say the least. It does not establish, however, that the committee had a discriminatory *animus*. These problems raise issues under the collective agreement, rather than a question under the law of human rights.

[60] I have already stated that I was impressed with the evidence of Scott Hunter, the other committee member who was a forthright witness, with an excellent recollection of the facts. Mr. Hunter was quite willing to acknowledge that the position should not have been awarded to the successful candidate and suggested that the union could have grieved the decision. None of this redeems Mr. Hill's conduct during the interview, which failed to hit the mark. When he was asked why he wanted the position, for example, Mr. Hill went into a relatively long monologue about his aspirations as a novelist. This was unprofessional and clearly out of keeping with the interview process. It probably explains the comments of the third committee member, Ms. Lange, who wrote on her assessment sheet that Mr. Hill was "laid back". I think it is stretching the truth to suggest that this comment was racially motivated.

[61] The problem with the case for the Complainant is simply that the evidence does not establish that race was a factor in the selection process. The evidence is merely that Mr. Hill, who was a member of a racial minority, did not receive the position. I think it is fair to say that Mr. Hill would have been entitled to a new competition, like the other applicants, but I find very little in the evidence that would suggest he was the best candidate. This is evident in the scoring, even when the problems with Mr. Clement's score sheets are taken into account. I am simply unable to see any injustice in the committee's failure to award him the position.

[62] It is characteristic that Mr. Hill complained about the selection process for the Planner III position and spoke to Mr. Clement about the interview process. This merely presented an opportunity for new allegations, which are not worthy of comment. In Mr. Hill's mind, this nevertheless added to his mounting sense of injustice. I think it is fair to say that Mr. Hill felt persecuted by the progress of events.

(iii) The Events of October 18, 1994

[63] There is no question that Mr. Hill felt oppressed by his experience in the engine shop. I believe that his failure to obtain the Planner III position was a serious disappointment, which added to the emotional pressure on him. He was also going through some personal difficulties. I have no desire to minimize what he experienced and it was clearly a difficult time for him. In any event, the tensions in the workplace reached their inevitable climax on October 18, 1994, in the supervisors' office.

[64] Some of the facts relating to the events of October 18, 1994, are not in dispute. On September 13, 1994, Mr. Cavasin submitted a "speedy memo" requesting that he exchange shifts with Mr. Hill until November 15, 1994. This was unusual, since Mr. Cavasin usually preferred to work afternoons, and would trade his day shifts with mechanics who wanted to stay on the day shift. His testimony was that his wife was on maternity leave and it was more convenient, in these circumstances, to work days. It appears that mechanics frequently switched shifts and there was nothing out of the ordinary in this request.

[65] As a result of the change in shifts, Mr. Hill was assigned to afternoons on October 18, 1994. On the 17th or 18th, however, Mr. Hill stated that the two men agreed to return to their original shifts. I am inclined to believe that this was done at Mr. Hill's request, in spite of his evidence that he was accommodating Mr. Cavasin. Mr. Hill's testimony was nevertheless that he submitted a speedy memo on October 17, 1994, requesting that he return to day shift the following day. The memo requested that the previous memo be withdrawn.

[66] I think it is significant, in understanding the psychology of the situation, that the memo required approval. There was some dispute about this, but in the final analysis, management had the right to refuse the request. It is apparent that the process for changing shifts had been abused by the mechanics, who generally wanted to work days, and there were times when three or four mechanics all claimed to have switched their shifts with Mr. Cavasin. There was therefore some sensitivity on this issue.

[67] On October 18, 1994, for some reason which no one has adequately explained, both gentlemen arrived at work for the day shift. Although the evidence did not establish who was at fault, I suspect that Mr. Hill had not advised Mr. Cavasin of the memo he had filed on the previous day, or that it had yet to be approved. This is borne out by the fact that Mr. Ryan asked Mr. Hill why he was reporting for the day shift. He explained that he had submitted a speedy memo requesting the change in shifts.

[68] Mr. Ryan asked Mr. Hill to speak to Mr. Strohmaier and Mr. Jureidin, both of whom were supervisors. They merely asked him to have Mr. Cavasin sign the memo from the previous day. There appears to have been some confusion as to whether Mr. Cavasin had traded shifts with Mr. Hill or someone else. At the very least, something was out of order. When Mr. Hill took the memo to Mr. Cavasin, the latter signed it and wrote sarcastically "why tell me." This seems to support the suggestion that Mr. Cavasin was not completely aware that the shift was being changed.

[69] I believe that Mr. Cavasin's explanation of events makes the most sense. He testified that he put a "smart ass remark" on the first memo to "sabotage the memo a bit". He was "kind of like

giving him the gears a bit, eh and make - you know - there was a lot of tomfoolery". In any event, Mr. Cavasin wanted to force Mr. Hill to fill in another memo and come back for a second signature. Mr. Hill turned the tables on him by taking the memo into the supervisor's office, much to the chagrin of his superiors.

[70] When he was told to fill out another memo, and have it properly signed, Mr. Hill went back to Mr. Cavasin, who testified that he didn't believe Mr. Hill had taken the first memo to the supervisors. I cannot help but wonder if Mr. Cavasin was resentful of the fact that Mr. Hill had changed shifts on him. On the second memo, Mr. Hill wrote "Ross C. and I would like to mutually transfer our shifts back to normal starting now." When he went back to Mr. Cavasin, Mr. Cavasin signed the memo, but could not refrain from writing another sarcastic comment. This comment was "what is normal?"

[71] It is evident that it took an inordinate amount of time to complete this process. Having seen the shop, it is apparent to me that it should not have taken more than ten minutes to deal with the two memos. The supervisors apparently thought that Mr. Hill was writing the comments, but allowed him to continue on the day shift. During the morning, Mr. Ryan complained to the supervisors that he was not getting much work out of Mr. Hill. There is evidence suggesting that Mr. Cavasin's foreman had also complained. The evidence suggests that there was a certain amount of loitering and bantering between Mr. Hill and Mr. Cavasin, which may have irritated the foremen. At about 12:30 p.m., Mr. Cavasin and Mr. Hill were called to a meeting with Mr. Jureidin, Mr. Strohmaier, and Mr. Abbing, a shop steward.

[72] I do not accept Mr. Hill's portrayal of himself as a passive participant in these events. The original memo had obviously not been processed, and since he was requesting the change, he was responsible for setting Mr. Cavasin's signature. It is also obvious that he was a shrewd and insightful employee, who would have known that he was stoking the fires by returning the memos with the sarcastic comments from his confrère. Both men had a reputation for failing to respect authority and any responsible manager would have felt obliged to reacquaint them with the proper protocols.

[73] After the issue of changing shifts was resolved, Mr. Jureidin turned to the issue of socializing. When Mr. Cavasin's foreman walked by the office, he was called into the meeting. Under considerable pressure from Mr. Cavasin, he denied that he had complained to the supervisors. The conversation then switched to Mr. Ryan, who was paged and came to the office. This led to a shouting match between Mr. Hill and Mr. Ryan, which escalated out of all proportion. Mr. Cavasin testified that Mr. Ryan: "came into the office, and the rest is just a blur, I mean it was ugly."

[74] The office in question was extremely confined and one can only imagine what it was like when the shouting match occurred. At some point, Mr. Hill told Mr. Ryan to get his facts straight and walked out of the office, slamming the door behind him. Mr. Cavasin testified that the men were on the verge of blows and suggested that there would have been a fight if Mr. Hill had not left the room. Mr. Hill went immediately to Mr. Shelford's office and discussed the matter with him. Mr. Shelford could see that Mr. Hill was extremely upset and gave him permission to go home. He did not return to work at Canadian.

D. The Allegation of Harassment

[75] There was a discussion about the nature of racism during the hearing. I would endorse the position put forward by the Complainant and the Commission, who argued that the members of dominant groups in society are often blind to the existence of discrimination and harassment. Counsel referred me to a passage in *Naraine v. Ford Motor Co. of Canada (No. 4)*, (1985) 27 C.H.R.R. 230 (Ont. Bd. of Inq.), at para. 25, where the Board recognized that the members of racial minorities often possess "a certain amount of expertise" on the subject. This is a product of their long experience with prejudiced and even oppressive members of the majority. I think this is a cautionary principle, which must be kept in mind in considering the testimony of the witnesses in a case based on an allegation of racism, particularly in the instance of harassment.

[76] In his complaint of harassment, Mr. Hill gives five examples of racist graffiti that he saw on the bathroom walls. This included the swastika and statements like "All niggers must die" and "I see nothing wrong with niggers, everyone should own one". All of the witnesses agreed that there was graffiti in the washrooms at Canadian. This graffiti included demeaning sexual comments, racist comments and character assassination. The evidence establishes that the sexual graffiti was predominant, though the racial comments formed part of the larger problem. The matter was troubling enough that Mr. Shelford, the Director of the power plant, made a number of efforts to correct it. This included painting the washrooms black, a strategy that was apparently unsuccessful in the long run. White boards were also placed in the washrooms, to try and contain the problem. Although the only real solution seemed to lie in continually repainting the washrooms, the financial constraints on the company prevented the company from doing so very often.

[77] Mr. Hill also provided five examples of racist jokes that he heard in the engine shop. The tenor of these jokes is evident in the following examples:

> "Niggers and Chinks were used to build the railroad because the owners did not want to waste mules bringing nitro-glycerine in." - told by a co-worker, in 1992.
>
> "How do you baby-sit little nigger kids? Wet their lips and stick them to the ceiling." - told by Kerry Ryan, my foreman, in spring 1993.
>
> George Lenihan told a story about going out with friends and hitting black people with broom handles from the back of a pick-up truck, which he referred to as "broom the coon".

I am not satisfied that Kerry Ryan told the second joke, though it may have been told by someone, and it is clear, I accept that mechanics tried to outdo each other in telling tasteless and derogatory jokes.

[78] The complaint also alleges that Mr. Ryan called Mr. Hill a "nig nog" on several occasions. Mr. Kirby felt that this was a surreptitious way of calling him a "nigger". It was not until Mr. Ryan took the stand that the two meanings of the term emerged. Mr. Ryan stated that he had used the same term with his children, and produced a definition from the Internet, explaining that

the term was used in Lancashire "to express mild disapproval of someone's action". On this reading, it merely meant a silly person and was not a racial term.

[79] I cannot be sure what Mr. Ryan's intentions were, in using the term "nig nog", though I have suspicions that Mr. Kirby's view is the right tone. I do not find the suggestion that Mr. Ryan would use the same language in speaking to his children and Mr. Hill completely convincing, particularly in a place where strong language was the order of the day. It is unclear to me why he had to use any epithets at all. I nevertheless accept Mr. Ryan's evidence that he did not use the term after Mr. Hill questioned its use. I do not find Mr. Hill's testimony that Mr. Ryan continued to use the term on "just about … every occasion [when] he addressed me" a credible statement.

[80] The most troubling evidence of harassment relates to the time that Mr. Hill spent on the 737 line in the area known as the hangar. Mr. Hill testified that there were jokes about "niggers, gooks, pakis and stuff like this, day in and day out". He also testified that there was a constant attempt to denegrate the black race. Gordy White, another mechanic, would always refer to him as "nigger". There was little independent evidence of this, and Mr. Hill may or may not have overstated the situation, but I accept that racial language was used. Mr. Cavasin testified that mechanics still refer to each other as "wops", "polacks" and "flips". He distinguished between these names and racial slurs, however, and I do not believe that the social environment on the Dash-80 line can be compared to the situation on the 737 line.

[81] I regret to say that there was a general lack of respect on the shop floor. One of the problems for Mr. Hill is that there is evidence that he participated in the constant baiting that occurred within the engine shop. This was in keeping with his general resentment of authority.
Mr. Ghuman testified, for example, that Mr. Hill used the nickname "old set of pissflaps" for another mechanic. He apparently used this appellation regularly in the face of the employee, who replied in kind. Mr. Ghuman testified that "they looked forward to putting each other down". He also testified that Mr. Hill referred openly to another employee as "dumb cunner", another reference to the female anatomy.

[82] There is also the "Canadian Performance Rating Form", which was entered into evidence. Mr. Hill was evasive and equivocal when he was asked whether he had filled out this form, saying only that the hand writing "looked" like his. He went on to grudgingly admit that he had completed the form, but in a way that minimized his actions. The form appears to be a mock-up of a personnel record made out in the name of Gordie White. It describes Mr. White's job as "dogfucker". Mr. Hill has placed check marks beside entries on the sheet like the following:

> Does shitty work and constantly fucks up.
>
> He works only if kicked in the ass frequently.
>
> The stupid bast'd doesn't know shit from shinola.
>
> Piss - poor attitude, thinks always being shit on.

This is an example of the rough and ready nature of the exchanges that took place on the shop floor on a regular basis.

[83] It is significant, in the context of harassment, that Canadian also had a workplace harassment policy. One of the purposes of the harassment policy was to ensure that employees were aware of the seriousness of such conduct. Although there was evidence that the employees were not aware of the policy, my view of the situation is that the culture within the workplace was changing during the time that Mr. Hill was in the engine shop. There is no doubt that Mr. Hill's complaint may have been a factor in this, since the Ferguson-Rogers report, the report from Ms. Knorr, and the directions from Mr. Shelford all contributed to an increasing awareness that racial comments were no longer acceptable.

[84] There were other developments which helped to establish this, such as the initial and rather hapless attempts of the employer to determine the distribution of visible minorities throughout the shop. There was also harassment training, at least by the union, and the evidence established that the company subsequently made an attempt to see that members of minorities were given an opportunity to advance.

E. The Complainant's Grievances and the Internal Investigations

(i) The First Grievance

[85] The Complainant filed three grievances under the collective agreement with respect to the matters raised by the two complaints before me. The first was filed on September 1, 1993 under Article 39 of the collective agreement, which dealt with sexual and personal harassment, and raised the issue of grooming. I have already mentioned the letter in which Mr. Hill alleged that some mechanics were groomed for promotion, and others left out, on the basis of race. Mr. Hill stated specifically that the members of minorities were not "assigned to work and problem solving in areas which would allow them to develop their skills to meet the criteria for advancement." He accordingly requested that the matter be investigated and that a program be set up to assist minorities and encourage them to apply for more responsible positions.

[86] As a result of the Complainant's grievance, a committee consisting of Hunter Rogers and Laurie Ferguson, a management and union representative, investigated the situation in the engine shop. In the course of their investigation, they interviewed Mr. Hill, Mr. Ryan, and a number of mechanics. They subsequently produced a report of their findings, which was completed in October, 1993 and entered as exhibit C-1.13 in the hearing.

[87] The report contains three important conclusions. The first was as follows:

> We believe that harassment has taken place in this area but find that [it] is very hard to associate with a particular individual.

The second concerns assignment of work:

> The allocation and distribution of jobs in the shop is another matter. While there is a perception of unequal distribution of work that could go as far as seeming to select certain individuals for advancement there is inconclusive evidence of this. There does, however, seem to be some lack of sensitivity to the concerns of the employees and there has been no effective clarification of the work allocation system.

This remains an issue between the parties.

[88] The third conclusion in the Ferguson-Rogers report reflects the lack of morale at Canadian during this period of time:

> An overall malaise seems to exist within the shop that manifests itself in the unacceptable ways. The workers are late reporting to work, take extended coffee breaks, and are unhappy when assigned to the more mundane tasks. They make jokes and comments that some employees find offensive yet the situation is allowed to continue. People choose to ignore the problem rather than address it. Ignoring a problem does not make it go away, it just poisons the environment in which it festers.

The suggestion is that the continuing problems with the company were enough, in themselves, to poison the work environment.

[89] At the end of the report, Ms. Ferguson and Mr. Rogers made three recommendations. They were as follows:

> 1) A fair and equitable system for the allocation of work should be established.
>
> 2) Employees should be made aware that the use of derogatory comments or racial slurs in the workplace will not be tolerated. Any such conduct violates company policy and the law.
>
> 3) Remind employees in the area of the availability of [the Employee Assistance Program] and the services they can provide during this stressful period in which we find ourselves.

The report was forwarded to John Madden, the Director of Employee Support.

[90] Mr. Fakirani took issue with the Ferguson-Rogers report. He argued that it was not a thorough investigation, that its conclusions were misleading, and that it failed to deal with the allegations raised by the Complainant. Counsel for the Complainant and Commission have also argued that the report was out of time under the collective agreement. The Respondent was "dragging its feet". It is easy to find fault with the details of the report, however, and neglect its substance. On the whole, I believe that the report was a sincere attempt to deal with the substance of Mr. Hill's grievance.

[91] Counsel has suggested that the authors of the report did not appreciate the onus that the law places on the employer and that the authors made the mistake of looking for examples of deliberate rather than institutional racism. These are legal issues, however, and neglects the factual nature of the report. Ms. Ferguson and Mr. Rogers appear to have tried to give all of the relevant individuals a reasonable opportunity to present their version of events. As I have already stated, they had the benefit of speaking to these individuals before they had a chance to consider the impact of what they were seeing. I believe that the Ferguson-Rogers report provides a good sense of the situation that prevailed in the engine shop.

[92] Whatever the problems with the report, Ms. Ferguson and Mr. Rogers made a somewhat equivocal finding of discrimination. Mr. Fakirani argued that this should have rung the alarm and alerted Canadian to the seriousness of the situation. The argument on the other side is that it did exactly that. Mr. Madden sent Mr. Hill a letter on November 3, 1993, setting out his own recommendations with regard to the implementation of the report. These were as follows:

> 1) That a fair and equitable system of work and allocation be developed and communicated by Mr. Shelford.
>
> 2) That Mr. Shelford make the leaders in the engine shop aware of their responsibilities to ensure a harassment free workplace.
>
> 3) That Mr. Shelford make employees aware that the use of derogatory comments or racial slurs will not be tolerated.

As the Director, Mr. Shelford had final authority over the entire operations of the engine shop.

[93] Mr. Madden's letter was copied to Mr. Shelford, who testified that he complied with the first two recommendations in a number of ways. For one thing, he raised the issue of harassment with the supervisors. He also mentioned the subject at staff meetings and directed that the harassment policy be posted on the bulletin board. The evidence as to whether the employees were aware of the issue was mixed, but there is no reason why some of the witnesses would remember these actions years after the fact. I was impressed with Mr. Shelford's evidence and accept that he addressed the issue with both his supervisors and the employees at large. Mr. Hill disputed the latter contention, but his attendance was such that he could have missed the meetings, and I see no reason to disbelieve Mr. Shelford.

[94] The Complainant and Commission argued that any meeting should have been compulsory, but the company was in a desperate financial position and the evidence establishes that there was no problem with attendance, since the employees were anxious for information regarding the company. While he could not have been completely aware of the situation between Mr. Hill and Mr. Ryan, I believe that Mr. Shelford made a conscientious attempt to implement Mr. Madden's recommendations.

[95] This left the question whether the "system" of assigning work in the shop was discriminatory. This is where the complaint of discrimination really lies. The Commission and the Complainant have argued that Mr. Shelford failed to take this question seriously. I do not

think this is entirely fair to Mr. Shelford, though I naturally agree that Mr. Shelford, Mr. Strohmaier and other managers did not feel that the system of assigning work was unfair or inequitable. In their view, work would have to be assigned in accordance with the priorities of the day. This would mean that the skills and experience of the various mechanics would have to be taken into account by the relevant supervisor or foreman, who would have to make a subjective call as to who should be assigned to a particular task. Since this practice was in place, they accordingly felt that a fair and equitable method of allocating work was already in place.

[96] Mr. Shelford dealt with the recommendation by requesting that the company's employment equity co-ordinator, Marjorie Knorr, investigate the way in which work was distributed within the engine shop. On February 23, 1994, Ms. Knorr accordingly visited the engine shop and reviewed the "system" of assigning work. As I have already indicated, there is a dispute between the parties as to whether there was a meaningful system in place. I do not feel that much is to be gained by weighing in on the discussion between counsel as to whether the practice followed by the foreman and supervisors in assigning temporary work meets the definition of a "system". It may be more helpful to say that it was an informal rather than a formal system, which gave the managerial staff a great deal of latitude in making such assignments. I am nevertheless of the view that there was a system, a loose way of doing things, though it was characterized by improvisation and relied upon the exercise of personal judgment by foremen and supervisors.

[97] Ms. Knorr spent an afternoon at the engine shop, at which time she reviewed the system of temporary assignments with the supervisors and foremen. She was apparently taken through the relevant paperwork, and apprised of the general considerations that they employed in assigning work. Her focus was entirely on the system and she did not speak to individual mechanics. I do not accept Mr. Hill's suggestion that Ms. Knorr was a captive of management and it was clear to me that she performed her investigation in a sincere and conscientious manner. Subsequently Ms. Knorr prepared a relatively impromptu report for Mr. Shelford, which was entered as exhibit C-1.20. The report concludes that the system was not discriminatory, though Ms. Knorr acknowledged on the witness stand that it could be abused by individual foremen.

[98] Ms. Knorr's report is dated March 10, 1994 and states that the foremen in the shop use a variety of criteria to distribute work in the shop. These criteria include the following factors:

- people who were most experienced and productive were assigned to "rush" jobs;
- new or inexperienced people are put with more experienced staff;
- less motivated employees are placed with more motivated employees;
- when less favourable jobs are to be assigned a variety of ways are used; the crew will determine who's "turn" it is, a coin will be tossed, or the job is given to the person who arrives last

[99] Ms. Knorr concluded that work was assigned "primarily" on work performance. This was naturally subject of the perceptions of the foremen, whose view of their crew members was essential in determining who was given more technical or demanding work.

[100] Ms. Knorr also investigated the process for determining who would receive training. She found no evidence of discrimination and did not feel that there was a reason to investigate the distribution of work and training any further. Her report was sent to Mr. Shelford, who distributed it to the supervisors in the engine shop. The foremen in the shop were alerted to the concerns that led to the writing of the report. Although there were attempts to clarify and improve the system for distributing work, it is understandable that management felt that the report had exonerated them.

[101] Counsel have complained that the Knorr report, like the Ferguson-Rogers report, was inadequate. If it did not reveal evidence of discrimination, the argument goes, it was because Ms. Knorr did not investigate the matter thoroughly. This seems to be the response of the Complainant to many of the deficiencies in the evidence and leads nowhere. The truth is that I am left with a choice between the evidence of the Complainant and a growing list of more reliable witnesses. I accept Ms. Knorr's evidence that:

> … the impact of shift changes, crew changes, bumping, types of jobs, the occasions and sick leave, and the variety of priorities lead me to believe that applying discriminatory practices to work assignments would be very difficult.

The Commission and Complainant have argued that this only proves that the work was distributed in an arbitrary and therefore discriminatory way, but this seriously overstates her testimony and does not support the Complainant's case.

[102] The Complainant and Commission have suggested that there was "too much room for flexibility" in the existing system, which left it open to foremen and supervisors to abuse their authority. This raises another issue, however, which was not the subject of the systems review carried out by Ms. Knorr. This narrows the scope of the present inquiry. If the system for allocating work was fair, it cannot be the source of the discrimination Mr. Hill is alleged to have suffered, and the issue is whether Mr. Ryan abused his authority. Although there was considerable enmity between the two men, I think the evidence establishes that Mr. Ryan took his managerial responsibilities seriously. There is no convincing evidence that he abused his position.

[103] Mr. Hill appealed his grievance to the district lodge of the IAM, which referred the matter to binding arbitration. Vincent Ready was appointed as an Arbitrator and the arbitration was heard on September 15, 1994. Mr. Ready was asked to determine whether the recommendations in the Ferguson-Rogers report had been adequately implemented. There seems to be some suggestion on the part of the Complainant and Commission that the union was not as zealous in prosecuting Mr. Hill's grievance as it might have been. There may be some truth to such an allegation, but this could easily be interpreted as a reflection of the fact that it was not completely convinced of the merits of the case.

[104] Mr. Ready issued his award on October 19, 1994, which reviewed the Ferguson-Rogers' report and held that:

> I have carefully reviewed the evidence and the submissions of the parties. I am satisfied that the recommendations [in the Ferguson-Rogers' report] are an appropriate response to Mr. Hill's complaints. The union could point to no specific company action or omission which would support the claim that it has not effectively implemented the recommendations. To the contrary, I find that both parties have carried out the recommendations to the extent practical and possible.

[105] Mr. Ready accepted Ms. Knorr's report on the distribution of work and training, and then went on to deal with the question of harassment. While Mr. Ready did not accept that harassment had been established, he left it open to Mr. Hill or any other employee to raise the problem in the future. Mr. Ready ordered that his award be posted in the engine shop, along with the conclusions and recommendations in the Ferguson-Rogers report, and the company's harassment policy.

[106] Although the Ferguson-Rogers report was rather vague, I think there was a genuine attempt to address the issues that Mr. Hill had raised. Some of the vagueness in the company's response was a product of the hesitation in the report, which was tentative at best. It does not contain the kind of explicit finding that would vindicate Mr. Hill's complaint of discrimination and seems more designed to placate the Complainant than anything else. The report suggests, in point of fact, that there is no evidence of explicit discrimination and merely speaks to the insensitivity of the employees in the engine shop.

(ii) The Second Grievance

[107] Mr. Hill filed the second grievance on July 29, 1994, with respect to his unsuccessful application for the Aircraft Maintenance Planner III position. In this grievance, he requested a meeting with the interviewers. Although the grievance was denied, Mr. Clement and Mr. Hunter eventually met with Mr. Hill. After discussing the interview, and the selection process as a whole, Mr. Hill withdrew his grievance.

(iii) The Third Grievance

[108] Mr. Hill also filed a third grievance under Article 39 of the collective agreement alleging personal harassment. This grievance arose out of the climactic events of October 18, 1994. Dave Park and Ted Pierre, a union and a management representative, conducted separate investigations into the matter at the end of January 1995. Their findings were combined in a set of joint recommendations. Although Mr. Park and Mr. Pierre expressed sympathy for Mr. Hill, and did not approve of the way in which the meeting was handled, they rejected the allegation of harassment.

[109] The company held a meeting with the individuals involved in the events of October 18th on March 10, 1995 to discuss the Park and Pierre report. This was described as a meeting of the whole. Mr. Hill attended the meeting, along with Mr. Shelford, Mr. Strohmaier, Mr. Jureidin, Mr. Ryan, Mr. Lawrence, Mr. Abbing, Mr. Cavasin, Mr. Park, and Mr. Pierre. Mr. Hill was advised that he was welcome to return to the engine shop. Mr. Ryan had been transferred to a plant at Tilbury, where the Dash-80 line was now situated. Mr. Hill advised at the meeting that

he would not return to work until the issues between himself and the company had been resolved. He expressed continuing concern with the situation of minorities in the engine shop, took issue with Ms. Knorr's report, and raised questions with respect to the programs available to minorities.

[110] Mr. Hill subsequently received two letters from Canadian advising him that his employment would be terminated if the company did not hear from him. His evidence was that Mr. Beaudin at the B.C. Human Rights Coalition responded to these letters on May 17, 1996, informing the company that Mr. Hill wished to return to work but only when the matter was resolved. Mr. Hill's employment with Canadian was eventually terminated by a registered letter dated October 9, 1996, in which the Respondent stated that it had closed his file and was now requesting the repayment of some four thousand dollars in pay and benefits. The Respondent did not acknowledge receipt of Mr. Beaudin's letter.

III. ANALYSIS

A.Prima Facie Case

[111] The present case does not raise complicated legal issues. At the end of the hearing, I nevertheless raised the question whether there was any need to decide whether the Complainant and Commission had established a *prima facie* case. This calls for further elaboration.

[112] The decisions in the area hold that the initial burden in the human rights process lies with the Complainant, who must establish a *prima facie* case of discrimination. Once a *prima facie* case is established, it is usually said that the Respondent has the burden of explaining. The traditional source of this formulation is *O'Malley v. Simpson Sears*, [1985] 2 S.C.R. 536, which dealt with a *bona fide* occupational requirement. Some of the more recent case law now suggests that the burden then returns to the Complainant, to demonstrate that the explanation provided by the Respondent is a pretext for discriminatory conduct.

[113] There are a variety of problems here. The case law seems to have neglected the origins of the *prima facie* test, which is used to decide whether there is a case to meet. The question is accordingly whether the responding party must lead evidence. This question arises more naturally at the close of the case for the Complainant and Commission than at the end of the case. If the Complainant and Commission have not established a *prima facie* case at this stage of the process, the Respondent has no reason to explain its conduct and is entitled to a non-suit. There is a related question as to whether the Respondent must decide whether to call evidence before applying for a non-suit.

[114] The difficulty arises when the *prima facie* test is used at the end of the inquiry into a human rights complaint. This may seem feasible, as in *O'Malley*, when the Respondent has not led evidence. But it seems rather late in the process, if the purpose of the test is to determine whether there is a case to meet. This becomes apparent if the Respondent has called evidence, since it is redundant to ask whether the Respondent has an obligation to call evidence, if it has already done so.

[115] There is a discussion of the meaning of a *prima facie* case in The Law of Evidence in Canada. The authors of this text begin by asserting that the idea is notoriously vague and can mean a number of things. They also make a distinction between an evidentiary and a legal burden of proof, which goes to the difference between raising a legal issue and proving a fact. The whole notion of a "burden" is somewhat misleading here, however, and I have to say that the discussion in the text only complicates the matter.

[116] The *dicta* in *O'Malley* does not require that the Complainant and Commission "prove" the *prima facie* case in the normal sense of the word. This is in keeping with the practice in the courts, where the issue is merely whether the case should go to the jury and be considered by the court. This is apparent in the original passage from *O'Malley, supra*, at para. 28, which is quite tentative:

> A *prima facie* case is one which covers the allegations made, and which, *if believed*, is complete and *sufficient* to justify a verdict in the complainant's favour in the absence of an answer from the respondent. (emphasis added)

As I understand it, the Tribunal is not called upon to decide whether it believes the case at this point in time. The issue in deciding whether there is a *prima facie* case, at least as it is set out in *O'Malley,* is merely whether the essentials of a case have been made out.

[117] On this view, one would have thought that it is still open to the Tribunal to reject the evidence presented by the complaining parties and dismiss the case. I say this because the ordinary test for a *prima facie* case does not require that the evidence be weighed, at least in the normal run of cases. If the Tribunal simply moves to the Respondent's case, one of the normal steps in the normal process of weighing evidence is lost and the case for the Commission and Complainant is not subjected to an analysis on a balance of probabilities. This is a product of the decision to move the *prima facie* test from the close of the case for the Complainant and Commission to the end of the hearing.

[118] There seem to be two possibilities. One is that this simply moves the burden of proving the case on a balance of probabilities from the complaining to the responding parties. As Justice McIntyre writes, rather starkly, in *O'Malley*: "the Board of Inquiry was in error in fixing the Commission with the burden of proof." (¶28) The other possibility is that the burden shifts: that would mean that *prima facie* test employed at the end of a human rights inquiry is substantive and requires proof of the Complainant's case on a balance of probabilities. I am not sure that the matter is decided, though the idea of a shifting burden has been a source of concern in the courts. This is because it tends to obscure the ultimate burden of proof in a case, which normally rests with the party bringing the action.

[119] I realize that the court in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 states that the burden shifts, but the case does not address the issue explicitly. I am inclined to think that the decision in *O'Malley*, at least, places the burden of proof in most cases of discrimination on the Respondent. There are reasons for this: it is the employer who is in the best position to prove undue hardship. I nevertheless find myself hesitating before I accept that the Supreme Court intended to alter the burden of proof in

a case where this kind of issue does not come before the Tribunal. This takes me to the case before me, where the contest between the parties was remarkably simple.

[120] The Complainant and Commission alleged that there was discrimination and harassment. The Respondent demurred. Although the *prima facie* test has been used in cases where there is an allegation that the Complainant was not awarded a position, this is on the basis that the employer had supervision of the competition and was privy to the decision-making process. This is not a significant consideration in the present case, where the only real issue is whether the Complainant and the Commission have established a credible case. This requires some weighing of the evidence.

[121] The question is ultimately whether the burden of proof should be placed on the complaining or the responding parties, and whether the *prima facie* test should be used in a case where there seems no reason to apply it. In the final analysis, I do not feel that it is possible to go against the usual conventions of proof without more explicit direction from the courts. There is some support for this in *O'Malley*, again at paragraph 28, where Justice McIntyre says:

> I agree then with the Board of Inquiry that each case will come down to a question of proof, and therefore there must be a clearly-recognized and clearly-assigned burden of proof in these cases as in all civil proceedings. To whom should it be assigned? Following the well-settled rule in civil cases, the plaintiff bears the burden. He who alleges must prove.

I cannot say whether the original motivation behind the conventional rule was to discourage litigation. This is not the place to deal with justifications, however, and the fundamental rule is too entrenched in the foundations of our legal system to be easily displaced.

[122] I realize that this seems to create different burdens in different cases. If there is a simple allegation of discrimination and a simple denial, the burden remains on the Complainant and Commission. If the employer argues undue hardship, on the other hand, the burden seems to fall on the Respondent. I see no alternative, however, but to restrict myself to the case before me. The issue in the immediate case is not whether a *prima facie* case has been made out, which calls for a response. It is whether the Complainant and the Commission have proven their case. If the burden of proof actually shifts in a human rights case, this would seem to be a case where the evidence led by the Respondent goes to the first rather than the second burden.

[123] I think my primary obligation is to clarify what approach I have followed, in assessing the evidence before me. In my view, then, the fundamental probative issue in the case before me is whether the Complainant and Commission have established on all of the evidence that there was discrimination or harassment. As I understand it, the evidence led by the Respondent was led for the purpose of negating such an inference and not for the purpose of proving a separate set of positive assertions. The only question for the Respondent is whether it has led sufficient evidence to offset any preponderance of evidence on the other side. Most of the issues in the case relate to the credibility of ordinary witnesses.

[124] In these circumstances, I cannot see what purpose it serves to determine whether the Complainant and Commission have established a *prima facie* case in the circumstances before me. There is simply no need to go into such an inquiry: the issues between the parties lie in the merits of the case and the prefatory question simply does not pose itself. This does not prevent the Respondent from submitting, at least rhetorically, that the Complainant and Commission did not establish a *prima facie* case. This neither adds nor detracts from the task before me, however, which is to decide whether the Complainant and Commission have proven discrimination or harassment on a balance of probabilities.

B. Discrimination

[125] There are two complaints before me. The first alleges a pattern of discrimination against Mr. Hill. This pattern can be found in the assignment of tasks on the Dash-80 line, the allocation of temporary assignments, the decision to award the Planner III position to someone else, and the more general treatment of minorities in the shop.

(i) The General Evidence

[126] There was a general allegation of discrimination. Mr. Ash submitted that there were "golden boys" who were given the better job assignments and groomed for promotion. The mechanics who were members of visible minorities were excluded from this process, presumably by reason of race. The Complainant and Commission relied on the evidence of other witnesses, which provided circumstantial evidence of discrimination and harassment in the work place. Counsel referred to this as "similar fact evidence". There was testimony from Carl Hibbert, for example, who felt that he had been discriminated against in applying for more senior positions.

[127] I am not completely comfortable with the term "similar fact evidence" in this context, since I am not convinced that Mr. Hill's experiences were all that similar to those of other employees. There is no real evidence that Mr. Ryan, for example, displayed the same hostility to other mechanics that he displayed to Mr. Hill. The power plant was a large workplace and it is dangerous to generalize in this kind of way, at least in the present circumstances. The environment on the 737 line was clearly different than the environment on the Dash-80 line or in areas where minorities prevailed.

[128] The case law nevertheless establishes that circumstantial evidence may be helpful in deciding whether there was discrimination. This is a product of the fact that direct evidence of discrimination is often difficult to obtain. In *Canada (Canadian Human Rights Commission) v. Chopra*, [1998] F.C. No. 432, for example, Justice Richard held that statistical evidence regarding the distribution of minorities in the workplace could provide the basis for an inference that an individual Complainant was discriminated against.[(1)] Although I heard some evidence regarding the distribution of minorities at Canadian, Ms. Knorr testified that there were no reliable figures available, as the union discouraged employees from completing the relevant forms.

[129] The decision in *Chopra* is still helpful, at para. 22, in establishing the importance of contextual evidence. At para. 22, Justice Richard holds that "general evidence of a systemic

problem" is admissible as circumstantial evidence of discrimination. This goes well beyond on the admission of statistical evidence and encompasses the personal testimony of other employees who may have suffered from the same pattern of discrimination. It follows that general evidence of discrimination in the workplace may be helpful in determining whether there was evidence in a specific case.

[130] The problem is that most of this evidence, in the present case, was vague and impressionistic. It consisted for the most part of personal opinions. It was also selective. This was apparent in the evidence of the training that was given to mechanics at Canadian. The training in question appears to have taken place prior to 1992, over ten years ago, and the evidence was sketchy. Although there may have been favouritism in deciding who received this training, it is very hard to judge from this distance whether there is any substance to such allegations. I can understand the suspicions of the Complainant and the Commission, but suspicion is not proof.

[131] The Complainant and Commission may understandably feel that Canadian has benefited from its own failure to determine the number of minorities in its workforce. I am nevertheless willing to accept the impressionistic evidence that the representation of minorities in senior positions was notably sparse in the late eighties and early nineties. I am not, however, prepared to infer from this that Mr. Hill was discriminated against in his own attempts to advance in his career. I say this because the evidence as a whole establishes that the problems Mr. Hill encountered were a product of his own making.

[132] The Commission has also cited *Basi v. Canadian National Railway Co.* (1988), 9 C.H.R.R. 5029 (C.H.R.T.) and *Holden v. Canadian National Railway* (1991), 14 C.H.R.R. 12 (F.C.A.) as authorities for the principle that it is sufficient if race was one of the factors in what occurred to Mr. Hill. I accept this principle but do not find it helpful in the immediate case. In my view, the personality conflict that developed between Mr. Hill and Mr. Ryan was not a product of race, whatever racial views Mr. Ryan might have held. It was a product of Mr. Hill's attitude towards his work, his resentment of authority and his tendency to project his problems on to other people.

[133] In the circumstances before me, I am not prepared to extend the experiences of other mechanics to the case of Mr. Hill. As the Tribunal held, in *Swan v. Canada (Armed Forces)* (1994) 25 C.H.R.R. 312, at para. 30, there must be a nexus between contextual evidence and the case before the Tribunal. I find myself in much the same position as the Tribunal in that case, which held that evidence of allegations by other individuals did not add to the Complainant's case. One must also exercise a certain caution in relying upon circumstantial evidence, particularly in cases where there are other explanations for what occurred.

[134] This seems to bring in the rule from *Hodge's case* in the criminal courts, which holds that an individual cannot be convicted on circumstantial evidence unless the evidence is "inconsistent with any other rational explanation". The Complainant and the Commission have provided me with an excerpt from Proving Discrimination in Canada, at p. 141f, where the author takes issue with an Ontario decision and argues that the rule is out of place in a case where the civil standard of proof applies.[(2)] I would hazard to suggest, however, that the origins of the test have more to do with the inherent fragility of circumstantial evidence than with the burden of proof.

[135] I think it is enough in the present case to say that a tribunal should be reluctant to find against a respondent on the basis of circumstantial evidence when there is a reasonable alternative to the theory that the Complainant was discriminated or harassed. The general prejudicial effect of similar fact evidence is well recognized: although the rules of evidence have been relaxed in the context of human rights, the case law holds that such evidence is only admissible when its probative effect outweighs its prejudicial force. See: *Mehta v. MacKay* (1990), 15 C.H.R.R. 232 (N.S. App.Div.) and *Hewstan v. Auchinlek* (1997), 29 C.H.R.R. 309 (C.H.R.T.), at p. 313.

[136] There is another issue that raises itself in the context of the general evidence of discrimination. Counsel submitted that the systemic issues in the workplace were brought to the company's attention when Mr. Hill filed his initial grievance. This gave rise to a general duty to rectify the situation. Although there were a number of investigations, the Complainant and the Commission took the position that the Respondent failed to treat the matter with the importance it deserved, or pursue it diligently. In the words of Mr. Fakirani, they "kept dropping the ball".

[137] I agree that the questions of discrimination and harassment were brought to the attention of the employer and raised a duty to investigate and correct any problems in the workplace. I do not agree, however, that the employer failed in its duty of due diligence. I accept that the attempts of the company to deal with these issues may have received less attention than some of the other issues in the workplace. They were nonetheless real and substantive. I accept the conclusions in the Ferguson-Rogers report, the decision of Arbitrator Ready, and Ms. Knorr's brief report on temporary assignments. I also think that the Complainant and Commission have overlooked the sincere attempts of the management to accommodate Mr. Hill after the incident of October 18th, 1994.

[138] I should add that the employer has an obligation to provide a workplace free of discrimination and harassment, and this duty of due diligence extended to the larger issues in the workplace. The only complaints before me are the personal complaints of Mr. Hill, however, which originally took the form of grievances. The response to these grievances was by no means perfect: but it was more than sufficient, in my estimation, to satisfy the employer's obligation to deal with them diligently. I do not believe that there is any reason to discuss the principle of vicarious liability, which is not a significant issue in the present case.

(ii) The Use of the Term "Nig Nog"

[139] There is also an allegation that Mr. Ryan used the term "nig nog" in reference to Mr. Hill. As it turns out, however, the Oxford English Dictionary and the Oxford Dictionary of Modern Slang give two meanings of the term. These meanings support both of the positions put forward by the parties. Mr. Ryan testified that the word is used in Lancashire to describe a foolish person. This appears to be the original use of the term and may be related to the word "noggin". The racial use of the term appears to be a corruption of its original use, and refers to newcomers or immigrants who are not of the white race, undoubtedly acquiring some of its impact from its similarity to the word "nigger". If Mr. Ryan was looking for an underhanded way of provoking Mr. Hill, he certainly succeeded.

[140] I accept Mr. Hill's assertion that he told Mr. Ryan that the term was objectionable. There is no real evidence, however, other than the Complainant's, that Mr. Ryan used the word after it had been brought to his attention. I am prepared to accept Mr. Ryan's evidence that he stopped using the word. Although there is ample room for suspicion, I think it would be overstating the evidence to conclude that Mr. Ryan was using the term as a racial epithet. By all accounts, Mr. Ryan was a cautious man in his dealings with both his superiors and the mechanics on his crew. It would have been out of character for him to use explicit racial slurs, in addressing employees.

(iii) Temporary Assignments

[141] Then there is the allegation that Mr. Hill was discriminated against in the distribution of temporary assignments. In considering this aspect of the case, I feel obliged to say that it is not my place to decide how the workplace should be managed. That is the prerogative of management. There is no question that the distribution of work assignments within the machine shops was left in the discretion of individual foremen and was not based on a highly developed system. The Respondent argued that this was an inevitable aspect of the exigencies involved in the work done within the shops. There were clearly many situations in which the supervisory staff had to exercise their judgment in deciding the priority and distribution of work.

[142] The Complainant and Commission have focused on the process used by Mr. Ryan in assigning mechanics to Area H. Mr. Ryan testified that he was routinely asked to send specific individuals to the blade rework area. I think this was an attempt to deflect responsibility, since there is no doubt that he had considerable input into those decisions. In those cases where he was expected to exercise his own discretion, he would assign those mechanics who were working on less pressing tasks. It was also apparent that he did not have a high regard for Mr. Hill's abilities as a mechanic and felt that the more important jobs were beyond him.

[143] The Commission and Complainant have argued that a written record should have been kept of the temporary assignments. In their written argument, they submit as follows:

> The Commission and the Complainant submit that the system cannot be adequately managed without written procedures and policies as to how to run that system, and written records in order to maintain updated information about the system. An unwritten system of work is of little comfort to employees who have nothing more to rely on them but the goodwill and memories of their supervisors. This type of system is arbitrary, and difficult to track. The Commission and the Complainant submit that such a system would actively hinder any sort of effort at ensuring work is allocated in a fair and equitable manner.

I agree that a record should have been kept of the temporary assignments, at least in a case like the present, where the assignments were a source of controversy.

[144] I would reject the idea, however, that all of the mechanics should have been assigned to the least desirable areas of the shop on an equal basis. This would undermine the foremen and supervisors, who have a right and indeed a duty to manage the shop in the best way they see fit. A foreman is entitled to keep his best mechanics on the most important or challenging tasks, and

deploy less experienced and less capable mechanics in areas like balancing, viewing and blades. The safety of the airline industry enters into this. An employer is entitled to rely on the subjective assessment of a foreman, in determining the best distribution of mechanics in the workplace. It is not the job of the Tribunal to fine-tune these kinds of decisions, which are beyond its expertise.

[145] This does not mean that an employer can discriminate against less experienced mechanics, who are entitled to the opportunities that they need to advance in their careers. The different interests must be balanced and the issue is whether there is concrete evidence that a foreman is taking advantage of the situation to favour some mechanics and punish others. A written record may be helpful in deciding this, but it is not determinative. There is no real dispute as to the number of times Mr. Hill was assigned to Area H, and since his situation was unique, I do not believe a list would have made any difference in my determination of the facts.

[146] The ephemera of daily life takes on one meaning or the other, depending on the side that one adopts. Many of the mundane events of everyday life take on a sinister aspect, if one is inclined to view them in that manner. Mr. Hill testified, for example, that he was always given the "dirty" jobs, which required the use of lubricants and other unhealthy products. Mr. Radominski, on the other hand, testified that Mr. Hill did not like to get his hands dirty. As a result, he used the lubricants so sparingly that it was almost impossible to pry apart some of the components he had put together. This presented problems if the job had to be done over. The question that arises is whether Mr. Hill's contention was perception or reality.

[147] I am not satisfied on all of the evidence that Mr. Hill was discriminated against in the distribution of temporary assignments. The evidence on this aspect of the case was even more speculative than the rest of the evidence. Many factors entered into these decisions, some of which can be attributed to Mr. Hill. I accept the evidence of a number of witnesses, for example, who suggested that Mr. Hill did not show as much initiative as some of the other mechanics. Rather than take up work, he would wait for assignments. This left him more vulnerable to the mercies of the foreman and more likely to be transferred off the line.

[148] Although one of the purposes of the human rights process is to educate employers and employees, our constitution protects the freedom of conscience and it is not my place to regulate the private views of individual persons. I was not convinced by Mr. Ryan's avowal that he had no racial views. The evidence before me nevertheless suggests that he managed to keep them sufficiently to himself to protect the integrity of his decisions regarding the assignment of work. I cannot go beyond that. It is clear to me that Mr. Ryan was conscious of authority and would have known that his superiors were sensitive on the issue of discrimination.

[149] The Respondent thought the method of allocating temporary work was well-tailored to meet the demands in the shop. Mr. Shelford felt that he had sincerely looked into the matter, in asking for Ms. Knorr's report, and came to the conclusion that the existing system of assigning jobs was fair and equitable. Mr. Strohmaier took a similar position. I cannot say that these conclusions were unreasonable. The engine shop could not have operated satisfactorily without temporary assignments. It was clear that there were times when the normal methods of assigning work had to be supplemented with a more *ad hoc* procedure.

C. The Planner III Position

[150] There is also Mr. Hill's application for the Planner III position. The basic requirements in proving that an employer discriminated against a complainant in awarding a position are set out in *Shakes v. Rex Park* (1982), 3 C.H.R.R. D/1001 (Ont. Bd. of Inq.), at D/1002:

> In an employment complaint, the Commission usually establishes a *prima facie* case by proving (a) that the Complainant was qualified for the particular employment; (b) that the Complainant was not hired; and (c) that someone no better qualified but lacking the distinguishing feature which is the gravamen of the human rights complaint (i.e., race, color, etc.) subsequently obtained of the position. If these elements are prove, there is an evidentiary and onus on the Respondent to provide an explanation . . .

There is a no point in belabouring these kinds of issues in the present case. I am not satisfied, on the Planner III position, that the Complainant had the necessary qualifications for the position. I accept that he had the qualifications to apply for it: but the evidence of Mr. Clement and Mr. Hunter, in particular, establishes that he was a poor and inexperienced candidate.

[151] The matter is complicated by the fact that the person who received the position did so on the basis that he did not appear to have the necessary qualifications. Mr. Hunter acknowledged the problem but it does not follow, in the circumstances of the case, that Mr. Hill was the victim of racial discrimination. The evidence demonstrates otherwise: aside from his lack of knowledge of the Planner III position, I have to say that Mr. Hill's attitude to his work, which surfaced in his interview, would probably have excluded him from more senior positions. I realize that he may see this as the cost of challenging an unresponsive management, but that is a partial view and I can only say that the problems with his general attitude to work were real.

D. Harassment

[152] There is no need to discuss the law of harassment at length. The Respondent has cited *Dhanjal v. Air Canada* (1996) 28 C.H.R.R. 367 (CHRT), (1996), aff'd at [1997] F.C.J. No. 1599 (F.C.A.), which holds that harassment must be persistent and frequent. The gravamen of harassment lies in the creation of a hostile work environment, which violates the personal dignity of the complainant. It poisons the workplace, deprives it of neutrality, and humiliates the person who is harassed. A person who harasses a complainant has failed to respect the fundamental dignity of the person.

[153] The law establishes that there is a subjective and an objective component in harassment. As a result, as *Dhanjal* puts it, at para. 210, "the seriousness of the impugned conduct must be perceived from the perspective of the victim." At the same time, the Tribunal must adopt the perspective of a reasonable victim. At paragraph 213, the Tribunal holds that:

> A number of factors may be weighed in assessing the "reasonableness" of the impugned conduct. In this regard, we share Mr. Pentney's opinion when he states the following, in the work he co-authored with Tarnopolsky, Discrimination and

> the Law (Toronto, De Boo, 1985 and cumulative supplements), at pp. 8-31 and 8-32:
>
> the touchstone in applying this test must be the usual limits of social interaction in the circumstances....
>
> Several factors are relevant in evaluating the limits of "reasonable" social interaction, including the nature of the conduct at issue, the workplace environment, the pattern or type of prior personal interaction between the parties, and whether an objection or complaint has been made.

The present case takes me beyond these issues, since there is no question in my mind that the complainant breached the limits of reasonable interaction. This seems to be the decisive consideration in the immediate case.

[154] There was a workplace harassment policy at Canadian. It was reasonably broad and stated that racial slurs and comments that "intrude upon a person's or group's dignity" would constitute harassment. This does not mean that the employer was obliged to maintain a pristine work environment. It was inevitable, given the antecedents, education and nature of the workforce, that the daily exchange between employees would include comments of a salacious or unduly vigorous nature. The testimony of Mr. Cavasin, even in the rather dignified confines of the courtroom, is a case in point. It was not a tea party.

[155] Much has been made of the fact that the harassment policy co-ordinator was never formally appointed. Nor were harassment policy representatives. The employees in the engine shop were unaware that such a position existed and I agree that the harassment policy was never properly implemented. It does not follow, however, that Canadian defaulted on its obligations to prevent harassment in the workplace. I think it is more accurate to say that Canadian was struggling to meet all of its obligations, most of which related to the survival of the company. Ms. Knorr testified that she had played the role of the Policy Co-ordinator and dealt with specific issues when they arose. While the company's conduct was far from perfect, I am satisfied that there was a serious if limited attempt to deal with the racial issues in the workplace. The attempt to deal with Mr. Hill's complaints is a case in point. Whatever the problems within the process, I believe there was a sincere effort to deal with the substance of his complaints.

[156] I do not want to go into estimates as to how much of the graffiti in the washrooms was racial in nature. It is enough to say that it was one of the themes that found expression on the walls. There is no evidence that graffiti was a serious problem elsewhere and there is evidence that the management took steps to control it. Not do I see any reason to discuss how often the bathrooms were painted. It is true that Mr. Shelford found himself unable to do this as often as he would like, as a result of budgetary restraints. But the point is that the management tried to deal with the matter. Mr. Shelford also testified that he addressed the issue at a meeting of the employees and discussed it with supervisors and foremen. The actions of the employer were serious and sincere.

[157] In any event, the evidence in this regard goes to more systemic issues, where the better complaint seems to lie. Although this provides an important context, which is helpful in examining the origins of Mr. Hill's complaint, I have to say that it does not explain the series of events that finally culminated in the termination of his employment. This goes back to the question of a nexus. The evidence is overwhelming that the problems Mr. Hill experienced were of his own creation. The Respondent has stressed that the Complainant did not complain about the graffiti or the racial slurs until after he left Canadian and was compiling a case against it. I suspect that hindsight played a part in this, but I am not convinced that the Complainant was a particular target of racial improprieties.

[158] Almost all of the evidence of personal harassment was provided by the Complainant. Mr. Hill testified that Gordy White, Bill Davidson, Herb Pierce and Mr. Ryan all used racial language or directed racial epithets at him. I do not accept that Mr. Ryan did so: the evidence regarding the other individuals, with the exception of Herb Pierce, was fragmented and unsupported. The only individual that was alleged to use derogatory racial comments towards Mr. Hill on the Dash-80 line was Mr. Pierce and there is no evidence that this was a general pattern among other mechanics. I have stated that it is clear to me that employees became considerably more sensitive to the issue over time.

[159] Although I suspect that minorities were not treated with the respect and dignity that they deserve, I believe the problem was more general. The evidence establishes that many of the mechanics were not respectful of other employees. I include Mr. Hill in this. I am also satisfied that the problem was more acute as one goes back in time. There is no question that offensive comments were commonplace on the shop floor. Some of these were of a sexual nature; some of them were racial; and many scatological. It may be *naïveté* on my part, but I was surprised at the general lack of respect that the mechanics displayed towards each other. It is evident from the testimony of a number of the mechanics that there was a good deal of baiting in the shop. This goes a long way toward explaining some of the more offensive forms of humour in the shop, which openly demeaned others.

[160] Some of this may have been inevitable, given the antecedents, education and nature of the workforce. While there was evidence that the machine shops remained productive, there is little doubt that this aspect of the workplace was exacerbated by the prevailing uncertainty with regard to the future of the Airline. Ms. Knorr testified that this placed enormous pressure on everyone in the workplace. This does not excuse inappropriate conduct, but it provides the context in which such conduct must be measured. The decision in *Dhami v. Canada (Employment and Immigration Comm.)* (1989), 11 C.H.R.R. 253 (CHRT), at paragraph 80, suggests that factors such as the malaise brought about by "the pressures of reorganization and integration" may be relevant in assessing whether a complainant was a target of racially motivated behaviour.

[161] It is manifest that the mechanics peppered their exchanges with whatever seemed offensive, in a rather adolescent attempt to subvert the normal standards of courtesy. There is evidence, for example, that a Chinese mechanic referred to himself as a "chink". The idea was apparently to push the limits of civility as far as they would go, in a rather questionable form of sport. Mr. Hill participated in this aspect of the workplace, apparently with some gusto. I realize that the mechanic who was described as a "dog-fucker" on the "rating performance record" was

one of the persons that allegedly made racial comments. It is also true that there is nothing racial in the comments on the form. These considerations seem beside the point, however, and Mr. Hill cannot conduct himself in this way and expect to come before the Tribunal when others do the same.

[162] It is a blunt way of putting it, but the Complainant cannot object to conduct that he seemed to relish. This issue needs to be squarely faced. If Mr. Hill is offended by racial comments, but happy with cutting sexual remarks like "piss flaps" and "dumb cunner", he was merely choosing his forms of disparagement. It is significant that there were women in the workplace. I accept Mr. Ghuman's testimony that Mr. Hill enjoyed using these terms, in the face of the individuals to which he was referring. This is a form of harassment, in itself, and undermines the dignity of the person. The situation before me is different than the situation in *Swan v. Canada (Armed Forces)*, cited *supra*, where the Complainant acknowledged that he was not offended by some of the racial comments directed at him, which were used in a joking manner.

[163] The Tribunal in *Swan* held that a Complainant's participation in racially offensive behaviour does not necessarily justify the behaviour. I agree that this kind of behaviour is unacceptable and in that sense, no amount of consent, can justify it. A distinction must be made between situations where someone feels compelled to participate in this kind of activity, however, against his inclinations, and a situation where he willingly does so. The obligation to respect the value and dignity of the person is reciprocal, and I think something like a doctrine of clean hands doctrine must apply in the field of human rights, at least in the context of personal complaints. The reputation of the human rights system would be undermined by a policy that rewarded complainants who violate the fundamental rights of other employees. There is a different set of considerations in systemic complaints.

[164] The Respondent has submitted that there are some similarities between the present case and *Dhanjal v. Air Canada*, cited *supra*, where a personality conflict developed between the Complainant and his supervisor. There was testimony, as here, that the supervisor had real issues with the Complainant's work. The supervisor was described as an "authoritarian" manager who dealt with the employees underneath him in a high-handed way. I do not know if that is an accurate description of Mr. Ryan, but there is no question in my mind that authority was the real issue in the contest of wills that took place between Mr. Hill and Mr. Ryan. I am not prepared to say that there is no *prima facie* case before me, as the Tribunal did in *Dhanjal*. But the evidence from the Complainant is more in the nature of speculation than anything else and is thin by legal standards.

[165] The Respondent has also directed me to *Baptiste v. Canada (Correctional Service)*, [2001] (C.H.R.T.), where the Tribunal found itself unable to conclude that the Complainant's supervisor was motivated by race in giving her poor evaluations. There was a personality conflict between the Complainant and the supervisor, who became increasingly frustrated with her over time. There is a point, in these kinds of cases, where the perceptions of an employee become tainted with disaffection and even outright enmity. At that point, an employee feels victimized, and becomes thoroughly convinced that the problem is with the supervisor. In such a situation, it is only natural to project one's difficulties onto other people.

[166] I am not questioning the sincerity of Mr. Hill's feelings. Since race was one of the defining features in the engine shop, with negative overtones, it comes as no surprise that it would provide him with a ready explanation for what occurred. This is not a case where I find it helpful to ask whether a reasonable person in Mr. Hill's position would have felt harassed. Mr. Hill's position was unique to himself and I am compelled to say that I do not believe that a person with a more reasonable attitude would have found himself in Mr. Hill's position. There was a certain amount of misfortune in the way that things developed in Mr. Hill's life and the events at work may have become the focus of more general issues. There is nothing I can say to that: but misfortune is not harassment.

[167] The Complainant and Commission has suggested the circumstances in the present case bear some similarity to the facts set out in *McKinnon v. Ontario (Ministry of Correctional Services)(No.3)* (1988), 32 C.H.R.R. 1 (Ont. Bd. of Inq.) and *Hinds v. Canada (Employment and Immigration Commission)* (1989), 10 C.H.R.R. 5683. I simply do not agree: the problems in the present case can ultimately be traced to the Complainant rather than the employer. Any reasonable manager would have eventually come to the conclusion that Mr. Hill and Mr. Ryan needed to be separated, wherever the blame lay in their conflicting relations. In point of fact, Canadian recognized this at the meeting "of the whole" that was held to deal with the aftermath of the incident on October 18, 1994 and offered Mr. Hill another assignment. I do not find it reasonable for Mr. Hill to demand that Mr. Ryan be removed from the Dash-80 line.

E. The Fundamental Nature of Human Rights

[168] It is now recognized, in Canada and elsewhere, that the law of human rights has a fundamental character. I think it is significant, however, that it applies in the civil sphere. The *Canadian Human Rights Act* does not merely extend to government: it extends to the relationships between private individuals, which were traditionally outside such scrutiny. This naturally takes in the workplace: employees are entitled to a workplace that recognizes their inherent dignity and value, and an employer has a duty to prevent discrimination and harassment. This has been described in the case law as a term or condition of employment.

[169] It follows that many of the complaints that come before Human Rights Tribunal arise in the workforce. This is as it should be. The *Canadian Human Rights Act* nevertheless deals with more fundamental interests and should not be merely seen as another level of appeal or review in the field of labour relations. I recognize that the complaints before me appear to invoke those interests. On closer examination, however, I have to say that the matter before me is primarily a personality conflict between an employee and supervisory staff. It raises serious workplace issues, which belong more in the field of labour relations than human rights.

[170] There is some recognition of these concerns in the law of harassment. In *Rampersandsingh v. Wignall*, T.D. 13/02; 2002/11/26, at para. 45, this Tribunal held that a certain seriousness was necessary to establish the gravamen of harassment. The Member in the case refers to *Habachi v. Commission des droits de la personne du Québec*, [1999] R.J.Q. 2522, R.E.J.B. 1999-14361, [1999] J.Q. No. 4269 (Q.L.) (C.A.Q.), where the Quebec Court of Appeal held that the legal notion of harassment should not be rendered mundane, or "banalisé", in the French, by opening

up ordinary workplace disputes to the scrutiny of human rights tribunals. Something more is needed to invoke such fundamental rights.

[171] There are similar concerns in the immediate case. A human rights complaint engages public interests that go beyond the private interests of the parties. The irony may be that Mr. Hill laid a more general complaint, which was not before me. I cannot say how that complaint might have been dealt with or whether it would have been substantiated, but it would at least go beyond the private dispute. Nor do I mean to discount the significance of what occurred to the participants. But I do not believe that the personal relations between Mr. Hill and Mr. Ryan raise the kind of fundamental issue that calls for examination in the present forum. The expertise of the Tribunal lies in human rights, rather than in management and labour issues.

[172] In the immediate case, the allegation of discrimination really raised itself in the daily distribution of tasks on individual crews. These kind of complaints arise in any workplace and are easily overstated. It is impossible to scrutinize every aspect of the work assigned to individual employees, particularly when the events in question occurred over ten years ago. There is a certain critical mass, if I can put it that way, which is needed to justify a complaint. It was not present in the immediate case. I do not see the kind of public policy issue that one would expect to see in a case before a Human Rights Tribunal.

IV. ORDER

[173] In the circumstances, the Complainant and the Commission have not established on a balance of probabilities that Mr. Hill was discriminated against or harassed during the relevant period at Canadian. The complaints are therefore dismissed.

[174] There is one incidental matter that I would like to mention. At the end of the hearing, I advised the parties that I would endeavour to issue my decision as soon as possible. I would like to express my regret that other matters intervened.

"Original signed by"

Paul Groarke

OTTAWA, Ontario

February 18, 2003

CANADIAN HUMAN RIGHTS TRIBUNAL

COUNSEL OF RECORD

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APPEARANCES:

Cecil F. Ash For the Complainant

Salim Fakirani For the Canadian Human Rights Commission

Paul Fairweather and Lisa Steiman For the Respondent

1. [1] Affd. at [1999] F.C.J. No. 40 (F.C.A.)

2. [2] Béatrice Vizkelety, Proving Discrimination in Canada (Carswell: Calgary, 1987)