NOVA SCOTIA COURT OF APPEAL

Docket: CA 286568

Between:

C. R. Falkenham Backhoe Services Limited

Appellant

v.

Nova Scotia Board of Inquiry under the Human Rights Act and the Nova Scotia Human Rights Commission and Lionel Gough

Respondent

MacDonald, C.J.N.S.

ORDER FOR JUDGMENT

REASONS FOR JUDGMENT having been delivered this day by Saunders, J.A.; MacDonald, C.J.N.S. and Oland, J.A. concurring;

IT IS ORDERED THAT the appeal is dismissed with costs to the respondent in the amount of $2,000 exclusive of disbursements as taxed or agreed.

DATED at Halifax, Nova Scotia, this 25th day of April, 2008.

Deputy Registrar

Ann Saunders
Deputy Registrar
Nova Scotia Court of Appeal

IN THE NOVA SCOTIA
COURT OF APPEAL
I hereby certify that the foregoing document, identified by the Seal of the Court, is a true copy of the original document on file herein.
Dated the 25 day of APRIL A.D., 2008.

Deputy Registrar

NOVA SCOTIA COURT OF APPEAL

Citation: ***C.R. Falkenham Backhoe Services Ltd. v. Nova Scotia (Human Rights Board of Inquiry)***, 2008 NSCA 38

Date: 20080425
Docket: CA 286568
Registry: Halifax

Between:

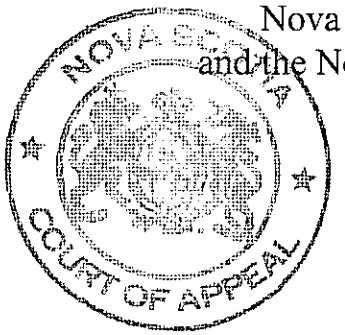
C. R. Falkenham Backhoe Services Limited

Appellant

v.

Nova Scotia Board of Inquiry under the Human Rights Act and the Nova Scotia Human Rights Commission and Lionel Gough

Respondent



Judge(s): MacDonald, C.J.N.S.; Saunders & Oland, JJ.A.

Appeal Heard: April 16, 2008, in Halifax, Nova Scotia

Held: Appeal dismissed, per reasons for judgment of Saunders, J.A.; MacDonald, C.J.N.S. & Oland, J.A. concurring

Counsel: Stephanie Atkinson, for the appellant
William Mahody, for the respondent, Nova Scotia Human Rights Commission
Lionel Gough, self-represented respondent
Edward Gores, Q.C., for the Attorney General of Nova Scotia, not participating

IN THE NOVA SCOTIA COURT OF APPEAL
I hereby certify that the foregoing document, identified by the Seal of the Court, is a true copy of the original document on file herein.
Dated the 25 day of April A.D., 2008.
Deputy Registrar

Reasons for judgment:

[1] A corporate employer asks us to reduce the damages awarded to an employee who fell victim to racist and discriminatory conduct in the workplace. The company complains that the level of compensation does not reflect either a correct application of the law, or a proper understanding of the evidence.

[2] I see no reason to intervene. For the reasons that follow I would dismiss the appeal and affirm the decision and order of the Board of Inquiry.

[3] Before addressing the issues that arise in this appeal I will briefly introduce the circumstances which led to this complaint and its subsequent proceedings.

Introduction

[4] This is an appeal by C. R. Falkenham Backhoe Services Limited ("Falkenham" or "the company") from the decision and order of a Nova Scotia Board of Inquiry ("the Board") chaired by Ms. Cheryl Hodder appointed pursuant to the **Nova Scotia Human Rights Act**, R.S.N.S., c. 214, as amended.

[5] The appeal centres on two specific complaints, both relating to the damages awarded by the Board. First, the appellant says the Board erred in law in awarding $8,000 in general damages plus interest at 2.5% from the time of the complaint to August 21, 2007, being the date of the decision. The appellant argues that the amount of general damages is excessive and is contrary to the legal principles which apply to such awards.

[6] Second, the appellant says the Board erred in law in awarding damages totalling $15,300 as compensation for 20 weeks lost wages for the period from August 16, 2004 to December 24, 2004. It is said that the award under this head of damage ought to have been limited to seven weeks, which was the period of time for which the complainant's attending physician had recommended taking a leave of absence.

[7] I will now consider the material background to this dispute.

Background

[8] Falkenham is a small family run construction business which specializes in site excavation, underground tank work, septic system work and concrete sidewalks and curbs. It has been in business for approximately 25 years.

[9] Lionel Gough is an African-Canadian who was employed at Falkenham for more than 8 years starting in 1996. His duties included masonry, construction and general labour around various work sites.

[10] He was paid $17 per hour. He was employed on a seasonal basis. This generally entailed full time work during the warmer months and as available during the cold season.

[11] Mr. Gough did not return to work for employment related purposes after July 28, 2004. He sought medical attention for the adverse effects to his health and well being from what he described as a racist work environment.

[12] In November 2004 Mr. Gough filed a complaint with the Nova Scotia Human Rights Commission alleging that he had been subject to discrimination on the basis of race during his employment with Falkenham.

[13] In his complaint Mr. Gough alleged several instances of discrimination which could be said to fall into three general categories:

a) uttering various racial slurs;

b) being denied training opportunities and promotions due to his race; and

c) being forced to complete dangerous work not expected of others because of his race.

[14] Mr. Gough's complaint was the subject of a Board of Inquiry appointed pursuant to the **Human Rights Act**. The hearing lasted four days commencing on June 13, 2007. Nine witnesses testified.

[15] On August 21, 2007 the Board released a written decision.

[16] It is from that decision and order confirming it that Falkenham now appeals.

Issues

[17] The various grounds and arguments raised by the appellant may be reduced to four principal issues:

1. What is the appropriate standard of review in this case?

2. Did the Board of Inquiry err in failing to provide adequate reasons?

3. Did the Board of Inquiry err in assessing $8,000.00 in general damages?

4. Did the Board of Inquiry err in assessing $15,300.00 in special damages for lost wages?

[18] I will turn now to a consideration of each of these issues.

Analysis

 # 1 Standard of Review

[19] In **Nova Scotia Construction Safety Association v. Nova Scotia Human Rights Commission**, 2006 NSCA 63, this Court considered the appropriate standard of review in matters involving complaints launched pursuant to the **Human Rights Act**. We observed:

> [50] Accordingly, different aspects of the Board's decision in this case will be subject to different standards of review. If the nature of the problem is a strict matter of law, or statutory interpretation, the standard of review will be one of correctness. If, on the other hand, the issue arises as a result of the Board's findings of fact, I will apply a standard of review of reasonableness. If the issue triggers a question of mixed fact and law, my analysis will call for greater deference if the question is fact-intensive, and less deference if it is law-intensive.

> Finally, if the issue concerns the Board's application of law to its findings of fact, I will apply a reasonableness standard of review. (Authorities omitted)

[20] The Supreme Court of Canada has very recently reconsidered the approach to be taken in judicial review of decisions of administrative tribunals in **Dunsmuir v. New Brunswick**, 2008 SCC 9. In this seminal judgment the Court reduces the standards of review to correctness and reasonableness, while offering concise and practical definitions of these standards. The Court rejected the traditional model which to that point had prescribed three levels or criteria for judicial review: patent unreasonableness, reasonableness *simpliciter* and correctness as being "too difficult to apply to justify its retention", and instituted in its place a "revised system" which we are now to refer to as the "standard of review analysis."

[21] Undertaking this review requires a contextual analysis. As the Court observed:

> 64 The analysis must be contextual. As mentioned above, it is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal. In many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case.

[22] The Court provided a working definition for "reasonableness" at ¶ 47:

> 47 . . . Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[23] The Court went on to define "correctness" as:

> 50 . . . When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it

> agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

[24] As the Court explained in **Dunsmuir**, an exhaustive review is not required in every case in order to decide the appropriate standard of review. Existing jurisprudence may be helpful in characterizing the nature of the question under scrutiny and which of the two standards ought to be applied when subjecting it to the necessary review analysis.

[25] In my respectful view the Court's directives in **Dunsmuir** completely support the analysis we undertook in **Nova Scotia Construction Safety Association**, supra, and which I have described in ¶ 19, supra. Accordingly, there is no need for me to repeat the kind of analysis we applied in that case and which may be properly invoked again here.

[26] In respect of the matters before the Board of Inquiry appointed to consider Mr. Gough's complaint, if the nature of the problem being considered by the Board was strictly a matter of law, the required analysis will attract a standard of correctness. On the other hand, if the issue arises as a result of the Board's findings of fact, or inferences drawn from those facts, we will recognize the appropriate deference and margin of appreciation that is to be accorded such decisions and will apply a standard of reasonableness in our review.

2 Sufficiency of Reasons

[27] Here the appellant argues that the Board erred in failing to provide adequate reasons to support her award of damages to the complainant. In particular, the appellant says the Board failed to give adequate explanation in her reasons concerning "the extent of the effect of the discrimination on the complainant in light of the pre-existing injuries"; failed to properly address Mr. Gough's ability to work after leaving the appellant's employ; and failed to specify the racist or discriminatory conduct which formed the basis of the compensation awards.

[28] In this, the appellant's complaint seems to combine two discrete allegations: first, that the reasons for judgment are so inadequate as to constitute an error in law; and second, that the Board misapprehended or overlooked important evidence

in arriving at her decision. In my respectful view there is no merit to either assertion.

[29] Error said to have been occasioned by misapprehending or forgetting important evidence, or failing to provide adequate reasons, would usually be classified as errors of law which, in a case such as this, ought to be analysed on a standard of correctness. That is the criterion I will apply to their consideration here.

[30] A judge is not obliged to mention every piece of evidence which he or she considered and may have chosen to accept or reject in disposing of the matters in dispute. Here, in an articulate and comprehensive decision the Board carefully reviewed the material evidence in a way which can leave no doubt as to either her appreciation of the issues, or the line of reasoning she applied in coming to the result. I am not persuaded that she missed, or misunderstood the evidence.

[31] With respect to the alleged insufficiency of the Board's reasons, counsel cite **R. v. Sheppard**, [2002] S.C.J. No. 30. As that decision makes clear, the requirement for reasons in any particular case is tied to their purpose, and the purpose varies with the context. That case arose of course as a Crown appeal from a majority decision of the Newfoundland and Labrador Court of Appeal which had set aside the conviction and ordered a new trial based on the absence of adequate reasons. In writing for a unanimous court dismissing the appeal Binnie, J. noted at ¶ 19 what he described as the:

> . . . significant differences between the criminal courts and administrative tribunals. Each adjudicative setting drives its own requirements. If the context is different, the rules may not necessarily be the same . . .

[32] Nevertheless, since the Court filed its judgment in **Sheppard** six years ago, the propositions therein contained have been applied in a host of cases covering a broad spectrum of subjects ranging from immigration to divorce to probate, from actions for wrongful dismissal to claims of bodily injury and breach of fiduciary obligations. Here we are concerned with the reasonableness of the Board's findings and awards of damages based on the evidentiary record. A protest that the Board's reasons are inadequate does not invoke a discrete right of appeal. Rather, the complaint as to an absence or paucity of reasons entails a functional inquiry: is it possible to undertake an informed, principled and valid review for

error? As this court recently observed in **2446339 Nova Scotia Limited v. A.M.J. Campbell Inc.** 2008 NSCA 9 at ¶ 90, it is important to emphasize that:

> Deficiencies in a trial judge's reasons do not afford a free standing substantive right of appeal in the civil context, any more than in a criminal context.

In the circumstances of this case the test is whether what the decision-maker has written stands as a significant impediment to the exercise of the right of appeal. I am satisfied that the Board's reasons in this case have allowed for meaningful appellate review. My analysis of the appellant's various complaints has in no way been thwarted by holes in the decision-maker's line of reasoning.

[33] The Board understood and did not overlook the evidence. Her reasons were comprehensive and clearly expressed. Accordingly, I would dismiss this ground of appeal.

[34] I will now consider the third and fourth grounds of appeal. Each involved findings of fact or drawing inferences from the facts and which must therefore be analysed on the basis of reasonableness. Similarly, the Board's assessment of damages which involved the application of legal principles to a matrix of determined facts should be reviewed on a standard of reasonableness.

[35] I start by referring to the relief and remedies ordered by the Board. The operative parts of the Board's confirmatory order dated September 10, 2007 provide:

> NOW IT IS HEREBY ORDERED THAT:
>
> 1. The Respondent, Falkenham, shall pay to the Complainant, Lionel Gough, the sum of $15,300.00 as compensation for 20 weeks lost wages from August 16, 2004 to December 24, 2004.
>
> 2. The Respondent, Falkenham, shall pay to the Complainant, Lionel Gough, the sum of $8,000.00 in general damages plus interest at 2.5% from the time of the complaint to August 21, 2007.
>
> 3. The Respondent, Falkenham, shall be required to offer sensitivity training, with regard to racial discrimination and training with respect to the illegality and harmful effects of racial discrimination, during working

hours, with no loss of pay to its employees, for as many hours as the Nova Scotia Human Rights Commission considers necessary. The training shall occur within three months of the date of this Order.

The three-month time limit may be extended up to six months by mutual agreement of Falkenham and the Nova Scotia Human Rights Commission, but in no case should it be extended beyond a period of six months from the date of this Order.

4. The Respondent shall develop a harassment policy within three months from the date of this Order. The Nova Scotia Human Rights Commission must approve the harassment policy.

The three-month time limit may be extended up to six months by mutual agreement of the Respondent and the Nova Scotia Human Rights Commission, but in no case will be extended beyond a period of six months from the date of this Order.

3 General Damages

[36] The variety of incidents which form the basis of Mr. Gough's complaint are described in considerable detail in the Board's decision especially at ¶ 13-27 where Mr. Gough's evidence is accurately summarized. Incidents of harassing and discriminatory conduct included being made the brunt of disparaging jokes. Apparently a thyroid condition from which Mr. Gough suffered caused his eyes to protrude, prompting a co-worker to compare Mr. Gough's appearance to looking like "a choked rabbit" while others laughed. On another occasion he was asked what would happen if he "fell into a swimming pool and turned white." At lunch while others were having fish and chips Mr. Gough felt humiliated when he was told "blacks like chicken and watermelon." On more than one occasion co-workers used the phrase "nigger it up" in an apparent reference to improvising something to get it to work. He was told that a foreman on the job did not like "niggers and Newfoundlanders." Mr. Gough described times when he had to do dirty trench work, or labour under dangerous working conditions, whereas the same tasks were not expected of others on the crew who were Caucasian. He said he was not allowed to utilize his skills as a backhoe operator or put to use his experience in operating such machinery. These rejections arose he said because he is black.

[37] Mr. Gough testified to meeting on more than one occasion with Mr. Cyril Falkenham, the owner of the company in an attempt to promote fair treatment and racial harmony in the workplace and to insist that he not be subjected to such harassment and discrimination.

[38] Ms. Hodder, as the single chair of this Board of Inquiry conducted four days of hearings, heard testimony from nine witnesses, and received documentary evidence. Representatives from the company denied Mr. Gough's allegations and insisted that his complaints were false. The Board recognized that "(t)he facts giving rise to the Complaint are in serious dispute." Chair Hodder made several strong and unambiguous findings which in my opinion all confirm her grasp of the issues and her clear understanding of the evidence. Many of these findings concerned matters of credibility. The Board's decision reflects a careful consideration of the whole of the evidence, and a recognition that it was the Board's duty to address the troublesome contradictory evidence and decide matters of credibility.

[39] Having conducted the appropriate assessment and based on the facts as she found them, the Board then asked whether those facts established a breach of s. 5(1)(d) of the **Act** which states:

> 5(1) No person shall in respect of
>
> (d) employment;
>
> discriminate against an individual or class of individuals on account of
>
> (i) race;
>
> (j) colour;

Discrimination is defined in s. 4 of the **Act** as follows:

> 4 For the purpose of this Act, a person discriminates where the person makes a distinction, whether intentional or not, based on a characteristic, or perceived characteristic, referred to in clauses (h) to (v) of subsection (1) of Section 5 that has the effect of imposing burdens, obligations or disadvantages on an individual or a class of individuals not imposed upon others or which withholds or limits

> access to opportunities, benefits and advantages available to other individuals or classes of individuals in society. 1991, c. 12, s. 1.

[40] The Board found that the complainant had made out a *prima facie* case of discrimination based on race and colour. That finding has not been challenged on appeal. She said:

> 64. . . . I find that Mr. Gough's race was an operative element in the conduct of his employer Falkenham and his co-workers toward him. In analysing the totality of the evidence presented at the Inquiry I find that racism was present in the Falkenham workplace. The evidence of Kevin Shaw was detailed and credible regarding many of the specific instances of racism to which Mr. Gough testified. Mr. Shaw clearly stated that he had heard racist comments being made in the workplace and that racist comments were directed toward Mr. Gough. Mr. Shaw is still employed with Falkenham and continues to work with the employees whose testimony he has contradicted. He had nothing to gain from testifying at this Inquiry. I find Mr. Shaw's testimony to be compelling and where it conflicts with the testimony of John MacNeil, Glen Pierce and Angela Falkenham, I prefer the evidence of Mr. Shaw.

[41] The Board went on to find:

> 65. . . . that Falkenham has not demonstrated any rational or credible justification for the conduct of its employees. As mentioned earlier in this decision, the attempts to characterize some of the racist comments as being phrases from old English were contrived and quite frankly, offensive. I find that Falkenham has not demonstrated that its employees' actions were not discriminatory.

and further:

> 74. . . . Falkenham is liable for the discriminatory conduct of its employees against Mr. Gough. I find that Angela Falkenham was aware of the discriminatory conduct of Falkenham's employees towards Mr. Gough.
>
> 75. I therefore conclude that Falkenham meets none of the elements required in order to avoid liability. I find that Falkenham chose to ignore the incidents of racism complained about by Mr. Gough and therefore consented to race discrimination by its employees. Falkenham did nothing to prevent the discriminatory acts from occurring and did nothing to mitigate or avoid the effects that the discriminatory conduct had on Mr. Gough.

[42] I am satisfied that the Board's findings are all fully supported in the record and satisfy any standard of reasonableness.

[43] In calculating suitable compensatory damages the Board had regard to earlier jurisprudence and recognized the "humiliation, stress and pain" Mr. Gough experienced because of the racist comments made by his co-workers. She described the testimony of Dr. Wanda Thomas Bernard who had given expert opinion evidence on the effects of racism on employees and the sense of violation that black people experience when subjected to acts of racism. The Board referred to the testimony of Mr. Gough's family physician, Dr. Raiche-Marsden who confirmed that Mr. Gough had consulted with her and that during their office visits he had complained about racism in the workplace and how it was affecting him physically and psychologically. On this record I see no error in the Board's conclusion:

> . . . that the conduct of the Falkenham employees had a devastating effect on Mr. Gough for which he should be compensated.

or in granting an award of $8,000 in general damages plus interest as appropriate compensation. It is within the range of general damages for contraventions of the **Act**. See, for example, **Nova Scotia Construction Safety Association**, supra, at ¶ 137. Accordingly I would dismiss this ground of appeal.

4 <u>Special Damages</u>

[44] Under this head of damage the respondent alleged that he was unable to work for 55 weeks – that is from the period August 16, 2004 to September 8, 2005. When he left the company on his doctor's advice Mr. Gough worked an average of 45 hours per week at $17 per hour. He therefore claimed a total amount of $42,075 in wages covering the 55 week period he said he was unable to work.

[45] Falkenham on the other hand says that he should only have received a maximum of 7 weeks lost wages based on the duration of the leave of absence recommended by Dr. Raiche-Marsden. The appellant says this figure should be further reduced to account for the "extent" and "impact" of the complainant's

"pre-existing injuries". I am not persuaded by the appellant's submission. The Board heard considerable evidence concerning Mr. Gough's health including his experiences with Graves disease, and strategies to manage his anger regarding the various stressors in his life. On this record it was certainly open to the Board to conclude that these circumstances ought not to discount the "devastating effect" which Falkenham's discriminatory conduct had on Mr. Gough.

[46] The Board awarded the complainant 20 weeks lost wages from August 16, 2004 to December 24, 2004, described by the Board as being "the time at which he would have been laid off for the winter season."

[47] I see no error in the Board's award of special damages. It is consistent with the undisputed evidence as to Mr. Gough's income (which was provided by Falkenham officials and is referred to by the Board in her decision). The award closely tracks what Mr. Gough earned for the same weeks worked the year before. The compensation of 20 weeks worth of lost wages would bring Mr. Gough's 2004 income to a level consistent with his prior annual income while employed by the appellant. I would not disturb the Board's award.

Conclusion

[48] Before concluding these reasons I wish to comment upon a point raised several times by Falkenham in oral argument. At the hearing before us counsel for the appellant alleged error on the part of the Board in not drawing an adverse inference against the respondent for what she described as his failure to call family, friends or Dr. Becky DeCoste so as to "verify" or "support" his "subjective" claims of the impact Falkenham's discriminatory conduct had upon his health and well-being. There are a number of problems with the appellant's assertion. First, the Board was never asked to draw such an adverse inference at any time during the 4 day hearing or counsels' final submissions. I find it difficult to assign error for a failure to do that which was never requested. Second, the decision to draw an adverse inference and the weight to be attached to it is discretionary. Whether or not to invoke such judicial license will depend on the specific circumstances of the case. It is permissive and not mandatory. See for example, John Sopinka, Sidney N. Lederman & Alan W. Bryant, *The Law of Evidence in Canada*, 2d ed. (Toronto and Vancouver: Butterworths, 1999) at ¶ 6.321; Alan W. Mewett and Peter J. Sankoff, *Witnesses*, looseleaf (Toronto:

Thomson-Carswell, 1991) at ¶ 2.2(d)(i); **R. v. Jolivet**, [2000] 1 S.C.R. 751, at ¶ 22-28; and **Davison v. Nova Scotia Government Employees Union**, 2005 NSCA 51, at ¶ 73-75. In the case before us here, it would have fallen to the discretion of the Board as to whether such an evidentiary consequence might properly ensue. Third, it is obvious the Board found ample support in the record to conclude that Mr. Gough had suffered greatly on account of discriminatory conduct attributable to his employer, and for which he deserved adequate compensatory damages. The Board's decision is replete with references to Mr. Gough's own evidence together with the testimony of other lay and expert witnesses which was obviously accepted by the Board as being detailed, credible, corroborative and compelling. Absent a mistake in law, or palpable and overriding error of fact which do not present here, we will not intervene. See, **Housen v. Nikolaisen**, [2002] 2 S.C.R. 235; **H.L. v. Canada (Attorney General)**, [2005] S.C.R. 401; **McPhee v. Gwynne-Timothy**, 2005 NSCA 80; **Secunda Marine Services Ltd. v. Liberty Mutual Insurance Co.**, 2006 NSCA 92; **2703203 Manitoba Inc. v. Parks**, 2007 NSCA 36; and **Wilmot v. Ulnooweg Development Group Inc.**, 2007 NSCA 49.

[49] For all of these reasons I would dismiss the appeal and affirm the order of the Board dated September 10, 2007. I would award costs of $2,000 to the respondent, exclusive of disbursements as taxed or agreed.

Saunders, J. A.

Concurred in:

MacDonald, C.J.N.S.

Oland, J.A.

IN THE MATTER OF the *Human Rights Act*, R.S.N.S. 1989,
c. 214, as amended S.N.S. 1991, c.12
Between
Lionel Gough, Complainant, and
C.R. Falkenham Backhoe Services, Respondent

Case No. 04-0072

Nova Scotia Board of Inquiry
Under the ***Human Rights Act***

Cheryl Hodder (Chair)

Heard: June 13-15 and 18, 2007
Decision: August 21, 2007

Counsel:

Lionel Gough, on his own behalf

William L. Mahody for the Nova Scotia Human Rights Commission

Stephanie Atkinson for the Respondent

DECISION

INTRODUCTION:

1. On November 24, 2004, Lionel Gough made a complaint to the Nova Scotia Human Rights Commission ("Commission") outlining a Complaint against C.R. Falkenham Backhoe Services ("Falkenham"). Mr. Gough's Complaint alleged that Falkenham discriminated against him in the matter of employment on the basis of his race and/or colour, contrary to Section 5(1)(d) of the *Human Rights Act*, R.S.N.S. 1989, c. 214, as amended S.N.S. 1991, c. 12 (the "Act").

2. Lionel Gough is a black man who was employed with Falkenham for more than eight (8) years. Mr. Gough's duties included general labour, masonry, construction and general duties around various work sites.

3. Falkenham is a family run construction business which specializes in site excavation, underground tank work, septic system work and concrete sidewalks and curbs.