TD-9/83
Decision rendered on August 8, 1983

THE CANADIAN HUMAN RIGHTS ACT
HUMAN RIGHTS TRIBUNAL

BETWEEN: JULIUS ISRAELI
COMPLAINANT
AND: CANADIAN HUMAN RIGHTS COMMISSION
AND
PUBLIC SERVICE COMMISSION
RESPONDENTS

DECISION OF THE TRIBUNAL
BEFORE: WILLIAM TETLEY, Q.C.
Appearances: DR. JULIUS ISRAELI: FOR HIMSELF
DOUGLAS STANLEY Counsel for the Canadian
Human Rights Commission

DAVID MEADOWS Counsel for Public
Service Commission

Dates of Hearing: Pre Hearing, April 8, 1983
Hearing - June 14 & 15, 1983

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(S.C. 1976-77 c.33)

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-and -
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PUBLIC SERVICE COMMISSION
Respondents

Heard at Ottawa, June 14, 15, 1983.

This case concerns a complaint under the Canadian Human Rights Act (S.C. 1976-77 c.33 as amended) against the Canadian Human Rights Commission (CHRC) and the Public Service Commission (PSC) alleging discriminatory hiring practices based on three grounds: religion, national or ethnic origin and physical handicap. The nature of the claim raises a number of important points of practice and of law.

Firstly, the customary procedure before a Canadian Human Rights Tribunal had to be modified because the complaint was against the CHRC itself. Normally, the complainant files the complaint with the CHRC and it is the CHRC which represents the complainant in the hearing before a Canadian Human Rights Tribunal and on occasion institutes the suit in its own name. The present claim, however, was against the CHRC. It is noteworthy that the procedures provided for in the Canadian Human Rights Act proved to be flexible enough to accommodate this new situation.

Secondly, Dr. Julius Israeli, the complainant, was not assisted by counsel, choosing to plead his own case. In consequence an obligation was placed on the Tribunal chairman to assist Dr. Israeli, and amongst other matters to raise points of proof and procedure which the litigant might have omitted because of lack of formal legal training. This in turn put considerable strain on respondents' counsel who could have had difficulty in knowing when to object to evidence made by the complainant. Fortunately, the attorneys for each of the Commissions acted with restraint and understanding. It should be noted as well that Dr. Israeli seemed to be a forceful and experienced litigant.

I. The Facts

In January, 1979, the Public Service Commission (PSC) published an advertisement (document R-1) in local newspapers to the effect that the position of Regional Investigator (Halifax) for the CHRC was to be filled. Dr. Julius Israeli, born in 1933 (document R-3) in Roumania (Testimony at p. 166) and living in Newcastle, N. B. filed a very detailed application (document R-2), dated January 9th, 1979, to which he attached considerable supporting information (documents R-3 to R-18). In particular, detailed qualifications were listed in page 4 of document R-2. In due course, 224 applications were received including Dr. Israeli's and were screened by a board consisting of Mr. Hugh McKervill of the CHRC, Mrs. Brenda Hudson-Firth of the PSC and Mrs. Lucille Finsten of the CHRC. Six applications were dropped

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immediately, having been received too late, but Dr. Israeli's application had been received on time.

The first stage of the screening process for the 218 remaining applications involved five "basic requirements", being: 1) education, 2) experience in investigating complaints, 3) experience in negotiating terms of dispute settlement, 4) experience in preparing detailed reports and correspondence and 5) experience in affirmative action. Only ten of the applicants fulfilled all these requirements and went on to the next stage of the screening process. Dr. Israeli was not among those ten. The three screening officers McKervill, Hudson-Firth and Finsten all stated that in their view Dr. Israeli did not have the necessary experience required for the position of regional investigator in respect to three requirements being: experience in investigating complaints,

experience in negotiating terms of dispute settlement and experience in affirmative action.

II. Important Questions of Evidence

Three important questions of evidence arose during the proceedings:

A. The burden and order of proof in matters of discrimination.
B. The requirements for a prima facie case.
C. Whether similar fact evidence should be admitted.

A. The Burden and Order of Proof

The burden of proof in discrimination cases is important, as is the order of presentation of the evidence. Cases of refusal of employment on discriminatory grounds before boards of inquiry in Canada, whether at the federal or provincial level all seem to employ the same burden and order of proof. The complainant must first establish a prima facie case of discrimination. Once this is done, the burden of proof shifts to the employer to provide a reasonable explanation for the otherwise discriminatory behaviour. Finally, the burden shifts back to the complainant to prove that this explanation was merely a "pretext" and that the true motivation behind the employer's actions was in fact discriminatory.

Two recent cases in particular, set out more or less the foregoing burden and order of proof and provide useful expositions: Offierski v. Peterborough Board of Education (1980) 1 CHRR D/33, (Ontario Board of Inquiry) at paras 269-270 and Ingram v. Natural Footwear (1980) 1 CHRR D/59 (Ontario Board of Inquiry) at paras 468-475.

Many additional cases use the same burden and order of proof. These include:

Little v. Saint John Shipbuilding (1980) i CHRR D/1 (New Brunswick Board of Inquiry) at para 43; Clariss Kelly v. Via Rail Canada (1980) 1 CHRR D-97 (Canadian Human Rights Tribunal) at paras. 810-812; Foreman et al v. Via Rail Canada Inc. (1980) 1 CHRR D-111 (Canadian Human Rights Tribunal) at paras. 1001-1002; Severien Parent v. Dept. of National Defence and A-G Canada (1980) 1 CHRR D-121 (Canadian Human Rights Tribunal) at para 1059; KS Bhinder v. C.N.R. (1981) 2 CHRR D-546 at paras 5070-5079; and Powell J in McDonnall Douglas Corp v. Green 411 U.S. 792 at p.802 (1973).

Offierski v. Peterborough Board of Education (1980) 1 CHRR D/33 at para 270 succinctly describes the shift of the burden to the employer as follows:

Upon establishing a prima facie case, the burden shifts to the employer to provide an explanation that is reasonable. This can be done by adducing evidence that shows the complainant to be not as well qualified as the successful applicant for the position i.e. that there is no discrimination on the factual

evidence, or alternatively that even though there is discrimination based on the "sex of the applicant, that sex is a bona fide occupational qualification and requirement for the position or employment." (subsection 4(6) of the Code.)

In Ingram v. Natural Footwear (1980) 1 CHRR D/59 Chairman John D. McCamus took the proof one step futher when he stated at paragraph 473.

Once the employer has come forward, however, the burden rests with the complainant to prove, on the balance of probabilities, that the explanation put forward is false and pretextual.

It is important to follow this order of proof very strictly, otherwise, innumerable difficulties will arise. Although the respondents in the present case offered to proceed first with their evidence, Dr. Israeli refused such a procedure. Such was certainly his right and in the view of the Tribunal was the proper decision to take. It is essential for the complainant to make his case and for the Respondents to refute it. Only by such order can a decision be properly made as to the admissibility of evidence, on the ground that it is relevant, that it contradicts evidence of the other party to the case etc. Only by such procedure can evidence be properly evaluated and fairly admitted or refused.

B. Requirements for a Prima Facie Case of Discrimination
The requirements for a prima facie case of discrimination also seem to be relatively fixed in the case law. The complainant must show: 1. that he belongs to one of the groups which are subject to discrimination under the Act eg. religious, handicapped or racial

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groups; 2. that he applied and was qualified for a job the employer wished to fill; 3. that although qualified he was rejected; and 4. that thereafter the employer continued to seek applicants with complainant's qualifications. See in this regard McDonnell Douglas supra at p.802. See also Offierski v. Peterborough Board of Education supra at para.269 and Ingram v. Natural Footwear supra at paras.469 & 470.

C. Admissibility of Evidence
1. The Employment Procedure
Early in the proceedings, another decision had to be made. The complainant wished to introduce into proof detailed evidence as to government employment procedure in order to show a pattern of discrimination. The Respondents could have objected to such evidence, particularly because from the beginning and even as the proof continued there was no evidence of discrimination. Nevertheless, with the cooperation of Respondents' Counsel, all the evidence was admitted into the record, the Respondents themselves in fact making much of the proof. The result was that the Tribunal had before it a detailed description of the employment practices and procedures which together allegedly comprised a pattern of

discrimination. The Tribunal found there was no evidence of such pattern of discrimination.

2) Similar Fact Evidence
Dr. Israeli also wished to put into evidence, documents in respect to other applications that he had made for employment with the CHRC, which applications had also been unsuccessful. The evidence, in particular documents W-36, W-37, W-39, W-41, W-14, W-12, W-10, W-24, was received under reserve.

Similar fact evidence involves the presentation into the record of fact situations separate from, but similar to the issue at hand. The party introducing the evidence claims it to be relevant in the determination of the issue at hand. In the circumstances of this case it seemed proper to receive the evidence under reserve for the following reasons:

a) Probative Value
Extra caution must be taken in order to ensure that the probative value of similar fact evidence is not outweighed by the undue prejudice it may cause to defendants. The two opposing forces: "probative value" and "prejudice", must be evaluated in each case by the court, often forcing it to make difficult value judgements. It was felt, in the present case, that receiving the evidence under reserve would give the complainant, who believed he

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had been badly treated, the benefit of the doubt while no real prejudice would be caused to the respondent institutions.

b) Collusion
The possibility of collusion between witnesses is one of the elements that a tribunal must take into consideration when deciding upon the acceptance of similar fact evidence.

In the case of Chia-Su Won and Lee Min Chen and Shun-Shun Soong v. Greygo Gardens and Frank Peter (1982) 3 CHRR D-812 at para 7183) (Ontario Board of Inquiry), Chairman Robert W. Kerr examined the problem of collusion, stating:

Particular concern is shown in cases where the parties who allege the similar facts have discussed their respective situations prior to giving evidence.

Collusion between witnesses, however, did not appear to be a danger in the case at hand because the similar fact evidence was in the form of documents, the authenticity of which was not in dispute while Dr. Israeli did not rely on other witnesses who could be the subject of collusion.

c) Tribunals as Opposed to Juries
The effect of similar fact evidence on the members of a jury has traditionally been a major factor in admitting or refusing such evidence. It is assumed that having heard the evidence, the

members of the jury could not properly put it out of their minds, merely upon instruction to do so, should such instruction be necessary. In the case of a single judge who has had the benefit of legal training this problem is not as urgent. As McCormick's Handbook of the Law of Evidence, 2 Ed., 1972 by Edward W. Cleary, at p 837 states,

Since many of the rules ... are designed to protect the jury from unreliable and possibly confusing evidence ... the technical common law rules barring the admissibility of evidence have generally been abandoned by administrative agencies.

Again, because no jury was involved in the present case, it was believed that receiving the evidence under reserve would cause no real prejudice.

d) Administrative Tribunals
In administrative tribunals, the rules of evidence are usually relaxed. This is because administrative tribunals are striving towards goals that are different from those of a court of law, in particular, administrative tribunals are more consciously involved in the formulation of policy than are courts. See McCormick supra. at p. 837. The present CHR Tribunal is in fact an administrative tribunal and this was another factor in admitting the similar fact

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evidence.

e) Sect 40 (3)(c) of the CHR Act
It is also noteworthy that sect 40(3)(c). Of the Canadian Human Rights Act specifically permits the circumvention of the strict rules of evidence and gives the Tribunal the discretion to accept questionable additional evidence.

Sect 40(3)(c) reads:
... a Tribunal may
(c) receive and accept such evidence and other information, whether on oath or by affidavit or otherwise, as the Tribunal sees fit, whether or not such evidence or information is or would be admissible in a court of law.

f) Relevancy
The ultimate test of admissibility of any kind of evidence and similar fact evidence in particular is that it be relevant; relevancy must be the predominant consideration at any hearing. A modern definition of relevancy is as follows:

"Evidence is relevant if it is logically probative or disprobative of some matter which requires proof." See Reg. (Director of Public Prosecutions) v. Kilbourne [1973] A.C. 729 at p. 756.

For all the above reasons, the documents in relation to complainants previous applications for employment were received under the reserve of subsequently being proven relevant. The documents were received and no evidence of discrimination was found.

It is noteworthy that the result of admitting additional evidence under reserve was to enlarge and prolong the inquiry but also gave a clear picture of all surrounding facts and certainly gave the complainant extremely broad leeway and opportunity to discover new facts and possible patterns of discrimination and to make proof from what was discovered.

Certainly there are dangers and inconveniences in admitting such evidence but the disadvantages were outweighed by the fact that no complaint would be made that the complainant was not given a fair opportunity to make his case. In the words of Lord Hewart, C.J. in Rex v. Sussex Justices [1924] 1 K.B. 256:

"it is of fundamental importance that justice must not only be done, but should manifestly and undoubtedly be

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seen to be done".

Subsequent Evidence

Similar fact evidence concerning inquiries which followed the application of Dr. Israeli in this case after the complaint had been received were not accepted even under reserve. This evidence was too far removed from the complaint at hand. Nor was there any initial evidence or commencement or proof of any discrimination in any of these documents or in any evidence offered in respect to them by the complainant. Documents W-38, W-13, W-11, W-17, W-18, W-43, W-44, W-42, R-20, and R-21 were studied but not received even under reserve.

III. Findings of Fact

A. Irregularities

Part of Dr. Israeli’s claim was based on alleged irregularities in the employment proceedings. In particular, he appears to have improperly received document C-3, being a document for another employment competition. R-31 a very similar document to both Document R-17 and Document C-3 was also erroneously put into the file at the pre Trial Conference in April 1983. In addition, complainant alleged that certain remarks handwritten on the screening profile (Document R-18) by the screening officers were irregular in light of what he had written at page 4 on his application (Document R-2). The receipt of Documents C-3 and R-31 and the written remarks on Document R-18 if pertinent were explained by the various officers of the respondents and no evidence of discrimination was shown.

Dr. Israeli, however, argued forcefully that these irregularities could be an indirect method of racial discrimination. In this respect, he referred to the U.S. Supreme

Court in Arlington Heights v. Metropolitan Housing Department 429 U.S. 252 at p.267 (1977) where it is stated:

> Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decision maker strongly favor a decision contrary to the one reached.

Certainly, racial discrimination has occurred in the past by unfair practices in respect to blacks in the southern United States. In the present case I found no prejudicial irregularities and no discrimination from any possible irregularities.

B. Religion

Nor did any of the evidence (similar fact or otherwise) disclose discrimination because of Dr. Israeli's religion as a Jew.

Mr. McKervill, Mrs. Hudson-Firth and Mrs. Finsten were credible and sincere witnesses who screened out Dr. Israeli and 207 other persons on the grounds that they did not meet the "basic requirements". Religion was not a requirement nor a consideration and I found no discrimination on religious grounds in respect to Dr. Israeli nor in the consideration of his application for employment.

C. National & Ethnic Origin

In respect to national and ethnic origin, Dr. Israeli alleged that he had been discriminated against because he had been born behind the Iron Curtain. Cabinet Directive 35, he argued, therefore applied to him. Directive 35 to be found in Attny. Gen. of Canada v. Murby [1981] 1 F.C. 713 at p.721, is dated December 18, 1963 and was issued on behalf of the Government of Canada in the interests of security in the Public Service. The directive applies to the provisions of the Public Service Employment Act R.S.C. 1970 C.P.-32. (See Attny. Gen. of Canada v. Murby supra at p. 718.). Sect 6(c) of the Directive warns against the exposure of confidential information to:

> A person who, though in no sense disloyal or unreliable, is bound by close ties of blood or affection to persons living within the borders of such foreign nations as may cause him to be subjected to intolerable pressures.

At the hearing, however, evidence was produced by Mrs. Hudson-Firth and Mrs. Finsten and by Mr. McKervill as well as by Mr. Edgar Gallant, Chairman of the PSC, that this was not a position requiring security clearance. Nor had the issue of security clearance arisen in the case of any of the applicants in the competition and in particular in the case of Dr. Israeli.

D. Physical Handicap
Dr. Israeli's complaint was also based on physical handicap. There was, however, no evidence of discrimination on this ground.

E. Dr. Israeli's Proof
It was argued by counsel for respondents that Dr. Israeli did not make adequate proof of a physical handicap, or of his religion or of his national and ethnic origin. It is true that Dr. Israeli's evidence on these questions was sketchy and vague although his personal testimony and assertions were not contradicted by evidence of respondent's counsel. Nevertheless, whether or not such proof was made need not be decided because there was no evidence of discrimination.

F. General Discrimination - Res Ipsa Loquitur?
Dr. Israeli felt, one gathers from his testimony, his argument and indeed his cross-examination that it was inconceivable that a well-known advocate and fighter for human rights such as himself would not have been employed for this position or would have been dropped out in the first screening. The only explanation, he felt, was discrimination. In response to this allegation Mr. McKervill, Mrs. Hudson-Firth and Mrs. Finsten testified that Dr. Israeli was not experienced in investigation or negotiation or in affirmative action and therefore did not qualify for the next stage of the competition despite his other obvious qualities which could be used in other positions. I found no ground for Dr. Israeli's argument.

IV. Preliminary Conclusions
It should be noted that Dr. Israeli's original complaint was against the PSC, the CHRC and Mrs. Hudson-Firth and Mr. McKervill, with reference as well to another person, presumably Mrs. Finsten (See document T-2). The complaints against the particular individuals were not brought forward, Dr. Israeli having so agreed at the pretrial conference (see document T-3, at page 2). It was, however, understood that the dropping of the personal complaints would not affect his claim against the two Commissions for the acts of their employees.

The hearing was held in camera as Dr. Israeli so wished because he was mindful of the seriousness of the allegations made against not only the two Commissions but also against the three persons in question.

In taking his suit, Dr. Israeli has placed two government Commissions and three persons in difficult positions, causing them considerable embarrassment, time, effort and expense. Dr. Israeli, by his own testimony, has been unemployed for many years. He thus has the time to take suit while many of his expenses were paid by the CHRC including travel to the pre-conference hearing and the hearing, as well as the cost of lodging and meals.

Dr. Israeli exhibited a genuine concern for human rights, which as he says, he saw violated in Roumania. This, however, should not cause him to believe that his actions for the defence of

his own rights may violate the rights of others or strain the society of which he is now a member.

Canada has a relatively free society and in claiming to be the victim of society we should not by our actions victimize that society or its individual members. It is noteworthy that Dr. Israeli's charges, despite the most generous rules of evidence in his favour, provided not even the commencement of proof of discrimination. On the other hand, it is true that a free society is dependent on its being able to take the time necessary and to expend the monies necessary to properly study the complaints of individuals and to defend their rights. The problem for both the

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individual and society is to arrive at a fair balance between individual rights and an orderly working of society.

It should also be noted that Dr. Israeli's complaint against the two Commissions was delayed from March 20, 1979 to February 28, 1983. Apparently difficulty was encountered in finding an independent body to study the complaint and eventually that study was carried out by the Human Rights Commission of Quebec. Nevertheless, the delay was far too long and required proceedings by Dr. Israeli in the Federal Court, which although perhaps improperly taken, apparently resulted in the present tribunal finally being appointed. It is a truism that justice delayed can be justice undone; nevertheless, it should be added that Dr. Israeli's claim was not in any way prejudiced by the delay.

V. Conclusions

It can be said in conclusion with respect to this interesting and involved case, that despite a number of difficult questions of law and new problems of procedure, the Canadian Human Rights Act has been able to meet the challenge presented to it. In respect to the complaint of March 20, 1979 of Dr. Julius Israeli it is found that there was no discrimination whatsoever on the part of the Canadian Human Rights Commission or the Public Service Commission or their employees on the grounds of religion, national or ethnic origin, or physical handicap, that the complaint was not substantiated and is dismissed under sect. 41(1) of the Canadian Human Rights Act.

I wish to congratulate the witnesses for their candid and objective testimony, Messrs David M. Meadows and Douglas C. Stanley respectively the counsel for the PSC and the CHRC for their clear exposition as well as their understanding and patience, and Dr. Israeli for his irrepressible bonhommie throughout. I wish also to thank the clerk Mr. Michael P. Glynn for his efficient handling of all details of the proceedings and Miss M. Lynn Bailey LL.B. for her invaluable assistance.

Dated at Montreal this 29th day of July 1983.

William Tetley Q.C.
Chairman