

T.D. 10/83

Decision rendered on September 14, 1983

IN THE MATTER OF THE CANADIAN HUMAN RIGHTS ACT
(S.C. 1976-77, C. 33)

And in the Matter of a Hearing Before a Human Rights Tribunal
Appointed Under Section 39 of the Canadian Human Rights Act

BETWEEN: EMILDA SHAFFER

Complainant

- and -

TREASURY BOARD OF CANADA

as represented by Department of Veterans Affairs

Respondent

HEARD BEFORE: MARY LOIS DYER

TRIBUNAL

APPEARANCES:

R. JURIAN SZ COUNSEL FOR The Canadian
Human Rights Commission

G. GRENVILLE-WOOD COUNSEL FOR The
Complainant

L. LEDUC COUNSEL FOR The Responent

DATES OF HEARING: February 15, 16, 17, 1983

May 2, 1983

>I.

INTRODUCTION

This matter involves a complaint by Emilda Shaffer against
Treasury Board Canada under Sections 7 and 10 of the Canadian Human
Rights Act (S.C. 1976-7, C-33).

The complaint form signed by Emilda Shaffer and entered as
Exhibit H-2 stated that:

"I have been working at the Rideau Veterans Home as a
registered nursing assistant for the last 25 months. On
August 9, 1981, while working in Unit 3 East with Mrs. McLean,
Emile Bertrand and Marcel Côté, the latter called me a
"nigger". A second incident took place on August 10 where
this time Mr. Côté slapped me without any provocation on my
part. I reported the matter to Mrs. Knox, my immediate
supervisor, who later told the Home Administrator, Mr.
McGovern but nothing was done to correct the situation.
Instead I was told by Mr. McGovern (a) that he considered the
issue to be an individual matter, (b) that the Home would not

get involved and (c) that Mr. Côté and myself should resolve
the matter between ourselves. I therefore believe that I have

been discriminated against because of my race (East Indian) and colour (black) and this, in contravention of Sections 7 and 10 of the Canadian Human Rights Act."

The complaint was dated at Ottawa, Ontario August 28, 1981. On the 8th day of November, 1982 I was appointed a Tribunal to inquire into the complaint of Mrs. Shaffer pursuant to Section 39 (1) of the Canadian Human Rights Act to determine whether the action complained of constituted a discriminatory practice under the Act.

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- 2 -

Evidence at the hearing brought out allegations of discrimination based on race and colour involving Mrs. Shaffer. The complaint was brought against Treasury Board of Canada and not particular individuals. Counsel introduced a document, Exhibit C-1, which was a transcript of a criminal trial which took place based on the incidents which occurred. The purpose of introducing the document was to avoid bringing in one of the witnesses at that trial who was a resident of the Rideau Veterans Home and his testimony is accepted by way of filing these proceedings.

Counsel for the Complainant stated that it was his intention to show the employer liable by proving that more reasonable steps to provide a workplace free of name-calling and physical harassment should have been taken and that liability extends to the employer because of its failure to uphold this duty. Further, the Council sought to prove that the employer through its agents on site failed to deal adequately with the situation and "either to discipline the particular individual involved or to make it clear to the other members of the staff over whom the employer had supervisory duties, that such a behaviour or pattern of behaviour, or such activity was totally unacceptable and would be subject to severe disciplinary action". (I-9). By so doing, counsel claimed the employer failed to uphold the principals of the Human Rights Act.

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- 3 -

Finally, the Tribunal accepted a formal motion to amend the complaint in order that Treasury Board, Canada be named the Respondent as represented by the Department of Veterans Affairs.

II. EVIDENCE

EMILDA SHAFFER

Emilda Shaffer was born in Mangalore, India and came to Canada with her husband and children in November, 1970. Mrs. Shaffer completed general nursing studies in Calcutta, India in 1957 and worked in the nursing field there until moving to Canada. In Canada, Mrs. Shaffer worked in both Ottawa and Toronto as a nurse before taking her RNA (Registered Nursing Assistant) training and

receiving her RNA registration in 1977-78. In 1979 Mrs. Shaffer moved to Ottawa and commenced working July 3, 1979 at the Rideau

Veterans Home. Mrs. Shaffer has been employed there continuously since in the capacity of a registered nursing assistant.

The evidence revealed that there were two incidents which are the focus of attention for this complaint. Each is distinct from the other and yet each should not be considered in isolation of the other.

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Shaffer stated that there were approximately 130 beds at the Rideau Veterans Home. In August, 1981, Mr. McGovern was the Administrator of the Home and the Director of Nursing was Mrs. Tassé. In the administrative hierarchy there are two nursing supervisors, one for the East wing wards and the other for the West wing wards. Mrs. Shaffer testified that Mrs. Knox was the supervisor of the East wing and Mrs. Ekhdal, the supervisor of the West side. On the West side of the institution there is one nursing station with one or two registered nurses as the patients are active and fairly mobile and those with restricted abilities are located in 2 West. On the East side, Mrs. Shaffer testified there are three nursing stations with one or two registered nurses, several RNA's and the orderlies. Mrs. Shaffer further testified that there are other non-white staff at the Rideau Veterans Home.

Concerning the incident on August 9, 1981, Mrs. Shaffer stated: "The dietitian was serving some onions to the patients and there were one or two that couldn't eat Spanish onions and I told the diet girl to skip the onions for that particular patient and Marcel Côté was right behind me and he picked the thing from there and said 'These niggers cannot afford Spanish onions and that is why they don't want the patients to have them'. He kept on repeating that several times whenever I passed him in the hallway with the trays, he kept on saying 'These niggers don't eat onions'. He kept on repeating that several times." (I-21) See also II-180.

Mrs. Shaffer continued:

"I think even when we were serving, when we were feeding the patients, there were some that had to be fed, and the two orderlies and myself were feeding the

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- 5 -

patients and he (Côté) kept on saying the same things in front of the patients and by then I said 'It's not like hitting your wife, so don't harass me in that way'." (I-22)

Mr. Côté was a nursing orderly in the Rideau Veterans Home and working on 3 East at the time in question. Mrs. Shaffer revealed that shortly following this exchange of words with Mr. Côté, there was a phone call. Mr. Côté spoke on the phone and during the

conversation Mrs. Shaffer overheard Mr. Côté to say:
"There is a nigger who works here, why don't you give her a
piece of your mind." (I-24)

The Head Nurse at the time was Mrs. McLean and Mrs. Shaffer
testified that:

"The RN said I don't want such conversation to take place over
here and we'd better get involved in our work, and when I
heard that I asked permission to go to the supervisor."
(I-24) See also II-190.

Mrs. Shaffer testified Mrs. McLean denied her permission and
suggested that Mrs. Shaffer get back to work. Mrs. Shaffer
testified that:

Marcel Côté took off without permission even and went to Mrs.
Knox himself, and told her his version of the story." (I-25)

That same day Mrs. Shaffer filed an incident report (Exhibit
C-2) which states as follows:

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- 6 -

"Marcel Côté an orderly repeatedly and several times, called
and referred to me as a nigger and black woman in front of the
patients, the RN Mrs. McLean and the orderly Mr. Emile
Bertrand. When he had a personal phone call, he referred to
me as a 'nigger' in full hearing of the patients and staff."
(C-2)

In further testimony Mrs. Shaffer reported that Mrs. Knox came
to the floor soon after Mr. Côté had seen her and that the only
action taken was that:

"... she told me that I am not a nigger and I shouldn't worry
about it." (I-26)

On August 10, 1981 the second incident took place. Mrs.
Shaffer describes it as follows:

"On August the 10th, I had answered one phone call and that
asked for the orderly by the name of Jim Ritchie and I gave
the information that Jim Ritchie is not in 3 East and to try
2 East and Emile Bertrand, another orderly, was right behind
me, and he heard my part of the conversation and after I put
the phone down he said "Jim Ritchie is not in 2 East, he
hasn't come in to work today" and I said well, I've already
answered the phone and they'll find out." (I-27)

Next, Mrs. Shaffer testified that a short time later she was
in the process of transferring a patient from a chair to a
wheelchair when Marcel Côté came up to her and said 'Don't ever

talk so rudely to my wife' and I didn't know what he referred to and he slapped me. (I-27)

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Shaffer described the slap as follows:

"Q. Now, tell us about the slap? Was it a little tap or how much force was behind the slap?

A. There was quite some force and there was quite a sound to it, because it was ... it was quite loud.

Q. On which cheek did he hit you, which side of your face?

A. He hit me on my right side.

Q. On your right side?

A. Yes.

Q. With the front of his hand or the back of his hand?

A. With his palm.

Q. And would that be his left hand or his right hand, do you recall?

A. His left hand.

Q. And what was your immediate reaction?

A. I was shocked, I was taken aback, I was humiliated and my face was all red and I just left that place." (I-126)

After she was slapped, Mrs. Shaffer stated that she left the floor without permission and went to Mrs. Knox to tell her what had transpired. Mrs. Shaffer stated:

"She called for Mr. Côté and the head of the orderlies was over there and she heard my version and she heard his version and he denied having slapped me and they said if I was slapped there would be some fingermarks on my face. They didn't believe me." (I-28)

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- 8 -

Mrs. Shaffer filed an incident report before she left later that day, Exhibit C-3 which states as follows:

"Marcel Côté struck me in the face with no provocation on my part after having harassed me verbally the previous day on the basis of my racial origin (India)."

Mrs. Shaffer testified that she asked permission to make a telephone call, was denied permission and eventually left later that morning to go home. Mrs. Shaffer indicates that when she went to pick up her purse before going home she looked around to see if any of the patients might have witnessed the event. A patient, Mr. Sweeney told her he saw Marcel Côté slap her. Mrs. Shaffer called Mrs. McLean, the nurse on the floor and asked Mr. Sweeney to tell

her and to tell Mrs. Knox that he had seen Marcel Côté strike her and Mr. Sweeney so advised them.

Mrs. Shaffer was asked whether or not anyone else was present from the staff to witness the event and she replied:

"I have no recollection as to where Mrs. McLean was but I still feel that Emile Bertrand was in the same room because he said, I heard him say Marcel you shouldn't have done that."
(I-125-126)

On the evening of August 10, 1981 Mrs. Shaffer testified she wrote a letter to Mr. W.L. Ford the Public Service Alliance representative so that she could get the facts on paper and advise

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what management did at the time." (I-32). This letter was introduced as Exhibit C-4 and with some elaboration details the basic events of August the 9th and 10th involving the name-calling and slapping incidents.

Mrs. Shaffer testified that when she left her work place on August 10, 1981 she did not return to work for five days. On August 11 she was "suffering from pain and emotion and I just couldn't go to work." (I-33), she visited her doctor and he prescribed Tylenol for the pain and Valium as a tranquilizer. In addition, Mrs. Shaffer testified that on August 11 she filed a complaint at the Ottawa Police Department against Marcel Côté. The proceedings relating to the trial concerning that complaint have been entered into the record as exhibit C-1 and are accepted as evidence that the slapping incident indeed took place.

Pertaining to the 5 1/2 days of sick leave, Mrs. Shaffer testified and it was not contradicted that she took those 5 1/2 days sick leave, that she was paid for those days but as a result used sick leave credits. Later in November, 1981 Mrs. Shaffer was absent on sick leave for 20 days, due to the stress that arose out of the incidents in August and subsequent events. (See transcript 1, p. 146 to 149).

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- 10 -

On her return to work on August 18, 1981 Mrs. Shaffer was advised that a meeting would take place with Mr. McGovern. Also present were Mrs. McLean and Mrs. Knox. Mrs. Shaffer stated that the meeting was based on the incident report and that Mr. McGovern "issued instructions to Mrs. Knox to have counselling sessions with me" (I-36). Mrs. Shaffer's evidence also indicated that she apologized for leaving a patient unattended after the slapping incident on the 10th. Mrs. Shaffer clearly states that no reference to the specific incident of the slapping was made at this meeting which lasted approximately 10 minutes.

When Mrs. Shaffer reported to work on August 19th, 1981 she was invited to a meeting with Mr. McGovern, Mrs. Knox, Mrs. Gervais

(the shop steward) and Mr. Côté. Mrs. Shaffer's testimony reveals that Mr. McGovern opened the meeting and indicated that it was pertaining to the incidents which had taken place between Mrs. Shaffer and Mr. Côté. In Mrs. Shaffer's words, she recalls:

"He (Mr. McGovern) said this happened between the two of you, the incident is between the two of you, the Home would not get involved and the two of you will have to get it resolved and I had to give it in writing that I would work in harmony with Marcel Côté." (I-39)

Mrs. Shaffer's testimony reveals that she asked for time to think about a response to the request to work in harmony with Marcel Côté and that she was given several days to think about it. (I-40, II-232-233).

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- 11 -

On August 20, Mrs. Shaffer testified she received a copy of a memorandum from Mr. McGovern to Mrs. Knox, Director of Nursing pertaining to the counselling procedure (Exhibit C-5):

"This memorandum will confirm the meeting of August 18 attended by yourself, Mrs. McLean, Mrs. Shaffer and myself. As Mrs. Shaffer claimed to be unaware of the many counselling sessions she received during her employment, it was agreed by all present that to avoid future confusion in this regard, her supervisor will confirm in writing, to Mrs. Shaffer, the contents of any future counselling sessions. She is to be asked to sign a copy of the statement for inclusion in her personal file. Mrs. Shaffer, of course, has the opportunity to disprove the contents, but if she cannot do so, and should she refuse to sign, a witness may signify to this event.

Hopefully the system will ensure the counselling sessions will achieve their objective, namely to provide the employee with the opportunity of becoming aware of any shortcomings in her work habits, attitude, or interpersonal relations with staff or residents, and of taking steps to remedy these deficiencies. I therefore instruct you to implement this system immediately, on Mrs. Shaffer's behalf, and to apply it without exception to any future counselling sessions she may have."

Mrs. Shaffer at pages 221 to 222 and pages 290 to 291 clearly states that she was unaware that counselling sessions had taken place prior to receiving this memo and also explained her impression of what a counselling session meant.

On August 31, 1981 a grievance was filed by Mrs. Shaffer in connection with the incidences which says:

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- 12 -

"On August 9 I was verbally abused and racially harassed by Marcel Côté. On August 10 I was physically assaulted by

Marcel Côté. Both of these events were reported to Mrs. McLean and Mrs. Knox, ultimately to Mr. McGovern, the Administrator. To my knowledge nothing has been done by any of the above in discipline of Marcel Côté or by other means to promote and maintain occupational safety and health, which minimally includes protection from abuse and attack from an employee, Article 34.01." (See page 143 of the transcript.)

The record indicates that the grievance was replied to on September 4, 1981 and that the requested corrective action against Mr. Côté was denied. To Exhibit H-3 is annexed, a second level grievance response dated October 6, 1981 and a third level grievance reply dated November 23, 1981 both of which were denied.

Mrs. Shaffer testified that several days passed and on August 27, 1981 she sent a formal letter of reply to Mr. McGovern's request at the meeting of August 20. The letter was introduced as Exhibit C-7 and specifically the first, third and last paragraph were read into the transcript and are highlighted here although the full contents of the letter have been considered.

"Subsequent to the events of August 9 and 10, I have had pressure brought to bear upon me by yourself and Mrs. Knox in several ways. In a manner that is highly discriminatory, I have been the subject of special surveillance and reporting. You have written instructions to Mrs. Knox which singled me out for "special treatment" which is not only repugnant, but in violation of the collective agreement. This will be grieved." (middle paragraph at page 2, Exhibit C-7)

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- 13 -

In the passage of a few short days I have been transposed from being the offended person to being the offender. It is a strange performance. I was harassed and verbally abused and the management did nothing. I was physically assaulted; the management still did nothing. Now, I am placed on the defensive as a result of a criminal action in which I was the victim. Mrs. Knox's written "counselling" of August 11, 1981, will be grieved also. The letter is demonstrably vexacious and can only have been intended for some purpose other than the purpose alleged. (Page 3 and 4, Exhibit C-7)

In response to your specific request to me, I wish to advise you that I will continue to perform my duties in harmony with my fellow employees and a deep sense of duty and obligation to the patients of Rideau Veterans Home. Your previous question as to whether I would "forgive and forget" Mr. Côté's criminal

and illegal acts is, of course, answered in the negative."
(page 5, Exhibit C-7)".

Mrs. Shaffer gave evidence that she was at the time of writing this letter not aware that Marcel Côté had been disciplined and in fact only became aware of it shortly before the hearings related to this tribunal. (See page 49 and 145 of transcript.)

Mrs. Shaffer then gave evidence of the series of incidences in the fall of 1981 and in the winter of 1982 which indicated to her

the response of the employer to the whole situation discussed herein. This led to a feeling of fear and discrimination on the part of Mrs. Shaffer.

One event took place on October 17, 1981:

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- 14 -

"Well, I was on my way to work. I had a flat tire and my husband was supposed to call the Ontario Motor League and I was waiting where my car was and he went to phone the Home to say that I would be late for work. I was on evening shift.

So, in the meantime, at about 3:35 the RN phoned home just as my husband was at the door, the phone was ringing, and I was deducted half an hour pay for coming in late." (I-51)

Mrs. Shaffer grieved the deduction of this half hour pay as she had felt that appropriate action to provide notice to her employers had been taken (Exhibit H-5). The grievance was successful and the deduction recinded.

Exhibit C-8 was entered as the minutes or notes of meetings between Mrs. Shaffer and others dated October 28, 1981 in connection with meetings on October 23, 1981 at 10:30 and a subsequent meeting on October 26, 1981 at 15:00 hours. In attendance besides Mrs. Shaffer were Mr. Giroux, representing the management, Mrs. Tassé, Mrs. Gervais, and Mr. Perkins. Mrs. Gervais and Mr. Perkins represented the union. Mr. Giroux was the acting Administrator. The meetings were held because Mrs. Shaffer stated that she had fears for her safety. The minutes indicate that Mrs. Shaffer was counselled on means taken by the management for her protection and safety at the Home, and on her personal behaviour and performance.

With respect to the means taken for her protection and safety Mrs. Shaffer testified at pages 58 to 60 that on many occasions her shift and the shift of Mr. Côté overlapped and she had to encounter

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in the halls and she feared for her safety. In addition the meeting notes that Mrs. Shaffer's parking space was moved to a

better lighted area of the parking lot and that nursing protection was offered during shift change. A procedure was established to avoid their meeting during the ten minute overlap of shifts and it was indicated that it would continue as long as humanly possible. It was not promised indefinitely.

With respect to the personal behaviour of Mrs. Shaffer, the notes concerning those meetings indicate that she was counselled about leaving her post before quitting time, about numerous and long conversations on the nursing station phone, about poor performance and attitude with staff and residents and about late arrivals.

Mrs. Shaffer replied to each of the points taken up by the minutes (see pages 58 to 72 and 153 to 167). To summarize, Mrs. Shaffer's position was that she and Mr. Côté had indeed been scheduled to work on the same shift, that her parking permit had been moved to a better lighted parking spot but this had been afforded to all the women on the staff, that although nursing protection had been offered during shift change it had not been provided, that she had asked to leave her post before quitting time because she was afraid of running into Mr. Côté, that she had had

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a single conversation with her husband by telephone on an occasion when she was particularly fearful for her safety. As respects her poor performance Mrs. Shaffer gave details of several situations she encountered where patients had been uncooperative or difficult. (I-67, 69-70)

Exhibit C-9 is a letter from Mrs. Shaffer to Mr. W.L. Ford of the Public Service Alliance of Canada, dated October 25, 1981. Essentially the letter reviews Mrs. Shaffer's reaction to the meeting of October 23.

A letter to Mr. R. Singh of the Canadian Human Rights Commission, dated November 9, 1981 was entered as Exhibit C-10. It details the history of the events to that time in connection with this matter and makes note of an incident during the summer of 1980 when Mrs. Shaffer reported an insufficiency in the work habits of another nurse. In addition it notes an occasion when Mrs. Shaffer was denied permission to have a resident at her home for a Sunday dinner.

On approximately November 9, 1981 Mrs. Shaffer consulted her physician and was advised to stay away from work due to the stress of events. (See pages 80 to 81 of volume 1 of the transcript and also pages 146 to 147 of volume 2 of the transcript.)

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- 17 -

On November 30, Mrs. Shaffer returned to work and a meeting was called, the minutes of which are entered as Exhibit C-11. In

attendance at that meeting were Mrs. Shaffer, Mr. Giroux, Mrs. Tassé, Mr. Ford, Mr. Perkins and Miss Johnson for the union as well as Mr. Letourneaux and Mr. Killam. As a result of the meeting Mrs. Shaffer testified that she felt an agreement had been reached and had hoped that matters would "settle down". (I-82). In addition exhibit C-12 notes that Mrs. Shaffer agreed to withdraw the 3 outstanding grievances.

About this time Mrs. Shaffer made a request to review her performance appraisal which she had last reviewed and signed on October 16, 1980. A copy of the performance appraisal was introduced as Exhibit C-13. On her review Mrs. Shaffer discovered new statements had been added after her signature. In the words of Mrs. Shaffer:

"What Mrs. Tassé wrote was not discussed with me but Mrs. Knox went already through the evaluation with me and we had signed it, but Mrs. Tassé's remarks were not there.

Q. So, it was the very first time you saw it (new remarks) then, when you asked to see it, in November, 1981?

A. Yes. (I-88)

Mrs. Shaffer stated that in January, 1982 she was advised that her performance review, a new one, would be delayed for another six months due to recent events.

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- 18 -

In February, Mrs. Shaffer received a letter dated February 23, 1982 from Mr. McGovern who had been the Chief Administrative Officer of the Rideau Veterans Home but had since been transferred to Prince Edward Island. Entered as Exhibit C-14 the letter indicated Mr. McGovern's "sincere and personal regret for the incidents which occurred at Rideau Veterans Home on and subsequent to August 9 and 10 last." In answer to a question whether that was the first indication Mrs. Shaffer had acknowledging, on the part of the employer, any responsibility regarding the incidents, Mrs. Shaffer replied yes. (I-93). At pages 168 to 169 and 252 to 253 of the transcript Mrs. Shaffer indicates that notices and a copy of the Human Rights Act were posted in the conference room and board room of the Rideau Veterans Home.

On June 16, 1982 Mrs. Shaffer filed an incident report (Exhibit C-15) which recorded an altercation with a supervising nurse;

Mrs. Shaffer received a memorandum dated June 17, 1982 (Exhibit C-16). It is signed by Mrs. Tassé the registered nurse and says as follows:

"It has been reported by your supervisor, Mrs. Sparks that you flatly refused her instructions to give Mr. Price his toothbrush. It has also been reported that, when asked to

make the last 10:30 p.m. rounds, your answer was: 'that she (Mrs. Sparks) was lazy, didn't do anything, and to go and do it herself.' This sort of behaviour is most unethical, dysfunctional and unbecoming for a registered nursing assistant.

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- 19 -

The responsibility for deciding what is to be done rests with the registered nurse, and refusal on the part of the registered nursing assistant to carry out these instructions is clearly insubordination. You have been reminded on numerous occasions that you are here to take care of the resident, no matter who he is. Any further instances of this sort will result in strong disciplinary action. Consider this a written reprimand, and this will also appear on your

personal file."

Exhibit C-17 was introduced as a memorandum in connection with incidents of July, 1982. The memo was signed by Mrs. Tassé and related to conduct at work on the day shift on July 8, 1982. The memo indicates that after having been denied permission to escort two residents to the funeral of a former Home resident, Mrs. Shaffer attended, even for a few minutes. In addition, the memo notes that on July 9, 1982, without permission, Mrs. Shaffer made a telephone call leaving a resident in the bathtub unattended. The memo also indicated that the matter was regarded seriously and should be taken as a last written warning. A reprimand would also appear on the personal file of Mrs. Shaffer. Mrs. Shaffer clearly states her reasoning behind her action concerning the incidents in question and does not feel in any way that she transgressed her authority. Mrs. Shaffer indicated that she grieved these letters of reprimand, which went to third level and which was denied throughout. (I-102)

Mrs. Shaffer describes an incident where she was lifting a patient and suffered an injury to her back. In her words:

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- 20 -

"I was lifting a patient by myself from a chair to a wheelchair and my legs gave way and I felt a pain in my back and I had to drop the patient back in his chair. I didn't let him fall down. That was on the 28th of November. (1982)"
(I-103)

Mrs. Shaffer states she went to Riverside Hospital emergency ward and that she was later treated by her family doctor regarding the injury with pain pills. Rest was recommended until the 13th of December. Mrs. Shaffer testified she filed a medical certificate with her employer and that she returned to her position on December 11. She was still having pain at that time and her physician recommended anti-inflammatory drugs and physiotherapy and further rest for two weeks. Mrs. Shaffer testified she relayed this

information to her employers on the 11th of December. On the 13th of December she received a letter asking her to go for a medical examination from the acting administrator, Mr. Giroux. Mrs. Shaffer replied in her words:

"The appointment was made at Health and Welfare and he did not ask me if I was in a position to go or did I have any pain or whether I was available to go at that time because I also had to go for physio and he fixed up an appointment on the 20th of December and I replied to that letter asking him as to why this medical examination was required of me, while I was under workmen's compensation..." (I-106. See also II-275)

Mrs. Shaffer testified that Mr. Giroux called her on the 20th of December asking why she had not kept her appointment. She indicated a letter had been sent. On the 22nd of December Mrs. Shaffer received another letter advising that another

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had been made for the 24th of December at 8:30 a.m. and that she was required to be there. At this time Mrs. Shaffer took a three week period of annual leave which her employer was aware of. On her return she received a registered letter from Mr. Giroux indicating that as she had not kept the medical appointment set up by him she was to be disciplined and suspended for three days. Mrs. Shaffer testified that she did not attend the medical appointments, in her words because:

"First and foremost, I was having enough pain to go for having another medical examination. Secondly, I found out from reliable sources that this is something unheard of from the employer. The workmen's compensation usually asks for a second opinion and when I asked them what the benefits were..." (I-109)

Mrs. Shaffer was advised by a letter dated January 3, 1982 by the Workmen's Compensation Board that her claim had not been allowed because her employer had no knowledge of the accident. This letter was introduced as Exhibit R-2.

Exhibit R-1 was introduced as the transcript of a hearing at the Public Service Staff Relations Board under the Public Service Staff Relations Act between Mrs. Shaffer and a number of respondents under section 20 of the act. The complaint was dismissed.

Mrs. Shaffer also reviewed in her evidence some of the difficulties she had in obtaining special leave of absence to attend at this hearing. (I-281)

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- 22 -

Finally, Mrs. Shaffer also testified (page 55 and 152) that these matters were upsetting for her. In her words:

"I was very much hurt and I was upset. I had very many nightmares that this would have happened at work in front of some many residents, in front of so many staff and the word spread around, everyone knew that I was struck and I didn't get any support from the management. On the contrary, I was being harassed quite a bit and it made the work place rather not too pleasant (I-55).

And further "... I mean August it was there but in October, November all those incident reports and memos, attending meetings. The whole role was reversed against me and it was as if I had done it, they treated me in such a way ... and I felt, you know, everybody was aware of it and they treated me harshly." (I-152)

EMILE BERTRAND

Mr. Emile Bertrand, employed at the Rideau Veterans Nursing Home for approximately 2 1/2 years, testified to the events noted above. His testimony was confusing, uncertain, and contradictory

from one question to the next. He indicates on page 317 of the transcript that he did not see the slapping event itself and only saw Mr. Côté point his finger at Mrs. Shaffer. He recalled hearing the words "nigger" at various points during the events of August 9 and 10 but cannot relate them to specific incidents.

THOMAS J. MCGOVERN

Mr. McGovern testified that he was employed by the Department of Veterans Affairs and is presently the Assistant Director,

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- 23 Hospital

Services at the Head office, Charlottetown. He has been in that position since January of 1982. Mr. McGovern indicated that from October 1980 to mid-September 1981 he was the Administrator at the Rideau Veterans Home. In mid-September he went on french language training and returned to the Home on special project for November and December before departing for Charlottetown in January, 1982. The evidence indicated that Mr. McGovern's background has been in health care management for many years:

"I've been the accountant at two large Toronto hospitals for approximately five years. I was the Administrator of a Toronto hospital for eight years, the Administrator of a regional psychiatric center of the Correctional Service in Kingston for four years and following that, I came to Rideau Veterans Home." (III-332)

Mr. McGovern's evidence indicates he has participated in courses put on by the Canadian Hospital Association on health management and also took courses in long-term care organization and management.

Mr. McGovern gave evidence that as Administrator of the Home, he was responsible for the complete operation of the Home which is a 142 bed facility for veterans. He indicated that four principals reported to the administrator: the Director of Nursing was responsible for the complete nursing department, the Dietitian, who is responsible for the food service department, the Director of

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- 24 Recreation

or activities, responsible for recreation or motivational activities at the home and an assistant administrator, who is responsible for finance, clerical, maintenance and other non-clinical functions. (III-333)

Mr. McGovern described the nursing aspect as organized under a Director of Nursing, two Nursing Supervisors, a number of Registered Nurses and a number of Registered Nursing Assistants as well as a number of Registered Nursing Orderlies. Supervisors reported to the Director of Nursing who in turn reports to him. At all times pertinent to the incidents at hand the Director of Nursing was absent and her position was being filled by Mrs. Knox

in both the role of Supervisor and Director. (III-334)

The line of authority in the words of Mr. McGovern went as follows:

"The director of nursing is responsible to me for the complete nursing department. She delegates her authority to her supervisors. As you heard, the Home is sort of split into two wings and one supervisor generally is responsible for one wing and the other for the other and that at each nursing station there is a registered nurse during, lets say, day periods, at least one registered nurse. Reporting to the registered nurse are the nursing assistants and orderlies.

So in terms of receiving instructions as it were, the director of nursing might instruct the nursing supervisors who would instruct the registered nurse who would instruct the nursing assistants or the orderlies." (III-335)

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- 25 -

The record indicates that Mr. McGovern normally works Monday through Friday and is not usually at the Home on Saturdays or Sundays.

Mr. McGovern reported that on Monday, August 10:

"Shortly before noon, somewhere between 11 and 12, Mrs. Knox came to me to report that there had been an apparent slapping

incident and she also mentioned the name-calling of the previous day. She at that point was the acting Director of Nursing. I instructed her to commence an immediate investigation and report to me." (III-336)

Mr. McGovern gave evidence that he had instructed Mrs. Knox to proceed in this direction in order to establish the facts surrounding the incidents. He added that in the course of the next several days Mrs. Knox kept him updated on the pieces of information she was receiving including written reports. Some staff were off-duty and others were impossible to reach during the day which lengthened the investigation in some respects.

Mr. McGovern stated that the first opportunity he had to speak directly to Mrs. Shaffer was the 18th, when she returned to work. He called a meeting on that day. He did so because in his words "he had conflicting information regarding the incident." (III-339). Mr. McGovern stated:

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- 26 -

"Mrs. Shaffer had indicated that without provocation she had been called names and without provocation she had been struck.

Mr. Côté had denied striking her and indicated what I would have considered to be some degree of provocation. So I really wanted ... I really didn't want to rehash the incident again.

It has been my experience as a manager, as I told them at the meeting, that such quarrels are usually best resolved by the individuals concerned. So what I was hoping is that I could persuade them, as I persuaded people in the past to resolve it amongst the individuals concerned without having management imposing a solution, which in my experience is usually not well received by one or other of the people.

So, I guess the main objective of my meeting was hopefully to persuade both parties to settle this matter amongst themselves." (I-339-340)

Mrs. Knox as acting Director, Mrs. McLean as the nurse at the time, and Mrs. Shaffer were present in his office. He indicated that he wished to discuss the events and noted that his experience as a manager indicated that quarrels such as these are best resolved among the individuals themselves and that he hoped that that could be achieved in this case. Mr. Côté was not present as he had already left for the day. Mr. McGovern noted that his "technique in cases like this is usually to see both individuals separately and then see them together" (III-341). Mr. McGovern stated that early in their discussions the matter of Mrs. Shaffer leaving a patient alone was brought up. To this Mrs. Knox noted that Mrs. Shaffer had been counselled on a number of previous occasions. Mrs. Shaffer, according to Mr. McGovern, immediately denied she had ever been counselled. In order to clarify the

situation and not pursue a yes/no discussion, Mr. McGovern suggested that Mrs. Knox record in writing all future counselling

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- 27 sessions.

His objective was "really to clarify for the future" (342) so misunderstandings or inconsistent interpretations would not occur in the future (see III-416-419).

Mr. McGovern stated:

"It was my primary ... my primary intention was to try to persuade her and subsequently persuade Mr. Côté to settle this matter amongst themselves but it was a suggestion on my part. At no time did I state that the Home would not become involved. It was an attempt to achieve a reconciliation." (III-343)

On the 19th Mr. McGovern met with Mr. Côté when his shift ended at approximately 7:30 a.m. and discussed much the same matters that he had reviewed with Mrs. Shaffer the day earlier:

"That this would have been resolved between two individuals, that they would make up and agree to work in harmony together." (III-344)

Later Mrs. Shaffer was asked to join the meeting and Mr. Côté remained for this meeting. Mr. McGovern recapped saying he hoped both of them would resolve the matter together and he asked Mrs. Shaffer for a commitment to work in harmony with all staff. He confirms that she asked for time to consider. Mr. Côté was asked for the same commitment which he gave verbally at that meeting.

Mr. McGovern indicated he asked for Mrs. Shaffer's commitment in writing because:

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- 28 -

"It's been my experience that Mrs. Shaffer has difficulty accepting the opinions or the interpretations of other people when they differ from her own. The counselling was an example. There are other examples I am aware of and I just wanted to be sure that there would not be a confusion as to whether or not she had given a commitment to work in harmony." (III-345)

Mr. McGovern next gave evidence that the meeting was held on August 26 with Mrs. Shaffer, Mrs. Knox, himself and the union representative and at that time Mrs. Shaffer indicated in the words of Mr. McGovern:

"that she had considered that I had said that I would not get involved, that the Home would not get involved and that it was a private matter between the two of them and I didn't want to

have anything to do with it. I indicated that that was not my recollection and the other members, Mrs. Knox primarily also indicated that that was not what was said, that I had suggested and hoped that it would be settled, but I had not issued a definite statement that I would not get involved."
(III-346)

Mrs. Shaffer indicated that she would reply on Friday the 28th of August and she did so by letter given to Mr. McGovern in his office with a copy to Mrs. Knox. In the last sentence of the letter Mr. McGovern took notice that her response was that she would not agree to resolve the matter on an individual basis. Mr. McGovern gave evidence that his first priority was to try and get the individuals to resolve the matter themselves and had he that assurance the next step would have been to determine what action to be taken. He indicated that it had been his experience that "an imposed solution satisfies one party and usually not the other."
(vol. 3 - 349).

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- 29 Mr.

McGovern stated that he considered the matter further over the weekend and again when back at work on Monday. He indicated he was disturbed by some comments and interpretations contained in the letter of Mrs. Shaffer. Mr. McGovern stated that he felt that the purpose of disciplinary action was not punitive but to encourage or to motivate people to resolve or correct problems of deficiencies or whatever else might be the cause of disciplinary action. His reasoning in the case at hand is as follows:

"In this case I had on one hand a written report from an individual denying the slapping and indicating provocation. The individual had a blameless record, there was nothing in his personal file, no previous representations, no previous record of anything than exceptional behaviour. On the other

hand, I had a statement from Mrs. Shaffer saying that she had been slapped without provocation and the name-calling had been without provocation, which obviously conflicted with Mr. Côté's version.

In the middle, I had a statement from a resident, Mr. Sweeney. I should perhaps explain that the Home is intended for domiciliary care which is very light care but because of the difficulty of getting patients to the chronic hospitals, we end up with, as the patients get older, they get more in need of care. We tend to put the patients most ill, most in need of care, in 3 East.

You have various levels of chronic care. Patients there have good days and bad days. So I had Mr. Sweeney who was a patient in chronic care receiving, in the ward that receives maximum care. He wears glasses. He has good days and bad days and his report had indicated that Mrs. Shaffer I believe,

was slapped on the left side of the face, whereas her report was that she had been slapped on the right. So faced with these two extremes and a witness who's evidence I didn't really feel happy with, I felt that the appropriate action would be ... I felt that both parties had been aware of the problem and the discussion with Mrs. Knox and discussions with me and that appropriate action would be with the objective of remedying things, not to take action against

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- 30 -

Mrs. Shaffer because I felt that the point had been made, but to take the road of giving Mr. Côté a written reprimand.

At that point, I was still unsure that the slapping had actually taken place. Mr. Côté had said that evidently no. Mrs. Shaffer had said yes and Mr. Sweeney's evidence was suspect in my mind." (III-350-352, See also page 371 and 372)

Exhibit R-4 was produced which was identified as a letter of reprimand to by Mr. Côté dated August 31, 1981. It is noted in part:

"... While there appears to have been provocation, I cannot allow staff to be subjected to the racial slurs or slapping that is alleged to have occurred ... As you took the matter into your own hands, I must reprimand you in this instance, despite the provocation that is alleged to have precipitated (sic) the incident."

Mr. McGovern indicated that he was at pains to note that the offence was alleged because in his mind whether or not it had occurred was still in doubt. Mr. McGovern also indicated that the letter of reprimand was not made public as it is policy to not publicize disciplinary actions. Mr. McGovern indicated that from his discussions with Mr. Côté he was certain that Mr. Côté expected some disciplinary action particularly in relation to the name-calling. Mr. McGovern pointed out that in his view the letter of reprimand to Côté placed on his personal file constituted a serious reprimand because Côté had not received counselling or even

verbal reprimands before. (III-402)

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- 31 -

Mr. McGovern indicated that later in the fall, he had discussions with representatives from the Canadian Human Rights Commission and their recommendation concerning the circumstances would be that a notice regarding discrimination should be posted permanently in the Home, that a letter of regret be sent to Mrs. Shaffer and that a monetary settlement be provided to her. Mr. McGovern's view was that the monetary settlement was unwarranted. After discussing matters with his superiors a letter was provided sometime later toward the end of February, 1982. Mr. McGovern described the letter as one of regret and not apology, which in his

view implied responsibility. Much time was taken in questioning Mr. McGovern on this matter and he remained firm and committed to his view that the letter to Mrs. Shaffer did not in any way imply responsibility but was a matter of personal regret on his part. (See pages 390 to 395 and also 403 to 408).

Mr. McGovern identified Exhibit R-5 as a memorandum he received on January 28, 1981 signed by approximately 18 of Mrs. Shaffer's co-workers. The memorandum indicated that the undersigned refused to work with Mrs. Shaffer and that they had tolerated her behaviour long enough. Mr. McGovern gave evidence that he discussed the matter with the Director of Nursing, Mrs. Tassé and agreed that it was impossible to take any action on such a general statement. Mr. McGovern met with some representatives of the group, advised them of this and indicated that if they could

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- 32 document

specific instances with witnesses consideration would be given at that time. Mr. McGovern indicated that the representatives of the group seemed unhappy with Mrs. Shaffer's attitude which militated against friendly ongoing camaraderie which tended to exist in a small working environment like the Home. Mr. McGovern indicated the matter had nothing to do with race and that it was more a personality situation.

Throughout his testimony Mr. McGovern indicated that he left his managers to do whatever investigation appropriate in the circumstances and take whatever remedial action was necessary. In response to a question concerning whether Mr. Côté and Mrs. Shaffer had been separated or transferred to different wards, Mr. McGovern replied that he assumed that the manager in question would have taken whatever steps were necessary in the circumstances. (See page 363.)

Cross examination by Mr. Juriansz brought out the fact that counsel for Mr. McGovern at the hearing in 1982, in connection with the Public Service Staff Relations Board had agreed that as a matter of fact on August 10, 1981 Mrs. Shaffer was struck in the face by one of the employees at the Rideau Veterans Home.

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- 33 Mr.

McGovern explained in some detail what he considered to be provocation as mentioned in his letter of August 31, 1981 to Mr. Marcel Côté. He says:

"If you go back right to the first incident, which apparently precipitated the whole thing, the dietary requirements of the patients are under the control of a dietitian or in her absence a food service manager who has taken a number of courses, who utilizes the services of the Home physician and who has close relations with the National Defence Medical

Center which is a large hospital of a couple of hundred yards away.

I felt that Mrs. Shaffer, if she had concerns about the onions, should have referred primarily to the nurse or at least to the person in charge of the dietary section.

I felt that perhaps her arbitrarily removing it from the plate might have aggravated, shall we say, anybody else, Mr. Côté, which sort of might have had an effect on the name-calling. The main provocation area was the question of the telephone call. It was my understanding that following the racial terms she had made derogatory statements regarding Marcel's wife that he was a wife beater and some personal remarks regarding his wife.

Then the following morning it was my understanding that his wife had called, she had apparently hung up on her and that his wife had called back a few minutes later and told Marcel. So I saw the personal remarks that she had made about him and about his wife and the alleged action with the phones as being the provocation for the alleged slapping incident."
(III-379-380)

As to the question of trying to resolve the matter of credibility between Mrs. Shaffer and Mr. Côté, Mr. McGovern stated that he looked at the individuals and their records and resolved the matter in favour of Mr. Côté's version. (III-381-383)

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- 34 MR.

MARCEL COTÉ

Mr. Côté gave evidence that he worked for the Rideau Veterans Home, Department of Veterans Affairs at the time in question as a nursing orderly. Mr. Côté indicated that since October 1982 he has been on loan working for the Maintenance Department. He agreed that certain incidents took place on the 9th and 10th of August. He described the fact that Mrs. Shaffer picked onions off the plate of a resident and described his own activity as "screaming at her." He said:

"She was at one end of the dining room and I was at the other end and we were yelling and screaming at each other and this is when the 'black people' came in. I said something to the effect about India or something. I don't know what done it to

me." (III-134)

And he went on to say:

"Well, I remember she said one thing that I heard myself, she said that I was a wife beater and that's when I said a nigger and there's a few other things that I said. I don't understand why it's not on paper. I called her "a big piece of shit" and I called her ... there's a few other things that I said." (III-434-435)

Mr. Côté gave evidence that he was very upset and went "crazy" and that he spent some time in the hall cooling off and in the locker room. He met Mrs. Knox, spoke to her about the incident and later met Mrs. McLean and spoke to her.

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- 35 -

Mr. Côté identified the document known as Exhibit R-3 as being in his handwriting and as writing it several days after the incident, exactly when he could not recall. It is his description in writing of the incident.

He testified at this hearing as to the incident of August 10 as follows:

"... approximately 9:15, Mrs. McLean came to me and she says 'Marcel, you're wanted on the phone'. So, I picked up the phone and I says hello, and it was my wife Judith and she says 'Marcel, who answered the phone before Mrs. McLean?' and I said 'I dont't know, just a minute, and I said why?' She said 'Well, whoever answered the phone, she was very rude, she hung up on me.' and I said 'O.K., just a minute'. I put the phone on the side. Emile was on the other side of the nursing station and I says 'Emile, who had just answered the phone before Mrs. McLean?' and he says Mrs. Shaffer and I walked right out of the nursing station, I walked right up to her and she was getting ready, I think it was Mr. Belanger, she was getting him ready and he was in no wheelchair, he was just in a regular chair and she was just about to transfer him from the chair that he was sitting, onto a commode chair, you know that's a chair to wheel him in ... So, I just walked up to her and I slapped her across the face and I said 'If you ever hang up on my wife again, I'll kick your ass from here to Smyth Road' and that was it. (III-page 438 to 439)

As to the inconsistency between Exhibit R-3 where he said he did not slap Mrs. Shaffer and his testimony noted above, Mr. Côté indicated that he was protecting himself and he did not want to lose his job. He indicated that he was angry because Mrs. Shaffer had been rude to his wife and the day before had called him a wife beater. (See page 440.) Mr. Côté indicated that the incident of

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10th had nothing to do with race (III-441). He indicated that

at the advice of Mrs. Knox he made a report of the incident, Exhibit R-3. He also indicated that he met several times with Mr. McGovern and told him he wanted to handle the matter himself. Mr. Côté gave evidence that no further incidents transpired between himself and Mrs. Shaffer and that he did not block her way, threaten her or interfere with her on shift changes. In fact his testimony indicates that he went out of his way to avoid her. (See pages 444-445.)

Mr. Côté gave evidence that following the meetings with Mrs. Knox and Mrs. Gervais he thought he apologized for the name-calling incident. He did not remember the details of the conversation, however.

The transcript reveals some confusion about a period of 18 months between when Mr. Côté formerly worked for the Rideau Veterans Home and when he renewed his employment with them in 1979. Mr. Côté testified that he had a clean personal record at the time of his departure from the home in 1979. No evidence contrary to this was adduced.

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- 37 Mr.

Côté's testimony clearly indicated that he did not see Mrs. Shaffer answer the telephone on August 10th, but relied on information from Emile Bertrand that she had done so. This phone call provoked him to hit her because she had been apparently rude to his wife.

It must be noted that Mr. Côté conducted himself in a volatile fashion throughout his testimony and several times had to be cautioned about his language at the hearing. It must also be noted that his testimony was vague and uncertain in parts. Finally, it must be noted that the court record in connection with criminal proceedings of assault clearly indicate that he mislead management and lied in connection with the slapping incident.

JUDITH COTÉ

Mrs. Judith Côté testified that she was the wife of Mr. Marcel Côté and that on August 10 she made a telephone call to her husband at the Rideau Veterans Home. In her words:

"At that time a lady answered the phone and very abruptly said No, not here, and slammed the phone down and I made the phone call again and at this time I spoke with my husband and I asked him, I said who was so rude on the phone, you know."
(III-469)

Mrs. Côté testified that the person who answered the phone was definitely a woman and could recall no further details.

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- 38 ONA

GERVAIS

Mrs. Gervais testified that she was an employee of the Rideau Veterans Home and had been such for 18 years. She was a registered nursing assistant and as well performed the duties of the shop steward for the union since 1978.

Mrs. Gervais testified that the duty of the steward is to assist in the resolution of problems and to discuss these problems

with the supervisor and try to resolve them before they become critical. After explaining the organization of the union within the Rideau Veterans Home, Mrs. Gervais went on to indicate that she had attended at the meeting of August 19, 1981. In her own words:

"Well, Mr. McGovern asked all parties would they go back to the floor and work in harmony with all the staff members and Mr. Côté replied, he said he would, and then he asked Mrs. Shaffer and Mrs. Shaffer replied, she said I need time to think about it and up to ... she said that she would give the answer on Wednesday, the 26th of August, 1981. (III-475-476).

Mrs. Gervais identified Exhibit C-8 the memorandum in connection with the meeting of October 23, 1981. She indicated she was present for the discussions and reviewed the various steps taken including a better lighted parking spot, nursing protection,

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- 39 as

well as difficulties encountered when Mrs. Shaffer left her post before quitting time, and her conversations on the telephone (III-476-480). Later testimony revealed that Mrs. Gervais is no longer the union representative for Mrs. Shaffer and has been replace by Kathy Johnson because in the words of Mrs. Gervais, Mrs. Shaffer did not trust her any longer. Cross examination of Mrs. Gervais revealed that Mrs. Gervais had been present at only one of the October meetings and yet she had clearly recalled all conversations in regard to that situation. This is inconsistent and obviously her testimony must be disregarded on this matter. Further, Mrs. Gervais also admitted to signing the petition of January, 1981 in connection some employees refusing to work with Mrs. Shaffer.

THEODORA PRETO

Miss Preto is a Complaints Officer with the Canadian Human Rights Commission and has been employed as such since 1978. She gave evidence as to what an investigator for the Commission does and reported she had been designated an investigator to enquire into the complaint of Emilda Shaffer against Treasury Board. Mrs. Shaffer had interviewed Mr. McGovern in reference to the incidents at that meeting, Mrs. Preto recalled by consulting her notes on a meeting with Mr. McGovern that he said:

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- 40 -

"that on August the 19th, he met with both Mrs. Shaffer and Marcel Côté at the same time. He told them that it was a private matter, that he considered this certain incident as

such, ... and he asked both Marcel Côté and Mrs. Shaffer if they agreed." (IV-498)

MRS. EMILDA SHAFFER

Mrs. Shaffer was recalled to give further evidence with the

agreement of all parties. Mrs. Shaffer gave evidence that the meal being served in question on August 9 was lunch and that she removed the onions because the patient receiving the tray was about 80 years old, did not have dentures and would not be able to chew. Mrs. Shaffer reiterated what Mr. Côté had said to her during the events of that day that "these niggers cannot afford onions, because they are expensive, and that is why she doesn't want the patients to have them". Her testimony indicates that she did not reply to those comments but that Mr. Côté continued to badger her and also called her paranoid.

Mrs. Shaffer reviewed facts which were not divergent from her previous testimony. Then a discussion took place concerning the introduction of new evidence and counsel for the complainant made a motion to reopen the case (see page 516) which was not opposed.

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- 41 -

Mrs. Shaffer testified that further to the question of her leave status in connection with her appearance at this Tribunal, her employers advised her that she was entitled to "leave with pay, because I was not called as a witness. According to the employer, I was not a witness, I was the plaintiff" (IV-517). Mrs. Shaffer had been given 2 days off and the third day was either leave without pay on statutory holiday applied. Further to this matter Mrs. Shaffer had filed a grievance which is still being considered.

WAYNE R. CUNNINGWORTH

Mr. Cunninghamworth testified that he had been working with the Department of Veterans Affairs for approximately 9 years. After explaining his role as one of providing advice to management on labour relations issues he gave evidence on his involvement with the issues concerning this tribunal. In his words:

"Mrs. Shaffer had presented a request at Rideau Veterans Home for paid leave for the dates of the Tribunal hearing in February. If my memory serves me right, it's the 15th, 16th and 17th of February. She had requested leave according to a clause in her collective agreement. The clause was entitled "Other leaves, with or without pay", and specially the clause of that article dealing with court leave. At that point in time, local management sought an interpretation of the collective agreement ... the interpretation placed on the collective agreement was that an employee who was particularly a part, like the complainant or the plaintiff - if you wish, or whatever

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- 42 -

- would not benefit from the pay leave provision stipulated within the collective agreement. ... It was simply an attempt to determine by virtue of the wording of the collective agreement, ... whether that collective agreement in fact,

provided for paid leave. Another point I have discussed in the advice provided to the local management was that a schedule, a work schedule in existence at the time of the question being put forward, had Mrs. Shaffer on days of rest, on both the 15th and 16th of February. The collective agreement prevented the employer from granting leave on a day on which the employee is not required to work. (IV-522-523).

Mr. Cunningworth testified that Mrs. Shaffer was granted the full entitlement of the collective agreement in paid leave and that the advice he provided to management was simply directed toward insuring that the principals of the collective agreement were respected.

Before hearing the legal arguments, Counsel for the Complainant reserved the right to call additional evidence with regard to quantum of damages should the need arise. It was agreed that in the event the decision of this Tribunal is found in favour of Mrs. Shaffer, argument will be re-opened on the matter of damages and any decision in connection with damages will be reserved until that argument is heard.

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- 43 III.

FINDINGS OF FACT

After hearing all of the evidence, and observing the demeanour of witnesses, I intend here to summarize my findings of fact. Where instances of conflict in the evidence arise, I will indicate my preference as to credibility.

After careful consideration of all the evidence and after considering the demeanor of each of the witnesses, I make the following findings of fact. It should be explained that I have been persuaded that the incidents mentioned by the complaint at issue should be considered separately and I have attempted to do so.

On August 9, 1981 a denigrating and heated exchange of words took place between the complainant, Mrs. Shaffer and her co-worker, Mr. Côté. The exchange included repugnant and racial comments by Mr. Côté concerning Mrs. Shaffer's racial origin. There is no doubt the exchange took place and I accept fully Mrs. Shaffer's evidence in that regard, which was supported by other witnesses to this Tribunal.

On August 10, there was an assault which took place when Mr. Côté slapped Mrs. Shaffer on the side of her face. Whether or not there was provocation for the slapping was never clearly

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- 44 -

determined by the evidence of either Emile Bertrand or Mrs. Judith Côté. As between the versions of Mr. Côté and Mrs. Shaffer, I find

Mrs. Shaffer to be the more credible. However, I must add that I believe Mr. Côté's action was taken in a real belief that his wife had been insulted or treated rudely and that he acted hastily and without thought. In no way, however, does this excuse or diminish his repugnant and violent behaviour.

The evidence of all parties supports the finding that there was no racial motivation or tone to the slapping incident as there had been the day previous.

My findings to follow concern themselves with the essence of this complaint against Treasury Board, Canada and that is whether the actions and motivations of the employer regarding the two incidents were sufficiently responsive to the situation.

I find that as to the events of August 9, both parties were treated in much the same manner: each was consoled, requested to write an incident report and requested to get back to work. I find this reaction to the exchange of words not prejudicial to either party and in the circumstances, where both parties made derogatory remarks, albeit one was clearly racial and unacceptable, a rational approach.

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- 45 -

On the 10th of August the acting Director of Nurses is advised of the slapping incident by the complainant, is told a different version by Mr. Côté, which in part alleged some provocation. An independent witness, a patient, gives another view of the event. The nurse directs both parties to prepare incident reports and proceeds to tell the Administrator. The Administrator gives instructions for an immediate investigation. Mrs. Shaffer goes home and does not return to work until August 18, on the advice of her doctor.

As to the evidence presented concerning meetings of August 18, 19 and 26, I find the evidence of Mr. McGovern to be more credible than that of Mrs. Shaffer. I was not satisfied that Mrs. Shaffer was blameless in these incidents, as she would have me believe. From observing her demeanor and hearing her testimony I believe she is an astute and careful woman but that she fails to understand or accept approaches which are not her own. Her conduct indicated she had difficulty communicating with others, either on a casual or employment basis. Further, it was apparent that she did not follow instructions easily. I find the events of August 18, 19 and 26 to be as described by Mr. McGovern and impute no discriminatory motive or intent on the part of the employer.

As to the issue of whether a reprimand was sufficiently disciplinary to Mr. Côté in the circumstances, I accept

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- 46 Mr.

McGovern's testimony that he was, at the time, uncertain as to

whether the assault took place and consequently took the reprimand action because he was dealing in his view with a racial slur incident. Now, the criminal prosecution and other hearings and Mr. Côté himself, have shown Mr. McGovern to be in error. I find, however, at the time that he acted honestly and with no discriminatory motivation or intent.

On the matter of counselling, Mr. McGovern stated he felt it a suitable and protective procedure for Mrs. Shaffer as he identified certain misunderstandings on her part and there was no "record" to which to refer her. On the issue of working in harmony, I accept Mr. McGovern's view that as a first step, he was hopeful the matter would be resolved among themselves. The fact that he acted immediately to reprimand Mr. Côté when he did receive Mrs. Shaffer's formal letter indicating she would not accept this approach, was further evidence of his sincerity and lack of discriminatory motivation.

From this point in the chronology of events in this situation I find the events of October and November to be insular to the major issue at hand. I find that the management of the Home continued to uphold its responsibilities to the employee in the circumstances throughout October and November, 1981 and made reasonable efforts to accommodate her needs at all times.

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- 47 -

I find that evidence describing events and the incidences beyond November, 1981 to be too remote from the complaint itself and not at all indicative of harassment strategies or any pattern of discrimination.

As to the issue brought up late in the evidence concerning the matter of pay for Mrs. Shaffer of the leave taken to appear at the hearings, I make no finding at all. It is not relevant to the complaint as laid and would only have been pertinent had it played a part in a pattern of discriminatory or differential treatment.

IV. FINDINGS - THE LAW

The complaint of Emilda Shaffer was lodged as being contrary to Sections 7 and 10 of the Canadian Human Rights Act. Argument was not presented to this tribunal in connection with a contravention of Section 10 of the Act but was restricted to a discussion of the applications of Section 7b of the Act.

The essential question that the Tribunal must consider is whether the employer, Treasury Board of Canada, has a duty to provide a work place free of racial harassment and if they do, whether any failure to so provide constitutes a discriminatory practice by virtue of Section 7(b) of the Canadian Human Rights Act?

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- 48 -

Section 7(b) of the Act states as follows:

"It is a discriminatory practice, directly or indirectly, in the course of employment to differentiate adversely in relation to an employee on a prohibited ground of discrimination."

Section 3 of the Act defines prohibited grounds of discrimination to include "race, and colour.", the grounds alleged in the complaint.

Other issues to be considered in this context concern the matter of whether or not racial slurs are discriminatory and whether or not the employer took appropriate steps to provide a work place free of them (racial slurs).

The Tribunal was directed to consider the case of the Canadian National Railway Company v. The Canadian Human Rights Commission and K.S. BHINDER (1983), Federal Court of Appeal, not yet reported. This tribunal is persuaded and guided by the argument in that case. In the majority decision of Mr. Justice Heald at page 2, he notes that he is in agreement with his brother Le Dain, J. on the matter of a treatment of Section 7 of the Canadian Human Rights Act and says:

"I agree further with his conclusion that Section 7 of the Canadian Human Rights Act contemplates only direct discrimination and does not extend to discrimination in which there is neither a discriminatory intention or motivation or differential treatment."

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- 49 -

Mr. Justice Heald went on to say that he was not however in agreement with Mr. Justice Le Dain's view of Section 10 of the Act as being sufficiently comprehensive to include the effect of indirect discrimination. No arguments were presented before me in connection with Section 10 so I will limit my discussion of this case to the matters concerning Section 7(b).

In BHINDER (supra), the Tribunal found that CNR did not have a discriminatory intention or motivation in applying its safety hat requirement to Mr. Bhinder, but that the requirement as it applied to him had a discriminatory effect. In other words, its application to him created a distinction on a basis which was prohibited by the Act. Mr. Justice Le Dain reviews in great detail the Canadian case law in connection with the matter of discriminatory intent and I adopt his reasoning in full. Mr. Le Dain at pages 16 and 17 of the decision described the issue as follows:

"... as whether they include indirect as well as direct discrimination. Quite clearly the Act is concerned with discriminatory effects, and in a case of differential treatment, such as unequal pay, it is the objective fact of

discrimination rather than intention that matters. The distinction is between differential treatment, which may or may not be accompanied by a discriminatory motivation or

animus, but which will generally be intended, and what is on its face equal treatment but nevertheless has a discriminatory effect on a particular person by reason of a prohibited ground or basis of discrimination."

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- 50 -

Mr. Le Dain goes on to say at page 17:

"In my opinion Section 7 only contemplates direct discrimination -- that is, discrimination in which there is a discriminatory intention or motivation or differential treatment on a prohibited ground, with or without intention. It does not extend to discrimination in which there is neither a discriminatory intention or motivation nor differential treatment."

Mr. Justice Le Dain described his concept of indirect discrimination as referring to the manner in which the prohibited conduct described is carried out rather than the manner in which it prohibits its discriminatory effect.

I was also referred to the decision of Ontario Human Rights Commission v. Simpsons Sears (1982), 3 C.H.R.R., D/796 (from which an appeal is pending to the Supreme Court of Canada). This case is one concerning the new Ontario Human Rights code and takes the position that intent is indeed required for a finding of discrimination.

The case of SIMMS v. Ford of Canada (June 4, 1970), formerly Professor, now Mr. Justice Kreever, notes at page 18:

"In my opinion the word "discriminate" in the context of the Code means to treat differentially, or in the particular context of Section 4 (1), to make an employee's working conditions different (usually in the sense of less favourable) from those under which all other employees are employed. Thus to permit, even passively, a black employee in a plant where the majority of employees are white to be humiliated repeatedly by insulting language relating to his colour

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- 51 -

by other employees, even, I would go so far as to say, by non-supervisory employees, would be to require the black employee to work under unfavourable conditions which do not apply to white employees. In such circumstances, the employer has an obligation, imposed by s.4(1), to remove the cause of the discriminatory working conditions and police the prohibitions against the humiliating conduct or language."

It is important to note in the SIMMS case that verbal abuse itself can constitute a breach of the Ontario Code but that the remark in that situation was isolated and consequently no breach occurred.

This tribunal also considered the case of SUCHA SINGH DHILLON v. S.W. Woolworth Company Limited, (1982), 3 C.H.R.R., D/743. In that case the Tribunal found that the complainant and other East Indian employees were subject to regular and significant verbal harassment and abuse and that the employer knew of this harassment and did not take reasonable steps to end it.

On the facts of the case at hand, it is my finding that Mrs. Shaffer had indeed experienced racial slurs and racial harassment on August 9 and 10 but that this harassment was not of such a regular and significant nature as to be discrimination under the Act. It was an isolated incident for which no intention or motivation was proven.

Nevertheless, this Tribunal must consider the more important issue of the responsibility of the employer in connection with the discriminatory episode of August 9 and 10. To do so I must decide

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- 52 whether

Mrs. Shaffer was differentiated against adversely and whether that differentiation occurred directly or indirectly.

The tribunal was referred to the decision of a federal Human Rights Tribunal KOTYK and ALLARY v. Canadian Employment and Immigration Commission and Jack Chuba, April, 1983 (not yet reported). At page 49 of that decision the Tribunal, Mrs. Ashley, noted that in most of the cases where employers have been responsible for acts of supervisors or employees, the employer has been the perpetrator of the discriminatory conduct itself. The cases reviewed by that Tribunal in favour of this proposition are accepted by this Tribunal.

The case of Brennan v. Robichud, (1982) 3 C.H.R.R., D/977 was appealed from and the Review Tribunal found that the actions of the Department involved in relation to the complainant were questionable and deemed to be breach of the Act (Section 7b). It must be noted that this decision is now under appeal. At page 8 of the Review Tribunal decision it is noted:

"In this case there was no clearly defined policy against sexual harassment which had been communicated to the employee. Secondly, when the complaints were brought to the attention of Mr. Brennan's superiors, no investigation was conducted by the employer to determine the truth or otherwise of the allegations in particular and no investigation was requested or made pursuant to the Financial Administration Act, Section 10. On the contrary, steps were taken to remove Mrs. Robichaud from the normal routine of a lead hand."

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- 53 -

In the ALLARY (supra) case it was found that the senior manager made a decision not to investigate the complaint despite recommendations on the contrary by three of his employees. The complaints in Allary were of persistent sexual harassment over a

lengthy period of time, including probationary time, for the complainant. At page 51, Mrs. Ashley says:

"It seems that Mr. Johnson, the person directly responsible for initiating an investigation, did not feel that the complaints of sexual harassment were serious, despite the recommendations of his staff ... however, the decision not to deal with the complaints at all is the point at issue. That decision suggests that the conduct of Mr. Chuba was condoned by the Director at Regional Office."

IV. DECISION

The question then is whether or not more reasonable steps should have been taken to deal aggressively with the situation and to afford protection to the Complainant. When Mr. McGovern was advised on August 10th of the events of August 9th and 10th, he immediately took steps to have the matter investigated by his acting Director of Nurses, Mrs. Knox. Individuals were interviewed, incident reports were filed and the situation communicated to Mr. McGovern. On the 18th and 19th of August, meetings were held with Mrs. Shaffer and also with Mr. Côté and others in an effort to resolve the matter among the individuals themselves. One of the individuals, Mr. Côté, apologized for his behaviour and agreed to work in harmony with the other from that

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- 54 moment

on. The other individual, Mrs. Shaffer requested time to consider the matter further. Mr. McGovern became aware that communication problems or problems of misinterpretation might arise between himself and the Complainant and created a communication system of letters as a protection for Mrs. Shaffer so that no misunderstandings would arise. Mr. McGovern awaited the response of Mrs. Shaffer and when it arrived it was evident that she did not consider the matter as capable of resolution between herself and Mr. Côté. After some thought Mr. McGovern agreed to take the necessary steps to reprimand Mr. Côté for his offensive behaviour and such reprimand went on his personal file and was not subject to public scrutiny in keeping with internal policy.

The authority of this Tribunal is to consider the complaint at hand and the matters which surround it. Evidence was given on events which occurred after January, 1982 in an effect to show racial motivation and harassment on the part of management. In the view of this Tribunal those events are not pertinent to this inquiry. An error of judgement in trying to resolve the matter between the two individuals from the beginning may have been made

initially, but when it appeared the matter would not be resolved in this fashion, disciplinary action was taken. More importantly the matter was attended to and with some seriousness. Mr. McGovern did not ignore or refuse to act upon his responsibilities in this situation. At all times he made an effort to resolve the matter.

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- 55 -

This Tribunal does not find that the facts indicate any adverse differentiation and accepts the evidence that steps were taken for the preservation of Mrs. Shaffer's position. There is no suggestion that the conduct of Mr. Côté was condoned by Mr. McGovern's activity. In fact he was treated the same as Mrs. Shaffer throughout the meetings in August and then more severely by reprimand on his personal file. On the later advice of the Human Rights Commission officers, Mr. McGovern assured that a notice concerning human rights issues and matters of discrimination was placed in appropriate spots in the Rideau Veterans Home and as well that a personal letter of regret was sent to Mrs. Shaffer in connection with the incidents.

This tribunal does not find it necessary to deal with the issue of vicarious liability as a result of its decision.

The case of Bhinder from the Federal Court of Canada has provided a definition and context for this case and has been followed by this Tribunal. Because no discriminatory intent or motivation were proven, the question was whether there was any differential treatment to the complainant, direct or indirect on the ground of race or colour. I find there was none. The management of the Rideau Veterans Home did not discriminate either directly or indirectly, there was no differential treatment and there was no failure to provide a work place free from harassment or the fear of harassment. This complaint is dismissed.

DATED AT OTTAWA, this 9th day of September, 1983.

Mary Lois Dyer, TRIBUNAL