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Yousufi v. Toronto Police Services Board, 2009 HRTO 351 (CanLII)

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HUMAN RIGHTS TRIBUNAL OF ONTARIO

BETWEEN:

Abdullah Yousufi

Complainant

-and-

Ontario Human Rights Commission

Commission

-and-

**Toronto Police Services Board, Keith Bradshaw,
Ed Stewart and Brian Ward**

Respondents

DECISION

Adjudicator: Kaye Joachim
Date: March 27, 2009
File Number: HR-1216-06; HR-1217-06
Citation: 2009 HRTO 351
Indexed as: **Yousufi v. Toronto Police Services Board**

APPEARANCES BY

Abdullah Yousufi, Applicant))	on his own behalf
)	
)	
Toronto Police Services Board, Clark, Ed Stewart and Brian Ward, Respondents))	Sharmila M. Counsel
)	
Keith Bradshaw, Individual Respondent))	Gary R. Clewley, Counsel
)	
Ontario Human Rights Commission Abrahams,))	Sharon Counsel
)	
)	

INTRODUCTION

[1] The complainant self-identifies as a non-white person of Afghan descent. He alleges that he was subject to a poisoned work environment as a result of his ethnic origin, place of origin and perceived creed (Muslim) and that the Toronto Police Services Board ("TPS") failed to take appropriate action to prevent this employment discrimination, contrary to sections 5(1) and (2) of the Human Rights Code ("Code"). The respondents deny the existence of a poisoned work environment and assert that they took all appropriate steps to address the complainant's allegations in a timely and appropriate way.

[2] Several case management meetings were held to prepare combined pleadings and focus the issues in dispute. The parties also filed affidavits of evidence of all witnesses, which reduced the hearing time required for evidence in chief. The hearing into the allegations of a poisoned work environment took 12 days over February and March 2009. In a prior decision, the Tribunal directed that the issues of reprisal and remedy, if required, would be heard separately.

BACKGROUND

[3] The complainant is a civilian employee of the TPS employed in the Planning Division of the Forensic Identification Section ("FIS"). On September 12, 2001, the day after the destruction of the World Trade Centre buildings in New York City, Keith Bradshaw, a Detective in the Homicide Division, left a message on the answering machine of Al Morrison, a Detective Constable in FIS, to the effect that he had information that the complainant was involved in the events of September 11, 2001.

[4] The Unit Commander of FIS, Staff Inspector Ed Stewart, referred the message to Internal Affairs (now Professional Standards), the division of the TPS responsible for investigating, among other things, internal police conduct. During the course of the investigation, the message was played for the complainant, who was shocked and upset by the message.

[5] The Ontario Human Rights Commission (the "Commission") and the complainant assert that the TPS, upon hearing the message, believed that the complainant was potentially a suspect in the events of 9/11 because of his Afghani origins. Proceeding on that racially biased assumption, they proceeded to interrogate the complainant. Eventually, the TPS discovered that the message had been left by Detective Bradshaw, allegedly as a "joke" on Morrison. The TPS docked Bradshaw 16 hours of sick pay, a form of discipline the complainant and the Commission allege was woefully inadequate to address the seriousness of the offence.

[6] The respondents assert that the complainant was never a suspect in the events of September 11, 2001 and that they immediately identified the incident as a misguided form of humour by an internal member of the TPS. They assert that the investigation was referred to Internal Affairs for the sole purpose of confirming the identity of the caller. The TPS stands by the level of discipline meted out to Bradshaw in the circumstances. This is the first aspect of the complaint.

[7] The Commission and the complainant assert that the complainant's co-workers in FIS and elsewhere in the TPS learned about the telephone message and believed he was a suspect in the events of September 11, 2001. The ensuing rumours and comments to and about the complainant further poisoned his work environment. The Commission and the complainant assert that the respondents failed to take adequate steps to quell the poisoned work environment arising from the rumours and innuendo flowing from the telephone message left by Bradshaw.

[8] The respondents deny that the complainant's work environment was poisoned by suspicions of TPS members that the complainant was a suspected terrorist and assert that the complainant's perceptions were misguided. This forms a second aspect of the complaint.

[9] During the course of the investigation into the telephone message, the complainant identified historical harassment by members of the Unit dating back to his joining FIS in 1994. The Commission and the complainant assert that the complainant experienced a poisoned work environment from 1994 to 2001.

[10] The TPS takes the position that the complainant never brought the 1994 to 2001 allegations to its attention until after the telephone message on September 12, 2001. When he did, the TPS conducted an internal investigation into the allegations and determined that the allegations were not substantiated. The 1994 to 2001 allegations of historical discrimination and the adequacy of the TPS response to those allegations form a third aspect of the complaint.

Credibility

[11] There is considerable dispute between the complainant's version of events and the versions put forward by the respondents' witnesses. The respondents' witnesses' evidence was mostly confirmed by official log books kept in the course of duty and/or written documentation provided to the TPS at the time. The complainant's written notes, on the other hand, were kept in a private notebook and not shared with anyone until long after the events. I am not satisfied that the notes in the personal notebook were actually recorded contemporaneously nor that they were an actual reflection of what transpired, regardless of when he wrote them. The complainant testified that he began

insisting that everyone respond to him in writing immediately following the events surrounding the message left on September 12, 2001, but chose not to publicly document his version of events (except as described below). On several occasions (described below) the complainant's evidence was inherently improbable, and his perceptions were at odds with the preponderance of probabilities. I conclude that the applicant's evidence was not reliable.

[12] For the most part, the complainant's version of events was not corroborated by any witnesses. Many of the complainant's allegations were allegedly said openly in the FIS Unit which consisted of at least 90 civilian and uniform employees, yet, with very limited exception, the complainant was not able to bring forward any witnesses to confirm his specific version of events. The witnesses who testified on the complainant's behalf were either reporting only what the complainant told them (John Irwin and Barb Bampton) or were so vague as to dates, particulars and persons involved that their evidence could be given very little weight (Patricia Quinton, Janice Morrison, James Greavette). I am cognizant of the fact that employees are reluctant to testify against their employer or give negative testimony against their colleagues, and I have not given undue weight to the lack of corroboration. However, this phenomenon does not relieve the applicant of the burden upon him to present credible evidence to support his allegations. Had I found the evidence of the applicant to be reliable, there would be no necessity for corroborating evidence. However, I have found, for reasons other than the lack of corroboration, that the applicant's evidence was not reliable.

[13] I accept that there were several discrepancies and contradictions in the evidence of some of the respondents' witnesses, and, at times, I have found that one or another of the respondent witnesses' evidence was not reliable. However, for the most part, I find that the discrepancies and contradictions in the evidence of the respondents' witnesses, except as described below, is consistent with the fading of memories over the passage of time and the fact that no two persons (or three or four as the case may be) can witness the same event and describe it with exact consistency five minutes later, much less six years later. There were instances where the evidence of the respondents' witnesses could not be explained by the passage of time, and were indicative of an attempt by the witnesses to present themselves and the TPS in the best possible light and I have taken this lack of honesty into account where appropriate.

[14] However, the evidentiary burden rests on the complainant and the Commission to establish their allegations on a balance of probabilities, and not on the respondents to disprove the allegations. For the most part, the complainant's allegations were not made out on his own evidence and the inconsistencies in the respondents' evidence did not serve to make them out.

[15] For the reasons described above, I have concluded that the complainant's evidence is not reliable on a balance of probabilities. Where the complainant's evidence is corroborated, I have accepted it. I will further explain my conclusions regarding the reliability of the various witnesses throughout this decision. Thus, the following analysis sets out my factual findings, in light of my conclusions on credibility.

Did the respondents breach the complainant's rights under the Code in their handling of the investigation into the telephone message of September 12, 2001?

[16] Keith Bradshaw testified that on the evening of September 12, 2001, his wife, Kathy Bradshaw, a civilian supervisor in FIS, mentioned that Morrison, a colleague in FIS, had stated to her that they should be careful what they said in front of the complainant in light of the events in New York. Bradshaw concluded that Morrison was paranoid about the complainant and decided to play a joke on Morrison.

[17] On the evening of September 12, 2001, Keith Bradshaw called Morrison's work telephone and, disguising his voice with an accent supposedly from someone from the Middle East speaking English poorly, left the following message:

I have a tip for Abi Yousufi taking secret airline pilot lessons at Buttonville Airport to fly 767's and 757's for knockdown twin towers. You will search his locker immediately for Arabic flight manual and he must be interned like the Japanese do during the Second World War. He must be interned. He is evil, evil Islamic militant goodbye.

[18] On the morning of September 13, 2001, Morrison retrieved the message. He did not recognize the voice and the TPS telephone system indicated that the message came from a K. Sanders. He did not recognize the name or telephone number. Morrison testified that while he did not believe that the complainant was actually involved in the events of September, 2001, he thought the matter was serious enough to warrant an investigation. He reported the message to his supervisor, Detective Sergeant Brian Ward. Ward testified that upon hearing the message, he immediately interpreted the message as a poor attempt at humour. He discovered that the telephone number was consistent with the home telephone number of Kathy Bradshaw, a civilian employee in FIS. Ward assumed that that message had been left by Keith Bradshaw, Kathy Bradshaw's husband, since it was a male voice.

[19] Morrison and Detective Wisniowski made an audio tape of the message on the answering machine and created a typed transcription. Ward, Wisniowski and Morrison prepared written statements confirming the above.

[20] Unit Commander Stewart testified that based on the reports received from the three officers above, he believed that the offending officer was Keith Bradshaw. He decided to refer the matter to Internal Affairs for an independent investigation. On September 14, 2001, he dropped off the statements of Ward, Wisniowski and Morrison, the tape and the transcription with Internal Affairs.

[21] These versions of events are all confirmed by statements of the above witnesses written on September 13, 2001.

[22] On the morning of Friday, September 14, 2001, two Internal Affairs Officers, Detectives Sergeant Richard Stubbings and Gordon Sneddon, were assigned to conduct the investigation to determine who had left the message. They reviewed the above statements and interviewed Morrison that morning. This interview was conducted and recorded twice, as the Officers believed that there was a problem with the first recording. Transcriptions of both recordings were placed into evidence and do not indicate any significant discrepancies. By the time of his interview, Morrison testified that he had heard through the Unit grapevine that the person who had allegedly left the message was Keith Bradshaw. The transcript of his evidence indicates his disbelief that his friend, Kathy Bradshaw, could have been involved in such an incident.

[23] The Internal Affairs Officers also interviewed the complainant to see if he could recognize the voice on the tape. The message left on Morrison's machine was played for the complainant and then the tape recorder of the official interview was turned on. The official tape recording was approximately two minutes long. The transcription indicates a very brief conversation in which the complainant is asked whether he recognized the voice on the tape. The complainant is obviously much shaken and denies recognizing the voice. The complainant is asked where he is from and when he came to Canada. The complainant is asked how the message made him feel and he replied that he was in shock and scared that somebody hated him because he was born in Afghanistan. The tape concludes with Sneddon stating that the Service takes this type of matter very seriously, and that the complainant was a valued employee.

[24] The complainant testified that the interrogation took 30 to 45 minutes and the Internal Affairs Officers turned the tape on and off at will. While I accept that the tape recorder was in the control of the Officers from Internal Affairs, I do not accept the complainant's version of events. At the start of the interview, Sneddon noted the time as 11.44 a.m. and at the end of the interview he noted the time as 11.46 a.m. These times are confirmed in his log book. In my view, it is not in keeping with the preponderance of probabilities that Sneddon was at this

time fabricating the time notations on the tape and in his log book with a view to hiding a lengthy interview.

[25] Most telling are the notes the complainant claimed to have recorded in his notebook a few days later. In that notebook, the complainant's version of events is mostly consistent with the taped version. The version of events the complainant gave at the hearing was more elaborate. He claimed the Officers stated that many people had died in the terrorist attacks and no one person or group had been identified. Then they asked questions such as "Why should someone leave such an important tip for the police if you are not involved?" "There are over 7000 employees in the TPSB, why should someone choose only you." "You must have been involved." "When were you last in the US?" "Who do you live with" "Who are your friends?" I do not accept that these questions were asked.

[26] Such comments are not consistent with the documented reports of the investigation which indicate clearly that the purpose of the investigation was to determine who made the telephone call. In my view, this is an example of a serious misrepresentation by the complainant of what transpired at the interview.

[27] The complainant also asserted that during or following the interrogation, his locker was searched. Stubbings denied that the complainant's locker was searched. Brian Ward testified that the complainant insisted that he (Ward) search the locker and that following a cursory search, he reported back to the Internal Affairs Officers that there was nothing in the locker. Thus, there is a discrepancy between Stubbings and Ward's evidence on this point. In my view, this is a minor discrepancy which is understandable given the passage of over six years between the time of the events and the time of the hearing.

[28] The Commission and the complainant asked me to draw an adverse inference from the failure to the TPS to call Sneddon as a witness to the September 14, 2001 interview. I decline to do so. I note that there were four parties at the disputed meeting and three testified. In addition, a tape of the conversation was entered into evidence as were the log books of Sneddon, Stubbings and Ward. The Tribunal does not encourage parties to call unnecessary witnesses to repeat what other witnesses have already said. In my view, Sneddon's evidence would have been repetitive of the extensive evidence before me on what transpired at the meeting.

[29] The complainant also testified that when he expressed concern for his safety in light of the message, Ward allegedly stated "when you go home before starting your car, make sure no one is around and close to your car" and that "everyone laughed." This was denied by Ward. I am not satisfied that the complainant has established that Ward made this comment.

[30] The complainant testified that he recalled that Sneddon had contacted him the day before the interview (September 12, 2001) and asked him strange questions about where he was living. The complainant concluded that Sneddon had been obtaining information to put him under surveillance. This belief ought to have been assuaged after the full disclosure of the documentary evidence which indicated that Sneddon was not apprised of the situation until September 13, 2001. However, the complainant persisted at the hearing on testifying that he believed that Internal Affairs had initiated surveillance on him on September 12, 2001. In my view, this demonstrates that the complainant's perceptions are not reliable.

[31] On Monday, September 17, 2001, the Internal Affairs Officers interviewed Keith Bradshaw. The delay in contacting Bradshaw was due to the fact that he was on vacation at the time. The interview was taped. Officer Bradshaw was advised that he was compelled to give a statement, which was not something that was said to the complainant or Morrison. This is consistent with the TPS position that the Officer under investigation was the person suspected of making the telephone call and not the complainant. Bradshaw immediately agreed that he left the message and stated that it was supposed to be a joke on Morrison and that he never anticipated that anyone other than Morrison would ever hear the tape. He offered to apologize to the complainant and Morrison.

[32] The Internal Affairs Officers met with the complainant again on September 17, 2001 in the presence of the complainant's supervisor, Brian Ward, and advised the complainant that the caller was Keith Bradshaw. The complainant was initially disbelieving but eventually accepted that it was true.

[33] The Internal Affairs Officers presented a written report of their investigation to their Unit Commander on September 17, 2001. They also advised the Human Rights Co-ordinator Abbey Mushega, as they believed that the situation may involve issues of workplace harassment. As a result of the Internal Affairs investigation confirming that Keith Bradshaw had left the telephone message, the matter was referred back to the Unit Commander of the Homicide Unit to determine the appropriate action. A complaint file against Bradshaw was opened on September 18, 2001.

[34] On September 26, 2001, Jane Wilcox, the Administrative Inspector of the Homicide Unit, served official notice on Bradshaw of an investigation into his conduct relating to the telephone call. He was alleged to have engaged in Discreditable Conduct, in the form of "profane, abusive or insulting language that relates to a person's individuality." Bradshaw again admitted the conduct and apologized.

[35] On October 16, 2001, Staff Inspector Bob Clark, Unit Commander of Homicide, and Wilcox met with the complainant and Ward. Clark apologized to

the complainant on behalf of the Homicide Unit and conveyed that Bradshaw was willing to apologize. He advised that Morrison, who was the formal complainant in the matter, had refused to accept an apology and wanted the matter dealt with formally. They asked for the complainant's input. The complainant advised that he was very hurt, upset and humiliated and was seeing a psychologist as a result. The complainant's private notes of the meeting are generally consistent with the above as are the log book notes of Wilcox.

[36] However, the rest of the complainant's notes of the meeting are widely divergent from Wilcox's version of the meeting. In particular, the complainant's notes indicate that he said at this meeting that he felt that he was being continually raped by the actions of his Unit. In my view, it is not in keeping with the preponderance of probabilities that Wilcox would have forgotten or omitted to make note of such a claim, especially as she had just returned from the sexual assault unit. I note that Wilcox is not a named respondent and that there are no allegations against her. I find that she had no reason to fabricate her evidence or tailor her notes. I find that the notes that the complainant made in his private notebook, regardless of when they were written, are simply not a reliable version of what transpired.

[37] Wilcox consulted with Mushega, the Human Rights Co-ordinator, on October 17, 2001 and sought his input on the investigation. On October 23, 2001, Wilcox met with Mushega who recommended a penalty of two days. Although Mushega denied approving or recommending a penalty of two days, I find that his memory of these events and his notes are so vague and unreliable that I prefer Wilcox's evidence and notes on this point. I find that although Unit Commander Clark made the final decision with respect to discipline, Mushega's input was considered.

[38] The complaint file into Bradshaw notes that the complaint was substantiated and 16 hours were removed from his sick bank. The undisputed evidence is that this recorded discipline remained on his record for a period of two years.

[39] Meanwhile, on October 11, 2001, the complainant wrote to the Toronto Police Association (the "TPA") expressing his concern that the telephone message had not been appropriately dealt with and that his co-workers were taunting him about being a suspect in 9/11. A copy of this letter was sent to the Human Rights Co-ordinator.

[40] The TPA wrote to the complainant's Unit Commander Stewart on October 19, 2001 advising that the complainant had complained about harassment arising from September 11, 2001, that he had endured "hurtful and unpleasant comments" and that he was upset that the investigation by Internal Affairs had

not been resolved. Stewart did not respond to the letter, although he subsequently met with the complainant, as described below.

[41] The complainant met with Mushega on November 1, 2001 and November 5, 2001 to hear the complainant's concerns about the handling of the telephone message. Mushega arranged a meeting with Stewart on November 6, 2001 to discuss the complainant's concerns.

[42] At that meeting, the complainant expressed the view that the matter was a hate crime and that Bradshaw should be charged criminally. Mushega advised that he had consulted with the Hate Crimes Unit and that he had been advised that the matter did not amount to a hate crime. The complainant was not satisfied with this response.

[43] It is evident from the above recitation of evidence and conclusions that I have rejected much of the complainant's and the Commission's theory of the events immediately following the message of September 12, 2001. I will add that I do not doubt the sincerity of the complainant's perception that he was a suspect in the events of September 11, 2001 as a result of the telephone message, that there was a conspiracy among the FIS officers, Internal Affairs and the Homicide Division to cover up that he was a suspect, and that he was seriously traumatized by the message and its aftermath. However, I find that the complainant's perceptions are not supported by the evidence.

[44] The written notes and statements of Ward, Morrison, Stewart, Stubbings, Sneddon, Bradshaw, and Wilcox are more consistent with the respondents' assertion that the only investigation taking place was an investigation into the person who left the message, rather than an investigation into the complainant as a potential participant in 9/11 and a conspiracy to cover up a racially biased investigation.

[45] I find that there was no element of discrimination on the basis of place of origin, ethnic origin or perceived creed in the manner in which the TPS carried out the investigation into the message left on Morrison's telephone.

[46] In arriving at this conclusion, I am cognizant of the fact that the complainant was asked during the interview on September 13, 2001 where he was from and when he came to Canada. I accept the evidence of Stubbings that he thought this was relevant to the context to explain why the complainant might have been the target of the telephone message. This explanation is consistent with Stubbings notifying the Human Rights Co-ordinator immediately.

[47] With hindsight, it is easy to conclude that playing the message for the complainant and interviewing him to ascertain whether he recognized the voice

on the message caused unnecessary stress to the complainant in light of the other evidence clearly pointing to Keith Bradshaw as the perpetrator. However, I am satisfied that the decision of the Officers from Internal Affairs to interview the complainant was not so unreasonable as to give rise to an inference that the decision to interview him as a witness was somehow an act of discrimination.

[48] The Commission submitted that the applicant's subjective perception that he was being treated as a suspect in the events of 9/11 is, in and of itself, sufficient to establish a finding of discrimination by the TPS. I accept the applicant's evidence that on September 14, he sincerely believed that he was being investigated as potential participant in the events of 9/11. I have found that his perception was not correct, but given the speculation rife in the aftermath of 9/11, his suspicions were not unreasonable. However, I find that the fact that the complainant drew an incorrect conclusion from the reasonable actions of the TPS in response to the telephone message does not amount to a breach of the *Code*.

[49] I accept that Keith Bradshaw decided to leave the telephone message for Morrison to lampoon Morrison because his wife reported to him that Morrison appeared to be suspicious of the complainant. However, the words chosen to mock Morrison were at the complainant's expense. The message Bradshaw left for Morrison was redolent with ugly stereotypes. The accented voice, mimicking someone from the Middle East as speaking in heavily accented and broken English and casting suspicions on the complainant as being involved in the event of 9/11 amounts to discrimination on the basis of ethnic origin, place of origin and creed. The fact that the message was left on a colleague's work telephone establishes the workplace connection. Whether or not Bradshaw intended anyone other than Morrison to hear the message or whether his intention was to discriminate is irrelevant. I find that Keith Bradshaw discriminated against the complainant within the meaning of section 5 of the *Code*.

[50] The TPS began a prompt investigation and imposed discipline in the form of two days lost time. In hindsight, it might be said that the discipline was insufficient, in light of the long term impact on the complainant. However, at the time the TPS made its decision, this long term impact was not known. In light of Bradshaw's immediate confession, offer to apologize, and the Human Rights Coordinator's approval of the penalty, I am satisfied that the discipline was not so unreasonably low as to amount to a condonation of the discriminatory act.

[51] I note the complainant's view that Bradshaw ought to have been charged with various criminal code offences such as disseminating a false message or a hate crimes offence. However, intent is an element of both those offences, and in my view, the TPS' conclusion that the intentional element of those offences could not be established was not unreasonable.

Did the respondents fail to take adequate action to respond to the alleged rumours that the complainant was a suspect in the events of September 11, 2001?

[52] The complainant testified that various unnamed members of the TPS continuously asked him if he continued to be a suspect in the events of September 11, 2001. He also testified that Wallace and other unnamed persons asked him whether he would choose the needle or the gas chamber if he were shipped to the States. Wallace denied making this statement. I do not accept the complainant's evidence that Wallace made this statement.

[53] However the evidence of the complainant's witnesses and some of the respondents' witnesses confirm that that it was generally well known in FIS and outside the Unit that the complainant had been named by someone in TPS as involved in the events of September 11, 2001. As Morrison put it, it was a "tight" office and the fact of the telephone call spread like "wildfire". Kathy Bradshaw testified the message was played freely around the Unit. It is in keeping with the nature of office gossip that a rumour sparked by a telephone message on September 12, 2001 that a person within the TPS was somehow involved in the events of September 11, 2001 would spread and that the named person would be the subject of speculation.

[54] The documentary evidence confirms that the complainant brought his concerns about this office speculation to the attention of his superiors. The complainant's concerns were expressed both as an ongoing challenge to the initial investigation of the September 12, 2001 telephone message as well as a concern about the reaction of his colleagues. The TPS chose to focus on the first concern, and dismissed the complainant's complaints about the ongoing office speculation. In my view, where the TPS erred was in their failure to address the complainant's legitimate concern that he was the subject of intolerable speculation as a result of Bradshaw's telephone message.

[55] I find that the complainant was subject to a poisoned work environment following September 13, 2001 by office speculation that he was somehow involved in or connected to the events of September 11, 2001. The Unit Commander testified that he issued various notices urging "professionalism" in the Unit and ensured that pamphlets about workplace harassment were prominently displayed in the Unit. Having regard to the serious distress the complainant was under, this response was inadequate. While there may have been no single correct way to handle the situation, more focused and direct action was required. For example, Stewart could have issued a notice to all personnel within the Unit clarifying the facts and expressly and distinctly advising that the complainant was at no time a suspect in the events of September 11, 2001. A warning could have issued that any harassment of the complainant over this incident would be severely dealt with. While I find that the TPS breached the

Code in this respect, I do not find that the respondents Ward and Stewart are personally liable for this organizational error.

Did the complainant experience a poisoned work environment from 1994 to September 2001?

1994 to 2001 discriminatory comments

[56] The complainant testified with respect to the following discriminatory comments:

- Ward, Wallace, Kathy Bradshaw and Morrison frequently introduced him as “the Afghani,” referred to him as “camel goat” and mimicked his accent;
- Ward referred to him as the “Persian Prince of Passion” and stated “the ink has not dried on your immigration paper;”
- When the complainant asked for a vehicle to visit a crime scene, Ward and Wallace made comments such as “You are used to camels, now you are asking for a vehicle. Go take public transportation” and “Do you have a vehicle for this Afghani immigrant;”
- Ward, Wallace, Kathy Bradshaw, Stewart, McKeown, Badowski, Bunting and other unnamed TPS members made comments such as “the immigrant earns more than us now”; “you are getting more than you would at home;”
- After September 11, 2001, Stewart, Ward, Kathy Bradshaw and Morrison made the comment “that is more than the Taliban would give you.”
- Bunting stated in the presence of his supervisor, Dennis Bulligan, in 2001, “hey immigrant, I am going to write a letter to the Chief to train somebody else instead of you, you are making more than us.”
- In 2001, McKeown screamed “why do you immigrants make more than me.”

[57] Ward, Wallace, Kathy Bradshaw, Morrison, McKeown, Badowski, Bunting and Bulligan all denied those comments were made, except for one. Ward testified that he used to jokingly call the complainant the “Persian Prince of Passion” to tease the complainant and that the complainant never indicated any displeasure or discomfort about the comment until the complaint was filed.

[58] I have already stated that I do not find the complainant's evidence sufficiently reliable to establish on a balance of probabilities that the disputed comments were made. Two employees who worked in the Unit during the period in question gave some corroborating testimony. Janice Morrison, who left the TPS with some dissatisfaction, testified that she heard Brian Ward and Kathy Bradshaw make derogatory comments about the complainant relating to his nationality. She could not recall dates, names or specific comments except that to best of her knowledge she heard Kathy Bradshaw make a comment such as "if you were back home how much would the Taliban pay you?" However, on cross-examination she stated that although she was certain derogatory comments were made, she could no longer recall the specific comments. Patricia Quinton, who continues to work in FIS, recalled that some staff members made insensitive comments about the complainant's ethnic origin but she could not recall any names or specifics except one. She recalled that one employee, who is not mentioned by the complainant, called the complainant "the Arab" in an unpleasant way. Quinton was quite clear that neither Kathy Bradshaw nor Brian Ward were the ones who made these derogatory comments (which contradicts Morrison's evidence to some extent). The Commission and the complainant also relied heavily on email sent to Ward in December 1999 alluding to a New Year's resolution that Ward and others had allegedly made not to be "mean" to the complainant in the New Year. I accept that the email was sent. Nonetheless, the email falls far short of corroborating the comments alleged, as described above.

[59] I find that the complainant and the Commission have not established that Stewart and Ward made the discriminatory comments outlined above. However, I accept that, based on the evidence of Morrison and Quinton, some employees of the Unit made some derogatory comments about the complainant's ethnic origin between 1994 and 2001.

[60] I find that the evidence of Morrison and Quinton was so vague that it fails to satisfy me that the level of comment rose to the level of poisoning the complainant's work environment. The consensus of these witnesses and many of the respondents' witnesses was that the complainant had many friends in the Unit and was generally well liked and sociable, which is inconsistent with the complainant's claim of a poisoned work environment. I also find that the comment "Persian Prince of Passion", although an inappropriate comment, especially from a supervisor, did not rise to the level of poisoning the work environment.

1994 to 2001 discriminatory conduct

[61] The complainant alleged he experienced the following differential and discriminatory conduct:

- In 1996 John Wallace removed the complainant from the position of technical support liaison because two colleagues, Mike Ellis and Enrico Pera objected to the "immigrant who wanted to be better than us."

[62] Wallace, Ellis and Pera denied that they ever asked that the complainant be removed from the position of technical support liaison or that they made the above comment. I accept that the complainant was removed from the position, but I find that he has not established that this was an act of discrimination. I accept the evidence of Wallace, Ellis and Pera that they did not make the alleged derogatory comment about immigrants.

- The complainant was constantly reprimanded and threatened by Wallace, Stewart and Ward if he was late but his partner Greg Schofield was not. He was asked by Ward and Wallace to remove his accreditations from the office wall because it embarrassed his partner.

[63] Wallace, Stewart and Ward all denied these criticisms and denied asking the complainant to remove his credentials. Although Schofield confirmed that he disliked the complainant and the evidence confirmed that Schofield's resentment and dislike were well known, this does not raise an inference that anyone asked the complainant to remove his credentials. The Commission and the complainant have failed to establish this discriminatory conduct on a balance of probabilities.

- In 1996 after the complainant was sent on a course to Ottawa in preference to his partner, his partner's wife allegedly called the complainant and complained that "you immigrants come here and take the jobs and everything from us."

[64] This allegation is dependent on the evidence of the complainant. Bampton did not hear the comment but merely repeated the complainant's interpretation of what was said and that does not satisfy me that the comment was made.

- The complainant's photograph hanging in the hallway was frequently turned upside down and on at least one occasion was superimposed with a picture of a goat.

[65] There was corroborating evidence the complainant's photo and other photos were sometimes turned upside down. Some witnesses perceived that this happened to the complainant's photo more than other employees. Only the complainant's photo was ever covered with a picture of an animal. The complainant reported the matter to Wisniowski who offered to do a fingerprint check on the picture. No prints could be found. I accept Wisniowski's evidence that the complainant did not report any further incidents of this kind. I find that this conduct, even when taken together with the unspecified derogatory

comments occurring at the time, did not rise to the level of poisoning the complainant's work environment.

- The complainant's partner was sent on more courses than the complainant.

[66] From 1994 to the end of 2002, both the complainant and his partner attended a variety of courses. Some were paid for by the TPS, some were partially reimbursed, and some were not paid for, but the employees were paid for their time. In total, the complainant attended 13 courses during this time and his partner attended 17 courses. In my view, this discrepancy is not sufficient to give rise to an inference that the complainant was denied opportunities to take courses because of his ethnic origin, place of origin or perceived creed. The Commission and the complainant have not established on a balance of probabilities that the complainant was denied access to courses or that his partner was given preferential treatment because of the complainant's ethnic origin, place of origin or perceived creed.

- The TPS suppressed letters of commendation about the complainant.

[67] The complainant introduced one document from a colleague urging his supervisor to forward a letter of commendation about the complainant to the complainant's Unit Commander. There was no evidence before me that the Unit commander forwarded a commendation to the complainant's Unit Commander and therefore no basis upon which I can conclude that Stewart deliberately suppressed or refused to acknowledge the complainant's work. The complainant's personnel file did contain several commendations from or signed off by his supervisors, including Ward and Wallace. In my view, the Commission and the complainant have not established on a balance of probabilities that the TPS failed to put the letters of commendation into his file as a form of discrimination.

[68] I am concerned with the passage of time before the complainant raised these matters. A delay of this magnitude (dating back to 1994 and first mentioned in late 2001) affected the respondents' ability to investigate in a timely way. It also affects my conclusion regarding the impact these events had on the complainant at the time. The complainant explained that in an effort to get along he accepted the comments. However, some of comments described by the complainant are so insulting and abusive that it is difficult to accept that the complainant chose to remain silent. In my view, it is more likely that the unspecified comments were not of such a level as to poison the complainant's work environment. I find that, following the telephone message of September 12, 2001, the complainant recalled some prior comments and magnified and recharacterized these comments in the manner described in his testimony.

Did the TPS undertake a responsible investigation into the allegations of historical discrimination when they were raised?

[69] Employers are under a duty to investigate allegations of discrimination in a responsible manner and a failure to do so can amount to a breach of the *Code*, regardless of whether the underlying allegations are ultimately proven. Imposing an obligation on an employer to conduct an investigation best fosters the principle that employers have an obligation to provide a work environment free of harassment and discrimination: *Nelson v. Lakehead University*, 2008 HRTO 41 (CanLII), 2008 HRTO 41 (CanLII).

[70] The complainant first raised allegations of historical discrimination in the aftermath of the investigation into the September 12, 2001 telephone message. On November 1, 2001, he met with the Human Rights Co-ordinator about the impact the message had on him. During the course of that conversation he mentioned that he had in the past been the subject of racial comment and jokes and derogatory comments about coming from Afghanistan. This gave context to his present perception that the telephone message was a continuation of that behaviour.

[71] Although the immediate focus of their interaction was the September 12, 2001 telephone message, Mushega testified that he considered that the historical allegations were serious enough to be investigated. It is surprising then that Mushega took no steps to do so. Mushega could offer no explanation why he did not take any steps to investigate at that time. He indicated that there must have been some mitigating factors to account for the lack of action, but due to the passage of time he could not remember what they were.

[72] While I recognize that over seven years have passed between the November 1, 2001 meeting and the hearing, the TPS was apprised in May 2002 of many of the current allegations and had a responsibility to retain any evidence in this matter. In my view, the unexplained failure of the Human Rights Co-ordinator to respond to the complainant's allegations on November 1, 2001 regarding historical allegations of discrimination in the FIS Unit against the complainant amounts to a breach of the *Code*.

[73] The complainant raised these matters a second time in March 2002, when he filed a formal complaint against John Wallace arising from a comment that Wallace allegedly made to the effect that one day he might return to the FIS Unit and make life miserable for the complainant. The complainant perceived this as a threat, in light of his ongoing concerns about the post 9/11 message and the prior discrimination he perceived from Wallace. A police conduct report was filed against Wallace on March 26, 2002.

[74] Detective Sergeant Randy Hatherly was appointed to investigate the alleged threatening comment. During the initial interview, the complainant mentioned previous incidents of discrimination by Wallace.

[75] After consultation with the Human Rights Co-ordinator, Hatherly explored whether the parties would be interested in resolving the complaint in an informal manner, through mediation, but the complainant was inconsistent in expressing how he wanted the matter dealt with. At one point he indicated that he just wanted reassurance that the comment was not made as a threat and he wanted such conduct to stop. At another time he indicated that he wanted written documentation. Hatherly initially tried to mediate the dispute by asking Wallace to apologize for any misunderstanding but the complainant was not prepared to accept less than a written admission. Accordingly, the matter proceeded to formal investigation.

[76] On April 22, 2002, Hatherly and Mushega met with the complainant to take a taped statement from him regarding the historical allegations of discrimination. From that meeting Hatherly identified specific allegations of alleged discriminatory conduct by Wallace and also by Brian Ward. Hatherly then initiated a formal police conduct report against Ward on April 25, 2002. I will come back to the allegations against Ward later.

[77] The complainant alleged that Wallace had previously threatened to use his supervisory powers to suspend the complainant without pay, mimicked his accent, asked him to take down his credentials, stated that "immigrants want to be higher than everyone else" and referred to him as "goat" or "camel." He also complained that his picture had been turned upside down and management failed to do anything to stop it, that he was not given recognition for his work, and that he was criticized unfairly for coming in late while his partner was not.

[78] Hatherly began an investigation into the above allegations. With respect to the March 2002 threat, Hatherly obtained statements from the three persons who were present in the office when the comment was made: Greg Schofield, Wallace and Peter Mieszkalski. Hatherly concluded that a comment was made about Wallace coming back to FIS although the exact wording of the comment was unclear. Wallace, Schofield and Mieszkalski all provided statements to the effect that the comment, however phrased, had been said in a non-threatening, joking manner. Accordingly, Hatherly concluded that the alleged threat was not made out. In my view, this was a reasonable conclusion.

[79] Wallace denied the complainant's allegations of discriminatory comments. Hatherly interviewed three witnesses. Wisniowski confirmed that he had on one occasion three years previous attempted to take finger prints of the complainant's photograph which had a picture of an animal attached, but was unsuccessful. Storbach gave a statement that the complainant's and other persons'

photographs had been found turned upside down about three years previously but that the Unit supervisors had issued some directions about that and the incidents ceased. Ken Cenzura, the Unit Commander from 1999 to 2001 provided a statement that the complainant had never brought any of the allegations to his attention.

[80] The complainant refused to provide the names of witnesses at that time although he indicated that he could produce some if the matter went to a hearing.

[81] In November 2002, Hatherly submitted his report on the complaint against Wallace. He advised that the allegations could not be substantiated. Unit Commander Stewart accepted the report and advised Wallace and the complainant in December 2002 that there was insufficient evidence to support the allegations against Wallace.

[82] I find that Stewart's decision not to pursue the complaint further was reasonable in the circumstances. Without any corroborating evidence, the TPS would likely not have been successful in issuing any discipline against Wallace. The applicant's failure to identify any witnesses hampered the investigation.

[83] With respect to the Ward complaint, Hatherly testified that he took no action because the complainant asked him not to. The complainant denies ever asking Hatherly not to investigate the allegations against Ward. I do not need to resolve this disputed point in light of my findings below.

[84] In April 2002, the complainant brought his allegations of historical discrimination to the TPA and also advised them that he was in the process of filing a human rights complaint. The TPA conveyed its intention to the TPS to file a grievance with respect to the alleged discrimination, but proposed that if the Commission took jurisdiction the grievance should be deferred. The TPS agreed to hold the grievance in abeyance pending the Commission investigation process. I conclude that the decision by TPS to accede to the TPA request to put the grievance in abeyance was reasonable in the circumstances. The Tribunal's own jurisprudence confirms that parallel proceedings in arbitration and human rights systems ought to be avoided

[85] On May 27, 2002, the complainant filed the human rights complaint which gives rise to the present proceedings. In the complaint he alleged that co-workers directed racist jokes and comments at him, he was threatened with being fired or transferred or suspended, he was introduced as the "Afghani," his photo was turned upside down, he was accused of whining if he complained, he was not told of commendations given by other units, he was reprimanded if absent or late, his accent was mimicked, and he was asked to remove his credentials. He named Stewart and Ward as personal respondents, alleging that

when he advised them of these incidents, they condoned them. The complaint also alleged that the TPS failed to respond adequately to Bradshaw's telephone message and when advised that co-workers were constantly making comments associating him with 9/11.

[86] Although some of these matters (photo being turned upside down, reprimanded if late or absent, request to remove to credentials) were being investigated by Wallace, the complaint contained a more comprehensive series of allegations. Ward and Stewart were alleged to have both participated in and condoned the treatment. Another aspect of discrimination raised by the complaint was the TPS response to the telephone message and the ongoing office speculation about the complaint.

[87] The TPS did not take any steps to investigate these allegations of discrimination. They did not interview the complainant, Stewart, Ward or any member of the Unit. While I accept that the TPS response to the telephone message did not require further investigation, the alleged harassment of the complainant as a result of the message did.

[88] The TPS asserted that it was unnecessary to begin a second investigation, since Hatherly was already investigating the same allegations. However, Hatherly's investigation was narrowly focused on Wallace's conduct and did not encompass the additional matters identified above.

[89] The fact that the Human Rights Commission was also investigating did not relieve the TPS of its obligation to investigate the allegations of discrimination as well as the post 9/11 effect on the complainant. This amounts to a breach of the *Code*.

Conclusions

[90] I find that the Keith Bradshaw infringed the complainant's rights under the *Code* in leaving the telephone message on September 12, 2001.

[91] I find that the TPS breached the complainant's right to be free from a poisoned work environment after September 12, 2001 by failing to take adequate steps to quell the speculation arising from Keith Bradshaw's telephone message.

[92] I find that the TPS breached the complainant's right to be free from a poisoned work environment by failing to undertake an investigation into the allegations of discrimination first raised by the complainant on November 1, 2001.

[93] I find that the TPS breached the complainant's right to be free from a poisoned work environment by failing to undertake an investigation into the allegations of discrimination raised by the complainant in his human rights complaint filed May 2002

[94] I find that Brian Ward and Ed Stewart did not infringe the complainant's rights under the *Code* although their actions and inactions bind the TPS.

[95] The proceedings into the reprisal allegations will continue, as scheduled.

Dated at Toronto, this 27th day of March, 2009.

"Signed by"

Kaye Joachim
Alternate Chair

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