**File #1058-99**

# Prince Edward Island Human Rights Panel

**BETWEEN:**

**STEPHEN DOWLING**

**COMPLAINANT**

**AND:**

**GOVERNMENT OF PRINCE EDWARD ISLAND**

**RESPONDENT**

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## DECISION

**Hearing Dates: August 21, November 24, 25, 26, December 17, 2003**

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**Panel**
**Angela Cormier - Commissioner**
**Prince Edward Island Human Rights Panel**
**PO Box 2000**
**Charlottetown PE C1A 7N8**
**(902) 368-4180**

## THE COMPLAINT

1. Stephen Dowling filed a human rights complaint on August 14, 1997. Mr. Dowling alleges that the Government of Prince Edward Island discriminated against him in employment on the basis of political belief by failing to renew his seasonal contract at the Links at Crowbush Cove (Crowbush) where he had been Golf Professional for the four previous seasons. He had been employed seasonally for 12 years at the Mill River course and four years at the Crowbush course.

2. On May 6, 1996, Mr. Dowling asked for and was granted a leave of absence without pay to offer as a candidate for the Liberal Party in the 1996 General Election in District #11, Sherwood/Parkdale. In the vote held on November 18, 1996, the Progressive Conservative candidate, whose Party formed the Government, defeated Dowling. Mr. Dowling alleges that Government, as represented by the Minister of Economic Development and Tourism, "dismissed the Complainant as well as many others who were known to have affiliations with the Liberal Party of Prince Edward Island."

3. Mr. Dowling was among some 800 individuals who filed complaints of discrimination in employment on the basis of political belief in 1997.

## THE RESPONSE

4. Government responded to Mr. Dowling's complaint on February 1, 1998, denying the allegation of discrimination. All Golf Professional positions had been eliminated as part of a reorganization. The decision to eliminate the Complainant's and two other Golf Professional positions was management's prerogative and was not related to Mr. Dowling's political affiliation.

## EXECUTIVE DIRECTOR'S DECISION

5. On June 22, 1999, the Executive Director dismissed Mr. Dowling's complaint on the basis that Government eliminated all the Golf Professional positions, and that no golf professionals have been hired at the Provincially-operated courses since the positions were eliminated. The Executive Director accepted that Golf Shop Supervisors are paid approximately half the amount paid to Mr. Dowling as a Golf Professional.

## CHAIRPERSON'S REVIEW

6. On July 22, 1999, Mr. Dowling asked the Chair of the Commission to review the Executive Director's decision. Dowling's request for a review alleged that the position of Golf Shop Supervisor, created after the elimination of the Golf Professional position, had the same duties performed by Mr. Dowling. Mr. Dowling alleges that he was prevented from applying for the position of Golf Shop Supervisor and that the failure to afford him an opportunity to compete for it was discrimination on the basis of political belief.

7. On September 24, 1999, the Chairperson asked the Commission's Investigator to gather further information from the parties. On March 30, 2000, the investigator wrote to the Parties requesting information, which both parties provided – the Complainant on April 4, 2000, and the Respondent on April 28, 2000.

8. The Respondent argued that the allegation relating to the Supervisor position is barred by the time limit for the filing of complaints, because the Complainant raised it for the first time on July 22, 1999, "almost two years after the complaint was filed".

9. On November 23, 2000, the Chairperson directed that the complaint be heard at a public inquiry. The Chairperson specifically referred to the similarity of the Golf Shop Supervisor positions to the Golf Professional positions. He appears to have accepted as properly before him the allegation of discrimination relating to the failure to hire the Complainant for one of the new Supervisor positions.

**ALLEGATIONS RELATING TO THE GOLF SHOP SUPERVISOR POSITION**

10. Throughout this proceeding the Respondent maintained that the Complainant did not file the complaint relating to the Golf Shop Supervisor job within the one-year limitation period. Under to section 22 (2) (b) of the Human Rights Act R.S.P.E.I.1988, Cap. H-12, a complaint must be filed within one year of the "alleged contravention of the Act." Therefore, it is necessary for me to decide whether the Complaint was filed in time.
11. The particulars in the original complaint form are very brief. Mr. Dowling alleges merely that he had been employed by the Respondent for 16 years as a Golf Professional and that his employment was terminated on February 26, 1997. The alleged contravention of the Act on that date is described on the front page of the Complaint form as discrimination in the matter of employment on the basis of political belief and association.
12. The Complainant provided the particulars relating to the Supervisor position in the request for a Review dated July 22, 1999. The Complainant states in an attached affidavit that Golf Shop Supervisors perform the same duties as Golf Professionals, and that he was prevented from applying for the Supervisor position.
13. The allegations relating to the two positions are more properly described as particulars of the discrimination on the basis of political belief. The Chairperson requested that the Commission investigator gather further information about the allegations of discrimination relating to the Golf Shop Supervisor position. The Respondent had ample opportunity to address the allegation. The Respondent has not advised how it may be prejudiced by having to respond to the allegation

relating to the second position. In his decision of November 23, 2000, the Chair of the Commission referred the complaint to a Panel of Inquiry, specifically noting the need for an Inquiry in relation to the staffing of the Supervisor position. Under section 25 of the Human Rights Act, the Chairperson's decision is "final and binding upon the parties." Therefore, I consider the allegations relating to both positions to be properly before me.

## AMENDMENTS TO THE HUMAN RIGHTS ACT

14. On December 24, 1997, Government enacted amendments to the Prince Edward Island Human Rights Act limiting the compensation available to complainants who alleged discrimination on the basis of political belief. Certain individuals commenced an application in the Supreme Court of Prince Edward Island to challenge the amendments as being contrary to section 15 of the Charter. On June 26, 2002, Mr. Justice David Jenkins gave a decision declaring the amendments contrary to the Charter. The "compensation formula," therefore, had no force or effect. Mr. Justice Jenkins describes the factual background as follows:

> [6] Before the complaints were processed, the Legislature enacted Government-initiated amending legislation that specifically limits the power of a Panel to award a remedy regarding one particular category of complaint of human rights violation - namely, a complaint of discrimination in employment based on political belief by Government casual employees whose complaints were pending on December 24, 1997 or would be subsequently filed prior to June 1, 1999. Under the amending legislation a Panel that finds such a complaint has merit is expressly limited regarding the kind and extent of remedy it can order. A Panel can order only compensation. This excludes the power to order any one or more of the other four kinds of remedy listed in s. 28.4(1). The amount of compensation is limited not to exceed the prescribed formula amount of the weekly

> remuneration of the casual employee, multiplied by the total number of weeks worked, divided by 52, multiplied by two (which amounts to 3.846% of total wages): **An Act to Amend the Human Rights Act**, Stats. P.E.I. 1997, Cap. 65, s. 4, which adds ss. 28.4(2), (3), (4) and (5) to the **Act**. Section 6 of the amending legislation restates that the amending provisions apply retroactively to all unresolved complaints then filed with the Commission. The amendments apply to the applicants' complaints.
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> [7] The Government made settlement proposals to each of the complainants which are consistent with this compensation cap. The complainants declined acceptance. The Commission Executive Director then found pursuant to s. 22(4)(b) of the Act that the Government offers for settlement were consistent with the maximum remedy available under the new law, and on that basis he decided that the applicants had refused to accept a proposed settlement that was fair and reasonable. The Executive Director advised the parties to the complaints that his assessment of "fair and reasonable" must be based on the order which a Panel might make under the Act as directed by s. 28.4(2) which he compared to the maximum provided for in that section. He concluded that in those circumstances a reasonable settlement offer had been made and rejected; therefore, the Commission would discontinue any further action on the complaints.
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> Condon v. Government of PEI and Human Rights Commission 2002 PESCTD 41.

15. Mr. Dowling did not participate in the Condon proceedings, but the relief available to him under the legislation would have been limited by the formula. Government has appealed the decision. Therefore, I have conducted this inquiry as if the formula set out in section 28.4(2) has no force or effect.

**PRELIMINARY PROCEEDINGS AND COMPLAINANT'S REQUEST FOR COSTS**

16. Mr. Dowling's case is unique in that it was the only case of discrimination on the basis of political belief arising from the 1996 General Election to be referred to a hearing. It has taken five years to get here. As a result, Mr. Dowling has asked for an order of costs against the Respondent on the basis that the Respondent's actions have resulted in a delay of the proceedings. The Complainant states that the Respondent's refusal to disclose relevant documentation has resulted in delay and increased costs for which he should be compensated. It is therefore necessary for me to explore the causes of the delay at some length.

17. Mr. Dowling filed his complaint on August 14, 1997. The Government responded on February 1, 1998, four and one-half months after the 30 days permitted for a response. The Executive Director gave his decision on June 22, 1999, the Chair sent the matter to a hearing by his decision dated November 23, 2000.

18. In its correspondence of April 28, 2000, Government provided some but not all documentation relating to the Golf Shop Supervisor positions. The investigator clearly requested information that she was permitted by section 23 of the Human Rights Act to receive. Yet, Government persisted in its position that the information was not relevant.

19. On March 16, 2001, the Chairperson appointed a Commissioner to conduct the hearing. On April 26, 2001, the Commissioner scheduled the hearing for August 27, 28 and 29, 2001.

20. Between the Chairperson's decision on November 23, 2000, and April 26, 2001, when the Commissioner set the hearing date, the Complainant had responsibility to advise of his intention to take carriage and request a hearing date, but did not do so. The Panel set the date in an effort to move the matter forward. The time that elapsed between November 23, 2000, and April 26, 2001, may not be attributed to the Respondent.

21. Because Mr. Dowling and Government could not agree on the relevance of documents and disclosure of payroll records and financial results for golf courses, I granted an order on August 23, 2001, allowing the Complainant's request for an adjournment of the hearing and ordering that he make a specific request for the documents he wanted the Respondent to disclose. The request was to be made within 30 days. I was to be advised of any failure to disclose, and the Complainant was to request a new hearing date.The Complainant did not make the request for specific documents until October 30, 2001, including "T-4 slips for all golf shop supervisors employed in 1997, 1998".

22. On February 7, 2002, the Complainant advised that the Respondent had not provided the documents requested. At the Complainant's request I convened a preliminary conference to discuss the disclosure issue again. I issued a further order dated March 26, 2002, directing the Respondent to provide the documents requested in the Complainant's letter of October 30, 2001. Disclosure was to be made by April 5, 2002, and I reserved the jurisdiction to determine relevance at the hearing. The Respondent provided disclosure of some but not all of the documentation on April 5, 2002, including some of the T-4 's.

23. On May 22, 2002, the Complainant advised that he was not in a position to have the matter set for a hearing because he had not yet received full disclosure.

24. On July 2, 2002, the Commission's Administrative Officer wrote to ask the parties of their availability in August, 2002. Between that date and December 2, 2002, the parties, along with the Executive Director of the Commission attempted to resolve the matter of disclosure. On December 2, 2002, the Respondent wrote to advise, among other things, that "The Department is not prepared to provide individual T-4 slips other than those already provided."

25. On April 9, 2003, I advised the parties that the hearing would proceed on August 19, 20 and 21, 2003. The Complainant advised that if the hearing proceeded, he would be at a disadvantage because the disclosure had not been made.

26. I opened the hearing finally on August 21, 2003. The Complainant made a request for disclosure of specific documents, which I granted, and a request for costs, which I advised I would consider. I asked for submissions on costs, which I was to assess, and I advised I would give a decision with these reasons.

27. On September 22, 2003, more than a month after the date originally scheduled for the commencement of the hearing, and after my order itemizing specific disclosure requirements, the Respondent made substantial further disclosure. The hearing proceeded on November 24, 2003, with arguments on the costs of the preliminary proceedings. I also heard evidence and argument on November 25, 26, 2003, and on December 17, 2003. The Complainant presented a Bill of Costs for $14,433.44, and the Respondent has had an opportunity to address the cost issue orally and in writing. I have considered all representations.

**ISSUES**

28. There are two issues to be determined:

> (1) Did the Respondent discriminate against Stephen Dowling in employment on the basis of political belief when it eliminated the position of Golf Professional at the Links at Crowbush Cove?
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> (2) Did the Respondent discriminate against Stephen Dowling in employment on the basis of political belief by failing to hire him for the position of Golf Shop Supervisor in 1997?

**HUMAN RIGHTS ACT - Political Belief Discrimination**

29. The Prince Edward Island Human Rights Act R.S.P.E.I. 1988, Cap. H-12, as amended, states:

> *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.*

"Employer" is defined in section 1 of the Act to include "a person who contracts with a person for services to be performed by that person or wholly or partly by another person".

30. Section 1(1)(d) 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;*

31. Section 1(1)(m) defines "political belief" as:

> *… belief in the tenets of a political party that is at the relevant time registered under section 24 of the Election Act R.S.P.E.I. 1988, Cap. E-1 as evidenced by*
>
> *(i) membership of or contribution to that party, or*
>
> *(ii) open and active participation in the affairs of that party.*

**Burden of Proof**

32. Section 1(3) of the Act states:

> *For the purposes of this Act the onus of establishing an allegation of discrimination or action on a discriminatory basis in relation to political belief is upon the person making the allegation.*

33. In Burge v. Prince Edward Island (Liquor Control Commission) [1991] P.E.I.J. No. 104, the Appeal Division described the burden in political belief complaints as follows:

> *That provision is not ambiguous. One does not have to resort to extrinsic aids in order to discern its meaning. For the purposes of the Human Rights Act, it places the burden of establishing allegations of political belief discrimination squarely on the shoulders of the complainant. ... The Complainant, therefore, can rely on evidence adduced by any of the parties, including the Human Rights Commission, to substantiate his case. However, in the end the complaint will fail unless it is supported by a reasonable preponderance of the evidence. Section 1(3) leaves no doubt that in cases of alleged political belief discrimination the burden rests on the complainant throughout and never shifts to the respondent (at pp. 3-4).*

34. The Complainant must prove that he was a member of the PEI Liberal Party and that that Party was at all material times registered under section 24 of the Elections Act R.S.P.E.I. 1988, Cap. E-1. The Complainant must meet a civil standard of proof by establishing, on a balance of probabilities, that the Respondent did not employ him because of his political belief.

35. In Trainor v. Prince Edward Island (Human Rights Comm.) (1992), 18 C.H.R.R. D/137 (P.E.I.S.C.) [Tab 4], DesRoches J. described the standard of proof as a "reasonable preponderance of evidence" which he defined as follows:

> *I take from the above that the burden of proof on a reasonable preponderance of the evidence means that the trier of fact must find on reasonable grounds that the existence of the contested fact is more probable than its non-existence.*

**Inference of Discrimination**

36. 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 manner: 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.*
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> Proving Discrimination in Canada" (Vancouver: Carswell, 1987), Beatrice Vizkelety

37. The Complainant must prove that the facts make it more probable than not that his political belief was a factor in the Respondent's elimination of the Golf Professional position at Crowbush and their refusal to employ him in 1997.

38. The Complainant will have made his case if he shows that discrimination is one of the reasons for the refusal to hire:

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

**Evidence at the Hearing**

39. The parties presented documentary evidence on consent for use at the hearing. However, during the argument on the costs of the preliminary proceedings relating to disclosure, the Complainant presented "without prejudice" correspondence of the Respondent to support his argument that the Respondent was not in substantial compliance with the disclosure orders of the tribunal. I advised before the documents were tendered into evidence that I would not be relying on them to determine costs. On that basis the documents were entered in the record. Accordingly, while "without prejudice" correspondence appears at Book IV, Tab 154, intermingled with other correspondence, I did not rely on it or attribute any weight to it in making any determination, including costs. The documentary evidence fills five books and 165 Tabs, many with multiple pages. Some documents have high probative value and some have no probative value. The parties also provided me with pre-and post-hearing briefs of law and fact. I have reviewed everything before me except the "without prejudice" correspondence already noted.

40. The Complainant called Mr. Roger MacInnis as his first witness. Government hired him in the Spring of 1997 to fill the newly-created position of Golf Shop Supervisor. While he appeared as the Complainant's witness, the Complainant asked that he be declared "hostile" so that he could cross-examine him. I ruled

that such a finding was unnecessary because the practice of the tribunal was flexible and informal enough to allow wide latitude in the examination of the witness.

41. Mr. MacInnis testified that he had no prior experience in the golf or tourism industries and that he had worked previously as a teacher. He went to see his local Member of the Legislative Assembly, Mr. Kevin MacAdam, about obtaining employment. Mr. MacAdam telephoned MacInnis in the Spring of 1997 to advise that the position of Golf Shop Supervisor at Crowbush was available if he wanted it. There was no competition, no interview, and Mr. MacInnis merely reported to work on the appointed date. He did not fill out an application for the job until after he started work. His supervisor was Mr. Jack Kane and his employer was the Province of Prince Edward Island.
42. Mr. MacInnis acknowledged that he was at one time a member of the Conservative Party of Prince Edward Island, although at the time of hiring he did not possess a membership card in any political Party. He acknowledges that he knew Mr. MacAdam, “but we’re not best friends.” He denies that he openly or actively participated in the affairs of the Progressive Conservative Party, although he conceded that he identifies as a Conservative.
43. In addition to his work as a Golf Shop Supervisor, Mr. MacInnis performed duties on a casual basis for the Department of Economic Development and Tourism after the end of the golf season. The Respondent disclosed T-4 income for earnings for the Golf Shop Supervisor position, but not from Mr. MacInnis’ casual work for the Province.
44. After he completed his testimony, clearly embarrassed by an unexplained discrepancy between the T-4 earnings of $24,645.00 disclosed by the Respondent and his total reported income of 34,749.00, Mr. MacInnis provided to the tribunal, through Complainant’s counsel, another T-4, which he obtained from among his own records for the casual work with the Province of P.E.I. in the year 2000. That document was entered as Exhibit 158. While there is a complete record of his earnings for the year 2000, with T-4’s, along with an “Individual Income Tax Return Information” document prepared by Revenue

Canada, there are no such summaries for other years. Mr. MacInnis was forthright in his testimony and I place considerable weight on his admissions about the manner of his hiring through the local MLA and his lack of experience in the golf or tourism industries.

45. Mark Roberts was the individual hired for the newly-created Golf Shop Supervisor position at another Provincial Golf Course, Mill River, where he had been Golf Professional. When Government eliminated the Golf Professional position, Mr. Greg McKie, Mr. Roberts' supervisor, advised by letter dated February 26, 1997, that Roberts would not be re-hired but that he was encouraged to apply for the Golf-Shop Supervisor position. On February 21, 1997, Mr. Roberts had written to the Minister of Economic Development and Tourism, Wes MacAleer, enclosing a resume, expressing an interest in the Shop Supervisor position. The only T-4 earnings in evidence from employment with the Province for 1996, his last year as a Golf Professional, show the amount of $23,693.08. The first year of employment as a Golf Shop Supervisor in 1997 shows a T-4 from the Province in the amount of $18,408.02. No summary of total income from the Province was provided for Mr. Roberts for that year, however, the Complainant agreed that the T-4's entered in evidence accurately reflect how much money Mr. Roberts made as a Supervisor and Professional for the given years.
46. Mr. Albert Roche was Manager at the Brudenell Golf Course and Provincial Park at the time of the elimination of the Golf Professional positions. The Golf Professional at Brudenell had retired. He had discussions with Mr. Ron MacNeill, Director, and Mr. Frank Butler, Deputy Minister, about the strategy of golf development and the elimination of the golf professional positions. He states that there were never any discussions of Mr. Dowling's political affiliations in the elimination of the position. His evidence was that the Complainant's politics had no bearing on the re-organization of the delivery of golf programs at Provincial properties.
47. Mr. Roche stated that the positions were eliminated as part of the standardization of operations at the Provincial Golf courses. He testified that the purpose of

establishing Golf Shop Supervisor positions and eliminating the professional positions was to generate and enhance revenue from the golf properties. He asserted that the goal was revenue generation, not necessarily cost savings. At one time the golf professionals ran the concessions at the courses, sourced the golf supplies and received revenues. The changes made in 1996 and prior to that time included the incorporation of an entity to market golf on the Island, the removal of concessions from the golf professionals and, finally, the elimination of the golf professional positions.

48. Stephen Joseph Dowling is the Complainant, now 47 years old. He is certified by the Canadian Professional Golf Association (C.P.G.A.) and had been employed as a golf professional at the Government-operated Mill River and Crowbush courses. Mr. Dowling had asked for and obtained a leave of absence from his employment in the Fall of 1996 to run, unsuccessfully, for the Liberal Party in the 1996 General Election. The Respondent admitted that the Liberal Party meets the requirements set out in section 1(1) (m) of the Human Rights Act. There is no dispute that offering as a Liberal candidate in the Provincial Election constitutes "open and active participation in the affairs of that party."

49. The documents admitted into evidence show that each year of his seasonal employment Mr. Dowling would enter into a new contract with his employer. The type of services he provided evolved from that of a contractor who received revenue from concessions and sourced the items for sale in the concessions, to one who was paid a fixed amount for his services. The payment varied over the years; it invariably increased. Mr. Dowling was a self-employed businessperson who also operated a golf equipment retail business in Charlottetown. He operated the equipment concession at Mill River but not at Crowbush. He states his interest and involvement in Crowbush arose because he considered it to be the 'jewel in the Province's golf crown' and he was proud to be associated with it as Professional.

50. There is evidence of positive performance evaluations and a public service classification procedure that resulted in the fixing of step increases for his remuneration. He was not required to re-apply before commencing employment

annually. There is no dispute that he worked as a qualified golf professional for the Province until February 26, 1997, when he received a letter from his supervisor, Jack Kane, advising that his position had been eliminated. Unlike the letter Mark Roberts received from his supervisor, Mr. Dowling's letter did not encourage him to apply for the position of Golf Shop Supervisor. Nor did Mr. Dowling write to the Minister responsible to express an interest in the position of Supervisor.

51. Mr. Dowling states that he was "good friends" with Mr. Kane and, during the Spring of 1997, he spoke with Kane on a number of occasions to inquire about the possibility of employment. Mr. Dowling's evidence is that Mr. Kane, after a short period of uncertainty, realized that there was not going to be a competition for the Supervisor position. Kane never indicated that Mr. Dowling would be considered for the position, which was not classified through the Public Service Commission until some three years later. There was no opportunity to apply and no advertising or competition.
52. Mr. Dowling recounts an occasion when he was speaking with Mr. Kane by telephone and Mr. Kane advised that Mr. Frank Butler, Deputy Minister, came into his office and placed a note on Mr. Kane's desk with the name of Roger MacInnis on it, indicating that he would be the newly-hired Golf Shop Supervisor. Dowling was unable to say when the telephone conversation occurred.
53. When pressed about why he did not take other steps to gain employment at Crowbush in the Spring of 1997, other than speaking with Mr. Kane, Mr. Dowling stated: "I didn't see any requirement to take any additional steps. I just went to my supervisor, and I'm very happy that that's all I needed to do. He knew, he meets with Ron MacNeill [Director of the responsible Department], he meets with government, they sit at the table, and they could express that, yes, Stephen has [an] interest here."
54. The evidence is that in 1996, the final year of his employment as a Golf Professional at Crowbush, Mr. Dowling reported T-4 earnings of $42,112.16. In 1997, he reported T-4 earnings of $43,314.20. Mr. Dowling had commenced

employment under contract to a local accounting firm in either December of 1996 or January of 1997 to develop a golf management instructional program for Holland College. The reported income in 1997 is from that source. He was later employed as a instructor of the program. When confronted with the fact that he had already accepted employment that paid more than the Golf Professional position before the position had been terminated, Mr. Dowling noted that the Crowbush employment was for six months and would not preclude him from working during the winter for Holland College in an instructional capacity and during the golf season at Crowbush.

55. Ronald MacNeill is the Director of Tourism, a position he held at the time of the elimination of the Golf Professional position and the creation of the Golf Shop Supervisor position. He is responsible for the management of 45 Provincial properties, including four golf courses. Mr. MacNeill gave evidence over two days. He was intimately involved in the re-organization of the delivery of golf by the Provincial Government. He states that as early as 1995, there was internal debate about the role of golf professionals. He denied that the elimination of the Golf Professional positions was in any way politically motivated or a pretext to terminate the employment of Mr. Dowling. He asserts that the elimination of the positions was the culmination of a process to enhance the development of the golf market in PEI and to improve the delivery of golf services.

56. Regarding the staffing of the Golf Shop Supervisor positions, Mr. MacNeill states that “we requisitioned the positions and we were given names. I did not have the opportunity or benefit of scrutinizing their qualifications that came through the Minister’s office.” The position was filled without competition through a casual appointment process. Mr. MacNeill acknowledged that the role of the Shop Supervisor was similar to that of the Golf Professional. However, in his view the Supervisor position was essentially a retail sales position. The golf expertise was provided by Mr. Kane, a former C.P.G.A. professional. Mr. MacNeill asserts that Mr. Dowling was over-qualified for the position of Golf Shop Supervisor. He states that Mr. Dowling’s “dream job” of manager at Golf

Links PEI was later staffed through a public competition, and Mr. Dowling did not apply.

57. Frank Butler is the Deputy Minister responsible for the Provincial golf courses, among other Provincial properties. He was named to that position in 1996. He claimed as his own, and took responsibility for, the decision to eliminate the Golf Professional positions. He states that the restructuring of golf operations had nothing to do with the individuals who then occupied the positions.
58. He did not inquire into the qualifications of Mr. MacInnis, and he denies that he was involved in the selection process for the Supervisor position. He advises that he had no idea how they came to get Roger MacInnis' name. He was merely advised who was the individual to be named to the position, whereupon he passed on the name. Mr. Kane was the person responsible for determining the qualifications of the person named.
59. Mr. Jack Kane is currently on contract as a consultant to Golf Links Prince Edward Island Inc., a Crown corporation of the Government of Prince Edward Island. Between 1993 and 1997 he was General Manager of the Links at Crowbush Cove. For a time he was General Manager of Golf Links PEI. He advises that he was involved in the decision to eliminate the golf professional positions and, although as a former CPGA professional, he disagreed with the decision, it was not motivated by a desire to get rid of Mr. Dowling. He denied that he was grooming Mr. Dowling for his job at Crowbush, or that he had any role in the staffing of the Golf Shop Supervisor position.
60. He states that he knew by mid-March, 1997, that Roger MacInnis was the person named to the Shop Supervisor position. He trained the people whom Mr. MacInnis supervised and, although MacInnis started with limited skills, "his learning curve was short." Mr. Kane recalls a meeting in the early Spring of 1997 with certain employees at Crowbush, including Mr. Dowling. The employees questioned him about the possibility of work during the summer, but Mr. Kane was unable to give them any information to assure them of employment. The Executive Director questioned Mr. Kane about the high rate of staff turnover after the election. I find Mr. Kane's answers on questions touching on the

involvement of politicians in hiring unsatisfactory. He was reluctant to acknowledge the suggestion that there was unusual turnover that year at Crowbush. He refused to address the matter, suggesting that someone else should answer.

61. MLA Wes MacAleer was the Minister of Economic Development and Tourism at the relevant time. Although ultimately responsible for the decisions of his Department, he had no direct involvement of the elimination of the Professional position or the creation of the Supervisor position. He denies that he was responsible for appointing an individual to the position of Golf Shop Supervisor.

**DECISION**

62. The complainant will have proved a prima facie case of discrimination in employment if he is able to show, on a balance of probabilities, that a) he was qualified for the particular employment; b) that he was not hired; and c) that someone no better qualified but lacking the distinguishing feature that is the gravamen of the Human Rights complaint subsequently obtained the position (see Basi v. Canadian National Railway [1988] CHRD No. 2 T.D. 2/88). After proving a prima facie case, the burden usually shifts to the Respondent to provide a reasonable explanation for its actions. However, in this case, the burden remains on the Complainant throughout, in accordance with section 1(3).

63. Having reviewed all the evidence before me, I am unable to conclude that the Complainant has proven on a balance of probabilities that the Respondent discriminated against him in employment on the basis of political belief by eliminating the position of Golf Professional at Crowbush. I accept the evidence of witnesses for the Respondent that the decision to eliminate the Golf Professional positions was part of the re-structuring of the Province's golf operations, a process that was underway before the Complainant sought a leave of absence to seek elected office. The persuasive evidence of these witnesses is that the golf industry has moved from management by CPGA professionals.

64. It is telling that Mr. Dowling obtained employment with a learning institution that was developing a golf management course, and that Mr. Dowling was employed to offer instruction in that skill after he developed the course. The evidence was of a need in the industry for managers, not professional golfers. It is also significant that Mr. Dowling's current employment is as a golf course manager who may provide occasional instruction, not a professional who performs incidental management functions. I do not find it significant that the Province still employs golf professionals and funds the cost of their professional designation. The evidence is clear that, at Provincial golf courses, officials adopted a model of management by non-professionals in a re-structuring exercise.

65. Mr. Dowling's evidence is that he possesses the skills necessary to manage golf courses and provide instruction. In fact, he performed mainly management and sales, and little instruction. I am unable to accept his assertion that the creation of the Supervisor position was an exercise in "semantics," because the new position and the elimination of the Golf Professional position resulted in no change in the duties that Mr. Dowling had performed. Despite the similarity in the duties of both positions, I am unable to conclude that the Respondent discriminated against Mr. Dowling on the basis of his political belief when it eliminated the Professional position at Crowbush.

66. However, I find that Mr. Dowling has proven on a balance of probabilities that the Respondent discriminated against him by failing to offer him an opportunity to compete for the position of Golf Shop Supervisor at Crowbush.

67. Discrimination is defined as a *"distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society"* (see Ayangma v. The French School Board, 2002 PESCAD 5, quoting Andrews v. Law Society of British Columbia (1989), 56 D.L.R. (4th) 1 (SCC)). My review of the evidence leads me to conclude that Mr. Dowling was denied an

opportunity to be considered for the position because of his open and active participation in the affairs of the Liberal party during the General Election of 1996.

68. I find that the decision to create the position of Golf Shop Supervisor, like the decision to eliminate the Golf Professional position, was a legitimate exercise of management. However, there was no hiring process for the position of Supervisor, merely an appointment by the local Member of the Legislative Assembly. The hiring of Roger MacInnis was entirely the decision of the local MLA. Merit played no part, or none that has been presented in evidence. In the process disclosed in evidence, where an elected official makes such a hiring decision, Mr. Dowling would have had no chance of being appointed. Whereas Mark Roberts was encouraged to make known his interest in the Supervisor position at Mill River, Mr. Kane gave no such encouragement to Mr. Dowling.

69. I do not find persuasive the Respondent's suggestion that Mr. Dowling was himself motivated by politics in pursuing the position, knowing he had no genuine interest because the position paid less and had less prestige. Jack Kane described Dowling as a "young, aggressive person looking for opportunity." With an offer of employment during the winter, it is plausible that he would look to continue at Crowbush during the summer.

70. The evidence is clear that he made known his interest, expecting Mr. Kane, his supervisor, to advance it. But Mr. Kane did not do so, even though his evidence was that Mr. Dowling was a loyal and competent employee. Mr. Kane's evidence was that he had no role in the hiring. Mr. MacNeill, the Director, had no role in the hiring, and Mr. Butler, the Deputy Minister, had no role in the hiring. The Minister responsible, Mr. MacAleer, also had no role in the hiring. I accept the evidence of Roger MacInnis that Progressive Conservative MLA Kevin MacAdam offered him the position. I am entitled to make an inference

that Mr. Dowling was not offered an opportunity to compete for the job because he was a known supporter of the Liberal party.

71. The Appeal Division of the Prince Edward Island Supreme Court describes the nature of the evidence in human rights cases as follows: *"Only rarely is there concrete evidence of discrimination even when the allegation is of direct discrimination as opposed to adverse effect or systemic discrimination. As well, the proof of 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"* (see Ayangma v. The French School Board, at paragraph 36). The evidence is that Mr. Dowling was qualified for the position of Golf Shop Supervisor, that he expressed an interest in being hired for the position, and that someone no better qualified but lacking the distinguishing characteristic of open and active participation in the Liberal party obtained the position. I am entitled to infer and do infer that the Respondent's failure to offer Mr. Dowling an opportunity to compete for the position of Golf Shop Supervisor discriminated against him on the basis of political belief and his association with others who hold that belief.

**DAMAGES**

**Loss of Income**

72. Section 28.4 of the Human Rights Act permits a Panel of Inquiry to make an order (i) to cease the contravention complained of, (ii) refrain in future from committing the same or similar contravention, (iii) to make available to the complainant opportunities or privileges the person was denied, (iv) to compensate the complainant for lost wages or income, and (v) "to take any other action the Panel considers proper to place the complainant … in the position the person would have been in, but for the contravention."

73. Mr. Dowling was denied an opportunity to compete for the position of Golf Shop Supervisor at the Crowbush golf course. His circumstances are similar to those described in Basi v. Canadian National Railway. On the analysis set out in that case, after finding discrimination, it is necessary to determine whether or not Mr. Dowling had a reasonable possibility of obtaining the position. Having reviewed the evidence, I conclude that Mr. Dowling was a better candidate for the position than Roger MacInnis. After such a finding, damages for loss of income would normally be awarded. Nevertheless, I decline to award damages for loss of income because Mr. Dowling has not shown any loss. His total income in the years following the elimination of the Golf Professional position was greater than it had been before.

74. While Mr. Dowling argues that he could have performed the development job and acted as the Supervisor at Crowbush, his own evidence conflicts with that argument. The evidence is that he was paid $30,000.00 for a six-month contract as Golf Professional at Crowbush in 1996. Mr. Dowling testified that the work developing the management course for Holland College paid more money, but it was spread over the whole year. His evidence that he "could" have performed one job during the winter and the Supervisor position during the summer is at odds with his acknowledgement that the development of the management course was a year-long position. If the development work was completed over a year, it remains uncertain how he would have been able to perform the duties of Golf Shop Supervisor during the 1997 golf season. What Mr. Dowling lost was an opportunity to compete for the position of Supervisor. It would be speculative to award damages for loss of income.

**General Damages for Hurt and Humiliation**

75. I award Mr. Dowling $5,000.00 for hurt and humiliation. He testified about the lack of acknowledgement of his efforts for his employer over the 16 years of his service. One way to acknowledge his efforts would have been to give him an opportunity to compete for the Supervisor position. Because of discrimination on the basis of political belief, he was not given the opportunity to do so. He

testified specifically about the emotional effects of the abrupt end to his association with the Crowbush course.

**Costs**

76. The authority to award costs is found in section 28.4(6) of the Human Rights Act R.S.P.E.I. 1998, Cap. H-12, as amended.

> (6) A Human Rights Panel may make any order as to costs that it considers appropriate.

77. The number of months that elapsed from the time the Complaint was set for hearing until it was heard was approximately 36. My review of the Record reveals that the Complainant was responsible for some of that time. Taking into consideration the Complainant's earlier acknowledged reluctance to schedule the matter in August 2001, and allowing for the Complainant's late additions to the document and witness list, I find that most of the delay was the result of the Respondent's failure to disclose relevant material.
78. I issued three orders for disclosure, the first on August 23, 2001, a second one on March 26, 2002, and a third on August 23, 2003. The first and second orders were made on the consent of the parties, but the Respondent did not consent to the third order. The last two orders refer to the disclosure of T-4's and documentation confirming total annual remuneration for Golf Shop Supervisors. The Respondent persisted to argue that the documentation was not relevant and did not disclose many documents until September 23, 2003, and did not disclose certain documents at all.
79. The Respondent provided the T-4's relating to the Supervisor position, but did not provide T-4's for the Supervisors' other employment with the Province. The Respondent's failure to provide complete information about the earnings of Roger MacInnis, who was appointed as the Golf Shop Supervisor at Crowbush, resulted in embarrassment to that witness during his testimony. Roger MacInnis as issued a subpoena, under authority of the Public Inquiries Act, directing him to bring with him any documents relative to the matters in dispute. The record

clearly shows that counsel for the Respondent advised Roger MacInnis that he was not required to bring a summary of total earnings because all T-4's had been made available already. However, during the testimony of Mr. MacInnis, it became evident that all the T-4's had not been provided.

80. By withholding information about Mr. MacInnis' other income from employment with the Province, the Respondent created a false impression of his total remuneration. The Respondent's actions hindered the efficient conduct of the inquiry.

81. For the first time, in correspondence dated September 24, 2003, the Respondent referred to the Freedom of Information and Protection of Privacy Act R.S.P.E.I 1988, Cap. F-15. The Respondent stated that it has the responsibility to protect private information of third parties and is prevented from disclosing their earnings information. Furthermore, the Respondent argued that the Panel's "authority to demand the production of documents prior to the attendance of a summoned witness at a hearing is questionable". Upon review of the provisions referred to, along with relevant provisions of the Human Rights Act and the Public Inquiries Act, R.S.P.E.I. 1988, P-31, I conclude that the Respondent was plainly required to disclose the information.

82. To explain the failure to disclose all T-4 earnings of its Supervisors, the Respondent called a payroll clerk for the Province as a witness. She advised that the records for casual employment are kept in a separate location from T-4's for other employment. The explanation offered in argument is that Mr. MacInnis' T-4's from casual employment were stored in a location where they went undetected. However, the Respondent's consistent refusal to disclose documents, first, on the basis of relevance, then on the basis of privacy and, finally, when it was evident the Panel would consider an order for costs, on the basis of irregular document management, leads to the conclusion that the refusal was a strategy.

83. The early disclosure of the information could have assisted in an earlier resolution to this complaint. A great deal of time at the hearing was spent questioning witnesses about the existence and location of documents and the

reason they were not disclosed earlier. The Respondent did not comply with the spirit or the letter of the investigator's request, my orders, or the subpoenas. While it had the right to continue to argue that the Shop Supervisor position was not properly before the tribunal, it was improper to continue to refuse to disclose documents on the basis of relevance after the Chairperson had referred the matter to the Panel. The Respondent's actions resulted in delay in scheduling the hearing and embarrassment to a witness.

84. In all the circumstances, I consider an appropriate order of costs payable by the Respondent to the Complainant to be $9,600.00. This is not an interim order for costs, nor is it an order for costs thrown away. I have taken into account the actions of both parties, and the fact that the eventual result is divided. I have found that the Respondent's failure to disclose, along with its persistent challenge to the relevance of information directly on the issue of the claim for loss of income, warrant an award of costs. The Respondent's actions needlessly prolonged the proceedings and hindered the course of the inquiry. I make the order under my authority to take action to place the Complainant in the position he would have been in but for the contravention and under the authority of the Panel to order costs "that it considers appropriate."

**DATED** this _29th _ day of April 2004.

Signed Angie Cormier

Angela Cormier

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