

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

HUMAN RIGHTS TRIBUNAL

BETWEEN:

ROBERT DOKIS

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

DOKIS INDIAN BAND

Respondent

TRIBUNAL DECISION

TRIBUNAL: Keith C. Norton, Q.C. - Chairperson  
Kathleen Jordan - Member  
Anne L. Mactavish - Member

APPEARANCES: Odette Lalumière, Counsel for the Canadian Human  
Rights Commission

Geoffrey M. Laplante, Counsel for the Respondent

DATE AND LOCATION

OF HEARING: August 9-10, 1995  
Sudbury, Ontario

- 2 -

1. The Complaint

The Complainant, Robert Dokis, alleges that the Respondent, the Dokis Indian Band, denied him an employment opportunity because of his age, contrary to section 7 of the Canadian Human Rights Act (CHRA).

Section 7 of the CHRA states:

"It is a discriminatory practice, directly or indirectly, (a) to refuse to employ or continue to employ any individual, or (b) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination."

Section 3.(1) of the CHRA states:

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

## 2. The Facts

The Complainant, Robert Dokis, was born in Sturgeon Falls, Ontario, on July 30, 1930, and is a member of the Dokis Indian Band, having lived on the Dokis Reserve all his life.

In January of 1981, the Complainant was approached to take a job working for the Dokis Band as a "Clinic Driver" or Health Transfer Driver. This job entailed driving his own vehicle to transfer residents of the reserve to the hospital or the clinic when they required medical attention. At that time the position was not posted nor was there any formal competition held.

Robert Dokis described the work as "full-time" which he explained as meaning that he was on call twenty-four hours a day, seven days a week. However, he was paid only for the hours he actually worked driving or waiting for people at the clinic or hospital. He was paid weekly for his time and received no employment benefits.

There were several other people who also performed this job during the period from January, 1981 to July, 1994 but the evidence indicated that Robert Dokis was generally recognized as the first person to be called and the others were called only when he was already on a call or otherwise

unavailable such as when he was working as a guide, which he did for two weeks of each year.

Thus, he performed the service most of the time and certainly far more

- 3 -

than any other individual.

Understandably, over the years, he, his family and others generally came to regard the position of "Clinic Driver" as "Robert's job" even though others did perform it at times and no one did it full-time in the sense of holding a salaried position.

On April 30, 1991, the Dokis Band concluded a new Health Services Program Contribution Agreement with National Health and Welfare (Exhibit R-1) which, among other things set out in some detail the objectives and activities for the patient transportation function (Exhibit R-1, Appendix A-1). This included records and accounting requirements.

Apparently pursuant to this new agreement, the Band Council decided to create two positions in patient transportation: Medical Driver (full-time position), and Replacement Medical Driver (On Call Basis) and to conduct a formal competition for these positions.

Thus, it was with surprise and a sense of personal hurt that in early 1992, Robert Dokis learned without prior notice, that "his job" had been posted (Exhibit HR-2, Tabs 2 & 3) and that applications were being received for a job competition. As far as he was concerned, this was the very job he had been performing for eleven years.

The first notices of the competition for the positions were posted with an application deadline of February 17, 1992. These clearly set out the requirement of submitting proof of both a Class "B" driver's license and a good driving record with the application. They also stated the requirement that candidates be willing to take "CPR, First Aid and other specialized training". (Exhibit HR-2, Tabs 2 & 3)

A short time later, new notices were posted which were identical in all respects except the application deadline was extended to February 27, 1992, the applications were to be submitted to the Band Council rather than Denise Restoule as in the earlier ones and the driver qualification was altered to a Class "E" license from a Class "B". (Exhibit HR-2, Tabs 4 & 5)

Although these changes were questioned by counsel for the Commission, we heard evidence that the removal of Denise Restoule's name and substitution of that of the Band Council resulted from an incident, of which we have only hearsay evidence, involving the Complainant's son John, who was upset at the posting of "his father's job", and Denise, which resulted in police involvement and a peace bond. We also heard evidence that the Council lowered the driver qualification because community members expressed the view that the initial requirements were too high.

By letter dated February 26, 1992, the Complainant applied for the position of full-time Medical Driver and clearly stated that if unsuccessful in his bid for that position, he wished to be considered for the part-time position. His letter indicated that he had a temporary Class G-E license and was awaiting his permanent license. He further expressed

- 4 -

his willingness to undertake specialized training in CPR and First Aid. (Exhibit HR-2, Tab 7)

He was contacted by the Band Administrator to set up an interview for March 23, 1992. Four applicants were referred to the Hiring Committee established by the Band Council for the purpose of interviewing the applicants. The four applicants were Robert Dokis, Shirley Dokis, Chris Dokis and Wayne Restoule.

Robert Dokis, who at the time was sixty-two years of age, was considerably older than the other applicants. Chris Dokis and Wayne Restoule were each about 26 years of age and the age of Shirley Dokis is unknown, although it was understood that she was much younger than the complainant.

The Hiring Committee consisted of five people: Denise Restoule, the Health Transfer Co-ordinator; Marie Dokis, the Community Health Representative; and three members of the Band Council, Jack Restoule (now the Chief), Peter Restoule and Gordon Restoule.

The interviewers were provided with a prepared list of ten more substantial questions intended to test knowledge, ability, suitability and problem solving and ten mini-questions which sought more personal information. These questions were asked of each candidate and those asking the questions were provided with a range of possible answers and a scoring scheme. (Exhibit R-7)

At the conclusion of the interviews, the Committee members prepared a report to the Band Council including a tabulation of the scores for each candidate and a recommendation on who the successful candidates would be (Exhibit R-3). The committee recommended Chris Dokis, full-time driver and Robert Dokis, part-time driver.

Four out of five of the Committee members gave Chris Dokis the highest score and the fifth, Jack Restoule, who testified as to his great respect for the Complainant and spoke in his favour on a number of occasions scored a tie between Robert Dokis and Chris Dokis. In the overall averaging of the scores Chris Dokis was a clear winner.

At a Band Council meeting convened on March 26, 1992, the Band Administrator, Pat Restoule, presented the recommendations of the Hiring Committee. At this meeting there was a disagreement between two of the Councillors who had served on the Committee with respect to the issue of whether there ought to have been prior screening of the applicants to eliminate those who did not have the stipulated qualifications. (Exhibit R-3)

There is some confusion in the evidence surrounding this matter which was raised at the March 26, 1992 meeting by Jack Restoule. Denise Restoule, one of the interviewers, expressed in testimony the fact that they had no knowledge of whether there had been screening of the applicants prior to their being referred for the interview. It was also indicated by

- 5 -

the Band Administrator that he was simply instructed to pass the applications on to the Hiring Committee. He also expressed the view in a note attached to the copy of the minutes of the March 26, 1992 meeting, (Exhibit R-3) that Jack Restoule could have addressed the concern at the time because he was a member of the Hiring Committee, a member of the Band Council and an Employment Counsellor.

Despite this flaw in the process, the Band Council voted four in favour of accepting the recommendations of the Hiring Committee, one opposed and two, Jack Restoule and Chief Tim Restoule, abstaining.

By letter dated March 27, 1992, the Band Administrator advised Robert Dokis that he had been selected as the part-time driver. (Exhibit HR-2, Tab 8)

The Complainant wrote to the Chief, Band Council, Administrator and the Health Committee on March 30, 1992, appealing the decision to award him

the part-time position rather than the full-time position. In the letter he bases his objection on the fact that he had eleven years of experience, a Class "E" driver's license and had taken part in CPR and First Aid training. He further points out that the successful candidate for the full-time position had none of these. (Exhibit HR-2, Tab 9)

It is clear from this letter the Complainant is of the view that his employment as "full-time" driver had been terminated, that he had been "dismissed" and had been "degraded" to the part-time position.

At the Band Council meeting on April 14, 1992 with 47 band members in attendance the matter of the Complainant's appeal was raised. (Exhibit HR-2, Tab 10) The minutes of that meeting reflect the fact that a very divisive discussion occurred in which allegations were made, questions were asked and not much was resolved. Jack Restoule called for a vote of the band members present and, by show of hands, the vote was 32-0 in favour of reinstating the Complainant as the "full-time" driver.

Following this meeting, no action was taken on the appeal. In fact, testimony indicated that the issue was so divisive and traumatic in this small, closely knit community that the Band Council was virtually paralyzed - there being no Council meetings for several months.

On June 29, 1992, Robert Dokis made a formal complaint to the Canadian Human Rights Commission that the Dokis Indian Band had discriminated against him on the ground of age, contrary to Section 7 of the CHRA.

Further evidence indicated that the Band Council did not act on the implementation of the new position for over two years. In the opinion expressed by Pat Restoule, the Band Administrator, "no one wanted to hurt Bob" (the Complainant).

During this period the Complainant continued to work and the new van, to be used for medical transportation, was purchased. This van sat unused for over a year until finally, the present Band Council, elected in the

- 6 -

interviewing period, directed that action be taken on the March 26, 1992 decision. The van was activated and Chris Dokis began work in the position of full-time Medical Driver on July 20, 1994.

The Complainant ceased to work as a medical driver at that time.

### 3. The Law

The burden of proof in complaints under the CHRA was clearly set out by the Supreme Court of Canada in *Ontario Human Rights Commission v. Etobicoke* [1982] 1 S.C.R. 202 at page 208:

"Once a complainant has established before a board of inquiry a prima facie case of discrimination...he is entitled to relief in the absence of justification by the employer."

Thus, the initial burden is upon the Complainant to establish a prima facie case, then the evidentiary burden shifts to the respondent to show justification.

The standard of proof in human rights cases under the CHRA is the civil standard - a balance of probabilities.

A prima facie case is defined in the case of the Ontario Human Rights Commission and *O'Malley v. Simpsons-Sears* [1985] 2 S.C.R. 536 at page 558 as:

"... one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer."

In the case of *Shakes v. Rex Pak Limited* (1982) C.H.R.R. D/1001 at page D/1002, under the Ontario Human Rights Code, the Board of Inquiry sets out certain criteria for establishing a prima facie case in an employment complaint as follows:

"... the Commission usually establishes a prima facie 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. If the respondent does proffer an equally consistent explanation, the complaint of discrimination must fail for the onus of proving

discrimination ultimately rests on the Commission."

#### 4. Motions

Counsel for the Respondent raised, by way of a preliminary motion, a challenge to the jurisdiction of both the Canadian Human Rights Commission and the Human Rights Tribunal pursuant to section 67 of the CHRA. At that time, after hearing argument, the Tribunal reviewed the law and stated on the record its reasons for holding the view that there was no evidence before it to bring this matter within the wording of a provision of the Indian Act or a provision under or pursuant to that Act.

Thus, although the Tribunal was of the opinion that it did have jurisdiction in this matter, it decided to reserve a final ruling until it could hear and weigh all relevant evidence.

Having done so, the Tribunal has heard no evidence that would alter its preliminary position and thus rules that, for the reasons stated on the record at the conclusion of argument on the motion, the motion is denied and the Tribunal does have jurisdiction.

At the conclusion of the Commission's evidence, counsel for the Respondent brought a motion for a non-suit on the ground that there was no evidence to give rise to a reasonable inference in favour of the Complainant.

The Tribunal put the counsel to his election after explaining the procedure in some detail on the record. Counsel elected to proceed to call evidence and renewed his motion at the conclusion of his evidence. The Tribunal reserved at that time.

As can be seen in this decision, the Tribunal did find that the Commission established a prima facie case and thus the motion for non-suit is dismissed.

#### 5. Analysis

It is not difficult to understand why the Complainant, Robert Dokis, and many others in the community viewed the job of Medical Driver as his job. For eleven years, he had been the principal individual performing this service to the community. It is also not surprising that when the two

new positions were posted or advertised that it appeared that his job was being opened up to a competition in which others could compete for the position.

However, the facts are that the position the Complainant had held for eleven years was not exclusively his. Over the years, many others had also performed the service - albeit to a much lesser extent than the Complainant - and all were paid an hourly rate only for those hours worked.

The full-time position, with employment benefits, posted in early 1992 was clearly a new position. It was quite reasonable that the Band Council

- 8 -

should open this new position to a competition.

It is most unfortunate that, at that time, before the jobs were posted, someone in authority did not take the time to explain to Robert Dokis what was happening. This simple act of consideration could have avoided much misunderstanding and many hard feelings.

The question before this Tribunal is to determine what role if any Robert Dokis' age played in the job competition.

The Tribunal finds that, on applying the criteria set out in O'Malley, supra. and Shakes v. Rex Pak, supra. the Complainant has established a prima facie case:

- (a) The Complainant was qualified for the position. He had the required driver qualifications, extensive experience, First Aid and CPR training.
- (b) He was not hired for the full-time position for which he had applied as his first choice.
- (c) The successful candidate, Chris Dokis, was at the time not only no better qualified but in fact, did not have the required driver qualifications, had no training in First Aid and CPR, had less experience and was much younger than Robert Dokis.

Thus, in the absence of an explanation from the Respondent, the evidence might well be there to find in the Complainant's favour.

The answer in fact, comes not only from the Respondent but also from some of the evidence of the Complainant's witnesses.

It is clear that the Band Council tried to set up a hiring process that was objective and fair. They struck a Hiring Committee composed of three councillors and two administrators. The Committee was provided with standard questions to be asked of each applicant in the interview together with possible answers and a scoring scheme. (Exhibit R-7)

This part of the process is difficult to fault. As in any interview there is bound to be a subjective element in the individual scoring of the responses. However, with five people on the Committee, this would tend to be balanced.

Two witnesses, Denise Restoule and Jack Restoule, both on the Hiring Committee submitted their notes from the interviews as exhibits. (Exhibits R-6 & R-8) It is evident from the exhibits that there were significant differences in the responses of Robert Dokis and Chris Dokis to the questions.

It is particularly significant that four of the five interviewers gave Chris Dokis the highest score and the fifth, Jack Restoule, an admitted supporter of the Complainant, gave Chris and Robert Dokis the same scores.

There is no suggestion of any consideration of age in the process. On

- 9 -

all of the evidence Chris did well in the interview.

The most obvious flaw in the process is the failure to screen the applicants to determine whether they met the basic stated requirements - driving qualifications and willingness to take First Aid and CPR training. The First Aid and CPR training were clearly not required prior to the interview - only the stated willingness to undertake the training. Chris Dokis stated such willingness in the application.

The driving qualification, however, was stated as a condition precedent - proof was to be submitted with the application along with proof of a good driving record.

The Band Administrator testified that his instructions were to give the envelopes (i.e. the applications) to the Hiring Committee and he obviously interpreted that not to include any screening of qualifications of the applicants by him.

The Hiring Committee in turn seemed to interpret their role as limited to conducting the interviews and based on that, making a recommendation to

the Band Council. In the evidence of Denise Restoule, she stated that they had no knowledge of whether there had been any screening of the applicants prior to the interview.

As a consequence of this, the successful candidate in the interview obtained the full-time position even though, at the time, he did not have the required qualifications.

If there had been a proper screening of the applications, one might assume that Chris Dokis would have been screened out for want of driving qualifications prior to the interview. In that case, Robert Dokis, who came second in the interview would have been the successful applicant.

We find that the hiring process was seriously flawed in its failure to pre-screen the applicants. However, we find no evidence of discrimination against the Complainant because of his age. The fact that he was offered the part-time position which required him to be on call after hours for emergencies and on weekends - in many ways more demanding than regular day-time work - further suggests his age was not a consideration.

After a review of the applicants' responses in the interview compared with the suggested or desired responses, we find that the Respondent has provided a credible explanation for favouring Chris Dokis - he performed better in the interview.

In the absence of a finding of discrimination on a prohibited ground, this Tribunal has no authority to order the correction of a faulty or unfair hiring process.

- 10 -

## 6. Order

The Tribunal dismisses the complaint.

DATED this day of November, 1995.

Keith C. Norton

Kathleen Jordan

Anne L. Mactavish