File: In the matter of the Human Rights Act, R.S.N.S., 1989, c.214, as amended S.N.S. 1991, Between Lionel Gough, Complainant, and C.R. Falkenham Backhoe Services, Respondent
Date of Decision: August 21, 2007
Area(s): Employment
Characteristic(s): Race and/or colour

Complaint: Mr. Gough is African-Canadian. He alleged that he was discriminated against by C.R. Falkenham Backhoe Service Limited because of his race/colour. He said his colleagues made racist remarks around and to him, his employer did not give him opportunities to advance due to his race/colour; and he was forced to do dangerous work that other workers did not have to do.

Decision:

Racial Discrimination
The board found that there was extreme racism in this workplace. The Board found that threatening and racist comments were made to, and around, Mr. Gough in the course of his employment. The Board also found that Mr. Gough was assigned the most unpleasant work available even if it may not have been more "dangerous' than work others were doing.

Intention Irrelevant
The Board noted that, in human rights law, it is not a defence for Mr. Gough's colleagues that they were "only joking" or "meant no harm".

Employer's Liability
Employers are responsible for discriminatory conduct of their employees and have an obligation to provide a workplace free of harassment and discrimination. The Board found that Mr. Falkenham knew about the racism and did nothing to prevent or stop it.

Remedy: The Board found that the conduct of his colleagues had a devastating effect on Mr. Gough, and awarded the following remedies:

Individual Remedies

General damages (emotional harm): $8000 plus 2.5% interest
Special Damages (actual losses): Lost wages for 20 weeks ($15,300.00)

Public Interest Remedies

- Sensitivity training for employees with regard to racial discrimination
- Development of a harassment policy, to be approved by the Nova Scotia Human Rights Commission

Nova Scotia Court of Appeal

Mr. Falkenham appealed this decision, requesting that the damages be reduced. The Court of Appeal did not agree, and upheld the decision of the Board of Inquiry.

2007-NSHRC-4

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.

4. The Complaint filed on November 24, 2004 alleged at paragraph 2:

> During the course of my employment I have been the target of racial slurs and comments about my race and colour by management as well as co-workers. I have felt on at least one occasion that my life was in danger as a result of the attitudes and behaviours of my employer. I was denied opportunities to advance my experience and qualifications. On numerous occasions I requested to be trained on various machinery and was always told that there were too many workers doing one thing or another already. I felt I was being held down at a labourer's level while my employer hired other workers to do various jobs.

5. At the Hearing and in his pre-hearing brief, counsel for the Commission alleged the following to be acts of discrimination:

(1) While working for the Respondent, some of Mr. Gough's co-workers told him racist stories that he found hurtful. Examples of such stories are as follows:

> On June 24, 2003, a co-worker told Mr. Gough that he (the co-worker) once worked in a funeral home and "when your people (i.e. black people) were brought in they would just dig a hole and throw them into it";
>
> On one occasion a co-worker stated that when his (the co-worker's) black friend went to his house for drinks that his (co-worker's) mother would designate a specific glass for that friend to use. The black friend was only given that glass and no one else drank from it;

(2) While working for the Respondent, Mr. Gough's co-workers repeatedly made racist and disrespectful comments:

> In June 2003, Mr. Gough was asked by a co-worker if he (Mr. Gough) fell into a pool and turned white, what would he do;
>
> On June 12, 2003 a co-worker asked Mr. Gough if he was going to have chicken and watermelon for dinner because the co-worker knew that blacks liked chicken and watermelon;
>
> On July 28, 2004 Mr. Gough was working with a co-worker when the co-worker used the phrase "nigger it up";
>
> Mr. Gough was told by a co-worker that his foreman had stated that he "did not like niggers";
> After making a mistake regarding a co-worker's

coffee order, the co-worker said to Mr. Gough that he would “f’ing well go back and get another sugar”;

(3) While working for the Respondent, certain co-workers threatened Mr. Gough and conducted themselves in ways that risked Mr. Gough’s safety. Examples of the alleged incidents are as follows:

One co-worker told Mr. Gough that when he digs a hole, he leaves a big rock on the trench wall ledge just for Mr. Gough. Given that such an incident could lead to a fatality, Mr. Gough took the comment to be a threat on his life.

When Mr. Gough held a measuring tape for a co-worker, the co-worker flicked the tape out of Mr. Gough’s hands instead of asking him to let it go. This was dangerous because the measuring tape had two sharp prongs at the end that could cause serious injury;

Mr. Gough was once ordered to build a rock wall in February in snow and ice.

The Commission also alleged the following:

(4) The difficulties Mr. Gough experienced with his co-workers were exacerbated by the fact that he raised his concerns and experiences with members of the Respondent’s management team but no corrective action was taken.

THE LAW

Applicable Rules of Evidence at a Board of Inquiry

6. The jurisdiction of a Board of Inquiry in relation to determination of facts and law is found at S. 34 (7) of the *Act* which provides:

> 34 (7) The 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 a decision.

7. The evidence which a Board may receive and accept is described at Section 7 of the Boards of Inquiry Regulations, N.S. Reg. 221/91 as follows:

> 7 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 a Board of Inquiry sees fit, whether or not such evidence or other information is or would be admissible in a court of law; notwithstanding, however, the 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.*

8. The standard for assessing the evidence before the Board is the *Civil Balance of Probabilities*. The burden of proof in a human rights case was outlined by P. Girard, Chair of the Board of Inquiry in *Johnson v. Halifax (Regional Municipality) Police Service*, [2003] N.S.H.R.B.I.D. No. 2, at para. 9. This too was a case involving allegations of discrimination based on race:

> The burden of proof in such cases has been discussed many times. The Complainant must establish a *prima facie* case of adverse treatment which, it can reasonably be inferred, arose because of race. The cases speak of race being an "operative" element in the conduct alleged to be discriminatory; it need not be the main or major cause of the adverse treatment; see *Fuller v. Candor Plastics* (1981), 2 C.H.R.D./419 (Ont. Bd. Inq.); *Basi v. C.N.R*. (1988), 9 C.H.R.R.D./5029 (C.H.R.T.). The burden then shifts to the respondent to demonstrate a rational and credible justification for their conduct. The complainant may then try to show that such justifications are mere pretext or veils for conduct which is actually discriminatory. In most such cases, circumstantial evidence and inference are heavily relied upon as there is seldom direct evidence of discriminatory conduct. There was at one time some concern that developments in the Supreme Court of Canada jurisprudence on s. 15 of the *Charter* might alter this traditional understanding, but after a thorough review the B.C. Human Rights Tribunal recently concluded that the traditional tests remain unaffected: *Nixon v. Vancouver Rape Relief Society* (No. 12) (2002), 42 C.H.R.R.D./20.

THE WITNESSES

9. At the Hearing before the Board of Inquiry evidence was presented by the Commission and the Respondent Falkenham. The Commission's witnesses included the Complainant Lionel Gough, Dr. Wanda Thomas-Bernard, Dr. Michelle Raiche-Marsden and Kevin Shaw.

10. Falkenham presented evidence from Cyril Falkenham, Angela Falkenham, John MacNeil, Glen Pierce and Ken Zwicker.

11. Mr. Gough did not present any further evidence on his own behalf independently of what was presented by the Commission.

12. The facts giving rise to the Complaint are in serious dispute. I will therefore outline the evidence in considerable detail.

THE EVIDENCE

Lionel Gough

13. Mr. Gough testified that he was the only black employee at Falkenham and that there were no other non-white workers at the company. He stated that the alleged discrimination started about two or three years after he became employed at Falkenham or around 1999. He described his first recollection of a racist incident as occurring at a jobsite in Dartmouth where he was forming a concrete curb with Kevin Brown. Mr. Gough testified that it was "dinner time" and he and Kevin Brown were talking about a vehicle that Mr. Brown was repairing. According to Mr. Gough, Mr. Brown said that he could not get the parts to work so he "niggered it up". Mr. Gough testified that he got angry and asked what Mr. Brown meant. Mr. Brown said that he was sorry. Mr. Gough testified that he regarded Mr. Brown's comment as a "form of humiliation".

14. Mr. Gough testified about a second incident that occurred at a jobsite in Bayer's Lake. He recalled that some of his fellow workers wanted coffee and food from Tim Horton's. Mr. Gough took a list and returned with what he thought was the proper order. A co-worker, Kenny Dill said that he had wanted sugar. Mr. Gough indicated that he apologized for forgetting the sugar and alleged that Kenny Dill told him to "fuckin go back and get another one". Mr. Gough testified that he did go back to get a sugar out of respect for Kenny Dill who was older than him. When asked how this incident made him feel, Mr. Gough said "I felt humiliated, there were others there and I think he tried to humiliate me". Mr. Gough testified that he had never heard Mr. Dill speak like that to anyone else.

15. Mr. Gough testified regarding a second incident involving Kevin Brown. Kevin Brown allegedly told Mr. Gough a story about having a friend who would come over to Mr. Brown's house and that Mr. Brown's mother would give this man a particular glass that no one else was permitted to use. The friend was black. When questioned about this story Mr. Gough stated "I can see that is a form of racism".

16. Mr. Gough described another incident that happened after he returned to work following his attendance at a modelling competition. Mr. Gough testified that he was discussing the competition with co-workers Victor Veniot and Kevin Brown and he described the hotel where he stayed including the pool. Victor Veniot asked Mr. Gough what would happen “if he fell into the pool and turned white”. When questioned about this incident Mr. Gough replied "I wondered if that was a form of racism".

17. Mr. Gough also testified that he had a thyroid condition which when active, caused his eyes to protrude. He described a time when a co-worker, Victor Veniot, said he looked like a choked rabbit. Mr. Gough testified that his incident took place at a Quinpool Road work site where both Cyril Falkenham and Kevin Brown were present. They laughed when it was said. Mr. Gough indicated that the choked rabbit comment was made several times. He said that this comment made him angry.

18. Mr. Gough testified at the Hearing that he was not allowed to utilize his skills as a backhoe operator and that although he did not have a licence he did have experience in operating such machinery.

19. Mr. Gough testified that in May of 2001, or around that time, he was working with Victor Veniot on a worksite and was told by Mr. Veniot that he could get Mr. Gough fired, because he knew Cyril Falkenham very well. Mr. Venoit said that if he had any problems with Mr. Gough he could have him terminated. Mr. Gough testified that in June of 2000 he was working at a worksite on South Street with Victor Veniot. They were putting gravel into a fire hydrant area. Mr. Veniot dumped the full backhoe bucket of gravel into the hole when he was directed by Mr. Falkenham to only put in half a bucket full. Mr. Gough was then directed to shovel out the remaining amount, thus increasing his workload. Mr. Gough testified that a similar incident also occurred in June of 2000 while working with Kenny Dill. The backhoe operator dumped a full bucket of gravel into a hole when only a half bucket was required, therefore, once again, Mr. Gough had to shovel out the remainder.

20. In or around 2001/2002 at Stadacona military base, Mr. Gough said he was working with John MacNeil taking measurements with an industrial sized measuring tape. The measuring tape was flicked out of Mr. Gough's hands by Mr. MacNeil. Mr. Gough felt that this was a dangerous move because the prongs at the end of the measuring tape were quite sharp and he felt it was done intentionally and to cause him physical harm.

21. Mr. Gough testified that while working with Victor Veniot and Kevin Brown on a Fall River jobsite, Victor Veniot told Mr. Gough that where he came from workers at a funeral home "would fix up white people nice in preparation for the funeral, but when black people came in they would just throw them in a fucking hole and leave them". Mr. Gough testified that at a safety training seminar Victor Veniot told him when he goes into a trench he leaves a rock on the side of the ledge just for Mr. Gough. Mr. Gough took that as a threat to his life and did not think it was a joke.

22. At a Sobey's jobsite in Bedford Mr. Gough testified he was working with Kevin Brown when John MacNeil stopped by and asked how the job was going. Mr. Gough was holding onto a shovel and waiting for the concrete to dry when Mr. MacNeil grabbed the shovel from his hand, jumped into the hole and said "if he (Kevin Brown) had any fucking help it'd be done by now".

23. Mr. Gough also testified about a time in July of 2004 while at a worksite Cyril Falkenham's daughter Angie was in conversation with Mr. Gough. Following the conversation she told Mr. Gough to shut-up and get back to work. Mr. Gough said that he never heard Ms. Falkenham say anything like that to another employee.

24. Mr. Gough testified about two incidents involving a co-worker, Glen Pierce. In June of 2003 while doing a job at a school in Woodside with Glen Pierce, Kevin Shaw and Darryl Conway he was helping Glen Pierce repair pipes in the heating system. Shortly before noon, the men were discussing what they were going to have for dinner. Mr. Gough indicated that Glen Pierce said he was going to have fish and chips and asked Mr. Gough whether he was going to have chicken and watermelon because "blacks like chicken and watermelon". Mr. Gough indicated that this comment made him angry and he felt that it was not only humiliating to him but humiliating to his people.

25. Mr. Gough testified about another incident involving John MacNeil. Although Mr. MacNeil testified, he did not have an official title of supervisor at Falkenham, he was hired to supervise various jobs. Glen Pierce allegedly told Mr. Gough that John MacNeil did not like "niggers and Newfoundlanders". Mr. Gough spoke to John MacNeil about this in July of 2003.

John MacNeil denied making the comment.

26. In July of 2004 Mr. Gough testified the final act of discrimination was an incident which occurred when working with Glen Pierce. Mr. Pierce used the phrase "nigger it up" in regard to fixing a sheet of plastic over top of a cement slab that they were working on.

27. Mr. Gough testified that he discussed these incidents of racial slurs and comments about his race and colour with Angela Falkenham and his family doctor, Michelle Raiche-Marsden. He said he discussed them at a later date with Cyril Falkenham.

Dr. Wanda Thomas Bernard

28. Dr. Bernard is a professor in the Maritime School of Social Work at Dalhousie University. She holds a Doctorate in Sociological Studies from the University of Sheffield, England and a Masters Degree in Social Work from Dalhousie. She has been a professor at Dalhousie since 1990 and was appointed Director of the School of Social Work in 2001. Dr. Bernard is a well respected scholar who has conducted research and published numerous articles, book chapters and monographs on the experiences of black people in Nova Scotia, elsewhere in Canada and in England. Dr. Bernard's work on racism, anti-racist education and diversity training has attracted major grant funding from respected research institutes. Many of her publications are published in peer reviewed journals. Dr. Bernard has been qualified as an expert in the Nova Scotia Supreme Court case of *Campbell v. Jones* and in the Human Rights Board of Inquiry *Johnson v. Halifax Regional Municipal Police Services*. During this Inquiry, Mr. Mahody, counsel for the Commission, wished to qualify Dr. Bernard as an expert witness:

> "qualified to provide opinion evidence as to whether the experiences and the impacts of racism complained of by Mr. Gough are consistent with the experiences of other black men as documented in Dr. Thomas Bernard's research and other studies".

Ms. Atkinson, counsel for the Respondent, did not object to this qualification and nor did the Board.

29. Dr. Bernard gave testimony regarding research she conducted with black males in the workplace. This research was done by comparing the experiences of black males in Sheffield, England and Halifax, Nova Scotia. Dr. Bernard testified that the data obtained in this study indicated almost identical experiences of racism and the effect of racism on black males in both Sheffield and Halifax.

30. Dr. Bernard's hypothesis is that racism manifests itself as a form of violence. The racism experienced by black males in the workplace places extreme emotional pressure on the victim resulting in physical and psychological damage. After having experienced racism in the past and having nothing done after reporting it, the victim may feel stress and pressure as he goes forward, expecting that he will continue to experience racism in the workplace. The victim goes to work expecting this behaviour and is placed in a position of extreme physical and emotional pressure in preparing how to deal with its eventual re-occurrence.

31. Dr. Bernard testified that inaction on the part of the employer compounds the effects of racism on the victim employee. Not only does the employee have to face the stress from continued racism, he feels marginalized by the employer's inaction. Dr. Bernard stated that the

experiences described by Mr. Gough and Mr. Gough's reports on how those experiences affected him were consistent with the impact reported by other black men in her research studies.

Kevin Robert Shaw

32. Mr. Shaw is a co-worker of Mr. Gough's. He testified that he had been working with Falkenham for eight years or since 1999. Mr. Shaw's Interview Report with the Nova Scotia Human Rights Commission was entered into evidence (Exhibit 10). The Interview Report is dated March 14, 2005 and was signed by Mr. Shaw on March 18, 2005. Mr. Shaw testified that he read the Interview Report before he signed it and that "it was as accurate as possible". When asked at the Hearing whether there was anything he wished to change in the report he referred to question 6, which stated: "Have you ever witnessed the Complainant being assigned a job that was dangerous or that you wouldn't do? Explain? When? Where?" Mr. Shaw's reply as stated in the Interview Report was: "Yes, if he (Mr. Gough) was alone, he would be given the shit jobs". I've heard John MacNeil say, "I'll just get Lionel to do that" ".

33. During his testimony Mr. Shaw stated: "there were no dangerous jobs". And "if he (Mr. Gough) was alone, he would get the shit jobs".

34. I will set out below the entire statement of Mr. Shaw as provided in the Interview Report:

> 1. How long have you been employed with the Respondent? What did you do?
>
> Five years. I worked as a labourer and operator. I also looked after all types of jobs. I drove backhoe, excavator and other machinery. I worked in every job I was needed for.
>
> 2. Have you ever heard anyone in the workplace make comments about the Complainant's race/colour? If yes, who? When? What was said?
>
> Yes, well I've heard them call him the 'N' word. Well it happened pretty often with John MacNeil and a couple of other workers.
>
> I recall them saying to him twice when he was present and he sure did speak up for himself and let them know how he felt. There were also other times when he wasn't around that they would use the 'N' word.
>
> They also made fun of his eyes, as a joke. To clarify, now a joke is a joke to some and hurtful to others.
>
> 3. Have you ever heard anyone in the workplace tell racial stories about Black People? Who? When? What was said?

No. I don't think, not me for sure, I didn't tell any stories.

There was one guy, Kenny Dill, I think it was him, told the story about the black man and the woman not wanting him to use her good cups so she had a cup just for him.

It was John MacNeil, I believe, that said he didn't like Newfoundlanders and "N's".

4. Have you ever seen the Complainant treated differently than other workers? If yes, please explain.

Sure, they would get him to do concrete work, rock walls, etc. He could do this work but so could everybody else.

I can't say he was asked to do more than anyone else. When we were together, as a crew, we all pitched in and helped.

However, whenever Lionel worked by himself he was always given the shitty jobs. When there was a job that nobody wanted to do, John MacNeil would say "I'll get Lionel to do that".

5. Have you ever heard anyone in the workplace use the term "Nigger it up"? If yes, who? When? What was said?

Yes, that's not only in Newfoundland, that's everywhere. I don't know where it comes from. There were 3-4 guys who would say it all the time. Kevin Brown, Steve Brown and another fellow named 'newf' used the term all the time.

6. Have you ever witnessed the Complainant being assigned to a job that was dangerous or that you wouldn't do? Explain. When? Where?

Yes, if he was alone he would be given the shit jobs. I've heard John MacNeil say, "I'll just get Lionel to do that".

35. I found Mr. Shaw to be very straight forward and credible in his testimony. Where his testimony differs from the testimony of John MacNeil, I prefer the evidence of Mr. Shaw.

Dr. Raiche-Marsden

36. Dr. Michelle Raiche-Marsden is Mr. Gough's family doctor. She has been practising Family Medicine for 14 years. She testified that in her practice of family medicine, she receives cases over a broad aspect of medical issues and consistently updates her training. In this regard, she attends 50 to 70 hours a year of upgrading education which is actually more than is required by the College (of Physicians). She was qualified as an expert in family medicine to express opinion evidence on the specifics of Mr. Gough's condition and her recommendations

for his treatment. Counsel for the Respondent objected to this qualification. The Board agreed with the qualification as an expert in family medicine for the purpose of expressing a medical opinion on the reasons why she put Mr. Gough off work. This evidence was both necessary and relevant to the inquiry. Dr. Raiche-Marsden's evidence corroborates the evidence of Mr. Gough on several points and it also informs my discussion of remedies later in this decision. Dr. Raiche-Marsden testified that Mr. Gough spoke to her on several occasions about the racist comments that were made in his workplace. He attended an appointment on August 16, 2004 with Dr. Raiche-Marsden to specifically discuss the effect that the racial comments and slurs at work were having on him. An entry in Dr. Raiche-Marsden's chart indicated that Mr. Gough had worked hard to deal with the matters of racism in his workplace. She testified that back when she had first met Mr. Gough he had problems with anger management and that he resolved them now in a more positive manner. According to Dr. Raiche-Marsden's chart, Mr. Gough was put off work for a period of seven weeks by Dr. Raiche-Marsden's colleague, Dr. DeCoste (Exhibit 7).

37. Dr. Raiche-Marsden referenced chart notes (Exhibit 7) pepared by herself and Dr. DeCoste. These notes indicate that Mr. Gough complained of racism in the workplace during his doctor's appointments. She provided evidence that Mr. Gough had complained of racism on visits in the past and he discussed how it was affecting him physically and psychologically. She testified that he had incorporated non-violent coping techniques to deal with the stressors in his life. She found Mr. Gough in later visits to be more confident and more able to resolve his stress.

38. Dr. Raiche-Marsden testified that Mr. Gough was experiencing violence and anger from racism at work, which was manifesting itself in his behaviour as anger and frustration. Although Dr. Raiche-Marsden testified that she rarely prescribes time off work, she felt that Mr. Gough required some time away from his workplace in order to relieve some of the stress he was feeling.

Cyril Falkenham

39. Mr. Falkenham testified that he is a contractor who has done construction work all of his life. He runs the Respondent company, C.R. Falkenham Backhoe Services. He has owned this company for 25 years. Mr. Falkenham testified that his daughter, Angela, is the Safety Officer for the company and he is the only person with the authority to hire and fire at the company.

40. He testified that the heavy equipment operators at Falkenham were hired through the Union. The Collective Agreement between Falkenham and the operating engineers was entered as an exhibit (Exhibit 11). Mr. Falkenham testified that he had to hire the operators through the Union and that Mr. Gough was not an operating engineer or part of the Union so he could not be hired to operate the heavy equipment.

41. Mr. Falkenham indicated that he hired Mr. Gough firstly as a sub-contractor to do cement work, which Mr. Gough did for two years. He then offered him full-time work doing cement, rock walls and also general labour. He testified that Mr. Gough's rate of pay was $17.00 per hour. He further indicated that Mr. Gough "specialized in cement". Mr. Falkenham testified that the work was seasonal in nature and that he "tried to keep people working from spring to Christmas" and that he paid 10 hours per day. Workers could work as many as 50 hours in one week.

42. When questioned as to whether there was any construction work in the winter, Mr. Falkenham testified that after Christmas if any jobs came up he would attempt to provide a full week of work to any person whom he called in.

43. When asked about Mr. Gough's work attitude, Mr. Falkenham indicated that he had no problem with Mr. Gough's work attitude, that he did the jobs that he was asked to do. He further stated "when Lionel did cement work he worked hard and sometimes he had to push him a little bit if it was something he (Lionel) didn't want to do".

44. When questioned as to whether he had heard any of his employees make racial slurs or discriminatory remarks, Mr. Falkenham stated "It may have happened but not while I was there".

45. When questioned whether Mr. Gough's duties were different from anyone else, Mr. Falkenham replied "yes and no". He indicated that "many labourers are specialized" and that Mr. Gough did all of the cement and rock wall work and he "knew that's why he was hired". When there was no cement work, Mr. Gough worked as a labourer. He stated that he did not recall Mr. Gough telling him that certain co-workers did not help him. Mr. Falkenham replied "most of my workers are willing to pitch in on the site and I am not aware, I don't remember Lionel telling me".

46. When asked whether he had given Mr. Gough a chance to use his skills as an equipment operator, Mr. Falkenham indicated that he did not know that Mr. Gough was an operator and that he had hired him for cement, rock walls and labourer. He further stated that he could not have hired Mr. Gough as an operator unless he was a member of the Union.

47. Cyril Falkenham provided testimony in regard to John MacNeil and his role at Falkenham. Mr. Falkenham said that John MacNeil had the authority to direct work but not the authority to hire and fire personnel.

48. Mr. Falkenham testified that any concerns Mr. Gough had should have been directed through Angela Falkenham. Mr. Falkenham also testified that no complaints were sent to him through Angela or from Mr. Gough directly until July when Mr. Gough did not return to work. When Mr. Gough did not return to work, Mr. Falkenham said he contacted him and went to his house to discuss the matter.

49. Testimony was heard from several witnesses regarding a job site where a rock wall had to be built in February. Mr. Gough stated that this was a risky job to have to do during the winter months. Mr. Falkenham testified that if there was work available in the winter months he would call employees in to do it. He did not think that the rock wall job was risky. This is supported by the evidence of Kevin Shaw, who testified that there were no dangerous jobs. Angela Falkenham testified that Falkenham workers were made aware of the Falkenham Safety Policy and that they were made aware of the right to refuse unsafe work. I find that if Mr. Gough thought the rock wall job was dangerous he could have refused to do it under the Falkenham Safety Policy.

50. Mr. Falkenham testified that he was aware of the incident between Glen Pierce and Mr. Gough that occurred on July 28, 2004. He said that both Mr. Pierce and Mr. Gough told him about it and they "said the same thing". He indicated that Mr. Pierce told him he did use the phrase "nigger it up" and it was a phrase that he used commonly and no harm was meant by it. Mr. Falkenham recognized that Mr. Gough was offended by it. When asked what he did about this, Mr. Falkenham indicated that he "talked to Glen" and I "told him it is different these days;

you can't say those things". I found Mr. Falkenham to be forthright in his testimony and I accept his evidence as credible on all points.

Angela Falkenham

51. Angela Falkenham is the daughter of Cyril Falkenham and she has worked in the Respondent business for approximately fourteen years. She is responsible for Accounts Receivable, Payroll and delivering supplies to work sites. Referring to her job in handling payroll, Ms. Falkenham provided testimony about Mr. Gough's income. She testified that his 2001 gross income was $22,087.22; his 2003 income, $22,869.44 and his 2004 income up to the date of July 31st, was $6,930.00. She is currently the Safety Representative for Falkenham. Ms. Falkenham testified that if any employee had an issue with safety on a jobsite they would come to her as the Safety Officer or to her father as the owner of the company.

52. Ms. Falkenham testified that Falkenham does not have a harassment policy. She testified that she had not observed any discrimination at the company, nor had she witnessed any racial slurs. When asked whether Falkenham had taken steps to implement a harassment policy she indicated that she had consulted with the Construction Industry Association and that they did not have a policy yet, so neither did Falkenham. In relation to the harassment policy at work, Angela Falkenham testified that C.R. Falkenham does not have a harassment policy *per se* but they have company rules that refer to horseplay, joking and interfering with work. When asked if Mr. Gough had brought any concerns to Angela Falkenham, she said no and that if she had heard anything, it definitely would be considered and she would try to "fix it quickly".

53. Ms. Falkenham did recall Mr. Gough speaking to her regarding John MacNeil stating that he did not like Newfoundlanders and niggers. She stated that she did not write this complaint down, but did indicate that she spoke to John MacNeil about it within the next few days and that he said he did not say it. Ms. Falkenham went to great lengths in her testimony to describe the use of the term "nigger" at Falkenham to mean the "old English word niggard". She testified that employees who used that term did not mean it to be discriminatory. I prefer the evidence of Mr. Gough, Kevin Shaw and Cyril Falkenham on this point. I found Ms. Falkenham's evidence in this regard, to be less than candid. I have concluded from Ms. Falkenham's evidence that she believed because there was allegedly no intent in the comments made by John MacNeil and Glen Pierce that the comments were not racist.

John MacNeil

54. John MacNeil is a self-employed contractor who works exclusively for Falkenham. Although he denied being a supervisor it was clear from his evidence that he laid out jobs for the work crews and told them what to do. Cyril Falkenham testified that John MacNeil had the authority to direct work. Mr. MacNeil testified that he treated Mr. Gough "the same as everyone". He further testified "I never thought there was a problem between Lionel and myself". Mr. MacNeil also stated that "Somebody told Lionel that he said he didn't like Newfoundlanders and niggers". Mr. MacNeil denied making this statement. Mr. MacNeil testified that Mr. Gough confronted him about the allegation. I prefer the evidence of Kevin Shaw on this point. Mr. Shaw, in a statement to the Human Rights Commission that he adopted at the Hearing stated as an answer to question 3 of the statement: "Have you ever heard anyone in the workplace tell racial stories about Black People? Who? When? What was said? No I don't think, not me for sure, I didn't tell any stories … it was John MacNeil, I believe, that

said he didn't like Newfoundlanders and "N's"."

55. In his testimony Mr. MacNeil likened the "plight of the black man" to the "plight of the Scottish settler" and stated that while he may not have understood the plight of the black man, Mr. Gough did not understand the plight of the Scottish settlers. Mr. MacNeil also made a great effort during his testimony to attempt to distinguish between the phrase "nigger it up" and "niggard it up". He testified that he explained to Mr. Gough that this was a phrase from old English meaning to "hastily assemble" and he also testified that he tried to explain to Mr. Gough that this was not racist. He stated that he advised Mr. Gough that "Nobody meant anything". I find the evidence of Angela Falkenham and John MacNeil on this point to be contrived and lacking in credibility. I find as a fact that the phrase was used frequently at Falkenham and that its use had no relationship at all to old English.

56. Later on, in reference to Mr. Gough confronting Mr. MacNeil in regard to the "niggers and Newfoundlanders" comment, Mr. MacNeil said that he was upset that someone had said that he had said this. He testified that he always tried to get along with people. Mr. MacNeil also testified that he felt that Mr. Gough was treated better than other employees. Mr. MacNeil testified that Mr. Gough would often be on the work site in his car at 9:00 a.m. but not doing the construction work he was directed to do. Mr. MacNeil also testified that in the construction industry there is a lot of joking but it is only a fun thing and that everyone does it. He said he never saw anyone pick on Mr. Gough. Like Angela Falkenham, John MacNeil's testimony leads me to conclude that he thought if racist comments were not intentional then they were not racist.

Glen Pierce

57. Glen Pierce testified about the July, 2004 incident with the cement slab. Mr. Gough claims that Mr. Pierce used the term 'nigger it up'. Pierce testified that Mr. Gough complained to him that everyone at Falkenham was racist. Mr. Piece said that, "nobody here is racist". He testified that he then told Mr. Gough that they had a saying in Newfoundland, "nigger it up", but it is just a saying. Mr. Pierce testified that it was the next day that he was told that Mr. Gough quit because Mr. Pierce referred to him as a nigger. Mr. Pierce testified that Mr. Gough refers to him as a "goofie newfie" and made a point of saying that he (Pierce) has never complained.

Ken Zwicker

58. Mr. Zwicker is an excavator operator who has worked with Falkenham for eight years. He testified that he worked with Mr. Gough and "got along with him with no problems". When asked how Mr. Gough was treated, he said "he got a good wage for what he did". Mr. Zwicker was questioned regarding Mr. Gough's work ethic. Mr. Zwicker responded that Mr. Gough was not a "ball of fire" at work, but he was there. When asked whether Mr. Zwicker ever saw Mr. Gough treated unfairly or whether he had heard any comments made about Mr. Gough's race or colour, he said, "no".

LEGAL PRINCIPLES

59. Do these facts establish a breach of Section 5(1)(d) of the Act by Falkenham?

60. Section 5(1) of the Act 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;"

61. Discrimination is defined in Section 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." [emphasis added]

62. The burden of proof is on Mr. Gough to establish on the civil balance of probabilities that Falkenham discriminated against him. If Mr. Gough is able to establish a *prima facie* case, then the burden shifts to Falkenham to show rational and credible justification for its actions and the actions of its employees' to demonstrate the conduct was not discriminatory.

Finding of Discrimination

63. The Supreme Court of Canada set out the requirements as to what constitutes a *prima facie* case of discrimination in ***O'Malley v. Simpson-Sears Ltd.***, [1985] S.C.J. No. 74 (at para. 28):

> "A *prima facie* case of discrimination … is 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."

64. I find that Mr. Gough has made out a *prima facie* case of discrimination based on race and colour. 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 analyzing 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 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.

65. The burden now shifts to Falkenham to show that its actions and the actions of its employees were not discriminatory. I find 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.

66. On a number of occasions Falkenham employees testified that "nobody meant anything" by the comments and that there was a lot of joking around in the construction industry.

The Irrelevance of Intention

67. It is settled law that intention is not a factor meriting consideration in Human Rights Law.

68. In the Nova Scotia racial discrimination human rights case, *Downey v. Metropolitan Transit Commission*, [1991] N.S.H.R.B.I.D. No. 1, the Board reaffirmed the irrelevance of intention in Human Rights Law stating at p. 6:

> "Finally, a most important and significant reason not to require 'intention' is the Human Rights Legislation itself. The Act is remedial. It is not designed to punish or suggest moral turpitude. It is designed to prevent discrimination, both direct and systemic."

69. Therefore, the suggestion that one was merely "joking" or that one "meant no harm" as an explanation for racist comments or conduct is not a mitigating factor in determining whether the conduct complained of was discriminatory.

Falkenham's Liability for its Employees' Discriminatory Conduct

70. It is well established that employers are liable for the discriminatory acts of their employees because only employers have the ability to provide a harassment-free working environment. In the decision of the Supreme Court of Canada, *Robichaud v. Canada (Treasury Board)* [1987] 2 S.C.R. 84, the Court discussed an employer's liability for the discriminatory acts of its employees in the context of providing a workplace free from discrimination. Given that Human Rights Legislation is remedial, it is important that the entity which has the ability to address and eliminate discriminatory conduct be held liable. The Court held:

> "… if the Act is concerned with the effects of discrimination rather than its causes (or motivations), it must be admitted that only an employer can remedy undesirable effects; only an employer can provide the most important remedy – a healthy work environment. …
>
> … I would conclude that the Statute contemplates the imposition of liability on employers for all acts of their employees … It is unnecessary to attach any label to this type of liability; it is purely statutory. However, it serves a purpose somewhat similar to that of vicarious liability in tort, by placing responsibility for an

> organization on those who control it and are in a position to take effective remedial action to remove undesirable conditions. …
>
> … While the conduct of an employer is theoretically irrelevant to the imposition of liability in a case like this, it may nonetheless have important practical implications for the employer. … An employer who responds quickly and effectively to a complaint by instituting a scheme to remedy and prevent recurrence will not be liable to the same extent, if at all, as an employer who fails to adopt such steps. These matters, however, go to remedial consequences, not liability. (paras. 15, 17 and 19)

71. A poisoned work environment may constitute discrimination under the Act. In *Hinds v. Canada Employment and Immigration Commission* [1988], 10 C.H.R.D. No. 13, a complaint dealing with racial harassment, the Tribunal held that an employer is not obligated to maintain a "pristine working environment", however:

> "… There is a duty upon an employer to take prompt and effectual action when it knows or should know of co-employees' conduct in the workplace amounting to racial harassment. … To satisfy the burden upon it, the employer's response should bear some relationship to the seriousness of the incident itself. … To avoid liability, the employer is obligated to take reasonable steps to alleviate, as best it can, the distress arising within the work environment and to reassure those concerned that it is committed to the maintenance of a workplace free of racial harassment." (p. 8).

72. Furthermore, even if an employer is unaware of the discriminatory acts of its employees, it is not absolved from liability for that individual's discriminatory conduct. In *Smith v. Zenith Security and Investigation Limited*, [2002] B.C.H.R.T.D. No. 25, the employer claimed to be unaware of the discriminatory conduct of his employee. The Tribunal relied on *Robichaud, supra*, to find the following at para. 32:

> "I accept that Mr. Steffanson may not have known anything about the individual Respondent's conduct toward Ms. Smith. However, Zenith is not absolved from liability for the individual Respondent's discriminatory conduct toward Ms. Smith due to the failure of Zenith staff to tell him about it. Employers are vicariously liable for discriminatory acts of their employees because only employers have the ability to provide a harassment-free working environment.

73. The three basic elements that must be satisfied if an employer is to avoid liability were set out by the Tribunal in *Francais v. C.P. Rail* (1985), 9 C.H.R.D./4724 which was adopted by the Tribunal in *Hinds, supra*, are as follows:

> 1. That the employer did not consent to the commission of the act or omission complained of;
> 2. That the employer exercised all due diligence to prevent the act or omission from being committed; and

> 3. That the employer exercised all due diligence subsequently to mitigate or avoid the effect of the act or omission.

74. The law is clear. 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.

REMEDY

76. The powers available to a Board of Inquiry are found at Section 34(8) of the Act which provides:

> "**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."

77. In the recent decision of ***Hall v. Seetharamdoo***, [2006] N.S.H.R.B.I.D. No.4 the Board relied at paragraph 65 on the following finding in ***Henwood v. Jerry Van Wart Sails Inc.*** (1995), 24 C.H.R.R.D/244 (Ont.Bd.Inq.) (para. 33) for guidance as to the purpose and remedies and damage awards in human rights complaints:

> "These remedial provisions should be construed liberally to achieve the purposes and policies of human rights legislation; Cameron v. Nel-Gor Castle Nursing Home (1984), 5 C.H.R.R.D/2170 (Ont.Bd.Inq.) at D/2196. It is a principle of human rights damage assessment that damage awards ought not to be minimal, but ought to provide true compensation. This is necessary in order to meet the objective of restitution and also to give true compensation to a Complainant to meet the broader policy objectives of the Code.
>
> The objectives of the Code are to put the Complainant in the same position she would have been in had her Human Rights not been infringed by the Respondents: *Cameron* at p.D/2196, paras. 18526-27. The measure of monetary damages in a case such as this is the amount that the Complainant would have earned had she not been denied the employment opportunity: *Cameron* at p.D/2197, para. 18532; *Piazza v. Airport Taxi Cab (Molton) ASSN* (1989), 69 O.R. (2d) 281 and 282 [10 C.H.R.R. D/6347] (C.A.). The Complainant in this case had a duty to mitigate her damages; however, the onus of providing a failure to mitigate lies on the

> Respondent, as it does in other areas of the law: *Gohm v. Dom Tar Inc.* (No. 4) (1990), 12 C.H.R.R. D/1161 at D/181 (Ont. Bd.Inq.), citing *Red Deer College v. Michaels* [1996] to S.C.R. 324."

78. The most common remedies for violations of the Act include monetary compensation and non-monetary compensation. As noted in *MC Avinn v. Strait Crossing Bridge Limited No. 4* (2001), 41 C.H.R.R. D/1388 (C.H.R.T.) at para. 183, the goal of compensation in cases of discrimination is to make the victim whole, taking into account principles such as reasonable foreseeability and remoteness.

Damages

79. The Complainant has requested the following: "That Mr. Gough's damages should exceed those awarded to the Complainant in *Johnson* and should be consistent with the total damages awarded in *L.J.W*. In *Johnson v. Sanford and Halifax Regional Police Service*, [2003] N.S.H.R.B.I.D. No. 2, the Board found that the usual range of general damage awards in Nova Scotia is between $1,000 and $10,000. Ultimately, the Complainant was awarded $10,000 in general damages with prejudgment interest at a rate of 2.5% from the date of the incident in question.

80. In *L.J.W. v. Halifax Regional School Board*, [2006] N.S.H.R.B.I.D. No. 2, the Board, after acknowledging the limitation of money as an answer for hurt suffered, provided the following (at para. 125) regarding why the Complainant's damages exceeded what was awarded in *Johnson, supra*:

> Just the same, it does seem to me that Ms. L.J.W.'s situation, having to face day after day her accusers and those who were suspicious of her was worse than Mr. Johnson's.

81. In *L.J.W.*, the Complainant was awarded $5,000 for one particular breach and $5,000 for each of the years that a key actor in the discrimination she experienced remained in his leadership position, totalling $25,000.

82. The Commission submits that "like the Complainant in *L.J.W.* Mr. Gough had to face those who discriminated against him "day after day". The Commission argues, the repeated exposure to discrimination to those who discriminated against him had a severe impact on Mr. Gough. Dr. Raiche-Marsden diagnosed that impact and removed him from the workplace. The Commission argues the impact was so severe that, despite his efforts to do so, Mr. Gough was unable to work for 55 weeks and ultimately, the discrimination had an impact on both his physical and psychological well being.

83. Dr. Wanda Thomas Bernard testified about the effects of racism on employees. In her research Dr. Bernard learned that when an employer does not take action with regard to racism the employee faces continued stress and feels marginalized by the employer's inaction. This places the employee in a position of physical and emotional pressure.

84. Dr. Raiche-Marsden provided evidence that Mr. Gough complained about racism during his office visits and she also stated that he advised her how it was affecting him physically and psychologically.

Special Damages

85. The Complainant alleges he was unable to work for 55 weeks – August 16, 2004 to September 8, 2005. At the time his doctor removed him from the workplace, Mr. Gough worked an average of 45 hours per week at $17.00 per hour. He has therefore claimed the amount of $42,075 in wages during the 55 week period he alleges he was unable to work. He seeks compensation for that amount.

86. Furthermore, the Complainant submits he should be reimbursed for expenses incurred as a result of attending Anger Management sessions, as well as at other forms of counselling and rehabilitation. There was no proof of these expenses adduced at the Hearing.

87. The Complainant has requested several non-compensatory public interest remedies. They have specifically asked for the following:

(1) The Respondent's present employees, and any new employees, should take sensitivity training, training with respect to racial discrimination and training with respect to the illegality and harmful effects of racial discrimination, during working hours, with no loss of pay, for as many hours as the N.S.H.R.C. considers necessary. This should occur within three months of the Order date in this case.

The three-month time limit may be extended up to six months by mutual agreement of the Respondent and the N.S.H.R.C. but in no case extended beyond a period of six months from the Order date.

(2) The Respondent must develop a harassment policy within three months. The N.S.H.R.C. 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 N.S.H.R.C. but in no case will be extended beyond a period of six months from the Order date.

(3) The Respondent shall donate $250. to the Black Educators Association of Nova Scotia in the names of Mr. Lionel Gough and Respondent. The donation shall be made no later than twelve months from the Order date.

88. The Complainant has also claimed pre-judgment interest at 2.5%.

AWARD

89. I have carefully reviewed the submissions of the parties and reviewed the case law in relation to the specific facts of this matter and their impact on Lionel Gough. Mr. Gough testified as to the humiliation, stress and pain he experienced because of the racist comments made by his co-workers. Dr. Bernard testified as to the sense of violation that black people experience when subjected to acts of racism. I find that the conduct of the Falkenham employees had a devastating effect on Mr. Gough for which he should be compensated. I decline to award the

requested $250 donation to the Black Educators Association as I do not wish to highlight the events that are the subject of this complaint in this fashion. The Board has therefore reached the following conclusion as to remedy:

1. The Complainant shall receive compensation for 20 weeks lost wages from August 16, 2004 to December 24, 2005, the time at which he would have been laid off for the winter season.

2. The Respondent, Falkenham, shall pay to the Complainant, Lionel Gough, the sum of $8,000 in general damages plus interest at 2.5% from the time of the complaint to the date of this decision.

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 Order date in this case.

   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 the Order.

4. The Respondent shall develop a harassment policy within three months from the date of the Order in this case. 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 Order date.

90. I wish to express my gratitude to Counsel for their excellent legal briefs and their professionalism throughout these proceedings.

Dated at Halifax, Nova Scotia, this 21st day of August, 2007.

_____

Cheryl L. Hodder