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

HUMAN RIGHTS TRIBUNAL

BETWEEN:

MARY PITAWANAKWAT
Complainant

- AND -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- AND -

DEPARTMENT OF THE SECRETARY OF STATE

Respondent

DECISION OF TRIBUNAL

TRIBUNAL: BRENDA M. GASH - Chairperson
LOIS R. SERWA - Member
JAMES D. TURNER - Member

APPEARANCES: P.C. Engelmann and D. Russell, Counsel for
Canadian Human Rights Commission
M. Kindrachuk and B.W. Gibson, Counsel for
the Respondent

DATES AND LOCATION October 8, 9, 23, 24, 25 and 26, 1991
OF HEARING: November 7, 8 and 9, 1991
December 12, 13, 14, 16, 17 and 18, 1991
January 29, 30 and 31, 1992
March 9, 10, 11, 12, 19, 20 and 21, 1992
March 31 and April 1, 1992
May 19, 20 and 21, 1992
REGINA, SASKATCHEWAN

BACKGROUND

The Complainant in these proceedings, Mary Pitawanakwat, is a women of aboriginal origin, having Ojibway ancestry. Ms. Pitawanakwat commenced employment with the Regina office of the Department of the Secretary of State (hereinafter referred to as "the Department") in September of 1979 as a Social Development Officer which is classified by the Federal Government as a PM-4 position. Effective March of 1986, Ms. Pitawanakwat was fired from her position by the Respondent on the basis that she was no longer considered competent to do her job. The Complainant alleges that her firing was the consequence of racial discrimination and she relies upon Section 7 and Section 14(1) of the Canadian Human Rights Act to support her position.

The evidence presented before this Tribunal was exhaustive with neither counsel for the Human Rights Commission (hereinafter referred to as "the Commission") nor counsel for the Respondent leaving any stone unturned in an effort to fully present the Tribunal with support for their respective positions. The hearings did not commence until the fall of 1991 and consumed the good part of a month in sitting days and thousands of pages of documentary evidence and transcripts.

The events in question took place over a period of some six and one half years commencing in the fall of 1979 and concluding with Ms. Pitawanakwat's termination of employment in 1986. No satisfactory explanation has been provided to the Tribunal for the six year delay in the processing of Ms. Pitawanakwat's complaint which was filed in November of 1985.

Much of the viva voce evidence before the Tribunal was contradictory in nature and many of the numerous witnesses called by the parties had a hazy recollection of the times and events in question. More than twenty-five witnesses gave evidence and the hearing was spread out over a period commencing in October of 1991 and concluding with final argument on May 20 and May 21, 1992.

THE COMPLAINT

In the original complaint of Mary Pitawanakwat dated November 1, 1985, she alleges that she has been discriminated against as follows:

I have reasonable grounds to believe that the Department of the Secretary of State has discriminated against me by harassing me because of my race, contrary to Section 13.1 of the Canadian Human Rights Act.

I am an Indian of Ojibway ancestry. Racial harassment by the Department has poisoned my work environment. Harassment has

taken forms which include my being given workloads which are more demanding than those of my colleagues, being assigned to perform dangerous work, being ridiculed for leaving a Christmas party early after attending against my will, being criticised for not submitting travel claims on schedule, and having a complaint

against me solicited from a client group. The complaint, solicited by my supervisor in 1983 to discredit me, was withdrawn in 1984.

Harassment has also taken the form of my receiving biased and negative performance evaluations and being refused adequate training. I have formally requested training opportunities on three separate occasions in the last two years because of poor performance evaluations, but my requests have been denied.

I have been subjected to stereotyped perceptions that Indian people have trouble with time management and are non-communicative. I am required to submit weekly written reports of the work I have done and must have overtime and compensatory time pre-authorized. I have to develop a "plan of action" for the Regional Director's perusal prior to receiving such authorization. I must report to the Regional Director in detail on the times I arrive at and leave the office. Other staff are not monitored in this manner.

There has been a concerted effort on the part of the Department to encourage my resignation or to release me. The harassment culminated in the Regional Director recommending that I be dismissed from my position of Social Development Officer.

The Tribunal has been informed by counsel for the parties and through the evidence that this first complaint filed by Mary Pitawanakwat was suspended pending an appeal by her, under Section 31 of the Public Service Employment Act, of the Respondent's recommendation to release her on grounds of incompetence.

The November 1, 1985, complaint was amended on April 25, 1988, adding an additional ground under Section 7 of the Canadian Human Rights Act as follows:

The Department of the Secretary of State has discriminated against me during the course of my employment by failing to

provide me with a work environment free of harassment and adverse differentiation and by terminating my employment because of my race, in violation of Sections 7 and 13.1 of the Canadian Human Rights Act.

APPLICABLE SECTIONS OF THE HUMAN RIGHTS ACT

Ms. Pitawanakwat's complaint must be examined in the context of Section 2 of the Canadian Human Rights Act which sets forth the purpose of the legislation and, as well, the following:

Section 3(1)

For all purposes of this Act, race, national or ethnic origin, colour, religion,

age, sex, marital status, family status, disability and conviction for which a pardon has been granted are prohibited grounds of discrimination.

Section 7

It is a discriminatory practice, directly or indirectly,

(a) to refuse to employ or continue to employ an individual, or

(b) in the course of employment, to differentiate adversely in relation to an employee,
on a prohibited ground of discrimination.

Section 14(1)

It is a discriminatory practice,

(a) in the provision of goods, services, facilities, or accommodation customarily available to the general public,

(b) in the provision of commercial premises or residential accommodation or,

(c) in matters related to employment, to harass an individual on a prohibited ground of discrimination.

Section 65(1)

Subject to subsection (2), any act or omission committed by an officer, a director, an employee or an agent of any person, association or organization in the course of the employment of the officer, director, employee or agent shall, for the purposes of this act, be deemed to be an act or omission committed by that person, association or organization.

65(2)

An act or omission shall not, by virtue of Subsection(1), be deemed to be an act or omission committed by a person, association or organization if it is established that the person, association or organization did not consent to the commission of the act or omission and exercised all due diligence to prevent that act or omission from being committed and, subsequently, to mitigate or avoid the effect thereof.

EVIDENCE AND ARGUMENT

The evidence shows that the mandate of a Social Development Officer with the Department of the Secretary of State was to provide the primary link between the Department and the public by developing responses and initiatives to community groups to assist them in their development for the

purpose of increasing the degree of citizens' participation in Canadian Society and, to that end, a Social Development Officer has to, among other things, attend to the following:

- identify groups through which departmental policies and programs could be promoted;

- act as a sensing mechanism for social and political issues as identified by local groups which may affect Government policies and strategies related to citizenship, bilingualism, multiculturalism, arts and

culture and encourage and assist people to take action around such issues;

- identify funding sources and support through resources, either in the form of direct funding or referral to alternative funding sources, groups which can most effectively promote Government policies and priorities;

- promote the concepts of social and cultural development;

- analyze social indicators and determine trends in areas of social change;

- assist minority ethno-cultural groups, and more generally, under-privileged groups, to realize and articulate their needs and ensure that the rights and freedoms of everyone are known and respected.

It was apparent, as the evidence unfolded, that the job of a Social Development Officer, keeping the above mandate in mind, was not a particularly easy job in that these individuals were required to represent the Department as employees while advocating on behalf of the various client groups. In the case of Ms. Pitawanakwat, the groups she served were native client groups involving friendship centres, native communications, and native social and cultural development.

At the time Ms. Pitawanakwat joined the Department as a Social Development Officer, her immediate supervisor was Catherine Lane who later became, in 1981, the Regional Director for the Regina Office. Ms. Lane remained in that position until May of 1983.

André Nogue, upon the departure of Catherine Lane, became the office's Regional Director and Sue Smee became the Assistant Regional Director and Ms. Pitawanakwat's immediate supervisor. These three individuals all played a significant role in the office structure and are singled out by Ms. Pitawanakwat as management personnel key to her allegations of discrimination.

At this point, it is important to note that employment performance appraisals were prepared in relation to Ms. Pitawanakwat throughout the course of her employment by the Respondent and that in the performance appraisal of Catherine Lane dated July 24, 1981, Ms. Pitawanakwat received a "fully satisfactory" assessment of her performance, which level of assessment is defined as "always meets the major work objectives." In that

particular performance appraisal, Ms. Pitawanakwat states herself that she requires improvement in the area of writing skills and that she generally

felt satisfied within the Department. Ms. Lane describes Ms. Pitawanakwat in that assessment as having developed a good working relationship with the friendship centres and having motivation to learn and perform well. In Ms. Lane's words "Her knowledge of native history and cultural and current aspirations is obviously an asset in carrying out her duties. She deals honestly with client groups and her determination and interpersonal skills have enabled her to deal with difficult situations." The only negative comment in Ms. Lane's appraisal of the Complainant's performance at that point in time related to the difficulty the Complainant appeared to be having in the area of balancing the internal administrative requirements of her job with the external community work and also in the area of ensuring internal deadlines were respected. The period of employment covered by this performance appraisal was the period from October 22, 1979 to June 1, 1981 and, as stated earlier, Ms. Pitawanakwat had commenced employment in October of 1979.

The second performance appraisal entered into evidence covered the period from April 1981 to March 31, 1982 and saw a reduction in the Complainant's performance category from "fully satisfactory" to "satisfactory." This appraisal was prepared by Ms. Lane and in it she describes Ms. Pitawanakwat as a useful resource person who maintains good liaison with the native groups, works well with other Federal and Provincial Government agencies, is able to express her ideas to groups and makes suggestions for improvements and whose writing skills had improved over the reporting period. The only weakness described in that particular performance appraisal was in the area of meeting deadlines and carrying out work assignments with necessary attention to detail and without delay. Ms. Lane recommended a course in time management as being essential to the Complainant and committed herself to continue to work with the Complainant in ensuring deadlines were met and assignments carried out reliably.

These performance appraisals prepared early in Ms. Pitawanakwat's career with the Department stand in bold contrast to subsequent performance appraisals prepared by Ms. Smee and Mr. Nogue over the years leading up to Ms. Pitawanakwat's dismissal.

In their written and oral arguments, counsel for the parties have hi-lighted the issues to be addressed in this hearing and have broken down those issues into significant evidentiary areas.

7

The principal issues in dispute between the parties are as follows:

1. Was Mary Pitawanakwat subjected to differential treatment or harassment in the work place?

2. Could such differential treatment or harassment be categorized as a discriminatory practice pursuant to Sections 7 and 14 of the Canadian Human Rights Act?

Counsel for the Commission argues on behalf of the Plaintiff that a prima facie case of discrimination pursuant to Sections 7 and 14 of the legislation has been established and argues that the discrimination/harassment the Complainant received in the work place was a factor in employment decisions affecting Ms. Pitawanakwat and which eventually lead to her dismissal.

In establishing a prima facie case of discrimination, counsel for the Human Rights Commission sets forth seven different areas of differential treatment as follows:

1. Work Load
2. Monitoring
3. Training
4. Overtime
5. Travel Claims
6. General Task Assignments
7. Racial Slurs

In addition to these areas, the formal complaint of Ms. Pitawanakwat also makes reference to the soliciting of a complaint from a client group; biased and negative performance appraisals; and being forced to attend a Christmas party, all of which should be added to this list.

8

In support of his submission that the above differential treatment was "on a prohibited ground of discrimination," the following questions were posed by Counsel for the Commission:

1. Was the office situation a poisoned work environment for the Complainant and/or aboriginal people in general?

2. Were racial slurs and/or stereotypes used in the work place? If so, when and by whom?

3. Were members of management directly involved in the making of these comments?

4. Was the situation exacerbated by the action or inaction of management?

In responding to the questions posed by counsel for the Commission, the Respondent argues that human rights legislation does not exist to assist the "unduly sensitive." Consequently, it is argued, the action/inaction must go beyond being merely "unfair or insensitive" and must be based "on a prohibited ground of discrimination" in order for the Complainant to succeed under the legislation. The Respondent cites the following cases in support of that position, with which the Tribunal is in agreement:

1. Dhami v. Canadian Employment & Immigration Commission (1989), 11 C.H.R.R. D/253 at pp. D/269, D/281-D/282 (Can.)

2. Fu v. Ontario (Solicitor General) (1985), 6 C.H.R.R. D/2797 at pp. D/2811-D/2812 (Ont.)

3. Makkar v. Scarborough (City) (1987), 8 C.H.R.R. D/4280 at p. D/4300 (Ont.)

4. Syed v. Canada (Minister of National Revenue) (1990), 12 C.H.R.R. D/1 at pp. D/13-D/14 (Can.)

It is important in the context of human interaction to ensure that we do not, in the interpretation and enforcement of appropriate human rights legislation, interfere in circumstances in which the conduct alleged can be categorized as rudeness, poor judgment, bad taste, bonafide criticism or free flowing discussion and expression of ideas. The Respondent cites several cases which attempt to set up the boundary between such conduct and actionable harassment by suggesting that one must consider such things as the frequency, severity, and persistence of such action/inaction and knowledge of the victim's reaction to the conduct:

Aragona v. Elegant Lamp Co. Ltd. (1982), 3 C.H.R.R. D/1109 (Ont.)
Nimako v. Canadian National Hotels (1987), 8. C.H.R.R. D/3985 at p. D/4005 (Ont.)

Watt v. Niagara (Regional Municipality) (1984), 5 C.H.R.R. D/2453

at p. D/2459 (Ont.)

In arriving at its findings of fact in these proceedings, the Tribunal has had to assess the credibility of witnesses for the Complainant and the Respondent whose evidence differed substantially in the many significant areas:

1. Work Load

Despite the disparities in evidence as to the level of work load experienced by the Complainant throughout the period of her employment, the Tribunal finds that Ms. Pitawanakwat had a heavy work load that, in normal circumstances, was certainly manageable. We accept the evidence that there would be much repetition from year to year in the completion of forms and such other paper work as was required on the files and that the volume of work would be higher at certain times of the year, such as "April cheque issue." Additionally, given the nature of many of Ms. Pitawanakwat's client groups, we agree with her evidence that she would be required to spend additional time with them in areas of development of program plans.

The Tribunal also accepts the evidence of André Nogue that he was not aware of Ms. Pitawanakwat's difficulties with her work load until the filing of her grievance in the summer of 1984. We accept Ms. Pitawanakwat's testimony that one of the reasons she did not raise the issue of work load with Mr. Nogue earlier was out of a concern she had for her job future. The Complainant must bear some responsibility for, under those circumstances, taking on additional work in the form of Shirley Brabant-Bradley's case load at a time when she was clearly over-stressed.

The Tribunal accepts the evidence of Ms. Pitawanakwat that after her supervisor, André Nogue, became aware of her concerns with respect to her work load in the summer of 1984, no concrete steps were taken by him to alleviate the problem of work load although he did make efforts to work with the Complainant in an attempt to improve her efficiency.

The Tribunal finds that the performance appraisals submitted in evidence gave little acknowledgement of the intermittently heavy work load of the Complainant and almost no recognition of her positive achievements. Nonetheless, despite the fact that the Complainant's work load was, from time to time, heavy, the Tribunal finds that it would have been manageable under normal circumstances. We also find that the additional time spent by Ms. Pitawanakwat doing field work was, in part, related to the nature of

her case load but that her disinterest in administrative functions likely prompted her to spend more time outside the office.

2. Monitoring

The Tribunal finds that the evidence supports the Complainant's allegation that she was monitored in a manner different from other employees and, in fact, the Respondent accedes this point. We are not satisfied that the explanations for the differential treatment provided by André Nogue and Sue Smee, as representing a desire to assist Ms. Pitawanakwat in improving her

work performance and time management skills, are entirely acceptable. The evidence shows that management took few steps to truly get to the bottom of the Complainant's concerns and certainly never discussed with Ms. Pitawanakwat what steps were going to be taken and why, save in the form of unilateral memos or directives in performance appraisals. Nor does the evidence satisfactorily explain why Carmel Samphire and Alice Wardberg were instructed to keep an eye on Ms. Pitawanakwat in a rather clandestine manner and that none of these informal monitoring requests or reports seem to appear on the personnel file. Where there is a conflict in the evidence in this area, the Tribunal accepts the evidence of the Complainant's witnesses over that of the Respondents.

Although the Tribunal does find that there was justification for the monitoring of Ms. Pitawanakwat's performance, it does not feel that such monitoring was done properly and this was confirmed by Sue Smee herself who stated, during questions put forth by the Tribunal, that "we could have done better." Although it cannot be seen as an obligation on the part of management to design a job to fit the employee, the Tribunal finds that the efforts of management to assist Ms. Pitawanakwat in the areas of her weaknesses were often misguided and ineffective.

As the Tribunal is unable to accept the Respondent's rationalization for the differential treatment of Ms. Pitawanakwat in its entirety, we find that there is some evidence to support the Complainant's allegation that her differential treatment may have been, at least in part, racially motivated.

We find that André Nogue's choices with respect to monitoring Ms. Pitawanakwat, even though they may have been inspired by a sincere wish to assist her with respect to her employment performance, likely exacerbated the problems being experienced by the Complainant as they imposed upon her greater demands at a time when she was working with an excessive case load

and they completely failed to recognize or take account of the breakdown in communications between the Complainant and management.

3. Training

The Tribunal does not accept the evidence of the Complainant that she was discriminated against in the area of training. We accept the evidence of the Respondent that Ms. Pitawanakwat was given the same opportunities as other Social Development Officers to receive standard Department courses and programs.

The Tribunal also accepts the evidence of the Respondent that the in-house training program set up by André Nogue to assist Ms. Pitawanakwat was a legitimate attempt to improve her job performance. Mr. Nogue's in-house training idea was doomed to failure given the Complainant's attitude at that point in time, considering the concerns raised by Ms. Pitawanakwat in the area of discrimination and the lack of any meaningful response to those concerns on the part of management.

4. Overtime

The Tribunal finds that there is no support whatsoever in the evidence submitted on behalf of the Complainant for her allegation that she was discriminated against with respect to the issue of overtime and overtime policies. The Complainant alleged that she, unlike other Social Development Officers, was required to obtain approval prior to working overtime, that she was unreasonably denied overtime pay which had not been approved in advance, and that she was criticized for arriving late at the office the day after late night meetings. Where the Complainant's evidence in this regard conflicts with the evidence of witnesses for the Respondent, the Tribunal accepts the evidence of witnesses for the Respondent that pre-authorization for overtime could be given verbally or in writing, that other Social Development Officers had been refused overtime when not authorized in advance and that management showed the same degree of flexibility with the Complainant that it did with other Social Development Officers. The Complainant's allegations in this area are, in our view, unfounded and reflective of the breakdown in communications between the Complainant and management for which the Complainant must bear some responsibility.

5. Travel Claims

The Tribunal finds that there is no evidence to support the Complainant's allegation that she was discriminated against with respect to the issue of travel claims. The evidence presented indicates a single incident in relation to which a travel claim was questioned and the Tribunal certainly cannot draw any inference from this that it represents an element of systemic discrimination. The Tribunal accepts the testimony of witnesses called on behalf of the Respondent who stated that travel claim policies were applied in the same way to all employees. In fact, we find that the Complainant must bear responsibility for the problems she experienced in this area as she clearly flaunted the travel claim policy which had been put in place for valid accounting reasons.

6. General Task Assignments

In the category of General Task Assignments, the Complainant addressed three areas of concern:

(a) Was the request made by André Nogue to Ms. Pitawanakwat relative to her investigation into concerns regarding drug abuse within one of her client groups a reasonable request and, if not reasonable, was it further evidence of systemic discrimination?

(b) Were other Social Development Officers required to report weekly and/or bi-weekly to their supervisors?

(c) Were other Social Development Officers required to document files with memos in the same fashion as the Complainant?

The Tribunal finds that Mr. Nogue's request that the Complainant investigate the concerns about drug use within one of her client groups was

an example of bad judgment and nothing more. Mr. Nogue's failure to retract the request after having had the concerns of the complainant pointed out to him in writing was simply further evidence of poor judgment. There is nothing whatsoever to support the Complainant's allegation that this request was indicia of racial harassment.

As to the Complainant's allegation that the requirement to report weekly or bi-weekly to her supervisor was a form of racial harassment, the Tribunal finds that it was, more accurately, further indicia of poor judgment on the part of management and a failure to recognize a much more general problem

within the office. There is evidence to support the Respondent's claim that the Complainant failed to meet deadlines, that she failed to properly document files with memos, that she failed to advise management of absences from the office or of her intention to attend meetings outside of the office and that she failed to address the issue of finding a proper balance between community and administrative work within her case load. However, the Tribunal finds that the Respondent exercised bad judgment in imposing upon the Complainant the additional burden of weekly and/or bi-weekly reporting at a time when she was clearly under a great deal of stress, had taken on additional work from another Social Development Officer and was facing seasonal employment demands. The Tribunal finds that the imposition of this additional demand upon the Complainant by the Respondent was not in itself differential treatment which can be described as motivated by racial discrimination.

As to the third category of general task assignments raised by the counsel for the Commission, the Tribunal finds that Ms. Pitawanakwat's failure to properly document files with memos was no different than any other Social Development Officer, initially, but the Complainant herself requested at one point that all concerns and directions on the part of management should be placed in memo form. With the breakdown in oral communication, written memorandums took on a greater significance and we accept the evidence of witnesses for the Respondent that, during the latter stages of the Complainant's employment, it put the office at a disadvantage not to have proper documentation placed on the file by Ms. Pitawanakwat.

7. Racial Slurs

Much time was spent, during the course of these hearings, dealing with a comment made by Catherine Lane, the Complainant's supervisor at the commencement of her employment with the Department and, in fact, the Tribunal not only heard from management and staff within the office itself, it heard evidence from a linguistics expert, Dr. Bernard Wilhelm, called by the Respondent to testify relative to the meaning of the word "savages." In the fall of 1982, Ms. Pitawanakwat alleged that she suffered humiliation at hearing her direct supervisor, Catherine Lane, describe natives as "savages" following a meeting attended by the two women, which meeting saw some heated discussions between the client group and representatives of the Respondent. The Tribunal finds that, not only did the events indeed occur, the word "sauvages" was used deliberately by Ms. Lane, in its negative connotation, albeit in the heat of the moment. Efforts on the part of Catherine Lane, and other witnesses for the Respondent, to make light of

the use of the word "sauvages" by giving it a different, more positive definition are not accepted by this Tribunal.

Counsel for the Commission argues that there was considerable evidence from the witnesses called by both parties with respect to racist comments in the form of racial slurs, or in the form of jokes or stereotyping and that these kinds of comments were made in the work place during the Complainant's tenure with the Department. These comments, according to counsel for the Commission, contributed to the existence of a poisoned work environment. Reference was made to the case of Mohammed v. Mariposa Stores Ltd. (1990), 14 C.H.R.R. D/215 (B.C. Bd. Inq.) in which the term "poisoned work environment," in the context of racial harassment/discrimination, is defined as an environment in which employees of a particular race are subjected to a work place which is hostile, offensive or intimidating.

The Tribunal finds that racial slurs, jokes and stereotyping did occur in the work place during the Complainant's tenure, however, the language used in the work place during the period from 1979 to 1985 must be seen in the context in which it was used. One must also look at the frequency, severity, and persistence with which it was used as set forth in the Aragona, Nimako, and Watt cases referred to earlier. More significantly, the Complainant's reaction to the comments and the Respondent's knowledge of the Complainant's feelings are very critical to this case.

The Tribunal finds that Ms. Pitawanakwat not only accepted and tolerated the use of such terms as "Indian time," she participated in their use herself in the earlier stages of her employment when relations between people within the office were better. We accept the evidence of the Respondent's witnesses that friendly exchanges often took place within the office in which the Complainant herself made use of the term "Indian time" and that in equally light-hearted exchanges with other Social Development Officer's, she referred to French Canadians as "frogs". The Tribunal also accepts the evidence of Denis Gauthier that Ms. Pitawanakwat, on one occasion, stated to him during a moment of levity that it was most unlikely Mr. Gauthier would be "scalped" by an aboriginal group as his baldness protected him from that prospect. We accept the evidence of those witnesses who testified that where Ms. Pitawanakwat brought to their attention that she no longer considered such remarks acceptable, they were no longer used in her presence. However, we also accept the evidence of Shirley Brabant-Bradley, Alice Wardberg and Carmel Samphire, who stated that racial slurs within the Regina office of the Secretary of State continued albeit perhaps not in the Complainant's presence. It was observed by the Tribunal that many of the Respondent's witnesses had vague recollections in this area of testimony.

Most significantly, the Tribunal finds that the supervisors within the Regina office of the Department were aware of the allegations of racial discrimination as early as June, 1984 when they were raised by the Complainant in one of her performance appraisals. "...in the past year and a half I have endured personal harassment, racially discriminatory remarks and a cold environment." By the fall of 1984, the Complainant had filed personal harassment grievances and on

14

September 23, 1985, a Social Development Officer Task Force Report very clearly referred to racial discrimination as an area of concern which was to be conveyed to management. The task force committee was made up of the Social Development Officers from both the Saskatoon and Regina offices of the Department and the Complainant was not a member of the committee.

15

The task force report recommended office workshops to address the area of "working with native people" and suggested that a labour-management relations committee be set up to address the following (wording taken from the report):

i) working conditions

ii) environmental conditions

iii) overtime

iv) credit for work

v) unofficial orientation of new employees

vi) fear of reprisal by association makes consultation very difficult

vii) favouritism between management and staff

viii)program loads

ix) information should be shared directly rather than a Social Development Officer finding out through the "grape vine"

x) lack of: open-mindedness, respect, consultation

xi) measures should be developed to address grievances fairly, ie, discrimination, personal harassment, sexual harassment, targeted for dismissal

xii) respect for one's knowledge about his/her program area

xiii) any labour - management problems

André Nogue's response to this report was, according to the witnesses for the Complainant, negligible. Mr. Nogue himself testified that it was not within the ambit of his job as Regional Director to address such issues raised in the report as those concerning discrimination and personal harassment as there were formal grievance procedures set up within the bureaucracy to deal with those areas. The Tribunal cannot accept Mr. Nogue's abrogation of responsibility in this area as legitimate. It was up to him, during his tenure as Regional Director, to set the office tone in such critical areas and if he intended to have staff address those concerns through formal grievance processes, we accept the evidence of the Complainant's witnesses that such procedures were unclear and drawn to the attention of staff members in a cursory fashion only.

The Tribunal was given no satisfactory explanation for Mr. Nogue's failure to respond to: Ms. Pitawanakwat's concerns as raised in her performance appraisals; Mr. Lawson's concerns as raised at meetings with Mr. Nogue; his knowledge of the concerns of Ms. Pitawanakwat raised in relation to her harassment grievances in the fall of 1984; the concerns raised at the staff meeting attended by professor Ron Fisher in April of 1985; and the Social Development Officer Task Force Report recommendations, all of which made reference to Ms. Pitawanakwat's feelings that she was subjected to racial discrimination and harassment in the work place. Not only did Mr. Nogue fail to respond to these concerns, he acknowledged in his own testimony that he never discussed these concerns with his management team nor did he attempt to investigate the allegations himself nor direct that an investigation take place at all.

It is certainly clear that management within any given office sets the tone

within that office and although it is a finding of this Tribunal that the office of the Department of the Secretary of State in Regina, at the commencement of Ms. Pitawanakwat's employment, did not appear to be an office which would have condoned racism, a situation developed in which, to

some degree, racist remarks took on a level of acceptance within the office. The evidence of Ernie Lawson was that André Nogue told him he felt that the use of the word "savages" was simply a figure of speech, nothing to be concerned about. Mr. Lawson also testified that he did not believe André Nogue understood the cultural and historical differences between whites and people of aboriginal origin and the Tribunal accepts Mr. Lawson's evidence in these areas.

The physical lay-out of the Regina office of the Department of the Secretary of State is such that, according to the evidence, most everything that goes on within the office is audible to the others who work within the office. The Tribunal therefore makes a finding that not only did management, from time to time, make racists remarks themselves, they failed to respond to the racist remarks of others in an office in which such remarks can be easily heard. A review of the case law in the area of management inaction will follow.

Counsel for the Respondent summarizes the evidence in the area of racial slurs and harassment and a review of this area is believed, by the Tribunal, to be appropriate in light of the credibility concerns raised by the inconsistencies in the evidence. The most critical evidence is as follows:

(a) MARY PITAWANAKWAT

The evidence of the Complainant was that, throughout the entire course of her employment she was subjected to racial harassment and slurs about native people and organizations, which harassment created a poisoned work environment resulting in great stress to her and isolation within the office.

The finding of the Tribunal is that during the initial months of Ms. Pitawanakwat's employment, the atmosphere within the Regina office was pleasant, congenial and the stereotypical remarks made from time to time about natives or francophones or other cultural groups were made in a light-hearted spirit, without intention to offend and without offence being taken. Ms. Pitawanakwat participated in the creation of this atmosphere and we find that she used such terms as "Indian time" and "frogs" in the same light-hearted manner as others within the office. We accept the evidence of Denis Gauthier that another example of the Complainant's participation in this kind of banter was her description of a member of one of the client groups, whose name was Ken Standingready, as "Ken Standinggreedy." Such banter was exchanged by many within the office and could not be described as mean-spirited.

At that period in time, Ms. Pitawanakwat was not only a colleague of Sue Smee but they had become friends and the relationship between the Complainant and her Supervisor, Catherine Lane, was also of a positive

nature. However, the evidence shows that an incident took place in January of 1980 which appears to have been a major turning point in the relationship between Ms. Pitawanakwat and Sue Smee specifically, as well as the relationships between the Complainant and most everyone else within the Regina office. From that date onward, Ms. Pitawanakwat appeared to perceive most everything in a different light and the wheels were then set in motion for the creation of a negative work environment which the Complainant must herself bear much of the responsibility for. This incident involved a conference attended by both Ms. Smee and Ms. Pitawanakwat at which Ms. Pitawanakwat took offence that she was not permitted to bring her children into the substantive portion of the conference as daycare facilities had been provided for the children of women who would be attending the conference. It would appear that Ms. Smee did not support the Complainant in her protest and, throughout the balance of their association together within the Regina office, the Complainant's attitude towards Ms. Smee was cold and unforgiving. Ms. Smee admitted in her evidence that this event was a turning point and that she could have done better in responding to this change but that her conduct over the following years reflected a great degree of frustration surrounding the Complainant's attitude.

It is a finding of fact by this Tribunal that the Complainant's conduct following the daycare incident was very much coloured by her anger at Sue Smee for not supporting her at a time when she felt she should have been supported, in circumstances which had no racial overtones. Mary Pitawanakwat herself helped to set the negative tone for interpersonal relationships within her work environment from that point forward. Ms. Pitawanakwat's evidence in the area of racial slurs is, by contrast to other witnesses, limited. The Tribunal finds that, in many instances, the comments relied upon by the Complainant as examples of racial slurs were not racial slurs, in any context. Ms. Smee's crude description for high heeled shoes was not racist; Mr. Nogue's use of the word "managing" and "prod" and "salvageable" may have been words which Ms. Pitawanakwat did not want to see in her performance appraisals, but they cannot be regarded as racist nor is the Tribunal prepared to accept her argument that they were demeaning and show a pattern of harassment.

b) ALICE WARDBERG, SHIRLEY BRABANT-BRADLEY, AND CARMEL SAMPHIRE

The Tribunal accepts the evidence of these three individuals although it has concerns about the degree to which the repetition of a description of events by the Complainant or others was adopted as first hand evidence by some of the other witnesses. For example, it would appear unlikely that the term "savages" was used more than once, except in the retelling of the original story involving the use of that term even though Ms. Wardberg gave evidence that it had been used more than once.

Ms. Wardberg does testify, however, that the terms "Indian time" and "scalping" were used frequently by staff members, "right from the first day, even until today" and that such terminology is condoned by management

in the Regina office.

The Tribunal accepts the evidence of Shirley Brabant-Bradley that racial slurs were used by Sue Smee, "Indian time" and "lazy Indian," and by Catherine Lane, "Indian time" and "God damn Indians" and that such language continued throughout the course of the Complainant's period of employment.

Ms. Brabant-Bradley described the Respondent's Regina office as a most unpleasant work environment.

The Tribunal further accepts the evidence of Carmel Samphire that remarks regarding "scalping" and "Indian time" could be attributed to Denis Gauthier, as made in the presence of Sue Smee, Gary Grant, and André Nogue, and that statements about "lazy Indians," "dirty Indians," and Indians "having children without being married" can be attributed to Thérèse Pinsonneault.

The fact that these witnesses could not pin-point exact dates or times upon which such comments were made detracts in no way from the veracity of their evidence as the finding of the Tribunal is that the comments took place during the period of Ms. Pitawanakwat's employment and in the presence of management who took no steps to censure.

(c) CATHERINE LANE

Ms. Pitawanakwat herself gave evidence that she only heard the word "savages" used once by Catherine Lane in the context of her work

environment and that was on the occasion described herein. The Tribunal finds that far too much emphasis was given to this incident and although a foolish attempt was made to define the word in a better light, it was clearly used in the heat of a difficult moment, out of a sense of frustration. However, Ms. Lane and others who gave evidence designed to convince the Tribunal that the word was simply another way of saying "Indian" could have put the Tribunal's time to better use by owning up to the offensiveness and inappropriateness of the remark. It would appear that the word was never likely used again within the Regina office except in the retelling of the events surrounding its original use by Ms. Lane.

As to the Complainant's submission that Ms. Lane's description of aboriginal groups as "too demanding" or a "nuisance," the Tribunal finds that these statements were not racist or discriminatory if taken in the context in which they were used. We accept Ms. Lane's evidence that most client groups were demanding and had high expectations of the Department and that such demands came from not only the aboriginal client groups but other cultural groups.

As to the evidence of Shirley Brabant-Bradley that Catherine Lane said "God damn Indians, always wanting more," Ms. Lane denies ever having made such remarks, however, this kind of a remark would be consistent with the "savages" expression of frustration and, if made in that fashion, cannot be overlooked simply because it was not made in the presence of people of visible aboriginal origin. Shirley Brabant-Bradley testified that she is, in fact, of aboriginal origin. As previously stated, management sets the

tone for acceptable conduct within an office environment and Ms. Lane must bear some responsibility for remarks made to or by anyone who worked within that environment.

(d) SUE SMEE

The Tribunal finds that Ms. Pitawanakwat's anger at Ms. Smee over the daycare incident coloured her attitude towards Sue Smee and, consequently, there is little Ms. Smee could have said during the years following that incident which would not have been interpreted in a negative light by Ms. Pitawanakwat. For example, the Complainant describes as racist statements made by Sue Smee about high heeled shoes and about native women "not being true feminists." Although Ms. Smee's language may have been offensive to some and the manner in which she conducted herself aggressive, human rights legislation is not designed to censure for abrasiveness or rudeness and should certainly not be used to restrict people in the expression of their

opinions unless those opinions clearly fall within a category of discrimination. Additionally, the Tribunal does not feel that Ms. Smee's curtness, tendency to interrupt and ignorance of the sensitivities of others can be described as racist as it would appear that these characteristics surfaced in her interaction with others within the office who were not of aboriginal origin and we accept the evidence of Don McRae that the impatience and exasperation attributed by Shirley Brabant-Bradley and by the Complainant to Sue Smee vis-a-vis her interactions with Ms. Pitawanakwat at office meetings was, in fact, consistent with her dealings with all people. Additionally, if Ms. Smee did not show a particular warmth to Ms. Pitawanakwat at such meetings, one should not be particularly surprised in light of the poor relationship between these two women following the daycare incident and in relation to which, as previously stated, Ms. Pitawanakwat must bear some responsibility.

That said, although Ms. Pitawanakwat might have heard Ms. Smee use the words "Indian time" only once, we accept the evidence of other witnesses that Ms. Smee used this expression on other occasions, and often in relation to Ms. Pitawanakwat if she was not in attendance at the beginning of a meeting.

(e) DENIS GAUTHIER

Mr. Gauthier admitted to his use of the phrase "Indian time" and, as well, to the references he made to scalping at the end of a particularly volatile meeting with a client group at which violence was threatened. The Tribunal observed that whereas at the beginning of Ms. Pitawanakwat's employment such phrases were used without offence being taken by her and were in fact used by the Complainant herself, such terminology became a basis for her complaint to the Human Rights Commission. At first blush, it appeared as though the Complainant may have fabricated her case as justification for her dismissal. However, what the Complainant was herself unable to say about the operation of the Regina office of the Department has been said by many others called both on behalf of the Complainant and the Respondent and which gives much greater credence to her complaint of discrimination. Once again, however, the Tribunal would point out that Ms. Pitawanakwat

must bear some responsibility herself for the kind of language used in the Regina office as not only did she condone it but she participated in its use herself. We accept the evidence of Denis Gauthier that when Ms. Pitawanakwat informed him that she no longer considered it acceptable for him to use such terminology, he desisted.

(f) BRIAN RANVILLE, ANITA TUHARSKY AND LYNN CHABOT

The evidence of the above three individuals of aboriginal origin who have all been employed at one time with the Regina office of the Department of the Secretary of State and whose evidence was, generally speaking, supportive and positive about their experiences within that office, serves to raise a question about whether Ms. Pitawanakwat's negative experiences within the office were more attributable to personality conflicts than they were to a course of harassment and racism. Lynn Chabot was employed with the Regina office during the Complainant's tenure; Mr. Ranville was employed at the Regina office prior to the Complainant's tenure; and Ms. Tuharsky was employed in the Regina office subsequent to Ms. Pitawanakwat's tenure. Counsel for the Respondent cautioned the Tribunal relative to its reliance upon similar fact evidence, however, these three witnesses did not all have contemporaneous experiences with the Complainant. In any event, the Tribunal finds that their evidence is significant in that it is important for the Tribunal to know whether other employees of aboriginal origin had experiences similar to those of Ms. Pitawanakwat, involving the same management and staff.

Mr. Ranville, Ms. Tuharsky and Ms. Chabot all gave evidence that André Nogue was easy to work with and that at no time did they ever hear racist remarks from him. There appeared to be genuine respect for Mr. Nogue from these witnesses. Ms. Chabot's evidence was that, during her tenure with the Regina office, not only were there no racist comments, she saw both Sue Smee and André Nogue as fair and the office environment positive. Ms. Chabot further testified that she has personally experienced incidents of racism, both subtle and blatant, outside the environment, but that she never experienced racism within the Regina office nor did she witness it on any occasion. It should be pointed out, however, that Ms. Chabot and Ms. Smee became friends while working together and that Ms. Chabot's relationship with Ms. Pitawanakwat was strained, calling into question the credibility of Ms. Chabot in this area of testimony.

Ms. Tuharsky's evidence was, in the area of racial slurs, consistent in some respects with Ms. Pitawanakwat's. Although the Tribunal had concerns about the credibility of this witness considering her alleged lack of support for Ms. Pitawanakwat during her dismissal hearing, the Tribunal accepts as a fact that she was present at the office when, in the presence of several others during a coffee break, staff and management were joking about a Pow Wow which was to be put on by the Indian Federated College. The remark to which Ms. Tuharsky took offence was "the Pow Wow is in town, maybe we better be careful, lock our doors." Ms. Tuharsky's evidence was that, as an aboriginal person herself and as one who dances Pow Wow and is very proud of it, she was extremely offended by these remarks. According to Ms. Tuharsky, Alice Wardberg apologized to her on behalf of everyone who

had been present during coffee when the comments were made, and that present on that occasion were Sue Smee, Gary Grant, Denis Gauthier and André Nogue and that no attempts were made by anyone present to restrain people relative to their comments or to reprimand them.

Ms. Tuharsky was careful, in her evidence, to describe Mr. Nogue as compassionate and understanding but she clearly stated that he never intervened to censure people on their use of language within the office, regardless of how that language might offend someone else.

Ms. Tuharsky also gave evidence that she found Ms. Smee to be rude and aggressive and that she made disparaging remarks about natives such as "God damn friendship centre, they're at it again." It was clear from the evidence that Ms. Tuharsky did not like Ms. Smee and did not get along with her.

The evidence of Brian Ranville, who worked for the Regina office from 1976 to 1978, was that he worked with some of the same individuals the Complainant worked with when she came to the office in 1979, namely, André Nogue, Sue Smee, Bob Mitchell, Wayne McKenzie, and Thérèse Pinsonneault. He described his relationship with André Nogue as positive and said he could turn to him for advice. He described his relationship with Sue Smee as "fun" and said they got along well.

Furthermore, Mr. Ranville admitted in his testimony that he had been taught as a boy to ignore racists acts as a means of coping with them. This factor, in conjunction with his willingness to criticize Ms. Pitawanakwat's job performance without benefit of ever having worked with her, leads the Tribunal to question the veracity of his evidence.

Mr. Ranville's evidence was that he heard the phrase "Indian time" and the word "savages" used in the Regina office but that he was not offended by their use, even though he himself is a person of aboriginal origin. His evidence was that race was something he had never been concerned with and that even though he had been subjected to racism generally, he never experienced it during his tenure with the Regina office of the Department of the Secretary of State. Mr. Ranville acknowledged that Ms. Pitawanakwat had raised with him her concerns about discrimination within the office of the Department of the Secretary of State but he appears to have dismissed her concerns as lacking validity. The Tribunal questions the ability of Mr. Ranville to appropriately assess the seriousness of the Complainant's concerns in light of his evidence that he would himself never report a

racist complaint or encourage that it be reported because "it wouldn't do any good."

8. Soliciting of Complaint From Client Group

Much evidence was given surrounding a letter sent to the Respondent, to the attention of Sue Smee, by the Regina Native Women's Association. The Tribunal finds that there is no support for the Complainant's allegation that this letter was solicited by anyone within the Regina office of the Department in an effort to build a case for the Complainant's dismissal.

However, it is worthy of note that the letter initially had two signatories, one of whom chose to have her name removed from the letter. The Tribunal would also point out that this appears to have been the only written complaint against Mary Pitawanakwat by a client group during the entire course of her employment.

9. Biased and Negative Performance Appraisals

The Tribunal finds that although the appraisals done by the Complainant's various supervisors throughout the course of her employment became increasingly negative, so too did the Complainant's attitude and, near the end of her period of employment, her performance. Circumstances appear to have unfolded in a way which changed Mary Pitawanakwat from a conscientious and respected professional within her office to a bitter, noncommunicative and less effective employee. It cannot be overlooked, however, that, although Ms. Pitawanakwat's office skills continued to leave much to be desired and even deteriorated, she continued to be respected by the native groups she served and her work on the "front lines" was effective and appreciated. Ms. Pitawanakwat was "the expert" in the areas of her caseload and was turned to by others for advice and direction in that regard. One cannot help but be concerned about the absence of sufficient recognition in the performance appraisals for the positive contributions of the Complainant and we find that, had management been more sensitive to the circumstances developing within the Regina office, Mary Pitawanakwat could perhaps have found the proper balance between her administrative work and her "front lines work."

10. Socializing

The Tribunal finds that there is no evidence to support the complainant's allegation that the circumstances surrounding the Christmas party referred to in her complaint had any racial overtones. In fact, the Tribunal finds

that André Nogue extended his hospitality to the Complainant in a sincere effort to ensure that she was made to feel involved and that if anyone had reason to be offended by the events surrounding the Christmas party, it would have been André Nogue. It is unfortunate that such events could not have been used by both parties as a means to heal old wounds.

Has the Human Rights Commission established a prima facie case of discrimination pursuant to Section 7 and/or Section 14(1) of the Canadian Human Rights Act?

It is clear from the evidence that the Complainant was treated differently from other Social Development Officers in the Regina office. Although we do not find that there is differential treatment in the areas of work load, training, overtime, travel claims, soliciting of complaints, performance appraisals, socializing or general expectations, we do find that there was differential treatment in the area of monitoring of Ms. Pitawanakwat. However, we do not find that the additional monitoring, which very clearly impacted negatively upon Ms. Pitawanakwat, was racially motivated and it does not therefore fall within the ambit of Section 7 of the Canadian Human Rights Act. We find, not only from the evidence as put forth before this

Tribunal but also in the demeanour of the Complainant throughout the course of the hearing, that Ms. Pitawanakwat was inflexible; was disinclined to give credit to anyone, even where it was due; saw negatively even individuals who considered themselves to be on good terms with Ms. Pitawanakwat in their eyes and the eyes of others; and refused to accept any degree of responsibility whatsoever for her own failings within the office. Near the conclusion of the hearing, Ms. Pitawanakwat even turned on counsel for the Commission by stating that he had not adequately represented her interests even though Mr. Engelmann had taken great pains to capably present the position of Ms. Pitawanakwat. It is difficult, of course, for all people to be introspective about their own personal shortcomings, however, the downward spiral of interpersonal relations between the staff and management of the Regina office from the date of the daycare incident to the date of Ms. Pitawanakwat's dismissal cannot properly be blamed entirely upon management within the office. However, fault can certainly be found for not attempting to tackle these serious problems in a more aggressive or innovative manner.

The Tribunal finds, however, that a prima facie case for discrimination has been established under Section 14(1)(c) of the Canadian Human Rights Act.

Although one cannot point, in the evidence, to a clear pattern of intentional racial harassment, employers have an obligation to their employees to create and maintain a discrimination-free work environment.

Mary Pitawanakwat went from being a productive Social Development Officer with great potential to an employee "unsuitable for her position." The responsibility Ms. Pitawanakwat played in that change has been addressed in a review of the evidence. However, the Tribunal is satisfied that Management played a significant role in the downfall of the Complainant through its inaction and lack of sensitivity to the concerns respecting discrimination and racial harassment raised: at the Ron Fisher training sessions; in the Social Development Officer Task Force Report of September 23, 1985; in Ms. Pitawanakwat's comments in the "observations" section of the performance appraisal of June 5, 1984; in Ernie Lawson's representations on behalf of Ms. Pitawanakwat; by Ms. Pitawanakwat's 1984 personal harassment grievances; and in the context of the racist comments which continued to be made throughout the course of Ms. Pitawanakwat's employment. The Tribunal finds that André Nogue was aware of the concerns raised and must also have been aware of the ongoing comments which he condoned through his failure to censure. Although Ms. Pitawanakwat herself bears some responsibility for the creation of a poisoned work environment through her own intractability and refusal to communicate with fellow workers, the Tribunal finds that the Respondent, through its failure to take seriously the concerns raised by Ms. Pitawanakwat and others with respect to the possible existence of discrimination within the office, is also responsible for the creation of a poisoned work environment. Not to be taken seriously on a subject of such importance can only have exacerbated the Complainant's entrenchment and her feelings of isolation within the office and fed her concerns regarding racial discrimination.

Counsel for the Respondent agrees that, pursuant to Section 65(1) of the Canadian Human Rights Act, an employer is responsible for acts committed by

employees in the course of their employment and that if prima facie liability is established under Section 65(1) of the legislation, he goes on to say that a defence is available in Section 65(2) if, in the commission or omission on the part of the Respondent, it exercised "all due diligence to prevent the act or omission from being committed" and took steps to mitigate or avoid the effects thereof.

65(1) "Subject to subsection (2), any act or omission committed by an officer, a director, an employee or an

agent of any person, association or organization in the
course of the employment of the officer, director,
employee or agent shall, for the purpose of this Act,
be deemed to be an act or omission committed by that
person, association or organization."

65(2) "An act or omission shall not, by virtue of
subsection (1), be deemed to be an act or omission
committed by a person, association or organization if
it is established that the person, association or
organization did not consent to the commission of the
act or omission and exercised all due diligence to
prevent the act or omission from being committed and,
subsequently, to mitigate or avoid the effect thereof.

This Tribunal must, upon making a finding that the conduct of the Respondent constituted a discriminatory practice, establish a causal connection between the discrimination and such remedy as may be sought under Section 53(2) of the Canadian Human Rights Act. The Tribunal finds that had the Respondent given the Complainant the respect to which she was entitled by taking her concerns about discrimination within the office seriously, had Ms. Lane or Ms. Smee or Mr. Nogue taken steps to get to the bottom of why Ms. Pitawanakwat's attitude towards them and others within the office had changed dramatically and had they taken seriously the concerns raised by others, on the Complainant's behalf, about the possible existence of discrimination within their office, Ms. Pitawanakwat may well have developed into the capable and productive Social Development Officer which Ms. Lane, Ms. Smee, and Mr. Nogue at one time believed she could be.

Save for some of the administrative functions of her job, Mary Pitawanakwat did her job well. David McKay, an employee at the Regina Friendship Centre, one of Ms. Pitawanakwat's client groups, described the Complainant as one of the only employees of the Department who had a real appreciation for the true needs of native people. The Tribunal accepts his evidence that Ms. Pitawanakwat was respected for her ideas by his group and that she served his group well.

Blair Stonechild, a professor of Indian studies with the Saskatchewan Federated College since 1976, testified that Mary Pitawanakwat was pivotal in assisting him in obtaining funding for programs which have not only become significant to aboriginal people locally but also nationally. According to Mr. Stonechild, the Complainant educated him as to funding

ideas and motivated him and others to think in new ways and pursue new avenues for funding. Significantly, Mr. Stonechild stated in cross-examination that although there may well have been more money "in the trough" for funding such programs in the years during which Ms. Pitawanakwat was employed by the Respondent, he stressed the importance of her personal contact with the native community and further stated that non-natives could not have had the same success as the Complainant as they would not have had the same awareness of native issues. Mr. Stonechild also gave evidence that he had no concerns whatsoever as to the Complainant's level of competence in her capacity as a Social Development Officer.

The facts in this case bear a startling resemblance to many of the facts recited in the August, 1992, decision of Grover v. National Research Counsel Canada. (unreported)

Although in the Grover case the conduct complained of was clearly deliberate and calculated to demean the complainant's career status, which the Tribunal finds was not the case here, the Grover Tribunal described the conduct of one of the agents of the Respondent as reflecting "an attitude of indifference which was demeaning and inexcusable." In that case, the Tribunal goes on to express its concerns as to the propriety of the Respondent's handling of the case and cites the following reasons for those concerns:

a) Concealing of information by the Respondent
b) Intimidation of witnesses
c) Evidential bias
d) Non-sensicle grievance procedures
e) Control of evidence

The similarities between the above concerns and those of this Tribunal are startling. The following findings of fact in those specific areas are made by this Tribunal:

a) The Respondent did conceal information from the Complainant in the form of a confidential "personal" file kept on the Complainant by André Nogue, which file contained memorandums and other information which should clearly have been on the Complainant's personnel file. The Tribunal also heard evidence that similar files are kept in relation to Alice Wardberg and Shirley Brabant-Bradley, two of the witnesses who have, from the beginning, supported the Complainant in relation to her concerns regarding discrimination and differential treatment within the Respondent's employ.

b) We accept the evidence of Alice Wardberg that she was the victim of intimidation at the hands of Gary Grant prior to her giving evidence at the dismissal grievance hearing of Mary Pitawanakwat and that the comments of Mr. Grant caused her to be fearful for her future job security.

c) The Tribunal has been disturbed by the obvious bias in the evidence of not only Respondent witnesses but Complainant witnesses as well. This type of bias makes it very difficult for a Tribunal to make a fair finding of facts, however, it became obvious through the testimony of Alice Wardberg and Shirley Brabant-Bradley that the risks of taking a position contrary to that held by management, within the Respondent's office, are substantial.

d) As in the Grover Case, the Tribunal in this case is concerned about the "ridiculous irony" of setting up a grievance process in which the person to whom the Complainant must grieve may well be the same person who rules on the merits of the grievance.

e) A repetition of certain positions held by some Respondent witnesses, by other witnesses, throughout the hearing did cause this Tribunal concern about the prospect of control over the evidence. For example, much of the evidence given in the area of the "savages" incident appeared contrived and rehearsed.

The Grover Tribunal came to the conclusion that these concerns alone were sufficient to satisfy it that the Complainant had been the subject of differential treatment "contrary to Section 59 of the Canadian Human Rights Act."

We would also comment upon the absence of an employee of aboriginal origin in the case load which specifically deals with the native client groups. In fact, the case load formerly managed by the Complainant is now serviced out of the Saskatoon office of the Respondent by Raj Dhir who appears to be handling her case load very efficiently, but who is clearly not a person of aboriginal origin. This Tribunal finds that Ms. Dhir was hired on the basis of a "visible minorities competition" and that the Department took no

steps, when searching for a Social Development Officer to handle this case load, to search out a person of aboriginal origin. The Tribunal interprets this course of action as a failure to give adequate recognition to the importance of the awareness and understanding of a Social Development Officer who comes from the native community. Although this Tribunal puts no greater emphasis upon the burden or responsibility of a Respondent who, like the Department of the Secretary of State, has a specific mandate to redress social wrongs and empower people of minority groups within Canadian Society, we are drawn to the excerpt from the Donald Marshall inquiry referred to in the Grover case as follows:

"racism exists as a demonstrable social factor in social relations in Canada... a resolute political will must be adopted to acknowledge up front the existence of racism and to set about illuminating it by moving it into the public policy agenda. Policy makers,

legislators and Government have an extra responsibility to create a climate which will be more in-hospitable for racism."

It is hoped that attitudes have changed considerably since the early 1980's during which the events complained of herein took place, however, much of what has transpired in the context of within the hearing reminds us that sometimes such things are very slow to change.

CONCLUSION

The case of Holden vs. Canadian National Railway (1990), 14 C.H.R.R. D/12 (Fed. C.A.) sets forth the burden and standard of proof in cases such as this one, as follows (at page D/14 paragraph 6):

"the Complainant bears the initial onus of establishing a prima facie case of discrimination, after which the burden shifts to the Respondent to establish a justification upon a balance of probabilities:"

Not only is the Complainant's burden a civil burden, the Federal Court of Appeal in the Holden decision confirmed previous case law which established that discrimination need only be one factor amongst others for a contravention of law to be found. It need not be the only basis for a contravention.

The case of Basi v. Canadian National Railway Company (1988), 9 C.H.R.R. D/5029 (Can. Trib) goes further to state that if the Respondent does provide "a reasonable explanation for the otherwise discriminatory behaviours...the Complainant has the eventual burden of showing that the explanation provided was merely a "pretext" and that the true motivation behind the employers actions was in fact discriminatory."

There is, of course, good justification for the transfer of burden in discrimination cases as, due to its very nature, it is practised more often subtly or even subconsciously than overtly. The case of Kennedy v. Mohawk College (1973) (Ont. bd. Inq.) is cited in the Basi decision as follows: "An inference of discrimination may be drawn where the evidence offered in support of it renders such an inference more probable than the other possible inferences or hypothesis."

The Basi decision permits this Tribunal to therefore look not just at the isolated acts referred to in the complaint filed on behalf of Ms. Pitawanakwat but also at the Respondent's conduct before and after the events in question. At paragraph 38491, "The Respondent does not sufficiently refute an inference of discrimination by being able to suggest any rational alternative explanation; it must offer an explanation which is credible on all the evidence."

In the case before us, it certainly cannot be said with any degree of certainty that the discrimination alleged was the sole reason for the Respondent's conduct surrounding the events complained of, however, we are

satisfied that discrimination was one of the factors that influenced the Respondent in its dealings with the Complainant, which conduct resulted in her eventual dismissal.

Although the direct evidence of discrimination in this case is limited, and although the racial slurs might never have continued had anybody bothered to protest their use within the context of the Respondent's work environment, the aspect of this case which has caused this Tribunal the most concern relates to the Respondent's lack of interest, understanding or inclination to respond to repeated indicators about the possible existence of discrimination within its own office. The Tribunal in the case of Hinds v. Canada Employment and Immigration Commission (1988), 10 C.H.R.R. D/5683 (Can. Trib) held that the Respondent's "inaction did more damage since it left the impression with those concerned that this form of harassment was not even worthy of the commitment of investigative resources...One gets the

sense that the matter was treated as though it was considered a harmless joke."

For whatever reason, André Nogue chose to ignore not only the expressed concerns of the Complainant herself but the concerns raised by Ernie Lawson, the Union representative, by Ron Fisher, the Conflict Management Consultant, and, most significantly, the detailed report of the Social Development Officer Task Force which all raised clearly concerns about the existence of discrimination within the Respondent's work environment. We are satisfied that racial discrimination may not have been, and likely was not, the driving force behind Mr. Nogue's conduct in that regard, however, we are satisfied that it was one of the reasons for his inaction. As in the Hinds case (at paragraph 41629) "there is no reason to believe that the lack of response by (the Respondent) to the act of harassment was wilful. Rather it is better characterized as gross negligence."

REMEDY

Pervasive throughout this lengthy hearing was the sense that the principal players on both sides of the dispute were reluctant to bear responsibility for the part they played in this unfortunate unfolding of events. In an effort to establish that each was right, the parties took great pains to establish that the other was wrong and, to a large degree, that appears to be one of the reasons for the utter failure on the part of both the Complainant and the Respondent to aggressively confront the problems which arose within the office, at the time they arose. There appears to be little doubt that, in North America, to be a person of aboriginal origin means that one will likely have to endure more adversity and greater challenges to self-esteem than mainstream North Americans, however, race cannot be used to spare one from the normal challenges of life. Ms. Pitawanakwat was, from the evidence, not a timid woman and certainly was not adverse to taking a stand when she felt strongly about an issue. Too much of the evidence which went before this Tribunal was clearly an attempt to colour innocent conduct retrospectively with a racist brush or to provide justification for unacceptable conduct. One got the impression that Ms. Pitawanakwat found it easier to blame others for the downward spiral in her productivity than to organize herself in a way which would

have prevented her demise. That fact does not detract from the responsibility which the Respondent must bear for the part it played in that demise. However, it is with those things in mind that the award of this Tribunal is reduced from what it might otherwise have been had the

Complainant not been seen as contributing to the sad state of affairs which existed during the period of her employ.

Reinstatement of the Complainant to her former position would have been considered by this Tribunal had it not been made very apparent throughout the course of the hearing that such a reunion would be a recipe for disaster. There is clearly far too much bitterness between the parties to think that reinstatement of the Complainant to her former job is workable. However, the Tribunal is hopeful that Ms. Pitawanakwat can, in another setting, make a valuable contribution to the Department of the Secretary of State and therefore directs that the Department provide to the Complainant an offer of employment for the next Social Development Officer PM-4 position available in any region outside Saskatchewan. Such position shall be kept open for acceptance by the Complainant for a period of six months. If such employment is accepted by Ms. Pitawanakwat, the Department shall make available to her such re-training programs as may be required for other job trainees and such additional training as management would then deem necessary. The Department will obtain input from the Complainant in the area of her re-training and will be responsible for her moving costs.

This Tribunal also makes an award for lost wages and benefits from the date of the Complainant's dismissal for a period of twenty (24) months thereafter. Any employment income received by the Complainant during that 24 month period should be deducted from the wage award, as should such bursaries or grants as the Complainant received while enroled in an educational institution.

Additionally, for the periods during which the Complainant was hospitalized for any illness, the award will be reduced to the amount she would have received in employment disability benefits available to her while in the Respondent's employ. The salary to be applied with respect to the above award shall be at the PM-4 level applicable from the date of dismissal. It shall bear interest at the rate set by the Saskatchewan Pre-Judgment Interest Act. There shall be no award for hurt feelings in light of the part played by the Complainant in the misfortune suffered by her. Additionally, the Respondent shall forthwith:

(a) pursuant to Section 16(1) of the Canadian Human Rights Act, set up a program in its personnel guidelines designed to ensure that, where possible, there shall be in the recruitment of future Social Development Officers for case loads involving aboriginal clientele, preference given to applicants of aboriginal origin.

(b) provide cross-cultural training programs on a regular basis to all management and staff in the Regina and

Saskatoon offices of the Department of the Secretary of State, in the area of aboriginal culture.

(c) amend its management training curriculum to include a requirement that there be circulated to each and every employee in the Respondent's employ, on a bi-annual basis, clear information circulars on the subject of available resources and remedies for those with harassment concerns.

(d) enter into the personnel files of Shirley Brabant-Bradley (now Shockey) and Alice Wardberg, a memorandum setting forth this Tribunal's concerns about their treatment by the Respondent as a consequence of their support of the Complainant, a copy of which shall be given to Ms. Shockey and Ms. Wardberg.

(e) provide to the Complainant a written apology for the part it played in the circumstances leading to her dismissal.

Although this Tribunal is without authority to redress certain areas of concern through application of formal remedies under the legislation, it should be pointed out that those concerns are as follows:

a) The keeping of personal files by André Nogue, or anyone else in a management position, separate from the personnel files, containing information about Ms. Pitawanakwat, Ms. Shockey, and Ms. Wardberg was considered by this Tribunal as verging on harassment itself and is not to be condoned. Further, we would encourage the Respondent to turn over to those individuals such contents of those files to date as may in any way impact on their present or future employment.

b) The conduct of Mr. Nogue, Mr. Grant and any other management or staff in the Regina office, in ostracizing, intimidating or in any other way distinguishing, in a negative way, supporters of an employee who meets with their disfavour is not to be condoned.

c) It is considered curious, to say the least, that the Respondent would fill its visible minority quota by hiring an individual of a visible minority, with no aboriginal ancestry whatsoever, to fill a job designed specifically to encourage people/groups of aboriginal origin to increase their participation in Canadian society.

d) Although formal grievance procedures may well be available to staff within the Respondent's office, this Tribunal would encourage management in the Regina office to develop, as suggested by the Social

Development Officer task force, an in-office, informal process for dealing with concerns involving harassment or discrimination.

e) It is also most curious that the Respondent does not appear to recognize the inappropriateness of having the Regional Director involved at any level of grievance in circumstances

in which management was involved in the action grieved.

DATED THIS ____ DAY OF DECEMBER, A.D. 1992

____

BRENDA M. GASH

____

LOIS SERWA

____

JAMES D. TURNER