

T.D. 15/93
Decision rendered September 1, 1993

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

HUMAN RIGHTS TRIBUNAL

BETWEEN:

SHIRLEY DEWALD

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

DAWSON INDIAN BAND COUNCIL

Respondent

DECISION

- Chairman
- Member
- Member

APPEARANCES: Margaret Rose Jamieson for the Canadian
Human Rights Commission

Stephen L. Walsh for the Respondent

DATES AND PLACES

OF HEARINGS: March 15 to 18, 1993
Whitehorse, Yukon

TRIBUNAL:

Lee Ongman
Lois Rae Serwa
Barry M. Gelling

ISSUES

The Complainant, Shirley Dewald, filed a complaint under the Canadian Human Rights Act against the Respondent, the Dawson Indian Band on December 21, 1987, alleging she was discriminated against because her employment was terminated on the basis of race. The complaint was amended on November 23, 1989 to correct the name of the Respondent to Dawson Indian Band Council.

On February 20, 1990 the Canadian Human Rights Commission approved a new policy called the "Aboriginal Employment Preference Policy". The policy statement says:

"Within its area of jurisdiction, the Canadian Human Rights Commission will not, as a general rule, consider as discriminatory preferential hiring, promotion or other treatment of aboriginal employees by organizations or enterprises owned and/or operated by aboriginal people."

Counsel for the Commission and for the Respondent wish to have the Tribunal consider the application of the employment preference policy in this case.

FACTS

There were five witnesses called in the case to add to the testimony of the Complainant. The fact that six years had passed between the date that Mrs. Dewald filed her complaint and the start of this hearing, created some difficulty in specific recollections of conversations that were important. Credibility of the witnesses also had to be dealt with by the Tribunal.

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There was contradictory evidence presented to the Tribunal to determine the facts. Not in dispute was the fact that Mrs. Dewald began employment with the Dawson Indian Council in September, 1983 and was fifty four years old at that time. She originally moved to the Yukon on a temporary basis however once she obtained employment with the Dawson Indian Council (hereinafter also referred to as the "Band") she moved at her own expense and began full time work as a drug and alcohol counsellor in September, 1983. There was contradictory evidence as to whether she was employed as of September 12th or September 6th. She was continuously employed until her termination which is the subject matter before this Tribunal. During the course of the employment of Shirley Dewald, a drug and alcohol

counsellor named Freda Roberts was also hired and is still employed by the Band as a drug and alcohol counsellor at the time of the hearing by this Tribunal. She is a member of the Dawson Indian Band.

Chief Percy Henry gave evidence relating to his conversations with Mrs. Dewald in 1983 when she was originally hired. Chief Percy Henry had a conversation with Mrs. Dewald wherein he stated that the Band wanted to hire someone to train a native drug and alcohol counsellor. However, the Complainant was not hired as a trainer, but as a full time drug and alcohol counsellor.

The Complainant stated that at times she was treated differently from the rest of the Band employees. She specifically referred to an occasion where she was singled out from the rest of the employees not being permitted to apply for Group Life Insurance. Whether this incident occurred is in dispute. Angie Joseph's evidence is that Angie Joseph did not have any discussions with any individual employees regarding Group Life Insurance, including Ken Pike, and that she did not advise Ken Pike that Shirley Dewald was not qualified to apply for Group Life Insurance. Ken Pike was not called to testify.

The evidence is contradictory with respect to the facts at the date of termination of Mrs. Dewald. Mrs. Dewald stated that she received her termination notice in writing from the Band Manager who at the time was Margaret Kormendy and that the letter stated that she would be terminated on September 4, 1987 due to a decrease in program funds. She stated that when she asked Margaret Kormendy why she was terminated, Mrs. Kormendy replied "... the Band Council wanted to hire natives only and she always gets the dirty work". Mrs. Dewald then

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stated to Mrs. Kormendy words to the effect that this was discrimination. She says that Margaret Kormendy replied "yes I know, but they want to hire their own". Mrs. Dewald said that her husband was nearby and could have overheard the conversation.

There is some contradictory evidence as to whether there was a serious funding shortage in the fiscal year 1987, the year of termination of the employment of Shirley Dewald. Mrs. Dewald says that she had no indication that there was a budget cut. Angie Joseph, Margaret Kormendy and Freda Roberts all gave evidence that there was a budget cut in 1987. Hilda Pohlmann gave evidence that she was not aware of an imminent budget cut in 1987.

Mrs. Kormendy remembered delivering the termination notice to Shirley Dewald in 1987. Her evidence was that she was invited into the Dewald home by Mr. Dewald who subsequently withdrew into a bedroom or hallway, but in any event was out of sight. Under cross examination, she said that it was possible that Mr. Dewald, who was nearby, may have heard the conversation between herself and Shirley Dewald. She stated that she gave Mrs. Dewald the termination letter with a few minutes to read it. She recalled that Mrs. Dewald asked why Freda Roberts was not terminated and why she was the one that was terminated. Mrs. Kormendy's statement of the facts is that she informed Shirley Dewald that it was a Council decision and that any questions concerning the termination should be directed to the Chief, Angie Joseph. She stated that there was no discussion of termination on the basis of race or any mention of a discussion about discrimination. In response to cross examination by Counsel for the Human Rights Commission, Mrs. Kormendy repeated her evidence that it was a Council decision and that any questions or concerns were to be referred to the Chief, Angie Joseph.

The Tribunal was required to determine as a fact what the reasons were for terminating Shirley Dewald. Evidence stated by Margaret Kormendy, Angie Joseph and Freda Roberts was that it was very difficult to be fully informed as to the volume and the successfulness of the caseload carried by Mrs. Dewald as Mrs. Dewald kept that information confidential. The Dawson Indian Council did not know who the clients of Shirley Dewald were. It is a fact that Shirley Dewald worked especially well with the elders in the Band. The most serious drug and alcohol problem was with the 30 to 40 year old adults according to uncontradicted evidence.

The evidence from Shirley Dewald as to why she was terminated is because she was caucasian and not native. The evidence of the Chief, Angie Joseph and Margaret Kormendy was

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contradictory. Their view of the decision to terminate Shirley Dewald as opposed to Freda Roberts was that termination was based on a Council decision after representation by a Band Committee that considered the merits of both of the two drug and alcohol workers in order to decide which drug and alcohol counsellor should be terminated and which one should be retained

The Tribunal was not presented with any other facts in support of the Complainant's case for racial discrimination or the second issue namely, the application of an Aboriginal Employment Preference Policy.

ARGUMENT

Shirley Dewald did not present any argument herself but was content to adopt the argument of the Canadian Human Rights Commission. Their argument was that there was ample evidence of racial discrimination and that Section 7 of the Canadian Human Rights Code was applicable.

Counsel for the Commission acknowledged that an Aboriginal Employment Preference Policy now exists which would permit preferences but argued that even if such a preference to hire a native drug and alcohol counsellor was used the Council was required to deal reasonably with the employee namely, Shirley Dewald, who would be adversely affected by the application of such a policy of preference. The Commission further went on to argue that in this case if the Tribunal determined that there was an application of such a policy, it was not applied reasonably and that damages and a remedy should flow from that.

Counsel for the Dawson Indian Council argued that there was no evidence of racial discrimination on the facts as presented in this case. Mr. Walsh argued that the evidence was contradictory and on the issue of credibility on the pertinent facts Mrs. Dewald's testimony was not to be preferred. Mr. Walsh went on to argue that if the Aboriginal Employment Preference Policy was applicable on these facts that the Dawson Indian Council was justified in terminating Mrs. Dewald and continuing to employ Freda Roberts. He further went on to say that due to the lack

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of funding and the fiscal constraints of the Band that the severance package provided to Mrs. Dewald at the time of termination was reasonable in all of the circumstances.

APPLICABLE LAW

Section 7 of the Canadian Human Rights Act provides as follows:

"7. it is a discriminatory practice, directly or indirectly:

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

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

The Canadian Human Rights Act describes the prohibited grounds of discrimination as follows:

3.(1) For all purposes of this Act, race, national or ethnic origin, color, religion, age, sex, marital status, family status, disability or conviction for which a pardon has been granted are prohibited grounds of discrimination."

Counsel for the Commission argues and raises for the benefit of the Tribunal the concept of intention under the Canadian Human Rights Act and we accept the argument that it is not necessary to prove that there was an intention to discriminate on the basis of race if the actions discriminated on the basis of race, with or without intention. The Commission then proceeds to define discrimination. On page 448 of the Commission's arguments there is a continued quotation from the case of the Law Society of British Columbia vs Andrews as follows:

"Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape a charge of discrimination, while those based on an individual's merits and capacity will rarely be so classed."

Counsel for the Commission cites the O'Malley case for authority that the Canadian Human Rights Act should be broadly interpreted as the O'Malley case provides that it is the fundamental Act in Canada to prevent discriminatory practices.

with respect to the interpretation of statutes and aboriginal rights. In "Now" the following quote was provided:

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Counsel for the Respondent also provided us with the O'Malley case for authority where the Tribunal in that case said:

"The Complainant and proceedings before Human Rights Tribunals must show a prima facie case of discrimination. A prima facie case in this context is one which covers the allegations made in which they believe is complete and sufficient to justify a verdict in the Complainant's favour in the absence of an answer from the Respondent employer."

The case of No The Queen was a case presented by Counsel for the Respondent,

e Queen

"The following principal that should govern the interpretation of Indian Treaties and Statutes is set out:

... treaties and statutes relating to Indians should be liberally construed and doubtful expression resolved in favour of the Indians."

Section 67 of the Canadian Human Rights Act could also be relevant law in a case of this nature raised under the Act. Section 67 states as follows:

67. Nothing in this Act affects any provision of the Indian Act or any provision made under or pursuant to that Act."

It was not raised by the parties.

DECISION

In reviewing, the evidence, the Tribunal finds that the testimony of Hilda Pohlmann did not provide any evidence of employment on the basis of race, nor any policy of preferential hiring. The Tribunal considered the evidence of Percy Henry and finds as a fact that his evidence related to an incident in 1983 which is not relevant at the time of the termination of employment in 1987.

The Tribunal considers the testimony of Margaret Kormendy to be in some respect contradictory to the evidence of Shirley Dewald. Mrs. Kormendy specifically provided further evidence as to what method the Committee of the Council used in order to make a

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recommendation to the Band Council for the termination of a native counsellor. Her evidence of caseload and input from Band was that the Band looked at credentials, caseload, nature

members. She stated that when the Council looked at both of the workers' credentials they found that they were equally qualified. The Council believed that Freda Roberts had a very heavy caseload which included most of the 30 to 40 year old clients who had the most serious problem.

The Band considered it important that they knew who Freda Robert's clients were and did not know who Shirley Dewald's clients were.

They also considered it an important factor between the two co-workers that most positive comments from the Band members were directed at Freda Roberts and she was the worker most frequently requested to counsel them about their problems.

The evidence of Margaret Kormendy with respect to the discussions of discrimination on the basis of race at the time of the dismissal, contradicts the evidence of Mrs. Dewald. The Tribunal notes that Mr. Dewald may have overheard the conversation however he was not called and although no adverse inference is taken from that fact, the Tribunal accepts the evidence of Margaret Kormendy and finds as a fact that when Mrs. Kormendy presented the letter of termination to Mrs. Dewald she responded that any explanation would have to be taken up with the Band Council as it was a Council decision.

The Tribunal finds that there are no facts supporting a determination that race was one of the reasons for dismissal. The fact that one counsellor was caucasian and one counsellor was aboriginal is not germane to the issue. This is not evidence of discrimination as there will be many situations in which natives and non-natives of various races will be working together and race alone in the absence of any supporting evidence cannot be inferred by a Tribunal as a reason or even one of the reasons for a dismissal.

After a very careful review of the evidence the Tribunal finds as follows:

1. The incident relating to Chief Percy Henry's testimony was not relevant at the time of termination and formed no part of the decision to terminate the employment of the Complainant;

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2. If Mrs. Dewald was refused a Group Life Insurance application there was no reason given for such refusal.

3. The Tribunal is of the view that at the time of the delivery of the termination notice to Mrs. Dewald. Mrs. Kormendy has a clearer recollection of the event and the testimony of Mrs. Kormendy coincides with other witnesses and therefore we find it a fact that there was no reason given at the time of the delivery of the letter of termination to Mrs. Dewald that the termination was given on the basis that Shirley Dewald was not a native;

4. The Tribunal finds as a fact that, for financial reasons, the Band Council was required to terminate one drug and alcohol counsellor in September of 1987.

5. The Dawson Indian Council considered the merits of both employees and weighed the factors of, caseload, nature of caseload, credentials, identity of clients and client feedback in order to determine which worker best served the Band.

In conclusion, the Tribunal finds that the Dawson Indian Council continued to employ Freda Roberts on the basis of merit and that there is no evidence of termination of the Complainant's employment based on racial discrimination and thus the complaint is dismissed.

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The Tribunal does not find this a case in which we can offer any guidance of the application of the Aboriginal Employment Preference Policy as we are of the view that the policy does not apply to these circumstances.

Dated this 2nd day of July, 1993.

LEE ONGMAN

BARRY M. GELLING