

T.D. 8/98

Decision rendered on November 6, 1998

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

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

SURENDAR SINGH
Complainant
and

CANADIAN HUMAN RIGHTS COMMISSION
Commission
and

STATISTICS CANADA
Respondent

DECISION

TRIBUNAL: Anne L. Mactavish Chair
Peggy Blair Member
Athanasios Hadjis Member

APPEARANCES: Prakash Diar
Counsel for the Canadian Human
Rights Commission

Surender Singh
On his own behalf

Josephine Palumbo
Counsel for Statistics Canada

DATES AND PLACE

OF HEARING: January 5-8, February 3-5, 19-20, March 23-26,

April 1, 21-23, May 22, June 3-4, 16-17, 1998
Ottawa, Ontario

This case arises out of a complaint alleging discrimination on the basis of national or ethnic origin and age contrary to section 7 of the Canadian Human Rights Act (the ' Act').

I BACKGROUND

Surendar Singh was born in Dehli, India in 1945. Mr. Singh obtained an M.A. in English from Dehli University in 1969 and moved to Canada shortly thereafter. In 1971 Mr. Singh was awarded a Graduate Diploma in Public Administration from Carleton University in Ottawa. He subsequently obtained a Bachelor of Arts degree, with a major in Economics in 1973, and a Bachelor of Commerce degree in 1977, both from Carleton.

In 1981 Mr. Singh commenced working at Statistics Canada in a clerical position. He was initially hired on a term contract, however in 1982 Mr. Singh became a permanent or indeterminate employee. Mr. Singh occupied a clerical position in the Transportation Division of Statistics Canada at the CR-04 level in the government job classification system.

Commencing in 1985, Mr. Singh competed for a variety of jobs within Statistics Canada, primarily within the ES or Economist classification. As well, he competed for at least one job in the SI or Statistical Officer group. Notwithstanding these efforts on Mr. Singh's part, to date, he has been unsuccessful in obtaining a promotion to a permanent position at a higher classification level. In March, 1993 Mr. Singh filed a complaint with the Canadian Human Rights Commission (the ' Commission'), in which Mr. Singh alleges that his efforts at advancement have been detrimentally affected by his age and by his national or ethnic origin, which he describes as East Indian.

Mr. Singh's complaint is lengthy, and relates to a number of different competitions, each involving different individuals within Statistics Canada. Each of the allegations will be dealt with in turn. Before considering the issues raised in the complaint, however, there is one additional issue that must be addressed.

II THE 1985 ES-01 COMPETITION

In December, 1985 Mr. Singh competed for a position at the ES-01 level in the Transportation Division of Statistics Canada. At the time of the competition Mr. Singh was 40 years old. The competition was won by Mamady Kaba, with Mr. Singh (who had also been determined to have been qualified for the position) placing second. Mr. Kaba, who is himself a member of a visible minority, was 35 years of age at the time of the competition in question.

Mr. Singh alleges that he had not previously been able to compete for an ES-01 position as in the early 1980's these positions were not advertised, there was no formal ES recruitment

program,
and managers were picking and choosing whoever they liked. Mr. Singh testified that in 1985, he went to see Ellis Drover, the Director of the Transportation Division, and begged Mr. Drover to allow him to compete for an ES-01 position. Mr. Drover referred Mr. Singh to Mr. Mozes. At the time, Mr. Mozes was the Chief of the Surface and Marine section of the Transportation Division. According to Mr. Singh, when he spoke to Mr. Mozes, Mr. Mozes told him that he was too old for an ES position. Mr. Singh states that he then went back to Mr. Drover and, without telling Mr. Drover what Mr. Mozes had said, was able to persuade Mr. Drover to allow him to compete for an ES-01 position.

Mr. Singh's complaint form makes no mention of any concern relating to the hiring of Mr. Kaba, nor was any request made at the hearing to amend the complaint to deal with this competition. Nevertheless, in the course of his evidence, Mr. Singh made a number of allegations with respect to the hiring of Mr. Kaba. Statistics Canada led considerable evidence in response and addressed the matter fully in argument. The Tribunal is therefore prepared to consider the circumstances surrounding the hiring of Mr. Kaba in 1985 for the limited purpose of putting Mr. Singh's concerns with respect to subsequent events into context.

Specifically, Mr. Singh alleges that Mr. Kaba was a friend of Yvon DesLauriers, a member of the Selection Board in this particular competition, and that Mr. DesLauriers 'fixed' the competition so that Mr. Kaba would be the successful candidate, because they were friends. Mr. Singh described the circumstances surrounding the hiring of Mr. Kaba several times in the course of his testimony. On one of these occasions, he makes a passing reference to the fact that both Mr. DesLauriers and Mr. Kaba spoke French. Mr. Singh further alleges that after the competition he spoke to Mr. John Cooke, a Personnel Administrator with Statistics Canada, and that Mr. Cooke told Mr. Singh that Mr. Singh was more qualified than was Mr. Kaba.

Mr. Kaba denied that he was a friend of Mr. DesLauriers. Mr. Kaba testified that he had met Mr. DesLauriers once prior to the competition for about 15 minutes in the course of a training session. Mr. DesLauriers did not testify.

In his final submissions, Mr. Singh argued that the job had been fixed for Mr. Kaba because Mr. DesLauriers was French and Mr. Kaba spoke French as well.

In argument, counsel for the Commission indicated that while no remedy was being sought with respect to this competition, nevertheless, the allegations with respect to improprieties in the hiring of Mr. Kaba were being pursued. Specifically, the Commission alleged that Mr. Singh's

status as an East Indian, and even more so his age, were factors in the decision to hire Mr. Kaba over Mr. Singh. The Commission conceded that it was harder to establish national or ethnic origin as a ground of discrimination in this particular fact situation, given that Mr. Kaba was himself a member of a visible minority. The Commission maintains, however, that the five year age difference between Mr. Kaba and Mr. Singh was a factor in the hiring decision.

As a result of Mr. Singh's submissions regarding Mr. DesLauriers' alleged preference for a Francophone, the Tribunal asked counsel for submissions in light of the decision in *Cousens v. Canadian Nurses Association* (1981), 2 C.H.R.R. D/365, which found that an employer preference for a Francophone was a preference relating to 'ancestry', and that such a preference was therefore contrary to the provisions of the Ontario Human Rights Code. Counsel for the Commission then contended that Mr. Singh had been detrimentally affected by his linguistic abilities as well, and that one's linguistic abilities related to one's national or ethnic origin.

Counsel for the respondent argued that there had not been any discrimination in the hiring of Mr. Kaba and that Mr. Kaba had been the best qualified candidate. Counsel further submitted that language was not identified as an issue in the complaint form, and that the respondent would be seriously prejudiced if the Tribunal were to consider language as a basis for the complaint at this late stage, given that the respondent was no longer in a position to call evidence to address the issue.

The Tribunal is not prepared to consider whether linguistic background played any role in the selection of Mr. Kaba. The complaint filed by Mr. Singh is based on the grounds of age and national or ethnic origin, which Mr. Singh specifies in his complaint to be East Indian. Nowhere in the complaint is there any indication that Mr. Singh's language abilities or status as a non-Francophone were in issue in this case. The issue was only raised by Mr. Singh in final argument, after some 20 days of evidence had been received by the Tribunal. At no time was the respondent alerted to the fact that it might be necessary to address language as an issue in this case. To consider the issue now, even for the limited purpose of establishing context, would be fundamentally unfair to the respondent.

Mr. Singh's remaining allegations with respect to the hiring of Mr. Kaba do not disclose a breach of the Act. Mr. Singh's allegations with respect to the alleged friendship between Mr.

Kaba

and Mr. DesLauriers were based on nothing more than rumour, and were specifically denied by Mr.

Kaba. Even if it were true that Mr. DesLauriers 'fixed' the competition so that his friend Mr. Kaba

would be the successful candidate (no such finding being made by the Tribunal), such conduct would

not relate to either Mr. Singh's age or national or ethnic origin, and thus would be beyond the jurisdiction of this Tribunal. While the age-related comments attributed to Mr. Mozes are of concern, for reasons that will be set out further on in this decision, based upon the evidence before

us, the Tribunal cannot conclude, on a balance of probabilities, that the statements were, in fact, made. In any event, it is not at all clear on the evidence before us that Mr. Mozes was even involved

in the decision to hire Mr. Kaba over Mr. Singh.

III THE COMPLAINT - EVIDENCE

i) Failure to Replace Mr. Kaba from Eligibility List

As a result of having placed second to Mr. Kaba in the 1985 competition, Mr. Singh's name was placed on an eligibility list. The creation of eligibility lists is provided for by section 17 of the

Public Service Employment Act, which states:

17 (1) From among the qualified candidates in a competition the [Public Service] Commission shall select and place the highest ranking candidates on one or more lists, to be known as eligible lists, as the Commission considers necessary to provide for the filling of a vacancy or anticipated vacancies.

Section 6 of the Public Service Employment Act provides for the delegation of staffing authority from the Public Service Commission to individual governmental departments.

The eligibility list containing Mr. Singh's name was initially valid for one year following the competition. According to Mr. Singh, he went to Mr. Drover and asked Mr. Drover to extend the period in which the eligibility list would be valid in order to increase Mr. Singh's chances of the

position becoming vacant. Mr. Drover agreed, and the validity period for the eligibility list was extended to December, 1987.

In March of 1986, Mr. Singh left the Transportation Division to take up a temporary career development posting known as a CAD assignment in the Communications Division. This assignment was at the ES level. The assignment was for an initial term of six months, but was extended twice. Mr. Singh returned to the Transportation Division in December, 1987.

In June, 1987 Mr. Kaba won a competition for a position at the ES-03 level outside the Transportation Division and left the Division. Notwithstanding the fact that the eligibility list from

the 1985 competition remained valid, Mr. Singh did not replace Mr. Kaba. Mr. Singh testified

that

he was told by Mr. Drover and by Steven Mozes that they did not have the necessary funds to fill Mr. Kaba's position. According to Mr. Singh, notwithstanding the Division's alleged lack of funds,

after Mr. Kaba left, the respondent brought in two individuals on a temporary basis to do the work

that Mr. Kaba had previously been doing. Mr. Singh identified these individuals as Andrea Mathieson and Kathy Walsh. Mr. Singh states that in early 1988, Mr. Kaba's former position was

reclassified at the ES-03 level and a competition was held to replace Mr. Kaba, and that Kathy Walsh

was awarded the position. Mr. Singh testified that he believed that the competition was deliberately

postponed until after the eligibility list had expired, and the position subsequently reclassified so as

to prevent him from assuming the vacant position as would have otherwise occurred.

Mr. Singh testified as to his belief that these actions were taken as a consequence of his age and his national or ethnic origin. In support of this belief, Mr. Singh made reference to a number of comments that Mr. Singh attributed to Mr. Mozes. In this regard, Mr. Singh's complaint states:

... Incidentally, in the early 1980's, Steven Mozes used to make fun of me, saying that I was too old for an ES-01 position.

In his testimony, Mr. Singh described Mr. Mozes's comments in much more graphic terms:

Q. You said to the Tribunal that in the summer of 1985, when you approached Mr. Mozes, he said to your face that you were too old for an ES position

A. Mr. Mozes not only said that, but after I expressed that interest he started harassing me. He had a nasty habit of going by and saying, "You are too old; you are ugly; you are Indian. I don't like Indians." One day I asked Mr. Mozes, "Why are you saying all this?" He said, "I have very bad memories. I remember when in 1957 the Russians invaded Hungary --"

Q. Sorry, invaded Hungary?

A. Right. "Your Defence Minister at that time, Mr. Krishna Menon, sided with the Russians at the Security Council, and hundreds of thousands of Hungarians had to flee. I will never forgive the Indians." I asked Mr. Mozes, "What has that to do with me? I am not a politician. I was a kid at that time. Why are you taking this out on me?" He just laughed in my face and walked away.

After that he started harassing me so much that I said to myself, "I have no choice but to get out of this division." So I put my name on CAD assignments, and in March of 1986 I left there to go to Communications Division.

Perhaps I should also mention here that he did not even leave me there. When I was writing an article for SCAN, I used to bring a copy of those articles back to Transportation Division to show the Director and Mr. Mozes that I was capable of doing much more than that of a CR-04 level job, but he was always laughing in my face and saying, "This cannot be your article. You stole it. You are Indian and you

are not capable of writing this kind of stuff."

He told me many, many times, and his harassment continued whenever I ran into him. (Transcript, p. 116-117)

Elsewhere in his testimony Mr. Singh described other comments of a similar nature which he attributed to Mr. Mozes. Mr. Singh contends that Mr. Mozes was involved in a number of subsequent events, to Mr. Singh's detriment. Mr. Singh describes Mr. Mozes as 'the architect of [his] downfall' (Transcript p. 247).

With respect to the relationship between ES-01, 02 and 03 positions, Mr. Singh testified that in his view there was no difference between an ES-01, 02 and 03. According to Mr. Singh, in each case the same person would be sitting at the same desk, doing the same job, except that in the eyes of management he would have acquired one more year of experience. As each year went by, the employee would be automatically rubber-stamped to the next level. Elsewhere in his testimony, however, Mr. Singh contrasts the simple tasks that he says are performed by ES-01 level employees with the more complex tasks assigned to ES-03 level staff.

Pierre Mulvihill also testified for the Commission with respect to this issue. Mr. Mulvihill was a Service Officer with the Public Service Alliance of Canada, and in that capacity had been contacted by Mr. Singh in late 1988 with respect to an appeal that Mr. Singh wished to launch from another competition. According to Mr. Mulvihill, in the course of his discussions with Mr. Singh, Mr. Singh also raised a number of other concerns with respect to his treatment by the respondent, including the failure of the respondent to place him in the position formerly occupied by Mr. Kaba following Mr. Kaba's departure from the Transportation Division. Mr. Mulvihill testified that in the course of his discussions with Marc Cuerrier, the respondent's Director of Personnel, regarding Mr. Singh's various concerns, Mr. Cuerrier advised him that after Mr. Kaba left, the Division realized that they did not need someone at Mr. Kaba's level any longer, and that, as a result, 'they' changed the level and put someone else in. Mr. Mulvihill did not indicate who 'they' referred to.

A number of witnesses testified on behalf of the respondent with respect to this issue. Mr. Kaba testified that when he started in the Transportation Division, he was in charge of the statistics for the passenger bus survey and was working on the railway survey as well. These were monthly surveys. At the time, the Division was in the process of merging five publications into one

which became known as “ Trucking in Canada” . Mr. Kaba testified that six months to a year after he started he was asked to write articles for the new publication. This work was analytical in nature, represented an increase in responsibility, and was totally different from the work that he had done when he started in the Division.

According to Mr. Kaba, an ES-01 position is a recruitment level position. An individual occupying an ES-01 position at Statistics Canada who performs satisfactorily will ordinarily become an ES-02 within 12 months. In Mr. Kaba’ s case, prior to his leaving the Transportation Division, he had been told that he would become an ES-02, but that the paperwork had not been completed, and he was still being paid at the ES-01 level at the time of his departure.

In cross-examination, Mr. Kaba was asked who should have replaced him after he left:

Q. Would it be fair to say that when you vacated the position, the person who was on the list should get that position? Would that be a fair assumption to make?

A. If the list was still active, I would say yes. (Transcript p. 854)

Mr. Kaba subsequently testified that the type of work that he was doing at the time that he left the Division would not ordinarily be performed by an ES-01 at Statistics Canada: according to Mr. Kaba, the preference of the respondent would be to test new recruits with less complex work before giving them tasks of greater responsibility.

Had he not left the Transportation Division, Mr. Kaba testified that he would still have been doing analytical work. Mr. Kaba further testified that when he won the ES-03 competition, Mr. Mozes asked him to stay on in the Division.

Mr. Mozes testified that he was not involved in the decision not to fill Mr. Kaba's position after Mr. Kaba won the ES-03 position outside the Transportation Division. According to Mr. Mozes, at the time that the decision in issue was made he was not even in the Transportation Division but rather was on a two-year special assignment in the International Trade Division at Statistics Canada. This assignment was in effect from November 3, 1986 to November 3, 1988. Mr.

Mozes’ s absence from the Division during this time period is confirmed by the Minutes of the meetings of the Chiefs in the Transportation Division, as summarized in Exhibit R-36, Tab 40.

Mr. Mozes further emphatically denies making the age and national or ethnic origin-related statements attributed to him by Mr. Singh, and testified as to his positive relationships with other members of visible minority groups, including people of East Indian origin.

Brian Nemes testified at some length with respect to this issue. Mr. Nemes was the Assistant Director in the Transportation Division at the time in question. According to Mr. Nemes, during his time in the Transportation Division, Mr. Kaba was heavily involved in the development of the new "Trucking in Canada" publication. According to Mr. Nemes, "Trucking in Canada" brought together into one publication what had previously been separate publications for the Motor Carrier Freight survey, the Private Trucking survey, and a series of For-Hire Trucking Commodity Origin and Destination publications. Mr. Kaba had initially been hired to assist in the creation of charts and graphs from the mainframe computer and to assist in the analysis and write-up. According to Mr. Nemes, it was quickly determined that Mr. Kaba would be better employed in doing the tabulations than in doing the analysis and write-up. Mr. Kaba evidently had very strong computer skills, and as a result, he was able to develop a model for the publication, and in particular for the charts and graphs that would be used each year in the publication. Mr. Nemes described Mr. Kaba's contribution to the publication in glowing terms, and testified that having been involved in the 1985 and 1986 publications, Mr. Kaba had basically 'worked himself out of a job'. With the development work complete, it was no longer necessary to have a junior economist on the project. Had Mr. Kaba stayed in the Division, Mr. Nemes stated that he would have been assigned other duties.

Mr. Nemes testified with respect to the difference between the duties and responsibilities of an ES-01, 02 and 03, and explained how one progressed from one level to another. According to Mr. Nemes, ES-01 positions were developmental positions. Within Statistics Canada, when a junior economist came in, if they performed at the expected level and if they showed promise, it was almost a natural occurrence that the position would be reclassified upward. Reclassifications only took place from the ES-01 level to the ES-02 level. To move from the ES-02 level to the ES-03 level, employees had to go through the competitive process. ES-03 level employees were expected to do more complex tasks, with less supervision than lower level employees.

According to Mr. Nemes, Mr. Kaba's position was not reclassified in 1988. The position was "killed" during one of the respondent's purgings of vacant and unfilled jobs. With respect to the two individuals who came into the Transportation Division after Mr. Kaba's departure, Mr. Nemes testified that neither Ms. Walsh nor Ms. Mathieson was doing the work that Mr. Kaba had been doing. Mr. Nemes testified that Ms. Walsh had been working in the Aviation section of the

Transportation Division at the ES-03 level, and that she was transferred to work as an economist in the For-Hire Trucking Commodity Origin and Destination Survey in the Surface Transportation Section. Andrea Mathieson initially came into the Transportation Division from the Agriculture Division at Statistics Canada at the ES-03 level in February, 1988 on a CAD assignment. She worked in the Marine Transportation Unit to develop a Marine version of the “Trucking in Canada” publication. In July, 1988 Ms. Mathieson was transferred into a vacant ES-03 position in the Transportation Division.

Mr. Nemes confirmed that at this time the Transportation Division was facing Treasury Board-imposed freezes on staffing and on discretionary spending at this time. No ES-01's or ES-02's were hired after Mr. Kaba was hired in December, 1985. According to Mr. Nemes, the Transportation Division was able to meet its operational needs during this period by utilizing what he described as ‘creative staffing’ techniques such as CAD assignments. Management was free to move people around within the organization, but could not promote or bring new people in.

David Dodds also testified on behalf of Statistics Canada. Most of Mr. Dodds’ testimony related to his role as Chair of Statistics Canada’s ES Recruitment and Development Committee. In addition, however, Mr. Dodds was a former Director of the Transportation Division, having replaced Mr. Drover on September 1, 1989. Mr. Dodds confirmed that the “Trucking in Canada” publication is ongoing, and that it comes out annually. It is a compendium of information about the trucking industry from a variety of surveys which surveys are done on a variety of frequencies - some quarterly, some as often as weekly.

ii) Cross-Divisional Appointments

In addition to the fact that he was not awarded Mr. Kaba’s job when Mr. Kaba left the Transportation Division, Mr. Singh further alleges that Statistics Canada acted in a discriminatory fashion by reason of the fact that he did not receive an ES position elsewhere in Statistics Canada during the two years in which the eligibility list remained active, that is from December, 1985 to December, 1987.

Mr. Singh testified that managers at Statistics Canada routinely used eligibility lists from competitions in other divisions to fill positions in their own division. According to Mr. Singh, if managers in one division saw someone on another division’s eligibility list who they liked and they wanted, they would hire from that list. Mr. Singh stated that this could be done because positions at the ES-01 level were developmental jobs, and that the skills required were so fundamental, one

only needed a basic degree in Economics or Statistics. Whether one worked in one division or another is totally immaterial. Mr. Singh contends that an individual of his age and ethnicity would not be picked up by other managers. In response to questions from counsel for Statistics Canada he stated:

Q. In other words, it is your evidence that this is done on a routine basis

A. It is.

Q. -- where divisions swap eligibility lists on a daily basis --

A. If they want to.

Q. -- provided the managers like them.

A. Provided the managers like them.

Q. That is the only condition.

A. They know very well who is 35 on the list. Is it Mr. Singh, the Indian fellow, the 45-year-old? They would not touch him with a pole. This is how they do it.

If they want someone they like, they will pick him up. (Transcript, p. 204)

Mr. Singh points to three examples of cases where he says that people were hired for one division from another division's eligibility list. According to Mr. Singh in June, 1984 Bruce Daly,

who was on an eligibility list for an SI-01 level position in the Housing, Social and Family Statistics

Division, was offered a position in the Transportation Division. In April, 1988, Kathy Ouellet was

offered a position in the International Trade Division. She had been third on an eligibility list at the

SI-03 level, which list arose out of a competition in the Headquarters Division. Finally, in May of

1988, Nora Hillary was offered a position in the Agriculture Division. Ms. Hillary had been on an

eligibility list at the ES-01 level which list had been created by the Geography Division.

According to Mr. Singh, during the time that he was on the ES-01 eligibility list, other positions at the ES-01 level opened up at Statistics Canada and were not offered to him. Mr. Singh

could not point to any specific positions that became vacant during this time frame, but contends that

there were always ES-01 level positions being filled at Statistics Canada.

Ernest Akeaympong testified on behalf of the complainant. Mr. Akeaympong has been the Chief of the Labour Force Activity Section at Statistics Canada for the last ten years. Mr. Akeaympong confirmed that during his time with Statistics Canada he has seen appointments made

from eligibility lists on a cross-divisional basis. He explained that this is often done to save cost and

time. In order to do it, however, according to Mr. Akeaymong, it is necessary that the requirements of the two jobs be similar.

Mr. Mulvihill also gave testimony with respect to this issue. According to Mr. Mulvihill, in the course of his discussions with Mr. Singh in late 1988, Mr. Singh expressed his concern regarding his failure to get an ES-01 position during the two years that his name had been on the eligibility list. As a consequence, Mr. Mulvihill discussed the issue with Mr. Cuerrier, who advised him that divisions within Statistics Canada rarely, if ever, selected candidates from lists maintained by other divisions. Mr. Mulvihill initially accepted this as a reasonable explanation, but after Mr. Singh gave the three examples cited above where this had in fact occurred Mr. Mulvihill wrote to Mr. P. McLaughlin, the Director General of Personnel at Statistics Canada, explaining the situation and seeking an explanation (Exhibit HR-1, Tab 8, Letter of March 3, 1989). Mr. Mulvihill testified that he does not recall receiving a response from Mr. McLaughlin.

Mr. Mulvihill also testified for the appointment to be legal, a division could only take someone from one eligibility list for another position where the Statement of Qualifications for the position being filled is the same as the one that was used in the selection process from which the eligibility list was made. Mr. Mulvihill notes, however, that government departments do not always follow the provisions of the Public Service Employment Act in staffing matters.

Section 18 of the Public Service Employment Act provides:

Where an appointment under this Act is to be made to a position by competition, the appointment shall be made from an eligible list established for that position or positions of a similar occupational nature and level...(emphasis added)

Monique Clément is currently the Chief of Corporate Staffing for the respondent. She testified with respect to staffing practices at Statistics Canada. According to Ms. Clément, in order to ensure that the merit principle is respected, before an eligibility list from one competition can be used for to fill another position, the positions must be “very, very similar”. Ms. Clément confirmed that such appointments do occur, although it is not a common occurrence. Ms. Clément explained that managers often prefer to run their own competitions in order to place their own emphasis and priorities on the necessary qualifications for the job. As a result, managers at Statistics Canada do

not use existing lists from other competitions very often.

Ms. Clément testified that Mr. Singh's situation was not unusual within Statistics Canada. She provided statistical information with respect to the frequency of eligibility lists expiring at Statistics Canada with names remaining on them. In the period from 1989-90 to 1993-94, a total of 60 eligibility lists were created for ES level positions. Of these, 43 lists had more than one name on the list. Twenty-four of these lists (or 56%) expired with names remaining on them (Exhibit R-14, Tab 35). Reliable data was evidently not available for the period before 1989.

While the duties associated with ES-01 positions would be more generic in nature than would the duties associated with higher level ES positions during this time period, nevertheless each position dealt with a different subject matter, using different tools. According to Ms. Clément, there could be significant differences in the nature of the analytical work that each was called upon to perform.

Mr. Nemes testified at some length with respect to the climate for ES employees at Statistics Canada in the 1980's. According to Mr. Nemes, there was a tendency within Statistics Canada to build areas of responsibility or 'fiefdoms'. In staffing, this tendency manifested itself in positions generally being tailored for the needs of the particular area doing the staffing. These positions would not necessarily bear any resemblance to any other positions elsewhere in the organization. According to Mr. Nemes, it was a very rare event for one division within Statistics Canada to use another's eligibility list during this time period. It could only be done if one could show that the positions were identical or very close to identical.

Mr. Nemes further testified with respect to the impact that budget cuts had on staffing during this time period. According to Mr. Nemes, Statistics Canada's overall budget was cut back, and person years in the Transportation Division dropped from 87 in 1984/85 to 68 in 1987/1988. Mr. Nemes stated that:

... staffing on and off was halted during this period of time. No external staffing was being undertaken, and absolutely no staffing at the Economist Level 1 was undertaken during this period of time.

The last indeterminate Level 1 Economist position we brought into the Transportation Division was Mr. Kaba. (Transcript, at p. 1600)

Statistical evidence adduced by the Commission confirms that the total number of ES-01 level employees at Statistics Canada went from 24 in 1987 to 16 in 1988. (Exhibit HR-6)

Mr. Dodds testified with respect to staffing of ES level positions in the 1980's. Mr. Dodds stated that competitions tended to be very local in scope - that managers tended to look for

individuals with experience in their own subject area, which made it unlikely that someone from outside the division would be hired. There was very little sharing of eligibility lists. He described the organization as ' balkanized' - stating that it operated in fiefdoms, with no concern for the overall needs or long-term future of the organization. This situation led to an overhaul of Statistics Canada ES recruitment in the late 1980's.

Mr. Dodds confirmed that Statistics Canada as a whole was affected by downsizing in the mid-1980's. This would have the effect of reducing the number of positions available for people who could be hired from eligibility lists.

The Tribunal was provided with one Statement of Qualifications for an ES-01 level position from this general time period. The Statement of Qualifications related to a competition for a position in the Labour Division of Statistics Canada, which competition is the subject of another aspect of Mr. Singh's complaint. It describes the position as:

... a recruitment and learning level for employees to be involved in economic and statistical research and data analysis in the area of labour statistics...

The Statement goes on to specify that the successful candidate must have:

knowledge of economic theory and statistical techniques related to labour market surveys (Exhibit R-10)

iii) The 1988 ES-01 Competition

In late 1988 or early 1989 Mr. Singh applied for an ES-01 position in the Labour Division. He was found to be qualified for the position and was ranked second to Christine Cowan. Mr. Singh testified that he went to see Richard Vincent, the Chair of the selection board, after the competition and asked Mr. Vincent to put his name on an eligibility list. According to Mr. Singh, Mr. Vincent flatly refused to do so and did not provide Mr. Singh with any explanation for his refusal to act. Mr. Singh alleges that his age and his national or ethnic origin were factors in this decision.

Mr. Singh's complaint does not allege discrimination in the competition itself. In his closing submissions Mr. Singh alleged that the competition had been ' fixed' for Ms. Cowan, who had been in the position for some time in an acting capacity, but Mr. Singh stated that he " had no quarrel" with this. His complaint relates rather to the failure to create an eligibility list and to include his name on that list.

According to Mr. Singh, the normal practice at Statistics Canada following a competition was that the successful candidate would get the job, and all the other candidates who were found to be qualified for the position would be put on an eligibility list. In this case, Mr. Singh states that only Ms. Cowan and he qualified.

Mr. Mulvihill testified that he represented Mr. Singh in an appeal from this competition. According to Mr. Mulvihill, there were problems with the competition. As a result, he stated that "I didn't get him on the list, but I got him the acting appointment" (Transcript, p. 586). He subsequently stated:

When I first Mr. Singh, it was as a result of an appeal that had been filed. As part of the appeal, we got full disclosure, which means that I reviewed all the documents related to the selection process. Upon that review, I found some problems in it. I met with the employer and said, "There is a solution here. Mr. Singh will withdraw the appeal in exchange for, or will continue, and I guarantee I will win the appeal." The end of the story is that he got the acting. (Transcript, p. 606)

According to Mr. Mulvihill, there is no obligation on the employer to put the names of all of the qualified candidates on the eligibility list. In order to determine how many names to put on the list, the managers running the competition have to look at the anticipated turn-over rate during the life of the list. More names will be put on lists in positions known to have a high rate of turn-over. If only one vacancy is anticipated in the foreseeable future, the usual practice is that only one name will be put on the list.

Ms. Clément testified that an eligibility list must be created in every case where candidates qualify and an appointment is to be made. Ms. Clément stated that there may be cases where a manager may decide to create a list with a single name on it. She explained the factors that would go into such a decision as follows:

There would be things internal to the division, as I said, like turnover. Actually, I think that there is something I could show you on that, but other things he would consider for example would be does he anticipate that in the near future there would be other candidates who might be able to compete for this job and do very well; so, if he is going to have a list for a period of two years, then he is going to be bound by it for that period of time and any new additions to the division, any new terms or any new indeterminate staff then wouldn't have access to that particular job if it became vacant. So he may decide for that reason that he wants to refresh this process at a certain time. Also, he may anticipate that there might be changes in his area in the near future; so he wouldn't want to make a long list, he would prefer to have a short list and look at how things work out. (Transcript, pp. 938-9)

Ms. Clément further testified that managers sometimes try to put a number of names on a list in order to placate their employees, but that her preference, and the advice that her office gives to

managers, is to keep the list as short as possible and to base the length of the list on a realistic assessment of their anticipated needs. She recommends this so as to avoid creating expectations and false hopes for employees.

According to Ms. Clément, if all of the individuals on a list are offered jobs and the list exhausted, and the position again becomes vacant, it is possible to create a new list based upon the results of the competition without the need for holding a new competition, provided that this occurs within a reasonable time from the date of the original competition. Ms. Clément's testimony is confirmed by Statistics Canada's Staffing Policies and Guidelines (Exhibit R-21) and by the evidence of Mr. Akeaymong, one of the Commission's witnesses.

Ms. Clément provided statistical evidence with respect to the incidence of eligibility lists being created at Statistics Canada with only one name on them. Exhibit R-14, Tab 34 demonstrates that in the period from 1989-90 to 1993-94 a total of 629 eligibility lists were created within Statistics Canada. Of these, 265 lists had only one name on them. Exhibit R-14, Tab 35 demonstrates that in the same period, there were a total of 60 eligibility lists created for ES positions of all levels. Of these, 17 had only one name on them.

Additional statistical information with respect to the incidence of single name lists in competitions at the ES-01 to ES-03 level was introduced through Barbara Slater. Ms. Slater is the Director General of the Informatics Branch at Statistics Canada. According to Exhibit R-39, Tab 77, for the period from 1989-90 to 1993-94 there were 14 competitions at the ES-01 to ES-03 level. Of these, two lists had only one name on them.

Mr. Vincent testified with respect to his involvement as Chair of the Selection Board for the competition. At the time, Mr. Vincent was the Unit Head of the Quality Assurance Unit for the Survey of Employment, Payroll and Hours in the Labour Division at Statistics Canada. According to Mr. Vincent, there were eight to ten people in the competition. Ms. Cowan came first, with Mr. Singh a close second.

Mr. Vincent was asked how old Ms. Cowan was at the time of the competition. Mr. Vincent answered " She was a little bit older. I would say 26 or 27." (Transcript, pp.1185-6)

Mr. Vincent testified that he was briefed on the procedures to be followed in the competition by a Staffing Officer, who was subsequently identified as John Burke. After the competition was completed Mr. Vincent created an eligibility list (Exhibit HR-1, Tab 9). The list is dated

February

2, 1989 and remained valid until March 1, 1989. Ms. Cowan's name is the only one on the list.

When asked why he only put one name on the list, Mr. Vincent explained that:

A. There was only one position to fill. In addition, it was very common practice at that time to put only one name on an eligibility list -- and I stress "at that time." That was almost a culture of staffing at that time.

Q. You say there was only one position at the time. Did you not expect new positions to open in the future?

A. You have to remember that each job description was fairly specific to a position; that is one consideration. Secondly, I did talk to my supervisor and I asked him to canvass to see if there would be additional positions opening up. According to him, the answer was "no," in the foreseeable future. (Transcript, pp. 1139-40)

Mr. Vincent testified that this was not the only time that he had created a list with only one name on it, that he had done so a couple of other times.

Mr. Vincent stated that Mr. Singh called him several times after the competition, asking to have his name added to the list. According to Mr. Vincent, he told Mr. Singh that he could not foresee another position becoming available. Mr. Vincent stated that although he does not recall saying so in his answer to Mr. Singh, it was implicit in his response that there was no funding available for an additional position.

Mr. Vincent stated that Mr. Singh appealed the competition result, but that the appeal was dropped the day before the matter was to be heard. Mr. Vincent stated that he did not recall the grounds on which Mr. Singh appealed, nor does he know why the appeal was dropped.

According to Mr. Vincent, the competition was a fair one.

The evidence with respect to this competition must be considered in light of what else was going on at the time with respect to staffing at the ES level at Statistics Canada. Mr. Dodds testified at length with respect to the evolution of hiring of ES employees within Statistics Canada. He explained that sometime in the mid-80's, senior management within Statistics Canada became concerned with the ad hoc manner in which ES employees were being hired, and the effect that the

balkanization of the organization or the fiefdom system was having on the organization. According

to Mr. Dodds, a second problem with the existing recruitment process was identified:

... One of the things that we did at the end of the eighties and which many federal departments have done subsequently is to review the age profile of the senior managers in the organization. We did a study, I suppose, as good statisticians should, and we found that, again, as many other departments found in the last few years, that the age profile was such that a large proportion, a frighteningly large portion of the senior managers would, could anyway, be leaving over the next ten-, fifteen-, twenty-year period.

That was one of the driving forces behind that -- to begin to put together a program which would eventually lead to possible replacements for those senior managers. Again, Statistics Canada has a history of developing people from within rather than bringing them in at relatively high levels. We decided to start such a program with the ESs with a view to having people who would have some future potential in the organization. (Transcript, pp. 2453-4)

Mr. Dodds subsequently testified that the study in question was probably carried out sometime in 1987 or 1988 (Transcript, p. 2761).

In order to address these concerns, a formal recruitment program for ES employees was developed at Statistics Canada. There is both an internal and an external component to the program.

Internally, employees at Statistics Canada who have the necessary educational requirements can apply through the program. As far as the external aspect of the program was concerned, Mr. Dodds stated:

... Then there is the external component which is the university recruitment process where we go to campuses and we interview students who are typically about to graduate or maybe have just graduated. It is in that latter category, I think, where we needed to make some improvements. (Transcript, p. 2458)

These improvements took the form of a more structured and representative recruitment process. The expectation was that the new system would also assist Statistics Canada in attracting what Mr. Dodds described as 'equity groups'. Under the new system, applications are received in the fall of each year and offers made to successful candidates the following spring. The first applications under the new program were received in October, 1988 for jobs starting in the spring of 1989. (See also Exhibit R-1, Tab 22).

Mr. Dodds described the transitional period between the phasing-out of the old recruitment system and the introduction of the new formal recruitment process. According to Mr. Dodds, in the years from 1985 to 1987 there had been severe budgetary problems at Statistics Canada, with the result that ES hiring had been down. Statistics Canada would ordinarily have an attrition rate of about forty ES's each year. The intention was only to hire 12 recruits through the 1988-89 recruitment program. Managers at Statistics Canada were concerned that this was not enough, and were telling Mr. Dodds and the recruitment committee that three or four times that number should be brought in. According to Mr. Dodds, people were 'desperate' to get ES recruits. Sometime in the spring or summer of 1989, managers at Statistics Canada were told to stop holding competitions

for ES-01 candidates. However, they were still able to hire from existing eligibility lists. Mr. Dodds stated that because of the shortage of ES recruits in 1989, there was an incentive on managers to hire from eligibility lists, subject to the requirements of the positions being similar.

Mr. Dodds reviewed the Statement of Qualifications for the position Ms. Cowan obtained. According to Mr. Dodds, the requirements for this position were neither completely generic nor completely specialized, but were halfway in between the two. It was not clear to Mr. Dodds whether another division within Statistics Canada would have been interested in hiring a candidate with these qualifications, although he suggested that the qualifications were a little restrictive.

Mr. Dodds was asked whether, given Statistics Canada's concern with respect to the aging of its mid and senior level management, there would be any reluctance to hire older employees as ES recruits as part of the renewal process. Mr. Dodds responded that the issue was not the age of the managers, per se, but rather their propensity to retire. According to Mr. Dodds, because of the eligibility requirements under the government superannuation program, someone coming into the organization at 40 or 45 would likely stay in the organization until well into their sixties, whereas long service employees could retire with a full pension at age 55.

Statistics Canada's concern with respect to the aging of its population is also reflected in the documentary evidence introduced by the respondent. A 1997 Statistics Canada publication entitled 'A Comprehensive Human Resource Strategy at Statistics Canada' describes the problems associated with the staffing processes utilized by Statistics Canada in the 1980's and the changes that were introduced to address these concerns. In particular, the document noted as a concern the fact that:

The average age of all our employees and particularly of our middle and senior managers was found to be increasing at an alarming rate. Our Human Resource Information System projected a 30% net loss in our middle and senior management ranks over the next 15 years, assuming a continuation of normal replacement rates. The Agency needed to take a concerted approach to the recruitment, development and selection of our future managers, in order to prepare sufficient replacements. (Exhibit R-39, Tab 78, at p. 1)

As well, a summary of the ES Recruitment Program circulated within Statistics Canada in late 1990 confirmed:

... the Department has other reasons to build up its cadre of new professionals beyond the replacement level. Its current group of middle level managers (ES 5, 6, 7) as well as its senior managers (EX 1, 2, 3, 4) are all about the same age and will be able to retire on unreduced pensions at about the same time.

In view of these considerations it may be appropriate to target for an annual intake which is larger than the replacement level - perhaps 50 or 60. (Exhibit R-14, Tab 32)

The same document notes that the recruitment target for new ES' s was not contingent on the identification of specific vacancies. It stated:

The recruitment target does not require that specific vacancies be identified. The target is based on an overall allocation sufficient to meet the long term professional needs of the department.

Similar language appears in the " Policy Guidelines and Statistics for the ES Recruitment Programme" at R-1, Tab 22.

Several other witnesses mentioned age in relation to ES staffing. Mr. Nemes confirmed Mr. Dodds' testimony regarding the concern identified by Statistics Canada with respect to the aging of the management population. Mr. Kaba stated that when he was hired in 1985, at 35, he was ' very old' , and that now people coming in as ES-01's are 22 years old. Several other respondent witnesses testified that most people recruited under the ES recruitment programs were in their twenties or early thirties.

Statistical evidence was also introduced dealing with age and visible minority distribution amongst ES employees at Statistics Canada. This information discloses that of the ES-01 employees at Statistics Canada from March, 1987 to March, 1992, 87% were under 31, 10.6% were between 31 and 40 and 2.3% were over 40 (Exhibit R-39, Tab 74). Visible minorities who had self-identified accounted for between 4.1% and 29.2% of the ES-01 population over this time period (Exhibit HR-6). Within Statistics Canada as a whole, visible minorities accounted for slightly more than 3% of the population in 1990, the earliest year for which we were provided with information (Exhibit R-39, Tab 78) According to the 1991 census, 9% of the available workforce were visible minorities (Exhibit HR-10).

The statistical evidence also reveals an increase in the number of ES-01 level employees over time: the total number of ES-01 employees at Statistics Canada increased from 16 in 1988 to 24 in 1989 and 30 in 1990 (Exhibit HR-6). The total number of new people in these positions would be somewhat larger as a result of the fact that employees typically move through the ES-01 level and on to the ES-02 level within twelve months or so.

Finally, we were provided with a list of all recruits at the ES-01, ES-02 and ES-03 levels hired over a nine year period who were over 40 when they started (Exhibit R-36, Tab 52). The list, which has 19 names on it, differentiates between internal and external candidates. Five of the individuals on the list were hired from within Statistics Canada. Of these five, one was hired at the ES-01 level. Mr. Dodds testified that over ten years, Statistics Canada hired 340 individuals through the ES program, or an average of 34 per year. He further stated that, over the last few years, approximately 100 internal candidates were interviewed each year for ES positions.

iv) Failure to Extend ES-01 Term Position

In June, 1989 Mr. Singh was given a term position to work as an economist at the ES-01 level in the Transportation Division. The term of the assignment was to be from the spring of 1989 until March 31, 1990. In his complaint, Mr. Singh alleges that he requested that his term as an economist be extended, and that his request was refused. Mr. Singh further alleges that two other individuals who had started working on term assignments in the Transportation Division at the same time as Mr. Singh, both of whom were white, had their terms extended.

According to Mr. Singh, he was given the term position 'to silence him' because he had been complaining to a number of officials within and outside of Statistics Canada with respect to his treatment at the hands of the respondent and had been threatening to file a human rights complaint.

In this regard we were provided with copies of a number of documents relating to Mr. Singh's efforts to pursue his complaints (for example, his letter of February 20, 1989 to the Commissioner of the Public Service of Canada - Exhibit HR-1, Tab 10). Mr. Singh testified that Mr. Mozes did not want to give Mr. Singh the assignment, but that he had no choice in the matter.

According to Mr. Singh, he was initially reluctant to take the term position, but he agreed to do so after Mr. Mozes assured him that his initial term would be extended. He explained his reluctance to take the position because it was not a permanent job. Mr. Singh stated that temporary employees are always at the mercy of the manager. Mr. Singh testified that he knew that if he did not take the job his union would turn against him. Accordingly, after receiving Mr. Mozes' assurances that the term would be extended, he took the job. Mr. Singh explained that after term employees occupied positions for two years, they were normally made permanent without competition.

Mr. Singh testified that when he received this assignment, he had a specific task to perform, which was to prepare a paper on the potential for using income tax data to streamline the survey process as it related to the trucking industry. Mr. Singh described this work as very complex, and stated that it was at a level above that normally performed by ES-02's and ES-03's. According to Mr. Singh, he wrote the study by himself, and no one else worked with him on it. Mr. Singh testified that, by the end of his term he had finished the paper and completed the task 'to the end'

While working on the tax data study Mr. Singh was supervised by Yasmin Sheikh, who was herself supervised by Mr. Mozes. Mr. Singh identified Ms. Sheikh as a Pakistani Muslim, and stated:

I am Hindu; I am from India. She comes from Pakistan and she is Muslim. India and Pakistan -- I don't need to give a history lesson. (Transcript, at p. 223)

According to Mr. Singh, having been forced to give him the ES-01 assignment, Mr. Mozes and Ms. Sheikh decided to teach him a lesson, and began harassing him every day. Mr. Singh said that Mr. Mozes would give Mr. Singh one set of instructions and thereafter, Ms. Sheikh would give him a second set of instructions that were in conflict with the first.

Mr. Singh's frustration with the treatment he was receiving is summarized in a memo that he wrote to Ms. Sheikh on August 14, 1989, wherein he describes Ms. Sheikh as having treated him as 'almost nothing' and having been 'nasty and personal' with him. The memo goes on to provide a chronology of the instructions that Mr. Singh received from Ms. Sheikh and his efforts to respond to them. The memo also notes that it was eventually necessary for Mr. Singh to have a meeting with Mr. Mozes in order to clarify what was expected of him (Exhibit HR-1, Tab 11). According to Mr. Singh, Ms. Sheikh did not respond to this memo.

Mr. Singh stated that the harassment continued on a daily basis throughout his term. Mr. Singh received a one paragraph memo dated January 16, 1990 from Mr. Mozes wherein Mr. Mozes states that he had reviewed the latest version of the study, and would shortly be providing Mr. Singh with detailed comments. Mr. Mozes goes on to note that the draft report made mention of a possible solution to a technical problem that had previously been identified. Mr. Mozes observes that this solution had been suggested by Mr. Singh's supervisors, and that:

Your report should certainly state that this idea/solution did not originate from you

or from the study you conducted. However I do agree that this is the most promising solution. (Exhibit HR-1, Tab 13)

Mr. Singh responded to this memo with a four page memo of his own, which he copied to a number of individuals, including Mr. Mulvihill, Mr. Dodds, Ms. Sheikh, the Director General of the Personnel Branch at Statistics Canada, the President of the Economists' Union, the Commissioner of the Public Service of Canada and the Chief Commissioner of the Canadian Human Rights Commission. In his response, Mr. Singh gives his chronology of events, and states: "On several occasions in the past, you have accused me of 'lying' and 'cheating'." The memo accuses Mr. Mozes of "systematically trying to undermine [Mr. Singh's] reliability and potentiality," and of "singlemindedly pursuing a goal of destroying [Mr. Singh] in a calculated manner". Mr. Singh refers to his employment history with Statistics Canada since 1981, and states that, despite the fact that he had more academic qualifications than many others above him, he had systematically been excluded from all promotions. Mr. Singh goes on to state:

I have been in this position (ES-01 term) since June 2, 1989 and you have been writing memos like these (and worse) from the very beginning. A human being can take only so much, even if he is of a racial minority..."

...Even if I am of a racial minority, it does not give you right to harass me. I have taken an enormous amount of unjustified abuse from you... (Exhibit HR-1, Tab 13)

According to Mr. Singh, no response to this memo was received from Mr. Mozes.

Mr. Singh did not file a formal complaint with respect to the harassment that he says he was encountering at the hands of Ms. Sheikh and Mr. Mozes. According to Mr. Singh, he was afraid to complain: he was a low level employee who would be going up against those much higher up in the organization. He had a wife and two children to support and felt that his livelihood was on the line.

Mr. Singh states that he approached both Mr. Mozes and Mr. Dodds in late March, 1990, to ask that his term be extended. According to Mr. Singh, Mr. Mozes told him that his term would not be extended, that he would revert to his previous status as a CR-04, and that he was being transferred out of the Transportation Division. Mr. Dodds reportedly advised Mr. Singh that the Transportation Division did not have the money to continue to pay his ES-01 salary. Effective April 1, 1990, Mr. Singh was transferred to the Operations and Integration Division of Statistics

Canada
at the CR-04 level.

Mr. Singh testified that at around the same time that he started his term assignment, Barbara Bekooy and Randy Semotiuk also started on term assignments in the Transportation Division. According to Mr. Singh, Ms. Bekooy and Mr. Semotiuk were doing work that was very different that the work the he was doing, and that their work was routine. Ms. Bekooy was evidently the daughter of Jan Bekooy, who had been the Chief of the Transportation Division for a long period of time. Both Ms. Bekooy and Mr. Semotiuk were white and, according to Mr. Singh, both Ms. Bekooy and Mr. Semotiuk's terms were extended beyond March 30, 1990, although Mr. Singh does not know how long an extension each received.

In the Spring of 1990, Ms. Sheikh prepared an appraisal of Mr. Singh's performance while in the term ES-01 position. Mr. Singh did not agree with Ms. Sheikh's assessment of his performance and grieved the appraisal. His grievance was denied, first by Mr. Dodds and subsequently by Ms. Slater.

Mr. Mozes testified that after he got the funding for the redevelopment project, he went to see Mr. Drover and asked to hire staff to help him with the project. Mr. Drover agreed to Mr. Mozes hiring people, but told him to hire for fixed terms only as there were concerns as to timing and the ongoing availability of funding. Mr. Mozes stated that it was Mr. Drover who suggested that Mr. Mozes hire Mr. Singh for a fixed term. According to Mr. Mozes, the tax data study was part of a much larger redevelopment project, which had been his idea, and for which he was solely responsible. Mr. Mozes stated it was very important to him that the project succeed, as his professional reputation and his job were on the line. According to Mr. Mozes, the project was being carried out on a cost-recovery basis: Statistics Canada had a partnership-type arrangement with the Canadian Transport Commission, Transport Canada and provincial Transportation Departments, who sponsored the redevelopment project financially, supported by the trucking association.

Mr. Mozes denies promising Mr. Singh in the spring of 1989 that his term as an ES-01 would be extended beyond the initial term. Mr. Mozes stated that he was not in a position to make a commitment of this nature as he did not have the requisite staffing authority.

Mr. Mozes stated that while on the term assignment, Mr. Singh was directly supervised by Ms. Sheikh. However, Mr. Mozes was very involved in the work that Mr. Singh was doing. Mr. Mozes described concerns that he had with the work that Mr. Singh had been doing, and the steps that Mr. Mozes and Mr. Singh took to guide Mr. Singh in the performance of the

assignment. Mr.

Mozes denies that either he or Ms. Sheikh harassed Mr. Singh. Mr. Mozes acknowledged that while

he and Ms. Sheikh did not disagree on the basic objectives of the project, they each may have emphasized different things in their discussions with Mr. Singh, and that Mr. Singh may have perceived that they were contradicting each other.

Mr. Mozes was copied with Mr. Singh's August 14 memo to Ms. Sheikh (Exhibit HR-1, Tab 11). He states that he sat down with Mr. Singh and Ms. Sheikh separately in order to discuss Mr. Singh's concerns. As a result of these discussions, Mr. Mozes decided to implement weekly meetings between the three of them in order to avoid future misunderstandings.

Mr. Mozes acknowledges receiving Mr. Singh's January 22, 1990 memo and confirms that he did not respond to it in writing. He explained:

I found it very insulting. I was very, very hurt. It's not true. Saying that it is not true is really an understatement. I just did not respond to it because the nature of the memo and the way it was written I thought really didn't deserve an answer. I am a professional, and I didn't think I should respond to that memo. (Exhibit HR-1, Tab 13)

Mr. Mozes maintains that he did discuss the memo with Mr. Singh, and told Mr. Singh how upset he was with the memo.

According to Mr. Mozes, there were three reasons why Mr. Singh's term was not extended past March 31, 1990: his work was completed, his term expired, and the analytical portion of the overall project was coming to an end and the funding was required to develop systems, sampling methodology, and for the purchase of resources for the project. Mr. Mozes denies that Mr. Singh's

age or national or ethnic origin were factors in the decision not to extend the term of his ES-01 assignment.

Mr. Mozes stated that both Ms. Bekooy and Mr. Semotiuk were brought in as term ES-01's. Mr. Semotiuk was working on an annual survey of trucking, which was an ongoing project. He was

supervising several people, and his services were needed until the Transportation Division could bring someone in to fill the position on a permanent basis. Ms. Bekooy was doing ad hoc work such

as writing articles and working on marketing projects for Mr. Mozes and the Director of the Transportation Division. Both stayed in the Transportation Division 'a little longer' than Mr. Singh,

and then both left Statistics Canada shortly thereafter to accept positions elsewhere in the Public Service.

Mr. Mozes explains that Mr. Singh was transferred out of the Transportation Division and into the Operations and Integration Division at the end of March, 1990 as part of a corporate decision

to consolidate or centralize certain survey functions into one division. The survey that Mr. Singh worked on as a CR-04 was one of the surveys moved over to the Operations and Integration Division, and Mr. Singh accordingly moved with it. Several other Statistics Canada witnesses (Mr.

Beauchamp, Ms. Carrière, Mr. Nemes, Ms. Slater and Mr. Dodds) gave similar testimony with respect to that circumstances surrounding Mr. Singh's transfer to the Operations and Integration Division.

With respect to the performance appraisal Ms. Sheikh carried out in relation to Mr. Singh, in Mr. Mozes' s view, if anything, the appraisal was a little bit generous.

Mr. Dodds recalls Mr. Singh approaching him about having his term extended, but does not recall any discussion regarding any promises that may have been made to Mr. Singh by Mr. Mozes

with respect to the extension of his term. According to Mr. Dodds, by March, 1990, the projects that

Ms. Bekooy and Mr. Semotiuk had been working on were nearly completed , and it would not have

made sense to take either Ms. Bekooy or Mr. Semotiuk off of their projects in order to replace either

of them with Mr. Singh. Ms. Bekooy and Mr. Semotiuk each had their terms extended for short periods in order to allow them to complete their work, following which each left Statistics Canada.

Mr. Nemes stated that Mr. Singh was given the ES-01 assignment as a chance to ' prove himself ' . Mr. Singh, Mr. Semotiuk and Ms. Bekooy were all hired for fixed terms on three separate

cost recovery programs, and that Mr. Singh' s term was not extended as he had completed his project.

Mr. Semotiuk and Ms. Bekooy' s projects were not completed and they received short extensions.

Following the expiry of his term, Mr. Singh reverted to his substantive position as a CR-04.

Although Ms. Sheikh evidently still works for Statistics Canada and was listed by the respondent as a witness to be called by it in these proceedings, she was not called to testify. There

was some evidence to suggest that Ms. Sheikh may have had her own race or national or ethnic origin-based complaints with respect to her treatment by Statistics Canada.

v) The 1990 SI Competition

Effective April 1, 1990, Mr. Singh was working as a CR-4 in the Operations and Integration Division. He reported to Terry Carrière, who in turn reported to Jacques Beauchamp, the Chief of

the Operations and Integration Division. Mr. Singh alleges that in 1990 he competed for an SI-02 position, and that he got high marks on the knowledge and ability aspects of the examination. He

further alleges that he was deemed unsuitable as a result of a negative reference given by Jacques Beauchamp. Mr. Singh maintains that Mr. Beauchamp disliked Mr. Singh, and that although he provided a reference, Mr. Beauchamp had no idea about the quality of Mr. Singh's work. In his testimony, Mr. Singh described the reference provided by Mr. Beauchamp as 'maliciously wrong' and 'full of lies and distortions'.

According to Mr. Singh, at the time of the competition, Mr. Singh had been in the Operations and Integration Division for two or three months. He testified that he did not know Mr. Beauchamp and that he had never worked for him. On several occasions Mr. Singh stated that he had never even met Mr. Beauchamp. At the same time, Mr. Singh testified that Mr. Beauchamp had disliked him 'from day one' and had harassed him 'left, right and centre'. Mr. Singh stated that Mr. Beauchamp was a friend of Mr. Mozes' and that Mr. Beauchamp had said to Mr. Singh: "Mr. Mozes got rid of you. I do not want you; you are not qualified for this kind of work" (Transcript, p. 421). Mr. Singh subsequently explained that he did meet Mr. Beauchamp, but only after he had been in Operations and Integration Division for over a year, well after the competition in question.

Mr. Singh states that he provided two names as references - Mr. Akeaymong and Wayne Smith. Mr. Smith had supervised Mr. Singh when he worked on a CAD assignment at the ES level in the Communications Division in 1986-1987. According to Mr. Singh, the standard practice at Statistics Canada was to go to the individuals listed by the candidate as references unless the candidate expressly consented to the board going elsewhere. Mr. Singh did not consent to a reference being sought from Mr. Beauchamp. He stated by the time that he became aware that this was something that he could grieve, the time for filing a grievance had passed.

Mr. Singh was initially unable to identify the members of the selection board for the competition, but stated that there were three and that they all worked for Mr. Beauchamp. In his final submissions, Mr. Singh identified two of the board members as Linda Gorman and Jasmine Boyer. Mr. Singh stated that Mr. Beauchamp had a reputation within Statistics Canada as a bully, that the members of the selection board were scared of him and that Mr. Beauchamp's views tainted the selection board.

Mr. Singh provided the Tribunal with a copy of his examination, copies of the reference information obtained by the selection board, and information with respect to his results that he

had obtained from Personnel (Exhibit HR-1, Tab 12). According to this information, Mr. Singh passed the knowledge and abilities portions of the examination, but only obtained six out of thirty on the Personal Suitability component. Eighteen out of thirty was required to qualify.

The written examination was apparently designed to test the candidate's knowledge. There was also an oral examination to test ability and personal suitability. The bulk of the questions in the oral examination were directed to assessing ability, although one of the questions appears to have been specifically intended to test personal suitability. It asks the candidate to describe how he or she would handle a particular fact situation. We were also provided with what appears to be the expected answer, which had approximately eleven elements to it, each of which was weighted for scoring purposes. Mr. Singh's response covered only one of the suggested elements, and as a result he was awarded one out of a possible fifteen marks for this question. The remaining fifteen marks for personal suitability appear to have related to the results of the reference inquiries.

The selection board obtained three references with respect to Mr. Singh from Mr. Beauchamp, Mr. Smith and Ms. Carrière. It is not clear who contacted the references. Each referee was asked to rate Mr. Singh's personal suitability in three areas: ability to maintain effective interpersonal relations, initiative and thoroughness. Each was measured on a scale of one to five, five being excellent and one being unacceptable. Mr. Beauchamp gave Mr. Singh a one on each in the first two areas, and a three in the area of thoroughness. The narrative comments with respect to Mr. Singh's ability to maintain effective interpersonal relations states that Mr. Singh had shown great difficulty relating to his co-workers, and that he had a very superior attitude. As far as his initiative was concerned, Mr. Beauchamp is noted to have said that Mr. Singh had shown no initiative, and an example is given. With respect to Mr. Singh's thoroughness, Mr. Beauchamp is noted to have said that Mr. Singh would follow instructions explicitly, but only on certain tasks, and that Mr. Singh had shown a preference for report writing only.

Mr. Smith rated Mr. Singh's ability to maintain effective interpersonal relations at three out of five, and his initiative at four out of five. No mark is assigned to his thoroughness, with there being a notation that Mr. Smith felt unable to rate Mr. Singh in this regard based upon the short time that he had observed Mr. Singh's work. The comments do note that Mr. Singh was unduly resistant

to criticism of his work. In his evidence, Mr. Singh stated that he did not take issue with the reference provided by Mr. Smith (Transcript, p. 302).

Ms. Carrière gave Mr. Singh a two with respect to his ability to maintain effective interpersonal relations, a two for initiative and a three for thoroughness. Her comments are more detailed than those of the other two, but echo many of the same concerns - that Mr. Singh considered himself academically superior to his co-workers, and that he was resistant to criticism. Reference was also made to a complaint received from another division about problems encountered with Mr. Singh. As well, Ms. Carrière is noted to have observed that Mr. Singh's primary concern was to find another position.

Mr. Beauchamp, Ms. Carrière and Mr. Smith all testified for the respondent. Each confirmed that they had provided references for Mr. Singh, and each confirmed that the references that they had provided represented a fair assessment of Mr. Singh's performance.

Mr. Beauchamp testified there were 65 to 70 employees in his section, and that he met Mr. Singh the day that he came to work in Operations and Integration Division. He was aware of problems with respect to Mr. Singh's performance as a result of his regular discussions with Ms. Carrière and Ghislaine Comeau. Ms. Comeau was a Statistical Officer to whom Mr. Singh also reported. Mr. Beauchamp stated that he was told that while Mr. Singh was good doing analytical work, he showed no interest in doing repetitive work. Much of the work done in the Operations and Integration Division was repetitive in nature.

According to Mr. Beauchamp, in October of 1990 he was contacted by Linda Gorman, who was one of his subordinates. Ms. Gorman was a member of the selection board. Mr. Beauchamp stated that he does not know who the other members of the board were. Mr. Beauchamp testified that he asked Ms. Gorman why he was being called, and that Ms. Gorman told him "that every employee of a Division was being referenced at the Chief level" (Transcript, p. 2041) Accordingly, he provided a reference consistent with that entered into evidence, which reference he believed to have been fair.

Mr. Beauchamp denied that he was a friend of Mr. Mozes', stating that he knew Mr. Mozes only as a client of the Operations and Integration Division, and that in fact he had frequently had arguments with Mr. Mozes over his demands.

Ms. Carrière confirmed the problems that she had encountered in supervising Mr. Singh, which problems she discussed with Mr. Beauchamp on a regular basis, and which are reflected in

the reference that she provided. Ms. Carrière explained the circumstances surrounding the complaint received from the Agriculture Division with respect to Mr. Singh, which complaint was documented in a memo dated August 16, 1990 from Lynn Walters of the Agriculture Division to Ms. Carrière (Exhibit HR-7). According to Ms. Walters' memo, Mr. Singh had been working on a survey for the Agriculture Division, and had shown himself to be uninterested in the work to be done. Mr. Singh was reportedly unreceptive to suggestions from the Agriculture Division, and failed to apply certain editing specifications, despite having been asked to do so. It is noteworthy that a copy of the complaint memo was sent to Mr. Beauchamp, as was Mr. Singh's response (Exhibit HR-8). In his final submissions, Mr. Singh stated that Ms. Walters was a close friend of Ms. Carrière, and that Ms. Walters wrote the memo in collusion with Ms. Carrière, in an effort to discredit Mr. Singh.

Ms. Clément testified to Statistics Canada staffing policies as they related to testing for personal suitability. She provided us with a copy of the Public Service Commission Policy on reference checks, which policy states that unless a reference check is being carried out to assess a reliability/security qualification, employee consent to the reference is not required when the referee is from within a federal institution. The policy does suggest that consent be obtained as a courtesy, even where it is not required (Exhibit R-18). Statistics Canada's internal policy regarding reference checks indicates that references contacted may be the ones identified by the candidate or may be anyone else familiar with the candidate's work. The policy stipulates that for candidates from outside the Public Service, employee consent is required before the employee's current employer is contacted. The policy further observes that it may be useful to contact references other than those provided by the candidate, in order to avoid encountering only referees who are excessively positive about the candidate (Exhibit R-19, p. 3).

Ms. Clément stated that the person giving the reference should have first-hand knowledge of the candidate's work performance, and should not rely on hearsay. The head of a section would normally have sufficient information to provide a reference, even if he was not the candidate's direct supervisor.

vi) The 1991 ES-01 Competition

From February, 1991 until August, 1991 Mr. Singh was away from the Operations and

Integration Division on a CAD assignment. During this time, Mr. Singh worked in the Labour and Household Surveys Analysis Division, where he was supervised by Mr. Akeaympong. Mr. Singh is described as having worked at the ' Junior ES level' , which appears to be analogous to the ES-01 level. Mr. Singh' s performance while on this assignment was described by Mr. Akeaympong as ' outstanding' . According to Mr. Akeaympong, Mr. Singh got on well with other members of the staff, was a diligent worker who needed little supervision and was definitely employed below his full potential (Exhibit HR-1, Tab 18). Following the completion of this CAD assignment, Mr. Singh returned to his CR-04 position in the Operations and Integration Division.

In 1991 Mr. Singh applied for an ES-01 position through Statistics Canada' s ES Recruitment Program. According to Mr. Singh, he wrote a written examination. He states that he did very well on the examination, however he did not pass. Mr. Singh testified that he went to see the Chair of the selection board, Ms. Lucie Laliberté, who told him that he had failed the examination by two marks. Mr. Singh stated that Ms. Laliberté dissuaded him from appealing, saying that it would reflect badly on the Department.

Mr. Singh states that having failed the examination, he did not move on to an oral interview, and that, as a result, no assessment of his personal suitability was carried out.

Mr. Singh has no information with respect to the other candidates in the competition. He has, however, provided a list from this competition which shows that forty-eight individuals were hired through the competition (Exhibit HR-2, Tab 20).

Mr. Singh does not know whether there had been any change in the quality of the applicants for Statistics Canada ES positions as a result of the introduction of the ES Recruitment Program, or whether the number of applicants increased. He contends, however, that the program is targeted to recent university graduates, most of whom tend to be young. He further disputes the finding that he failed the examination, pointing out that he had previously qualified in ES competitions, that he had performed successfully in ES level positions on several previous occasions and that he had superior academic qualifications.

In his testimony, Mr. Akeaympong confirmed that Mr. Singh performed well at the ES level while on the CAD assignment in 1991. He also stated that since the introduction of the ES Recruitment Program in 1990, both the number and the quality of ES applicants have increased.

Whereas prior to 1990, candidates would only have Bachelor's degrees, candidates now often have Master's degrees. In addition, Statistics Canada is now getting applicants with more sophisticated knowledge, with computer skills, and who are familiar with statistical manipulation techniques and econometric models.

A number of the respondent's witnesses dealt with the changes effected as a result of the implementation of the ES Recruitment Program. Mr. Vincent stated that the recruits under the new program are recruited from across the country and are 'the cream of the crop'. According to Mr. Vincent, candidates are now required to have Master's degrees.

Mr. Nemes also stated that under the new program, candidates now have at least a Master's degree in either economics, sociology or statistics.

Mr. Dodds provided a detailed explanation of the reasons for the introduction of the ES Recruitment Program, which has already been referred to earlier in this decision. As well, he provided a comprehensive overview of the program itself. According to Mr. Dodds, one of the purposes of the ES Recruitment Program was to ensure that recruits coming into Statistics Canada were of a uniformly high standard. Under the ES Recruitment Program all candidates must have a university degree with related specialization. This is a minimum requirement: candidates who do not hold a university degree will be screened out of the competition. For candidates coming from inside Statistics Canada, once the candidate meets the minimum standard, the nature or level of the degree does not matter. In other words, a candidate with a doctorate will not be considered any more favourably than will a candidate with a B.A. in economics. External candidates are assessed on the basis of marks, and as well, on the types of university courses they had taken. Preference was given to those with quantitative courses such as econometrics or statistics. According to the ES Recruitment and Development Program Policy and Guidelines, for external candidates, preference may be given to those with a Master's degree (Exhibit R-1, Tab 22, p. 2).

All candidates who meet the minimum educational requirements are then rated or assessed on the basis of knowledge, abilities and personal suitability. A pass mark in each of these areas was required in order for a candidate to be successful. The manner in which these elements were

assessed could vary from competition to competition. According to Mr. Dodds, where there was a

large number of applicants, the process usually started with a written test of knowledge and ability.

Those who passed the test would then go on to an oral interview. Personal suitability was usually

assessed through an oral interview, where, for example, role playing exercises could be used to assess attributes such as tact. Reference inquiries could also be used as an assessment tool. In competitions where there were fewer candidates, the written test could be dispensed with.

We have little information with respect to the process that was actually followed in this competition. Ms. Laliberté did not testify. No evidence with respect to the results of the competition itself was put before the Tribunal, other than the list of those hired. Thus we have not seen the examination questions, any expected answers that there may have been, nor have we seen Mr. Singh's answers. Similarly, we have not been provided with any information as to the identity, qualifications, age, ethnicity or results of any of the other candidates. Although it is not clear, it appears that the documentation relating to this and other competitions may have been destroyed in accordance with Statistics Canada's policy on the destruction of staffing files (Exhibit R-25).

vii) The 1992 ES-01 Competition

In 1992 Mr. Singh again applied for an ES-01 position through the ES Recruitment Program. According to Mr. Singh, this time the competition did not include a written examination, but consisted only of an oral interview. Mr. Singh was interviewed by Darryl Rhoades, who was the Director of the Transportation Division at the time, a process that Mr. Singh says was very subjective. Mr. Singh says that in the course of the interview, he was asked to complete a yellow form, which asked, among other things, his date of birth. He also self-identified himself on the form

as 'South Asian'.

Mr. Singh does not recall any of the questions asked in the course of the interview, nor does he recall being prompted by Mr. Rhoades to answer questions more fully. According to Mr. Singh,

he had no problems at all in the interview. Despite the fact that he did very well in the competition,

he was not offered any of the seventy ES positions Mr. Singh says the respondent filled as a consequence of the competition.

Although the option was available to him, Mr. Singh did not meet with Mr. Rhoades after the competition in order to discuss his performance, as he felt that he had done so well it wasn't necessary to do so. He stated that he was fully convinced that he should have been offered one of

the seventy available positions. He later went to the Public Service Commission Appeal Board, where he was advised that there was an ongoing problem with the Recruitment Program, the nature

of which is not clear from his evidence. Mr. Singh testified that he was told by the Appeal Board that he should file a complaint with the Human Rights Commission.

Mr. Singh initially stated that he did not grieve the competition process, although he subsequently recalled doing so when presented with documentation relating to the grievance. The grievance was denied at both the Director and Assistant Chief Statistician levels. Mr. Singh also brought his Union into the process, and a letter was sent on Mr. Singh's behalf to the Chief Statistician asking that the selection process be looked into, advising that a human rights complaint would be filed unless the matter was resolved satisfactorily. Mr. Singh was advised that Statistics Canada was of the view that the process was fair, and was also told that the Public Service Commission was auditing this competition, amongst others, and would be recommending corrective action in the event that irregularities in the process were subsequently identified.

A copy of the Public Service Commission audit was entered into evidence by the respondent (Exhibit R-1, Tab 13). The Public Service Commission concluded that the ES Recruitment Program was well managed, and that appointments made through the Program had been made according to merit. The audit report noted that particular efforts had been made to ensure that employment equity was integrated into the program, and that, in the 1991-92 ES Recruitment Program, 43% of those hired were women, 4% were aboriginal, 12% were visible minorities and 3% were disabled individuals. The Commission did recommend the creation of a separate, closed competition for Statistics Canada candidates, and further noted that the evaluation of personal suitability should be better defined.

According to Mr. Singh, the 1992 Recruitment Program was designed predominantly for young, white, university graduates, and that most of the successful candidates were in their early twenties.

Darryl Rhoades testified on behalf of the respondent with respect to this competition. Mr. Rhoades is the Director of the Industry Measures and Analysis Division at Statistics Canada. Mr. Rhoades was part of the team interviewing candidates as part of the 1992 ES Recruitment Program. According to Mr. Rhoades, there were close to eighteen hundred applicants in this competition, of which approximately five hundred were interviewed. One hundred and twenty-nine of these came from within Statistics Canada. Mr. Rhoades himself interviewed fifty-six candidates, twenty of whom were from within Statistics Canada. Mr. Rhoades stated that sixty-four individuals were

hired

as a result of the competition, some at the ES-01 level, and the rest as ES-02's.

According to Mr. Rhoades, external candidates were screened prior to being interviewed, in an effort to reduce the number of interviews necessary. Candidates were scrutinized with regard to the courses they had taken, and the marks they had achieved. Mr. Rhoades stated that the calibre of candidates was very high, and that the external candidates who progressed to the interview stage generally were 'A' students. Statistics Canada policy was to interview all of the internal candidates, regardless of marks, and on that basis, Mr. Singh was granted an interview. According to Mr. Rhoades, based upon his experience with the level of candidates in the competition, with his marks, had Mr. Singh been applying from outside Statistics Canada he would not have been granted an interview.

Mr. Rhoades testified that internal candidates were required to meet the basic educational requirement of a Bachelor's degree in order to be able to participate further in the competition. The fact that an internal candidate held a post-graduate degree did not provide any additional advantage.

Mr. Rhoades stated that the interview process was designed to test specific knowledge as well as analytical ability. Candidates were also assessed in terms of their personal suitability and overall composure. The assessment of the knowledge component was largely objective, with there being greater subjectivity in the assessment of candidates' abilities and personal suitability. The knowledge component was assessed by six specific questions. One question asked the candidates to look at two statistical tables, one indicating information about employment in various industries and another indicating information about output in various industries, and to describe what they saw.

On this question, the interviewers were looking to see if the candidates would make the analytical connection and draw the appropriate inferences about productivity. In addition, there were questions about occupational structures and unemployment, on how the Consumer Price Index is put together, and on monetary policy.

In addition to these standard questions, which were asked of all candidates by the various Committee members conducting interviews, the Recruitment Committee had prepared a detailed description of a range of expected answers (Exhibit R-33). Numerous possible answers were suggested for each question. According to Mr. Rhoades, these answers represented a starting

point,

but the interviewers would also accept appropriate answers that did not appear on the list.

According to Mr. Rhoades, the total marks allocated by the Committee for all of the questions in the competition came to more than 100%. As a result, it was necessary to scale candidates' marks on the knowledge component of the interview, so that the total result could be expressed as a percentage. It appears that a transcription error was made in the calculation of Mr.

Singh's net results, as well as in the calculation of the net results of several other candidates. As a

consequence of having mixed gross and net results, Mr. Singh's score was recorded on a chart summarizing the scores of all of the candidates interviewed by Mr. Rhoades (Exhibit R-34) as being

68 out of 109. In fact, his score was 75 out of 109 or 68%.

Mr. Rhoades had copies of his notes from his interview with Mr. Singh, and as well, had a copy of the grading grid recording Mr. Singh's mark as well as those of the other candidates that he interviewed (Exhibits R-6 and R-34). The 'Knowledge' component of the interview accounted for

forty-five percent of the total mark. Mr. Singh received thirty-nine out of fifty-four, which was subsequently scaled to thirty-two out of forty-five, on the 'Knowledge' component of the interview.

Mr. Rhoades reviewed each of the questions posed to Mr. Singh in some detail, and compared Mr.

Singh's answers, as recorded in Mr. Rhoades's notes of the interview, with the list of expected answers. According to Mr. Rhoades, Mr. Singh provided incomplete answers to the questions, although he was able to add to some of his initial answers as a result of prompting on the part of Mr.

Rhoades.

Candidates were also assessed on the basis of their abilities. Again, this assessment was based on the standard questions, measured against the list of expected answers. According to Mr.

Rhoades, the committee was looking at the candidates' ability to perform analysis, including deductive reasoning ability, the ability to draw connections between factors, and the ability to synthesize a message from a body of information. Mr. Rhoades again reviewed his notes of the interview, and compared Mr. Singh's answers against the expected responses. According to Mr.

Rhoades, Mr. Singh obtained twenty out of a possible thirty marks on the 'Abilities' portion of the interview.

The final area on which candidates were evaluated was 'Personal Suitability'. Under this heading, interviewers were looking at the candidates' communication skills as measured by the

individual' s ability to get their message across in the interview, as well as attributes demonstrated by the candidates such as composure, motivation, confidence and enthusiasm. Mr. Singh obtained a total of sixteen marks out of a possible twenty five in this area. Mr. Rhoades stated that this score was based on his assessment of Mr. Singh' s performance in the interview as a whole, rather than as a result of an answer to a specific question. Mr. Rhoades was unable to provide any more specific information on what factors were considered in rating Mr. Singh on his personal suitability.

Mr. Rhoades stated that in the course of the interview candidates were asked to sign a ' Personal Screening Request and Authorization' form which he identified as Exhibit R-35. The form asks the candidates for various information, including the candidate' s date of birth. Mr. Rhoades was unclear as to the purpose of the form, indicating that interviewers had been told by Personnel that candidates were required to complete the form. The form, which appears to relate to the obtaining of Government security clearances, has several parts to it - the part retained by the candidate is yellow.

As previously noted, Mr. Singh obtained a total score in the competition of 75 out of 109, for a net percentage score of 68%. According to Mr. Rhoades, this placed Mr. Singh at about 30% from the bottom of the fifty-six candidates that he interviewed. Amongst the candidates he interviewed, there were thirty-five with scores higher than that obtained by Mr. Singh.

After the interviews were completed, Mr. Rhoades and each of the other interviewers submitted lists with their top ten or twelve candidates on it to a central committee. Although candidates had to score at least 80% in order to qualify for a position, in fact, the lowest ranked candidate of those whose names were forwarded to the central committee by Mr. Rhoades had a score in the vicinity of 85%. In choosing amongst the top-ranked candidates, consideration was also given to ensuring that there was an appropriate mix between economists and sociologists. As well, favorable consideration could have been given to a slightly lower ranked individual if they were a member of a visible minority.

Mr. Rhoades acknowledged that the majority of the recent graduates hired through the ES Recruitment Program were in their twenties and thirties, but denied that this was a factor in his assessment of Mr. Singh' s candidacy.

Although not directly involved in this competition, Mr. Dodds testified at length with respect to the ES Recruitment Program at Statistics Canada. According to Mr. Dodds, any internal candidate who qualified (ie: met the threshold requirements for marks) under the ES Recruitment Program was offered a position, even if there were external candidates scoring higher in the process.

Statistics Canada's Policy and Guidelines for the ES Recruitment Program stipulate that candidates must meet a threshold of 80% in order to qualify for a position (Exhibit R-1, Tab 22, p.4).

viii) 1992 Grievance

Mr. Singh's complaint makes reference to a grievance that he filed in 1992. No evidence was received with respect to this issue. In argument, counsel for the Commission took the position that whatever may have gone on in the context of the grievance was not relevant to the matters before this Tribunal. Mr. Singh did not address the issue at all in his submissions. Accordingly, we do not intend to deal further with the matter.

IV LAW

Section 7 of the CHRA provides, in part, that:

It is a discriminatory practice, directly or indirectly ...

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

Age and national or ethnic origin are prohibited grounds of discrimination.

In a case of this nature, the burden of proof is on the complainant to establish a prima facie case of discrimination. Once that is done, the burden then shifts to the respondent to provide a reasonable explanation for the conduct in issue. (*Ontario Human Rights Commission v. Etobicoke*, [1982], 1 S.C.R. 202 at 208 and *Ontario Human Rights Commission and O'Malley v. Simpson Sears Limited*, [1985], 2 S.C.R. 536 at 558).

A prima facie case is one which covers the allegations made, and which, if believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent (*O'Malley, supra*, p. 558). The allegations made by the complainant must be credible in order to support the conclusion that a prima facie case has been established (*Dhanjal v. Air Canada*, [1997] F.C.J. No. 1599, (1997) 139 F.T.R. 37).

In the employment context, *Shakes v. Rex Pak Limited* (1982), 3 C.H.R.R. D/1001 describes a prima facie case as requiring proof of the following elements:

- a) that the complainant was qualified for the particular employment;
- b) that the complainant was not hired; and
- c) that someone no better qualified but lacking the distinguishing feature which is the gravamen of the human rights complaint (ie: race, colour etc.) subsequently obtained the position. (at p. D/1002)

This multi-part test has been modified to address situations where the complainant is not hired and the respondent continues to look for a suitable candidate. In such cases, the establishment

of a prima facie case requires proof:

- a) that the complainant belongs to one of the groups which are subject to discrimination under the Act, eg: religious, handicapped or racial ground;
- b) that the complainant applied and was qualified for a job that the employer wished to fill;
- c) that, although qualified, the complainant was rejected; and
- d) that, thereafter, the employer continued to seek applicants with the complainant's qualifications. (Israeli v. Canadian Human Rights Commission and Public Service Commission (1983), 4 C.H.R.R. D/1616 at p. 1618)

The Shakes or Israeli tests will not, however, appropriately identify the elements of a prima facie case in every employment-related case (Chander and Joshi v. Department of National Health and Welfare, TD 16/95, at p. 25, aff'd [1997] F.C.J. No. 692, (1997) 131 F.T.R. 301).

If the respondent does provide a reasonable explanation for the otherwise discriminatory behaviour, the complainant then has the burden of demonstrating that the explanation was pretextual, and that the true motivation behind the employer's actions was, in fact, discriminatory (Israeli v. Canadian Human Rights Commission 4 C.H.R.R. D/1616 at p. 1617 (aff'd 5 C.H.R.R. D/2147) and Basi v. Canadian National Railway Company (1988), 9 C.H.R.R. D/5029).

The jurisprudence recognizes the difficulty, in cases of discrimination, of proving the allegations by way of direct evidence. As was noted in Basi:

Discrimination is not a practice which one would expect to see displayed overtly, in fact, there are rarely cases where one can show by direct evidence that discrimination is purposely practised. (at p. D/5038)

Rather, it is the task of the Tribunal to view all of the circumstances to determine if there exists what was described in the Basi case as the "subtle scent of discrimination".

Statistical evidence regarding systemic issues in a workplace may constitute circumstantial evidence from which it may be inferred that discrimination probably occurred in an individual case

(Chopra v. Department of National Health and Welfare, [1998] F.C.J. No. 432).

The standard of proof in discrimination cases is the ordinary civil standard of the balance of probabilities. In cases of circumstantial evidence, the test may be formulated as follows:

"An inference of discrimination may be drawn where the evidence offered in support of it renders such an inference more probable than the other possible inferences or hypotheses. (B. Vizkelety, *Proving Discrimination in Canada* (Toronto), Carswell, 1987 at p. 142.)

It is not necessary that discriminatory considerations be the sole reason for the actions in issue for a complaint to succeed. It is sufficient that the discrimination be a basis for the employer's decision (*Holden v. Canadian National Railway* (1990), 14 C.H.R.R. D/12 at p. D/15.

V ANALYSIS

As a consequence of the significant volume of evidence adduced in the course of this hearing, and in the interest of providing a coherent decision, we have outlined the evidence as it relates to each of the principal allegations referred to in Mr. Singh's complaint and have used the same structure for the analysis portion of the decision. While each issue is dealt with separately, we have also considered each of the allegations in the context of the totality of the evidence, in an effort to determine whether there existed a discernable pattern of discriminatory conduct on the part of the respondent.

i) Credibility of Mr. Singh

The resolution of many of the issues in dispute in this case ultimately depends upon our findings with respect to the credibility of the various witnesses. As Mr. Singh was involved in almost every aspect of each of the events giving rise to his complaint, his evidence was key to many of his allegations. As a result, we will deal at the outset with our findings with respect to Mr. Singh's credibility. Questions as to the credibility of other witnesses will be considered as we address the involvement of each of those individuals in the events in dispute.

The Tribunal has no doubt that Mr. Singh honestly believes that he has been the victim of age discrimination as well as discrimination relating to his national or ethnic origin throughout most of his employment with Statistics Canada: indeed, his outrage at his perceived treatment at the hands of the respondent was palpable throughout his testimony. In the course of his testimony, however, Mr. Singh would often make sweeping statements where it appeared that he thought that it would advance his case. While he would usually retreat from these statements when pressed, this tendency does raise concerns as to Mr. Singh's reliability as a witness.

By way of example, in cross-examination, Mr. Singh was asked about his job performance. He stated:

Q. In 1985 to 1992 you had several supervisors.

A. Yes, I did.

Q. Some of them had positive comments about you, sir.

A. They did.

Q. Some of them had negative comments about you.

A. Nobody had negative comments.

Q. Nobody?

A. No. (Transcript, p. 194)

Mr. Singh was then confronted with several examples of different supervisors having made negative comments with respect to his job performance during this time frame. Mr. Singh did not deny that the comments were made, rather the essence of Mr. Singh's explanation for this apparent discrepancy was that he did not agree with his supervisors' comments.

In addition, there are instances where Mr. Singh has clearly confused events: for example, he was insistent that he gave Mr. Akeaymong's name as a reference in the 1990 SI competition (Transcript, p. 142 and p. 294). At the same time, Mr. Singh testified that he only went to work for Mr. Akeaymong in February of 1991. There is no suggestion that Mr. Akeaymong and Mr. Singh had more than a nodding acquaintance before Mr. Singh went to work for Mr. Akeaymong, or that Mr. Akeaymong would have been in a position to give an employment reference for Mr. Singh before 1991.

Certain aspects of Mr. Singh's testimony were in conflict with his subsequent testimony on the same issue. For example, at one point in his testimony, where it appeared to be to his advantage to say so, Mr. Singh contrasted the simple tasks performed by ES-01 level employees with the more complex tasks assigned to ES-03 level staff (Transcript, pp.136-7). Later in his testimony, in a different context, he was equally adamant that there was no difference in the work performed by employees at the ES-01, ES-02 or ES-03 level (Transcript, p.231).

Mr. Singh's testimony with respect to staffing practices at Statistics Canada was at times at variance with that of another Commission witness, namely Mr. Mulvihill, and was, in addition, often in conflict with published staffing policies of Statistics Canada as well as with the provisions of the Public Service Employment Act.

As a consequence of concerns such as these, we found that Mr. Singh was not an entirely reliable witness, and have concluded that his testimony should be approached with some caution.

ii) Failure to Replace Mr. Kaba from Eligibility List

The first question for the Tribunal is whether the Commission and Mr. Singh have established a prima facie case of discrimination on the basis of age and/or national or ethnic origin with respect to this issue. Given the Commission and Mr. Singh's theory of the case, the Israeli test is, in the Tribunal's view, the more appropriate one to consider, although the question of position reclassification and in particular, the eligibility list system complicate the staffing process with the result that this case does not fit neatly into the lists of elements which have been found in the jurisprudence to be usually necessary to establish a prima facie case of discrimination in the employment context. In the Tribunal's view both the Shakes and the Israeli tests serve as useful guides, and will be appropriate for direct application in many hiring or promotion cases. Neither test should, however, be automatically applied in a rigid or arbitrary fashion in every hiring or promotion case: rather the circumstances of each case should be considered to determine if the application of either of the tests, in whole or in part, is appropriate. Ultimately, the question will be whether the complainant has satisfied the O' Malley test, that is: if accepted, is the evidence before the Tribunal complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent?

It is undisputed that Mr. Singh is a member of an ethnic minority, and that he was older than many ES-01 level employees at Statistics Canada. Accordingly, he has met the first element of the Israeli test. It is common ground that he applied for and was deemed qualified for the position that Mr. Kaba ultimately obtained. We further find that under the eligibility list system, Mr. Singh would, in the normal course, have been placed in the position following Mr. Kaba's departure from the Transportation Division. In the circumstances of this case, we are prepared to find that this is sufficient to meet the second aspect of the Israeli test. There is no dispute that Mr. Singh was not given the job and that the third element of the Israeli test has therefore been established. It is the fourth element of the test that is the most problematic. Counsel for the respondent contends that Statistics Canada did not continue to look for employees after Mr. Kaba left as Mr. Kaba had done such a good job that the position no longer existed, and that as Statistics Canada did not continue to look for employees, therefore a prima facie case has not been made out. Mr. Singh contends that the work Mr. Kaba had been doing did not change, and continued to be performed in the Transportation Division. According to Mr. Singh, the respondent continued to look for

candidates,
first reclassifying the position in order to exclude him because of his age. We also have Mr. Kaba's evidence that he would have expected that the next person on the eligibility list would have replaced him, assuming that the list was still active.

In the Tribunal's view, in the absence of a reasonable explanation from the respondent, Mr. Singh's version of events would support a prima facie case of discrimination. In light of Mr. Singh's allegations, the fact that Statistics Canada continued looking for candidates at a different level than Mr. Singh (ie: with different qualifications) should not prevent the burden from shifting to the respondent to provide an explanation for its actions. Indeed, it is the crux of Mr. Singh's theory that the work associated with the position for which he had been found to be qualified and to which he was entitled upon Mr. Kaba's departure did not change, but that nevertheless the qualifications were intentionally changed to thwart him.

We find that the evidence put forward by Mr. Singh and the Commission with respect to this aspect of Mr. Singh's complaint is sufficient to establish a prima facie case of discrimination, and to shift the burden to the respondent to provide an explanation.

According to Mr. Singh, he was told that the decision not to fill Mr. Kaba's position after Mr. Kaba left was due to financial considerations. Although the respondent led considerable evidence with respect to the budget cuts and staffing freezes faced by Statistics Canada in the mid-1980's, the explanation for its decision put forward by the respondent in the course of the hearing was in fact more operational than financial in nature. Mr. Nemes testified as to the work that Mr. Kaba had been doing, and went on to explain that Mr. Kaba had done such a good job on the development work for the "Trucking in Canada" publication that he had effectively worked himself out of a job. With the development work on the "Trucking in Canada" publication complete, the respondent no longer had the need for a person of Mr. Kaba's level in that role.

The explanation provided by the respondent is, on its face, a reasonable, non-discriminatory one. We must then consider whether the explanation offered by Statistics Canada is pretextual, and whether the real motivation for the respondent's actions was, in fact, discriminatory.

In assessing the genuineness of the respondent's explanation, it is necessary to scrutinize Mr. Nemes' evidence in light of the evidence as a whole, and in particular, the evidence of two of

the respondent's other witnesses, namely Messrs. Kaba and Dodds. In this regard we note that there were significant discrepancies between Mr. Nemes and Mr. Kaba with respect to the nature of the work that Mr. Kaba had performed while in the Transportation Division. According to Mr. Nemes, Mr. Kaba was hired expressly to assist in the creation of charts and graphs from the mainframe computer for "Trucking in Canada", and to assist in the analysis and write-up. Mr. Kaba, on the other hand, testified that when he started in the Transportation Division, he worked on the passenger bus and railway surveys, and that he did not start to work on the new publication until six months to a year after he started.

Mr. Kaba testified that what he did do for the new publication was to write articles, work that he described as being analytical in nature. In contrast, Mr. Nemes testified that shortly after Mr. Kaba started in the Transportation Division it was determined that Mr. Kaba would be better employed doing tabulations than in doing analysis and write-up.

While one would expect that Mr. Kaba would have a reasonably good recollection of what it was that he himself had been doing during the time that he was in the Transportation Division, given the passage of time it would not have been surprising if Mr. Nemes, as a manager, had been less clear on the details of what one of his subordinates might have been doing some eleven or twelve years ago. That is not the case here. Mr. Nemes' testimony on these matters was lengthy, detailed and specific, and there was no suggestion that his memory on any of the essential aspects of his testimony may have been impaired by the passage of time. This raised questions in the Tribunal's mind as to whether some of Mr. Nemes' evidence may have been reconstructed in order to advance the respondent's position.

Quite apart from the conflicts in the evidence of Messrs. Kaba and Nemes, there are additional concerns with respect to the reliability of both individuals' evidence. In the case of Mr. Nemes, both his demeanour while testifying and the content of his testimony suggest that he was a highly partisan witness. On a number of issues, including issues that did not directly involve Mr. Nemes, where one would have expected a witness in Mr. Nemes' position to be more neutral in his approach, Mr. Nemes was clearly advocating for Statistics Canada. In the case of Mr. Kaba, it was evident from both the content of his testimony and his demeanour while testifying that he was

extremely hostile to Mr. Singh as a result of the allegations that Mr. Singh had made with respect to the circumstances surrounding the hiring of Mr. Kaba in the Transportation Division.

Both Mr. Kaba and Mr. Dodds testified as to the ongoing nature of the work associated with the publication of “Trucking in Canada”. Given Mr. Kaba’s evident animosity towards Mr. Singh, it is particularly interesting that Mr. Kaba testified that, in his view, following his departure from the Transportation Division the next person on the eligibility list should have received his job. This aspect of Mr. Kaba’s testimony is, however, difficult to reconcile with his subsequent testimony that the type of work that he was doing at the time that he left the Division would not ordinarily be performed by an ES-01 at Statistics Canada (even though at the time he left, Mr. Kaba was still officially classified as an ES-01 himself).

No evidence was put before the Tribunal as to what happened to the work that Mr. Kaba had initially been doing on the passenger bus and rail surveys.

As a consequence of these inconsistencies and unanswered questions, serious concerns have been raised as to the legitimacy of the explanation put forward by the respondent. That said, as we have previously noted, there are equally serious concerns with respect to the reliability of Mr. Singh’s evidence.

In addition to the concerns that we have previously articulated, the Tribunal notes that as a CR-04 in the Transportation Division, Mr. Singh would not be in the best position to know precisely what Mr. Kaba was working on at any given time. Similarly, Mr. Singh would not be in a position to know exactly what either Ms. Mathieson or Ms. Walsh were working on after they joined the Transportation Division. This is particularly so when one notes that Mr. Singh was in fact away from the Transportation Division from March of 1986 to December, 1987. At the same time, as a non-managerial employee, Mr. Singh would not have the ‘big picture’ with respect to organizational needs that someone in Mr. Nemes’ position would have.

Despite our concerns with respect to Mr. Nemes’ evidence, we note that Mr. Nemes’ explanation is consistent with the explanation given to Mr. Mulvihill by Mr. Cuerrier in 1989.

With respect to Mr. Singh’s allegation that Mr. Kaba’s position was reclassified upwards, and the competition delayed intentionally in order to prevent him from assuming the position, in the Tribunal’s view, it does not make sense that, in a time of financial constraint, Statistics Canada would replace an employee at the ES-01 level with one at the ES-03 level, with the attendant increase in salary costs, simply to thwart Mr. Singh’s career ambitions.

Finally, it is necessary to consider the statements that Mr. Singh has attributed to Mr. Mozes. On this point, in addition to the concerns that we have already expressed with respect to the reliability of Mr. Singh's testimony, we are troubled by the contrast in the tone of the allegations contained in Mr. Singh's complaint, where he alleges, almost as an afterthought, that Mr. Mozes would make fun of him with respect to his age, and the litany of vicious and hateful age and national or ethnic origin-related insults that Mr. Singh attributes to Mr. Mozes in his testimony. Mr. Singh explained this discrepancy on the basis that the complaint form had been drafted by an employee of the Canadian Human Rights Commission, that he had been advised that the complaint should be as brief as possible and that it was not necessary to provide more than a summary of his allegations. The evidence before us (including the evidence with respect to subsequent events involving Mr. Mozes and Mr. Singh) reveals a deep-rooted personality conflict between these two individuals, and there is no doubt that harsh words have been exchanged by these two people on more than one occasion over the years. There is evidence of Mr. Singh asserting that Mr. Mozes harboured an ethnically-based animus towards Mr. Singh prior to Mr. Singh filing the complaint with the Commission - by way of example, in Mr. Singh's memo of January 22, 1990 (Exhibit HR-1, Tab 13). Nevertheless, in all of the circumstances we are left with serious concerns that Mr. Singh may have embellished Mr. Mozes' comments to advance his case, or may have simply re-interpreted past statements over time as his dissatisfaction with his employer deepened.

At the same time, in the Tribunal's view, Mr. Mozes was also an unreliable witness. His demeanour while testifying was troubling. His answers, particularly while under cross-examination, were frequently preceded by lengthy pauses while he considered how to answer the questions put to him. On some occasions we found Mr. Mozes' answers evasive. His answer with respect to whether he had told anyone of his intent to pursue legal action against Mr. Singh left the Tribunal with serious concerns as to his truthfulness.

We are left in the position of having to choose between conflicting versions of events offered by two witnesses, neither of whom the Tribunal has found to have been particularly reliable. Mr. Singh has the ultimate burden of establishing on a balance of probabilities that the comments he has described were, in fact, made. In all of the circumstances, the Tribunal finds that he has not met this burden. As a result, we are not prepared to find that the statements described by Mr. Singh were

in
fact made by Mr. Mozes.

The fact that we have not accepted Mr. Singh's testimony with respect to the age and national or ethnic origin-related comments attributed to Mr. Mozes does not automatically mean that this aspect of Mr. Singh's complaint must fail. It is open to a Tribunal to find discrimination based upon all of the circumstances of a case, notwithstanding the absence of any overtly discriminatory acts.

While we have noted the concerns that we have with respect to the respondent's explanation, after careful consideration of all of the evidence before us we cannot conclude that the respondent's explanation was pretextual, that the real reason for Statistics Canada's actions with respect to this issue was Mr. Singh's age or national or ethnic origin or that these issues were factors in the respondent's decision making. This aspect of Mr. Singh's complaint is accordingly dismissed.

iii) Cross-Divisional Appointments

We must next consider whether Mr. Singh has established a prima facie case of discrimination in connection with Statistics Canada's failure to offer him an ES level position during the time that his name was on the eligibility list. The Tribunal is not satisfied that Mr. Singh has established a prima facie case of discrimination with respect to this issue.

To support a finding that a prima facie case has been established, the complainant and the Commission must do more than put forward sweeping assertions that are general in nature and contain no specifics.

Mr. Singh asserts that Statistics Canada filled positions at the ES-01 level during the time that the eligibility list remained valid. While that may well be true, we were not provided with information with respect to a single specific ES-01 position that was actually filled during this time period.

Mr. Singh asserts that ES-01 positions were generic in nature, and that he was qualified for positions that became available. We do not accept as credible Mr. Singh's view of the nature of ES-01 level positions in the mid to late 1980's as being completely generic in nature. While the jobs were indeed entry level positions, nevertheless a review of Exhibit R-10, the only Statement of Qualifications for an ES-01 level position that was before us from around this time period, discloses that at least some knowledge of the specific subject area to which the position related was, in fact, required.

We have not been provided with any specific information about the job requirements of any of the positions Mr. Singh is referring to. Similarly, we have not been provided with any information with respect to the successful candidates, their age or ethnicity, or how their qualifications compared to those of Mr. Singh. We do not know whether there were eligibility lists in place for any of the positions that became available, and whether the positions were staffed from those lists.

In the Tribunal's view the evidence before us with respect to this issue does not meet the standard set out in the O' Malley case. That is, the aspects of Mr. Singh's evidence on this issue that we accept are not complete and sufficient to justify a verdict in his favour, in the absence of an answer from the respondent. Accordingly, this aspect of the complaint is dismissed.

iv) The 1988 ES-01 Competition

Although Mr. Singh alleges that Mr. Vincent refused to create an eligibility list after this competition was completed, it is clear that Mr. Vincent did create an eligibility list (Exhibit HR-1, Tab 9), and that a copy of this list was provided to Mr. Singh. Further, despite Mr. Singh's contention that there was an obligation on the part of Mr. Vincent to put the names of all of the qualified candidates on the eligibility list, we accept the testimony of Mr. Mulvihill and the respondent's witnesses that under the provisions of the Public Service Employment Act, managers need only include sufficient names on the list to meet anticipated needs.

In light of these findings, we must determine whether Mr. Singh and the Commission have established a prima facie case of discrimination in connection with this allegation. The evidence establishes that Mr. Singh qualified for an ES-01 position in the 1988 competition. He has adduced evidence through Exhibit HR-6 that Statistics Canada was hiring at the ES-01 level at the time. Although this competition was not part of the 1988-1989 ES Recruitment Program, the evidence further establishes that in this time frame Statistics Canada had an ongoing organizational need for ES-01 level employees. Indeed, in March of 1989, just weeks after the establishment of the eligibility list in issue, Statistics Canada offered positions to 26 candidates under the ES Recruitment Program (Exhibit R-14, Tabs 32 and 33). In order to be screened into the competition under the ES Recruitment Program, candidates had to have similar basic requirements in terms of education and knowledge of socio-economic theory to the qualifications held by Mr. Singh (see Exhibit R-1, Tab 22, at p.2 and Appendix 'A').

There is evidence as to Statistics Canada's concern with respect to the aging of its population. In addition to Mr. Vincent's statement that, at 26 or 27, Ms. Cowan was 'a little bit older', we have

Mr. Kaba's comment that he was 'very old' when he was hired as an ES-01 at 35. As well, we have statistical evidence regarding the age distribution of ES-01 employees within Statistics Canada which shows that a disproportionate number of the employees were under 40, and that in fact, the vast majority of recruits were under 30. Mr. Singh was 43 or 44 at the time.

We do not have any evidence with respect to specific positions that were staffed around this time, or of the job requirements of those positions, nor do we have any evidence with respect to the

identity, qualifications, age or ethnicity of the candidates who were hired. However, unlike his allegations with respect to the failure of Statistics Canada to place him in an ES-01 position during

the currency of the eligibility list resulting from the 1985 competition, Mr. Singh's allegation here

is not that he did not get a job, but rather that he was denied access to the eligibility list system that

could have resulted in him getting a job. As a consequence, the failure to adduce evidence on these

points is not fatal to the establishment of a prima facie case with respect to this aspect of Mr. Singh's

complaint. Applying the test articulated in the O' Malley case, we find that the evidence before us

as it relates to the age issue is sufficient to justify a verdict in Mr. Singh's favour, in the absence of

an answer from the respondent. Accordingly, we find that Mr. Singh has established a prima facie

case of discrimination on the basis of age and that the burden shifts to the respondent to provide a

reasonable explanation for its actions.

Again applying the O' Malley test, we find that Mr. Singh has not established a prima facie case of discrimination on the basis of his national or ethnic origin. Apart from his assertion of his

belief that his national or ethnic origin was a factor in the decision not to include his name on the eligibility list, there is little evidence to support his claim. At best, we have statistical evidence with

respect to the representation of visible minorities with Statistics Canada as a whole, which does suggest that members of visible minorities were somewhat under-represented within the organization. However when one looks at the incidence of visible minorities within the ES population itself, the statistical evidence does not support Mr. Singh's position in the same way that

it does on the age issue. Circumstantial evidence of under-representation within Statistics Canada

as a whole, coupled with a bare statement of Mr. Singh's belief that his national or ethnic origin was a factor in what happened is not complete and sufficient to justify a verdict in Mr. Singh's favour.

Statistics Canada's explanation for the conduct of this particular competition rested almost entirely on the evidence of Mr. Vincent, who testified that he did not put Mr. Singh's name on the eligibility list as there was only one position to fill. Mr. Vincent further explained that his supervisor (who was never identified) had advised him that it was not anticipated that any other positions would be opening up.

The explanation provided by Statistics Canada appears, on its face, to be reasonable. It remains to be determined whether the explanation provided by Statistics Canada is pretextual, and whether the motivation for the respondent's actions related, at least in part, to Mr. Singh's age.

Mr. Vincent professed to have little recollection of many of the events surrounding this competition, and his evidence was often lacking as a result. For example, he could not remember the number of candidates in the competition, who the other members of the Selection Board were, or what the grounds were for Mr. Singh's appeal. On the other hand, Mr. Vincent was able to tell us that Mr. Singh had been given a 6.5 out of a possible 10 on a question relating to personal suitability, that Mr. Singh's personal suitability score had been downgraded by approximately two points following a reference check, which represented the margin between Mr. Singh and Ms. Cowan, and that Mr. Singh's appeal had been dropped on the day before it was to have been heard.

As a consequence, we found Mr. Vincent's powers of recall somewhat selective.

In the course of Mr. Vincent's cross-examination the suggestion was made by Commission counsel that an allegation of racial discrimination had been raised by Mrs. Sheikh in connection with a later competition. We found Mr. Vincent's testimony on this issue to have been evasive. While questions relating to this later competition are not directly relevant to our inquiry, nevertheless, Mr. Vincent's demeanour when responding to these questions caused us concern.

The circumstances surrounding the withdrawal of Mr. Singh's appeal regarding this competition are also troublesome. We know that shortly after withdrawing his appeal, Mr. Singh was given a term assignment at the ES-01 level. Mr. Nemes testified that this was an

‘ extremely rare’ situation, and that this was the only occasion that he knew of where a CR-04 was offered an ES-01 assignment of this nature.

None of the witnesses called by Statistics Canada were able to provide a satisfactory explanation of how Mr. Singh obtained this term assignment in the absence of a competition. Mr. Vincent denied that any discussion with respect to an assignment of this nature had taken place with Mr. Singh and his union representative. Mr. Mozes testified that he thought that Mr. Singh had been on an eligibility list, which is clearly not the case. When this was drawn to his attention, Mr. Mozes then testified that the Director of the Division and Personnel would have had to have been involved in such a decision.

Ms. Clément testified that all positions, whether term or indeterminate, required a competitive process. She also testified that the only way to promote an employee into a term position without a competition would be where the Public Service Commission approved the promotion on the basis that the position was so highly specialized that no one else in the Department could do the job and it was therefore unnecessary to run a competition. Such a situation clearly did not exist here.

Considering the evidence as a whole, we are satisfied that Mr. Singh obtained his term appointment as a result of union intervention on his behalf. Although Mr. Singh stated in his submissions that he had not been aware of a deal having been made, he had previously testified that he was only given the ES-01 term assignment because of his threats to file a human rights complaint.

We accept Mr. Mulvihill’s evidence that there were indeed problems with this competition, and that it was the existence of these problems and the possibility of Mr. Singh’s success on the appeal that resulted in a negotiated settlement with the employer. Although we do not know what problems had been identified with respect to the competition, the resulting deal does raise questions about the fairness of the process generally. In that the creation of the eligibility list is an integral part of the competitive process, our findings also raise serious questions about Mr. Vincent’s explanation for his failure to include Mr. Singh’s name on the resulting eligibility list.

In further considering the respondent's explanation we note that it is unclear from Mr. Vincent's evidence whether his information was that no positions were expected to open up in the Labour Division, or within Statistics Canada as a whole. There was little in the way of corroboration for Mr. Vincent's evidence that it was not anticipated that any positions would be opening up. Mr. Vincent's supervisor did not testify, nor did Mr. Burke, the Staffing Officer assigned to this competition or Ms. Tittley, whose name appears on the eligibility list as the Responsible Staffing Officer. No information was received with respect to staffing levels, funding cuts or numbers of person-years within the Division at the time, although Mr. Vincent testified that funding concerns were implicit in the explanation provided to Mr. Singh.

In contrast, the respondent provided detailed evidence with respect to these types of issues as they related to what had occurred earlier in the Transportation Division in the context of other staffing actions (see for example Exhibit R-36, Tab 48).

Similarly, no evidence was put before us as to how many ES-01 positions existed within the Labour Division, how long Ms. Cowan occupied her ES-01 position, when the next ES-01 position opened up in the Labour Division, and what were the requirements of that position.

We have not overlooked the statistical evidence introduced by the respondent to establish that it was not uncommon for eligibility lists at Statistics Canada to only have one name on them. It is noteworthy that the statistical evidence before us in relation to this issue covers the period from 1989-90 to 1993-94, whereas the competition that we are dealing with here took place in 1988-89. Statistics Canada evidently had a comprehensive computerized human resource information system in place starting in 1985: in 1997 the system was described as containing over ten years of data (see Exhibit 39, Tab 78). In explaining why statistics were not provided for the time period in issue, Ms. Clément testified to her belief that the Global system was only introduced in 1989 (Transcript, p. 953), whereas Ms. Slater stated that information for the period before 1989 was no longer available (Transcript, pp. 2281-83). These conflicts in the evidence are troubling.

The statistical evidence does suggest that in the majority of cases in the period from 1989-94, eligibility lists had more than one name on them, although it was not uncommon for lists to be created composed of just a single name. In light of this evidence, Mr. Vincent's statement that the

use of one-name lists was almost part of the staffing culture seems something of an over-statement.

The evidence also establishes that more often than not, multi-name lists expired with names still on them. Indeed, Ms. Slater referred to this data while dealing with the fact that Mr. Singh was not hired from an eligibility list in the period from 1985-87, and used it to suggest that lists often had more names on them than positions actually materialized.

The statistical information dealt with eligibility lists within Statistics Canada as a whole, within the ES classification generally, and within the entry level of the ES-01 classification (the ES-01 to ES-03 groups). It is this latter information that would be most directly relevant to the situation at hand. This table indicates that of fourteen competitions held, twelve lists had more than one name on them, and only two were comprised of a single name. We know, however, from the evidence that the ES Recruitment Program was in effect during this time period, and that all hiring at the ES-01 level was done through the program, where groups of individuals were hired each year, resulting in multi-name eligibility lists. It is therefore a reasonable inference that the two competitions that resulted in single name lists were at the ES-03 level, and that all of the ES-01 competitions resulted in multi-name lists. While one could argue that the respondent's statistical evidence actually supports Mr. Singh's position, we find that given the fundamental changes to the hiring process for ES-01 candidates brought about by the introduction of the ES Recruitment Program in 1988-89, to use statistics from the post-ES Recruitment Program period to try to reflect what would have gone on under the previous system would be, in effect, to compare apples to oranges.

For all of these reasons, we have concluded that the statistical evidence put forward by Statistics Canada on this issue is of limited assistance to our inquiry.

We have considered the evidence of Mr. Dodds and Mr. Nemes with respect to the 'feifdom' mentality that existed within Statistics Canada. We accept that such a mentality did exist within Statistics Canada at the time, and that this may well have played a role in the decision to leave Mr. Singh's name off of the eligibility list. For reasons that are set out below, however, we have concluded that this was not the only factor that went in to the decision making process.

It is clear from the evidence of Mr. Dodds and Mr. Nemes that in the late 1980's, Statistics Canada had become concerned about the aging of its managerial population, had identified the need for renewal, and had set about recruiting a younger workforce. We note that Statistics Canada did not attempt to justify the failure to put Mr. Singh's name on the eligibility list on the basis that, in the circumstances, being young was a bona fide occupational requirement of the position, but rather the respondent denied that Mr. Singh's age was a factor in the decision itself.

In early 1989, Mr. Singh would have been 43 or 44 years old. At that age, he clearly did not meet the need that Statistics Canada had identified for recruitment into ES level positions. We have considered Mr. Dodds' testimony that it was not the age of the ES candidate, per se, that was the concern, but that rather it was the individual's propensity to retire that was in issue. Mr. Dodds denied that there would be any reluctance on the part of Statistics Canada to hire older individuals as part of the renewal process because, according to Mr. Dodds, as a consequence of public service pension eligibility requirements, someone coming into the organization at 45 or 50 would likely stay into their sixties. This explanation makes sense insofar as the hiring of older candidates from outside the Public Service is concerned, however the logic behind it does not follow for internal candidates. In 1989, a 43 or 44 year old manager with seven years of service with the Public Service would, presumably, have had the same propensity to retire as would Mr. Singh.

In the Tribunal's view, the statistical evidence adduced by the respondent itself provided compelling circumstantial evidence of an organizational predisposition against promoting older internal candidates into ES positions. In particular, Exhibit R-36, Tab 52 demonstrates that over a nine year period, out of a total of 340 individuals hired, only five internal candidates over the age of 40 were hired into ES-01, 02 or 03 level positions, and only one into an ES-01 level position. These statistics must be viewed in light of Mr. Dodds' testimony that, over the last few years, approximately 100 internal candidates were interviewed each year for ES positions.

We further note Mr. Vincent's testimony that, at 26 or 27, Ms. Cowan was "a little bit older" than the other ES candidates. In addition, we have considered Mr. Kaba's testimony that when he was hired in 1985 at 35, that he was "very old", and that now people coming in as ES-01's are 22 years old. These comments are largely borne out by the statistical profile of the ES-01 population, which shows that in the period from 1987 to 1992, only 2.3% of the ES-01 population was over

(Exhibit R-39, Tab 74).

Unlike Mr. Singh's other complaints, our findings with respect to the failure to add Mr. Singh's name to the eligibility list in question do not rest to any extent on Mr. Singh's testimony.

After careful consideration of all of the evidence before us, we have concluded that the explanation put forward by the respondent, while appearing at first to be reasonable, was in fact pretextual. We are satisfied that it can reasonably be inferred that the failure to put Mr. Singh's name on the eligibility list was at least in part because, at 43 or 44, Mr. Singh did not fit the profile that Statistics Canada had in mind for ES-01 level recruits. As we have found that Mr. Singh's age was a factor in the respondent's decision making, accordingly, we have concluded that in this regard, Statistics Canada discriminated directly against Mr. Singh, and this aspect of Mr. Singh's complaint is sustained.

There is, of course, no guarantee that Mr. Singh would have been given an ES-01 position, had his name been put on the eligibility list following the Cowan competition. In the Tribunal's view, this is an issue that must be considered in the quantification of damages, and does not affect the liability of Statistics Canada.

v) Failure to Extend ES-01 Term Position

We have previously found that Mr. Singh was given this term position in exchange for his withdrawing his appeal in the 1988 competition. Having carefully considered all of the evidence, we cannot find that any commitment was in fact made to Mr. Singh by Mr. Mozes prior to Mr. Singh accepting the term assignment or that Mr. Singh only accepted the assignment as a result of the promises made to him by Mr. Mozes. It is clear that Mr. Singh felt that he was over-qualified for a CR-04 position, that he had repeatedly competed for ES level positions, and that he was desperate to work as a professional in the ES category. In the Tribunal's view, Mr. Singh's suggestion that he was reluctant to take a term position at the ES-01 flies in the face of the evidence as a whole. His explanation for his reluctance is not satisfactory. As a result, we reject Mr. Singh's evidence in this regard.

We also do not accept Mr. Singh's evidence with respect to the harassment that he says he was subjected to by Mr. Mozes and Ms. Sheikh in the course of his assignment. It is noteworthy

that
Mr. Singh's complaint is based solely on section 7 of the Canadian Human Rights Act, and makes
no mention of section 14, the section dealing with workplace harassment. Indeed, despite Mr. Singh's allegations that he was subjected to harassment on a daily basis during the time that he was
on the term assignment, the narrative portion of Mr. Singh's complaint makes no mention of any
harassment during this time.

Mr. Singh's description of the nature and scope of the work that he was doing in the course of this assignment is at odds with that of Mr. Mozes, and more importantly, is at odds with the documentary evidence before us from the time in question. Mr. Singh describes himself as the sole
author of the tax data study, and attempts to minimize the input of others into the finished product.
However, it is clear from the exchange of memos between Mr. Singh and his supervisors that Mr. Singh's work on the study was directed by others and was closely supervised (see Exhibit HR-1, Tabs 11 and 13). This difference in perception no doubt contributed to friction between Mr. Singh and his supervisors and to the disagreement over Mr. Singh's performance appraisal.

There was a great deal of evidence before the Tribunal to suggest that Mr. Singh was unwilling to accept criticism of his work, which evidence is consistent with our own observations of Mr. Singh throughout this hearing. We have further found that a long-standing personality conflict existed between Mr. Singh and Mr. Mozes. It may be that Mr. Singh perceived the efforts of Mr. Mozes and Ms. Sheikh to direct his work as harassment, particularly in retrospect. Mr. Mozes did concede that he and Ms. Sheikh may have given Mr. Singh conflicting directions from time to time. While it would have been preferable to hear from Ms. Sheikh with respect to these events, in all of the circumstances, we are not prepared to draw any inferences from her failure to testify. Similarly, while it is somewhat surprising that Mr. Mozes would not have responded in writing to Mr. Singh's memo of January 2, 1990, given the very serious allegations made by Mr. Singh in the memo, in light of all of the evidence before us, including Mr. Mozes's explanation in this regard, we are not prepared to do as counsel for the Commission asked us to and to infer from these circumstances that the allegations contained in Mr. Singh's memo must therefore be true. When

the evidence before us is considered as a whole we cannot find that the efforts of Mr. Mozes and Ms.

Sheikh to manage Mr. Singh's work constituted harassment or were in any way connected to either

Mr. Singh's age or his national or ethnic origin.

We are then left with the allegation referred to in Mr. Singh's complaint, that is that the respondent refused to extend his term as an ES-01 while extending the terms of two white employees. The evidence before us does not establish a prima facie case of discrimination in this regard. Mr. Singh does not allege that three people, two white and one a member of a visible minority, were doing the same work, and that only the white individuals had their terms extended.

Given Mr. Singh's testimony that the work that Ms. Bekooy and Mr. Semotiuk were doing was completely different from that Mr. Singh was doing, it is not appropriate, in the Tribunal's view to

compare their situations to that of Mr. Singh.

Mr. Singh testified that he was hired for a specific term to perform a specific task and that he completed that task 'to the end'. On the evidence before us we cannot find that Mr. Singh's age or his national or ethnic origin played a role in the decision not to extend his term.

Had we found that Mr. Singh had established a prima facie case of discrimination with respect to this issue, we still would have dismissed this aspect of his complaint. Mr. Mozes' and Mr.

Nemes' evidence with respect to the requirements of the redevelopment project was not seriously

disputed by either the Commission or Mr. Singh. Indeed it is clear that Mr. Singh had little sense of the overall divisional needs, a fact that was not surprising, given his position. We accept their explanation that once Mr. Singh had completed the tax data study, the funds for the project were required for other things.

vi) The 1990 SI Competition

Counsel for the respondent argues that as we have not been provided with any evidence as to the qualifications, age or ethnicity of the successful candidates in this and other competitions, the

Commission and the complainant have failed to establish a requisite element of a prima facie case

of discrimination.

The Commission submits that it was the respondent that had access to this information, and that the files had been destroyed prior to Mr. Singh's complaint having been filed, in accordance

with Statistics Canada policy that staffing files only be retained for two years after the last administrative action arising out of a competition. Accordingly, the Commission argues that the respondent should be estopped from advancing this argument.

It should be noted that, other than Ms. Clément's testimony with respect to Statistics Canada's general policy on the destruction of files, there was no direct evidence before us that some or all of the files in issue in this case had, in fact, been destroyed in accordance with the policy. All we have is the conflicting representations of counsel as to the availability of the files. In any event, we are satisfied that the effect that the possible destruction of the respondent's staffing files should have on these proceedings does not have to be addressed here. Mr. Singh's complaint here is not that he did not get the SI-02 job, and that someone did who was younger or of a different national or ethnic origin, but no better qualified than Mr. Singh. Rather, his complaint is that he had been excluded from even being considered for the position as a result of his having failed the personal suitability portion of the competition. How Mr. Singh compared to the other candidates is not relevant here as he never got to that point in the process.

What is required, however, for us to have jurisdiction to grant relief in this matter, is that Mr. Singh's failure on the personal suitability portion of the competition be related in some way to his age or his national or ethnic origin. In this regard, Mr. Singh has not put evidence before the Tribunal that would be sufficient to justify a verdict in his favour in the absence of an explanation from the respondent.

There may have been irregularities in the reference process in this competition - in particular, having sought a reference from Ms. Carrière, the selection board in effect obtained the same reference a second time from Mr. Beauchamp, given that Mr. Beauchamp was largely dependent on Ms. Carrière for his information with respect to Mr. Singh's job performance. An irregularity in the staffing process does not, however, automatically lead to an inference of discrimination, in the absence of other evidence linking the irregularity to a proscribed ground of discrimination (Kibale v. Transport Canada (1985), 6 C.H.R.R. D/3033 at p.D/ 3038, affirmed (1987), 8 C.H.R.R. D/4055 (Rev. Trib.), 10 C.H.R.R. D/6100 (F.C.A.) leave to appeal to S.C.C. refused (1989), 101 N.R. 238).

Although much of Mr. Singh's anger is focussed on the fact that Mr. Beauchamp gave a reference even though his name had not been put forward by Mr. Singh, the uncontradicted evidence before us is that references for all candidates in this competition were being sought from the candidates' divisional chiefs. There is nothing to suggest that Mr. Singh was treated any

differently
than any other candidate in this regard.

Mr. Singh' s theory as to the malicious intent of Mr. Beauchamp is undermined by the uncontradicted evidence that it was the selection board that sought out Mr. Beauchamp and not the other way around. There is no evidence to suggest that Mr. Singh' s age or national or ethnic origin were factors in the assessment carried out by the members of the selection board.

The Commission argues that, in addition to the statistical evidence before us, we must consider the fact that managers do talk among themselves, and that Mr. Mozes' s feelings toward Mr.

Singh may have tainted the process. This argument is speculative at best. In addition, the Commission and Mr. Singh urge the Tribunal to consider that the fact that even with three degrees,

Mr. Singh is still a CR-04 after all this time. Indeed, we have considered this fact throughout our assessment of the evidence in this case. With the greatest of respect, however, in the Tribunal' s view, more than this is required to establish a prima facie case of discrimination.

There is no doubt that the assessment of personal suitability in employment competitions must be carefully scrutinized, given that it is often partly or totally dependent on subjective considerations, and may as well, result in stereotyping and unconscious cultural biases being brought

into play. In this case, however, even if we were to accept that Mr. Beauchamp' s reference was completely unjustified or even malicious (which we do not), there is little evidence before us to connect the negative content of Mr. Beauchamp' s reference to either Mr. Singh' s age or to his national or ethnic origin.

Mr. Singh' s theories as to the connections between Mr. Beauchamp and Mr. Mozes, between Mr. Beauchamp and the members of the selection board, and between Ms. Walters and Ms. Carrière, and these people' s allegedly concerted attempts to undermine Mr. Singh are simply not credible, and are not substantiated by the evidence.

As a result, we find that the Commission and Mr. Singh have not established a prima facie case of discrimination, and this aspect of Mr. Singh' s complaint is accordingly dismissed.

Had it been necessary to consider the respondent' s explanation we would have accepted that explanation as reasonable and non-pretextual. Part of the assessment of candidates' personal suitability was based upon a written question with predetermined answers. Having regard to the expected answers, Mr. Singh' s response was clearly inadequate and his mark appears appropriate.

The balance of the assessment appears to have been based on the reference inquiries. On all of the evidence, we find that the references provided by all three referees were fair and represented an accurate assessment of Mr. Singh's performance. It is clear that Mr. Singh was very unhappy to have been moved to the Operations and Integration Division following the expiry of his term as an ES-01. It appears that the Operations and Integration Division was a production facility, with something of an assembly line atmosphere. The work performed there by the clerical staff was highly repetitive and would have been extremely unappealing to someone with Mr. Singh's background and aspirations. It is also clear that Mr. Singh was becoming increasingly frustrated at his inability to advance within Statistics Canada. This frustration was undoubtedly beginning to affect his job performance. Indeed, Ms. Carrière noted that Mr. Singh's primary concern at the time was to find another position.

The comments with respect to Mr. Singh's superior attitude are consistent with the tone of Mr. Singh's testimony before this Tribunal, where he was critical of some of his co-workers on the basis of their inferior educations. Similarly, Mr. Singh's resistance to criticism of his work has been a recurring theme throughout this case, and was apparent to the Tribunal in the course of Mr. Singh's testimony.

As a result, we find that the assessment of Mr. Singh's personal suitability in this competition was fair and reasonable, and that neither Mr. Singh's age nor his national or ethnic origin were factors in that assessment.

vii) The 1991 ES-01 Competition

The respondent contends that Mr. Singh and the Commission have failed to establish a prima facie case of discrimination in connection with this competition as it has not been established that Mr. Singh was qualified for the position. In addition, the Commission and Mr. Singh have not established that individuals, no better qualified than Mr. Singh, but younger or of a different national or ethnic origin, were in fact hired.

The Commission and Mr. Singh contend that the evidence establishes that Mr. Singh was qualified for an ES-01 position in 1991. Insofar as the absence of evidence relative to the other candidates is concerned, as was previously noted, the Commission argues that it was the respondent that had access to this information, and who had destroyed the files, and that, as a result, the respondent should be estopped from advancing this argument.

Having considered both the evidence and the arguments carefully, we are of the view that

the Commission and Mr. Singh have not established a prima facie case of discrimination in relation to this competition, and that this aspect of Mr. Singh's complaint must therefore fail. Based upon the evidence before us, it appears that the written examination was intended to test the candidates' knowledge. On Mr. Singh's own evidence, he failed the written examination. There is nothing to suggest that either Mr. Singh's age or his ethnicity was a factor in the marking of the examination, or indeed, that those marking the exam would even have been aware of either Mr. Singh's age or his national or ethnic origin. As a result, Mr. Singh and the Commission have failed to establish the first element of the Shakes test, that is that he was qualified for the position.

The thrust of the Commission and Mr. Singh's argument is that having twice previously qualified in other ES-01 competitions, having performed well in ES-01 level jobs, and having superior academic qualifications, Mr. Singh was qualified for the ES positions being staffed through this competition. This argument, while attractive, does not take into account the evidence before us (including evidence from Mr. Akeaymong, one of the Commission's own witnesses) that the standards for ES recruits at Statistics Canada went up significantly with the establishment of the ES Recruitment Program in 1989. There is no evidence before us to suggest that Mr. Singh's knowledge was tested in anything other than an objective manner. Subjective considerations, such as the assessment of personal suitability did not enter into this competition, as Mr. Singh did not get that far in the process.

We are satisfied that the fact that we do not have the competition files, and thus are unable to consider the qualifications of the successful candidates does not affect our conclusion one way or another, as Mr. Singh was never compared to these individuals, having been eliminated from the competition at an earlier stage.

viii) The 1992 ES-01 Competition

The respondent argues that the Commission and Mr. Singh have failed to establish a prima facie case of discrimination in connection with this competition as they did not prove that Mr. Singh was qualified for an ES position. In addition, the respondent submits that neither the Commission nor Mr. Singh have established that individuals, no better qualified than Mr. Singh, but younger

or
of a different national or ethnic origin, were in fact hired.

As with the previous competition, the position of the Commission and Mr. Singh is that having twice previously qualified in other ES-01 competitions, having performed well in ES-01 level jobs, and having superior academic qualifications, Mr. Singh was in fact qualified for the ES positions being staffed through this competition, and that his age and his national or ethnic origin were factors working against him in the context of the ES Recruitment Program.

Having considered both the evidence and the arguments advanced in relation to this competition carefully, we are of the view that the Commission and Mr. Singh have not established a prima facie case of discrimination, and that this aspect of Mr. Singh's complaint must therefore fail.

As previously noted, we accept the evidence of the respondent and Mr. Akeaymong that the standards for ES recruits at Statistics Canada went up significantly with the establishment of the ES Recruitment Program in 1989. As a result, we do not accept that, as a consequence of having previously qualified for ES positions and having performed satisfactorily at the ES level, Mr. Singh should necessarily have qualified under the new régime.

In considering the fairness of the process by which Mr. Singh's candidacy was assessed, it is necessary to consider Mr. Singh's evidence in light of the testimony of Mr. Rhoades, as well as the documentary evidence relating to the competition. Mr. Singh was unable to recall much about the interview itself, other than his recollection that he had done very well. Having declined to meet with Mr. Rhoades after the competition, Mr. Singh would, of course, have had no way of knowing what the expected answers were for the questions that he was being asked, nor would he have known how he performed in comparison to other candidates.

We were very favourably impressed by the evidence of Mr. Rhoades. His testimony was given in a clear and forthright fashion, and was corroborated in all material respects by his contemporaneous notes of the interview, and by the questions and expected answers prepared for the competition. We were particularly impressed by Mr. Rhoades' response when the arithmetical errors in his scoring were drawn to his attention - he did not attempt to deny the errors, to justify them, or to explain them away - rather he was candid in admitting his mistakes, and in taking responsibility for them. As a consequence, where Mr. Rhoades' evidence conflicts with that of

Mr. Singh, we prefer the evidence of Mr. Rhoades.

We accept Mr. Rhoades' description of the competition process, and find that Mr. Singh was asked the same questions as the other candidates in the competition, that his answers were measured against the expected answers as were those of the other candidates, and that he was assessed in the same manner as were the others interviewed by Mr. Rhoades. While there was admittedly an element of subjectivity in the process, more so as it related to the assessment of ability than knowledge, and especially in the assessment of personal suitability, we are not satisfied on the evidence before us that either Mr. Singh's age or his national or ethnic origin were factors in Mr. Rhoades' assessment of him.

We find as a fact that the error in the recording of Mr. Singh's score was innocent, and in any event, did not affect the outcome of the competition. Similarly, we note that even if Mr. Singh had achieved perfect marks on the personal suitability component of the interview, he still would have failed to reach the 80% threshold to qualify in the competition.

Having concluded that Mr. Singh has failed to prove that he was qualified for the position, it follows that a prima facie case had not been established. As with the previous competition, the fact that we are unable to consider the qualifications of the successful candidates does not matter, as Mr. Singh was never compared to these individuals, having been eliminated from the competition at an earlier stage.

ix) Adverse Effect Discrimination

This case was presented as one of direct discrimination. That is, throughout the hearing, the Commission and Mr. Singh's theory of the case was that Mr. Singh's age and his national or ethnic origin were factors influencing Statistics Canada's decision making. The evidence was presented in that context, and there was no suggestion that any accommodation of Mr. Singh was either necessary or appropriate. In his final submissions, however, counsel for the Commission appeared to be attempting to advance an argument based upon adverse effect discrimination (Transcript, p. 2934 et seq.) Counsel submitted that Statistics Canada had a policy or practice of recruiting ES employees who tended to be young, and that this policy or practice tended to have an adverse impact on Mr. Singh. Counsel went on to explain that, in his submission, Statistics Canada had identified a need for younger recruits, and that this represented a 'mind set' on the part of managers. Mr. Singh

did not fit the profile that Statistics Canada had established, either explicitly or implicitly, for desirable candidates, and as a result, he was excluded.

In the Tribunal's view, what is being suggested by counsel would not, if proven, constitute adverse effect discrimination at all, but discrimination that is direct in nature. An employee profile that calls for young recruits would not be a policy or practice that is neutral on its face, but rather would be one that discriminates directly.

The design of Statistics Canada's ES Recruitment Program does raise issues with respect to potential systemic discrimination. That is, a policy that targets recent university recruits could potentially be one that tends to be inaccessible to older candidates. It is not, however, necessary to decide the potential systemic consequences of the policy in the context of this complaint. On the evidence before us, as a candidate from within Statistics Canada, Mr. Singh did have ready access to the ES Recruitment Program. We have further concluded that his candidacy was considered fairly, and that neither his age nor his national or ethnic origin were factors in Statistics Canada's assessment of that candidacy.

VI SECTION 41(e) OF THE ACT

In her closing oral submissions, counsel for the respondent argued that the Tribunal cannot grant relief for events occurring more than one year prior to the filing of the complaint by Mr. Singh, absent evidence that the Commission considered it appropriate to extend the time in accordance with the provisions of section 41 (e) of the Act. In support of this submission, counsel referred to the decision of the Federal Court in Canada (Attorney General) v. Canada (Human Rights Commission) (Pitawanakwat), 43 F.T.R. 47 and the decision of the Federal Court of Appeal in Canada (National Film Board) v. Coallier, [1983] F.C.J. No. 813.

In subsequent written argument, the respondent submitted that while it was not for this Tribunal to review the decision of the Commission under section 41 (e) of the Act, it was open to the Tribunal to consider the limitation provision in light of the respondent's ability to make a full and complete defence due to the lapse of time, the impairment of witnesses' memories, the deaths of potential witnesses and the destruction of documentary evidence. In this regard, the respondent refers to the decision in Vermette v. Canadian Broadcasting Corporation (1994), 28 C.H.R.R. D/89, aff'd (1996), 28 C.H.R.R. D/139 (T.D.).

The respondent also relies upon the equitable doctrine of laches. (Re Saanich Firefighters Union, Local 967 and District of Saanich (1981), 22 D.L.R. (3d) 577 (B.C.S.C.)

Finally, the respondent contends that the complaint form does not set out a specific time frame for the complaint, nor was the complaint ever amended (Pitawanakwat, supra.). In any event, complaints cannot be adjudicated as extended: extensions beyond one year are statute-barred (Bell Canada v. Communications, Energy and Paperworkers Union of Canada (1998), F.C.J. No. 312 (F.C.T.D.).

The Commission submits that the Tribunal does not have jurisdiction to enquire into the Commission's decision to refer this matter to Tribunal: any such challenge must be brought in the Federal Court. The Commission further submits that the respondent has failed to adduce any evidence of any prejudice to it.

In addition, the Commission argues that the respondent did not give any notice of its intention to make this argument, and accordingly no evidence was adduced by the Commission on the relevant issues.

The Commission further notes that the complaint does set out a specific time frame for the complaint, and that it is clear from the form itself that the complaint is in relation to the period from 1985 to 1992.

Section 41 (e) of the Act provides:

41. Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that ...
- (e) the complaint is based on acts or omissions the last of which occurred more than one year, or such longer period of time as the Commission considers appropriate in the circumstances, before receipt of the complaint.

From a review of the jurisprudence cited by the respondent (no cases having been cited by the Commission in support of its position), it is apparent that the decisions of the Human Rights Tribunal and of the Trial Division of the Federal Court in Vermette (supra.) are most directly on point. In Vermette, Muldoon J. of the Federal Court noted that Tribunals do not have the power to review decisions of the Canadian Human Rights Commission made under the provisions of section 41 of the Act for the purpose of determining whether the Commission acted properly or improperly in the exercise of its discretion. That does not mean, however, that Tribunals are precluded from determining, based upon the evidence before them, whether a respondent is to be deprived of the benefit of the limitation period contained in the section. The Court concluded that Tribunals do

have the jurisdiction to dismiss complaints based upon acts, the last of which occurred more than one year before the receipt of the complaint, if the Tribunal concludes that there is no reasonable justification for depriving a respondent of the benefit of section 41. In making its decision as to whether or not such a reasonable justification exists, the Tribunal should consider the following factors:

- i) the period of time that elapsed between the act or omission that is the subject of the complaint and the time when the complaint was filed with or received by the Commission;
- ii) the period of time that elapsed between the act or omission that is the subject of the complaint and the time when the respondent received notice of the complaint;
- iii) the reasons for the delay in filing the complaint or notifying the respondent of the complaint;
- iv) the reasons of the Commission for deciding pursuant to section 41 of the Act to proceed with the complaint notwithstanding that the complaint is based on acts or omissions the last of which occurred more than one year before receipt of the complaint; and
- v) the prejudice caused to the respondent by the delay. (Vermette, Decision of the Federal Court, *supra.*, at pp. D/161-2 and 165)

The Court noted that there is some overlap between these factors and those that must be considered in the application of the equitable doctrine of laches, but that the final test was different: the doctrine of laches requires a balancing of the expectation of reasonable diligence of the complainant and the prejudice caused by delay that may prevent a respondent from mounting a full answer and defence to the complaint. Here, the question is whether there is a reasonable justification for depriving the respondent of the benefit of the limitation period provided for in section 41.

The difficulty for this Tribunal in attempting to address the factors enumerated by the Court in Vermette is that most of the issues were never addressed by any of the parties in the course of the hearing. There was, of course, no reason for them to do so, as no notice was given by the respondent that section 41 of the Act was going to be in issue in this case. The issue only came up mid-way through respondent's counsel's closing argument - after all of the evidence was in and after all of the parties had closed their cases. In these circumstances, in the Tribunal's view, it would be fundamentally unfair to the Commission and to Mr. Singh to allow the respondent 'hide in the bushes' with an argument of this nature, and then to seek to benefit from the absence of relevant evidence. Notice of an argument such as that advanced by counsel for the respondent must be

given

in a timely fashion: in the normal course, this should be well before the hearing commences. Accordingly, the respondent's argument is rejected.

In any event, we note that Mr. Singh's complaint is dated March 5, 1993. While we do not know when the final decisions were made in connection with the 1992 ES competition (that is the

last of the incidents referred to in the complaint and pursued at the hearing), the evidence suggests

that the process was ordinarily completed in the spring of each year. It is not, therefore, clear that

Mr. Singh's complaint was filed more than a year after the last of the incidents giving rise to the complaint. We further note that the last incident actually referred to in Mr. Singh's complaint relate

to the grievance filed by Mr. Singh in May of 1992 - that is well within the one year limitation period.

Finally, we are not satisfied that the respondent has suffered any real prejudice with respect to the delay in this matter. We have found in the respondent's favour with respect to all of Mr. Singh's allegations except that relating to the failure to include Mr. Singh's name on the eligibility

list arising out of the 1988 ES-01 competition. For reasons already cited, we have concluded that

information relating to the other candidates was not relevant to the issues raised by this allegation.

Accordingly, no prejudice to the respondent flows from the destruction of the competition files.

There is nothing to suggest that either Mr. Drover or Françoise Singh, both of whom are now deceased, were involved in any way in the decision not to include Mr. Singh's name on the eligibility list. As a result, we cannot conclude that the respondent's ability to properly defend itself

in relation to this allegation has been compromised as a result of the delay.

VII REMEDY

Having found liability on the part of Statistics Canada with respect to the failure to include Mr. Singh's name on the eligibility list arising out of the 1988 ES-01 competition, it remains to be

determined what, if any, remedy should properly be provided to Mr. Singh. In fashioning a remedy,

the Tribunal's jurisdiction is governed by section 53 of the Act. In addition, the Courts have established that in cases of discrimination, the goal of compensation is to make whole the victim of

the discriminatory practice, taking into account principles of reasonable foreseeability and remoteness (see *Canada (Attorney General) v. Morgan*, [1992] 2 F.C. 401, and *Canada (Attorney General) v. McAlpine*, [1989] 3 F.C. 530).

i) Instatement

The Commission and Mr. Singh ask that Mr. Singh be provided with a position at the ES-03 level. It is clear that the remedial powers provided by section 53 (2) (b) of the Act extend to allow

Tribunals to order promotions where it has been determined that such promotions have been denied

for discriminatory reasons (*Canada (Attorney General) v. Uzoaba*, [1995] 2 F.C. 569, 26 C.H.R.R. D/428).

Before making any such award, however, the Tribunal must be satisfied that there was at least a serious possibility, if not a probability that the complainant would have received the position, but for the discrimination (*Morgan, supra.*)

We note that the eligibility list relating to this competition was only valid for a period of one month. According to Ms. Clément, the validity period for eligibility lists is governed by section 18

of the Public Service Employment Regulations, which provides, in part:

18 (1) Subject to this section, an eligible list is valid for a period of one year from the effective date thereof as determined by the responsible staffing officer.

(2) The responsible staffing officer may establish an eligible list that is valid for a period that is less than one year from the effective date thereof, as determined by the responsible staffing officer...

In the circumstances, we are of the view that it can reasonably be inferred that, with only one name

on the list, the expectation was that the list would only be used for one staffing action. There would

be no reason to extend the validity period beyond the time necessary to promote Ms. Cowan. Based

upon the wording of the Regulation, the evidence with respect to the validity periods for other eligibility lists (see, for example, Exhibits HR-1, Tab 4 and HR-2, Tab 21), and Mr. Dodds' testimony that eligibility lists are typically valid for one year, it is reasonable to assume that the list

would have been valid for longer, had there been more names on it and that, in all likelihood, the list

would have remained valid for a year.

In this case, based upon all of the evidence, considering the normal turn-over rate for ES-01 employees, the 1988-89 hiring levels for ES employees at Statistics Canada, and in particular, Mr.

Dodds' evidence with respect to the scarcity of ES recruits in the months following this competition,

we are satisfied that if Mr. Singh's name had been included on the eligibility list arising out of the

1988 competition, he would probably have obtained an ES-01 position at some point during the

time
that the eligibility list remained valid.

Although we have found that it was probable that Mr. Singh would have obtained an ES-01 position, it is not certain that he would have done so. While there was conflicting evidence on this issue, we find that, in the normal course, employees progress to the ES-02 level within a year or so, assuming satisfactory performance, and on again to the ES-03 level sometime thereafter. However, it is by no means certain that Mr. Singh's progress would have followed this path. The evidence before us has identified weaknesses in Mr. Singh's performance, in particular his resistance to constructive criticism of his work. Further, we are satisfied that, commencing in 1989, the calibre of the ES-01 employees coming into Statistics Canada was markedly higher than had previously been the case. Measured against such competition, it is quite possible that Mr. Singh's performance may have been found wanting. In order to take these factors into account, the Tribunal orders Statistics Canada to provide to Mr. Singh, at the first reasonable opportunity, a position within Statistics Canada at the ES-01 level. Such position should be provided on the same terms and under the same conditions as are in place for internal Statistics Canada candidates hired through the current ES Recruitment Program.

ii) Lost Wages

The Commission and Mr. Singh ask that Mr. Singh receive an award on account of lost wages in an amount equal to the difference between what he actually earned and what he says he should have earned, assuming that he was placed in an ES-01 position following Mr. Kaba's departure from the Transportation Division in June of 1987. Their salary calculations further assume that Mr. Singh would have remained at the ES-01 level for one year, following which his position is reclassified to the ES-02 level. After a further twelve months, Mr. Singh and the Commission's scenario has his position being further reclassified to the ES-03 level. He is assumed to continue at that level to this day.

In light of the Tribunal's findings on liability, Mr. Singh's damages do not start to flow until after the 1988 competition. Further, as noted in the previous section, we do not accept that Mr. Singh would necessarily have progressed in the manner suggested by the Commission and Mr. Singh. Accordingly, we order that Statistics Canada pay to Mr. Singh the difference between the salary actually received by him as CR-04, and the salary that he would have received, had he become

an ES-01 on August 2, 1989, that is, the mid-point of the notional validity period for the eligibility list for the 1988 competition. Mr. Singh's pension and other employment benefits will have to be adjusted to take these payments into account.

Our task is to attempt, insofar as it may be possible, to put Mr. Singh in the same position that he would have been in, but for the discriminatory conduct of Statistics Canada (McAlpine, supra.). In the Tribunal's view, it would unfairly penalize Mr. Singh if he were to suffer a more onerous income tax burden by reason of receiving nine years' worth of salary differential in a lump sum than he would have incurred had the monies been paid to Mr. Singh as salary over the intervening period. Accordingly, we direct Statistics Canada to pay to Mr. Singh an additional amount sufficient to cover the additional income tax liability that he will incur as a consequence of receiving the monies in this fashion.

iii) Mitigation

Counsel for the respondent contends that any award made to Mr. Singh should be adjusted on the basis that Mr. Singh has failed to mitigate his damages. In support of this argument, counsel points to various training courses which were available within Statistics Canada, which the respondent says would have improved Mr. Singh's chances in the various competitions. The respondent also points to Mr. Singh's failure to meet with selection board members after competitions in order to obtain feedback with respect to his performance, so as to enable him to address his deficiencies. Finally, the respondent suggests that Mr. Singh could have pursued positions in the SI category more vigorously, there being evidence that the SI group was a 'feeder group' for the ES stream.

There is no doubt that any award of damages under the provisions of the act must take into account the sufficiency of the complainant's efforts to mitigate his or her damages (Morgan, supra.). Viewed closely, however, the respondent's argument is not really directed to the issue of damages - rather, the suggestion implicit in the argument is more that Mr. Singh was, at least to some extent, the author of his own misfortune (see, in particular, paragraphs 155-157 of the respondent's written argument).

The question of mitigation only arises if we have concluded that there has been discrimination on the part of the respondent. We have found that Mr. Singh's age was a factor in

the failure of the respondent to include Mr. Singh's name on the eligibility list arising out of the 1988 ES-01 competition. Having concluded that Mr. Singh's age was a factor preventing his inclusion on the eligibility list, we fail to see how this could have been prevented or addressed by any actions on the part of Mr. Singh. Even if Mr. Singh had availed himself of certain of the opportunities available to him through the respondent, as perhaps he should have, nevertheless, at the end of the day, he would not have ended up a minute younger than he would otherwise have been. As a result, we are not prepared to conclude that there has been any failure on the part of Mr. Singh to mitigate his damages.

iv) Special Compensation

Subsection 53 (3) of the Act permits a Tribunal to order compensation to be paid, to a maximum of \$5,000, where the Tribunal finds that a respondent has acted wilfully or recklessly or where the victim of the discriminatory practice has suffered in respect of feelings or self-respect.

There is no doubt that the allegations contained in Mr. Singh's complaint, had they been proven, would have supported an award of damages at the upper end of the monetary scale. However, the Tribunal had only found that Statistics Canada engaged in an age-based discriminatory practice on a single occasion. We have dismissed Mr. Singh's allegations, as they related to his national or ethnic origin, in their entirety.

While there is no doubt that Mr. Singh has suffered considerable frustration and anguish in the course of his employment with Statistics Canada, we are satisfied that much of this arises out of events other than the failure to include Mr. Singh's name on the eligibility list for the 1988 competition.

In all of the circumstances, the Tribunal orders Statistics Canada to pay to Mr. Singh the sum of \$3,000 as special compensation.

v) Apology

Mr. Singh has asked that the Tribunal order that the management of Statistics Canada provide him with an apology.

In cases where the conduct of the respondent has been marked by insensitivity, Tribunal have ordered that apologies be provided (See, for example, *Uzoaba v. Canada (Correctional Services)* (1994), 26 C.H.R.R. D/361, aff'd *Canada (Attorney General) v. Uzoaba*, supra.)

Having considered all of the circumstances of this case, we are not persuaded that this is an appropriate case in which to order an apology.

vi) Interest

It is now well established that interest is payable on awards for damages for special

compensation as well as on awards for lost wages (Morgan, supra.). The Tribunal therefore orders that simple interest be paid on the monies awarded pursuant to this decision. Interest on the lost wages should start to run from August 2, 1989, that is the date upon which we have found Mr. Singh would probably have been awarded an ES-01 position. Interest on the special compensation should run from February 2, 1989, that is the date upon which the eligibility list for the 1988 ES-01 competition was published. Interest should be calculated using the Canada Savings Bond rate. Having regard to the fluctuations in interest rates over the last nine years, the Tribunal orders that the average Canada Savings Bond rate for each of these periods be utilized. In no case, however, should the total amount payable on account of special compensation, including interest, exceed \$5,000 (Canada (Attorney General) v. Hebert, [1996] F.C.J. No. 1457).

vii) Retention of Jurisdiction

In the event that the parties are unable to agree to the calculation of Mr. Singh's entitlement under one or more of the heads of damages referred to in this decision, the parties may make further submissions to the Tribunal.

VIII OTHER ISSUES

i) Breach of Confidentiality

Although it was not directly relevant to any of the issues which form the subject matter of this complaint, much time in this hearing was devoted to an alleged breach of confidentiality by Mr. Singh as a result of his having circulated copies of the Tax Data study within Statistics Canada in support of his efforts to find a new position at a higher level. Much was made of importance of confidentiality in the business of Statistics Canada, and evidence was received from several of the respondent's witnesses that Mr. Singh's actions constituted a very serious breach of Statistics Canada's rules, one which could have justified Mr. Singh's dismissal. Given the serious nature of the allegations made against Mr. Singh, albeit on a collateral issue, we felt it was appropriate to address these allegations in this decision.

We do not intend to review the conflicts in the evidence of the various witnesses on this issue, other than to note that despite the alleged seriousness of the infraction, there is no mention of Mr. Singh's conduct in any memoranda or written reprimand, nor is it mentioned in his performance appraisal covering the time in question. Further, Mr. Dodds, whose evidence we prefer to that of the respondent's other witnesses, testified that in cost-recovery projects of this nature, the studies produced were public in nature, and that the distribution of such studies within Statistics Canada was

permitted. As such, we are satisfied that Mr. Singh did not breach any obligations that he had with respect to confidentiality when he circulated copies of the study, and that the allegations put forward by the respondent represented an unwarranted attack on Mr. Singh's professional integrity.

ii) Disclosure Issues

Given the prominent role that questions relating to the disclosure of documents, or more precisely, the non-disclosure of documents, played throughout hearing, we would be remiss if we did not comment on the issues that presented themselves in this case.

As is the Tribunal's normal practice, a pre-hearing conference was held in this case, during the course of which the Tribunal directed the parties to make full disclosure of the documents each side intended to put in to evidence in the course of the hearing, and established a timetable for such disclosure. Disclosure was to have been completed just over two weeks before the hearing was to begin.

Notwithstanding the direction from the Tribunal, on an almost daily basis throughout the course of this hearing, objections were received (primarily from Commission counsel and Mr. Singh, although on occasion from Ms. Palumbo as well), complaining that documents were being sprung on opposing counsel at the last minute. Explanations for the failure to disclose were provided on each occasion, which explanations were generally quite unsatisfactory. This had the effect of increasing the apparent acrimony between counsel, making what was inevitably going to be a long and difficult hearing longer and more unpleasant for all concerned.

In preparation for Tribunal hearings, and in order to comply with their disclosure obligations, in addition to reviewing the relevant files and records, counsel should contact each witness that they intend to call in order to ascertain whether the witness possesses or is aware of any documents that may be relevant to the proceedings. It is no answer to an objection to untimely disclosure made midway through a lengthy hearing to state that counsel had only just met with the witness and become aware of the existence of a document.

Counsel further has an obligation, in advance of a hearing, to think through the issues that can reasonably be expected to present themselves in the course of the hearing, in order to ensure that disclosure obligations are honoured. Obviously, there will be situations where this is simply not possible, or where issues arise in the course of a hearing that were not originally contemplated by counsel. This should, however, be the exception and not the rule.

In addition to the aforementioned obligations, which apply to all parties appearing before the Human Rights Tribunal, counsel for the Canadian Human Rights Commission have special obligations, which arise as a consequence of the Commission's statutory mandate to act in accordance with the public interest (Section 51 of the Act). It is now well-established that, in proceedings before Human Rights Tribunals or Boards of Inquiry, the role of Human Rights Commissions is analogous to that of Crown counsel in criminal proceedings - that is, they are expected to act as 'ministers of justice' (see, for example, Ontario (Human Rights Commission) v. Ontario Human Rights Board of Inquiry (Jeffrey House) et al. (1993) 21 C.H.R.R. D/498, I.M.P. Group Limited v. Dillman and Nova Scotia Human Rights Commission (1995), 24 C.H.R.R. D/329 (N.S.C.A.) and Dhanjal v. Air Canada (1996), 28 C.H.R.R. D/367, aff'd [1997] F.C.J. No. 1599, (1997) 139 F.T.R. 37 (F.C.T.D.)) In the House decision, supra., the Ontario Divisional Court made reference to the decision of the Supreme Court of Canada in R. v. Stinchcombe ([1991] 3 S.C.R. 326), and noted that:

R. v. Stinchcombe also recognized that the 'fruits of the investigation' in the possession of the Crown 'are not the property of the Crown for use in securing a conviction but are the property of the public to be used to ensure that justice be done' ([at] 331). We are of the opinion that this point applies with equal force to the proceedings before a board of inquiry and the fruits of the investigations are not the property of the Commission.

As a consequence, Commission counsel are bound to make timely disclosure of all evidence that is relevant and available to them, including evidence which tends to support the complaint as well as that which does not. In light of these obligations, we were, therefore, surprised at the position taken by Commission counsel in this case, that is, that he was not obliged to disclose documents to the respondent that he intended to rely upon in cross-examination, so as not to lose the tactical advantage of surprise. In the Tribunal's view, this misapprehends the role of Commission counsel, and should not occur in the future.

iii) Intimidation

In the course of this hearing it emerged that shortly before the commencement of the hearing, Mr. Singh and Mr. Kaba had at least two telephone discussions about the case. While there is some disagreement between Mr. Kaba and Mr. Singh as to who called who and precisely what was said in the course of these conversations, it is clear that in the course of these conversations Mr. Kaba threatened to take legal action against Mr. Singh based upon the allegations that Mr. Singh was making with respect to the circumstances surrounding the hiring of Mr. Kaba by Statistics

Canada
in 1985.

The Tribunal questioned Mr. Singh about what effect, if any Mr. Kaba's threats had on Mr. Singh's testimony. After hearing from Mr. Singh we were satisfied that the threats had not caused

Mr. Singh to modify or qualify his testimony in any way, and the hearing proceeded.

As a result of these threats having been made, both counsel for the Commission and Mr. Singh submitted that Mr. Kaba had infringed section 59 of the Act, which states that:

No person shall threaten, intimidate or discriminate against an individual because that individual because that individual has made a complaint or given evidence or assisted in any way in respect of the initiation or prosecution of a complaint or other proceeding under this Part, or because that individual proposes to do so.

Mr. Singh has asked the Tribunal to refer this issue to the Attorney General of Canada for possible prosecution.

The Tribunal has carefully considered Mr. Singh's request. We note that there is no suggestion of any complicity or involvement on the part of the respondent in any of Mr. Kaba's actions. Rather, on the evidence before us it appears that Mr. Kaba's actions were those of an individual, acting on his own initiative, in a somewhat misguided attempt to protect his own reputation. In light of all of the circumstances we do not propose to refer the matter to the Attorney General. There is, of course, nothing to prevent either Mr. Singh or the Canadian Human Rights Commission from asking the Attorney General to look into the matter if they wish to do so.

IX ORDER

For the foregoing reasons, this Tribunal declares that Mr. Singh's rights under the Canadian Human Rights Act have been contravened by the respondent, and orders:

- i) that Mr. Singh be provided, at the first reasonable opportunity, a position within Statistics Canada at the ES-01 level. Such position should be provided on the same terms and under the same conditions as are in place for internal Statistics Canada candidates hired through the current ES Recruitment Program;
- ii) that Statistics Canada pay to Mr. Singh the difference between the salary actually received by him as CR-04, and the salary that he would have received, had he become an ES-01 on August 2, 1989. Mr. Singh's pension and other employment benefits are to be adjusted to take these payments into account;
- iii) that Statistics Canada pay to Mr. Singh an additional amount sufficient to cover the additional income tax liability that he will incur as a consequence of receiving the monies referred to above in this fashion;
- iv) that Statistics Canada pay to Mr. Singh the sum of \$3,000 as special compensation; and
- v) that simple interest be paid on the monies awarded pursuant to this decision:
 - a) on lost wages from August 2, 1989; and
 - b) on the special compensation from February 2, 1989

Interest should be calculated using the average Canada Savings Bond rate for each of the periods in question. In no case, however, should the total amount payable on account of special compensation, including interest, exceed \$5,000.

Dated at Ottawa this day of September, 1998.

Anne L. Mactavish

Peggy J. Blair

Athanasios Hadjis