

The Prince Edward Island Human Rights Panel

BETWEEN:

NOEL AYANGMA

COMPLAINANT

AND:

EASTERN SCHOOL BOARD

RESPONDENT

DECISION

Hearing Dates: March 14, May 10, 11, & 12,
June 15, & 16, July 5, 6, & 8, 2005

**Panel Member
Commissioner Richard W. Montigny
Prince Edward Island Human Rights Commission
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CASES CITED

- * *Espinoza v. Coldmatic Refrigeration of Canada Inc.* (1995), 29 C.H.R.R. D/35 (Ontario Board of Inquiry)
- * *Ayangma v. French School Board* [2002] PESCAD 5
- * *O'Malley v. Simpson Sears*, [1986] 2 S.C.R. 536
- * *Shakes v. Rex Pak Ltd.* (1981), 3 CHRR D/1001 (Ont. Bd. Inq.)
- * *MacAvinn v. Strait Crossing Bridge Ltd.* (No. 4) (2001), 41 C.H.R.R. D/388 (Canadian Human Rights Tribunal)
- * *Basi v. Canadian National Railway* [1988] C.H.R.D. No. 2 T.D. 2/88
- * *Canada (Attorney General) v. Morgan* [1992] 2 F.C. 401 (F.C.A.), I

LEGISLATION CITED

Prince Edward Island *Human Rights Act*, R.S.P.E.I. 1988, Cap. H-12

THE COMPLAINT

1. On August 17, 1998, Noel Ayangma filed a complaint against the Eastern School District and/or Regional Administrative School Board, Unit III. In his complaint, he alleges that he had been repeatedly refused employment by the School District over a ten-year period. Mr. Ayangma alleges that he was refused employment because of his race, colour, ethnic or national origin, and age. He further alleges that less qualified and less experienced French teachers had been interviewed and offered positions which he was not given an opportunity to interview for.
2. Alternatively, Mr. Ayangma alleges systemic discrimination in violation of section 6 of the Prince Edward Island *Human Rights Act* R.S.P.E.I. 1988, Cap. H-12 and section 15 of the *Canadian Charter of Rights and Freedoms*.

THE RESPONSE

3. On September 15, 1998, a Response was filed on behalf of the Eastern School District. The response denied the allegations of discrimination, stating that Mr. Ayangma reactivated his application annually but did not provide a current resume. He had not worked for the Respondent since 1988 and had not placed his name on the list of substitute teachers.

INVESTIGATION BY CARL WHITE

4. The investigation and settlement of the complaint was delegated to Carl White of the New Brunswick Human Rights Commission. This was done because the PEI

Commission was concerned over apprehension of bias. When the investigation was completed, the Executive Director of the PEI Human Rights Commission delegated carriage of the complaint to Janet Christian-Campbell, a Compliance Officer with the PEI Commission.

EXECUTIVE DIRECTOR DELEGATE DECISION - Janet Christian Campbell

5. On July 13, 2000, Janet Christian-Campbell, Executive Director Delegate, dismissed Mr. Ayangma's complaint pursuant to section 22(4) of the *Human Rights Act* on the basis that it was without merit.

CHAIRPERSON'S REVIEW - Christian Campbell Decision

6. Mr. Ayangma made a request for a review of this decision to the Chairperson of the Prince Edward Island Human Rights Commission on July 14, 2000.
7. On December 19, 2000, the Chairperson concurred with the decision of the Executive Director Delegate to dismiss the complaint.

JUDICIAL REVIEW OF CHAIRPERSON'S DECISION

8. Mr. Ayangma sought judicial review of the decision of the Chairperson of the Prince Edward Island Human Rights Commission. In a decision, dated July 30, 2001, Justice Jenkins of the PEI Supreme Court, Trial Division, granted the application for judicial review and ordered the matter back to Carl White of the New Brunswick Human

Rights Commission. Mr. White was ordered to confirm that he had completed his work without reaching a settlement, or to make a decision and report to the parties.

EXECUTIVE DIRECTOR DELEGATE DECISION - Carl White

9. On November 18, 2002, the Executive Director Delegate, Carl White, dismissed the complaint, concluding that there was no evidence to justify the appointment of a Board of Inquiry in this matter.

CHAIRPERSON'S REVIEW - White Decision

10. On November 29, 2002, Mr. Ayangma requested a review of the decision of Carl White. The Chairperson concurred with the decision of the Executive Director Delegate.

JUDICIAL REVIEW OF CHAIRPERSON'S DECISION

11. Mr. Ayangma sought judicial review of the Chairperson's decision. On January 29, 2003, the Supreme Court, Trial Division, dismissed Mr. Ayangma's application for judicial review.

APPEAL OF JUDICIAL REVIEW DECISION

12. Mr. Ayangma appealed the dismissal of his judicial review application. In a decision dated November 12, 2004, the Appeal Division allowed the appeal and ordered that a Human Rights Panel be appointed. The decision of the Appeal Division directed

the appointed Panel to consider only those hirings that occurred between August 17, 1997 and August 17, 1998, because the positions at issue must be limited to the one year prior to the filing of Mr. Ayangma's complaint.

ISSUE

13. Did the Respondent discriminate against Noel Ayangma in employment on the basis of race, colour, age, or national or ethnic origin by denying him the opportunity to interview for French language teaching positions which were filled between August 17, 1997 and August 17, 1998?

THE PEI HUMAN RIGHTS ACT

14. The Panel must consider two sections of the Prince Edward Island *Human Rights Act* R.S.P.E.I. 1988, Cap. H-12, as amended:

DISCRIMINATION IN EMPLOYMENT

6(1) No person shall refuse to employ or continue to employ any individual on a discriminatory basis or discriminate in any term or condition of employment.

15. Section 1(1) (d) of the PEI *Human Rights Act* describes discrimination as:

“discrimination in relation to age, colour, creed, ethnic or national origin, family status, marital status, physical or mental handicap, political belief, race, religion, sex, sexual orientation, or source of income of any individual or class of individuals”,

16. In the *Act*, the term “age” is not limited, as it is in other jurisdictions, to apply to those between the ages of 18 and 65.

17. The terms race, colour, ethnic and national origin are not defined in the *Human Rights Act*. However, each term has a particular meaning:

In addition to the specific findings of fact made in the course of reviewing the testimony, I make the following findings.

[210] *The complaint alleges discrimination on a number of grounds which are often combined as a kind of wide net to get at certain complex discriminatory conduct: race, colour, ancestry, ethnic origin and place of origin.*

[211] *Race was defined by Dr. Henry as "a biological concept which refers to the inherited physical and physiological characteristics of a group of people", the most common of which are skin colour and hair texture. Colour is therefore a characteristic within a race. Ancestry was defined in Cousens v. Canadian Nurses' Association (1981), 2 C.H.R.R. D/365 (Ont. Bd.Inq.) to mean "family descent ... determined through the lineage of one's parents through their parents". These grounds were not actively pursued in either evidence or submissions.*

...

[213] *Ethnic origin and place of origin are not defined in the Code and have not been discussed at length in the case law. In the Concise Oxford Dictionary, "ethnic" is defined as "pertaining to race, ethnological" and "ethnology", as the "science of races and their relations to one another and characteristics".*

Espinoza v. Coldmatic Refrigeration of Canada Inc. (1995), 29 C.H.R.R. at p. D/35 (Ontario Board of Inquiry)

18. The Panel accepts, pursuant to *Espinoza v. Coldmatic Refrigeration of Canada Inc.* (1995), [supra], that discrimination on the basis of race may take the form of a difference of treatment on the basis of language, religion, national, cultural or physical characteristics.

BURDEN OF PROOF

19. The Supreme Court of PEI (Appeal Division) identifies the relevant legal principles as follows:

Only rarely is there concrete evidence of discrimination even when the allegation is of direct discrimination as opposed to adverse effect discrimination. As well, the proof of an intent to discriminate is not required because even where an individual has the best of intentions he or she may still be found to have contravened provincial human rights legislation. If the distinction is the proximate cause of the complainant not receiving the same treatment as those who do not share his personal characteristics, a case for discrimination will be made out. Proof is frequently found in circumstantial evidence and the reasonable inferences to be extracted from this evidence.

Ayangma v. French School Board, [2002] PESCAD 5 (para. 36)

20. The tribunal must assign the initial burden of proof to the complainant according to principles set down by the Supreme Court of Canada:

To begin with, experience has shown that in the resolution of disputes by the employment of the judicial process, the assignment of a burden of proof to one party or the other is an essential element. The burden need not in all cases be heavy – it will vary with particular cases – and it may not apply to one party on all the issues in the case; it may shift from one to the other. But as a practical expedient it has been found necessary, in order to ensure a clear result in any judicial proceeding, to have available as a tie-breaker the concept of the onus of proof.

O'Malley v. Simpson Sears, [1986] 2 S.C.R. 536 (at para. 28)

INFERENCE OF DISCRIMINATION

21. The Panel may rely on circumstantial evidence to infer discrimination.

There is, indeed, virtual unanimity that the usual standard of proof in discrimination cases is the civil standard of preponderance. The appropriate test in matters involving circumstantial evidence, which should be consistent with this standard, may therefore be formulated in this matter: an inference of discrimination may be drawn where the evidence offered in support of it renders such an inference more probable than other possible inferences or hypotheses.

“Proving Discrimination in Canada” (Vancouver: Carswell, 1987), Beatrice Vizkelety

22. The Complainant must prove that the facts make it more probable than not that his age, colour, race, or national or ethnic origin were factors in the Respondent’s failure to interview him between August 17, 1997 and August 17, 1998.

COMPLAINANT’S EVIDENCE

Witness: Jacob Mal

23. The first witness for the Complainant was Jacob Mal, a retired vice-principal and principal with the Eastern School Board, who is of East Indian descent. Mr. Mal testified that he met the Complainant as a substitute teacher in his school and later, knew him from the PEI Multicultural Association. Mr. Mal’s evidence was consistent with the information he had provided during the investigation. Mr. Mal felt Mr. Ayangma was very qualified for any of the positions the School Board had open.

24. Mr. Mal stated that definite documentation was necessary to deny tenure to a teacher after two years of teaching. He felt that race was a factor in Mr. Ayangma not receiving tenure and, ultimately, a permanent position.
25. Mr. Mal had been involved in hiring processes during his career but had not interviewed Mr. Ayangma for a teaching position. When conducting an interview, he stated that he looked at qualifications and references but placed priority on experience. Mr. Mal indicated that he felt that persons presenting themselves for teaching positions must be “diverse” and be able to teach almost any subject. Mr. Mal stated on cross examination that he felt an incomplete application or an application not tailored to a particular position can work to the detriment of an applicant.

Witness: Noel Ayangma

26. Mr. Ayangma testified on his own behalf. He stated that it was his position that experience was an important part of the selection process. In reviewing his resume for the Panel, he indicated he had taught subjects other than French Immersion and Core French. He stated that his application was originally filed with the School Board in 1983 and that in subsequent years, he requested that it be reactivated. Mr. Ayangma made the Panel aware that 83 positions were filled in a ten year span from 1989 to 1999. There were 43 positions filled for French Core/French Immersion, with three having an English component.
27. The Complainant provided the following evidence to support his allegations of

discrimination:

- a) His resume demonstrates that he has experience teaching at the secondary school level;
- b) A letter from C. Donald King, Superintendent of Education for Unit 1, dated May 13, 1988, indicated that Mr. King was 'very impressed' with Mr. Ayangma's qualifications;
- c) A recommendation from Jim MacNeil, Assistant Superintendent, Unit IV dated September 14, 1995, recommended that Mr. Ayangma's teaching license go from interim to permanent certification;
- d) A letter dated April 2, 1991 from the Eastern School Board to Mr. Ayangma, contains no indication that Mr. Ayangma's application was deficient of information;
- e) Letters dated May 27, 1994, and June 8, 1995, from the Eastern School Board to Mr. Ayangma do not indicate that there were deficiencies in his application;
- f) He was interviewed by School Units 1, 2, 4 and 5 and was successful in obtaining a position in Units 2 and 5. He was not invited to interview for any positions with Unit 3 (now part of what is known as the Eastern School Board).
- g) He provided applications of individuals hired by the Eastern School Board, who lacked experience or who had less experience than he had at the time they were hired for positions that Mr. Ayangma was not invited to interview for.

28. Mr. Ayangma submitted that he was qualified for any of the positions offered by the School Board. He stated that he is black and, therefore, a visible minority and that he has suffered financially, emotionally, and physically as a result of the School Board's discriminatory actions.

29. Mr. Ayangma provided evidence to support the fact that not one of the teachers hired

by the School Board was a visible minority. In addition, he stated that none of the successful applicants were “as old” or “older” than he was. Mr. Ayangma submitted that factors such as his African ethnicity, his place of birth (Cameroon, Africa), and his surname not being familiar were a cause of him not being hired by the School Board.

30. Mr. Ayangma says he did everything he could do to be considered for a position by the Eastern School Board. He testified that he called the Board office each year to have his application reactivated. In 1998, he stated that he spoke with Mr. Hood, Director of Human Resources and Administration, concerning the treatment he was receiving. Mr. Ayangma testified that he was concerned that many of the applicants, who were considered for employment by the Board, had been on its list for less than one year and that no one had an application on file as long as he had.
31. On cross-examination, Mr. Ayangma acknowledged that his address had changed three times between 1987 and 1991. Mr. Ayangma further acknowledged that he had resigned from Unit IV and was not interested in tenure at that time. When asked about Unit IV having to bring in an outside evaluator because of problems with his teaching style, Mr. Ayangma stated that he felt he had no reason to cooperate with the examiner because she was not qualified to adjudicate his work.
32. During cross examination, Mr. Ayangma indicated that the handwriting on his

application form in the Eastern School Board files was not his own. He asserted that the last two pages of the application were missing. Mr. Ayangma stated that he was not sure if he had submitted letters of reference and transcripts of marks as requested by the Board office. However, he stated that the application provided as evidence by the Eastern School Board was not the application he submitted in 1983.

33. Considerable time was spent reviewing Mr. Ayangma's academic qualifications. He has a Grade 13 and an undergraduate teaching degree from Africa. He has a Masters Degree in Business Administration from the University of Moncton, and a PhD in Business Administration from California Coast University.
34. Mr. Ayangma stated on cross examination that he had not supplied his substitute teaching experience as he felt it was not relevant. However, it was introduced in evidence as being 37 days in the 1987-1988 school year. There is no dispute about his Level VI teaching certificate, which is the highest level of certification.
35. Mr. Ayangma indicated that he was employed during the 1995 - 1996 and 1996-1997 school years on a part-time basis at Ecole Francois Buote. He testified that he had taught entrepreneurship, social studies, math and computer science. He stated that he was recommended for a permanent position by school principal Zain Esseghaier, however, there was no position available in the 1997-1998 school year. Mr. Ayangma believes the School Board hired a full time music teacher for this school so as to deny

him a position. It is his belief that the French School Board transferred the money to fund his teaching position into funding for a full-time music teacher. He stated that he did not follow up his concern with the PEI Teacher's Federation.

36. Mr. Ayangma indicated on cross examination that he was never interviewed for a teaching position by Mr. Ray MacCormack, who was the former vice-principal at East Wiltshire School, where the Complainant had substituted. However, this evidence was contradicted by a letter provided by the Board to the Panel from Mr. MacCormack dated March 20, 2000.
37. On cross examination, Mr. Ayangma testified as to a number of lists he had prepared, which contained information relating to individuals who had been hired during the relevant time period. These lists compared age, teaching experience, and ethnic or national origin. Mr. Ayangma acknowledged on cross examination that he did not know all the persons listed personally.

RESPONDENT'S EVIDENCE

Witness: Ricky Hood

38. The Respondent's first witness was Ricky Hood, who has been the Director of Human Resources and Administration for the Eastern School Board since July of 1992.
39. During his testimony, Mr. Hood reviewed the Board's "Search Selection Committee Policy", which has been in place since 1992. Mr. Hood stated that there is also an internal Review Policy to deal with any problems arising with the selection procedure.
40. Mr. Hood reviewed the Board's "Employment Practices Policy", which includes an

Equal Employment Policy. However, on cross examination. Mr. Hood acknowledged that the Board has never advertised to recruit visible minority groups for any positions.

41. Mr. Hood testified about the process the Board follows when an application or resume is received. All applicants are placed in a database according to their major course of study and preferred grade level. When a teaching position becomes available, applications are “pulled” or brought forward for review by the principals according to the applicants’ area of study and grade preference. Mr. Hood stated that an applicant’s file is available to the individual for the purpose of updating.
42. Mr Hood acknowledged that the Board does not know where the Complainant’s original application is. The ‘shell’ application provided by the Respondent was acknowledged by Mr. Hood as having been prepared by a staff member, not the Complainant. It does not contain any documents dated prior to 1991. Mr. Hood’s evidence indicated that this was the application which was used to screen out Mr. Ayangma when applications were being reviewed for interviews for teaching positions.
43. Teaching positions can be filled either internally or externally by the Board. For internal positions, the principal of the school with the vacancy sets the criteria for the position.
44. Mr. Hood testified that Mr. Ayangma indicated on his application that he was only

interested in French Immersion/Core French positions. This, Mr. Hood stated, would eliminate him from consideration for positions with subjects other than French.

45. A number of applications, resumes and contracts for candidates were provided by the School Board, for the time period in question. Many of the candidates had 'shell' applications and a number had limited or no previous teaching experience with the Board. Mr. Hood reviewed these shells and stated that these individuals were hired for teaching positions.
46. Mr. Hood testified that there were two candidates hired in the 1997-1998 school year; Renee Bellavance Stewart and Pamela MacMillan were hired for French Immersion/Core French positions by the Board. He acknowledged that neither of these candidates had previous experience with the Board. Mr. Hood stated that another candidate, Nelson Valois, who had been originally hired for French Immersion/Core French, but had an English component added, had no previous teaching experience with the Board. Mr. Hood confirmed that Mr. Valois's application was received on May 27, 1998, and that he was interviewed and offered a position on May 28, 1998. Mr. Hood acknowledged that Mr. Valois's application was not officially received by the Board office until June 3, 1998.
47. For the 1998-1999 school year, there were four positions filled by the Board for Core French and French Immersion with no English teaching component, two of which were full-time. In addition, there were six new positions for Core French/ French Immersion with an English teaching component. Mr. Hood indicated that there were

74 applicants for these positions and six candidates were interviewed. Further, Mr. Hood indicated that none of the four people hired, Carolyn Godfrey, Michelle Arsenault, Dawn Bonin and Jocelyn Boisclair, had previous teaching experience with the Board.

48. Mr. Hood testified regarding the importance of an applicant's experience. He stated that the relevance of the teaching experience, volunteer experience, grade level experience, and suitability of experience to positions were factors explored during the hiring process.
49. Contrary to testimony from Jacob Mal, Mr. Hood felt there were only three elements to consider when reviewing an application: (a) qualifications; (b) certification of license; and c) suitability of candidate to curriculum. Mr. Hood testified that he did not feel that any person with a teaching license could necessarily teach any subject.
50. Mr. Hood indicated that the *School Act* sets out a two-year probationary period for new teachers. He stated that this allows the Board to judge performance, suitability, ability to teach the subject(s), and the teaching environment created by the teacher. The probationary period is a requirement for permanent certification for license but not for a permanent contract. It normally does not transfer from one position to another.

Witness: Ray MacCormack

51. The Respondent's second witness was Ray MacCormack, a teacher for twenty-eight years, and a Vice Principal for twenty-two years. He testified that he had assisted in the hiring of teachers.
52. He referred to his letter dated March 20, 2000, to Ricky Hood, in which he related

problems he encountered with Mr. Ayangma, when he substituted at East Wiltshire school. Mr. MacCormack also spoke about an interview in 1990 for a position at East Wiltshire School that he participated in. Mr. MacCormack stated that Mr. Ayangma was one of the candidates and that he felt that the Complainant was not prepared for the interview. He testified that the Complainant was nervous and scored low. Mr. MacCormack further testified that he remembered that Mr. Ayangma wore a dirty white shirt but was unsure of other details of the interview, such as who else was on the interview panel, the date of the interview, and what type of position was being interviewed for.

Witness: Zain Esseghaier

53. Zain Esseghaier testified at the request of the Panel. He was principal of Ecole Francois Buote when the Complainant was a teacher at that school. Mr. Esseghaier identified himself as a visible minority and stated that he had met Mr. Ayangma socially prior to working with him.
54. Mr. Esseghaier testified that Mr. Ayangma taught for two years at Ecole Francois Buote, and he confirmed that he had prepared an evaluation at the end of this period recommending Mr. Ayangma for tenure. Mr. Esseghaier advised that there was no position available for Mr. Ayangma and as a result, he left the school. Mr. Esseghaier indicated that his favourable recommendations of Mr. Ayangma in a letter dated June 25, 1997, remain the same today.

Witness: Ian Scott

55. Ian Scott, the former Registrar of the PEI Department of Education testified that a teacher must possess or be qualified to apply for a teaching license from the Department in order to teach in this province. Mr. Scott reviewed the policies which guide the Registrar in granting a teaching certificate level. He stressed, however, that holding a teaching certificate is not an endorsement for teaching. He testified that the School Boards are free to choose the most suitable candidate with the most appropriate background.

Witness: Debbie Pineau

56. Debbie Pineau, the current Registrar with the Department of Education, reviewed Mr. Ayangma's application for a teaching certificate.

Witness: Michael Murphy

57. Michael Murphy, a retired principal, reviewed the selection process he followed in hiring teachers. He testified that he always involved other teachers and that he, as the principal, checked references. Mr. Murphy admitted that he knew some candidates prior to hiring them through family connections, practice teaching or referrals by other principals.

58. He testified that he had never reviewed Mr. Ayangma's application, as he usually passed by 'shell' applications when he selected candidates for interviews. He stated that he felt it was very important to consider experience in a particular subject area and general teaching experience. During his testimony, Mr. Murphy reviewed the Complainant's application, resume, and letters of recommendation. He expressed

support for the contents, indicating his approval of the Complainants education, experience, and recommendations.

59. When Mr. Murphy testified about his experience with foreign teachers, he stated that they tended to experience problems relating to communication with students and parents.

Witness: Linda Lowther

60. Ms. Lowther worked with the Unit III School Board prior to 1990 as a French Coordinator. She was a member of an interview panel in 1987 which Mr. Ayangma participated in. She testified that during the interview, she remembered the Complainant stating that he wasn't adverse to using force in a classroom for discipline purposes. No written record was made of this and the interview was carried out in French. Ms. Lowther testified that while she was a French Coordinator, she recruited French Immersion/Core French teachers from Quebec.

POSITIONS TO BE CONSIDERED

61. The experience and hiring circumstances for the following individuals who were interviewed between August 17, 1997, and August 12, 1998, are relevant to this inquiry.

Renée Bellavance Stewart

62. This candidate first applied to the Eastern School Board on April 22, 1997, and her application was acknowledged on that date. Although the interviews were held on August 1, 1997, Ms. Bellavance Stewart did not sign a teaching contract until August

20, 1997.

63. Mr. Ayangma's application was reactivated for the 1997 - 1998 school year on June 20, 1997. Therefore, his application was current during this hiring process.
64. Ms. Bellavance Stewart had previous teaching experience, as did the Complainant, but had no experience with the Eastern School Board. The Complainant's application had been on file with the Board for many years, while this was the first year Ms. Bellavance Stewart had applied for a position with the Board.
65. Ms. Bellavance Stewart had a Certificate V in Special Education and Counselling but lacked any education beyond a bachelor's degree. The Complainant held a Bachelor of Education in Linguistics and a Masters in Business Administration.

Jocelyne Boisclair

66. This applicant was interviewed for a position by the Eastern School Board on August 1, 1998. This was within the time frame as outlined by the Court of Appeal.
67. It was the Respondent's claim that this position should not be considered because it was for a part time position. Mr. Ayangma's application is silent regarding his willingness to work part time. However, the Panel was presented with evidence that the Complainant had accepted part time work with both the Unit IV School Board and the French School Board in the past. Further, the evidence provided to the Panel indicated that the School Board's process, including the requirement of a completed application form, was not consistently followed. Therefore, the Panel considered this position in its decision.
68. Ms. Boisclair has a bachelor level degree and no previous teaching experience with

the Eastern School Board. The Panel noted that Ms. Boisclair originally activated her application with the Board on May 16, 1996, however, it was not reactivated until June 25, 1998. Ms. Boisclair was interviewed on August 1, 1998, for the position she received. A witness for the Respondent, former principal Michael Murphy, stated in his testimony that candidates have received interviews based on the principal being familiar with the candidate or his or her family.

69. As with the Bellavance Stewart position, the Panel was not presented with any evidence to suggest the Respondent's hiring procedure was followed.

Michelle Arsenault and Carolyn Godfrey

70. These candidates were hired for teaching positions within the one-year time period that this Panel was directed to examine. However, Mr. Ayangma's application indicated that it was not reactivated in time for these interviews as it was not reactivated until June 3, 1998. As noted above, evidence showed that applicants were instructed to reactivate in March of each year. The Respondent submitted that Mr. Ayangma's delay in reactivating his application, not discrimination, was the reason he was not screened in. However, another successful candidate, Nelson Valois, who interviewed with the same group as Ms. Arsenault and Ms. Godfrey, activated his application a day prior to the interviews.

71. Ms. Godfrey only had substitute teaching experience with the Eastern School Board. Her education was at the bachelor level, she was younger than Mr. Ayangma, and she was not a person of colour. Her application was on file for just one year with the Eastern School Board prior to her interview and offer of a teaching position.

72. Michelle Arsenault was interviewed on May 28, 1998, for a French Immersion/Core

French position. The Panel notes that her application was reactivated on May 21, 1998, just seven days prior to the interviews. This again raises the question of proper procedure being followed. The Panel is entitled and able to infer that Ms. Arsenault received encouragement to activate her application, whereas Mr. Ayangma did not.

73. Ms. Arsenault had some substitute experience with the Eastern Board, however, she was younger, Caucasian, and had fewer academic qualifications than Mr. Ayangma.

Nelson Valois

74. The evidence put forward at the hearing indicated that Mr. Valois was advised to put his application forward for consideration. His application was marked as received on May 27, 1998, just one day prior to interviews for a French Immersion/Core French position with the Board.

75. Mr. Valois had no previous teaching experience with the Board and evidence was inconclusive as to where he did his practice teaching. This candidate had an incomplete 'shell' application, just as Mr. Ayangma did, yet was granted an interview and was offered a position at the Junior High level.

ANALYSIS

76. The School Board has a hiring procedure in place, outlined in Mr. Hood's testimony. However, no evidence was presented by the Respondent that the same procedure is followed in each case. Mr. Hood, on behalf of the Respondent, advised the Panel that principals were responsible for hiring teachers within their school. As Director of

Human Resources, he indicated that he plays no part in the hiring, except if a concern is lodged after the selection is made. The role of the Board is to act as a repository for applications and to create “short lists” of potential applicants that are then reviewed by principals.

77. Former principals Jacob Mal and Michael Murphy described different approaches regarding the selection of candidates for interviews. Mr. Mal testified that he put a great deal of emphasis on experience, while Mr. Murphy stated that he rejected all applicants, regardless of experience, if the application materials were deficient in some way.
78. Mr. Ayangma’s application was on file with the Board for ten years, yet two candidates were interviewed and hired within weeks of activating their application. Both candidates were younger, both were of Caucasian not African heritage, and both had little or no experience.
79. The Respondent acknowledged, through testimony of its own witnesses, that it did not always follow its own procedure in hiring teachers. A procedure that is not consistently followed or applied equally to all applicants cannot be used as a reasonable explanation for the selection of one candidate over another.
80. This acknowledgement can only leave the process open to the perception of discrimination because qualified candidates can be screened out for reasons unrelated to the hiring process.
81. The Panel determined from evidence that applications were to be reactivated each

year at the beginning of March.

82. The hiring process involving Mr. Valois demonstrated a lack of adhering to procedure on the part of the Respondent, which disentitles it to rely upon the strict rules of its procedure as a defence. It is apparent that this one candidate, who was a new graduate and first time applicant, was alerted to apply. Testimony from Michael Murphy confirmed that Mr. Valois was advised to apply. The question this raises is why the same consideration was not afforded to Mr. Ayangma, who was known to the Board and who had teaching experience.
83. Mr. Ayangma's application was on file for ten years. He had substituted for the Board and had held teaching positions with other Boards in the Province, yet he was not able to get 'in the door' for an interview. As indicated earlier in this decision, the fact that Mr. Valois, a young white applicant, was alerted to apply indicated that the Respondent's hiring procedure is not applied equally or consistently. This leads to a selection process which may result in discrimination. The principals carry out the hiring functions of the employer. One principal indicated that visible minorities had difficulty communicating with parents and students. Another, who had hired the Complainant as a substitute teacher, indicated that he may not have been hired for the relevant positions due to racism.
84. It was the Respondent's evidence that the Complainant's 'incomplete' shell application was a factor in him being eliminated from consideration for positions. However, evidence provided by the Respondent showed that many candidates who

were considered for interviews had incomplete 'shell' applications. One candidate, Zain Esseghaier, provided only his resume and did not submit a 'shell' application to the Board. Others provided resumes and "shells" upon being advised to do so immediately prior to their interviews.

85. Mr. Ayangma provided his resume to the Board in 1983 to be considered for teaching positions. Mr. Hood testified that in cases where only a resume is supplied, Board staff would fill in minimal information on a 'shell' application for that candidate.
86. The application of Mr. Ayangma, as supplied by the Respondent, was prepared by staff and did not contain any materials dated prior to 1991. The Complainant testified that he prepared one initially, however, the Respondent acknowledged it did not know where the original application of the Complainant is. A letter of April 1991, requested letters of reference which, if supplied, were not in the file. Acknowledgement letters of 1993, 1994, and 1995, while being form letters, also request this updated information be supplied to the Board.
87. The Complainant was unsure if he had supplied letters of reference or transcripts to the Respondent. The Respondent did not provide any evidence to refute or support the supplying of this information.
88. There was ample evidence to suggest that the Respondent's procedure in the selection of candidates for interviews was not followed consistently, and that had the effect of imposing disadvantages on the Complainant which weren't imposed on others. Interview boards requested resumes, looked favourably at applications of candidates familiar to them and chose younger candidates than the Complainant to interview.

Principals carried out the hiring functions, while the employer did not ensure fairness in access to hiring processes.

DECISION

89. In *Shakes v. Rex Pak Ltd.* (1981), 3 CHRR D/1001, the Ontario Board of Inquiry stated that three elements make out a *prima facie* case of discrimination in employment:

- a) The Complainant was qualified for the particular employment;
- b) The Complainant was not hired; and
- c) Someone no better qualified but lacking the distinguishing feature which is the gravamen of the human rights complaint subsequently obtained the position.

90. Having reviewed all of the evidence before me, I am able to conclude that the Complainant has established a *prima facie* case:

- a) He was qualified for the positions which were open as he held a level VI teaching certificate and has held similar positions with other school boards;
- b) He was not hired for any of the relevant positions with the Regional School Unit III or its successor, the Eastern School Board, nor was he interviewed;
- c) All candidates hired for the positions under consideration by the Panel were no better qualified than the Complainant and did not share his personal characteristics. None of the individuals who were hired had more experience than the Complainant and some successful candidates were completely lacking in experience.

91. All of the candidates hired during the time period in question were white and younger

than Mr. Ayangma.

92. After the Complainant has shown a *prima facie* case of discrimination, the burden shifts to the Respondent to show credible, non-discriminatory reasons for the failure to hire. Upon a review of the evidence presented at this hearing, the Panel is unable to conclude that the Respondent discharged this burden.
93. The Respondent acknowledged in testimony that it had a 'Hiring Policy' in place but also acknowledged it was not followed. It became apparent to the Panel, through the evidence provided, that the unknown application of selection criteria for interviews and positions suggests that discrimination may have occurred.
94. Principals testified that they interviewed candidates they knew, they advised persons to submit applications just prior to a screening process and failed to acknowledge experience as a qualifying factor. They interviewed and hired recent graduates with little or no experience.
95. I do not find persuasive the Respondent's suggestion that Mr. Ayangma was the author of his own misfortune. His application may not have been perfect, however, any deficiencies were not sufficient to deny Mr. Ayangma the opportunity to be interviewed. Such deficiencies did not deny others the chance to be interviewed.
96. The evidence is that Mr. Ayangma was qualified for the teaching positions filled between August 17, 1997 and August 17, 1998 and that he expressed an interest in these positions by reactivating his application. Further, the evidence demonstrated that other candidates, who were no better qualified but lacking the distinguishing

personal characteristics of Mr. Ayangma, were selected for interviews and hired for the teaching positions. I am entitled to infer that the Respondent's failure to offer Mr. Ayangma the opportunity to compete for teaching positions between August 17, 1997 and August 17, 1998 resulted in discrimination against him on the basis of race, colour, ethnic and national origin, and age.

97. The Complainant will have made his case if the evidence demonstrates that discrimination is one of the reasons he was not hired for the positions: *McAvinn v. Strait Crossing Bridge Ltd.* (No. 4) (2001), 41 CHRR D/38 (Canadian Human Rights Tribunal). While the Complainant may have done more, such as placing his name on the substitute teachers' list, he was subjected to a difference of treatment in the hiring procedure on the basis of his race, colour, ethnic and national origin, and age.
98. It is noted that the Charter issue raised by the Complainant was not dealt with. No evidence was presented at the hearing, nor were any arguments made by either party.

DAMAGES

Loss of Income

99. Section 28.4 of the PEI *Human Rights Act* outlines the powers of a panel:

28.4 (1) A Human Rights Panel

...

(b) subject to subsection (s), may, if it finds that a complaint has merit in whole or in part, order the person against whom the finding was made to do any or all of the following:

...

(iv) to compensate the complainant or other person dealt

with contrary to this Act for all or any part of wages or income lost or expenses incurred by reason of the contravention of this Act;

(v) *to take any other action the Panel considers proper to place the complainant or other person dealt with contrary to this Act in the position the person would have been in, but for the contravention.*

100. Mr. Ayangma was denied the opportunity to compete for the teaching positions which were filled by the Respondent between August 17, 1997 and August 17, 1998. Based on the analysis set out in *Basi v. Canadian National Railway* [1988] C.H.R.D. No. 2 T.D. 2/88, after finding that Mr. Ayangma has been discriminated against, the Panel must determine whether or not he had a reasonable possibility of obtaining the position. Having reviewed the evidence, the Panel concludes that there was nothing to suggest that the successful candidates were better qualified or better suited to the positions than Mr. Ayangma. As such, the Panel is making an order for lost wages from September 1997 to January 1999, when Mr. Ayangma obtained employment with Health Canada.

101. In calculating the appropriate amount of damages, the Panel finds that Mr. Ayangma had a duty to mitigate his damages during this time frame and that there was no evidence provided to indicate that he sought substitution, temporary work, or any other employment. The Panel accepts the evidence provided, which indicated that Mr. Ayangma had 37 substitution days in the 1987-1988 school year. Based on a 185-day school year, this would represent 20% of the year. Further, the Panel accepts the evidence provided as to the salary levels at which Mr. Ayangma would have been paid

had he was successful in obtaining a teaching position. As such, I calculate Mr. Ayangma’s lost wages as follows, based on one full year of lost wages plus another third of a year to the time when Mr. Ayangma began employment with Health Canada in January of 1999:

TIME PERIOD	LOST WAGES	20% REDUCTION (MITIGATION)	AWARD OF PANEL
Sept. 1997 to Aug. 1998	\$50, 948	\$10, 189.60	\$40, 758.40
Sept. 1998 to Jan. 1999	\$17, 322.33 (1/3 of \$51, 967)	\$3, 464.46	\$13, 857.87

The Panel orders lost wages rounded to the amount of \$55,000, plus interest at the Supreme Court of PEI rates.

102. I am unable to make an award for damages based on the possibility that Mr. Ayangma may have been promoted to a school principal position. After reviewing the evidence presented at the hearing and applying the “serious possibility test” articulated in *Canada (Attorney General) v. Morgan* [1992] 2 F.C. 401 (F.C.A.), I conclude that Mr. Ayangma becoming a principal was a “mere possibility”. I am unable to conclude that it was a “serious” possibility. A principalship is not a guaranteed opportunity for any teacher. I find that damages relating to loss of income based on a principalship are too speculative to award.

General Damages for Hurt and Humiliation

103. I award Mr. Ayangma \$6,000.00 for hurt and humiliation. He testified about his attempts to obtain employment with the Board and the hardship he and his family endured when he was denied the opportunity to compete for positions for which he was qualified.

Dated this 8th day of December 2005.

Signed Richard W. Montigny
Richard W. Montigny, Panel of Inquiry

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