

IN THE MATTER OF: *The Human Rights Act*, R.S.N.S., 1989, c. 214,
Amended 1991 c. 12

- and -

IN THE MATTER OF: Section 5(1) (d) (q)

- and -

IN THE MATTER OF: A Complaint under the *Human Rights Act* by Aleem
Ibrahim, Complainant, against Dartmouth Volkswagen
(DVW) (now known as Steele Volkswagen), Respondent

BEFORE: Kenneth D. Crawford, Q.C., Chair

DATE OF DECISION: 20 August, 2002

PLACE: Halifax, Nova Scotia

APPEARANCES BY: Michael Wood, Q.C. and Jennifer Ross, Counsel for the
Nova Scotia Human Rights Commission

Aleem Ibrahim, on his own behalf

David Farrar and Lisa Gallivan, Counsel for
Dartmouth Volkswagen

NOVA SCOTIA HUMAN RIGHTS COMMISSION

**Complaint under the *Human Rights Act*
R.S.N.S., 1989, C. 214, as amended by 1991 C. 12**

Complainant

Aleem Ibrahim
#3-6457 Young Street
Halifax, Nova Scotia
B3L 2A4

Respondent

Dartmouth Volkswagen
215 Wyse Road
Dartmouth, Nova Scotia
B3A 1N1

Nature of Complaint:

Case Number: 04-98-0118

Employment-Ethnic Origin/National Origin
Section 5(1)(d)(q)

DECISION OF THE BOARD OF INQUIRY

BACKGROUND

On 1 November, 2001, I was appointed as a Board of Inquiry under the *Nova Scotia Human Rights Act*, R.S.N.S., 1989, c. 214, Amended 1991 c. 12, to investigate, seek settlement and decide the complaint of Aleem Ibrahim alleging discrimination against him because of his “ethnic and/or national origin” contrary to Section 5(1) (d) (q) of the *Nova Scotia Human Rights Act* (hereinafter referred to as the “Act”).

THE COMPLAINT

Aleem Ibrahim's Complaint states, "I am a person of East Indian ancestry."

On or about May 25, 1998 I was hired as a salesperson by Mr. William Spicer, Sales Manager at Dartmouth Volkswagen. It is my position that throughout the three months that I worked at Dartmouth Volkswagen I performed all duties of my position in an effective and professional manner.

Mr. Purcell verbally provided me with 5 reasons as to why I was being dismissed. One reason given indicated the "way I spoke to customers." I have obtained Letters of Support from ten individuals whom I assisted while working for Dartmouth Volkswagen. I was late arriving to work on two occasions and did play Solitaire on the computer three times. Other employees have been late reporting to work and have played solitaire on the company's computer, however, they have not (to my knowledge) been threatened with employment termination. At no time did I sell insurance from my office while working at Dartmouth Volkswagen.

During my employment with Dartmouth Volkswagen, Ms. Krista Crossland, Administrative Assistant, overheard Mr. Purcell make a comment to the effect of "I don't know why Bill hired Aleem. I have worked with those people before and I don't like working with those types of people."

Mr. Purcell constantly harassed me while I worked at Dartmouth Volkswagen. I advised my co-workers that Mr. Purcell was constantly picking on me during my employment. Examples of Mr. Purcell's harassing behaviours include that I was once reprimanded for wearing a non-issued golf shirt to work. No other Salesperson has been reprimanded for wearing a non-issued shirt to work.

As a Salesperson working for Dartmouth Volkswagen, I did not receive the support that my co-workers received from Mr. Purcell. There were occasions when Mr. Purcell refused to conduct Dealer Searches for my customers and refused to accept offers made by my customers that were below the Manufacturers Suggested Retail Price for other Salespersons, when asked. Without the support and assistance of Mr. Purcell, it was difficult for me to maintain a high sales record.

On one occasion a customer who is black provided a personal cheque for the purchase of a 1997 Hyundai. Mr. Gerard Coleman, General Manager expressed concern that the customer wrote a personal cheque adding that “those people don’t have any money”. I was floored by the racial comment made by Mr. Coleman. Mr. Coleman finished the business transaction by telling Jerry (employee) not to bother putting gas in the car - a courtesy that is extended to persons who purchase vehicles from Dartmouth Volkswagen.

On or about August 12, 1998 I was fired by Mr. Gary Purcell, Sales Manager. It is my position that I was discriminated against throughout my employment and in my subsequent employment termination because of my ethnic and/or national origin (East Indian) which is a violation of Section 5(1)(d)(q) of the *Nova Scotia Human Rights Act*.

LEGISLATION

The *Nova Scotia Human Rights Act*, as amended, reads:

Section 4 - “Discrimination” means, 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.

Section 5 (1) (d) (q) - No person shall in respect of employment discriminate against an individual or class of individuals on account of ethnic, national or aboriginal origin.

Section 34(7) - A board of inquiry has jurisdiction and authority to determine any question of fact or law or both required to be decided in reaching a decision as to whether or not any person has contravened this Act or for the making of any order pursuant to such decision.

Section 34(8) - A board of inquiry may order any party who has contravened this Act to do any act or thing that constitutes full compliance with the Act and to rectify any injury caused to any person or class of persons or to make compensation therefor.

Section 7 of the Regulations under the Act reads: In relation to a Hearing before a Board of Inquiry, A Board of Inquiry may receive and accept such evidence and other information, whether on oath or Affidavit or otherwise, as the Board of Inquiry sees fit, whether or not such evidence or information is or would be admissible in a court of law; notwithstanding, however, a Board of Inquiry may not receive or accept as evidence anything that would be inadmissible in a court by reason of any privilege under the law of evidence.

THE EVIDENCE

ALEEM IBRAHIM

The Complainant, Aleem Ibrahim, is 53 years of age and of East Indian origin. He has resided in Nova Scotia for the past 35 years. The Complainant obtained a Bachelor of Science Degree from Dalhousie University in 1976 and was a self-employed insurance agent from 1976 to 1997.

William Spicer, Sales Manager at Dartmouth Volkswagen, hired Mr. Ibrahim as a car sales person with employment to commence on 25 May, 1998. His hours of employment were Monday to Thursday from 9:00 a.m. to 9:00 p.m. with one evening off during that period, Friday from 9:00 a.m. to 6:00 p.m. and Saturday from 9:00 a.m. to 5:00 p.m.

During the first or second week of the Complainant's employment, he telephoned the receptionist to advise he would be late for a sales meeting which commenced at 8:00 a.m. He subsequently arrived at approximately 8:30 a.m. and attended the meeting until its end at 9:00 a.m..

On a second occasion, the Complainant was late for a sales meeting (10 to 15 minutes late). He had been told by the Sales Manager, William Spicer, on the first occasion that coming to a sales meeting late was not acceptable and on the second occasion he was tardy, William Spicer informed him not to "let it happen again."

On a third occasion, the Complainant telephoned Gary Purcell, the new Sales Manager to advise that he would be late. He subsequently arrived some five minutes late at 9:05 a.m. At approximately 9:30 a.m. that morning, Gary

Purcell told the Complainant that the General Manager of DVW, Gerard Coleman wished to speak to him. Mr. Coleman proceeded to chastise him for being late. He was told his employment would be terminated in the event of future tardiness.

Below is a list of dates the Complainant was late:

1. First incident - first or second week of his employment;
2. Between the 25th of May and end of June or first of July;
3. Second, third or fourth week of July.

Around the end of July or first week of August of 1998, the Complainant wore a short sleeve patterned shirt to work. He testified there had been a heat wave that week and thus, his reason for doing so. Prior to this incident, the Complainant had always worn a shirt and tie to work. The Sales Manager (Gary Purcell) told Mr. Ibrahim that this mode of dress was unacceptable to the General Manager, Gerard Coleman. He offered to go home and change into an appropriate shirt and Mr. Purcell advised that it was unnecessary to do so. Mr. Purcell emphasised the Complainant was to wear a shirt and tie in the future.

Within an hour of the previously mentioned episode, the Complainant approached Dan Walker, a car sales person who on occasion wore a golf shirt to work, and inquired as to whether he had ever been told not to do so. Mr. Walker indicated that no one from management had ever approached him to complain of the golf shirt.

However, sometime following the Ibrahim incident, Mr. Walker was advised not to wear a golf shirt. It should be noted that management subsequently

permitted car sales persons to wear grey golf shirts with a Volkswagen logo during hot summer months.

Some time in July of 1998, the Complainant played solitaire on a computer (located in the reception area of the car dealership) on a Saturday morning prior to 11:00 a.m. On noticing the Complainant in front of the computer, Gary Purcell told him not to use the computer for this purpose. (He had played the computer for approximately 5 minutes).

On the evening of 10 August, the Complainant played solitaire on the computer for approximately 30 to 60 minutes. Gerard Coleman and Gary Purcell passed by the reception desk on numerous occasions and said nothing.

On 11 August at approximately 7:00 p.m., there were no customers in the car dealership and it was at that time that the Complainant again played solitaire on the computer and again, Gary Purcell told him not to do so.

On 4 August, Mr. Purcell called the Complainant into his office and told him that he was not to “carry on” with Jennifer (Jennifer was the receptionist). He was also advised not to discuss soccer. Mr. Purcell did not provide any specifics or details concerning the aforementioned.

The Complainant’s evidence was that the area around the reception desk was a gathering place for management and the car sales representative when there were no customers in the showroom area. He further indicated that his relationship with Jennifer Forbes was friendly during his employment with the Company. They had often discussed his children and former wife. He had also helped her with small tasks around the office.

As to discussing soccer at DVW, the Complainant stated he spoke of same to Leo Gamolakus who was his friend, Kevin Seyffert, Assistant Service Manager, Tony Liberatore, Parts and Service Manager and a technician whose name he could not recall.

Prior to the expiration of the three month probationary period, Gary Purcell, on 13 August, fired the Complainant and cited the following five reasons:

1. The way in which the Complainant spoke to customers;
2. His lateness;
3. Playing poker on the receptionist's computer;
4. Everything the Complainant did was "upside down," and;
5. Selling insurance from the car dealership.

The same day the Complainant was fired, Jennifer Forbes telephoned Mr. Ibrahim and told him that Gary Purcell told Krista Croslyn (now Seyffert) and Andy Feltmate the day he was hired the following:

"I don't know why Bill hired Aleem, I have worked with those people before and I don't like working with those types of people."

On 14 August , 1998 the Complainant had an interview with O'Regan's, a car dealership in the Halifax/Dartmouth metro area. He also sent out resumes to

companies advertising for sales positions, but did not receive any responses. He also applied for positions advertised in the newspaper and went to the Canada Employment Centre at the Halifax Shopping Centre to check the board for potential sales jobs.

In mid-October, the Complainant acquired a position as a night watchman earning \$6.00 per hour. He worked 10 hours each night, seven days per week. He earned approximately \$420.00 per week until late January, 1999, at which time he obtained a position with the ICT Group as an insurance validator. He is presently employed with Minacs Worldwide and holds a similar position. He has held this job for the last two and a half years.

KRISTA CROSLYN (NOW SEYFFERT)

Krista Seyffert was the Office Manager at DVW until March of 2002 when she resigned to be at home with her children. She testified the disciplinary procedure on lateness in the employee handbook stated that the employer was to provide a verbal warning with documentation to be placed in the employee's file. The second offense called for a written warning and the third offence would result in termination. No documentation had been placed in the Complainant's file.

Ms. Seyffert indicated employees played solitaire on the computer at the reception desk. However, she was unable to recall the specific employees. She never played games on the computer. Further, she recalls games being played around the time she would leave the office for the day. To her knowledge, the games were not played during normal business hours.

Ms. Ross, counsel for the Human Rights Commission directed Ms. Seyffert

to the complaint where it was alleged she overheard Gary Purcell make a comment to the effect of, "I don't know why Bill hired Aleem, I have worked with those types of people before and I don't like working with those types of people." Ms. Seyffert did not recall hearing the foregoing.

Ms. Seyffert was ten to fifteen minutes late for work on three to four occasions without comment from management. She went on to indicate that other employees were on occasion, ten to fifteen minutes late without comment from herself or management.

While Ms. Seyffert was employed, she noticed employees, including the Complainant, congregated around the reception desk and that same was not considered to be a problem or prohibited conduct.

Ms. Ross referred Ms. Seyffert to tab 2 of the joint exhibit book. This exhibit was a response to Mr. Ibrahim's complaint of 9 November, 1998. The response was dated 1 December, 1998. Reference is made to the second paragraph of page 4 of the response which reads:

"Mr. Purcell does not recall making the comment attributed to him at page 1 of the complaint. However, Krista Seyffert recalls that the comment was made in the presence of herself and another employee, Andy Feltmate. The comment was made approximately two days before Mr. Ibrahim started to work at DVW. At the time of making the comment, Mr. Purcell was a sales person."

Mr. Farrar objected to the admissibility of this statement citing same to be double hearsay. After a great deal of argument, I ruled Ms. Ross could read the statement to Ms. Seyffert and ask if same refreshed her memory, to which she replied in the negative.

JENNIFER FORBES

Jennifer Forbes was the receptionist at DVW from April to August or September of 1998. She indicated it was common for employees to gather and chat at the reception desk.

Ms. Forbes recalled that various sales people did not wear regulation shirts and was uncertain as to whether management spoke to them.

During the five months Ms. Forbes was employed at DVW, she estimated she was late on approximately three occasions and that Gerard Coleman, the General Manager, told her that he did not mind as long as she was only five minutes late. She also testified that other employees were late on occasion.

Ms. Forbes' evidence was that the Complainant did not make any inappropriate comments to her.

Ms. Forbes recalled the comment Gary Purcell was alleged to have made to Krista Seyffert; that is, 'I don't like those type of people anyway.....'.

KEVIN SEYFFERT

Kevin Seyffert was a Service Advisor at DVW from 1998 to 1999 and left

in 1999 or 2000 to work at Canadian Tire. He worked at Canadian Tire for a year and returned to DVW for six months. He is presently at Canadian Tire.

Mr. Seyffert testified that he, the Complainant, Tony Liberatore (Parts and Service Manager) and Mr. Seyffert would jokingly call each other racially motivated names at DVW, but never in the presence of customers or management. Neither of the parties was offended by the remarks.

Over a two week period, Mr. Seyffert was often late by about fifteen to twenty minutes. As a result, Mr. Liberatore placed a letter to that effect in his file.

Gerard Coleman told Mr. Seyffert he would be fired in the event he saw Mr. Seyffert playing computer games on his computer. Mr. Seyffert testified he saw employees playing computer games in the evening at the reception desk.

DANIEL WALKER

Daniel Walker was a car sales person at DVW for four months and left in the middle or last of September, 1998. He estimates he sold some 28 to 30 motor vehicles (the figure was actually 24). He indicated no member of management told him how many motor vehicles he was expected to sell, nor did they indicate his sales performance was inadequate. He felt his sales performance was comparable to that of Mr. Ibrahim.

One Saturday, Mr. Walker wore to work jeans, cowboy boots, a shirt and

tie. He was sent home to change into appropriate attire.

Mr. Walker testified he wore golf shirts to work each day during the month of June and management did not discuss the inappropriateness of wearing such shirts.

Mr. Walker testified most of the sales staff played computer games at the reception desk and moreover, William Spicer, the former sales manager, also played computer games. Also, most of the sales staff congregated around the reception desk.

GERARD COLEMAN

Gerard Coleman was the general manager of DVW from February 1998 to 1999.

Mr. Coleman recalled having spoken to the Complainant on one occasion with respect to his being late for a sales meeting. He also told other employees that he did not approve of their lateness.

The Complainant reported to two sales managers during his employment; namely; William Spicer and later, Gary Purcell. Mr Coleman could not recall the specific content of verbal reports received from Mr. Spicer concerning the Complainant's job performance, but is certain discussions did take place. He did remember talks with Mr. Purcell wherein he stated Mr. Ibrahim was having a problem "closing car deals" (In other words, finalizing the sales transaction).

Another issue Gary Purcell brought to Mr. Coleman's attention was that of locating vehicles. If a customer is interested in purchasing a motor vehicle but same is not on the lot, a search is conducted at DVW using a computer to ascertain if a particular car dealership in the Country has a vehicle the customer is requesting. However, before this search is conducted, the car sales person should, amongst other things, obtain a deposit from the customer and at that time, the customer signs a document indicating he or she is willing to purchase the vehicle if it can be obtained from another car dealership. Mr. Purcell told Mr. Coleman that the Complainant often requested the searches be conducted and Mr. Purcell was of the view the requests were unreasonable. In other words, the Complainant would not have completed the necessary prerequisites prior to requesting a vehicle search.

Mr. Purcell told Mr. Coleman of alleged inappropriate sexual comments the Complainant made to the receptionist, Jennifer Forbes. Mr. Coleman spoke to Ms. Forbes and told her that he did not approve of such comments, at which time Ms. Forbes told Mr. Coleman she would handle the matter. Mr. Coleman did not tell Mr. Ibrahim of the conversation he had with Ms. Forbes.

On three occasions, Mr. Ibrahim was told not to use the computer at the reception desk to play solitaire. Mr. Coleman indicated he spoke to him on two occasions. He also discussed the use of the computer with other employees.

In discussing the Complainant's sales performance, Mr. Coleman stated the number of vehicles Mr. Ibrahim sold was lower than that of the more experienced sales persons.

The reasons as to why Mr. Coleman instructed Gary Purcell to dismiss the

Complainant are as follows:

1. Mr. Ibrahim's sales performance;
2. Number of times the Complainant was late;
3. Problems with closing a sale;
4. Comments the Complainant made to Jennifer Forbes;
5. Violation of the dress code.

ANTHONY LIBERATORE

Mr. Liberatore was a parts and service manager at DVW at the time of the Complainant's employment. He is presently a service adviser at Canadian Tire. His evidence was he got along quite well with Mr. Ibrahim and the racist comments each directed to the other were said in jest. Neither was offended by the remarks. The comments were made at the back of the car dealership in the absence of customers. No one from management discussed the comments with Mr. Liberatore.

Over twelve years Mr. Liberatore worked at the dealership, he was late on two occasions (10 minutes each time). He was not reprimanded for being late. A friend of Mr. Liberatore worked in his department and had been late on a few occasions until finally, Mr. Liberatore, after speaking to the employee each time, placed a letter in the employee's file.

Mr. Liberatore saw many individuals at the car dealership playing video games on the computer at the reception desk. He saw the Complainant late in the evening on approximately two occasions playing games. He also indicated the

reception desk was a meeting place where employees congregated.

WILLIAM SPICER

William Spicer was a sales manager at DVW for approximately three months in 1998 and toward the end of June or beginning of July, he was replaced by Gary Purcell. He is currently a sales manager at Courtesy Chrysler in Dartmouth. Mr. Spicer hired the Complainant.

Mr. Spicer classified the Complainant's sales performance as average in comparison to the other sales people at the car dealership. He indicated he had discussed sales objectives with the Complainant. Generally, he was satisfied with the Complainant's performance. However, he did voice concern with respect to the Complainant's ability to close a sale. Mr. Spicer stated at line 16 on page 312 of the transcript:

“He was doing a great job with introduction, introducing himself to the clients, doing the product presentation, vehicle demonstration was great, but when it came down to asking for the sale, finding (sic) he had to work in that area. He was a little, you know, not afraid, a little bit unsure on how to close a deal up. And (sic) which to me was not a great concern because I mean that's what I was there for as the sales manager. I had a lot of experience in that field, good track record, and I was working with Ale to overcome some of those objections on the closing of a deal, so but that's about it for that (sic)

Q: Okay. You say you were working with Mr. Abraham,

was that work coming along successfully from your point of view?

A: Yeah.”

At the time the Complainant was having problems closing vehicle sales, other sales people were experiencing similar problems.

One morning at approximately 10:00 o'clock, Mr. Spicer noticed he had not heard from the Complainant. At about 10:30 a.m., Mr. Abraham telephoned Mr. Spicer and was surprised to discover that an individual at the office had failed to inform Mr. Spicer that he had an appointment. To Mr. Spicer's recollection, the Complainant was late on two occasions.

On four or five occasions, Mr. Spicer saw Mr. Ibrahim playing computer games on the reception computer. The Complainant did so on evenings. Other employees also played computer games and moreover, Mr. Spicer played same on occasion.

GARY PURCELL

Gary Purcell became sales manager of DVW at the end of June or the first of July, 1998. He is presently sales manager at what is now Steele Volkswagen. Mr. Purcell denied the comment attributed to him concerning Mr. Spicer's hiring of Mr. Ibrahim.

Mr. Purcell recalled Gerard Coleman had spoken to the Complainant after he was late for a sales meeting.

The matter of playing computer games on the reception desk computer was again raised and Mr. Purcell testified a number of employees played computer games including the Complainant. He recalled he saw Mr. Ibrahim playing computer games on approximately six occasions and he requested the Complainant refrain from playing computer games. This request was made on two or three occasions.

The Complainant was an avid soccer fan and often spoke to customers, staff and friends in the showroom about soccer. On one occasion, Mr. Purcell told Mr. Ibrahim to refrain from discussing soccer in the showroom. His reason being it resulted in the neglect of customers in the showroom and on the car lot.

Mr. Purcell told the Complainant to cease making inappropriate comments to Jennifer Forces, the receptionist.

Mr. Purcell alleged the Complainant was not a “team-player” as he would continue to disregard instructions when told not to do a particular thing.

With respect to the Complainant’s sales performance, Mr. Purcell indicated his sales figures were satisfactory.

THE LAW

The problem confronting this Board of Inquiry involves a consideration of discrimination on the part of the employer. At the outset, the nature and purpose

of human rights legislation must be addressed (see Ontario Human Rights Commission and Theresa O'Malley (Vincent) v. Simpsons - Sears Limited et al., (1985), 7 C.H.R.R.D/3102 (S.C.C.) at p. 24766. Also see Section 2 of *Act*, which reads:

The purpose of this Act is to a) recognize the inherent dignity and the equal and inalienable rights of all members of the human family; b) proclaim a common standard for achievement of basic human rights by all Nova Scotians; c) recognize that human rights must be protected by the rule of law; d) affirm the principle that every person is free and equal in dignity and rights; e) recognize that the government, all public agencies and all persons in the Province have the responsibility to ensure that every individual in the Province is afforded an equal opportunity to enjoy a full and productive life and that failure to provide equality of opportunity threatens the status of all persons; and f) extend the statute law relating to human rights and to provide for its effective administration.

The aim of the Act is the elimination of discrimination. The approach is not to punish the discriminator, but rather to provide relief for the victims of discrimination. It is the result or the effect of the action complained of which is significant. If it does, in fact, cause discrimination; if its effect is to impose on one person or group of persons obligations, penalties, or restrictive conditions not imposed on other members of the community, it is discriminatory (see Simpsons-Sears case, supra at p. 24766).

As stated in Section 4 of the Act, discrimination is made out “where the person makes a distinction, whether intentional or not, based on a characteristic, or perceived characteristic.....” In the case of Britnell et al. v. Brent Personnel Placement Services Ont. (1968), the Board Chairman made the following references to proof of intent or motive (p. 4):

“Sometimes one can be compelled to the conclusion that discrimination was the motive only after observing a series of similar activities. Sometimes the conclusion that discrimination was the motive can be determined on the basis of one act of denial in the light of the surrounding circumstances.”

On the issue of intent, the statement enunciated by Board Chair Harry Arthurs is pertinent (Ruest v. International Brotherhood of Electrical Workers and Nicholls (Ont., 1968) (pp. 2-3). He stated:

“Seldom will those who act for motives which are forbidden by the law and held in disrepute by the community announce in clear and unmistakable terms that they are acting for illicit motives. As experience under the *Labour Relations Act* has indicated, much depends upon the ability of a Tribunal to draw inferences from conduct which (at least in the eyes of a person familiar with employment relations) are reasonable if not compelling. Once these inferences are raised by the conduct of the Respondent, an onus shifts to him of explaining the Tribunal that his motives were other than

what they appeared to be.”

Still on the onus of proof, the dicta in Metropolitan Meat Packers Ltd. (1962), 62 C.L.L.C., para. 16, 230 at page 1025 is worthy of mention:

“The primary onus...lies on the complainant, but that does not mean that the complainant is bound to prove by direct evidence every fact or conclusion of fact upon which the issue depends. Legitimate and reasonable inference may be drawn from all the evidence adduced and that which is clearly deductible from the evidence is as much proved as if it had been established by direct evidence.....It should be borne in mind, that the facts as to the real reasons for discharge often lie peculiarly and necessarily with the respondent.....”

Direct evidence of discrimination is very seldom present in enabling a complainant to prove discrimination. The comment at paragraph 38482 in Basi v. C.N.R., (1988), 9 C.H.R.R. D/5029 (C.H.R.T.) is most helpful in explaining whether or not a complainant has been able to prove that an explanation is pretextual by inference from what is, in most cases, circumstantial evidence:

“Discrimination on the grounds of race or colour are frequently practised in a very subtle manner. Overt discrimination on these grounds is not present in every

discriminatory situation or occurrence. In a case where direct evidence 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) (Ont. Bd. Inq.) (Borons) [unreported]].

The standard of proof required in discrimination cases is a civil standard by a preponderance of evidence on a balance of probabilities. On this point, the Board Chair in Basi (supra) had this to say at page 142 in referring to a book by **B. Vizkelety Proving Discrimination in Canada** (Carswell, 1987):

“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, virtue unanimity that the usual stand 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.”

As earlier indicated, the Complainant who is of East Indian descent has alleged discrimination on the basis of his “ethnic/national origin”. The International Encyclopaedia of Social Sciences, 1968, MacMillan Co. and The Free Press at p. 167 defines an ethnic group as:

“ A distinct category of the population in a larger society whose culture is usually different from its own. The members of such a group are, or feel themselves, or are thought to be, bound together by common ties of race or nationality or culture.”

At the outset of this Inquiry, Mr. Wood, counsel for the Nova Scotia Human Rights Commission referred to the admissibility of hearsay evidence in human rights proceedings and in particular cited Regulation 7 (N.S. Reg. 221/91) which reads:

“In relation to a hearing before a Board of Inquiry, a Board of Inquiry may receive and accept such evidence and other information whether on oath or affidavit or otherwise, as the Board of Inquiry sees fit, whether or not such evidence or information is or would be admissible in a court of law; notwithstanding, however, a Board of Inquiry may not receive or accept as evidence anything that would be inadmissible in a

court by reason of any privilege under the law of evidence.”

In further discussing hearsay evidence, Mr. Wood referred me to excerpts at pages 15-68 and 15-69 of a text entitled Discrimination and the Law by Tarnapolosky and Pintey. The authors, in discussing the justification for the occasional admissibility of hearsay evidence, referred to Bremer v. Board of School Trustees, School District No. 62 et al. (1976) at pp. 37-8 which states:

“Boards of Inquiry will frequently be required to make conclusions of fact based upon circumstantial evidence and, perhaps, with the assistance of evidence which may be inadmissible in a superior court. At the heart of a contravention of the Code is the determination of whether the respondent’s conduct was motivated by a consideration which constitutes the absence of reasonable cause; the factual issue of motivation will in most cases not be a matter about which there exists any direct evidence.”

“For these reasons, this Board is of the opinion that it would represent an unwarranted and potentially restrictive limitation on Board (sic) of Inquiry if we were to determine that hearsay evidence subsequently contradicted will in *all* circumstances constitute no evidence. However, the Board would hasten to add that the use of hearsay evidence must of course be approached with great caution.”

The foregoing is reinforced by Regulation 7 of the Act previously referred to which deals with the admissibility of evidence in a human rights proceeding which would not be otherwise admissible in a court of law. I may add that I advised counsel at the beginning of this Inquiry that I had no intention of making a decision based solely on hearsay evidence because to do so would be a misinterpretation of the Regulation.

DECISION

After very carefully analysing and taking into account the *Act* and its Regulations, evidence and case law, I conclude the Complainant, Aleem Ibrahim, has satisfied the onus of proving the Respondent, DVW and now Steele Volkswagen, did discriminate against him in the matter of employment because of his ethnic origin.

When Gary Purcell dismissed Mr. Ibrahim, he provided five oral reasons. Yet, in response to the complaint, the Respondent provided seven reasons. On closely examining the alleged reasons and evidence, the Board is of the view that the reasons provided were actually a pretext for the Complainant's dismissal.

During the Complainant's employment, he was late for work on three occasions. At the same time, the evidence disclosed that most of the employees were late from time to time and they were not dismissed.

The majority of the sales staff including William Spicer played computer games on the reception desk computer. None of the sales staff was dismissed for playing computer games.

Gerard Coleman directed William Spicer to speak to the Complainant and advise that selling insurance from the car dealership would not be tolerated. Mr. Ibrahim testified he had never sold insurance from the car dealership and no one had discussed the matter with him. The Board accepts Mr. Ibrahim's evidence on this point.

The Complainant wore an unacceptable shirt to work on one occasion. Daniel Walker wore a cowboy shirt to work on one occasion and a golf shirt at various times and he was not dismissed.

The first time the Complainant learned his sales performance was not adequate was when he read the response to his complaint. The evidence disclosed however, that this allegation was not accurate.

It is interesting when one peruses the evidence of Gary Purcell and William Spicer, both of whom were sales managers during the Complainant's employment. Both stated the Complainant's sales performance was adequate. However, Gerard Coleman, the General Manager, testified Mr. Ibrahim's sales numbers were lower than some of the more experienced sales people. This is to be expected given Mr. Ibrahim had been selling motor vehicles for only two and a half months. When one looks at the sales records, it can be seen the Complainant's sales performance was comparable to most of the car sales people.

One of the reasons for the Complainant's dismissal was because of alleged inappropriate comments made to Jennifer Forbes, the receptionist. Of interest is the first occasion on which the Complainant learned of same was on receipt of the response to his complaint. Both Mr. Ibrahim and Ms. Forbes denied he had made

any remarks either of them considered to be inappropriate.

Having considered the foregoing, the Board is led to the inescapable conclusion that all of the reasons offered were a pretext for the Complainant's dismissal.

There was an admission in DVW's response to the complaint where Gary Purcell stated, "I don't know why Bill hired Aleem. I have worked with those people before and I don't like working with those types of people." Krista Seyffert, in the response, recalled the comment had been made to her and Andy Feltmate. She said in her evidence she did not recall hearing the statement. On a balance of probabilities, I find the comment was made. The result was Mr. Ibrahim did not commence his employment at DVW on, as Mr. Wood, indicated in his summation, "a level playing field."

It is important to emphasize Gerard Coleman was relying on Gary Purcell's evaluations of the Complainant. It is trite to state that Mr. Purcell's preconceived opinion of Mr. Ibrahim was reflected in his reports to Mr. Coleman.

Mr. Purcell's testimony was the Complainant was not a team-player. This is not borne out by the evidence. All of the staff gave evidence that they got along well with Mr. Ibrahim. The Complainant testified he periodically assisted Jennifer Forbes in some of her minor job functions. This does not appear to the Board to be evidence of the Complainant not being a team-player. As Mr. Wood remarked in his summation, "....."that language (team-player) is sometimes used when people are recognizing that someone's of a different background, a different ethnic background, a different religion. They're not part of the team, they're not part of the group. They don't fit in".

I do not accept Gary Purcell's evidence Mr. Ibrahim was not a team-player. Indeed, throughout the hearing, I find where there was a discrepancy between the evidence of Gary Purcell and the Complainant, I prefer the evidence of the Complainant.

REMEDIES

Counsel for the Human Rights Commission suggested compensation be paid to the Complainant in the form of general damages for embarrassment, hurt feelings and humiliation and special damages for loss of income.”

On direct examination, the Complainant discussed the effect the dismissal had on him. He said:

“when I was fired that day, it was as though something was ripped out of me. A hole was created. It did something to my dignity, my self-esteem and I felt as though my person was defiled, I felt dirty. As I have seen in so many movies and to compare and shows (sic) them about women being raped and they feel dirty. That's the way I felt. I was always a trusting person. I don't trust people anymore.....”

Mr. Ibrahim has suffered great humiliation and pain and in my opinion, should be accordingly compensated. As a result I award the sum of \$3,000.00 for general damages.

Counsel for the Human Rights Commission requested special damages for loss of income. Mr. Wood stated while the Complainant was employed at DVW, he earned commissions of some \$3,437.00 over a ten week period. Mr. Ibrahim was unemployed for approximately the same period of time. Assuming his commissions from sales would have remained constant over the same period of time, I award the sum of \$3,400.00.

Before concluding, I would like to once again thank all counsel for their cordial, courteous and professional conduct throughout the Inquiry.

ORDER

For the foregoing reasons, this Board of Inquiry orders as follows:

1. The Respondent, Dartmouth Volkswagen (now Steele Volkswagen) is to pay to the Complainant within 30 days of the date of this Decision the following:
 - a) As Special Damages for Loss of Income, the sum of \$3,400.00;
 - b) As General Damages for embarrassment, hurt feelings and humiliation, the sum of \$3,000.00;

For a Total amount of \$6,400.00.

DATED at Halifax, Nova Scotia this 20th day of August, 2002.

**KENNETH D. CRAWFORD, Q.C., CHAIR
BOARD OF INQUIRY**

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