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Decision rendered February 16, 1988

Tribunal Decision under The Canadian Human Rights Act

BETWEEN:

BALBIR BASI; COMPLAINANT: AND:

CANADIAN NATIONAL RAILWAY COMPANY; RESPONDENT:

BEFORE:

RICHARD I. HORNUNG, Q. C. - CHAIRMAN

APPEARANCES:

RENE DUVAL - Counsel for the Canadian Human Rights Commission representing BALBIR BASI;

DONALD KRUK - Counsel for the Canadian National Railway Company

HEARING DATES: June 15- 16, 1987 REGINA, Saskatchewan August 21st, 1987 WINNIPEG, Manitoba

AWARD

I. On May 25th, 1984, Balbir Basi filed a complaint with the Canadian Human Rights Commission (hereafter the "Commission") alleging that he, an East Indian, had been denied an employment opportunity with the Canadian National Railway Company (hereafter "CNR") because of his race, color and national and ethnic origin, in violation of Section 7 (a) of The Canadian Human Rights Act.

II. In February of 1984, the CNR advertised for 2 qualified Heavy- Duty Mechanics for its Saskatoon shop and invited prospective applicants to apply, in person, to Mr. Fred Symenuk at the CN Equipment Shop at Saskatoon (see exhibit C- 3). Although 2 positions were originally advertised, a subsequent decision was made that only 1 person was to be hired.

Mr. Basi, residing in Regina, was referred to the position by Loretta Trowsdale, an employment counsellor at the Canadian Employment Centre there. After reviewing Basi's qualifications, Mrs. Trowsdale telephoned the CNR in Saskatoon and arranged for him to apply for the position.

I am satisfied that Basi, at a minimium, had the necessary qualifications for the position advertised.

Basi was given a "mobility grant" and used the funds to attend at Saskatoon for an interview on February 23rd, 1984. When he went to Saskatoon the position had not yet been filled although, to his knowledge, there were a large number of applicants for the job. On his arrival, Basi was asked to complete an application form and was interviewed by Symenuk.

Basi's original complaint about discrimination stems from this interview. He testified that the interview was cursory and that Symenuk appeared disinterested and rudely accepted a telephone call in the middle of his interview. Further, he was slighted by the fact, according to him, that Symenuk did not inquire as to his qualifications which he was obviously proud of. The entire interview, according to Basi, lasted only 10 to 15 minutes.

Symenuk, for his part, recollects receiving a call from someone at the Canadian Employment Centre in Regina (obviously Trowsdale) who told him that they had someone with qualifications for the advertised position. He responded that CNR already had over 20 applicants, at that stage, but if they wanted to send Mr. Basi up it was fine with him.

He recalls the interview with Basi but denies being rude or cursory. He testified that he spent time with Basi and briefly reviewed Basi's work experience. Symenuk agrees that the interview lasted only 10 or 15 minutes but says that all of his interviews with all of the applicants lasted that length of time.

After the interview Mr. Basi returned to Regina. He testified that approximately 2 days after his interview he called CN to determine whether his application was successful. He was told by someone on that date that: "the position is all filled". This evidence by Mr. Basi is understandably not refuted by the CNR insofar as it would have been impossible for it to do so since Mr. Basi could not recal who he had his conversation with. Accordingly, although I raise the matter as part of the fact scenario, that portion of the evidence did not have any bearing on my eventual determination in regard to this matter.

The deadline for applications closed on February 27th, and thereafter Mr. Symenuk embarked on a method of selection with which I will deal at length later.

In all, there were a total of 44 applicants for the position many of whom, according to Symenuk, had the necessary minimium qualifications but none of

whom stood : "head and shoulders", about the rest. On March 9th, 1984, CN wrote to Mr. Basi and advised him that the position in Saskatoon had been filled (ex. R- 8).

III. METHOD OF SELECTION: Because of the nature of the complaint, the method employed by the CNR in selecting the successful applicant is of paramount importance.

In that regard, Symenuk stated that after all the applications were in he was told by his supervisor, Mr. Newfield, to select 5 applicants for further interviews and make appointments with them.

According to Symenuk, he selected the 5 "short list" applicants in the following manner:

Q. Now who made the selection of those five people who were to be selected for a second interview?

A. I made the selection.

Q. Now, how did you go about doing that? I'm speaking about after all the 44 applications are in. were they kept in any particular order?

A. Yes, they were kept in the order that they were received and I took them from the top down, went through several times until I picked my five out that I thought would qualify.

Q. Let me stop you there for a moment. You say they were kept in the order that they were received?

A. Right

Q. And on a given day would you have more than one application?

A. Oh, yes. There were days that there were several.

Q. So then you would keep them sort of in a pile? Is that the idea?

A. That's right. I had the file, and as they came in they just went on file as they came in.

Q. And was the procedure the same? In other words, the person would come in, the application would be filled out, it would be reviewed with them and then put on the file? Is that the way it happened?

A. Yes, that's correct.

Q. Now, once you had the 44 or some odd applications there and you were selecting the five, how did you go about doing that?

A. Well, like I just said, I took them from the top down. I started from the very first one received, reviewed them again, went through them until I had five selected. (emphasis mine)

Q. Okay. So initially you said you went through all the applications one more time?

A. Oh, initially I went through all the applications, yes.

Q. And what was the purpose of that?

A. Well, I was looking for someone that may have stood out head and shoulders above anyone else, which wasn't the case.

Q. So then you start off with the first application that you received and you went through them until you selected the five that you felt-

A. Yes, that's correct.

Q. Do you recall approximately how many you went through before you had achieved the five or had selected the five?

A. Roughly I would say 15 or 16, in and around that neighbourhood."

(pp 191- 193)

His method of review was again reiterated in cross- examination in the following exchange:

Q. When did you first review the applications?

A. When they were completed, when they were filled out and completed.

Q. In other words, you went up until the 27th, as your application date of the 27th?

A. No, I reviewed every application as they were filled out, the day the applicant filled it out.

Q. Now, you said you had to review them twice before selecting the 5 candidates. Is that correct?

A. I said that I reviewed all 44 applicants' applications and then I started with the very first one and reviewed them until I selected five.

(p. 217)

Following this method of review, Symenuk went through 15 or 16 applicants before he found the first 5 "finalists" who were qualified for the position. Basi's application was not one of those 15 or 16. According to Symenuk, when Newfield attended at Regina, he too went through the 44 applicants and agreed with the 5 Symenuk picked earlier. Newfield however, testified that he agreed with the 5 Symenuk chose without review of the entire list of applicants.

In any event, after interviewing the 5, a candidate was awarded the position and the remaining 4 finalists plus Mr. Basi (ex. R- 8) received letters advising them that the position was filled.

Why Basi, one of the 39 remaining candidates, received a letter along with the 4 unsuccessful finalists remains a mystery today. Symenuk says that although he signed Exhibit R- 8, he did not

know why it was prepared and assumes it was likely because Mr. Basi asked for it. Basi says he received it in the mail "out of the blue".

IV. I am satisfied that at his initial interview, Basi was treated no better or no worse than any of the other 44 applicants.

At first glance, all outward appearances, combined with the explanation of the selection process, support CNR's position that Basi was not discriminated against at the time of the job application.

However, during the course of the Hearing, a number of matters, relating to the conduct of CNR after the interview, were brought to the attention of the Tribunal which gave me considerable pause and caused me to question that initial conclusion:

(i) LETTER OF MARCH 9TH, 1984: The letter of March 9th, 1984, (ex. R- 8), was sent to Basi advising him that the position was filled when no one else other than the 4 "short list" candidates received a similar letter. In initial correspondence with the Commission the CNR advised that it had no record of any such letter being sent to Mr. Basi. In point of fact, as indicated earlier, no explanation was given even at the time of the Hearing as to why the letter was sent to the complainant;

The CNR was originally advised of Mr. Basi's complaint by a letter from the Commission dated June 26th, 1984 (ex. R- 10). The letter was directed to Mr. Al Cormack and, inter alia, asked for the following information:

... "in order to facilitate an early resolution of this matter, could you please provide him with the following information: ...

4. A copy of the letter notifying the complainant that the position has been filled.

5. Any further information or comments you have respecting this complaint."

On August 13th, 1984, Mr. Cormack responded to the Commission's letter.(R- 9) Specifically, in answer to the above questions, Mr. Cormack responded as follows:

"... The following is the information you requested: "4. Mr. Basi was not included in the list of five candidates considered best for the job, and was therefore not formally interviewed. Although we have copies of letters sent to the 4 unsuccessful candidates who were interviewed, we have no record of any letter issued to Mr. Basi." (emphasis mine)

The evidence is clear that Basi did receive a letter and, surprisingly enough, a copy of it was extracted from the CNR's file during cross- examination at the Hearing.

(ii) REFERENCES: Mr. Cormack's letter of August 13th, 1984 (R- 9) constituted CNR's first formal response to Basi's complaint. In it he provides the following explanation as to why Basi's application was not successful:

"5. Mr. Basi was not chosen to fill this position because we were not impressed with his qualifications in relation to our requirements. His experience lies mainly with buses, with some background on locomotive repair. More significant, 2 previous employers (Red Head Equipment and Kramer Tractor) were contacted and we were advised that Mr. Basi was released from their employ because of tardiness and absenteeism problems.(emphasis mine)".

Leaving aside the issue of qualifications for the moment, the evidence clearly established that Basi's references were not contacted until after the CNR received the Commission's letter of June 26th, 1984 (R- 10).

Therefore, contrary to Mr. Cormack's statements in R- 9, Mr. Basi's references had absolutely nothing to do with him not being awarded the position.

(iii) Letter of November 26th, 1984: The problem in (ii) above, is compounded by the fact that on October 15th, 1984 (R- 11) the commission wrote to Mr. Cormack and posed, inter alia, 2 further questions, as follows:

"6 (a) please provide us with the names and phone numbers of the representatives from Red Head Equipment and Cramer (sic) Tractor who advised that the complainant was released from their employment because of tardiness and absentee problems;

(b) who contacted the complainant's references? (c) Was this done prior to the complainant's application or afterwards? 7. Why were the complainant's references checked, if his qualifications were not sufficiently relevant for the position?"

In his response to the Commission's requests on November 26th, 1984, (R- 12) Mr. Cormack leads one to believe even further that the references were

checked after Basi's interview with Symenuk but before the position was filled:

"The following is the information you requested: 6. (a) The representative of Red Head Equipment contacted was wade Sandoff, Service Manager, Regina, Telephone 545- 3690. The representative at Kramer Tractor, Regina was Clarence Sick, Telephone 545- 3311.

(b) Bruce Hunter, Administrative Clerk, Work Equipment Clerk, Saskatoon.

(c) After the interview with Foreman Symenuk. 7. Mr. Symenuk was not satisfied with some of Mr. Basi's responses to interview questions. It was felt a thorough review should be made because Mr. Basi had been referred by Canada Manpower which normally expects such a review." (Emphasis mine).

As indicated, it became clear during the hearing that no checks were made on Mr. Basi's references until after the complaint to the Human Rights Commission and until they were specifically requested by Mr. Newfield following the complaint. Newfield, the Superintendent of CNR Shops in Winnipeg, testified that he received a request from the Labour Relations Officer of the CNR asking him to check Mr. Basi's references after the CNR received a complaint from

the Commission, accordingly, he instructed Bruce Hunter to do the investigation on behalf of the CNR.

(iv) HUNTER'S REPORT: Bruce Hunter's report to Mr. Newfield, which formed the basis of the CNR's initial response to the Commission, is contained in a memorandum marked Exhibit C-21. That report concludes with 2 paragraphs, the contents of which are self- explanatory:

"We had a total of 23 applicants with mechanics' papers. This was narrowed down to 5 which came in for interviews. Basi did not make it as far as the interview as he did not have any welding experience which is almost a necessity for the job. Even out, of the other applicants that didn't make it for interviews, there were better qualified mechanics.

When the UIC office in Regina phoned about him coming to Saskatoon to put in an application, they were told that we already had plenty of applications. I got the impression that he came here only because UIC was paying his expenses."

(emphasis mine)

(v) QUALIFICATIONS: Dealing with Basi's qualifications, Symenuk testified, in chief, as follows:

"I didn't feel that he had enough experience in that field, in that sort of time to qualify for that job.

Q. When you say that, when you say he didn't have enough, you mean he didn't have enough in relation to other people who had applied?

A. To other people and to the related work involved." (pp 188 - 189) The above statement of Mr. Symenuk is significant insofar as in cross- examination he subsequently admitted that he did not make the decision that Basi was not qualified until after the Human Rights Commission began investigating Basi's complaint.

When asked in cross- examination, when he made the decision respecting qualifications, he responded:

A. I guess after the Human Rights had come out and questioned me on that fact.

THE CHAIRMAN: Q. It's not a decision you made while he was sitting in the office opposite you during your interview. A. No, it was not." (pp 233 - 234) (emphasis mine) Despite the above, CNR consistently took the position, from the outset, that Basi was not hired because of a lack of qualifications.

As late as March 24th, 1986 (C- 20) Mr. Cormack wrote to provide the Commission with "certain additional comments for (its) consideration". In that correspondence Mr. Cormack took pains to outline the qualifications which the CNR sought for the Mechanic in question and then states:

"Mr. Basi was not one of the five applicants selected for a second interview. In CN's view, the five applicants had superior qualifications to those of the other applicants, including Mr. Basi, based on the foregoing criteria."

This entire scenario of the CNR attempting to explain in various correspondence (R- 9 to R- 12 and C- 20), why Basi was not hired, are completely inconsistent with the simple, seemingly straight forward explanation given by Symenuk as to his method of selection; and directly conflict with his testimony that he did not review the qualifications of Basi, as against the 5 finalists, until after the CNR became aware of the complaint to the Human Rights Commission.

V. The burden, and order, of proof in discrimination cases involving refusal of employment appears clear and constant through all Canadian jurisdictions: a complainant must first establish a prima face case of discrimination; once that is done, the burden shifts to the respondent to provide a reasonable explanation for the otherwise discriminatory behaviour. Thereafter, assuming the employer has provided an explanation, the Complainant has the eventual burden of showing that the explanation provided was merely a "pretext" and that the true motivation behind the employer's actions was in fact discriminatory.

It is therefore encumbent on the Complainant, in this case, to first establish a prima face case:

"In an employment complaint, the Commission usually establishes a prima face case by proving:

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 subsequently obtained the position.

If these elements are proved, there is an evidentiary onus on the Respondent to provide an explanation of events equally consistent with the conclusion that discrimination on the basis prohibited by the Code is not the correct explanation for what occurred."

Florence Shakes v. Rex Pak Limited (1982) 3 CHRR D/ 1001 at D/ 1002 Julius Israeli v. Canadian Human Rights Commission and Public Service Commission (1983) 4 CHRR D/ 1616

There is no question that Mr. Basi is of East Indian descent and that he was not hired. Equally, in light of Mr. Symenuk's evidence, I find that "someone no better qualified" subsequently obtained the position. Accordingly, it is my view that the Commission has met all 3 requirements as set forth above to meet its initial burden.

It therefore falls to the respondent to provide a reasonable explanation as to why Basi was not employed in the position under consideration. The explanation offered by Mr. Symenuk was essentially: that he went through all of the applications and determined that several appeared to be equally qualified for the position; that he therefore went through the applications in chronological order of receipt until he found 5 people who appeared to be sufficiently qualified; that he reached the number of 5 finalists after reviewing 15 or 16; and that therefore, Basi was not one of those applicants who made the "short list" for the position.

There were of course subsequent matters that arose with respect to Mr. Basi's qualifications of which I will deal later. However, for the time being, to distill the evidence to its simplest form, the above constituted the explanation of the employer.

Standing alone, that explanation appeared to meet the evidentiary onus of providing a reasonable explanation that is equally consistent with the conclusion that discrimination on the basis prohibited by the code is not the correct explanation for what occurred. Faced with the employer's response, the final evidentiary burden returns to the complainant to show that the explanation provided is pretextual and that the true motivation for the employer's actions was in fact discriminatory.

VI. To accomplish that end the complainant would have a herculean task were it necessary for him to prove, by direct evidence, that discrimination was the motivating factor. Discrimination is not a practise which one would expect to see displayed overtly. In fact, rarely are there cases where one can show by direct evidence that discrimination is purposely practised.

Since direct evidence is rarely available to a complainant in cases such as the present it is left to the Board to determine whether or not the Complainant has been able to prove that the explanation is pretextual by inference from what is, in most cases, circumstantial evidence :

"Discrimination on the grounds of race or color are frequently practised in a very subtle manner. Overt discrimination on these grounds is not present in every discriminatory situation or occurence. In a case where direct evidence of discrimination is absent, it becomes necessary for the Board to infer discrimination from the conduct of the individual or individuals whose conduct is at issue. This is not always an easy task to carry out. The conduct alleged to be discriminatory must be carefully analyzed and scrutinized in the context of the situation in which it arises."

Kennedy v. Mohawk College (1973) Ontario Board of Inquiry (Professor Borons)

In many instances, Tribunals have taken the view that the inference of discrimination that must be drawn from the circumstantial evidence in order to support the complainant's case:

"must be consistent with the allegation of discrimination and inconsistent with any other rational explanation".

KENNEDY v. MOHAWK (supra) It seems to me that a test of that nature is too severe, particularly under the present circumstances. It is virtually undisputed that discrimination generally must be established according to the civil standard of proof, that is: by a preponderance of evidence on a balance of probabilities.

Julius Israel v. C. H. R. C. (Supra) BHINDER v. CNR (1981) 2 C. H. R. R D/ 546; [aff. (1985) 2 S. C. R. 561] It follows therefore that in establishing the circumstantial evidence, a complainant should face no more onerous a test than he would in proving his case generally in the ordinary course. To require the complainant to meet the test enunciated in Mohawk College (supra) would essentially require him to meet a criminal standard of proof in establishing the circumstantial

evidence, when in fact the pervasive burden throughout the entire case is only on a balance of probabilities.

I am persuaded by the logic employed by B. Vizkelety in her recent book: Proving Discrimination in Canada, (1987) Carswell, where she states at page 142:

"it is suggested that the Kennedy (v. Mohawk College) Standard reflects a criminal as opposed to a civil standard of proof and that, as such, it is too rigid. There is indeed, virtual unanimity that the usual standard of proof in discrimination cases is a civil standard of preponderance. The appropriate test in matters involving circumstantial evidence, which should be consistent with this standard, may therefore be formulated in this manner: 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."

In my view therefore, the more suitable test for drawing an inference of discrimination in cases such as the present is the test formulated and emphasized above.

VII. At the hearing, the CNR attempted to provide alternate explanations for its failure to hire Mr. Basi, as set out in Part IV of this Award. As indicated, those explanations are inconsistent with the reasons given by Symenuk for originally picking the 5 finalists.

Mr. Kruk ably argued that the various inconsistencies were matters that in themselves should not affect my decision insofar as they had nothing to do with the initial hiring procedure employed by Mr. Symenuk.

I disagree. Although Mr. Kruk’s arguments are persuasive they are not compelling. Surely, the conduct of the Respondent, both before and after the alleged act of discrimination, cannot be isolated from the act itself. It would be virtually impossible for the complainant to prove that the explanation offered by Mr. Symenuk was pretextual unless he was able to rely on inferences drawn from the employer’s actions both at the time of the hiring and subsequent thereto. Much depends, in cases such as the present, on the ability of a Tribunal to draw inferences, (which are reasonable if not in fact compelling) from the conduct of the employer. Once these inferences are raised the employer has an onus of explaining what his motives were other than what they appeared to be. In my view therefore, the conduct of the parties, up to the date of the hearing, are properly matters which I must consider.

The respondent does not sufficiently refute an inference of discrimination by being able to suggest any rational alternative explanation; it must offer an explanation which is credible on all the evidence; see Fuller v. Candur Plastics Ltd. (1981) 2 CHRR D/ 419.

In my view, the CNR has not provided a sufficient credible explanation as to why the evidence of Mr. Symenuk re: his selection method is contradicted so dramatically by the reasons as disclosed in exhibits R- 9 to R- 12 and C- 20. Nor, for that matter, has the CNR provided a satisfactorily credible explanation for any of the other matters set forth in Part IV of this Award.

VIII. Frankly, the subtle scent of discrimination permeates the entire manner in which the CNR dealt with the Human Rights Commission in attempting to justify their actions regarding Basi. I am left with the conclusion that the rationale for not hiring Mr. Basi, as described by Mr. Symenuk, was not as innocent, direct nor reasonable as first proposed. It appeared to me, from the explanations provided to the Commission and from the information contained in the files of the CNR, that the Respondent was attempting to justify the actions taken by Mr. Symenuk. The effect of the conflicting explanations and inconsistencies is to leave an inference, not only more probable but irresistible, that either the explanations of Mr. Symenuk with respect to the method of selection, or the subequent explanations with regard to qualifications etc., (or perhaps both), are pretextual.

I am left with no alternative but to draw the necessary negative inferences and conclude that the complainant has sufficiently rebutted the employer's explanation and has shown, by inference in the circumstances earlier described, that the explanation was not the real reason for Mr. Symenuk's decision not to hire Mr. Basi but rather that it was a pretext.

Accordingly, the complaint of Balbir Basi to the Commission (C- 8) is well founded and I find that discrimination as set forth in his complaint was one of the reasons for the CNR failing to offer him the position in question.

IX. Although I have reached the conclusion that Mr. Basi was discriminated against by the CNR, I am not able to say that this discrimination was the sole reason why he did not receive the position in question; nor, can I say that he would have received the position but for the discrimination.

However, it is sufficient to reach a conclusion that discrimination was one of the factors that influenced the employer in refusing Mr. Basi the position; it is not encumbent on me to determine that it was the sole or primary reason for that decision:

"... it is sufficient for a complainant to establish that the prohibited ground of discrimination constituted only one among a number of factors leading to the decisions which are the subject matter of the complaint ....

Although the prohibited ground of decision making must have some causal role or influence in the decision made, it need not be the exclusive cause of or influence on the decision. Indeed, as is suggested in Bushnell itself, it is not necessary to establish that the prohibited ground was the main reason for the decision in question."

Almeida v. Chubb Fire Security Division of Chubb Industries Ltd. (1984) 5 CHRR D/ 2104 at 2105

I cannot categorically say that Mr. Basi would have received the position but for the discrimination; however, I can say that the circumstantial evidence satisfies me that discrimination played a part in the employer's failure to offer it to him.

X. The parties agreed at the outset of the Hearing that I would restrict my determination, to whether or not discrimination existed with respect to Mr. Basi's job application. Having so found, I was to retain jurisdiction with respect to remedies and damages in order to permit the parties to either agree on the same or alternatively call evidence in that regard.

Accordingly, in the event the parties are unable to reach an agreement regarding a remedy, I shall retain jurisdiction with respect to this matter for a period of 30 days from the date of this Award. Either party is at liberty, within the 30 day period, to request that the Tribunal reconvéne.

DATED this 8th day of February, A. D., 1988. RICHARD I. HORNUNG, Q. C.

T. D. 2/ 88

Tribunal Decision under The Canadian Human Rights Act BETWEEN:

BALBIR BASI; COMPLAINANT AND:

CANADIAN NATIONAL RAILWAY COMPANY; RESPONDENT

BEFORE:

RICHARD I. HORNUNG, Q. C. - CHAIRMAN APPEARANCES:

RENÉ DUVAL - Counsel for the Canadian Human Rights Commission representing Balbir Basi;

DONALD KRUK - Counsel for the Canadian National Railway Company. HEARING DATES: August 16, 1988 REGINA, Saskatchewan.

AWARD

I. In a decision of February 8th, 1988, I found that the CNR discriminated against the complainant, Balbir Basi, when he applied for a position with that Company. I retained jurisdiction with respect to the remedy aspect of the matter in the event the parties were unable to agree. In point of fact, the parties could not agree on the remedy aspect and the matter was brought back before me on August 16th, 1988 at Regina, Saskatchewan for determination.

II. The complainant seeks compensation from the respondents: initially, for the amounts representing the difference between what he might have earned in the heavy duty mechanic's position to date and the amounts which he actually earned; additionally, he seeks "moral" damages pursuant to Section 41 (3) (b) of the Canadian Human Rights Act (hereafter the Act)..

The relevant portions, for our purposes of the Canadian Human Rights Act, dealing with damages are Sections 41 (2) and Section 41 (3). The sections read as follows:

"(2) If, at the conclusion of its inquiry, a Tribunal finds that the complaint to which the inquiry relates is substantiated, subject to subsection (4) and section 42, it may make an order against the person found to be engaging or to have engaged in the discriminatory practise and include in such order any of the following terms that it considers appropriate: ...

(b) that such person make available to the victim of the discriminatory practice on the first reasonable occasion such rights, opportunities or privileges as, in the opinion of the Tribunal, are being or were denied the victim as a result of the practice;

(c) that such person compensate the victim, as the Tribunal may consider proper, for any or all of the wages that the victim was deprived of and any expenses incurred by the victim as a result of the discriminatory practice; and..... (3) In addition to any order that the Tribunal may make pursuant to subsection (2), if the Tribunal finds that

(a) a person is engaging or has engaged in a, discriminatory practice wilfully or recklessly, or (b) the victim of the discriminatory practice has suffered in respect of feelings or self- respect as a result of the practice,

the Tribunal may order the person to pay such compensation to the victim, not exceeding five thousand dollars, as the Tribunal may determine."

III. DAMAGES RE: LOSS OF WAGES: This case presents an interesting problem. In ordinary circumstances, where a person had lost a specific job as a result of discriminatory practice, the amount of damages or the remedy to be invoked would be simplistic. This case however is different. There is no suggestion here that Mr. Basi lost the job in question. His complaint is essentially that because of the discriminatory practices he lost an opportunity to properly apply for the position in question. Essentially, his claim is for the denial of a job opportunity rather than the denial of the job itself.

The employer argues that there should be no damages assessed against it for the loss of wages claimed by Mr. Basi.

The position of the employer is essentially that before any damages can be awarded to the complainant it must be shown that their was actually a reasonable possibility that the opportunity would have produced the job and the financial reward associated with it.

See Michael Dantu v. North Vancouver District Fire Department (1987) 8 C. H. R. R. 3649 (at 3651)

As I understand it therefore, it is encumbent upon me to determine first of all, as a threshold step, whether or not Mr. Basi had a reasonable possibility of obtaining the position in question. I have reviewed the evidence at length and I am of the view that he would not. Considering the qualifications of the individuals who were the 5 finalists; and, considering the qualifications of the individual who eventually obtained the position, I am of the view that Mr. Basi would not have had a reasonable possibility, all other things aside, in obtaining the position. I say this particularly in light of his lack of experience in the welding field.

Accordingly, under the circumstances, it would be inappropriate, and highly speculative to award damages to Mr. Basi under Section 41 (2) (c) of the Act.

IV. MORAL DAMAGES:

On the other hand, having equally reviewed the evidence, I am of the view that Mr. Basi should be awarded damages pursuant to Section 41 (3) (b) of the Act.

There is no need for me to reiterate those facets of the evidence which confirm my view that Mr. Basi suffered discrimination. A review of my decision outlines those facts. However, I am satisfied that considering the conduct of the employer after the job application was received and considering the fashion in which Mr. Basi was treated both by Mr. Symenuk and subsequently, I am of the view that there ought to be a substantial award given against the employer under Section 41 (3) (b).

Accordingly, I award Mr. Basi the sum of $5,000.00 pursuant to the said section.

DATED this 1st day of December, 1988. RICHARD I. HORNUNG, Q. C.