Strengthening the Commission's handling of Race-based Cases

Consultant's Report

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Executive Summary

The Commission has made a laudable commitment to strengthening its handling of race-based cases. It has conducted a preliminary round of training for staff and Commissioners on unconscious bias and the fundamental legal principles that apply in race-based cases. It has established the Pilot Project on Race-based Complaints. It has held an initial meeting with community groups and organizations representing the interests of racialized people. It has retained me as a consultant to review its handling of race-based cases and to make recommendations to strengthen the Commission and its processes. I have prepared tools and resources to assist Commission staff with their approach to race-based cases, and will be providing training on these tools and resources in the near future.

These are significant preliminary steps. But make no mistake, a lot of hard and challenging work lies ahead that will require a sustained commitment of the Commission's time and resources in order for its efforts to strengthen its handling of race-based cases to be successful.

This Report focuses on issues relating to the Commission's substantive work. Under a separate contract, I also have prepared a Supplementary Report and Recommendations from the March 4, 2020 Stakeholder Meeting that focuses on issues of an institutional or structural nature within the Commission. The discussion and recommendations from these two Reports need to be reviewed and addressed together. In order to be successful in strengthening its approach to race-based cases, the Commission cannot merely focus on its substantive work without also attending to institutional and structural issues that may be contributing to its deficiencies in handling race-based cases. These two aspects of anti-racism organizational change are inextricably intertwined, and must be addressed in tandem in order to achieve success.

In Sections 1 and 2 of this Report, I review the Criteria and Guidelines used by the Commission in its analysis and assessment of its cases. I identify two main issues with the Criteria that have a particularly negative effect on race-based cases. First, the Criteria indicate that Commission staff, and by extension the Commissioners, are required to make factual findings or determinations that the negative treatment alleged by a claimant occurred and that it is linked to a prohibited ground. This is the role of the Tribunal, and is not properly part of the Commission's administrative screening function. Second, by placing consideration of the respondent's explanation for its actions at Step 2 of the analysis, the Criteria removes the ability to consider inconsistencies or deficiencies in the

respondent's explanation as part of the evidence that should be considered in assessing whether there is a reasonable basis to support the allegations. I have recommended revisions to the Criteria to correct these issues.

In Section 3 of the Report, I address the Commission's intake and initial review process, and make recommendations aimed at enhancing the Commission's ability to obtain more detailed information from claimants about the link to race underlying their allegations.

In Section 4 of the Report, I address the Commission's mediation process, and in particular the lower resolution rate for race-based cases, and make recommendations to assist in rectifying this.

In Sections 5 and 6 of the Report, I address the Commission's use of s. 41 of the Act and make recommendations to improve this process as it is applied to race-based cases. In particular, I express concern about the use of s. 41(1)(d) to dismiss a race-based complaint as "frivolous" due to a perceived deficiency in the basis for showing a link between the allegations and a race-based ground, given the challenges faced by racialized claimants in fully articulating this connection.

In Section 7 of the Report, I discuss the Commission's assessment process, and make recommendations to improve this process as it relates specifically to race-based complaints. The need for the assessment to commence with a fulsome and thorough interview of the claimant is stressed, together with the necessity of a probing review of the respondent's witnesses and documents. Mindful of the Commission's limited resources, I also make recommendations to cut off Commission assessments and refer cases to the Tribunal where it is clear that resolving the issues would require the weighing of evidence or credibility assessments that go beyond the Commission's proper role.

In Section 8 of the Report, I address specific issues that have arisen regarding the way the Commission treats a claimant's statements, which too often are not regarded and treated as evidence in the way they should be. I also address concerns about anti-claimant bias, which is often more prevalent for racialized claimants.

In Sections 9 and 10 of the Report, I discuss the fact that the complaint process exacts a significant toll in terms of the well-being and health of racialized claimants, and make recommendations in relation to supports for claimants during the Commission's process and before the Tribunal.

In Section 11 of the Report, I discuss the use of social science research and literature in the context of race-based cases, and make recommendations for the Commission to embark on a project to collect this literature and establish a resource library available to Commission staff and the public.

In Sections 12 and 13 of the Report, I address the issues of systemic racial discrimination and the use of data and disaggregated data in race-based cases, and make recommendations for how the Commission can more effectively address these issues.

The Recommendations I have made throughout this Report may appear challenging, or even daunting. They are not intended to be cast in stone, and no doubt may be improved by further engagement and discussion. But the underlying issues identified and addressed in my Reports as impairing the Commission's handling of race-based cases are very real, and demand urgent and sustained action.

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Introduction

[1] I have been retained by the Canadian Human Rights Commission (the "Commission") to review and update the criteria and guidelines currently used by the Commission's human rights officers, with an aim to ensuring that these tools provide effective guidance in assessing race-based complaints that raise subtle forms of discrimination. I also have been retained by the Commission to provide it with a Report outlining recommendations for strengthening its assessment of race-based cases. This Report will address those two aspects of my work. A short bio is appended, setting out my background and experience [Appendix A].

[2] I further have been retained by the Commission to provide a full-day training session to all staff on the updated criteria and guidelines, as well as on tools and resources I am preparing for Commission staff in intake and initial review, mediation and assessment to use when dealing with race-based complaints. My approach has been to identify typical types or patterns of race-based complaints the Commission receives from racialized claimants, and to develop tools and resources to assist Commission staff in understanding the main issues that arise in these kinds of cases, what kind of questions and documents the Commission should be asking and requesting of claimants, what kinds of questions and documents the Commission should be asking and requesting of respondents, and what kind of questions the Commission should be considering in

drafting its assessment reports and making its recommendations under s. 44 of the Act (these tools and resources are called "Case Patterns", and are appended to this Report [Appendix B].

[3] The full-day training was scheduled to take place in Ottawa on April 28, 2020, to be attended by all Commission staff, and was to include morning presentations and a question and answer session, and then afternoon group workshops on applying the updated criteria and guidelines and the new Case Patterns in practical fact scenarios. Regrettably, this training session needed to be postponed due to the Covid-19 crisis. However, the Commission is committed to ensuring that this training will take place at the earliest possible time, once circumstances permit and perhaps in an appropriate alternate format.

[4] For the purpose of my work, I have reviewed background materials provided by the Commission, including recent training materials, relevant caselaw, and sample assessment reports. I have worked closely with the Director of the Assessment branch and the members of the Race-based Complaints Pilot Project team, who have been invaluable in providing me with information, feedback and support. I also had teleconference sessions with Commission managers and staff from Intake and Initial Review, Mediation, and Assessment, in order to share with them the kinds of tools and resources that I was planning to develop to assist them in dealing with race-based cases, and to hear from them any questions or feedback they may have about their needs.

[5] As part of a separate contract with the Commission, I also attended a full-day meeting in Ottawa on March 4, 2020 that was hosted by the Commission, and identified as an "Expert Dialogue Session on Access to the Complaints System". This meeting was attended by Commission staff and representatives of stakeholder groups representing racialized people. The purpose of the meeting was to learn about the experiences that people from racialized communities have had in using the Commission's complaints process, and to identify suggestions for how it can be improved. Following this meeting, I prepared a Report setting out the feedback received from the participants, and also have

prepared a Supplemental Report setting out my views and recommendations regarding some of the issues raised by participants at this meeting.

[6] While the work I have undertaken has been under two separate contracts, it is important for the discussion and recommendations from this Report to be read and addressed together with the discussions and recommendations from my Supplementary Report and Recommendations from the March 4, 2020 Stakeholder Meeting. The issues I am addressing in this Report are more about the Commission's substantive work, as opposed to relating to the issues of an institutional or structural nature within the Commission that are addressed in my Supplementary Report from the March 4, 2020 Stakeholder Meeting. In my experience, in order for an organization to be successful in strengthening its approach to race-based issues, an organization cannot merely focus on its substantive work without also attending to institutional and structural issues that may be contributing to the organization's deficiencies in handling race-based issues. These two aspects of anti-racism organizational change are inextricably intertwined, and must be addressed in tandem in order to achieve success.

[7] I will commence this Report with my review and recommendations for updating the Criteria and Guidelines, which are addressed in the first two sections of this Report. The revised Criteria and Guidelines as proposed by this Report are appended [Appendix C].

[8] I will then turn to my discussion and recommendations for strengthening the Commission's assessment of race-based cases. The Commission's processes for dealing with race-based complaints, from Intake and Initial Review, through Mediation, Assessment under s. 41 of the Act, Assessment and Assessments under ss. 44 and/or 49 of the Act, and Tribunal hearings are addressed in Sections 3 to 11. Systemic discrimination and data collection are specifically addressed in Sections 12 and 13.

[9] A summary of my recommendations is appended [Appendix D].

1. Review of Criteria

[10] As stated above, as part of my work, I have been asked to review and update the criteria used by human rights officers in preparing their assessment reports under s. 44 of the Act, with an aim of ensuring that these tools provide effective guidance in assessing race-based complaints that raise subtle forms of discrimination.

[11] For this purpose, I have been provided with a set of documents headed "Complaint Criteria Legal Advice" dated November 9, 2015 and prepared by Legal Advisory Services (referred to collectively as the "Criteria"). While it is collectively comprised of a total of 28 pages, the Criteria are broken down into a series of two to three page components applicable to each section in the Act under which a s. 44 referral to the Tribunal may be made, from s. 5 through to s. 14.1 (with the exception of s. 11) and which could support a finding of a discriminatory practice. Employment cases under s. 7 of the Act are further broken down into three categories: (1) alleged adverse differentiation in employment; (2) alleged discrimination in the failure to receive a job, promotion or acting assignment; and (3) alleged discrimination in the termination of employment.

[12] For the purpose of my review, I have focused on the provisions in the Act under which race-based complaints most commonly are filed, namely s. 5 (services), s. 7 (employment), s. 10 (employment policies and practices) and s. 14 (harassment). However, the concerns expressed as a result of my review apply equally to the components of the Criteria relating to other provisions.

[13] The Criteria essentially provide a bare-bones framework to guide a human rights officer's assessment under s. 43 and to guide the preparation of the s. 44 assessment report. Each component of the Criteria starts by setting out the applicable provision from the Act. The Criteria then have a section entitled "Steps in the Assessment" which is virtually identical for each of the Criteria under s. 5, s. 7 and s. 10. This section states:

> There are two steps in the assessment:
>
> If there is sufficient information provided in Step 1 that supports the allegations in the complaint, then it is necessary to consider information regarding a defence at Step 2. If not, the analysis ends at Step 1.
>
> In Step 2, one of two defences will usually be considered: whether the respondent has a reasonable explanation for what happened that is not a pretext for discrimination; or whether the respondent has a *bona fide* occupational requirement for the alleged discriminatory practice.

The only difference is that for s. 5, the words "occupational requirement" in Step 2 are replaced by "justification".

[14] The Steps set out in the Criteria for s. 14 (harassment) are slightly different and will be discussed in more detail below.

[15] The Criteria then have a section headed "Step 1", which for ss. 5, 7 and 14 directs the officer to examine whether there is support for the complainant's allegation of discrimination (or harassment in the case of s. 14) by considering a number of questions. These questions will be addressed more specifically below. Step 1 under the Criteria for s. 10 similarly directs the officer to consider a number of questions, but without the introductory language. Those questions too with be addressed more specifically below. The one exception under s. 7 is the Criteria that apply to an allegation of discrimination in hiring or promotion. This too will be discussed in greater detail below.

[16] The Criteria then has a section headed "Step 2", which for ss. 5, 7 and 10 sets out what are described as two potential "defences" available to the respondent: (1) the "defence" of reasonable, non-pretextual explanation; and (2) the defence of *bona fide* occupational requirement (or justification in the case of s. 5). Under each of these defences, the officer is directed to consider either one question in the case of the first "defence", or a series of questions in the case of the second. The manner in which the first "defence" is characterized will be discussed in more detail below.

[17] In the Criteria under s. 14, Step 2 is different, and relates to the respondent's knowledge of and response to the alleged harassment. The way this is framed also will be addressed in more detail below.

[18] Finally, the Criteria for ss. 5, 7 and 10 each have a final section headed "complaints involving a possible failure to accommodate", which direct the officer to consider certain questions in cases where accommodation is an issue.

[19] My first observation is that the Criteria do not provide any particular guidance in the assessment of race-based complaints at all and not just those that raise subtle forms of racial discrimination, nor do they provide any particular guidance in the assessment of complaints under any particular protected ground. The Criteria are entirely generic, and not specific to any ground. Addressing any specific ground of discrimination does not appear to have been the intention of the Criteria. Rather, it appears that the Criteria were prepared with the intent of providing human rights officers with a generic template for assessments and the preparation of s. 44 assessment reports that could be applied to all complaints alleging a particular discriminatory practice. As a result, in my view, the Criteria cannot be faulted for not being something that it appears they were never intended to be.

[20] In relation to implementing tools to provide effective guidance in the assessment of race-based complaints generally and in particular those that raise subtle forms of discrimination, this was the specific purpose for which the Guidelines were prepared in 2019. The Guidelines will be discussed in more detail in the next section of this Report. In addition, as part of my work, I have developed a series of "Case Patterns" relating to the different types of allegations of race-based discrimination or harassment that commonly come before the Commission, with the view to providing officers with very detailed guidance on the assessment and assessment of race-based complaints within these case patterns. These materials are appended to this Report. In my view, it is the Guidelines and the Case Patterns, not the Criteria, that are the tools to provide effective guidance in the assessment of race-based complaints.

[21] Having said that, I have two general concerns about the Criteria that affect the assessment of complaints on all grounds, but that in my view have a particularly negative impact on race-based complaints, and especially on those that raise more subtle forms of racial discrimination. The first concern is that officers are directed by the Criteria to make factual findings or determinations, which is not properly part of the Commission's administrative screening function under s. 44 of the Act. And the second concern is that framing a respondent's reasonable, non-pretextual explanation as a "defence" is not correct. This error is compounded by the direction to the officer to consider at Step 1 whether the alleged conduct occurred and whether it was linked to a protected ground, prior to even considering the respondent's explanation. This exposes every claimant, and particularly every racialized claimant, to what is effectively a non-suit motion[1] at the outset of every assessment.

[22] These two concerns, independently and especially when taken together, have a profoundly negative impact on race-based complaints, because allegations of racial discrimination or harassment typically involve situations where the link to race is not explicit or readily discerned, making them notoriously difficult to prove at a Tribunal hearing. By requiring the officer to make a factual finding or determination at the s. 44

[1] At human rights hearings in the olden days, respondent counsel often would stand up at the close of the claimant's case and demand that the tribunal determine, on the basis of the claimant's evidence alone, whether the claimant had made out a *prima facie* case; and if the claimant had not, respondent counsel would demand that the case be dismissed. This was known as a "non-suit motion", after a similar procedure in the courts.

assessment stage that the alleged conduct occurred and that it was linked to race, the Commission is requiring racialized claimants to prove racial discrimination at the administrative screening stage, rather than to do so at the Tribunal hearing. This requirement of proof at the screening stage effectively weeds out a disproportionate number of race-based complaints alleging more subtle forms of discrimination. This problem is then compounded by subjecting the claimant to a non-suit motion at the s. 44 assessment stage, prior to even considering the respondent's explanation. Once again, doing so has a particularly disproportionate impact on race-based cases, where often the most compelling evidence in support of an allegation of racial discrimination derives from the respondent's failure to be able to provide a reasonable, rational or consistent explanation for its conduct.

[23] I will address each of these two general concerns in more detail below. Following that, I will address some additional concerns I have regarding individual components of the Criteria that apply in specific circumstances.

[24] I appreciate that my recommendations appear to set out some rather significant changes to the Criteria. However, I note that the recommendations I have made for updating the Criteria are consistent with the approach to the Commission's administrative screening function and the nature of the questions that should be asked in determining the appropriate s. 44 recommendation as set out in the more recent Guidelines. I also understand that in recent months, human rights officers have been encouraged to ask the question "what is the alleged negative treatment and is there <u>some information</u> that it occurred?" rather than the definitive "did it occur" question as set out in the current Criteria, which is closer to the changes to the Criteria I have recommended. I further understand that recently, some s. 44 reports have moved on to step 2 of the Criteria even though the officer cannot say with certainty whether the alleged negative treatment occurred, and that there also have been s. 44 reports where the officer concludes that it is not possible to determine whether there is a link or connection to race because credibility assessments are required and the referral recommendation is made on that basis. These developments are an indication that a more flexible approach already is

being taken to relying on the Criteria, which needs to be codified in the Criteria in light of how the law has developed in better articulating the Commission's screening function.

A. The Criteria invite the officer to make factual findings

[25] Each component of the Criteria invites the human rights officer to make factual findings or determinations at the s. 44 assessment stage. In particular, these factual findings and determinations are to be made at the Step 1 stage, and essentially require the officer to determine whether the claimant has proven their allegations.

[26] For example, in the Criteria under s. 5 (services), Step 1 directs the officer to consider in question (d), "What is the negative treatment alleged and did it occur?" (emphasis added). Then question (e) directs the officer to consider, "Is the alleged treatment linked directly or indirectly to [insert applicable grounds of discrimination]?"

[27] In Criteria 3.1 under s. 7 (alleged adverse differentiation in employment), Step 1 similarly directs the officer to consider in question (a), "What is the negative treatment alleged and did it occur?" (emphasis added), and in question (b), "Is the alleged treatment linked directly or indirectly to [insert applicable grounds of discrimination]?"

[28] In Criteria 3.3 under s. 7 (alleged discrimination in termination of employment), Step 1 directs the officer to consider in question (c), "Was the termination linked to [insert applicable grounds of discrimination]?"

[29] In the Criteria under s. 10 (employment policies and practices), Step 1 directs the officer to consider in question (c), "Does the standard deprive or tend to deprive an individual or class of individuals of any employment opportunities based on [insert applicable grounds of discrimination]?"

[30] In the Criteria under s. 14 (harassment), Step 1 directs the officer to consider in question (a), "Did the alleged harassing conduct occur?", and in question (f), "Was the conduct linked to [insert applicable grounds of discrimination]?"

[31] It is well-established that, while the Commission performs a screening function when assessing complaints under s. 44, it is not the job of the Commission to determine if the complaint is made out: *Syndicat des employés de production du Québec et de L'Acadie v. Canada (Canadian Human Rights Commission)*, [1989] 2 S.C.R. 879 ("*Syndicat*"); *Cooper v Canada (Human Rights Commission)*, [1996] 3 SCR 854, 140 DLR (4th) 193 (SCC) 2020; *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10, [2012] 1 SCR 364 ("*Halifax*"); *McIlvenna v Bank of Nova Scotia (Scotiabank)*, 2019 FC 1610 ("*McIlvenna*"); *Ennis v. Attorney General of Canada and Tobique First Nation*, 2020 FC 43.

[32] The Commission's screening role has been described in various ways. In *Syndicat*, above, the Supreme Court described this role as follows:

> The Commission is not an adjudicative body; that is the role of a tribunal appointed under the Act. When deciding whether a complaint should proceed to be inquired into by a tribunal, the Commission fulfills a screening analysis somewhat analogous to that of a judge at a preliminary inquiry. It is not the job of the Commission to determine if the complaint is made out. Rather its duty is to decide if, under the provisions of the Act, an inquiry is warranted having regard to all the facts. ...
>
> The other course of action is to dismiss the complaint. In my opinion, it is the intention . . . that this occur where there is insufficient evidence to warrant appointment of a tribunal . . . It is not intended that this be a determination where the evidence is weighed as in a judicial proceeding but rather the Commission must determine whether there is a reasonable basis in the evidence for proceeding to the next stage.

[33] In *Halifax*, above, at paras. 23-24, the Supreme Court stated:

> What is important here is that a decision to refer a complaint to a board of inquiry is not a determination that the complaint is well founded or even within the purview of the Act. Those determinations may be made by the board of inquiry. In deciding to refer a complaint to a board of inquiry, the Commission's function is one of screening and administration, not of adjudication.
>
> . . . While there is some limited assessment of the merits inherent in this screening and administrative role, the Commission is not making any final determination about the complaint's ultimate success or failure.

[34] At para. 50, the Court said (citing the *Zundel* decision):

> While no doubt the Commission, in deciding to refer for inquiry, has some quite limited role to screen the merits of the complaint, its task is not to decide the issues which underlie its decision to proceed to the next stage; these are left to the board of inquiry.

[35] In *Wagmatcook First Nation v. Oleson*, 2018 FC 77 ("*Wagmatcook*"), the Federal Court stated at paras. 18-19:

> When the Commission decides that an inquiry is warranted, it undertakes only a limited assessment of the merits of the complaint, and its conclusions are not a final determination . . .
>
> Indeed, the Commission may only consider the sufficiency, not the weight, of the evidence before it.

[36] The Court further stated, at para. 41:

> . . . it is not the Commission's role to adjudicate the dispute and make a "finding" of differential treatment or otherwise decide whether discrimination took place. Rather, the Commission only considers the sufficiency of any

evidence before it to determine whether an inquiry is warranted in all of the circumstances.

[37] At para. 44, the Court stated:

> . . . the Commission's role is not to resolve factual disputes, but to consider whether an inquiry is warranted, based on the sufficiency of the evidence and all the circumstances before it . . . Thus, when the Commission decided to refer Ms. Oleson's complaint to the Tribunal, all it concluded was that the evidence before it required consideration and weighing by the Tribunal . . .

[38] And at para. 47:

> . . . the Commission identified a live dispute. Further, even if the Commission could be said to have framed Ms. Oleson's position generously on these points, the Commission's job was not that of deciding or weighing evidence, but only ensuring its sufficiency.

[39] In *McIlvenna*, above, the Court stated:

> A sufficiency analysis is not designed to take sides or determine points in a complaint. This is not a balance of probabilities matter but a question of whether a reasonable basis for a referral to the Tribunal exists. Credibility and weight are usually the preserve of the Tribunal.

[40] I have been referred to the Federal Court's decision in *Canada (Attorney General) v. Tran*, 2011 FC 1519 ("*Tran*") for the proposition that the Commission is not only entitled, but in fact is obliged, to assess credibility in making its determination under s. 44 as to whether a referral to the Tribunal is warranted. The *Tran* decision distinguishes prior Federal Court decisions stating that it is not the Commission's role to assess credibility as part of its administrative screening function, and relies on other Federal Court decisions to hold that the Commission is obliged to subject the evidence to a "hard look"

before referring a complaint to the Tribunal, which obliges the investigator to consider the factors that favour and negate the evidence being assessed.

[41] While the *Tran* decision has been relied upon by some subsequent Federal Court decisions, I note that the approach taken in *Tran* is not consistent with the approach recently taken in *McIlvenna*, above, where the Federal Court is clear that the assessment of credibility is usually the reserve of the Tribunal, or in *Ennis*, above, where the Court states (at para. 33) that while not every conflict in the evidence is sufficient for a referral to a tribunal, evidentiary conflicts with "some level of relevance and importance on an objective basis" are.

[42] I note that in making its ruling, the *Tran* decision does not make reference to the Supreme Court of Canada's decision in *Syndicat*, above, or to the Supreme Court's admonition against the Commission "weighing the evidence as in a judicial proceeding". In my view, the Court's direction in *Tran* that a Commission investigator is obliged to consider factors that favour or negate the evidence and to make assessments of credibility is precisely the kind of weighing of evidence that the Supreme Court found was not the Commission's proper role. Further, the *Tran* decision is inconsistent with the Supreme Court's decision in *Halifax*, above, which held that it is not the Commission's role to decide the issues or make a final determination in the case. In my view, requiring a Commission investigator to make credibility assessments and consider factors that favour or negate the evidence is essentially requiring the investigator to decide the issues and make a final determination in the case, especially where making an unfavourable credibility assessment against the claimant and preferring the respondent's evidence would result in dismissal of the complaint.

[43] In addition, the *Tran* decision is inconsistent with the decision of the Ontario Court of Appeal in *Khan v. Ottawa (University of)*, 1997 CanLII 941, which held that, where credibility is a central issue, an oral, in-person hearing is required. Notably, in reaching this conclusion, the Court relied upon the Supreme Court of Canada's decision in *Singh v. Canada (Minister of Employment and Immigration)*, 1985 CanLII 65, which is binding

on the Federal Court. While a Commission investigator may interview the parties by phone as part of the assessment, that is not the same as the kind of oral, in-person hearing that can only be held by the Tribunal.

[44] In my view, the *Tran* decision is an example of bad facts making bad law. In that case, the key respondent witness was not even interviewed by the investigator as part of the assessment, due to a mix-up about the respondent's representative. Without even interviewing this key witness, the investigator issued a report determining that there was a credibility issue as between the claimant and this key witness, such that referral to the Tribunal was warranted. After receiving the report but prior to the Commission's decision, the respondent requested that its key witness be interviewed by the investigator, who declined to do so. In these circumstances, there is little wonder that the Commission's decision was overturned.

[45] In my view, the weight of judicial authority, and particularly from the Supreme Court of Canada, favours the proposition that, while the Commission may have some limited role in considering credibility, it is not a proper part of the Commission's administrative screening function for the Commission to engage in any kind of detailed credibility assessment on important or central issues, except perhaps where the claimant's evidence is inherently implausible.

[46] In distilling the principles established in these cases, it can be stated that the Commission's proper role in performing its administrative screening function under s. 44 is <u>not</u> to:

- Perform an adjudicative function
- Determine if the complaint is made out or well-founded
- Make any final determination about the complaint's ultimate success or failure
- Decide the issues which underlie its decision to proceed to the next stage

- Draw conclusions that are a final determination of the merits of the complaint
- Adjudicate the dispute and make a "finding" of differential treatment or otherwise decide whether discrimination took place
- Weigh the evidence as in a judicial proceeding
- Consider the weight of the evidence before it
- Resolve factual disputes, conflicts in the evidence or credibility issues on important or central points
- Decide or weigh evidence on the balance of probabilities

[47] On the other hand, all of these decisions recognize that the Commission performs an administrative screening role when making a decision under s. 44, which requires some assessment of the sufficiency of the evidence. In this regard, in distilling the principles established in these cases, it can be stated that the Commission's proper role in performing this screening function is to:

- Perform an administrative function
- Determine whether there is a reasonable basis in the evidence for proceeding to the next stage
- Assess whether there is a reasonable basis on the law or the evidence to refer the complaint to the Tribunal
- Consider only the sufficiency, not the weight, of the evidence before it, which may include some limited consideration of credibility

[48] In my view, when human rights officers are directed in the Criteria to consider whether the claimant's allegations of negative treatment "occurred" and whether the alleged treatment is linked directly or indirectly to a protected ground, they are effectively being asked to make a determination whether the complaint is made out or well-founded, to decide the issues, to draw conclusions that are a final determination of the complaint, to adjudicate the dispute, and to make a finding of whether differential treatmentor

discrimination took place. This is precisely what the Courts have consistently said is not the Commission's function.

[49] In my view, what human rights officers really should be directed to do in the Criteria is to consider whether there is a reasonable basis to support that the claimant's allegations could have occurred, and whether there is a reasonable basis to support that the claimant's allegations could be linked to race (or any other protected ground). In making this assessment, officers should consider the totality of the evidence and circumstances relating to the complaint, including the evidence from both the claimant and the respondent. And in making this assessment, the officer should not be trying to resolve conflicts in the evidence or factual disputes or make assessments of credibility on key issues, unless there is clear and compelling evidence to support one side or the other.

[50] I use the term "could" in framing what the officer should be considering due to the Supreme Court's discussion of what is meant by "reasonableness" in the *Halifax* decision (above, at paras. 44ff). While I appreciate that this discussion takes place in the context of the standard of review, I note that Justice Cromwell's discussion of reasonableness is blended with his discussion of the Commission's proper screening role. When discussing what is meant by "reasonableness", Cromwell J. notes that "certain questions that come before administrative tribunals do not lend themselves to a single result". In the standard of review context, it has long been recognized that when applying the reasonableness standard, the reviewing court is not deciding what decision it would have made in the circumstances, but merely whether the decision was reasonable; and that a decision may be reasonable even if in conflict with other decisions of the same administrative tribunal: see *Dunsmuir* and more recently *Vavilov*.

[51] My point here is that the same approach should be taken to the Commission's screening function in determining whether there is a "reasonable" basis in the evidence to support proceeding to a Tribunal hearing. By using the word "reasonable", this connotes that there could be different potential outcomes from the Commission's decision. The Tribunal may decide to uphold the complaint and find a violation of the Act,

or the Tribunal may dismiss the complaint. That is the Tribunal's role and function, not the Commission's. So in determining whether there is a reasonable basis in the evidence to warrant referral to the Tribunal, the Commission should be considering whether there is a reasonable basis in the evidence to support that the alleged conduct could have occurred and could be linked to race.

Recommendation 1.1: That the Criteria be amended to replace Step 1 questions that call for the human rights officer to make a factual finding or determination to instead state: "Is there a reasonable basis in the evidence to support that the negative treatment could have occurred?" and "Is there a reasonable basis in the evidence to support that the alleged treatment could be linked to [insert applicable grounds of discrimination]?"

B. The Criteria effectively subject the Claimant to a Non-Suit Motion

[52] As reviewed above, the Criteria divide the analysis under most provisions into two steps, and contain a specific direction to the officer not to proceed to Step 2 if there is insufficient information to support the allegations at Step 1. The Criteria then place the consideration of whether the respondent can provide a reasonable explanation for what happened that is not a "pretext" for discrimination at Step 2, and refers to this as a "defence".

[53] In fact, as discussed in detail in the Ontario Court of Appeal decision in *Peel Law Association v. Pieters*, 2013 ONCA 396 ("*Pieters*"), the question of whether a respondent has a reasonable, rational, consistent and credible non-discriminatory explanation for the conduct at issue is not a "defence" in the way that a *bona fide* occupational requirement is a defence under s. 15(1)(a) or undue hardship is a defence under s. 15(2). The latter are statutory defences available to a respondent once a claimant has proven *prima facie* discrimination, and shift the legal burden to the respondent to affirmatively prove the elements of the defence.

[54] In contrast, the question of whether the respondent has a reasonable, rational, consistent and credible non-discriminatory explanation for the conduct at issue is simply the second step of the circumstantial evidence test. In a circumstantial evidence case, as are virtually all raced-based cases, an initial evidentiary burden rests with the claimant to bring forward a *prima facie* case of discrimination. It has been recognized that in the context of the circumstantial evidence test, this is a very low burden on the claimant, as it only serves the purpose of shifting an evidentiary burden onto the respondent to come forward with evidence of a reasonable, rational, consistent and credible non-discriminatory explanation. Once the respondent has done that, the circumstantial evidence test proceeds to the third and ultimate question, which is whether on a balance of probabilities, an inference of discrimination is more probable from the evidence than the actual explanation offered by the respondent: see *Shaw v. Phipps*, 2010 ONSC 3884 (Div.Ct.) at para. 77 aff'd at 2012 ONCA 155.

[55] The *Pieters* decision has consistently been followed by the Canadian Human Rights Tribunal, including the adoption of the distinction between a respondent's rebuttable explanation for its actions and a respondent's assertion of a statutory defence: see for example *A.B. v. Eazy Express Inc.*, 2014 CHRT 35 at para. 13 and the many CHRT cases citing this. *Pieters* also was cited with approval by the Federal Court in *Canada (Attorney General) v. Davis*, 2017 FC 159.

[56] I hasten to note that this is the kind of analysis applied in a circumstantial evidence case when the complaint is before the Tribunal, and does not represent the test to be applied in the performance of the Commission's administrative screening role.

[57] At the same time, there are two important points that emerge from the *Pieters* decision that are pertinent to the Commission's proper role. First, the respondent's explanation is not a "defence", but rather is simply a step in the circumstantial evidence process imposing an evidentiary burden on the respondent to provide an explanation. It is at the next stage where the tribunal makes a final determination as to whether discrimination occurred.

[58] Second, once a respondent has actually come forward with its explanation, there is no longer any need to engage the first two steps of the test, and the tribunal can move directly to the ultimate issue. As stated by the Court of Appeal in *Pieters* (at para.83):

> . . . in a case where the respondent calls evidence in response to the application, the *prima facie* case framework no longer serves that function. After a fully contested case, the task of the tribunal is to decide the ultimate issue whether the respondent discriminated against the applicant. After the case is over, whether the applicant has established a *prima facie* case, an interim question, no longer matters. The question to be decided is whether the applicant has satisfied the legal burden of proof of establishing on a balance of probabilities that the discrimination has occurred.

[59] The reason this is important for the Commission is that, by the time a case has proceeded to the s. 44 assessment stage, the respondent has already provided its response to the merits of the complaint and has already participated in the assessment, and so has already come forward with its explanation for the conduct at issue. At that stage, what the human rights officer needs to do is to consider the evidence in its totality in order to assess whether there is a reasonable basis in the evidence to support that an inference of discrimination could be more likely than the respondent's explanation.

[60] Instead, the separation of the consideration of the sufficiency of the evidence to support the complaint in Step 1 from consideration of the respondent's explanation at Step 2 suggests that what the officer is being directed to do in every case is to determine whether the claimant has made out a *prima facie* case before considering the respondent's explanation. As made clear in *Pieters*, that is not a requirement even where a case proceeds to a tribunal hearing, and effectively puts a higher burden on claimants than what the caselaw sets out.

[61] As stated by the Court of Appeal in *Pieters* at para. 86 (citing its prior decision in *Shaw*):

> In *Shaw*, the court rejected the respondent's contention that the tribunal was obliged to declare whether the prima facie test was met at the end of the applicant's case and before the respondent presented his case. Lang J.A. rejected that contention saying at para. 28 "Where, as here, the person alleged to have discriminated chooses to give evidence, the Adjudicator must decide the case based on all the evidence."

[62] The importance of the consideration of the respondent's explanation is particularly significant in racial discrimination cases. As we know, it is often difficult for a claimant to affirmatively articulate the basis for the link between what happened and the race-based ground when the racial discrimination is subtle and not explicit. In these circumstances, it is often critical to consider the respondent's explanation for its conduct, and to probe whether this explanation stands up to scrutiny, and is reasonable, rational, consistent and credible. Knowing what we know about how racial bias operates, it is often the respondent's inability to provide a reasonable, rational, consistent and credible explanation for what it did that is suggestive of racial bias.

[63] As stated in *Pieters* (at para. 72):

> The question whether a prohibited ground is a factor in the adverse treatment is a difficult one for the applicant. Respondents are uniquely positioned to know why they refused an application for a job or asked a person for identification. In race cases especially, the outcome depends on the respondents' state of mind, which cannot be directly observed and must almost always be inferred from circumstantial evidence. The respondents' evidence is often essential to accurately determining what happened and what the reasons for a decision or action were.

[64] If the Commission wants to consider the sufficiency of the claimant's evidence in support of the complaint in the absence of the respondent's explanation, then the appropriate time to do that is through an assessment under s. 41 of the Act. As we know, in order to justify dismissal through a s. 41 assessment, the facts alleged in the complaint must be taken to be true and it must be "plain and obvious" that there is no proper basis

for the complaint. But that is not the proper approach to be taken at the s. 44 assessment stage.

[65] The impact of the approach taken in the Criteria is to subject the claimant to what is effectively a "non-suit motion" in every s. 44 assessment. At human rights hearings in the olden days, respondent counsel often would stand up at the close of the claimant's case and demand that the tribunal determine, on the basis of the claimant's evidence alone, whether the claimant had made out a *prima facie* case; and if the claimant had not, respondent counsel would demand that the case be dismissed. This was known as a "non-suit motion", after a similar procedure in the courts. However, as we have seen from the *Pieters* and *Shaw* decisions, even a human rights tribunal, let alone the Commission, does not need to entertain a non-suit motion at the conclusion of every claimant's case. In particular, with the Commission, the appropriate stage at which to consider any "non-suit motion" is through a s. 41 assessment, and not under s. 44.

[66] As a result, in my view, the consideration of whether the respondent has provided a reasonable, rational, consistent and credible non-discriminatory explanation should not be referred to as a "defence" and should be taken out of Step 2. Instead, as part of the questions to be considered under Step 1, the Criteria should include the following questions: "Has the respondent provided an explanation for what happened?" and "Is there a reasonable basis in the evidence to question whether the respondent's explanation is reasonable, rational, consistent and credible?"

[67] In making this recommendation, I have avoided the use of the terms "pretext" or "non-pretextual" which are currently used in the Criteria. While these terms were developed in past jurisprudence and still sometimes get referenced today, in my view the continued use of these terms serves to contribute to the misperception of racism and racial discrimination as being necessarily intentional or deliberate. For a respondent to provide an explanation for alleged discrimination that is a "pretext" suggests that the respondent is deliberately covering up for intentional behaviour. While that may sometimes be the case, it more often is not. Where racial discrimination is the result of

unconscious racial bias, the respondent may sincerely believe that the explanation it provides is sensible, but the explanation still may not withstand scrutiny as to whether it is reasonable, rational, consistent and credible. It is in the interstices of this dissonance between the respondent's explanation and its inability to withstand scrutiny that one finds evidence of the operation of racial bias. To avoid the perpetuation of the misguided link between racial discrimination and intentional behaviour, I have recommended replacing the "pretext" language in the Criteria with the consideration of whether the respondent has provided a reasonable, rational, consistent and credible non-discriminatory explanation.

Recommendation 1.2: In the Criteria, the consideration of whether the respondent has provided a reasonable, non-pretextual explanation should not be referred to as a "defence" and should be taken out of Step 2. Instead, as part of the questions to be considered under Step 1, the Criteria should include the following questions: "Has the respondent provided an explanation for what happened?" and "Is there a reasonable basis in the evidence to question whether the respondent's explanation is reasonable, rational, consistent, credible and non-discriminatory?"

C. Other Concerns

(a) Criteria 3.2 (s. 7 – hiring or promotion)

[68] Criteria 3.2 applies to complaints under s. 7 of the Act alleging discrimination in the failure to receive a job, promotion or secondment. While Criteria 3.2 shares the same problems I have identified above in relation to the Criteria as a whole, the manner in which Criteria 3.2 is expressed raises issues that are unique to hiring or promotion cases.

[69] Step 1 of the analysis as set out in Criteria 3.2 is a statement of what is often referred to in the caselaw as the "*Shakes* test" for *prima facie* discrimination in the context of a job competition. The "*Shakes* test" requires a claimant to establish the following:

a. That the applicant applied for and was denied the position;
b. That the applicant has a personal characteristic that is identifiedby a prohibited ground;
c. That the applicant was qualified for the position; and
d. That another candidate was hired or promoted who does not share the same personal characteristic and is no better qualified.

[70] The *Shakes* test has been subjected to a significant amount of criticism in the caselaw. See for example *Ogunyankin v. Queen's University*, 2011 HRTO 1910, at paras. 89 to 101; *Blakely v. Queen's University*, 2012 HRTO 1177.

[71] In particular, without considering the totality of the evidence from both the claimant and the respondent, it is nearly impossible to assess whether the successful candidate was "no better qualified" than the claimant. In most hiring and promotion cases, that is the very nub of the issue. Particularly in racial discrimination cases, it is often the examination of the respondent's explanation in the context of the nature of the job at issue, the kinds of qualifications, skills and experience that are relevant, and the comparison of the claimant to the successful candidate that is most revealing about whether discriminatory racial bias was involved.

[72] So in terms of Criteria 3.2, not only is the separation of Step 1 from the respondent's explanation in Step 2 problematic, but even within Step 1 it also is problematic to require the claimant to prove that the successful candidate was "no better qualified" as required by question (d) under Step 1.

[73] As a result, in my view, Criteria 3.2 should be amended so that question (d) under Step 1 reads, "If the claimant did not receive the employment opportunity, is there a reasonable basis in the evidence to support that someone who could be no better qualified or no more eligible but who lacks the claimant 's characteristic based upon [insert applicable grounds of discrimination] obtained the employment opportunity?"

[74] The recommendation below reflects this proposed change to Criteria 3.2 as well as the changes proposed by Recommendations 1.1 and 1.2.

Recommendation 1.3: That Criteria 3.2 be amended to incorporate the following changes to the Step 1 questions as follows: so that question (b) states, "Is there a reasonable basis in the evidence to support that the claimant could have met the essential qualifications or could otherwise have been eligible for the employment opportunity?"; so that question (d) reads, "If the claimant did not receive the employment opportunity, is there a reasonable basis in the evidence to support that someone who could be no better qualified or no more eligible but who lacks the claimant's characteristic based upon [insert applicable grounds of discrimination] obtained the employment opportunity?"; and so that question (e) reads, "Is there a reasonable basis in the evidence to indicate that the respondent could have continued to seek applicants or candidates for the employment opportunity, based on the same qualifications or eligibility criteria?" Criteria 3.2 should be further amended so that the consideration of whether the respondent has provided a reasonable, rational, consistent and credible non-discriminatory explanation should not be referred to as a "defence" and should be taken out of Step 2. Instead, as part of the questions to be considered under Step 1, Criteria 3.2 should include the following questions: (f) "Has the respondent provided an explanation for what happened?" and (g) "Is there a reasonable basis in the evidence to question whether the respondent's explanation is reasonable, rational, consistent, credible and non-discriminatory?"

b) Criteria for s. 10 (employment policies and practices)

[75] The Criteria applicable to complaints under s. 10 relates to employment policies or practices that are alleged to be discriminatory. I have two concerns arising from these Criteria.

[76] First, as discussed above, at least question (c) under Step 1 falls afoul of the admonition for the Commission not to be making factual findings or determinations as part of its administrative screening function. This question needs to be re-worded so that it states, "Is there a reasonable basis in the evidence to support that the standard or

agreement could have deprived or tended to deprive an individual or class of individuals of any employment opportunities based on [insert applicable grounds of discrimination]?"

Recommendation 1.4: That the Criteria for s. 10 (allegations of a discriminatory policy or practice) be amended so that question (c) under Step 1 reads, "Is there a reasonable basis in the evidence to support that the standard or agreement could have deprived or tended to deprive an individual or class of individuals of any employment opportunities based on [insert applicable grounds of discrimination]?"

[77] Second, it is unclear how the issue of the respondent providing a reasonable, non-pretextual explanation for what happened arises in the context of a s. 10 complaint. I appreciate that the respondent may take the position that it did not have the alleged policy or practice at all, or did not rely on the policy or practice in doing what it did. But that is not an explanation that absolves the respondent of potential liability under the Act. If the claimant nonetheless experienced the deprivation of some employment opportunity as a result of what the respondent did, then the fact that what the respondent did wasn't under a policy or practice just means that the complaint is under s. 7, not s. 10. And it would be in the s. 7 context that the respondent's explanation would be considered.

Recommendation 1.5: Consider removing reference to the respondent's explanation as a consideration under the Criteria for s. 10. Instead the Criteria for s. 10 should state, "If the respondent alleges that it did not have the policy or practice, or that it did not rely on the policy or practice, then the respondent's position should be analyzed under s. 7."

c) Criteria under s. 5 (services)

[78] I will raise one small additional point in relation to the Criteria under s. 5. Under "Step 2 – Defence of *bona fide* justification (BFJ)", question (a) refers to the "policy, practice, rule or standard". While that is the language applicable in the employment context under s. 10, the defence in the context of services uses the term "justification" in s. 15(1)(g) which is much broader than a "policy, practice, rule or standard".

[79] I won't make any specific recommendation arising from this point, but did want to raise it as part of my review.

d) Criteria – Complaints involving a possible failure to accommodate

[80] Most of the Criteria include a final section headed "Complaints involving a possible failure to accommodate". While this is beyond the scope of my work in relation to race-based complaints, I simply note that the questions in this section similarly invite the human rights officers to make factual findings or determinations, and should be amended.

[81] However, as this is beyond the scope of my work, I again will not make any specific recommendation.

2. Review of Guidelines

[82] I also have been asked to review and update the guidelines used by human rights officers in relation to race-based complaints, with an aim of ensuring that this tool provides effective guidance in assessing race-based complaints that raise subtle forms of discrimination.

[83] For this purpose, I have been provided with a document entitled "Overview of Key Points for the Assessment / Assessment of Race-Based Complaints" prepared in fall 2019 and identified as being solicitor-client privileged (the "Guidelines"). The Guidelines provide points for human rights officers to consider when conducting screening assessments of race-based complaints under s. 41 of the Act, when conducting assessments of race-based complaints under s. 43 of the Act, when dealing with competing versions of events and issues of credibility, and when determining the appropriate recommendation for race-based complaints under s. 44 of the Act.

[84] The Guidelines are specifically targeted to the assessment and assessment of race-based complaints, and in my view do an excellent job of providing effective guidance in assessing race-based complaints generally, and in particular those raising subtle forms of racial discrimination. The Case Patterns that I have developed as part of my work are an attempt to build on the Guidelines, and to apply those general principles in a more specific and structured way to the common types of race-based complaints filed with the Commission.

[85] I have only minor recommendations to make in relation to the Guidelines. First, on page 2, 3rd bullet point, the Guidelines state:

> A complainant does not need to prove that his/her race was definitely a factor in the alleged treatment. The standard is "balance of probabilities", which means they must show that it is "more probable than not" or at least a 51% likelihood that their race was a factor. A "subtle scent" of discrimination is all that is required. (*Basi*)

[86] My concern here is that the balance of probabilities standard is the standard of proof applied at a hearing before the Tribunal, and is not the standard that an officer should be applying at the s. 44 assessment stage. My recommendation is that this language be replaced by stating, "It is sufficient to support a referral recommendation if there is a reasonable basis in the evidence to support that the claimant's race could have been a factor". Making this change reinforces the reference to the *Basi* decision, as using the concept of a "subtle scent" of racial discrimination is a good way to describe the standard that the officer should be applying in making a referral recommendation under s. 44.

Recommendation 2.1: That the Guidelines on page 2, 3rd bullet point should be amended to read as follows: "A complainant does not need to prove that his/her race was definitely a factor in the alleged treatment. It is sufficient to support a referral recommendation is there is a reasonable basis in the evidence to support that the claimant's race could have been a factor. A "subtle scent" of discrimination is all that is required. (*Basi*)"

[87] Second, on page 2, 6th bullet point, the Guidelines use the language "to make an inference that it is more likely than not that the complainant's race was a factor in the alleged treatment". Once again, this refers to the standard of proof applied at a Tribunal hearing, and not the standard to be applied under s. 44. This language should be changed to say, "to conclude that there is a reasonable basis in the evidence to make an inference that the claimant's race could have been a factor in the alleged treatment".

Recommendation 2.2: That the language in the Guidelines at page 2, 6th bullet point be changed from "to make an inference that it is more likely than not that the complainant's race was a factor in the alleged treatment", to "to conclude that there is a reasonable basis in the evidence to make an inference that the claimant's race could have been a factor in the alleged treatment".

[88] Third, consistent with the recommendations made in relation to the Criteria, the references to Step 1 and Step 2 should be removed from the headings in the Guidelines. The second main heading on page 1 can be amended to read, "Key Points and Tips re: the Assessment Criteria" and the main heading on page 3 can be removed. In addition, the sub-headings in the Guidelines need to be changed to reflect the changes recommended to the considerations identified in the Criteria, as follows: the first sub-heading on page 1 should be changed to read "What is the negative treatment alleged and is there a reasonable basis in the evidence to indicate that it could have occurred?"; the second sub-heading on page 1 should be changed to read, "Is there a reasonable basis in the evidence to support that the alleged treatment could be linked directly or indirectly to the ground of race / colour / national or ethnic origin?"; and the sub-heading on page 3 should be changed to read, "Is there a reasonable basis in the evidence to question whether the respondent has provided a reasonable, rational, consistent, credible and non-discriminatory explanation?"

Recommendation 2.3: That the references to Step 1 and Step 2 be removed from the headings in the Guidelines; that the second main heading on page 1 be amended to read, "Key Points and Tips re: the Assessment Criteria"; and that the main heading on page 3 be removed. In addition, that the sub-headings in the Guidelines be changed as follows: that the first sub-heading on page 1 be changed to read "What is the negative treatment alleged and is there a reasonable basis in the evidence to indicate that it could have occurred?"; that the second sub-heading on page 1 be changed to read, "Is there a reasonable basis in the evidence to support that the alleged treatment could be linked directly or indirectly to the ground of race / colour / national or ethnic origin?"; and that the sub-heading on page 3 be changed to read, "Is there a reasonable basis in the evidence to question

whether the respondent has provided a reasonable, rational, consistent, credible and non-discriminatory explanation?"

[89] Fourth, at page 4, 1st bullet point, the Guidelines make reference to competing versions of the alleged incidents and whether there is "concrete" evidence to support one party's version over another. I am concerned about the use of the term "concrete", because it may be interpreted to suggest that if one person's version is supported by documentary evidence, it can be preferred. In my view, better language would be "clear and reasonably indisputable evidence". In my view, in the context of the Commission's administrative screening function, that is the kind of evidence that would be required to justify the making of the kind of credibility assessment or weighing of evidence that is typically reserved for the adjudicative function of the Tribunal.

[90] In addition, in the last sentence in this point, reference is made to referral usually being best if "complex" credibility assessments are required. The caselaw is clear that the Commission should not be making credibility assessment on key issues, whether complex or not. This is the preserve of the Tribunal. Further, if a credibility assessment is required on a key issue, it is not just "usually best" to recommend referral; it is my view that it is required. So I would replace that language as well.

Recommendation 2.4: That the following changes be made to the Guidelines at page 4, 1st bullet point: that the word "concrete" in the second line be replaced by "clear and reasonably indisputable"; that the word "complex" be removed from the fifth line; that the words "on key issues" be added after "assessments" in the 6th line; and that the final phrase "it is usually best to refer it to the Tribunal" be replaced with "a recommendation to refer it to the Tribunal should be made".

[91] A similar change needs to be made to the 2nd bullet point on page 4, once again to replace the word "complex" with "clear and reasonably indisputable".

Recommendation 2.5: That the Guidelines at page 4, 2nd bullet point be changed to replace the word "complex" with "clear and reasonably indisputable".

[92] And again, a similar change needs to be made to the first bullet point in the referral column of the chart on page 4, to replace the words "concrete / direct" with "clear and reasonably indisputable".

Recommendation 2.6: That the Guidelines at page 4, 1st bullet point in the referral column in the chart be changed to replace the words "concrete / direct" with "clear and reasonably indisputable".

[93] I have concerns about the language used in the dismissal column of the chart on page 4 of the Guidelines. This language suggests that the human rights officer is making a factual finding or determination at the s. 44 assessment stage as to whether the respondent has provided a credible and reasonable non-discriminatory explanation. For the reasons stated above, that is the Tribunal's role at an adjudicative hearing, not the Commission's role when exercising its administrative screening function.

[94] Accordingly, this language needs to be changed to indicate that dismissal of the complaint is only warranted where there is no reasonable basis in the evidence to question whether the respondent has provided a credible and reasonable non-discriminatory explanation, and that there is no reasonable basis in the evidence to question that the respondent's explanation suffices to establish that race could not even have been one factor in its conduct.

[95] Finally, consistent with the above recommendations, the reference to "concrete / direct" in the third bullet point needs to be changed to "clear and indisputable" and the word "key" added before the word "allegations" in the last line.

Recommendation 2.7: That the Guidelines at page 4 in the dismissal column of the chart be amended as follows: that the 1st bullet point be replaced with "There is no reasonable basis in the evidence to question whether the respondent has provided a credible and reasonable non-discriminatory explanation in response to central allegations raised in the complaint"; that the 2nd bullet point be replaced with "There is no reasonable basis in the evidence to question whether the respondent's explanation suffices to establish that race could not have been even one of the factors in its conduct (directly or indirectly; consciously or subconsciously)"; and that the 3rd bullet point be replaced with "There is clear and reasonably indisputable evidence that disproves the key allegations of the claimant".

3. Intake and Initial Review

[96] Intake and Initial Review at the Commission are responsible for receiving complaints filed by claimants under the Act. This group also deals with public inquiries as to whether claims fall within the Commission's jurisdiction.

[97] Due to limited resource issues, complaints filed at the Commission are predominantly self-drafted by the claimant or any representative they may have. The Commission does provide assistance in drafting complaints to claimants who are most vulnerable and have the highest needs.

[98] Once a complaint is filed, it is reviewed by a human rights analyst to ensure that the complaint is in a form acceptable to the Commission, and contains all of the information required to proceed with the complaint. Of relevance to my work, it is at this stage that the analyst or the Initial Review team may have follow-up questions to the claimant, which in most cases are sent in writing, if the complaint as filed does not in the analyst's view contain sufficient information to show a link or connection between the adverse treatment alleged and the race-based ground.

[99] I have a number of concerns arising from the Commission's intake and initial review process.

[100] It is well-known that race-based complaints are among the most difficult to articulate and prove, because they often are based on very subtle forms of discrimination. For a self-represented claimant, which is the vast majority of persons filing complaints with the Commission, it is often difficult for them to articulate in detail the basis upon which they believe that the adverse treatment they experienced is linked or connected to their race. Often this is because the link to race is intuitively obvious to them, based on their lived experience of racism. And often they lack the knowledge of social science and race

analysis literature that has provided people in the human rights world with the language to dig down into the details of what happened and identify the patterns, indicia or manifestations that are common in racial discrimination cases.

[101] So, by requiring most racialized claimants to self-draft their own complaints and by failing to provide claimants with the kind of expert assistance they require to fully articulate the link or connection to race, the Commission has created a barrier that impedes racialized claimants from filing fully and properly articulated race-based complaints. This barrier has ramifications throughout the Commission's process: it may cause the analyst or the initial review team to question the validity of the complaint at the intake stage; it may lead to dismissal of the complaint under s. 41; it may effect the nature and scope of any assessment under s. 43; it may cause the Commission to dismiss the complaint under s. 44. All of this can, and does, occur because the resources were not available at the front end to assist racialized claimants to fully and properly articulate their complaints.

[102] This barrier is compounded by the fact that most of the initial communications with the Commission are in writing. While the process may start with the claimant making a telephone inquiry to the Commission, the next step almost always will be for the claimant to set out the details of the complaint in writing and submit that to the Commission, whether on-line or by mail. If the human rights analyst has questions about the sufficiency of the information in the complaint, these questions generally are raised in writing and a written response required.

[103] Once again, this represents a significant additional barrier for many racialized claimants. Some racialized claimants may be recent immigrants for whom English or French is not their first language. Some may have difficulty expressing themselves in writing. And as stated above, virtually all such claimants will not have access to the kind of specialized language that human rights experts use when discussing and analyzing the more subtle forms of racial discrimination.

[104] This barrier is even further compounded by language barriers. Not only may some racialized claimants have difficulty articulating themselves in English or French, some may not speak either of these languages and may only be able to fully and properly express themselves in their own language. No interpretation services are offered by the Commission to assist claimants in such circumstances.

[105] In the world of private human rights processes, best practices regard it as an essential first step for the person dealing with an internal human rights complaint to meet with the claimant in person and to carefully and fully review their allegations and the basis upon which they are claiming a link or connection to a prohibited ground of discrimination. This is especially important in race-based complaints for the reasons articulated above. The interviewer generally will have human rights and race analysis expertise, which will enable them to ask probing questions of a racialized claimant in order to tease out the basis for the link or connection to race. Based on this interview, a detailed complaint typically will be prepared for the claimant's review, fully setting out the allegations raised and the basis for the link or connection to race. This complaint will then be used as the basis for further steps in the process, including being used to provide notice of the allegations to the respondent and an opportunity to respond, to inform any mediation process, to guide the assessment, and in preparation of the assessment report. If interpretation services are required for the claimant, these typically will be provided at the private institution's cost.

[106] I appreciate that this is not a perfect world, and that the Commission does not have sufficient resources to proceed in accordance with the best practices described above. Nonetheless, if the Commission is committed to strengthening its handling of race-based cases, this commitment needs to be displayed at the front end of the process, by ensuring that race-based complaints fully and properly articulate the adverse treatment alleged and the basis for the link or connection to race.

[107] So what reasonably can be done in light of the Commission's limited resources? I have a number of recommendations. First, while in a perfect world every claimant would

have an interview with an analyst and assistance in preparing their complaint, I appreciate that this is simply not possible. My first suggestion, however, is that where a self-drafted race-based complaint is reviewed by an analyst or the initial review team and it is their view that the link or connection to race is not sufficiently apparent, the analyst interview the claimant (ideally in person but at least by video-conference or phone) to ask the kinds of questions required to explore the link or connection to race, and then to assist the claimant by amending the complaint to include this additional information. In these circumstances, the analyst already would have been expending time following up with the claimant through written questions, and then reviewing the claimant's written response in any event, so I don't think taking the additional recommended steps would unduly tax the Commission's resources. And the Guidelines and the Case Patterns, used in conjunction with the training already provided and the further training that will be provided by me, will direct the analyst specifically to the kinds of questions that need to be asked and to the kinds of information the analyst should be seeking in the context of the specific kinds of allegations raised in the complaint.

[108] Another option for the Commission to consider is the approach taken by the Nova Scotia Human Rights Commission. That Commission has hired an "African Canadian Liaison" person to serve the role of helping racialized claimants draft their complaints. The CHRC may benefit from taking this approach, and having an intake analyst position specifically dedicated to this kind of role. The person hired into such a position would require significant and demonstrated critical race expertise and lived experience of racism in order to most effectively carry out this role.

[109] I appreciate that this kind of additional intervention could be provided to self-represented claimants who file complaints on non-race-based grounds, but my concern is that extending this additional assistance to all grounds may over-tax the Commission's limited resources. The justification for providing this additional assistance to racialized claimants is the challenges the Commission has been confronting in addressing race-based complaints in particular, which is the very reason behind the work I have been asked to do.

Recommendation 3.1: That where a self-drafted race-based complaint is reviewed by a human rights analyst or the initial review team and it is their view that the link or connection to race is not sufficiently apparent, the analyst will interview the claimant (ideally in person but at least by video-conference or phone) to ask the kinds of questions required to explore the link or connection to race, and then assist the claimant by amending the complaint to include this additional information. The Commission also should consider creating an intake analyst position that is dedicated to the role of helping racialized claimants draft their complaints. The person hired into such a position would require significant and demonstrated critical race expertise and lived experience of racism in order to most effectively carry out this role.

[110] My second suggestion stems from the work the Commission already is doing with groups in the disability community and Indigenous community groups. There are numerous community groups and organizations that represent the interests of various racialized groups, who may be able to partner with the Commission to assist self-represented claimants to prepare their complaints.

[111] These groups and organizations are particularly well-placed to assist, because they are aware of the patterns of racial discrimination experienced by their own communities and can use this knowledge to help claimants better articulate the link or connection to race. They also may be able to provide interpretation services to assist claimants who don't speak English or French.

[112] I will confess that I am troubled by effectively downloading onto non-profit or volunteer community groups or organizations an additional burden that properly should be the responsibility of a properly resourced human rights commission. So in a perfect world, my view would be that community groups and organizations should be free to assist claimants in preparing human rights complaints as they are able, but that the primary responsibility for doing this work should reside with the Commission. But I recognize that we live in a far from perfect world.

[113] In this context, the Commission should explore with community groups and organizations representing racialized groups, the extent to which they are able to assist self-represented claimants with preparing human rights complaints, and then make a list of such organizations available to its intake staff to refer claimants to as may be appropriate, and on its website so that claimants can contact these groups and organizations directly.

Recommendation 3.2: That the Commission explore with community groups and organizations representing racialized groups, the extent to which they are able to assist self-represented claimants with preparing human rights complaints, and then make a list of such organizations available to its intake staff to refer claimants to as may be appropriate, and on its website so that claimants can contact these groups and organizations directly.

[114] I understand that, in some circumstances, an intake analyst will send a letter to a claimant where the complaint as filed does not appear to fall within the Commission's jurisdiction, and request a response to certain questions if the claimant wishes to assert otherwise. In some circumstances, if the claimant's response is deemed insufficient, this can lead the complaint to proceed through the accelerated s. 41 process, where a s. 41 report recommending dismissal is initiated by the Commission and sent out to the parties for submissions at the same time as the complaint is served.

[115] I understand the Commission's rationale that, where a complaint is clearly within provincial jurisdiction, it wants to notify the claimant as soon as possible so that they can proceed quickly to re-file their complaint with the appropriate provincial human rights body. That makes sense to me where the complaint clearly falls within provincial jurisdiction, given the public confusion over what kinds of activities are federally regulated versus provincially regulated.

[116] However, if the basis for questioning whether a race-based complaint should be dealt with by the Commission is because the complaint is viewed as not sufficiently

articulating a link or connection to race, then it is my view that extreme caution should be exercised before sending out a letter suggesting that the complaint is frivolous or vexatious or is not within the Commission's jurisdiction, and could be dismissed on that basis.

[117] My understanding is that sometime soon after a complaint has been filed with the Commission, the complaint is reviewed at the "triage table". I understand that the triage table meets about twice per week, and reviews between 5 to 15 complaints at each session. The meetings are attended by the Initial Review manager, one of the managers from the Assessment Division, a Legal representative and others. The intake analysts attend the meeting only for the discussion of complaints assigned to them. The triage table recommends: whether the complaint should proceed to mediation; whether the parties should be asked to make submissions under s. 41 of the Act; whether the complaint should be referred for assessment; or whether further steps should be taken by the intake analyst and the complaint brought back to the triage table at a later date.

[118] Where an issue arises at the triage table as to whether a race-based complaint has set out a sufficient basis to support a link or connection to race, then in my view further steps need to be taken before a decision is made as to whether to invite submissions from the parties under s. 41(1)(d). Before making that decision, the appropriate next step would be for an interview with the claimant to be arranged, in order to probe for the information required to support the link or connection to race, and the claimant then be assisted in amending the complaint to include that information.

[119] I have considered who at the Commission should conduct this interview. In my view, the interview should be conducted by a human rights officer from the Assessment Division. I am of this view for three primary reasons. First, as you will see below, I recommend that the assessment of any race-based complaint commence with a thorough and probing interview of the claimant. Such an investigative interview necessarily would be conducted by a human rights officer. If an intake analyst had already conducted such an interview with the claimant in the context of a potential s. 41(1)(d)

issue, then the human rights officer would be duplicating work that already had been done. So in my view, it is preferable for a human rights officer to do the interview in the first instance, in order to avoid potential duplication.

[120] Second, it is a human rights officer in Assessment who has to prepare the s. 41 assessment report, so in my view, it makes sense to involve this officer in the claimant interview that will form the basis of the determination as to whether a s. 41(1)(d) issue arises, and if so, what recommendation should be made. Third, as can be seen from the Case Patterns, conducting an interview of this nature in the context of a race-based complaint requires a specific level of knowledge, experience and skill that I believe a human rights officer is better placed to possess.

[121] Once the officer completes this interview with the claimant, the complaint (as amended to include any additional information provided by the claimant as a result of the interview) would be returned to the triage table with a recommendation from the officer as to whether to proceed to invite s. 41 submissions, or whether the complaint should be referred to mediation or assessment. The officer would appear at the meeting to present the complaint.

Recommendation 3.3: That before a decision is made to request s. 41 submissions from the parties on the basis that a race-based complaint does not sufficiently articulate a link or connection to race, a human rights officer should conduct a thorough and probing interview with the claimant in order to probe for the information required to support the link or connection to race, and then assist in amending the complaint to include that information. Following this interview, the complaint as amended should be returned to the triage table with a recommendation from the officer as to whether to proceed to invite s. 41 submissions, or whether the complaint should be referred to mediation or assessment, with the officer attending the meeting to present the complaint.

[122] I am concerned about the three-page limit for complaints as set out in the Complaint Rules. In my view and experience, three pages is often insufficient to fully and properly set out not only the factual basis for and chronology relating to the alleged adverse treatment, but also to fully and properly articulate the basis for alleging the link or connection to race. This is particularly the case with employment complaints, where often there has been a long series of incidents alleged to be linked to race that led up to the ultimate incident that caused the claimant to file the complaint. In those kinds of complaints, it is crucial for the complaint to fully set out the series of incidents with supporting details, as these not only form part of the discriminatory practices complained of but also provide a pattern of adverse treatment that supports the link to race.

[123] I appreciate that there are some claimants who, in the absence of a page limit, will file lengthy complaints, sometimes running to hundreds of pages. We experienced this problem at the HRTO. However, my view is that the way to deal with this is on an individual case-by-case basis, for example by having a rule that gives the Commission the discretion not to accept a complaint that is viewed as being unnecessarily long, as well as the discretion to impose an appropriate page limit in those specific circumstances. In my view, such an approach is preferable to an arbitrary page limit.

[124] I also note the unfairness of imposing an arbitrary page limit on the claimant, but not having any corresponding page limit on the respondent when they are asked to file their formal response.

[125] I appreciate that under Rule 2.4(c), the Commission has the ability to waive the application of the page limit where it is just to do so. However, most self-represented claimants would not know to request waiver of the three-page limit, and instead would try to self-censor to abide by the Commission's rules. That is why, in my view, a better approach is to impose no page limit, but have a rule allowing the Commission to impose one where appropriate.

Recommendation 3.4: That Rule 7.4 imposing the three-page limit for complaints be removed and replaced by the following: "The Commission has the discretion not to accept a complaint where the narrative is considered to be unnecessarily long. In such circumstances, the Commission has the power to impose a page limit on the complaint."

4. Mediation

[126] After a complaint is filed with the Commission, it proceeds through a "triage" process. One of the options that can be exercised through the triage process is that the complaint can be referred to mediation. If that option is exercised, the parties will be notified that the complaint has been referred to mediation. If mediation is successful, the parties will enter into a settlement agreement and the matter will be concluded. If mediation is unsuccessful, then the complaint will proceed to assessment.

[127] I understand that the Commission is concerned that its mediators are having less success in resolving race-based complaints than complaints filed on other grounds, and about how that can be improved.

[128] This is supported by statistics provided to me by the Commission. During the period from the fiscal years 2016/17 to 2019/20, the Commission's overall settlement rate for all grounds was 58.1%. However, for the ground of race, the settlement rate was only 46%. In terms of the other race-related grounds, the settlement rate for the grounds of national or ethnic origin was 47%, and for the ground of colour the rate mysteriously was somewhat higher at 53%. The largest part of this disparity is in relation to complaint alleging discrimination in services under s. 5 of the Act, where only 34.3% of race complaints were settled as compared to a settlement rate of 48.4% overall. In relation to employment complaints, the settlement rate for race cases was 54.6% as compared to 61.5% overall.

[129] From my experience, this disparity in settlement rates between race-based cases and complaints filed on other grounds is not surprising. Having conducted hundreds of human rights mediations at the HRTO, there are two factors that contribute to the relative lack of success in resolving race-based complaints at mediation. The first, as has been discussed above, is the notorious difficulty in proving racial discrimination through the

legal process. At the same time, the legal challenge in proving racial discrimination is contrasted with the claimant's own visceral belief in their own experience of racial discrimination at the hands of the respondent, and how that experience has struck them to the very core of their sense of self. So to a greater extent than cases on other prohibited grounds of discrimination, race-based complaints expose a broader gulf between the respondent's willingness to resolve the case given its assessment of its risk in being found legally liable, and the claimant's strong feelings of violation and the attendant expectation that a robust remedy is warranted.

[130] The second factor arises from the respondent's response to a complaint alleging race-based discrimination. While there is abundant social science and academic research and legal jurisprudence establishing that much racial discrimination is not only not intentional or deliberate, but can emanate from unconscious racial biases and stereotypes that have been imbued in our psyches through our families, our communities, our education system and our media, a respondent confronted with a race-based complaint still often reacts to the complaint as if they are being accused of being an overt, racist bigot or White supremacist. Not only is this the reaction of the respondent representatives themselves, this reaction is often reinforced by their legal counsel (although I have encountered younger legal counsel who are more "woke"). So from this perspective, the respondent views resolving the complaint, even for a nominal amount, as an admission of racist bigotry, which they refuse to do.

[131] So in order to be successful in mediating race-based cases, two things are required. First, the mediator must have the ability to break through the respondent's misunderstanding of the nature of modern racial discrimination, and get past the emotional barriers of anger and resistance to resolution. In these kinds of mediations, I often will uncork my Racism 101 lecture to help the respondent and its counsel properly understand the nature of racial discrimination at the present time. While it is difficult in a very condensed period of time to pierce through the emotions and get these ideas across, it can be successful in lowering the temperature enough to have a reasoned discussion about potential resolution.

[132] Second, the mediator needs to have a thorough understanding of not just how racial discrimination can manifest generally, but the specific manner in which it may have manifested in the context of the complaint at mediation. This calls for the mediator to have been properly trained in race analysis, and to have the tools and resources available on an ongoing basis to assist in this understanding and knowledge. Having this thorough knowledge will assist the mediator in helping the respondent understand how the Commission or the Tribunal could view the claimant's allegations as being linked or connected to race, and to work with the claimant to help them understand the challenges they may face in trying to legally prove racial discrimination. In this way, the parties can be persuaded away from their opposing extremes, and moved toward compromise and resolution.

[133] I am aware that at least some of the Commission's mediators received training on unconscious bias and the fundamental principles of racial discrimination in June 2019. As part of my work, I have identified the goal of equipping the Commission's mediators through the Case Patterns with tools and resources to assist them in furthering their knowledge and understanding of racial discrimination in the context of the specific types of cases that come before the Commission. I also will be providing training to the Commission's mediators on these tools and resources, as well as engaging them in practical exercises to help them further enhance their ability to move respondent's away from outdated and limited understandings of racial discrimination, toward a more nuanced understanding of the way in which racial discrimination is commonly manifested now.

[134] As this is work I already will be performing pursuant to my contract, I do not feel the need to make any specific recommendation at this time in relation to the tools and resources I am developing for use by all Commission staff, and the training I will be providing.

[135] However, there is one aspect of the Commission's process that I wish to address, as in my experience it has an impact on the ability to resolve race-based complaints at mediation. If a complaint filed with the Commission is referred to mediation, the

respondent is not asked at that time to file a formal written response. This will be required only if the case doesn't settle at mediation, and then only after any s. 41 issues have been addressed. As a result, heading into mediation, neither the Commission mediator nor the claimant has the benefit of the respondent's written response.

[136] In my experience, knowing the respondent's formal response to a complaint is crucial to being able to conduct an effective mediation for race-based complaints. As discussed above, it is often the respondent's evidence that will be critical to the analysis of the link or connection to race, through the ability of the claimant and the Commission to test whether the respondent's explanation for its conduct is reasonable, rational, consistent, credible and non-discriminatory. Being able to focus on the specific facts and circumstances of the individual case and discuss with the parties the strengths and weaknesses of the case based not only on the claimant's allegations but also on the respondent's position, helps the mediator move the parties away from their respective emotional responses to the situation – the claimant's visceral feeling of having been violated on the one hand, and the respondent's feeling of having been unfairly defamed and attacked on the other.

[137] I am aware that the Commission tries to use "interest-based" mediation, rather than "evaluative" mediation, although from my teleconference meeting with the Commission's mediators there seems to be some unevenness on this. The point I am making is that, in my experience, in the specific context of race-based cases, interest- based mediation is not as effective at resolving cases as an evaluative approach where the mediator is able to engage the parties in a detailed and rigorous discussion of the strengths and weaknesses of their respective cases.

[138] I also understand that some Commission mediators may speak to the parties separately prior to the formal mediation session, and that way may gain information about the respondent's position in response to the allegations in advance of the mediation. While that may provide some level of information, it is simply not the equivalent of having a formal, written response from the respondent that sets out its position in full in response

to the claimant's allegations, so that not only the Commission mediator has all of this information, but so does the claimant.

[139] Accordingly, while I appreciate that this would be a departure from the Commission's normal practice, I am recommending that the Commission consider requesting that respondents to race-based complaints provide their formal, written response prior to mediation. This could be implemented on a pilot or test basis initially, say for a one-year period, to see if requiring a response prior to mediation results in an increased resolution rate at mediation for race-based cases. If it does, the Commission could then consider whether it might wish to change this practice for all complaints.

Recommendation 4.1: That the Commission consider requesting that respondents to race-based complaints provide their formal, written response prior to mediation, initially on a pilot or test basis for a defined period of time to study and assess the results.

5. Assessment under Section 41(1)(d)

[140] Section 41(1)(d) of the Act gives the Commission the authority to dismiss a complaint if it appears to the Commission that the complaint is trivial, frivolous, vexatious or made in bad faith. In the context of race-based complaints, where the claimant does not have a reasonable basis for believing that the alleged adverse treatment is linked to race, the complaint may be dismissed under s. 41(1)(d) as being "frivolous". The Commission takes the position that having a "reasonable basis" requires more than just a statement (or what is referred to as a "bald assertion") that the conduct is discriminatory.

[141] In making decisions of this nature under s. 41(1)(d), the caselaw establishes two things. First, the factual statements made in the complaint are presumed to be true. While this encompasses factual statements, it does not extend to accepting as true a claimant's mere statement of their belief that they experienced adverse treatment because of their race. Second, in order to justify dismissal of the complaint at this preliminary stage, it must be "plain and obvious" that there is no reasonable basis for believing that the alleged adverse treatment is linked to race.

[142] A number of concerns arise from the application of s. 41(1)(d) to race-based complaints. As has been stated repeatedly in this Report, race-based complaints are very difficult to prove in the legal context, and it often is difficult for a claimant to be able to fully articulate the basis for their belief that their race was a factor in how they were treated. That is why, in previous sections of this Report, I have recommended providing additional assistance and resources particularly to racialized claimants who are self-represented and who are seen to be struggling with how to explain the link or connection to race.

[143] As I already have recommended above, no race-based complaint should be subject to a s. 41(1)(d) assessment and decision unless the claimant has first been interviewed by a human rights officer to obtain their full evidence as to the basis for their allegation of racial discrimination.

[144] This recommendation would apply whether consideration under s. 41(1)(d) was initiated by the Commission through the accelerated s. 41 process, or whether it was requested by the respondent. I note that such an interview with the claimant would not be required if the Commission decides to defer consideration of a respondent s. 41 request until after the assessment, although as I will discuss below, an initial interview with the claimant is an integral part of any assessment under s. 43.

[145] I appreciate that there are some complaints that may be filed where it is abundantly clear on their face that there is no link or connection to race, and that this would not change even if the claimant were interviewed by a human rights officer. In such circumstances, before a decision is made at the triage table to request s. 41 submissions from the parties, my recommendation is the initial review manager consult with the Pilot Project team to obtain their input.

Recommendation 5.1: That no race-based complaint be subject to a s. 41(1)(d) assessment and decision unless the claimant has first been interviewed to obtain their full evidence as to the basis for their allegation of racial discrimination. Any exception to this would require prior consultation with the Pilot Project team.

[146] When considering whether it is appropriate to send a race-based complaint forward for an assessment under s. 41(1)(d), the Commission needs to be mindful of the fact that in many racial discrimination cases, evidence in the possession of the respondent is crucial in supporting the link to race. For example, in a hiring or promotion case, the claimant may know little more than that they were qualified for the job and weren't hired. They may not know who the successful candidate is, let alone be able to

establish that this person was no better qualified. The claimant also typically will not have been given an explanation by the respondent as to why they weren't hired or promoted, and so be unable to test whether this explanation is reasonable, rational, consistent, credible and non-discriminatory. This information is in the respondent's possession. As a result, applying s. 41(1)(d) to these kinds of cases before even obtaining this information from the respondent is inappropriate.

[147] Similarly, the respondent's evidence is often crucial in other types of racial discrimination. As the Ontario Court of Appeal stated in *Pieters* at para. 72 (and as already quoted above):

> The question whether a prohibited ground is a factor in the adverse treatment is a difficult one for the applicant. Respondents are uniquely positioned to know why they refused an application for a job or asked a person for identification. In race cases especially, the outcome depends on the respondents' state of mind, which cannot be directly observed and must almost always be inferred from circumstantial evidence. The respondents' evidence is often essential to accurately determining what happened and what the reasons for a decision or action were.

[148] The claimant often will not know the respondent's explanation for why they were treated the way they were. The claimant often will not be in a position to identify evidence of differential treatment by pointing to White employees who engaged in similar conduct but were not treated as harshly. The claimant often will not be in a position to identify evidence of a pattern of adverse treatment of racialized employees by pointing to other racialized employees who were subject to racial discrimination or harassment by the respondent. The claimant will not have access to documentary or statistical evidence in the respondent's possession that could support the link to race.

[149] These are all factors that need to be taken into account by the Commission when considering whether to proceed with a s. 41 assessment and decision, or in making a recommendation in response to a respondent's s. 41 request.

Recommendation 5.2: When considering whether it is appropriate to send a race-based complaint forward for an assessment under s. 41(1) and/or in making any recommendation under s. 41(1) on the basis that the support for a link to a race-based ground is viewed as insufficient, that the Commission be mindful of the fact that in many racial discrimination cases, evidence in the possession of the respondent is crucial in supporting the link to race and is not available to the claimant at that preliminary stage.

[150] One final concern under this heading is the appropriateness of the Commission's use of s. 41(1)(d) and the language of determining a complaint to be "frivolous" in the context of the dismissal of a race-based complaint for failure to sufficiently show a link to race. I appreciate that in making a decision under s. 41(1)(d), the Commission is using the term "frivolous" not in its colloquial sense, but in the narrow legal sense of meaning that the complaint has no prospect of success. However, with respect, that is a rather fine distinction that is lost of a self-represented claimant who is being told that their complaint is regarded by the Commission as "frivolous".

[151] In my view, the use of this term is both inappropriate and unnecessary. Section 41(1)(c) gives the Commission the power to dismiss a complaint if the complaint is beyond the Commission's jurisdiction. I appreciate that in the context of the CHRC, this provision is most commonly used to dismiss complaints that are under provincial, not federal, jurisdiction.

[152] But where it is plain and obvious that a complaint is not linked to a protected ground, such a complaint equally is beyond the Commission's jurisdiction. Under the Act, the Commission has no jurisdiction over complaints of general unfair treatment unconnected to a protected ground. This is the approach taken by the HRTO through its Notice of Intent to Dismiss ("NOID") process, where it will dismiss a human rights application prior to service as beyond the HRTO's jurisdiction, if the application makes only a "bald allegation" of discrimination without a basis to link to a protected ground: see

for example *Harrison v. Toronto Community Housing*, 2013 HRTO 50 among many others.

[153] In my view, it is equally legally correct to tell a claimant in these circumstances that a complaint not sufficiently linked to a protected ground is beyond the Commission's jurisdiction, and such an explanation is much more palatable than being told that the complaint is "frivolous".

[154] The feedback I have received in response to this recommendation suggests that I may be fighting an uphill battle. I appreciate that the Commission may have taken a restricted view of the application of s. 41(1)(c) of the Act given the frequency with which it deals with issues of federal vs. provincial jurisdiction. While not as frequently, the same issues arose at the HRTO. But just because the issue of jurisdiction is applied in one context doesn't mean that it can't also be applied in another context, where the lack of a link or connection to a protected ground is equally jurisdictional. I also am well aware that the HRTO's approach and caselaw is not binding on the Commission. I do not intend to suggest otherwise. All I am saying is that it is insulting to racialized claimants to tell them their complaint is "frivolous" (even if you explain how that term is being used in a narrow legalistic sense), and that it is unnecessary to do so when there is a readily available alternative.

[155] If it does not want simply to draw from the HRTO's approach, the Commission could consider how similar provisions for early dismissal of complaints are interpreted and applied in other provincial jurisdictions.

Recommendation 5.3: That when dismissing a complaint on the basis that the alleged adverse treatment is not sufficiently linked to a protected ground under the Act, the Commission rely on s. 41(1)(c) to find that the complaint is beyond its jurisdiction, rather than finding that the complaint is "frivolous" under s. 41(1)(d).

6. Assessment under Section 41(1)(a) and (b)

[156] Section 41(1)(a) gives the Commission the power to dismiss a complaint where it appears that the alleged victim of the discriminatory practice of the discriminatory practice to which the complaint relates ought to exhaust grievance or review procedures otherwise reasonably available. Section 41(1)(b) similarly gives the Commission the power to dismiss a complaint where it appears that the complaint is one that could more appropriately be dealt with, initially or completely, according to a procedure provided for under an Act of Parliament other than this Act.

[157] I am concerned that s. 41(1)(a) or (b) not be used automatically or perfunctorily to deny unionized employees access to the Commission's process. Unions generally exercise discretion as to whether and to what extent to proceed with grievances. In some unions, a racialized member who is in the minority may face barriers to having their grievance processed in an appropriate manner. As a result, when exercising discretion under s. 41(1)(a) or (b) in relation particularly to race-based complaints, the Commission should be alive to consideration of whether the racialized claimant has experienced or could experience barriers in getting their human rights issues addressed through grievance or review procedures.

Recommendation 6.1: That when exercising discretion under s. 41(1)(a) or (b) in relation particularly to race-based complaints, the Commission should be alive to consideration of whether the racialized claimant has experienced or could experience barriers in getting their human rights issues addressed through grievance or review procedures.

[158] I am aware of concerns about the potential for the Commission to consider a race-based workplace violence and harassment assessment under the *Canada Labour Code* to be a "grievance or review procedure" within the meaning of s. 41(1)(a) or as something that could more appropriately be dealt with, initially or completely, according to a procedure provided for under another Act pursuant to s. 41(1)(b). In this regard, I recommend that the Commission consider HRTO caselaw which has held that an internal human rights assessment is not a "proceeding" that can provide justification for preliminary dismissal of a human rights claim: see *Maurer v. Metroland Media Group*, 2009 HRTO 200; *Cedeno v. Martens*, 2012 HRTO 383; *Armstrong v. Ontario (Revenue)*, 2012 HRTO 1527. Among many other things, in an internal assessment, the ultimate decision resides with management, who are the very representatives of the institutional respondent that would face potential liability for a human rights violation. While no binding on the Commission, this HRTO caselaw may prove helpful.

Recommendation 6.2: That in considering whether a race-based workplace violence and harassment assessment under the *Canada Labour Code* can be a "grievance or review procedure" within the meaning of s. 41(1)(a) or as something that could more appropriately be dealt with according to a procedure under another Act pursuant to s. 41(1)(b), the Commission should consider HRTO caselaw which has held that an internal human rights assessment is not a "proceeding" that can provide justification for preliminary dismissal of a human rights claim.

7. Assessment

[159] When a race-based complaint is referred for assessment under s. 43 of the Act, the assessment should always commence with a thorough interview with the claimant, preferably in person but at least by phone, so that the officer can obtain from the claimant: all of the claimant's evidence and details in support of the incidents of alleged adverse treatment raised in the complaint; clarification regarding what specific incidents or interactions are being relied upon by the claimant as a violation of their rights under the Act; the claimant's evidence regarding the basis for the link or connection between the adverse treatment and race, using the kind of probing questions set out in the Case Patterns; the claimant's evidence in reply to the formal response to the complaint by the respondent, and especially any evidence the claimant may have to question the legitimacy of the respondent's stated explanation for its conduct; the claimant's relevant documents, not just by making a general request but by probing during the interview to see if there are documents relating to specific matters; and the names of witnesses and what evidence they may be able to provide that is relevant to the claimant's case.

[160] It is imperative that this be the first step in the assessment so that the officer has a full and complete understanding of the allegations at issue and the basis for the link to race, so that this can inform the assessment as it proceeds further. While this may seem obvious, based on my review of Federal Court decisions, it is not clear to me that the investigating officer always interviews the claimant as a first step in the assessment, or at all. It appears to me that at least in some assessments, the officer may simply rely on what is set out in the complaint and may only interview respondent witnesses. That should never happen.

[161] But even beyond ensuring that the claimant is interviewed at the start of any assessment, my further point is that the interview needs to be comprehensive, thorough and probing in order to obtain a full understanding of the claimant's allegations and the

basis for them. In my view, conducting this kind of interview with the claimant at the outset of the assessment would have prevented the kinds of reversible errors we see in cases like *Peterkin* and *Banda*. The Case Patterns at Appendix B have been specifically designed to provide direction to human rights officers regarding the kinds of questions they should be asking of claimants when investigating race-based cases.

Recommendation 7.1: That the Commission's investigating officer commence every assessment of a race-based complaint under s. 43 of the Act by conducting a comprehensive, thorough and probing interview with the claimant, preferably in person but at least by phone, in order to obtain a full understanding of the claimant's allegations and the basis for them.

[162] At the same time, it is not reasonable to expect the claimant to have possession of all of the evidence required to support their claim. As already discussed above, relevant and sometimes crucial evidence that may support a race-based complaint often lies in the hands of the respondent. It is the responsibility of the Commission's investigating officer to actively pursue this evidence from the respondent, both by interviewing witnesses and requesting documents. In the Case Patterns I have prepared, I provide guidance to investigating officers regarding the kinds of questions they should be asking respondent witnesses in the context of different case types, and the kinds of documents they should be requesting.

[163] In particular, when sending out the letter requiring the respondent to file its formal, written response to the complaint, the human rights officer should use the Case Patterns to identify specific questions that they want the respondent to address and specific documents that they want the respondent to produce.

[164] As stated above, training on the Case Patterns and how to apply them will be provided by me to Commission officers in the near future.

Recommendation 7.2: That the Commission not expect the claimant to have possession of all of the evidence required to support a race-based complaint and recognize that relevant and sometimes crucial evidence that may support a race-based complaint often lies in the hands of the respondent. Accordingly, it is the responsibility of the Commission's investigating officer to actively pursue this evidence from the respondent, both when requesting the respondent's formal, written response to the complaint, and by interviewing witnesses and requesting documents.

[165] I am aware that concern has been expressed regarding the Commission's practice of conducting assessment interviews by phone. I agree with this concern, and that in-person interviews with at least the claimant and the key respondents is highly preferable. In a telephone interview, the officer is unable to pick up the nuances of body language and attitude, which form a significant part of communication. In addition, conducting an interview by phone renders it virtually impossible to review relevant documents with the witness to obtain their evidence in response.

[166] I appreciate that the Commission may not have the resources to send its officers out to respondent work sites to conduct interviews. However, it seems to me that it would not be unreasonable for the Commission to conduct claimant interviews by video-conference. As a result of the restrictions caused by the pandemic, many private human rights investigators, including myself, are interviewing the parties and witnesses by video-conference and have experienced great success with this technology.

[167] Accordingly, wherever possible, I recommend that in the assessment of race-based complaints, interviews with claimants and key witnesses be conducted by video-conference rather than by phone.

Recommendation 7.3: That, wherever possible, in the assessment of race-based complaints, interviews with claimants and key witnesses be conducted by video-conference rather than by phone.

[168] As I am writing this Report, I am imagining folks at the Commission reading what I have recommended and having the reaction, we just don't have the resources to do all this!

[169] I am mindful of that reality. As a result, I have turned my mind to how it may be possible to reduce the amount of assessment work the Commission is required to do. In this regard, I have a couple of ideas.

[170] First, as I have recommended above, where a race-based complaint has been referred to assessment, the first step should be conducting a comprehensive, thorough and probing interview with the claimant. I am assuming that, by the time this interview is conducted, the respondent already will have been required to file its formal written response to the complaint. At the time the response is requested, the Commission may also invite the respondent to identify relevant witnesses and provide a summary of their expected evidence and provide relevant documents, so that this evidence is available to be reviewed with the claimant. This can be done in the letter requiring the respondent to file its formal, written response.

[171] At this point, the Commission will have the complaint, notes from a thorough interview with the claimant, the respondent's formal written response, and perhaps also its witness statements and documents. My suggestion is that at this stage, the file could be subject to review regarding whether or not any further assessment is required in order to warrant referral to the Tribunal, given the constraints on the Commission's administrative screening role.

[172] For example, if it is apparent from the evidence already collected or filed that the determination of whether there is a reasonable basis in the evidence that could support the allegations would require the Commission to resolve factual disputes, conflicts in the evidence or credibility issues on key matters or engage in a detailed review and weighing

of the evidence, then proceeding further with the assessment would make no difference to the end result. In such circumstances and in the context of the Commission's limited resources, it may make sense not to continue with the assessment and save those resources for other cases.

[173] The question would be whether the Commission is capable of making a referral decision under s. 44 in such circumstances. In my view, it may be. Section 44 requires the Commission to receive a report of the findings of the assessment before making a decision under sub-sections (2) or (3). Section 44(1) requires that this report be submitted by the investigator as soon as possible after the conclusion of an assessment.

[174] We know from Federal Court jurisprudence that, before the Commission is entitled to dismiss a complaint under s. 44, an assessment must be thorough and not overlook obviously crucial evidence. But there is caselaw, relying on the Supreme Court's decision in *Halifax*, to support that a less exacting standard may apply to complaints where a referral decision is made: see for example *Wagmatcook First Nation v. Oleson*, 2018 FC 77 at para. 20.

[175] So the question would be whether the steps described above would be sufficient to constitute an "assessment" within the meaning of the Act sufficient to support the "conclusion" of the assessment pursuant to s. 44(1). In my view, if the Commission were to try to dismiss a complaint at that stage, such a process is likely not to be regarded as sufficiently thorough. On the other hand, if the Commission were to make a decision to refer a complaint to the Tribunal at that stage, then a less exacting standard may find that the Commission conducted a sufficient assessment to warrant referral in the circumstances.

[176] Alternatively, or in addition, the Commission could in such circumstances exercise its power to refer the complaint to the Tribunal pursuant to s. 49 of the Act, which does not require an assessment or the conclusion of an assessment and can be exercised at any stage after the filing of the complaint. The Commission could take the position that

referral to the Tribunal is warranted on the basis of the evidence collected so far and its view that further assessment would not serve to change the fact that, in light of the constraints of its administrative screening role, the complaint would need to be referred to the Tribunal in any event.

[177] I have been provided with an Information Sheet on Section 49 of the *Canadian Human Rights Act*, that sets out the factors the Commission may consider in deciding whether to refer the complaints to the Tribunal under s. 49. In particular, I note factor (g), which states: "What is the likelihood that an assessment would assist the Commission in deciding whether further inquiry is warranted?" I would amend this factor slightly to insert "or further assessment". I also would amend the Information Sheet to make clear that the Commission can rely on factor (g) to support referral to the Tribunal under s. 49 where a determination of whether there is a reasonable basis in the evidence that could support the allegations would require the Commission to resolve factual disputes, conflicts in the evidence or credibility issues on key matters or engage in a detailed review and weighing of the evidence, such that proceeding further with the assessment would make no difference to the end result.

Recommendation 7.4: That the Commission consider conducting a review of race-based complaints under assessment at the stage where the Commission has the complaint, the record of the claimant's interview, and at least the respondent's formal written response, to assess whether or not any further assessment is required in order to warrant referral to the Tribunal, given the constraints on the Commission's administrative screening role. If referral to the Tribunal would be required regardless of the result of any further assessment, then the matter could be referred to the Commissioners for a referral decision under s. 44 and/or s. 49.

Recommendation 7.5: That the Commission's Information Sheet on Section 49 of the *Canadian Human Rights Act* be amended to insert the words "or further assessment" after the word assessment in factor (g), and to make clear that the Commission can rely on factor (g) to support referral to the Tribunal under s. 49 where a determination of whether there is a reasonable basis in the evidence that could support the allegations would require the Commission to resolve factual disputes, conflicts in the evidence or credibility issues on key matters or engage

in a detailed review and weighing of the evidence, such that proceeding further with the assessment would make no difference to the end result.

[178] The second suggestion arises from situations where a respondent refuses or fails to cooperate with an assessment, either by failing to make relevant witnesses available for interview, or by failing to provide relevant information or documents as requested by the Commission.

[179] In such circumstances, I understand that the Commission has ended the assessment and made a referral recommendation under s. 49 of the Act, so that any issues regarding the calling of witnesses and the production of documents or information could be addressed and enforced by the Tribunal. However, in the Information Sheet on Section 49, I do not see reference to the Commission using s. 49 in these circumstances. As a result, I recommend that the Information Sheet be amended to add the following as factor (i): Has the respondent refused or failed to cooperate with the assessment, either by failing to make relevant witnesses available for interview, or by failing to provide relevant information or documents as requested by the Commission?

[180] Making use of s. 49 in this manner also should be raised as a possibility with a respondent who is expressing an unwillingness to provide relevant evidence, as a means of exerting more leverage on the respondent to cooperate with the assessment.

Recommendation 7.6: That the Commission's Information Sheet on Section 49 be amended to indicate that it may refer complaints to the Tribunal pursuant to s. 49 where a respondent refuses or fails to cooperate with an assessment, either by failing to make relevant witnesses available for interview, or by failing to provide relevant information or documents as requested by the Commission.

8. Evidence from Claimant

[181] I have been apprised of concerns that Commission staff are not viewing a racialized claimant's own statements, as made in the complaint or in other written submissions to the Commission or orally at an interview, as constituting "evidence" of their allegations unless they are supported by documents or other witness evidence.

[182] I have two points to make in this regard. First, a claimant's own statements certainly are evidence. At a Tribunal hearing, the primary source of evidence is the oral statements of the parties and their witnesses when testifying. A claimant's statement most certainly does not need to be supported by any document or the testimony of another witness in order to be accepted as evidence.

[183] Second, as I have reviewed at length above, it is not the Commission's proper role as an administrative screening body to assess credibility on key matters, and that certainly includes not disbelieving a claimant's own statements in the absence of supporting documents or witness evidence. As I have stated above, the claimant's own statements regarding key factual matters – things the claimant directly observed, experienced, heard or said – should not be disbelieved unless there is clear and reasonably indisputable evidence to the contrary.

[184] For example, if an officer writes a s. 44 assessment report stating that there is "no evidence" to support the claimant's allegations, when what is meant by that is that there is no supporting documentary or witness evidence, then the officer is actually disbelieving the claimant's own evidence about the allegations and thereby making a negative credibility assessment of the claimant, which it is fundamentally not the Commission's role to do.

[185] This is not new territory for the Commission. In sexual harassment cases, it long ago was recognized that there was unlikely to be witness or documentary evidence to support the claimant's allegations, but that this was not a proper basis for disbelieving the claimant's own statements. From my experience in working in the human rights field for over 30 years, it does seem to me that a higher level of scrutiny and suspicion gets applied to racialized claimants than it does to claimants alleging discrimination or harassment on other non-race-based grounds.

[186] In this regard, having worked at human rights commissions and tribunals over many years and having also for many years represented parties in the human rights process, I have encountered what I can only describe as the existence of an "anti-claimant bias" among people working at human rights commissions and tribunals, where one starts from a place of disbelief, skepticism, minimization and challenge to the claimant's lived experience, unless and until the claimant can sufficiently prove the truth of their allegations. In my experience, this kind of anti-claimant bias is particularly pronounced in relation to racialized claimants.

[187] On the other hand, in my experience, there is a greater willingness among people working at human rights commissions and tribunals to accept and/or believe the respondent's version of events, unless there is proof to the contrary. Often, after reviewing the claimant's allegations, the attitude will be, now let's get the real story by seeing what the respondent has to say. In addition, and particularly where the respondent is a large, sophisticated organization, the attitude too often is that the respondent should be believed because things like racial discrimination simply don't happen in such places, when in fact, the problem of racial bias affects all organizations. In my view, there is a need for Commission staff to be aware of and to actively challenge any such bias, in a working environment where they are supported in doing so.

[188] I want to be clear that this is not about reversing the legal onus of proof, but rather about Commission staff challenging their own internal biases and accepting the truth of what the claimant says unless there is clear evidence to the contrary, while still seeking

the evidence required to support the link or connection to race. As with the #MeToo movement, there is a difference between moving from a place of "I don't believe you until you can prove it", to starting from a place of hearing and accepting the claimant's stated experience with an approach of openness and curiosity, without abdicating the need to ultimately assess the evidentiary support for the allegation required by the legal process.

Recommendation 8.1: That the Commission ensure that its staff are treating a racialized claimant's own statements about key factual matters as evidence, even in the absence of supporting documentary or witness evidence, and accepting these statements at face value unless there is clear and reasonably indisputable evidence to the contrary.

Recommendation 8.2: That the Commission ensure that its staff are aware of and actively challenge any anti-claimant bias, in a working environment where they are supported in doing so. This means starting from a place of hearing and accepting a racialized claimant's stated experience with an approach of openness and curiosity, rather than from a place of disbelief, skepticism, minimization and challenge, without abdicating the need to ultimately assess the evidentiary support for the allegation required by the legal process.

9. Supports for Claimants

[189] It is well-documented that the experience of racial discrimination, whether legally provable or not, is a source of significant trauma for racialized claimants, and can lead to mental health issues. Unfortunately, this trauma and any mental health issues can be exacerbated for racialized claimants as a result of going through the human rights process, due to the delays, the barriers, and having their lived experienced being disbelieved or discounted.

[190] I appreciate that the Commission is not an organization intended or equipped to provide mental health services to claimants. At the same time, however, the Commission needs to remain cognizant of the significant toll taken on racialized claimants both of the experience of racial discrimination and of taking this issue on through the human rights process.

[191] There are a number of ways the Commission can do this. As discussed above, I already have recommended that the Commission provide an enhanced level of support to self-represented racialized claimants at the intake and initial review stage, where there is concern as to the sufficiency of the information in the complaint as filed. And I already have recommended that the Commission partner with community groups and organizations, to whom racialized claimants can be referred for assistance in preparing their complaints.

[192] In addition, at the inquiry stage, Commission intake staff should be mindful of the trauma and mental health effects often experienced by racialized claimants, and take this into account when providing direction as to next steps. Simply directing the claimant to the Commission's website and telling them to fill out the complaint form may not be appropriate or even practicable for the claimant. Instead, Commission staff should be prepared not only to advise the claimant of any additional supports that may be

implemented as a result of my recommendations, but also to inquire of the claimant whether filling out the complaint form online is something they can reasonably do, what assistance they may require, and where possible, to be prepared to offer support as required.

[193] Next, when reviewing a self-drafted complaint and particularly when interviewing a racialized claimant who is affected by trauma or mental health issues, Commission staff need to be mindful of the impact of trauma on a person's ability to provide a concise, focused and structured narrative. Claimants in such circumstances may require assistance to organize their narrative and to remain focused on the issues that are relevant to their allegations. This requires both an understanding of the impact of trauma, and patience.

[194] Further, Commission staff also need to be aware of the impact of trauma on memory, and recognize that a racialized claimant's memory of events may be affected by trauma. In this context, just because a person who has experienced trauma mis-remembers one point about an event, even if it is an important point, does not necessarily mean that their evidence is entirely unworthy of belief. Rather, it may just mean that their experience of trauma has impacted how they recall that particular aspect of the event at issue.

[195] Finally, the Commission should be careful not to re-traumatize racialized claimants through the process. The most common way for this to occur is in the context of mediation. Just as you would be careful not to put a claimant who has alleged sexual harassment in the same room as the alleged harasser, you equally need to be careful not to expose a racialized claimant to respondent representatives who may re-traumatize them, especially if the respondent representative appearing for mediation was the key person alleged by the claimant to have been responsible for the racial discrimination or harassment. You should always seek the claimant's informed consent before bringing them in to a plenary session at mediation, and ensure that they are aware of who will be in the room.

Recommendation 9.1: That the Commission recognize that the experience of racial discrimination is a source of significant trauma for racialized claimants and can lead to mental health issues, and that the Commission take this trauma into account when dealing with racialized claimants, for example: by being prepared to provide additional information and assistance at the inquiry and intake stage; by recognizing the impact of trauma on the ability of a person to provide a clear narrative and providing assistance; by recognizing and taking into account the impact of trauma on memory; and by taking steps not to re-traumatize the claimant through the human rights process.

[196] It is recognized that some racialized claimants may have additional needs as a result of the trauma they have experienced and the impact on their mental health. Lawyers and people who are responsible for addressing human rights issues through the legal process, such as Commission staff, are not specifically trained to provide support for trauma or mental health issues in that way that, for example, social workers are.

[197] I appreciate that the Commission does not employ staff who work as social workers, nor does it have the resources to do so. However, as part of its partnership with community groups and organizations representing racialized groups, the Commission could inquire as to what resources are available to assist and support racialized claimants who are experiencing trauma or mental health issues, and compile a list of such services with contact information to post on its website and to make available to its staff to provide to claimants as may be appropriate.

Recommendation 9.2: That, as part of its partnership with community groups and organizations representing racialized groups, the Commission inquire as to what resources are available to assist and support racialized claimants who are experiencing trauma or mental health issues, and compile a list of such services with contact information to post on its website and to make available to its staff to provide to claimants as may be appropriate.

10. Supports for Claimants before the Tribunal

[198] I am aware of concern regarding the lack of support provided to many racialized claimants whose complaints are referred to the Tribunal. I also am aware that in the past, while the Commission did not act as legal counsel for the claimant, the Commission nonetheless would appear before the Tribunal at the hearing and present the case in support of the complaint. I further am aware that this changed quite a number of years ago, due to a stated lack of resources.

[199] I understand that at present, when a complaint is referred to the Tribunal, a determination is made by the Commission whether to be involved on the basis of "full participation" or "partial participation". Where the Commission opts for full participation, then the role of Commission counsel before the Tribunal is very much like it was in the past: while not acting as counsel for the claimant, Commission counsel nonetheless will take the lead in presenting the evidence in support of the complaint, will conduct examinations-in-chief of the claimant and their witnesses, will cross-examine respondent witnesses, and will make final submissions in the claimant's support.

[200] The Commission sometimes will opt for full participation even in cases where the claimant is represented by their own legal counsel. In such cases, the Commission's focus will be more on public interest or systemic issues, or in providing additional support that the claimant is unable to afford, such as expert witnesses.

[201] The other option the Commission can choose is "partial participation". In these cases, the Commission's role is more like a "watching brief": where Commission counsel monitors the proceeding and participates in case management calls in advance of the hearing in the event issues are raised that have broader implications, but does not appear at the hearing itself. In these cases, the claimant is left to "fend for themselves" at the

Tribunal hearing, either by representing themselves without counsel or by engaging legal counsel to present their case at the claimant's own expense.

[202] The issue here is obviously where the Commission elects "partial participation" where a race-based complaint has been referred to the Tribunal. As I have said already, I appreciate that the Commission is operating with limited resources. But I question how it is that the Commission was able to provide "full participation" in referred cases in the past, but is now no longer able to do so. While there may have been some increase over time in the number of cases being referred to the Tribunal, it is not clear to me that this increase is substantial enough to justify the Commission's withdrawal from full participation in all referred cases. In addition, the Tribunal currently has a much more robust mediation process that is more effective than in the past at resolving cases before they need to proceed to a full hearing, which should free up more Commission resources to do Tribunal hearing work.

[203] The negative impact on racialized claimants of not having the Commission's full participation at a Tribunal hearing is serious. As I have said already, racial discrimination is notoriously difficult to prove at a hearing. Having conducted many tribunal hearings in race-based cases, I can say with confidence that it is very difficult for a self-represented claimant to prove racial discrimination, unless the adjudicator is practising active adjudication to support the self-represented party and also has strong knowledge of race analysis. As a result, for racialized claimants who are self-represented, the Commission's decision for "partial participation" is tantamount to effectively dismissing the complaint, as it is highly unlikely that the self-represented claimant will be able to succeed at the Tribunal hearing.

[204] Further, even where the racialized claimant is represented by their own legal counsel, the expense of paying for legal counsel for a full human rights hearing is enormous and beyond the ability of most claimants to bear. And as we know, the claimant's legal expenses are no longer recoverable at the Tribunal hearing, even if the claimant is successful. I am further concerned that many legal counsel who privately

represent claimants do not have the same level of knowledge and expertise in race analysis as do Commission counsel, and so may not be as effective before the Tribunal in furthering the development of the caselaw on racial discrimination.

[205] In my view, even if the Commission truly does not have sufficient resources to provide full participation in all cases referred to the Tribunal, the well-recognized difficulty in proving racial discrimination at a Tribunal hearing justifies an exception being made for race-based complaints. As a result, my recommendation is that the Commission provide full participation for all race-based complaints referred to the Tribunal, whether under s. 44 or s. 49.

Recommendation 10.1: That the Commission provide full participation for all race-based complaints referred to the Tribunal, whether under s. 44 or s. 49.

11. Use of Social Science Research and Literature

[206] Social science research and literature in and of itself is not capable of providing proof that a specific claimant experienced discrimination. However, social science research and literature has long been regarded as providing important context for courts and tribunals to consider, particularly in relation to issues of discrimination.

[207] In my view, in the context of the Commission's administrative screening function, social science research and literature is capable of being used even more broadly. As discussed at length above, the Commission has an evidence gathering, but not an evidence weighing, role. It is not the Commission's function to weigh evidence as in a judicial proceeding, or to determine whether this or that particular piece of evidence proves that the claimant experienced discrimination.

[208] The role of the Commission is to determine whether there is a reasonable basis in the evidence to warrant referral of a complaint to the Tribunal. In that context, in my view, the Commission is entitled to refer to and rely on social science research and literature to support a determination that referral is warranted, without needing to make a finding that this research or literature would constitute admissible evidence before the Tribunal or whether it is capable to proving discrimination. Those are decisions for the Tribunal to make.

[209] For example, in *Moore v. Estate of Lou Ferro*, I held that reports by the Law Society of Ontario regarding the barriers faced by Black lawyers in obtaining positions at law firms were not, in and of themselves, capable of proving that the individual claimant had experienced racial discrimination when he was denied a specific legal position. I held that the claimant was required to bring forward more specific evidence to support how he in particular had experienced racial discrimination in the context of the specific hiring process used by the respondent law firm.

[210] That, however, was in the context of a full, *quasi*-judicial Tribunal hearing. In the context of the Commission's administrative screening role, in my view, it would be appropriate for the Commission to have regard to literature like the Law Society reports in order to support a determination that, in this societal context, there is a reasonable basis in the evidence to warrant sending a complaint of this nature forward to the Tribunal. It is fundamentally not the Commission's role or concern as to whether the claimant ultimately will be successful in proving their case at the Tribunal, nor is it the Commission's role or concern to decide what weight the Tribunal ultimately may place on a study of this nature. Rather, the Commission could say, here is the study that shows Black lawyers experience barriers in entering the legal profession and here is a complaint by a Black lawyer about being denied a legal position, and that may be enough to warrant referral.

[211] There are myriad ways that social science research and literature could be helpful to the Commission in its assessment and assessment of race-based complaints. As with the Law Society study, there may be research or literature that identifies specific barriers faced by particular racialized groups in particular contexts. In the hiring and promotion context, there is extensive research and literature about subjective processes and criteria such as "fit" and "suitability", and how this kind of subjectivity disadvantages racialized candidates. There is a significant body of research and literature on unconscious racial bias. Indeed, the speaker who provided training to Commission staff on this issue in June 2019 provided a list of some of these resources. There is social science research and literature on racial stereotypes, and how these operate in the context of specific racialized groups.

[212] There is a tremendous opportunity here for the Commission to hire a university student on contract to gather these resources together, categorize them, prepare brief abstracts identifying what each specific piece of literature is about, and create an online library to make these resources readily available and accessible to Commission staff. As part of this project, the student could do a series of hour-long webinars highlighting the categories of literature and the major studies within them, that could be offered live on a

weekly basis to Commission staff (with a permanent video record kept for those who can't attend live or for future training).

[213] I further note that community groups and organizations would be a great resource from which to seek out studies and literature of this nature, in addition to probing academic sources. There also is a body of literature on racism and racial discrimination that was compiled by the Ontario Human Rights Commission in the development of its Policy on Racism and Racial Discrimination, much of which is referenced in the Policy's extensive footnotes. So this is not a project that would need to be undertaken from scratch. There already are readily available sources of literature just waiting to be tapped and compiled.

[214] Finally, it is my view that any such collection of resources on racism and racial discrimination that may be compiled by the Commission should be made available to the public. Making this kind of resource available to the public would be providing a service in line with the Commission's mandate. It also would allow community groups and organizations, and indeed the public at large, to identify for the Commission where there may be gaps in the literature compiled or to refer the Commission to additional studies or literature that should be added.

Recommendation 11.1: That the Commission refer to and rely upon relevant social science research and literature in assessing race-based complaints and determining whether to recommend referral to the Tribunal.

Recommendation 11.2: That the Commission initiate a project to gather together social science research and literature on race-related issues to create on online library of these resources available to its staff, as supplemented by webinars describing the resources available.

Recommendation 11.3: That the Commission make this online library of resources available to the public.

12. Systemic Discrimination

[215] Systemic discrimination in the employment context has been described as discrimination that results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination. This discrimination is then reinforced by the very exclusion of the disadvantaged group because the exclusion fosters the belief, both within and outside the group, that the exclusion is the result of "natural" forces: see *Canadian National Railway Co. v. Canada (Human Rights Commission) and Action travail des femmes*, [1987] 1 S.C.R. 1114 ("*Action travail des femmes*").

[216] It also has been observed that systemic discrimination is often unintentional, and results from the application of established practices and policies that, in effect, have a negative impact upon the hiring and advancement prospects of a particular group. This is compounded by the attitudes of managers and co-workers who accept stereotyped visions of the skills and "proper role" of the affected group, visions which lead to the firmly held conviction that members of that group are incapable of doing a particular job, even when that conclusion is objectively false: *Action travail des femmes*, above.

[217] As can be seen, systemic discrimination is not the same as adverse effect or constructive discrimination. The "established procedures" that comprise the system at issue may contain facially neutral policies or practices that have an adverse impact on protected groups. But systemic discrimination also includes elements of direct discrimination, such as discriminatory attitudes or stereotypical beliefs that are embedded in the system and contribute to the disadvantage or exclusion experienced by protected groups.

[218] The elements of systemic discrimination can be identified as:

1) the existence of a system or process

2) which has a disparately negative impact on an identifiable group or an individual member of an identifiable group

3) because of ascribed or actual characteristics of the affected group.

[219] When we think about systemic discrimination, we often think about the large cases that have resulted in extensive systemic remedies, such as *Action travail des femmes*, above (disproportionate exclusion of women from blue collar jobs at CNR), *National Capital Alliance on Race Relations v. Canada (Health and Welfare)*, (1997) 28 C.H.R.R. D/179 ("*NCARR*") (disproportionate exclusion of racialized employees from management positions at the Ministry of Health and Welfare), or *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 (inequitable and insufficient funding for child and family services for First Nations on reserve).

[220] But systemic discrimination is not defined only by its breadth or scope. The essence of systemic discrimination is the existence of a system or process that disadvantages a protected group. Accordingly, "systemic discrimination" is a common element of many complaints dealt with by the Commission. Many complaints about discriminatory hiring or promotion practices will involve the issue of whether the hiring or promotion "system" or "process" has a disparately negative impact on the claimant because of their membership in a protected group. Where a complaint arises from the termination of employment in the context of a down-sizing or re-structuring, the complaint often will give rise to the issue of the "system" or "process" used to identify which employees were to be terminated. In the services context, complaints about racial profiling by Border Services will inevitably involve the "system" or "process" by which travellers are identified for additional scrutiny. The same with racial profiling complaints against the R.C.M.P. or banks or transportation services.

[221] The simple point I am trying to make here is that "systemic discrimination" is not some kind of mysterious and exotic form of discrimination that necessarily requires the commitment of large amounts of resources in every case. Rather, just like direct and adverse effect discrimination, systemic discrimination is simply another way that discrimination manifests in the context of many complaints routinely dealt with by the Commission. When an issue of systemic discrimination arises in the context of a particular complaint, Commission staff simply need to be equipped with the tools and resources to properly investigate and analyze the issue. To that end, I have embedded into the Case Patterns the kind of evidence about systems and processes that the Commission should be looking for in specific kinds of cases, and how that evidence should be analyzed in assessing whether the complaint should be recommended for referral to the Tribunal. In addition, I have supplemented this work with a separate Case Pattern addressing Systemic Discrimination, to provide a more specific focus on this issue. In addition, the training I will be providing to Commission staff will include training on systemic discrimination and the use of the tools and resources I have developed.

[222] Having said that, there are large, broad-based human rights issues that are properly characterized as issues of systemic discrimination, and that require the allocation of significant resources. Sometimes, as they were in *Action travails des femmes*, *NCARR* and *First Nations Child and Family Caring Society*, these large systemic issues will be raised by complaints filed by organizations on behalf of individual members of protected groups. Sometimes, large systemic issues will be raised by a series of individual complaints that can be grouped and dealt with together by the Commission. Once again, while systemic discrimination issues of this nature may require the Commission to allocate additional resources to the assessment and analysis of such complaints, complaints of this nature fall within the Commission's role and responsibility under the Act and require the Commission to devote the resources required to properly perform its statutory duties.

[223] In terms of this Report and my task of identifying ways to strengthen the Commission's assessment of race-based cases, the strengthening of the Commission's assessment of race-based complaints raising issues of systemic discrimination in its reactive role of accepting and processing complaints filed by third parties is addressed through the tools and resources I have developed and the training I will provide.

[224] Instead, in this section, I will focus my attention on the proactive role the Commission can take in addressing issues of systemic racial discrimination, through the proactive exercise of its statutory functions, including its ability to initiate a complaint pursuant to s. 40(3) of the Act.

[225] It is the Commission's role to take the lead in addressing issues of systemic racial discrimination, and doing so should not just be left to individual claimants. Asking individuals to shape up and frame systemic complaints is too much to ask, as this kind of work takes significant resources, requires research and experts to put the evidence together, and needs the Commission with its powers of inquiry and assessment to ensure that the right evidence is sought and obtained to ensure that there is substance to support the allegation of systemic racial discrimination.

[226] The mistake I have seen made far too often when a human rights commission or organization is trying to address an issue of systemic discrimination is to identify an individual complaint that touches on the issue, and then to try to graft onto that individual complaint the weight of the entire systemic issue. This is categorically the wrong approach for a couple of key reasons. First, grafting the larger systemic issue onto an individual complaint invariably stretches the issue raised in the complaint beyond what it reasonably can bear. For example, in *Aiken v. Ottawa Police Services*, the complaint arose from a traffic stop that was alleged to be racial profiling. The OHRC entered into a settlement that required the Ottawa police to do data collection on vehicle stops. An organization representing the claimant then attempted to use this complaint to require data collection for pedestrian stops. Fourteen years later and after the expenditure of significant resources, it was determined that extending the complaint to require pedestrian stops

was not appropriate. This is not to suggest that the issue of racial profiling of pedestrians by the Ottawa police is not an important issue that is worthy of a systemic remedy such as data collection. Instead, the point is that, rather than trying to graft this issue onto a complaint about a vehicle stop, the important issue of racial profiling in pedestrian stops could have been advanced directly, and ideally on the basis of a group of racialized persons who had been stopped by the police as pedestrians, which would have been a much better use of limited resources. While the Commission has the power pursuant to s. 40(4) of the Act to deal with complaints together where they raise substantially the same issues, doing to is still reactive rather than proactive. What I am talking about is using the Commission's power to initiate a complaint under s. 40(3) on the basis of a group of racialized persons who have experienced the targeted issue.

[227] Second, trying to use an individual complaint in this way inevitably creates a tension between the individual interests of the claimant, and the broader interests of the human rights commission or organization. A human rights commission or organization that tries to piggy-back on an individual complaint to address a large systemic issue, and invests significant resources to do so, will find itself confronted by a respondent whose desire is to settle the complaint out from under them by offering a significant sum of money to the individual claimant. Without the individual claimant, the human rights commission or organization no longer has a legal basis to proceed, and the resources invested in trying to address the larger systemic issue are wasted.

[228] For these reasons, it is my strong recommendation that the Commission make use of its power to initiate a complaint under s. 40(3) of the Act when it wishes to engage the legal process to address a large issue of systemic racial discrimination.

[229] I am well aware that the Commission has limited resources, and that the bulk of its resources are taken up with the processing of individual complaints. However, the Commission should dedicate a certain amount of monies to addressing large issues of systemic racial discrimination, as a way of strengthening how it addresses such issues.

[230] In my view, the appropriate approach for the Commission to take is to conduct an environmental scan, including but not limited to its own complaint base, for the purpose of identifying large issues of systemic racial discrimination that it could address. The Commission then should prepare a list of perhaps 10 priority issues, and consult on this list with community groups and organizations to obtain their feedback as to whether the Commission has identified the right issues or whether some issues have been missed, to hear which of these issues should be given priority, and to find out what assistance these groups and organizations may be able to provide in pursuing these issues.

[231] With that feedback, the Commission then could identify the issue(s) of systemic racial discrimination that it has the resources to address in a particular fiscal year, and establish a plan of action to address the issue(s), including the potential initiation of a complaint under s. 40(3).

[232] Even if the Commission only has sufficient resources to pursue a few large-scale issues of systemic discrimination per year through the legal process, the Commission also has the authority pursuant to s. 27 of the Act (and particularly s. 27(1)(h)) to take non-complaint initiatives to address and/or highlight other systemic issues, for example by issuing special reports, by making reports to the UN, or simply by speaking out publicly.

[233] For example, the Commission could conduct research and publish reports on race-based topics (e.g. launching an inquiry on the issue of racial profiling in banking), and these reports could then be cited by claimants in support of their ccomplaints. This is something that the OHRC has been doing for many years. The Commission is also empowered by its designation as Canada's National Human Rights Institution, and could leverage this designation to engage with Parliamentarians and the Government on systemic issues affecting racialized peoples.

Recommendation 12.1: That the Commission conduct an environmental scan to identify a list of large issues of systemic racial discrimination that it could address, and consult on this list with community groups and organizations to obtain their feedback as to whether the Commission has identified the right issues or whether some issues have been missed, to hear which of these issues should be given priority, and to find out what assistance these groups and organizations may be able to provide in pursuing these issues. With that feedback, the Commission then should identify the issue(s) of systemic racial discrimination that it has the resources to address in a particular fiscal year, and establish a plan of action to address the issue(s), including the potential initiation of a complaint under s. 40(3) or further to its powers under s. 27.

13. Data and Disaggregated Data

[234] The collection of data is an important element in the assessment and analysis of systemic discrimination cases, in relation to the issue of whether the system or process has a disparate impact on a protected group, and of adverse effect discrimination cases, in relation to the issue of whether the policy or practice disproportionately disadvantages a protected group.

[235] Unlike in other Canadian jurisdictions, the federal Commission has ready access to data, at least in the employment context which makes up the majority of the Commission's cases. As a result of the *Employment Equity Act*, federally-regulated employers with more than 100 employees are required to collect and maintain data regarding the identification and representation of the four equity groups in their workplaces. This data is then required to be incorporated in employment equity plans and reports.

[236] I understand that concern has been expressed that the Commission is not making sufficiently robust efforts to collect this kind of data as part of its assessment of complaints. The extent to which this is the case is unclear to me. However, what is clear to me is that in the context of many employment complaints, the request for and collection of this kind of data should be an important component of the assessment and analysis, especially for race-based cases.

[237] I am aware that there are statutory limitations on the Commission's ability to use or disclose employment equity data. First, pursuant to s. 40(3.1) of the *CHRA*, the Commission cannot initiate a complaint under the *CHRA* as a result of information it obtained in the course of the Commission's administration of the *Employment Equity Act*. Second, pursuant to s. 40.1(2) of the *CHRA*, the Commission cannot deal with a complaint that is based solely on statistical information that purports to show that members of one

or more equity groups are under-represented in the employer's workforce. Third, pursuant to s. 34 of the *Employment Equity Act*, information obtained by the Commission under that Act is privileged and cannot be disclosed without the employer's consent, and cannot be used in any proceedings under another Act (which presumably would include the *CHRA*) without the employer's consent. And fourth, pursuant to s. 9(3) of the *Employment Equity Act*, employee self-identification information is confidential and can only be used for the purpose of implementing the employer's obligations under the *Employment Equity Act*.

[238] Notwithstanding these constraints, there still remains significant scope for the Commission to collect and rely on employment equity data in the context of its assessment of complaints. For example, while the Commission is prohibited from initiating a complaint as a result of information it obtained under the *Employment Equity Act*, this does not prevent the Commission from initiating a complaint on other bases and requesting disclosure of employment equity data from the employer as part of its assessment. Similarly, while the Commission is prohibited from using or disclosing information it obtained under the *Employment Equity Act* without the employer's consent, this again does not prevent the Commission from requesting disclosure of employment equity data from the employer as part of an assessment.

[239] In addition, while the Commission is prohibited from dealing with a complaint based solely on statistical information of under-representation, it has been held that that this does not prevent such statistical information from being used and relied upon as circumstantial evidence of discrimination in the context of a proceeding under the *CHRA*: see *Murray v. Immigration and Refugee Board*, 2013 CHRT 2. Further, while s. 9(3) of the *Employment Equity Act* prevents direct access to the raw data showing a specific employee's self-identification under that Act, it has been held that this does not prevent access to statistical data, or even third-party review of the raw data to confirm the accuracy of the statistical data: see *Perera v. Canada*, 2000 CanLII 16339 (FC).

[240] As a result, in the assessment of race-based employment complaints alleging systemic discrimination and/or adverse effect discrimination, the Commission routinely should be requesting employment equity data from the respondent, as it relates to the representation of members of racial groups (referred to in the *Employment Equity Act* as "members of visible minorities") and equity groups relevant to any intersectional grounds of discrimination that may be alleged.

[241] In some cases, employment equity data even broken down by occupational group will still be too broad to focus in on the specific work group at issue in the context of an individual race-based complaint. In such circumstances, it is my view that it may not be inappropriate to request the employer to provide information regarding the representation of members of racialized groups (and other relevant equity groups) within the particular work group at issue. The issue would be whether this would be regarded as an improper "use" of the information collected from the individual employees within the meaning of s. 9(3) of the *Employment Equity Act*. As seen from *Perera*, above, it has been held that in certain circumstances, this information can be used and reviewed in contexts beyond a narrow interpretation of what is meant by the use being strictly for the implementation of the employer's obligations under that Act.

[242] Further, particularly in the assessment of race-based cases, the Commission should not be afraid to request or compile data beyond what the employer may collect for employment equity purposes. This is particularly relevant in two contexts. First, it is relevant in the context of federally-regulated employers with less than 100 employees, who are not required to comply with the *Employment Equity Act*. And second, it is important in the context of the need to examine disaggregated race data, in order to focus on the specific and unique disadvantages and discriminatory barriers confronted by particular racialized groups.

[243] I formerly acted as legal counsel to the Employment Equity Commission in Ontario, and so am very familiar with the concept of self-identification for the purpose of collecting information about the representation of equity groups. However, when the Commission is

conducting an assessment of a complaint filed under the *CHRA*, it is not implementing an employment equity program. Rather, the Commission is collecting evidence relevant to the issues raised in a human rights complaint, for the purpose of performing its role in determining whether there is a reasonable basis in the evidence to warrant referral to the Tribunal. In that context, in my view, it would not be inappropriate for the Commission to ask the parties and/or witnesses for assistance in identifying the racial make-up, including the disaggregated racial make-up, of the particular work group that is relevant to the issue raised in the complaint. In discrimination cases, in contrast to employment equity programs, it is often the third-party perception of an individual's race that is more significant than how that individual self-identifies. For example, if an employee is perceived as White by management and therefore is treated more advantageously than racialized employees, this is more significant from a discrimination perspective than the fact that this employee may self-identify as racialized, as it is management's perception of the individual that is critical to the discrimination analysis.

[244] Finally, in addition to the collection and use of data in the context of human rights assessments, the Commission also has a public role to play under s. 27 of the Act in advocating for the appropriate collection and analysis of race data and disaggregated race data in other contexts, including for example in the contexts of border security, policing, and corrections.

Recommendation 13.1: That, in the assessment of race-based employment complaints alleging systemic discrimination and/or adverse effect discrimination, the Commission should request employment equity data from the respondent, as it relates to the representation of members of racial groups (referred to in the *Employment Equity Act* as "members of visible minorities") and equity groups relevant to any intersectional grounds of discrimination that may be alleged. Further, in the assessment of race-based cases, the Commission should request or compile data beyond what the employer may collect for employment equity purposes in the context of federally-regulated employers with less than 100 employees, who are not required to comply with the *Employment Equity Act*, and in the context of the need to examine disaggregated race data, in order to focus on the specific and unique disadvantages and discriminatory barriers confronted by particular racialized groups.

Recommendation 13.2: That the Commission exercise its role under s. 27 of the Act to advocate for the appropriate collection and analysis of race data and disaggregated race data in other contexts, including for example in the contexts of border security, policing, and corrections.

Appendix A

Mark Hart - Bio

Mark has over 30 years of experience working in the human rights field. Until recently, Mark was a Vice-Chair at the Human Rights Tribunal of Ontario for 12 years from 2007 to 2019. Prior to joining the Tribunal, Mark had a law practice focused on human rights and employment issues. Before that, he was counsel at the Ontario Human Rights Commission and the Employment Equity Commission.

Specifically in relation to race issues, Mark has had a particular focus on race-related issues and race analysis since the early 1990's when he was legal counsel at the OHRC. While at the OHRC, Mark was a member of the OHRC's Anti-Racism Committee, and led projects on developing a litigation strategy for race-related cases and applying race analysis to review the OHRC's assessment reports in racial discrimination and harassment cases.

While in private practice, Mark co-chaired a human rights symposium on Racial Discrimination, through Osgoode Hall Law School's Professional Development Program (May 2003). Mark also co-taught Racism and the Law in Canada at Ryerson University, and Discrimination and the Law at Osgoode Hall Law School.

As an adjudicator at the HRTO, Mark has written some of the leading decisions on race-related issues, including decisions that address racially poisoned work environments, racial stereotypes and unconscious racial bias, subjective hiring and promotion processes and the halo vs. devil effect, and recognizing allegations of "playing the race card" as a form of racial discrimination.

Appendix B

Case Patterns

A. Employment – Termination / Discipline / Other Adverse Treatment because of alleged misconduct or poor work performance (s. 7)

B. Employment – Termination / Other Adverse Treatment because of alleged down-sizing / re-organization (s. 7)

C. Employment – Hiring or Promotion cases (s. 7)

D. Employment – Harassment and Poisoned Work Environment (s. 14)

E. Employment – Policy or Practice (s. 10)

F. Employment – Systemic Discrimination

G. Services – Banking (s. 5)

H. Services – Transportation (s. 5)

I. Services – Corrections (s. 5)

J. Services – Border Security (s. 5)

K. Services – Policing (RCMP) (s. 5)

A. Employment – Termination / Discipline / Other Adverse Treatment because of alleged misconduct or poor work performance (s. 7)

Overview

These are cases where the termination / discipline / other adverse treatment is alleged by the employer to have been imposed because of something the claimant is alleged to have done. This action by the employer can be the result of a progressive discipline process, or for alleged work performance reasons, or due to some other conduct in which the claimant is alleged to have engaged. This case pattern applies not only where the employer terminates or disciplines the claimant, but to things like the imposition of performance improvement plans, demotions, transfers, re-assignments or any other adverse treatment by the employer which is alleged to be due to the claimant's conduct or work performance.

There are two critical issues that arise in these kinds of cases. The first is establishing whether there could be a link or connection to race. There are a number of principal ways of doing this, including: evidence of differential treatment (i.e. White employees who have engaged in similar conduct but not been terminated); similar fact or pattern evidence (i.e. employees from racialized groups who have been similarly treated); or other manifestations of racial discrimination (such as targeting, disproportionate blame, scapegoating, reliance on stereotypical assumptions or beliefs etc.).

The second is assessing whether there is a reasonable basis in the evidence to question whether the employer has a reasonable, rational, consistent and credible non-discriminatory explanation for its decision. This necessitates drilling down into the employer's witnesses, documents and other evidence, particularly in relation to its decision and the lead-up to its decision to terminate, discipline or otherwise adversely treat the claimant, but also in relation to searching for evidence regarding White employees who may have engaged in similar conduct but not been terminated (such as by examining disciplinary records, performance reviews and asking pointed questions of witnesses) and regarding other racialized employees who may have been similarly targeted.

Questions for Claimant

Getting the basics

At the outset, it is important to understand from the claimant their version of events regarding the factual circumstances leading to the employer's imposition of termination, discipline or other adverse treatment. Typically these basic facts will be set out in the complaint. If they are not, or not fully set out, then the first step is to obtain this evidence from the claimant.

- What was the reason given to you by your employer for terminating your employment [or for giving you a suspension, putting you on a performance improvement plan etc.]?

One of the most important pieces of evidence to obtain from the claimant is any evidence they may have regarding the employer's stated explanation for its action (not what the claimant believes is the reason, but what the claimant was told by their employer was the reason). Later in the process, you will hear from the respondent its explanation for why it took action against the claimant. But you will want to hear from the claimant what they were told at the time, as a piece of evidence to consider when assessing whether the respondent's stated explanation is reasonable, rational and consistent. In this regard, I note that when an employee is terminated for conduct or performance reasons, an employer often will refuse to provide an explanation to the employee. Nonetheless, it is important to find out and record if the employer failed to provide an explanation at the time, or if the claimant asked for an explanation, and the employer refused to provide one.

- If the claimant was terminated or disciplined, ask whether this was the result of progressive discipline, i.e. whether the claimant previously had been subjected to discipline. If so, ask about the prior incidents of discipline. If the claimant has copies of any documents relating to this prior discipline, request them from the claimant.

This kind of evidence is relevant whether or not progressive discipline was imposed. If the claimant was terminated or subject to serious disciplinary action (for example a lengthy suspension) without any prior discipline, then this kind of evidence can be a factor in assessing whether there is a reasonable basis in the evidence to question the basis for the respondent's decision. If there was prior discipline, it is important to have this information to assess the reasonableness of the respondent's actions, and whether the respondent followed any progressive discipline policy or practice it may have.

- If the claimant was terminated or disciplined or subjected to other adverse treatment because of alleged poor work performance, ask whether the employer had previously raised work performance issues with the claimant, and if so, obtain details about what issues were raised, when, and whether any assistance or resources were provided to the claimant to address the alleged performance issues. If the claimant has any documents relating to their work performance, obtain them. These can include: performance appraisals, letters of expectation, warning letters, performance improvement plans etc.

This is important because we sometimes see situations where an employee is terminated for alleged poor performance, but where the claimant's evidence is that performance issues had never previously been raised, or they had not been informed

that any performance issues were sufficiently serious to put their job in jeopardy. This kind of evidence can be a factor in assessing whether there is a reasonable basis in the evidence to question the respondent's stated explanation for its action.

Exploring the potential link to race

Apart from obtaining the claimant's evidence regarding the basic underlying facts leading to the termination, discipline or other adverse treatment, the most important issue engaged in this case pattern is exploring the potential link or connection between the claimant's adverse treatment and the race-related ground as alleged in the complaint.

What follows are some questions that may help you assist the claimant in articulating why they believe they have been subjected to racial discrimination, and to help you obtain their evidence to assist you in assessing whether there is a reasonable basis to support that race may have been a factor in how they were treated.

- Why do you believe that your race was one of the reasons you were terminated [or disciplined or otherwise adversely treated]?

While this may be a difficult question for the claimant to articulate an answer to, it nonetheless is important to ask this question in a general, open-ended way to hear what the claimant has to say, and to follow up to obtain any further clarification you may require in order to fully understand the claimant's answer.

- Can you identify any White co-workers who engaged in the same kind of conduct you did, but who were not terminated [or subjected to the same level of discipline or other adverse treatment]?

This question obviously is looking to explore whether there is evidence of differential treatment. The claimant may not be in a position to answer this question, because they may not be aware if a co-worker has engaged in similar conduct. But often a claimant will have awareness of the conduct of co-workers who have been more leniently treated, and if they are, it is important to obtain this information, including if possible the co-worker(s)' full name, their position, what they did, what if anything happened to them, and whether they worked for the same manager who took action against the claimant.

While the question has been framed to ask about "White" co-workers, you must recognize that there are workplace dynamics where one racialized group may be favoured over another. A respondent often will identify "visible minorities" or members of racialized groups as a monolithic entity, where the workplace reality may be that one group is treated more favourably than another. In these kinds of circumstances, it is

important to seek from the claimant any examples of more lenient treatment towards members of the favoured group.

- Can you identify any racialized co-workers who you believe were also terminated, disciplined or otherwise adversely treated because of their race?

What you are getting at here is whether the claimant can identify any evidence of a pattern of racial discrimination on the part of the employer, that may support their own allegation. To the extent that the claimant can identify racialized co-workers who were in the same work group or under the same manager, the better. In asking this question, it is important to note that, for example, if the claimant was terminated, this question should not be restricted only to ask about other racialized employees who were terminated. If the claimant has any evidence that race may have been a factor in how another racialized employee was adversely treated, that evidence should be obtained and considered.

Probing for indicia of more subtle racial discrimination

The next set of questions are designed to probe more deeply into the claimant's evidence, to help assess whether different common manifestations of racial discrimination may have been at play. Some of these questions may not fit the specific circumstances of the complaint, or may need to be adapted to those circumstances.

- Do you believe that you were targeted by your manager, for example by being subjected to excessive scrutiny or monitoring? If so, explain why.

- Do you believe you were disproportionately blamed for the incident that led to your termination, or that the penalty imposed was out of proportion to the seriousness of what occurred? If so, explain why.

- Do you believe that other people contributed to the situation that led to your termination, but that you are being singled out? If so, explain why.

- Do you believe you were penalized for a situation where what would be regarded as acceptable conduct by a White worker was regarded as rude, aggressive, confrontational, insubordinate or inappropriate coming from you as a racialized person? If so, explain why.

- Do you believe that how you were treated is connected to any stereotypical beliefs about you as a member of your particular racialized group? If so, please explain what stereotypes you believe may have been involved, and how they are connected to how you were treated.

- Do you believe that a White co-worker would have been treated in the same way that you were? If not, why not?

Questions for Respondent

The most important evidence to obtain from the respondent is its explanation or reason(s) for the action it took against the claimant, in order to have a basis to assess the extent to which the respondent's explanation is reasonable, rational and consistent.

When gathering evidence from the respondent and interviewing respondent witnesses, you will want to ask questions that explore three relevant sources of potential evidence of racial discrimination:

- Evidence of differential treatment
- Evidence of discrimination against other racialized employees
- Evidence of other more subtle indicia of racial discrimination

Exploring differential treatment

If the claimant has identified White co-workers whom the claimant believes were more leniently treated in similar circumstances, then you will want to ask the respondent specific questions about these co-workers. Sometimes the claimant will only have been able to provide a partial name (usually a first name) or just a job title or a time period when this co-worker worked there, so you will need to provide the respondent with as much identifying information as you can in order to obtain this individual's name.

Questions to ask about these White co-workers include:

- Sharing the conduct identified by the claimant that these White co-workers were said to have engaged in, and obtaining the respondent's version of events
- Finding out from the respondent whether any disciplinary or performance improvement measures were imposed on these White co-workers
- If not, or if any such actions were more lenient than actions taken against the claimant, obtaining an explanation from the respondent as to why this more lenient action was taken and why more severe action was not taken
- To the extent that the action taken by the respondent against these co-workers differs from the action taken against the claimant, obtaining an explanation as to why

Relevant documents to request from the respondent include:

- Termination letter, disciplinary records, performance appraisals, and any other documents relating to the claimant's alleged misconduct or work performance

- Any internal respondent e-mails, memos, texts or other documents relating to the decision taken in relation to the claimant and the claimant's alleged misconduct or work performance
- Disciplinary records, performance appraisals and any other documents relatingto the conduct the White co-worker(s) are alleged to have engaged in and management's response to this conduct

The more challenging situation arises when you are trying to explore whether there is evidence of differential treatment in the absence of the claimant being able to identify any White co-workers who engaged in similar conduct but were treated more leniently. In these circumstances, there are two ways of exploring potential differential treatment: (1) through witness interviews; and (2) through the respondent's records.

When conducting witness interviews in this case pattern, you should use a standard question that asks the witness whether they are aware of any White co-worker who engaged in conduct similar to the claimant, and if so, how that worker was treated. This question certainly should be asked of any respondent witness interviewed, but also of any witness identified by the claimant who was employed in this workplace.

- Sample question: Are you aware of any White employee who engaged in conduct similar to the claimant, and if so, how was that employee treated?

When seeking documents from the respondent, you should follow up on any specific White employees who were identified through your witness interviews, by seeking the documents pertaining to those workers as identified above.

If not, you should consider making a general request to review disciplinary and performance appraisal records for employees in the work group in which the claimant was employed. In order to avoid over-reach, you generally should limit any such request to employees who worked under the specific manager who the claimant has alleged engaged in racial discrimination or who the claimant has alleged as being primarily responsible for the alleged discrimination. You also should limit your request to a specific time period, for example the two-year period prior to the termination of the claimant's employment. This request should not just be restricted to current employees, but also extend to employees in the work group who are no longer there.

When reviewing these documents, you are looking to identify any references to conduct or issues similar to those alleged to have arisen with the claimant, and to identify from the documents whether any steps were taken to address any such conduct or issues, and if so, what these steps were. If anything of this nature arises from the document review, then you would want to follow up with the relevant witness(es) to obtain the kind of specific information identified above.

Exploring racial discrimination against other racialized employees

If the claimant has identified other racialized employees who the claimant believes were subjected to racial discrimination, then once again you will want to ask the respondent specific questions about these employees.

Questions to ask about these racialized employees include:

- Sharing the basis on which the claimant identified these other racialized employees as having been subjected to racial discrimination, and obtaining the respondent's version of events

Relevant documents to request from the respondent include:

- Termination letter, disciplinary records, performance appraisals, and any other documents relating to these racialized employee(s) alleged misconduct or work performance
- Any internal respondent e-mails, memos, texts or other documents relating to the decision taken in relation to these racialized employee(s) and their alleged misconduct or work performance

As when exploring evidence of differential treatment, the more challenging situation arises when you are trying to explore whether there is any evidence of racially discriminatory treatment of other racialized employees in the absence of the claimant being able to identify any other such racialized employees. As above, in these circumstances, there are two ways of exploring this kind of evidence: (1) through witness interviews; and (2) through the respondent's records.

When conducting witness interviews in this case pattern, you should use a standard question that asks the witness whether they are aware of any other racialized employee who experienced or alleged that they experienced discrimination, and if so, what evidence the witness has about what occurred. This question certainly should be asked of any witness, whether identified by the respondent or the claimant, who was employed in this workplace.

- Sample question: Are you aware of any racialized employee who experienced or alleged that they experienced discrimination? If so, what do you know about what occurred?

When seeking documents from the respondent, you should follow up on any specific racialized employees who were identified through your witness interviews, by seeking the documents pertaining to those workers as identified above.

Exploring subtle indicia of racial discrimination

Exploring the respondent's evidence relating to more subtle indicia of racial discrimination will largely come through witness interviews. In these interviews, you will want to explore the same kinds of questions about subtle indicia of discrimination that you asked the claimant, but as informed by the specific responses you obtained from the claimant.

For example:

- The claimant believes that they were targeted by you because you subjected them to excessive scrutiny or monitoring by doing [describe the specific examples given by the claimant]. Did you engage in the kind of behaviours identified by the claimant, and if not, please provide your version of what you did? In terms of how you say you behaved with the claimant, did you engage in similar behaviour with other employees? If so, please provide specificexamples.

- The claimant believes that they were disproportionately blamed for the incident that led to their termination, and that the penalty imposed was out of proportion to the seriousness of what occurred because [describe the reason(s) given by the claimant]. Do you agree, and if not, why do you believe that terminating the claimant was proportional to what you say they had done? Can you think of other situations when an employee was terminated for similar conduct?

- The claimant believes that other people contributed to the situation that led to their termination, but that they were singled out because [describe the basis for the claimant's belief]. Do you agree that other people contributed to the situation? If not, why not? If so, explain why none of them was terminated?

- The claimant believes that they were penalized for a situation where what would be regarded as acceptable conduct by a White worker was regarded as rude, aggressive, confrontational, insubordinate or inappropriate coming from them as a racialized person because [describe the basis for the claimant's belief]. Do you think that what the claimant did would have been regarded as more acceptable coming from a White employee, and if not, why not? Can you think of specific examples where a White employee engaged in similar conduct, and was treated the same way as the claimant?

- The claimant believes that how they were treated is connected to stereotypical beliefs about them as a member of their particular racialized group because [explain the stereotype(s) the claimant believes were in play and how they were connected to what happened]. Do you believe that a stereotype of this nature played a role in your decision, and if not, why not?

- The claimant believes that a White co-worker would not have been treated in the same way that they were because [provide the claimant's reasons]. Do you believe that a White employee would have been treated in the same way in the same circumstances, and if not, why not? Can you think of specific examples where a White employee engaged in similar conduct, and was treated the same way as the claimant?

The purpose of asking these questions is not in the expectation that the respondent witness will have a moment of self-revelation and confess to the realization that they engaged in a subtle form of racial discrimination. That is highly unlikely. Rather, asking these kinds of questions serves two purposes. First, as a matter of fairness, the respondent is entitled to know the basis of the allegations against them and be afforded an opportunity to respond. So to the extent that you are considering these kinds of subtle indicia of racial discrimination as part of the assessment, the respondent is entitled to know about them and respond.

Second, the responses provided to these questions by the main respondent witness, who typically would be the manager responsible or primarily responsible for the adverse treatment experienced by the claimant and for the alleged racial discrimination, provides a baseline of evidence that can be tested with the claimant and/or other witnesses. To the extent that the main respondent witness provides answers to these questions that conflict with the evidence of other witnesses or the claimant, that may be a factor for you to consider when assessing the extent to which the respondent has provided a reasonable, rational and consistent explanation for its actions, or whether determining that issue requires an assessment of credibility and a more detailed examination and weighing of the evidence that is more properly left to the Tribunal.

<u>Assessment</u>

When you are assessing the evidence gathered through your assessment, it is important to understand specifically what you are doing, and as importantly what you are not doing.

What you are doing is

- Assessing whether there is a reasonable basis in the evidence for proceeding to the Tribunal
- Making a recommendation as to whether referral to the Tribunal is warranted

What you are not doing is

- Making a determination as to whether or not racial discrimination occurred
- Resolving issues of credibility between the parties

- Engaging in the kind of detailed weighing of evidence that happens at a Tribunal hearing

So while you are required to assess the “sufficiency” of the evidence, this is only for the purpose of determining whether there is a reasonable basis in the evidence for proceeding to the Tribunal such that doing so is warranted.

In racial discrimination cases, the critical issue when assessing the sufficiency of the evidence comes down to the assessment of the sufficiency of the evidence to support a link or connection between the adverse treatment experienced by the claimant and the race-related ground(s) relied upon in the complaint.

In making this assessment, you need to consider the totality of the evidence before you and all of the circumstances relevant to the claimant’s allegation(s).

Specifically in relation to the kinds of evidence discussed in this fact pattern, you need to consider:

- Is there evidence of differential treatment that could provide a reasonable basis at a Tribunal hearing to support the claimant’s allegation of racialdiscrimination?

When considering this question, you need to recognize that no two situations are ever exactly the same, and so you will rarely find an example of alleged differential treatment that matches the claimant’s experience exactly. Rather, what you are considering here is whether there is enough of a similarity between the two situations that could provide the Tribunal with a basis to find support for the claimant’s allegation.

- Is there evidence of other racialized employees having been subjected to racial discrimination?

Here, the issue for you is not to determine whether this is admissible “similar fact” evidence, as would be done as a Tribunal hearing. Rather, the issue for you to consider is whether there is evidence that other racialized employees may have experienced racial discrimination, such that this could support the claimant’s allegation.

- Is there evidence of subtle indicia of racial discrimination that could provide support at a Tribunal hearing for the claimant’s allegation of racialdiscrimination?

In this context, you are considering the more subtle indicia or manifestations of racial discrimination and the evidence obtained as a resulting of your questioning of the claimant, the main respondent witness, and other witnesses. Again, the issue here is not for you to determine whether the totality of this evidence proves racial

discrimination, but merely whether this evidence supports a reasonable basis to warrant consideration at the Tribunal.

- Is there a reasonable basis in the evidence to believe that a White employee may not have been treated in the same way as the claimant was?

At a human rights tribunal hearing into an allegation of racial discrimination, the tribunal is directed to consider whether events would have occurred the same way if the person at issue was White instead of racialized. In the absence of specific evidence of differential treatment, this is necessarily a speculative exercise. However, as a former tribunal member, it is instructive in terms of examining the overall circumstances and gauging the extent to which the claimant's race was a factor in what happened. From your perspective as a human rights officer, you are not being called upon to make this kind of final determination. However, when considering whether referral to the Tribunal is warranted, it may be a useful exercise to at least consider whether there is a reasonable basis to support that a White person may have been treated differently in the same circumstances.

B. Employment – Termination / Other Adverse Treatment because of alleged down-sizing / re-organization (s. 7)

Overview

These are cases where the termination or other adverse treatment is alleged to have been the result of some re-structuring by the employer organization, which generally is framed as down-sizing or some kind of re-organization. In this case pattern, other adverse treatment besides termination could include things like demotions, transfers, or re-assignments.

In these types of cases, the primary evidence largely will be in the hands of the employer. The question mainly will focus on whether the employer has a reasonable, rational and consistent explanation for the re-structuring and for selecting the specific claimant as the employee to be terminated.

The focus in these types of cases will be: (1) on obtaining evidence from the employer regarding the alleged re-structuring (eg. witness evidence regarding the process leading to the re-structuring decision and the basis or reason for the re-structuring; e-mails, reports, memos or other documents among management discussing the need for the re-structuring and what it would entail; documents relevant to the basis or reason behind the re-structuring such as budgets or financial statements etc.); and (2) on obtaining evidence from the employer to explain why this specific claimant was chosen for termination as opposed to some other employee(s). With regard to the latter point, an employer can have an entirely reasonable and rational reason and even need for re-structuring, but still racially discriminate in terms of identifying the specific employee(s) chosen for termination.

Questions for Claimant

As stated above, the main source of evidence in this case pattern is in the hands of the respondent. However, it is nonetheless important to carefully question the claimant in order to obtain as much information as you can regarding what the claimant knows about the alleged re-structuring, and about why the claimant was selected for termination or other adverse treatment.

- Please describe the nature of the re-structuring implemented by the respondent.

What you are trying to understand here, as best as is known to the claimant, is what positions existed before the re-structuring, what positions were eliminated, and what positions may have been re-aligned to other departments. When dealing with this case pattern, I find it useful to have the claimant draw up a rough organizational chart

showing what their work group looked like prior to the re-structuring, and what it looked like after the re-structuring. To the extent that employees no longer appear in the post-restructuring chart, I ask the claimant to tell me, to the best of their knowledge, what happened to them, i.e. were they terminated as well, were they transferred to another job in a different department etc.

- What were you told was the reason for the re-structuring?

In a typical re-structuring, there will be a process whereby management describes to its employees that changes are coming and why these changes are required, before the re-structuring is actually implemented. Sometimes this will be through e-mails or memos, and sometimes it is done verbally by managers at staff meetings. You will want to hear the claimant's evidence as to what they were told was the reason for the re-structuring, in order to test this evidence against the explanation given by the respondent in the context of the CHRC process. To the extent that the claimant still has possession of any e-mails, memos or other documents relating to the re-structuring, you should obtain these from the claimant.

- What were you told regarding why you were terminated as a result of the re-structuring? [if not terminated, substitute the actual adverse treatment]

Unlike in other kinds of termination cases, an employer is sometimes more forthcoming in telling an employee why they were terminated in the context of a re-structuring. Once again, it is important to get this evidence in order to test it against the explanation given by the respondent in the context of the CHRC process. As stated above, there are two distinct explanations you are looking for here: (1) why was the re-structuring undertaken; and (2) why was the claimant in particular selected for termination (or other adverse treatment). Again, if the claimant has any documents stating why they were terminated, such as the termination letter or e-mails, memos or other documents, you should obtain them.

- Why do you believe that your race was one of the reasons you were terminated [or otherwise adversely treated]?

In response to this question, you often will hear a variety of reasons, such as: I had more seniority than a White co-worker who was retained; my work performance was better than a White co-worker who was retained; White co-workers were transferred to other positions, but I was terminated. Whatever the reason provided, obtain as much detail from the claimant as you can, as this information will greatly assist you in formulating your questions for the respondent.

I note that the examples of reasons given above call into question the reason why the claimant was terminated, rather than calling into question the legitimacy of the re-structuring as a whole. There are cases where a “re-structuring” is undertaken by an employer, not for budgetary or genuine re-organization reasons, but precisely for the purpose of ridding itself of a specific employee. These are sometimes referred to as a “re-structuring of one”, since only one person is affected by the alleged re-structuring (sometimes a support position tied to the employee’s role also will be eliminated). In these kinds of cases, there typically will be a build-up of issues between management and the employee over the preceding time period, which the employer chooses to deal with through “re-structuring” rather than confronting the employee through discipline or performance management. These kinds of cases have more in common with Case Pattern A (terminations for alleged misconduct or poor performance), and your questions for the parties and assessment should be guided more by the content of that Case Pattern.

- See if you can obtain information from the claimant about the racial identities of employees involved in the re-structuring

Based on the organizational chart you had the claimant prepare (or that you prepared based on what you were told by the claimant), you can then get the claimant to tell you the racial identity of the employees who worked for the employer prior to the re-structuring, and of the employees who remained afterwards. Depending upon the scope and extent of the re-structuring, the claimant may not be able to provide you with the full picture. Nonetheless, it is important to try to get as much information about this as you can from the claimant. What you are looking for is whether racialized employees were disproportionately affected by the re-structuring.

<u>Questions for Respondent</u>

As stated above, the key issue here is the respondent’s explanation both for the re-structuring itself, and for its decision to terminate the claimant’s employment as part of the re-structuring.

- Please describe the nature of the re-structuring you implemented

What you will want to obtain from the respondent is details about the full scope of the re-structuring, what departments and positions were affected, what employees were displaced as a result, and what happened to these employees. The respondent typically will have (or be able to provide you with) organizational charts, showing what the workplace looked like before and after the re-structuring. You will want to carefully

compare the information you receive from the respondent with what you were told by the claimant, and follow up to obtain explanations for any discrepancies.

- What was the reason for the re-structuring?

Here you want to understand the respondent's reason for undertaking the re-structuring, and again follow up on any inconsistencies with what you were told by the claimant or what you have seen from the documents.

- Why was the claimant selected for termination as part of the re-structuring?
- Did management engage in a process to identify which employees would be terminated? If so, describe that process.
- What criteria were used to determine which employees would be terminated?
- Who was involved in these decisions?

In most cases, these are the critical questions. Sometimes, even in non-unionized workplaces, an employer that is down-sizing will select employees for termination on the basis of seniority. If that is the explanation, then what you are looking for is whether there is any discrepancy between the claimant's seniority and the seniority of other employees who were retained.

More often, however, an employer engages in a nebulous process of consulting with its managers and supervisors to obtain their views as to which employees should be kept on and which let go. This is often a highly subjective process based on a mix of work performance, disciplinary record, and the manager's personal feelings. In these kinds of cases, what you are exploring is the process engaged in by the employer, who was involved, what criteria were used, and how that criteria applied specifically to the claimant. Based on the responses you get to these questions, you will then want to probe these answers by looking at relevant documents, such as performance appraisals and disciplinary records for employees in the claimant's original work group, in order to assess the extent to which the respondent's explanation is reasonable, rational and consistent, or the extent to which the degree of subjectivity involved may have left room for racial bias to operate.

- The claimant believes that their race was a factor in your decision to terminate their employment because [provide reason given by claimant]. What is your response to this? Please provide details.

Again, you want to provide the respondent with notice of the specific reason(s) alleged by the claimant for believing that their race was a factor in their termination (or other adverse treatment), and give the respondent an opportunity to respond. You also want

to hear the respondent's response to these specific allegations so that you can test that evidence against other witness or documentary evidence obtained in your assessment.

- Obtain information from the respondent about the racial identities of employees involved in the re-structuring

As stated above, the claimant has a more limited ability to provide this kind of information than the respondent. What is important to remember here is that by asking this question, you are not collecting data as part of an employment equity process, where self-identification is the standard. Rather, you are requesting this information from respondent management as part of an assessment into alleged racial discrimination. In this context, what is important in terms of the potential operation of racial bias is not how individual employees may self-identify for employment equity purposes, but how their racial identity is perceived by the manager(s) responsible for making the decisions at issue. So, in my view, it is entirely appropriate to ask the respondent to provide its perception of the racial identity of the employees involved in the re-structuring, in order to assess whether a disproportionate number of racialized employees were adversely affected. If a respondent refuses to provide such information in response to a request, that may be a basis to consider referring the matter to the Tribunal pursuant to s. 49, so that the Tribunal can address the issue and make whatever order it deems appropriate in the circumstances.

Documents to obtain from the respondent may include:

- e-mails, reports, memos or other documents relating to the re-structuring, including documents among management discussing the need for the re-structuring and what it would entail
- documents relevant to the basis or reason behind the re-structuring such as budgets or financial statements etc.
- organizational charts for the affected parts of the company both before and after the re-structuring
- documents relating to any process or basis upon which specific employees were identified for termination or other adverse treatment
- if employees were selected by seniority, the seniority dates of all employees who were part of the re-structuring, whether retained or let go
- if employees were selected in whole or part by work performance or disciplinary records, performance appraisals and disciplinary records for all employees who were part of the re-structuring, whether retained or let go

Assessment

As stated above, the critical issue in making your assessment under s. 44 is whether there is a reasonable basis in the evidence to support that the claimant's race may have been a factor in their termination (or other adverse treatment), such that referral to the Tribunal for the hearing and determination of this issue is warranted. As always, you need to consider the evidence and circumstances in totality.

In this Case Pattern, questions for you to consider include:

- Is there a reasonable basis to question the respondent's explanation for selecting the claimant for termination?
- Is there any inconsistency in the respondent's explanation?
- Was the respondent's decision to select the claimant for termination based on a process where racial bias could have influenced the result?
- Did the re-structuring have a disproportionate impact on racialized employees?
- Was this a "re-structuring of one", and if so, is there a reasonable basis to support that the applicant's race may have been a factor in the respondent's actions (having regard to the kind of considerations outline in Case Pattern A)?

This is not a situation where all of these questions need to be answered in the affirmative to warrant a referral recommendation. Rather, you need to consider the circumstances as a whole. It may be sufficient if only one of the above questions is affirmatively answered.

C. Employment – Hiring or Promotion cases (s. 7)

Overview

Hiring and promotion cases are a distinct category for a number of reasons, including the caselaw that has arisen regarding the formulation of what a *prima facie* case requires in such cases (which I have heavily criticized in some of my decisions) and because of the unique set of evidence and documents that apply in such cases.

Once again, in this category of cases, the focus primarily will be as to whether the employer has a reasonable, rational and consistent explanation for its decision to select the successful candidate and to not select the claimant. Assessing this explanation will not only entail witness interviews with the decision-maker and others on any assessment panel (such as interviewers or Human Resources representatives), but also obtaining access to documents such as applications, CVs, screening notes, interview questions and templates, interview notes, any scores or marking, memos or e-mails reporting on the assessment of the candidates, and any documentation of the decision and the reason(s) for the decision.

Not only must CHRC staff be alive as to whether the employer has a reasonable, rational and consistent explanation for its decision, but also to whether some aspect of the assessment process was in and of itself discriminatory.

Questions for Claimant

The basics

In hiring cases especially, the claimant may have little to say in support of their complaint of racial discrimination, other than that they applied for the job, were qualified, and were not hired. In most cases, the claimant will not be given a reason for not being hired, except perhaps that other candidates were “better qualified”.

Having said that, it is important to glean from the claimant whatever information they have.

- Did you meet with or speak to the prospective employer?
- Were you interviewed for the position?
- Please describe the hiring process as you understood it.
- What is your best recollection of what was discussed with the prospective employer?
- If you attended an interview, what do you recall being asked and what were your responses?

If the claimant actually met with or spoke to the prospective employer and/or were interviewed for the position, it is important to obtain from the claimant as much information about the process as you can. In a structured hiring process, the respondent is likely to have initial screening criteria that were applied to short-list for an interview, and standard questions that were asked at any interview. However, in an unstructured hiring process, the respondent may have little to no records about what was discussed with the claimant, what questions were asked at any interview, and what responses were given. Accordingly, you will need to get as much of this information as you can from the claimant.

You also should obtain basic documents from the claimant regarding the hiring process, including:

- Job advertisement
- Application form or letter and resume
- Any correspondence or e-mail from the prospective employer in response
- Any notes the claimant may have made of any discussions with the prospective employer or any interview attended
- Any letter or e-mail from the prospective employer regarding not being hired for the position
- Documents or notes relating to any subsequent communications or discussions with the prospective employer

In promotion cases, given that the claimant is already working for the employer, the claimant is likely to have more information about the promotion process. The claimant may have been informed as to the reason they were not successful in getting the promotion. They will likely know the identity of the successful candidate. Questions to ask in the promotion context include:

- Please describe the promotion process as you understood it.
- Did you have to apply for the promotion?
- Was there an interview for the position? Were you interviewed? Do you know who (else) was?
- What is your best recollection regarding any discussions you had with management about the promotion?
- If you attended an interview, what do you recall being asked and what were your responses?
- Were you told the reason why you did not receive the promotion? If so, what were you told?
- Do you know who got the promotion? Please identify by full name. Do you know why this person was selected for the promotion?

You also should obtain basic documents from the claimant regarding the promotion process, including:

- Any posting, advertisement or e-mail advising of the promotion opportunity
- Any application form or letter and resume
- Any correspondence or e-mail from employer in response
- Any notes the claimant may have made of any discussions with management regarding the promotion or of any interview attended
- Any e-mail, memo or other communication from the employer regarding not being selected for the promotion
- Documents or notes relating to any subsequent communications or discussions with the employer about the promotion
- Any announcement about the successful candidate obtaining the promotion

Evidence re potential link to race

- Why do you believe that your race was one of the reasons you weren't hired [or promoted]?

While the claimant may have little specific evidence to provide in response to this question, other than the fact that they are a member of a racialized group, were qualified for the position, and did not receive it, it nonetheless is important to obtain any additional information the claimant may have to support the link to race. The respondent may have made statements or exhibited conduct during the hiring or promotion process that indicates racial bias or stereotypical racial attitudes. The claimant may know of other (White) people who applied, and were hired or at least interviewed. In a promotion case in particular, the claimant may have more specific evidence or information to support their belief that their race was a factor, based on their presence in the workplace and how they were treated or regarded.

One question that could be asked is whether the claimant has any reason to believe that a racial stereotype may have played a role in the decision to deny the job or promotion. You could frame a question like:

- Do you believe that one of the reasons you were denied the job [or promotion] may be connected to any stereotypical beliefs about you as a member of your particular racialized group? If so, please explain what stereotypes you believe may have been involved, and how you believe they may be connected to the denial of the job [or promotion].

But even if the claimant has no additional evidence or information to provide to support a link to race other than the fact that they are a member of a racialized group, were qualified for the position, and did not receive it, that has been regarded at law as being sufficient at least to establish a *prima facie* case and place an evidentiary burden on the

respondent to come forward with an explanation for its decision. In this Case Pattern particularly, it would not be appropriate to question the Commission's jurisdiction to proceed (unless the employment fell within provincial jurisdiction) or to conduct a s. 41 assessment on the basis of insufficient evidence from the claimant to support a link to race. The reason the *prima facie* case standard in hiring and promotion cases is set so low is because it is recognized that it is the respondent that possesses the relevant information about why the claimant wasn't hired, and the claimant generally has no access to this information.

Questions for respondent

There are two critical issues in these kinds of cases. One is to understand and obtain evidence regarding the hiring (or promotion) process, and how it was applied to the claimant in particular. And the second is to obtain and test the respondent's explanation for why the claimant wasn't hired (or promoted) and why the successful candidate was.

The process

You first will want to understand the selection process used by the respondent. The typical selection process involves the advertising or posting of the position, the receipt of applications, some kind of screening to identify candidates for interviews, an interview process, and a selection decision. You will want to know if the employer used a structured or unstructured selection process.

If the employer used a structured process, it generally will have criteria it applied to review applications and decide who to screen in for an interview, a set of standard questions to be asked at the interview, and usually some kind of scoring of the candidates' answers. Questions to ask include:

- What criteria were used to assess the applications and decide who was screened in for an interview?
- Who did this initial screening? Who made the decision about who to interview?
- What questions were asked at the interview?
- What criteria were applied to assess the candidates' answers to the interview questions?
- Were the candidates marked or scored on their answers? Who assigned these scores and what was the process for assigning scores?
- Did you hire the candidate with the highest score? If not, why not?
- Why did you decide to hire the successful candidate?
- Why did you decide not to hire the claimant?
- What is it about the successful candidate's qualifications, skills, experience or other attributes that caused you to prefer them over the claimant?

Documents that you should request from a respondent that used a structured selection process and where the claimant proceeded to the interview stage include:

- Job advertisement or posting
- Applications and resumes submitted by the claimant and at least those screened in for an interview
- Any notes, marks or other documents from the screening stage
- Interview questions and templates, including any score matrices
- Interview notes for the claimant and the other candidates interviewed, including any scores or marking
- Any memos or e-mails reporting on the assessment of the candidates
- Any documentation regarding the decision to hire (or promote) the successful candidate, and the reason(s) for the decision.

If the claimant was screened out of the selection process prior to the interviews, then you would only need to request the first three categories of documents listed above.

If an unstructured process was used, you will need to probe the respondent to find out why some applicants were screened in for an interview and not others, what was asked during the interviews, and the basis upon which candidates were assessed and the successful candidate selected.

Questions to ask include:

- Who reviewed the applications?
- On what basis was the decision made about who to interview?
- Who made the decision about who to interview?
- What questions were asked at the interview?
- On what basis did you assess the candidates and decide who you wanted to hire?
- Did you give the candidates any marks or scores?
- If so, how did you decide what score to give?
- Did you hire the candidate with the highest score? If not, why not?
- Why did you decide to hire the successful candidate?
- Why did you decide not to hire the claimant?
- What is it about the successful candidate's qualifications, skills, experience or other attributes that caused you to prefer them over the claimant?

Documents that you should request from a respondent that used an unstructured selection process and where the claimant proceeded to the interview stage include:

- Job advertisement or posting
- Applications and resumes submitted by the claimant and at least those interviewed
- Any notes, marks or other documents from the screening stage
- Any list of interview questions
- Any notes from the interviews for the claimant and the other candidates interviewed, including any scores or marking
- Any documentation regarding the decision to hire (or promote) the successful candidate, and the reason(s) for the decision.

If the claimant was screened out of the selection process prior to the interviews, then you would only need to request the first three categories of documents listed above.

Evidence relevant to link to race

In this Case Pattern, the primary basis to support an allegation of racial discrimination is that the respondent's explanation for its selection decision doesn't add up.

In an unstructured interview process, the decisions made by the respondent are highly subjective and prone to the operation of racial bias and stereotypical attitudes. The mere fact that a selection process was highly subjective does not, in and of itself, prove racial discrimination. But whether or not a claimant can prove racial discrimination is a determination to be made by the Tribunal, not by the Commission. In terms of the Commission's screening role, the existence and application of a highly subjective interview process to exclude a claimant is a factor that may provide a reasonable basis to warrant referral to the Tribunal, in the absence of clear evidence to support that the respondent's decision wasn't racially discriminatory.

Research demonstrates that in an unstructured interview, the assessor forms an impression of a candidate within a few minutes. This impression tends to be more favourable towards candidates who mirror the assessor's characteristics (the "halo effect"), and more negative towards candidates who differ from the assessor (the "devil effect"). Where there is no set questions or framework for comparing the candidates' responses, the subjective overall impression formed of a candidate informs the assessment and decision made as to who to hire (or promote). This is how racial bias and stereotypes enter into the process.

So when you are questioning a respondent in the context of an unstructured selection process, you should press the respondent for specific examples to support its assessment of the successful candidate and the claimant. Don't just accept responses like: the successful candidate just seemed to be a better fit for our company; or the successful candidate had stronger communication skills; or the successful candidate displayed more confidence. These are just subjective impressions disguised as reasons.

You need to probe the respondent for any objective basis to support these subjective impressions, by asking questions like:

- You say the successful candidate seemed to be a better fit for your company. Can you describe what you mean by a “fit” for your company? Can you give specific examples from the interview regarding what the successful candidate said or did to demonstrate they were a better fit? Can you give me specific examples from the interview to demonstrate why the claimant would not have been a good fit?
- You say the successful candidate had stronger communication skills. What specifically were you looking for in terms of communications skills? Why were they important for the job? Can you give specific examples from the interview regarding what the successful candidate said or did to demonstrate they had stronger communication skills? Can you give me specific examples from the interview to demonstrate why the claimant did not have strong communication skills?
- You say the successful candidate displayed more confidence. What specifically are you looking for when you assess a person’s confidence? Why is that important to the job? Can you give specific examples from the interview regarding what the successful candidate said or did to display more confidence? Can you give me specific examples from the interview to demonstrate why the claimant did not display as much confidence?

To the extent that the respondent is unable to provide adequate answers to support its subjective assessment of the successful candidate and the claimant, this provides further support for the potential operation of racial bias.

A structured selection process on the other hand has the patina of objectivity. However, even in a structured process, subjectivity and racial bias can creep in.

In these processes, there often is less of a structured framework at the screening stage. If the claimant was screened out prior to the interview stage, you will need to probe the person who made this decision about why, and what specifically it was about the candidates screened in for an interview that objectively distinguished them from the claimant. If a claimant is screened out at this stage, a respondent often will say that this was based on a paper review of the application and resume, and the person making the decision was not aware of the claimant’s race. If this is raised, be careful to see if the claimant’s application and resume, while not expressly identifying their race, nonetheless contains information from which their race might be inferred, such as their name, where they live, what schools they attended, what courses they took, where they worked, or what their community or volunteer involvements were.

Even where a claimant progressed to the interview stage, there is still plenty of room for subjectivity and racial bias to creep in. If the questions are quite general and there is no

clear scoring grid, then the interviewer can be prone to the same subjective bias as in an unstructured interview. If this is the case, then when you question the interviewer, you should press for objective explanations to support the marks they awarded in the same way as set out above. (A good indication that the halo vs. devil effect is at play is when an interviewer's scores are relatively uniform across a series of different questions or criteria, which indicates that the interviewer simply formed an initial subjective impression of the candidate and applied it across all categories).

In other circumstances, the interviewer(s) may have a "result-focused" approach to the interview process, in the sense that the scores given to the candidates' answers reflect more a desire to give high marks to the candidate they want to hire rather than a true assessment of the quality of any particular answer. This is why it is important to know when the marks were assigned (whether after each interview or at the end of a group of interviews), or if there was an interview panel, whether marks were discussed before they were assigned on paper. Sometimes when you review the interview notes, you will actually see changes having been made to the assigned marks, for which you should request an explanation. Other times, you will see that better answers to a question have been given by the claimant or other candidates, but higher marks have been assigned to the successful candidate. Once again, if you encounter this, you need to ask pointed questions of the respondent.

Finally, in either process, you need to be mindful of how discriminatory factors or criteria can find their way into a selection process. In many cases, this arises under the auspices of an assessment of the candidate's "communications" ability. In this context, a racialized candidate can sometimes be penalized for an accent or for being perceived as not being as proficient in English or French. In these situations, you should specifically ask the interviewer(s) what they were assessing under the rubric of "communications", and if the claimant has an accent or does not have English or French as a first language, whether that was a factor in the selection decision.

<u>Assessment</u>

The critical issue in making your assessment under s. 44 is whether there is a reasonable basis in the evidence to support that the claimant's race may have been a factor in their not being selected for the position, such that referral to the Tribunal for the hearing and determination of this issue is warranted. As always, you need to consider the evidence and circumstances in totality.

In this Case Pattern, questions for you to consider include:

- Is there a reasonable basis to question the respondent's explanation either for selecting the successful candidate or not selecting the claimant for theposition?
- Is there any inconsistency in the respondent's explanation?

- Was the respondent's selection decision based on a process where racial bias could have influenced the result?
- To what extent has the respondent been able to objectively support its assessments of the successful candidate and the claimant?
- Is there evidence to indicate that a discriminatory factor may have been at play?

As with the previous Case Pattern, this is not a situation where all of these questions need to be answered in the affirmative to warrant a referral recommendation. Rather, you need to consider the circumstances as a whole. It may be sufficient if only one of the above questions is affirmatively answered.

D. Employment – Harassment and Poisoned Work Environment (s. 14)

Overview

This is a category of employment cases where the allegation(s) arise from how the claimant states they were treated in the workplace, whether by management or co-workers.

In this category of case, the first task is to obtain from the claimant their detailed and particularized evidence regarding all incidents of workplace conduct that they allege to be race-related, including specific dates and times, what happened, where, who was involved, and why and how they say the conduct was race-related. It also is important to obtain from the claimant any documents, such as e-mails, notes, texts, social media postings etc. that they have regarding their allegations.

This full understanding of the claimant's allegations then becomes the basis for developing the assessment plan, in terms of identifying witnesses to be interviewed and documents to be sought from the employer. These kinds of cases also involve an assessment of whether the employer knew or ought to have known of the alleged conduct, and whether it took appropriate and sufficient steps in response.

Questions for Claimant

The basics

As stated above, the first task is to obtain from the claimant their detailed and particularized evidence regarding all incidents of workplace conduct that they allege to be race-related, including specific dates and times, what happened, where, and who was involved. Much of this basic factual information should be in the complaint.

However, when setting out their allegations, many claimants will provide detail about some incidents, typically the most recent, but also make broad or vague allegations about other alleged conduct. For example, the claimant will allege something like: "during the summer of 2019, my supervisor was constantly bothering me about petty work issues". You want to probe with the claimant to obtain as much detail as you can about any specific such incidents. The claimant may not be able to recall the specific dates on which these incidents happened or all of the details of each incident, but you should seek to obtain and preserve the claimant's best recollection.

You should ask questions like:

- In your complaint, you say that during the summer of 2019, your supervisor was constantly bothering you about petty work issues. Can you recall for me a specific example of an incident where this occurred? Please provide as much detail about the incident as you can recall.

- Can you tell me when this specific incident occurred? You may not be able to recall a specific date, but can you recall the month when this happened? Was it early in the month, in the middle, or later in the month?
- Do you recall where this incident took place? Was it at your desk, was it in the supervisor's office or was it somewhere else?
- Do you recall if anyone else was present when this incident occurred? Who? Do you think this person saw and heard what happened?
- Do you recall the work issue that the supervisor was raising with you on this occasion? Why do you say the issue being raised with you was petty?
- Is there anything else about this specific incident that you can recall?
- Apart from the incident we have just discussed, do you recall any other specific example of your supervisor bothering you about petty work issues in the summer of 2019?
- [repeat until the claimant can't recall any further specific examples]

You also should obtain from the claimant any documents that they have regarding their allegations, including any as e-mails, notes, texts, social media postings etc. When being subjected to harassment, an employee often will start making notes of incidents, or send e-mails from work to their personal e-mail accounts recording incidents as they occur. In addition, outside the work context, claimants sometimes will vent through personal texts or social media postings to their family, friends or co-workers. In one case, I had a claimant who jotted things down on a calendar.

Retrieving and preserving these records is essential. They can provide documentary evidence to support the claimant's allegations in situations where only the claimant and the harasser were involved in the incident. They also are important sources of information to help refresh the claimant's memory about prior incidents that they may not now fully recall, or assist in pinning down dates or establishing a timeline or chronology.

At the same time, while any documents the claimant may have are helpful, they are not necessary to support a claim of harassment. The claimant's oral evidence about the conduct to which they were subjected is still evidence, even in the absence of any documentary support, and must be given due consideration in the conduct of the assessment and the assessment as to whether the complaint should be referred to the Tribunal.

Evidence re link to race

Sometimes, though not as often these days, the link to race will be apparent on the face of the claimant's allegations, for example due to an explicit or implicit reference to the claimant's race. As an example of an implicit reference to race, one of my decisions deals with a supervisor who told the Black male claimant that he looked "ghetto" because of what he was wearing on a casual Friday.

As always, the more challenging cases are those where there is no explicit or even implicit reference to the claimant's race on the face of the conduct at issue. In these situations, exploring the link to race with the claimant will be very similar to what we have reviewed in Case Pattern A. As in that Case Pattern, you will be probing the claimant to explore potential evidence in the following areas:

- Evidence of differential treatment
- Evidence of harassment against other racialized employees
- Evidence of other more subtle indicia of racial harassment

Using the example of a complaint alleging that the claimant was subjected to racial harassment by a supervisor bothering them over petty work issues, you should explore potential evidence of differential treatment by asking questions like:

- Can you identify any White co-workers who had the same kind of work issues as you did, but who were not bothered about them by the supervisor in the way you were?
- If so, what is their full name and job title?
- How do you know they had the same kind of work issues you did?
- How do you know they weren't bothered by your supervisor in the way you were?

As in Case Pattern A, while the question has been framed in terms of identifying "White" co-workers, you should be alive to workplaces where another racialized group may be favoured over the claimant's.

In terms of identifying potential evidence of harassment against other racialized employees, you should ask questions like:

- Are you aware of other racialized employees who worked under this supervisor?
- Can you identify the specific racial identity of these employees? Which ones were members of the same racialized group as you are?
- How would you describe your supervisor's relationship or interactions with these employees?

- Do you believe any of them were also harassed by this supervisor because of their race? If so, who? Please provide as much detail as you know about how this employee was treated.

In terms of probing more subtle indicia of racial harassment, as in Case Pattern A, you should start with a general question about why and how the claimant links the supervisor's conduct to their race, and then ask any of the more probing questions that are relevant in the circumstances. Using the above example, you should ask questions like:

- Why do you believe that your race was one of the reasons you were treated this way by your supervisor?

- Do you believe that you were targeted by your supervisor for excessive scrutiny or monitoring? If so, explain why.

- Do you believe you were disproportionately blamed for work issues out of proportion to the seriousness of what occurred? If so, explain why.

- Do you believe that other people contributed to the work issues raised with you by your supervisor, but that you are being singled out? If so, explain why.

- Do you believe you were penalized for what would be regarded as acceptable conduct by a White worker, but was regarded as rude, aggressive, confrontational, insubordinate or inappropriate coming from you as a racialized person? If so, explain why.

- Do you believe that how you were treated is connected to any stereotypical beliefs about you as a member of your particular racialized group? If so, please explain what stereotypes you believe may have been involved, and how they are connected to how you were treated.

- Do you believe that a White co-worker would have been treated in the same way that you were? If not, why not?

Management knowledge and response

You also should obtain any information you can from the claimant about management's awareness of the alleged harassment or poisoned work environment, and to the claimant's knowledge, what if any steps management may have taken to address it. For example, in a complaint alleging that the claimant was harassed by their supervisor, you might ask questions like:

- Did you raise your concerns about how you were being treated with the supervisor's manager, or with anyone else in management or human resources?
- If so, who did you raise your concerns with? Was this done verbally or in writing? If in writing, do you still have the e-mail, memo or other document in which you raised your concerns, and can you provide it to me? If verbally, what do you recall telling the person you spoke with?
- What if any response did you get to the concerns you raised?
- If you didn't raise your concerns with your supervisor's manager or anyone else in management or human resources, do you have any reason to believe any of them would have known about your supervisor's conduct? If so, what is the basis for your belief?
- Did management take any steps to address your supervisor's conduct? If so, can you describe what steps were taken?

Once again, if the claimant has any documents relating to them raising their concerns with management or human resources, these should be obtained and preserved.

Questions for Respondent

Obviously, you will want to get the respondent's version of the incidents as alleged by the claimant. If you have obtained information about additional specific incidents or additional details of incidents as a result of your questioning of the claimant that do not appear in the complaint, make sure that you raise these incidents or additional details with the respondent and given them an opportunity to respond.

As in Case Pattern A, you will want to explore with the respondent the evidence that you obtained from the claimant supporting a potential link between the alleged conduct and their race.

Exploring differential treatment

With regard to any evidence of differential treatment, you will want to ask the respondent specific questions about any White co-workers identified by the claimant who are alleged to have been treated differently. Using the example identified above, you should ask questions like:

- How would you describe the nature of your relationship and interactions with [name of White co-worker]?
- The claimant says that [name of White co-worker] also experienced the same work issues that she did. Do you agree with this? If not, why not?
- If the claimant shared any specific examples of work issues experienced by this White co-worker, provide these details to the respondent. Were you aware of this issue? What do you recall about this issue?
- If the supervisor acknowledges the work issue with the White co-worker, ask them to describe the nature of their response. If it differed from their response to the claimant, ask them to explain why.

In terms of documents to review, the most relevant documents for any White co-worker who the claimant alleges was treated differently is their performance appraisals, which you can compare to the claimant's performance appraisal to see the extent to which there is any similarity in the issues raised, comments or scores. To the extent that there is, you will want to raise these with the respondent for an explanation.

As in Case Pattern A, the more challenging situation is where the claimant is unable to identify any White co-workers who potentially were treated differently. In any harassment assessment, you will not just be interviewing the claimant and the alleged harasser. You also will be conducting interviews with employees in the claimant's work group who may have observed the interactions between the claimant and the alleged harasser. When interviewing these witnesses, in addition to asking questions about the claimant's specific allegations, you also should ask standard questions like (still using the same example):

- Did you experience the same kind of work issues as the claimant? If so, to what extent? Was your supervisor aware of these work issues? Did your supervisor ever raise or discuss these kinds of work issues with you? If so, please describe the nature of your interaction with your supervisor.
- Are you aware of any (other) White employee(s) who experienced the same kind of work issues as the claimant, and if so, to what extent? Do you know whether your supervisor was aware of these work issues? Do you know if your supervisor ever raised or discussed these kinds of work issues with this employee? If so, are you able to describe the nature of this employee's interaction with the supervisor.
- Can you please self-identify in terms of your racial identity?

In terms of reviewing documents from the respondent, you should follow up on any specific White employees who were identified through your witness interviews, by seeking performance appraisals or other documents relating to the identified issues that pertain to those workers.

If no White comparator employees are identified through your interviews, you could consider making a general request to review performance appraisal records for employees in the work group in which the claimant was employed. If you decide to request to review these kinds of records, you should limit your request in the manner described in Case Pattern A. While this kind of document review may be appropriate where a supervisor is alleged to be harassing a claimant over work issues, it may not be relevant in relation to other kinds of harassment, such as worker to worker harassment.

As in Case Pattern A, when reviewing these documents, you are looking to identify any references to issues similar to those alleged to have arisen with the claimant, so that you can follow up with the relevant witness(es) to obtain their response about these work issues. In the example we have been using, you would go back to the supervisor to ask specific questions about the White employees identified through the document review, what issues you found raised in the performance appraisals, and how the supervisor addressed them (adapting the questions shown above at page D6).

Exploring racial harassment against other racialized employees

If the claimant has identified other racialized employees who the claimant believes were subjected to racial harassment, then once again you will want to ask the respondent specific questions about these employees.

Questions to ask about these racialized employees include:

- Sharing the basis on which the claimant identified these other racialized employees as having been subjected to racial harassment, and obtaining the respondent's version of events

Relevant documents to request from the respondent include:

- Disciplinary records, performance appraisals, and any other documents relating to the alleged harassment of these racialized employee(s)
- Any internal respondent e-mails, memos, texts or other documents relating to the alleged harassment of these racialized employee(s)

As when exploring evidence of differential treatment, the more challenging situation arises when you are trying to explore whether there is any evidence of racial harassment against other racialized employees in the absence of the claimant being able to identify any other such racialized employees.

As in Case Pattern A, when conducting witness interviews in this case pattern, you should use a standard question that asks any witness who was employed in the workplace whether they are aware of any other racialized employee who experienced or alleged that they experienced racial harassment, and if so, what evidence the witness has about what occurred.

- Sample question: Are you aware of any racialized employee who experienced or alleged that they experienced racial harassment? If so, what do you know about what occurred?

I am aware that when conducting an assessment of this nature, current employees of the respondent may be reluctant to provide evidence in support of the complaint, for fear of losing their job. Even though you can tell a witness that they are legally protected against reprisal, this does not guarantee that they won't be fired in any event. In my experience, the most supportive evidence for the claimant often comes from former employees of the respondent, who are able to speak more freely.

If the claimant has identified co-workers who they believe may support their complaint, but these co-workers decline to be interviewed or decline to share what they know, it is important how you address this in your Assessment Report. There is a difference between a witness who provides evidence contrary to the complaint, as opposed to a witness who declines to provide evidence. While a witness who declines to give evidence cannot be regarded as supporting the claimant, they should not be regarded as contradicting the claimant either.

When seeking documents from the respondent, you should follow up on any specific racialized employees who were identified through your witness interviews, by seeking the documents pertaining to those workers as identified above.

Exploring subtle indicia of racial discrimination

Exploring the respondent's evidence relating to more subtle indicia of racial harassment will largely come through witness interviews. In these interviews, you will want to explore the same kinds of questions about subtle indicia of discrimination that you asked the claimant, but as informed by the specific responses you obtained from the claimant.

As in Case Pattern A, the purpose of asking these questions is not in the expectation of getting a confession, but rather in order to put the respondent on proper notice of the basis upon which the link to race is alleged and afford them an opportunity to respond, and to obtain a baseline of evidence that can be tested through further witness interviews or document review, and may provide a basis for referral to the Tribunal.

Once again using the example we have been referencing, you could ask questions like:

- The claimant believes that they were targeted by you because you subjected them to excessive scrutiny or monitoring by bothering them over petty work issues. Do you believe you engaged in excessive scrutiny or monitoring of the claimant, and if not, why not? Did you engage in similar scrutiny or monitoring with other employees? If so, please provide specific examples.

- The claimant believes that the amount of scrutiny and monitoring they were subjected to was out of proportion to the seriousness of the work issues raised. Do you agree, and if not, why do you believe that raising these kinds of issues with the claimant was proportional to what they had done?

- The claimant believes that other people contributed to the work issues you raised with them, but that they were singled out. Do you agree that other people contributed to these work issues? If not, why not? If so, did you raise these issues with them in the same way as you did with the claimant? If not, why not?

- The claimant believes that they were penalized for a situation where what would be regarded as acceptable conduct by a White worker was regarded as rude, aggressive, confrontational, insubordinate or inappropriate coming from them as a racialized person. Do you think the claimant's response to you would have been regarded as more acceptable coming from a White employee, and if not, why not? Can you think of specific examples where a White employee engaged in similar conduct, and was treated the same way as the claimant?

- The claimant believes that how they were treated is connected to stereotypical beliefs about them as a member of their particular racialized group because [explain the stereotype(s) the claimant believes were in play and how they were connected to what happened]. Do you believe that a stereotype of this nature played a role in your actions, and if not, why not?

- The claimant believes that a White co-worker would not have been treated in the same way that they were because [provide the claimant's reasons]. Do you believe that a White employee would have been treated in the same way in the same circumstances, and if not, why not? Can you think of specific examples where a White employee experienced similar work issues, and was treated the same way as the claimant?

Exploring management's knowledge and response

If the claimant's evidence is that they reported the harassment or poisoned work environment to management or human resources, then obviously you should obtain the respondent's response to this evidence. You will want to question the person from management or human resources to whom the claimant says they reported their concerns, and ask questions about what they were told and what if any steps were taken in response. In the example we have been using, you could ask questions like:

- The claimant says they raised concerns with you about how they were being treated by their supervisor. Is this correct?

- Was this done verbally or in writing? If in writing, do you still have the e-mail, memo or other document in which the claimant raised their concerns, and can you provide it to me? If verbally, what do you recall being told by the claimant?
- What was your response to the concerns raised?
- Did you or anyone else in management or human resources take any steps to address the claimant's concerns? If so, can you describe what steps were taken?

You will want to obtain from the respondent any documents relating to its knowledge of the claimant's concerns and any steps it took in response, including:

- If the concerns were raised in writing, the document raising the concerns
- If there was a meeting or discussion with the claimant about their concerns, any notes made of the meeting
- If the claimant's concerns were brought to the supervisor's attention, any e-mail or other documents relating to this or notes of any meeting or discussion
- Any documents reporting the claimant's concerns to higher levels of management
- Any documents pertaining to the steps taken by the respondent in response to the claimant's concerns

If the claimant's evidence is that they did not report their concerns to management or human resources, but they believe management would have been aware of the supervisor's alleged conduct, then you should follow up with the respondent as to whether it was aware, and specifically follow up on any basis provided by the claimant for their belief that management was aware.

In the example we have been using, you also would ask the supervisor as part of their interview whether they were aware that the claimant regarded the supervisor's conduct as harassment or as creating a poisoned work environment or as otherwise being inappropriate or uncalled for, and whether the supervisor ever discussed this with their manager or human resources.

Assessment

In making your assessment under s. 44, there are two primary issues: first, the extent to which the alleged conduct is supported by the evidence and is capable of amounting to harassment or the creation of a poisoned work environment; and second, the extent to which there is a reasonable basis in the evidence to support that the claimant's race may have been a factor in the conduct at issue such that referral to the Tribunal for the hearing and determination of this issue is warranted.

With regard to the first issue, once again it is not your role in making a recommendation to determine conclusively whether or not the conduct alleged by the claimant occurred. That is the Tribunal's role. The CHRC's only role as a screening body in assessing the sufficiency of the evidence is to consider whether there is a reasonable basis in the evidence to support proceeding to the Tribunal. In making this assessment, you should not be making assessments of credibility unless there is clear and compelling evidence to refute the claimant's allegations, as the assessment of credibility is the proper function of the Tribunal through the hearing process. You also should not be accepting the evidence of the respondent or witnesses still employed by the respondent over the claimant's evidence, which in essence amounts to a negative assessment of the claimant's credibility. You also need to bear in mind that the claimant's evidence is not just what can be supported by documents or other witnesses, but includes the claimant's statements as made in the complaint and in their interview.

The bottom line is that, unless there is clear and compelling evidence to the contrary, you should act on the basis that the claimant's evidence provides a reasonable basis to support that what they alleged may have occurred.

The other part of this issue is the assessment as to whether, on the basis of the claimant's evidence as to what occurred (unless refuted by clear and compelling evidence to the contrary), there is a reasonable basis to support that this alleged conduct is capable of amounting to harassment or as creating a poisoned work environment. This will include consideration of factors like: the extent to which the alleged conduct could be regarded as persistent or repetitious; in the case of a single incident, the extent to which the alleged conduct could be regarded as serious; the extent to which the alleged conduct could be regarded as unwelcome; the extent to which the alleged conduct led to adverse consequences for the claimant.

With regard to the second issue, namely the extent to which there is a reasonable basis in the evidence to support that the claimant's race may have been a factor in the conduct, you should consider:

- Is there evidence to indicate a link to race, whether explicitly or implicitly, onthe face of the alleged conduct?
- Is there evidence of differential treatment that provides a reasonable basis to support that race could have been a factor in the alleged conduct?
- Is there evidence that other racialized employees may have been subjected to racial harassment?
- Is there evidence of subtle indicia of racial discrimination that could provide support at a Tribunal hearing for the claimant's allegation of racial harassment, like targeting, excessive scrutiny or monitoring, scapegoating, disproportionate blame or treatment, or the involvement of racial stereotypes?

- Is there a reasonable basis in the evidence to believe that a White employee may not have been treated in the same way as the claimant was?

As always, you need to consider the evidence and circumstances in totality. And once again, this is not a situation where all of these questions need to be answered in the affirmative to warrant a referral recommendation. Rather, you need to consider the circumstances as a whole. It may be sufficient if only one of the above questions is affirmatively answered.

Finally, you also need to consider the respondent's knowledge of and response to the alleged conduct. Once again, you are not engaging in a detailed weighing of the evidence as in a Tribunal proceeding or making conclusive factual determinations. Rather, you are considering issues like:

- Is there a reasonable basis to support that the claimant notified respondent management or human resources of the alleged conduct?
- If not, is there a reasonable basis to support that respondent management or human resources should have been aware of the alleged conduct?
- What if any action did the respondent take in response to the alleged conduct?
- Is there a reasonable basis in the evidence to support that the respondent's response may not have been adequate to address the alleged conduct, or to prevent harassment from continuing?

If there is a conflict in the evidence as to whether the respondent was aware of the alleged harassment or about what steps the respondent took, then it is not your job to conclusively resolve this conflict. Rather, your role is to consider this conflict in the evidence in the context of assessing whether there a reasonable basis in the evidence to support that the respondent's response may not have been adequate to address the alleged conduct.

E. Employment – Policy or Practice (s. 10)

Overview

In its most commonly applied part, section 10 of the Act provides that it is discriminatory for an employer to have a policy or practice that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

There are two issues to be addressed up-front. First, there is a misconception that s. 10 is the provision in the Act that applies to systemic discrimination. This misconception derives from the common definition of "systemic discrimination" from the *Action Travails* decision, referring to systemic discrimination as resulting from "the unintended consequences of established employment systems and practices". While policies and practices certainly can form part of a pattern of systemic discrimination [to be discussed in the Case Pattern – Employment – Systemic Discrimination], systemic discrimination also arises from an organizational culture and attitudes that are distinct from the organization's policies and practices. As a result, an allegation of systemic discrimination would proceed under both ss. 7 and 10.

As a corollary to this, not every allegation of a violation of s. 10 raises an issue of systemic discrimination. For example, if an individual claimant alleges that a particular policy or practice had a discriminatory impact on them and denied them an employment opportunity, that is an individual allegation of discrimination, not an allegation of systemic discrimination.

The second issue is that s. 10 does not apply whenever a policy or practice of an employer is involved or plays a role in the discrimination alleged. Rather, under s. 10, it is the policy or practice itself which must deprive or tend to deprive an individual or class of individuals of an employment opportunity before s. 10 applies.

To illustrate this point, think of a fact scenario where an employer requires job applicants to provide a reference from their current employer. A racialized claimant was reluctant to use their current employer as a reference, and as a result was denied a job. The claimant files a complaint alleging racial discrimination on the basis that this was just a pretext to hide the fact that the employer didn't want to hire them because of their race. The assessment reveals that the employer hired White job applicants without insisting that they provide such a reference. The employer's policy is certainly involved and played a role in these circumstances. But there is nothing about the policy itself that deprived or tended to deprive the claimant or a group of racialized persons of the employment opportunity. Rather, it was the exercise of the hiring manager's discretion in not applying the policy to White candidates that forms the basis of the discrimination. That would be a violation of s. 7, not s. 10.

So, in the context of race-based discrimination, the question arises as to what kinds of allegations properly would fall within the scope of s. 10 of the Act. In relation to other protected grounds such as gender, disability or age, it is relatively easy to come up with examples of policies or practices that deprive these groups of employment opportunities: the fitness testing for firefighters that disproportionately excluded women; the unnecessary "ability to drive" requirement that excludes blind or visually impaired persons or some persons with mobility impairments; mandatory retirement for pilots at a particular age.

When thinking about these examples, note that they include both direct (mandatory retirement) and adverse effect (fitness testing) discrimination. This illustrates that s. 10 is not restricted only to adverse effect discrimination, but also encompasses direct discrimination – as long as it is the policy or practice itself which is causing the deprivation.

In relation to race-based grounds, examples of policies or practices which in and of themselves deprive racialized persons or groups of employment opportunities are relatively rare.

In the OHRC's Policy and Guidelines on Racism and Racial Discrimination, only three types of racially discriminatory policies or practices are identified in the employment context. The first is policies or practices imposing "language requirements". In Case Pattern C, we have reviewed how subjective criteria like "communications ability" in a hiring context can be used to disadvantage racialized candidates who speak with an accent or for whom English or French is not their first language. Whether or not that can properly be regarded as a "policy or practice" within the meaning of s. 10, or is just a discriminatory practice under s. 7, is unclear. A clearer example would be if an employer had a practice of not hiring people with "accents" (it is highly unlikely this would be in a written policy), which would be a clear violation of s. 10.

With regard to job requirements for employees to demonstrate a certain level of proficiency in English or French or both, that certainly could be a policy or practice within the meaning of s. 10.

A second type of racially discriminatory policy or practice is a standardized test that deprives racialized persons of employment opportunities. The example used in the OHRC Policy is where the language and content of questions on a standardized test are based on mainstream White culture and have the effect of disproportionately screening out racialized persons and recent immigrants. This too would be within the scope of s. 10, provided that the use of this test by the employer was part of a policy or practice.

A third type of racially discriminatory policy or practice is "Canadian experience" or "Canadian qualifications" requirements for access to professions or trades or simply employment generally. These kinds of requirements more directly discriminate on the basis of "national origin", but also indirectly discriminate on the basis of the other race-

based grounds given the disproportionate impact of these kinds of policies and practices on racialized persons.

To this, I would add a fourth example, which arises from the HRTO decision in *Haseeb v. Imperial Oil*. In that case, the employer had a policy requiring an applicant for an engineering position to be a Canadian citizen or permanent resident. The claimant had obtained his engineering degree from a Canadian university, but was on a graduate student visa (and could not become a permanent resident until, ironically, he first obtained a job). It was found that this was discrimination because of "citizenship", which is a protected ground under the Ontario *Code*. Under the federal Act, this kind of employer policy or practice could be addressed as direct discrimination because of national origin and indirect discrimination because of other race-based grounds.

Questions for Claimant

In dealing with a complaint under s. 10 about an employer's policy or practice, there are two main elements that initially need to be established:

1) The existence and nature of the alleged policy or practice; and
2) That the policy or practice deprives or tends to deprive the claimant or racialized persons of employment opportunities on a prohibited ground of discrimination.

To address the first element, you will need to obtain the claimant's version of events regarding the policy or practice. In most s. 10 cases, this is not a major issue in dispute. If the claimant has a copy of the policy, request and obtain it. If the information the claimant has about the policy or practice is based on any kind of written communication from the employer, then request and obtain any such documents. Otherwise, you will need to obtain the claimant's oral evidence regarding the alleged policy or practice that the claimant says excluded or disadvantaged them, and the basis upon which they believe in the existence of this policy or practice.

The more challenging issue arises from the second element. You will need to understand from the claimant how they allege that the policy or practice deprived or tended to deprive them of employment opportunities, and how they allege that is linked or connected to their race.

This is an area where the use social science literature and studies may be helpful. To take the example of a "Canadian experience" requirement, all a claimant is likely to be able to say is that this excludes them because they are racialized and a recent immigrant. However, social science literature and studies (to which the CHRC rather than an individual claimant is more likely to have access) can provide evidence of the impact of these kinds of requirements on members of racialized groups.

Questions for the Respondent

When questioning the respondent in a s. 10 case, there are three areas of evidence you need to cover:

1) Evidence regarding the policy or practice
2) Evidence regarding the impact of the policy or practice
3) Evidence regarding any BFOQ defence

In relation to evidence regarding the policy or practice, and as stated above, in most cases this will not be in dispute. However, the respondent will be able to provide you with any internal documents setting out the policy or practice, and evidence as to how this policy or practice was applied to the claimant.

In relation to evidence regarding the impact of the policy or practice, you should share with the respondent the evidence from the claimant or any relevant social science studies or literature, and afford the respondent with the opportunity to provide evidence in response.

It is the respondent's evidence in relation to the BFOQ defence that is more complicated. As you know, the BFOQ defence has three elements, namely that the policy or practice:

1) was adopted for a purpose or goal that is rationally connected to the function being performed;
2) was adopted in good faith, in the belief that it is necessary for the fulfilment of the purpose or goal; and
3) is reasonably necessary to accomplish its purpose or goal, in the sense that it is impossible to accommodate the claimant without undue hardship.

So in a s. 10 case, you should ask the respondent the following kinds of questions:

- When was the policy or practice developed?
- Why was the policy or practice developed?
- What purpose was it intended to serve?
- How is this purpose connected to the job requirements or duties?
- Are there any alternatives to the policy or practice that would still achieve this purpose?
- Has the policy or practice been consistently applied over the years? If not, obtain details.

- Have there been any exceptions to the policy or practice? If so, obtain details.
- Would there be any way to accommodate the claimant's inability to meet the requirements of the policy or practice?
- If so, how would any such accommodation cause undue hardship to you?

To the extent that the respondent has any documents related to the development of the policy or practice, its implementation, or any exceptions that may have been made, these should be obtained.

Assessment

In determining whether to recommend referral to the Tribunal, you should consider the following matters:

- Whether there is a reasonable basis in the evidence to support that the policy or practice could have deprived or tended to deprive the claimant of an employment opportunity because of their race
- Whether social science studies or literature provides support that the policy or practice could deprive or disproportionately deprive racialized persons or a particular racialized group of employment opportunities
- Whether there is a reasonable basis to question whether the purpose of the policy or practice is rationally connected to the job requirements or duties
- Whether there is a reasonable basis to question whether the policy or practice was adopted in the belief that it was necessary for the fulfilment of the stated purpose
- Whether there is a reasonable basis to question whether the policy or practice is reasonably necessary to accomplish the stated purpose
- Whether there is a reasonable basis to support that the claimant could have been accommodated without causing undue hardship to the employer

As with previous Case Patterns, you don't need to answer all of these questions in the affirmative. In fact, particularly in relation to the BFOQ defence, an affirmative answer to any one of the last four questions is a sufficient basis to leave the determination of whether the employer can establish the BFOQ defence to the Tribunal.

F. Employment – Systemic Discrimination

Overview

Systemic discrimination in the employment context has been described as discrimination that results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination. This discrimination is then reinforced by the very exclusion of the disadvantaged group because the exclusion fosters the belief, both within and outside the group, that the exclusion is the result of "natural" forces: see *Canadian National Railway Co. v. Canada (Human Rights Commission) and Action travail des femmes*, [1987] 1 S.C.R. 1114 (“*Action travail des femmes*”).

It also has been observed that systemic discrimination is often unintentional, and results from the application of established practices and policies that, in effect, have a negative impact upon the hiring and advancement prospects of a particular group. This is compounded by the attitudes of managers and co-workers who accept stereotyped visions of the skills and “proper role” of the affected group, visions which lead to the firmly held conviction that members of that group are incapable of doing a particular job, even when that conclusion is objectively false: *Action travail des femmes*, above.

As can be seen, systemic discrimination is not the same as adverse effect or constructive discrimination. The “established procedures” that comprise the system at issue may contain facially neutral policies or practices that have an adverse impact on protected groups. But systemic discrimination also includes elements of direct discrimination, such as discriminatory attitudes or stereotypical beliefs that are embedded in the system and contribute to the disadvantage or exclusion experienced by protected groups.

Elements of systemic discrimination

The elements of systemic discrimination can be identified as:

1) the existence of a system or process

2) which has a disparately negative impact on an identifiable group or an individual member of an identifiable group

3) because of ascribed or actual characteristics of the affected group.

In analyzing a complaint of systemic racial discrimination, you will want to consider the following:

- what is the system or process at issue? e.g. recruitment, hiring or promotion procedures
- what are the specific steps in each procedure? you will need details of what is done at each step, what is required to proceed to next step etc.
- who is involved at each step? what do we know about these individuals? e.g. attitudes/biases, training
- review of documents showing how the system or process operates - not just policies and procedures, but how the system or process is applied in specific instances
- evidence from persons responsible for implementing the system or process, and from persons who have experienced going through the system or process
- does the system or process have a disparately negative effect on a racialized group? this may involve a review of statistical evidence, if available
- what is it about the system or process that causes this negative effect?
- are any of the causes discriminatory?

For example, in *Action Travail des Femmes*, these elements were proven as follows:

1) system or process at issue
   - process for hiring and retention of women in blue collar positions at C.N.

2) disparate negative impact
   - statistics showing that by the end of 1981, women represented a mere 0.7% of the blue collar labour force at C.N. as compared to 5% of applicants and 13% among blue collar workers in Canada

3) evidence of discrimination
   - existing studies regarding women at C.N. that confirmed traditional beliefs in negative myths and stereotypes regarding women, with extensive review of attitudes of male personnel at C.N. including specific quotes, as well as quotes from women regarding negative attitudes of male supervisors
   - testimony of 13 women before the Tribunal as to their experiences as candidates or employees at C.N., including evidence of attempts to sabotage women's ability to perform blue collar jobs, a mock rape, and obscene comments
   - evidence regarding C.N.'s recruitment, hiring and promotion policies, including
     - lack of outreach

- attempts by the personnel office to steer women away from blue collar jobs and into secretarial positions
- requiring non-job related skills like soldering
- mechanical aptitude tests
- physical strength tests applied only to women
- hiring decision made by area foremen

Sources of evidence

Sources of evidence that can be used to prove systemic discrimination include:

- statistical evidence
- survey evidence
- individual complainant or witness experiences
- evidence re barriers

For example, in *National Capital Alliance on Race Relations v. Canada (Health and Welfare)*, (1997) 28 C.H.R.R. D/179 ("*NCARR*"), the following sources of evidence were considered in supporting the Tribunal's finding of systemic discrimination:

1) statistical evidence

- this evidence was used to help the Tribunal assess whether there was a problem of under-representation of members of racialized groups (referenced in the decision as "visible minorities") in the respondent's management group
- this involved a comparison between the representation of racialized employees in the "target" group (management) as compared to their availability in the "feeder" groups (the groups from which management employees were drawn)
- "utilization rate" is a statistical measure that compares representation in the target group to availability in the feeder groups
- the Commission expert's calculation of the utilization rate was based on the percentage of racialized employees in the management group (0.8%) as compared to the average availability of racialized employees in Health Canada and in the Federal Public Service (8.7 to 9.2% for a rough average of 9%) = 0.8% / 9% = 10%
- the respondent expert's calculation was based on the percentage of racialized employees in a more broadly defined management group (6%) as compared to their calculation of the availability of racialized employees (9.5%) = 6% / 9.5% = 63%

- the Tribunal did its own re-calculation and found an average utilization rate of 33%
- the Tribunal then considered what is known as the “80% rule”, which is a rough statistical measure used to assess whether there is a statistically significant under-representation of a particular group within an occupational category
- basically, if the utilization rate is less than 80%, then the difference between the representation of the group in the “target” occupational category and the representation of the group in the “feeder” occupational category is considered to be larger than what can be explained by mere chance, and is relied upon as an indicator that the group may be experiencing discrimination
- in contrast, if the utilization rate is 80% or higher, then this is not considered to be statistically significant and does not provide statistical support for a finding of discrimination
- in *NCARR*, the Tribunal’s calculation of a utilization rate of 33% supports the Tribunal’s finding of significant under-representation, as it is well below the 80% standard
- however, the limitation of statistics is that they reveal patterns, but don’t reveal the reason for these patterns and whether the under-representation is due to discriminatory practices
- for this, the Tribunal needed to consider other sources of evidence

2) survey evidence

- the Tribunal also considered evidence from a “mail back survey” which had been conducted to assess whether racialized employees had equal access to career development opportunities as compared to white employees
- the survey questions related to such things as career development training, special assignments, access to acting positions, supervisory responsibilities, and service on selection boards
- the survey was sent to 1563 employees and 533 responses were received
- respondees were asked to self-identify regarding their “visible minority” status
- the purpose of the survey was to create a set of comparative data
- for example, with regard to training, racialized employees less often had training than white employees (39% vs 46%) and were less often selected for acting positions (34% vs 45%)
- the difference was larger for males, e.g. for acting positions, if narrowed focus to racialized males vs. white males, the difference became 27% vs 47%

- the survey also found differences in terms of how employees found out about training opportunities and acting positions, with white employees more often informed by their manager whereas racialized employees had to be more proactive
- this kind of evidence needs to be obtained from an expert, who generally would be involved from outset in designing and administering the survey, and in analyzing the results

3) individual evidence

- five individual racialized employees were called to testify directly as to their experiences of discrimination

4) evidence re systemic barriers

- a further expert testified to identify the discriminatory practices that explained the statistical differences seen in representation and in career development opportunities, and to provide a context for the individual experiences of the witnesses who testified
- this expert could speak to the discriminatory barriers that exist in an organization that prevent the advancement of members of racialized groups, and then could apply this general knowledge to the circumstances of the case and identify which barriers were present
- the expert identified four barriers
    - 1) “ghettoization” or clustering of racialized employees into technical and professional jobs that don’t lead to management positions
    - 2) staffing decisions based on an informal process, especially in the use of acting appointments, such that even though the employer may use a properly designed formal selection process when the position became available on a permanent basis, because the white employee had the advantage of acting appointments to the position, the white employee would do better in the formal process
    - 3) less encouragement for visible minority employees, based on the survey responses which showed how opportunities were brought to the attention of different groups
    - 4) the employer’s perception of racialized employees as “different” and unfit for managerial positions, and management references to “cultural differences” and an inability to do business the “North American way”, which reflect discriminatory stereotypes that affected the perception of racialized employees

Questions for Claimant

Evidence re system or process at issue

You will want to start by getting basic information from the claimant regarding the system or process at issue. If the claimant works for the respondent and especially if they have been there for some time, you may be able to obtain a significant amount of information about the system or process. On the other hand, if the system or process at issue is a hiring or recruitment process, the claimant may not be able to provide a lot of information. Nonetheless, obtain as much information about the system or process as the claimant can provide.

Questions you can ask the claimant include:

- what is the system or process at issue?
- what are the specific steps in each part of the system or process that you experienced?
- can you provide details about what is done at each step, and what is required to proceed to next step?
- who is involved at each step and what is their role?
- what do you know about these individuals? e.g. attitudes/biases, training

To the extent that the claimant has documents regarding the system or process and the steps of the process they went through, you should request and obtain them.

Evidence re disparate impact

The claimant very rarely will be in possession of statistical evidence demonstrating the disparate impact of the system or process on racialized employees. However, the claimant often will have relevant information about how they and other racialized employees were disadvantaged as compared to White employees. This information then can be used as a basis to ask specific questions of the respondent at a later point in the assessment.

Questions you can ask the claimant include:

- How were you disadvantaged as a result of the system or process?
- Are you aware of other racialized employees who experienced disadvantage as a result of this system or process? If so, what are their names and when and how did they experience disadvantage?

- Are you aware of any White employees who were advantaged by the system or process? If so, what are their names and when and how did they experience advantage?

Just as in Case Pattern B, and depending on the system or process at issue, it may be helpful for you to obtain a rough organizational chart from the claimant, setting out the individuals in the work group, how they were advantaged or disadvantaged as a result of the system or process, and the claimant's perception of their racial identities. For example, if the issue is access to acting supervisory opportunities within a specific department, you may want to obtain information from the claimant to prepare a rough organizational chart of the department, and identify who was given access to acting supervisory opportunities and who was denied access, and the racial identities of these employees. This may not result in enough data to create statistically reliable comparisons, but it may provide you at least with some basic comparative information.

It is important to bear in mind that while statistical evidence often is relied upon in cases of systemic discrimination, this kind of evidence is not required to prove systemic discrimination, even if the cases proceeds to a hearing before a human rights tribunal: see *Radek v. Henderson Development (Canada) Ltd. (No. 3)*, (2005) 52 C.H.R.R. D/430 (BCHRT) at para. 509.

Evidence re potential link to race

At this stage, what you are looking for from the claimant is their evidence regarding what it is about the system or process that they believe caused the disadvantage they experienced, and on what basis they are linking or connecting this disadvantage totheir race.

As we have seen with other Case Patterns, the primary sources of evidence you are looking for from the claimant are:

- Evidence of differential treatment of similarly situated White employees
- Evidence of similar treatment of other racialized employees
- Evidence of more subtle manifestations of racial discrimination

For example, in *NCARR*, above, we saw that the claimants and supporting witnesses could provide evidence of discriminatory and stereotypical attitudes being expressed by managers. There also was evidence of differential treatment in terms of access to acting opportunities, and how different groups of employees were informed about acting opportunities. In addition, there was evidence of similar treatment of other racialized employees, both from the testimonial evidence and from the survey.

It is not often that a claimant will be able to provide the kind of survey evidence that was submitted in *NCARR* or *Action travails des femmes*. It also is not often that in the context of an assessment, you will have the resources to retain an expert to identify

barriers and how they are linked to race, as was done in *NCARR*. However, it is at least worth asking the claimant whether any studies or work of this nature has been undertaken by the employer. For example, in the context of conducting an employment systems review for employment equity purposes, the employer may have surveyed its employees on certain issues or may have convened focus groups, for example of racialized employees, to hear from them regarding systemic barriers. If the claimant is aware of any such work being done, whether or not they have any reports or other documents from this work, is worth finding out, as documents can be pursued from the respondent.

As with Case Pattern E, this also is an area where the use social science literature and studies may be helpful. Social science literature and studies (to which the CHRC rather than an individual claimant is more likely to have access) can provide evidence of common barriers seen in specific employment systems or processes, and the impact of these barriers on members of racialized groups. Any relevant literature or studies should be identified and briefly summarized in your Assessment Report, so that the parties and the Commissioners are aware of the social context in which you are assessing the evidence.

Questions for Respondent

Evidence re system or process at issue

This is essentially the same information that you were seeking from the claimant, except the respondent should have much more information and documentation available about the relevant system or process.

The questions you would ask the respondent are similar, including:

- what are the specific steps in each part of the system or process?
- can you provide details about what is done at each step, and what is required to proceed to next step?
- who is involved at each step and what is their role?
- what kind of training have these individuals received? e.g. anti-racism training, training on unconscious bias etc.
- review the claimant's experience in the system or process, and whether there was anything different about how the system or process was applied

To the extent that the respondent has documents regarding the system or process and the steps of the process they went through, you should request and obtain them.

Evidence re disparate impact

With the respondent, you will want to explore whether there is data available that is relevant to the system or process at issue. For example, if the system at issue is a promotion process and if the employer is large enough to be subject to the *Employment Equity Act*, then the employer should at least have relevant data regarding the representation of racialized employees in the relevant feeder group and in the relevant target group.

Sometimes this data will be insufficiently precise, in that it captures or applies to a larger work group than is relevant to the specific allegations under assessment. In such circumstances, you should consider asking the respondent to provide you with data that is tailored to the specific work group at issue.

In other circumstances, employment equity data may not be available due to the smaller size of the employer. In these situations, you may want to work with the respondent, as you may have with the claimant, to use or prepare an organizational chart, and obtain from the respondent its perception of the racial identities of the various employees.

Similarly, in cases where disaggregated race data is required in order to focus more specifically on a particular racialized group, you again may want to work with the respondent to use or prepare an organizational chart as it relates to the relevant work group, and obtain from the respondent its perception of the disaggregated racial identities of the various employees in that work group, for example by using the categories set out by Statistics Canada when collecting census data or as established under the Ontario government's Data Standards.

Evidence re link to race

To the extent that the claimant has identified examples of differential treatment of White employees, similar treatment of other racialized employees, or evidence of other manifestations of racial discrimination, you will want to specifically follow up with the respondent and relevant witnesses in the manner described in previous Case Patterns.

You also will want to ask the respondent whether the relevant system or process formed part of its employment systems review for employment equity purposes, and if so, request the relevant portions of the report from that review. You should also ask whether the respondent conducted any focus groups that included discussion of the relevant system or process, and particularly whether there were any focus groups of racialized employees or specifically addressing barriers for racialized persons, and request to see any relevant reports or documentation as it relates to the system or process at issue. You further should ask whether the respondent conducted any surveys of its employees that included or covered the relevant system or process, and request to see any report from the survey as it relates to this system or process.

Assessment

In determining whether to recommend referral to the Tribunal, you should consider the following matters:

- Whether there is a reasonable basis in the evidence to support that the system or process at issue could have had a disparate impact on the claimant because of race
- Whether social science studies or literature provides support that the system or policy at issue could present barriers that negatively impact members of racialized groups
- Whether there is a reasonable basis in any statistical data to support that the system or practice could have had a disparate impact on the claimant and/or members of the racialized group to which they belonged
- Whether there is any evidence of differential treatment of White employees, similar treatment of other racialized employees, or evidence of other manifestations of racial discrimination that could provide a reasonable basis to warrant referral to the Tribunal
- Whether there is other evidence, for example from employment systemsreviews, focus group reports or surveys, that could provide a reasonable basis to warrant referral to the Tribunal

As with previous Case Patterns, you don’t need to answer all of these questions in the affirmative to support a referral recommendation.

G. Services – Banking (s. 5)

Overview

The profile here is a bank customer being treated differently because they are racialized, whether in regard to accessing their accounts, obtaining a loan or credit, or in relation to any other service the bank provides to the public.

As was seen in *Peterkin*, it is important to be clear on the full extent of the claimant's allegations, i.e. not just the initial denial of service but also allegations relating to how the claimant was treated in the aftermath.

These situations also may involve the invocation by the bank of a policy, procedure or practice, and the need for an assessment of the extent of any discretion under that policy and whether any such discretion was exercised in a discriminatory manner.

Questions for Claimant

When dealing with a complaint alleging discriminatory treatment in relation to banking services, there generally is no issue arising from the first three questions posed at Step 1 of the Criteria, given that the service at issue is banking, the respondent bank provides the service, and banking services generally are customarily available to the general public.

The real issues for assesset are: (1) determining the nature of the negative treatment alleged to have been experienced by the claimant; and (2) exploring the link or connection between the negative treatment and the claimant's race.

Evidence re negative treatment

The first task is to obtain from the claimant their detailed and particularized version of events regarding the incident(s) of negative treatment that they allege to be race-related, including specific date(s) and time(s), what happened, where, and who was involved. Much of this basic factual information should be in the complaint. However, especially in a self-drafted complaint, there is sometimes a tendency to focus on the aspects of the incident that were most upsetting to the claimant, and not provide as much detail in relation to the connecting pieces. In your interview with the claimant, you should endeavour to obtain as much detail as you can about the incident(s) from start to finish. Generally, in a banking services case, there is only one principal incident, so obtaining this level of detail should not be too time-consuming.

As also stated above, you need to be clear about what specific aspect(s) of the incident the claimant is alleging violated their rights under the Act. For example, when the

complaint arises from the denial of a banking service, the claimant obviously will be alleging that they were subjected to racial discrimination as a result of the bank's denial of the service they were requesting. But you also would want to clarify with the claimant whether, in addition to alleging discrimination as a result of the denial of service, they also are alleging discrimination because of other ways in which they were treated in the course of the incident. You should seek this clarification in relation to aspects of the incident apart from the denial of the service that seem particularly troubling or upsetting to the claimant. For example, you could ask questions like:

- Apart from the denial of the banking service, are you also alleging that you experienced racial discrimination because of how you were spoken to by the bank manager? If so, on what basis?
- Apart from the denial of the banking service, are you also alleging that you experienced racial discrimination because of the bank's decision to call the police? If so, on what basis?

In banking services cases, the claimant may not have many documents, but you should request and obtain what documents they have, including:

- Any notes they made of the incident
- Any records they made of any attempts to report the incident
- Any social media postings or texts they may have made or sent regarding the incident
- Any documents in their possession relevant to the banking service they were requesting and to the incident(s)

Exploring the link to race

Unlike in employment cases, the claimant in a banking services case is unlikely to be able to provide you with specific examples of differential treatment of White customers or similar treatment of other racialized customers. Nonetheless, it is good investigative practice to at least ask the claimant these questions, in the event that they observed something in the course of their relationship and dealings with the bank.

In most cases, the questions you will want to ask the claimant will be directed to exploring the basis for their belief that they experienced racial discrimination. As we have seen in other Case Patterns, you should start with the general question about why the claimant believes that how they were treated was linked or connected to their race, and then proceed to ask more specific questions to explore other common manifestations of racial discrimination.

You should ask questions like:

- Why do you believe that your race was one of the reasons the bank treated you the way it did?

- Do you believe that you were targeted by the bank for excessive scrutiny? If so, explain why.
- Do you have any reason to believe that how you were treated by the bank deviated from the bank's normal practice in relation to the service you were requesting? If so, explain what you mean by this.
- Do you believe you were treated in an unprofessional or discourteous manner by the bank? If so, explain why.
- Do you believe the bank regarded you as being rude, aggressive, confrontational or inappropriate for what would be regarded as acceptable conduct by a White customer? If so, explain why.
- Do you believe that how you were treated is connected to any stereotypical beliefs about you as a member of your particular racialized group? If so, please explain what stereotypes you believe may have been involved, and how they are connected to how you were treated.
- Do you believe that a White customer would have been treated in the same way that you were? If not, why not?

Be sure to ask these kinds of questions in relation to each aspect of the incident(s) that the claimant alleges constitutes racial discrimination.

Questions for Respondent

Evidence re treatment of claimant and respondent's explanation

Obviously, the start for your questioning of the respondent is to obtain from the bank employees who were involved in the incident(s) their version of the events. You should make sure that you obtain the same level of detail from these bank employees as you did from the claimant, and specifically seek their response to the claimant's evidence on key points. You should specifically be alert to any differences between the respondent's and the claimant's version of events that raise credibility issues on important points of evidence.

Primarily, you will want to obtain the bank's explanation for why it treated the claimant in the way that it says it did. You will want to obtain the bank's explanation not only for any denial of service at issue, but for any other actions taken by the bank that the claimant alleges constitute racial discrimination.

In obtaining the bank's explanation, you specifically will want to ask about what policies or practices the bank may have relied upon in denying the service requested by the claimant, and/or in relation to any other aspects of alleged racial discrimination.

And you will want to request and obtain from the respondent all documents relating to the incident(s) at issue, including:

- Any notes, records or reports made of the incident

- Any policies or practices that are relied upon by the bank
- Any documents relevant to the banking service the claimant was requesting and to the incident(s)

Exploring the link to race

In services cases, the key issue often involves the scrutiny of the respondent's explanation, and the extent to which the explanation is reasonable, rational, consistent, credible and non-discriminatory. Remember that it is not the Commission's role to decide this issue, but only to assess whether there is a reasonable basis in the evidence to question whether the respondent's explanation is reasonable, rational, consistent, credible and non-discriminatory.

When questioning bank employees, you will want to ask about specific examples of other situations where a customer was denied the banking service requested by the claimant in similar circumstances, and if so, obtain the details of this situation and the employee's perception of the racial identity of the person involved. In addition to the specific bank employees who were directly involved in the incident with the claimant, you also will want to question other non-involved bank employees, and ask them the same questions. You also will want to ask whether the bank employees can recall any situations where the banking service at issue was provided in circumstances similar to the claimant's, and if so, obtain the details of those situations and the employee's perception of the racial identity of the customer. What you are exploring here is whether there is any reasonable basis to question the consistency of the bank's stated policy or practice.

Sometimes you will encounter a situation where the explanation for the bank's actions as provided in its written response to the complaint differs from the explanation provided by the bank employees being interviewed. In such situations, you should question the bank employees about the explanation provided in the written response, and ask why their explanation differs. What you are exploring here is whether there is any reasonable basis to question the consistency or credibility of the bank's explanation.

Another area that you should explore in your interviews with bank employees is whether the bank's explanation makes sense and whether there were alternatives to the actions taken by the bank. Here, you may be assisted by the claimant's evidence, who may have questioned why the bank didn't just accept the identification they provided or allow them to use their uncle as a guarantor for the loan. There also may be alternatives that seem evident to you. You should put these alternatives to bank employees you interview or any other basis for questioning whether the respondent's explanation makes sense, and hear their evidence in response. You should also question bank employees as to whether they have taken any alternative steps you or the claimant may have identified with other customers, and if so, obtain the details and the employee's perception of the racial identity of this customer. What you are exploring here is whether

there is any reasonable basis to question the reasonableness or rationality of the bank's explanation.

Finally, you also will want to explore with the respondent the specific bases on which the claimant alleges the link or connection to race as stated in their evidence, by asking the kinds of questions identified in Case Pattern A. For example, you could ask:

- The claimant believes that they were targeted by the bank for excessive scrutiny because [provide the claimant's reason]. Do you believe that your actions exposed the claimant to excessive scrutiny? If not, why not? Can you identify any White customers who were exposed to the same level of scrutiny as the claimant? If so, please provide the details.
- The claimant believes that how they were treated by the bank deviated from the bank's normal practice in relation to the service they were requesting because [provide the claimant's reason]. Do you agree that the bank's actions deviated from its normal practice? If not, why not? Can you provide any specific examples of White customers to whom the bank's practice was applied in the same way? If so, please provide the details.
- The claimant's evidence is that they were treated in an unprofessional or discourteous manner by the bank because [provide the claimant's reason]. Do you disagree that you treated the claimant in an unprofessional or discourteous manner? If so, why? Can you think of any specific examples where you treated a White customer in the same manner as the claimant? If so, please provide the details.
- The claimant believes the bank regarded them as being rude, aggressive, confrontational or inappropriate for what would be regarded as acceptable conduct by a White customer because [provide the claimant's reason]. Do you disagree? If so, why? Can you think of any specific example where a White customer behaved in the same way as the claimant, and was treated in the same fashion? If so, please provide the details.
- The claimant believes that how they were treated is connected to stereotypical beliefs about them as a member of their particular racialized group because [provide the claimant's reason]. Do you believe that a stereotype of this nature played a role in the bank's actions, and if not, why not?
- The claimant believes that a White customer would not have been treated in the same way that they were because [provide claimant's reason]. Do you believe that a White customer would have been treated in the same way in the same circumstances, and if so, why? Can you think of specific examples where a White customer engaged in similar conduct, and was treated the same way as the claimant? If so, please provide the details.

Step 2 – Defence of reasonable and bona fide justification (s. 15(1)(g))

In some cases, the bank may raise the defence of reasonable and *bona fide* justification for its actions. This typically would arise if the bank's actions were based on a specific policy or practice.

Like the BFOQ defence in employment cases, the defence of reasonable and *bona fide* justification in service cases has three elements, namely that the policy or practice:

1) was adopted for a purpose or goal that is rationally connected to the function being performed;
2) was adopted in good faith, in the belief that it is necessary for the fulfilment of the purpose or goal; and
3) is reasonably necessary to accomplish its purpose or goal, in the sense that it is impossible to accommodate the claimant without undue hardship.

So where a bank is raising the defence of reasonable and *bona fide* justification based on the application of a specific policy or practice, you should ask the respondent the following kinds of questions:

- When was the policy or practice developed?
- Why was the policy or practice developed?
- What purpose was it intended to serve?
- How is this purpose connected to the service being provided?
- Are there any alternatives to the policy or practice that would still achieve this purpose?
- Has the policy or practice been consistently applied over the years? If not, obtain details.
- Have there been any exceptions to the policy or practice? If so, obtain details.
- Would there be any way to accommodate the claimant's inability to meet the requirements of the policy or practice?
- If so, how would any such accommodation cause undue hardship to you?

To the extent that the respondent has any documents related to the development of the policy or practice, its implementation, or any exceptions that may have been made, these should be obtained.

<u>Assessment</u>

In determining whether to recommend referral to the Tribunal, you should consider the following matters:

- Whether there is a reasonable basis in the evidence to support that the claimant's race could have been a factor in how they were treated, based on potential differential treatment of White customers, potential similar treatment of racialized customers, or other more subtle manifestations of racialdiscrimination
- Whether there is a reasonable basis in the evidence to question whether the respondent's explanation for its actions is consistent with its normal policies or practices
- Whether there is a reasonable basis in the evidence to question whether the respondent's explanation for its actions has been consistent and credible, or has changed over time
- Whether there is a reasonable basis in the evidence to question whether the respondent's explanation for its actions is reasonable and rational, or whether there were alternative steps the bank could have taken or other ways in which its explanation may not make sense
- Even if there is no reasonable basis in the evidence to support that race could have been a factor in any initial denial of service, is the claimant raising allegations of racial discrimination arising from other aspects of the incident(s) and is there a reasonable basis in the evidence to warrant referral in relation to those allegations?
- Does the evidence from the claimant and the respondent differ on key points relating to the incident(s) at issue, such that a significant issue of credibility arises that should be dealt with by the Tribunal?

As with previous Case Patterns, you don't need to answer all of these questions in the affirmative to support a referral recommendation.

If the bank is raising the defence of reasonable and *bona fide* justification based on its reliance on a specific policy or practice, then you will also want to consider the following:

- Whether there is a reasonable basis to question whether the purpose of the policy or practice is rationally connected to the service at issue
- Whether there is a reasonable basis to question whether the policy or practice was adopted in the belief that it was necessary for the fulfilment of the stated purpose
- Whether there is a reasonable basis to question whether the policy or practice is reasonably necessary to accomplish the stated purpose
- Whether there is a reasonable basis to support that the claimant could have been accommodated without causing undue hardship to the respondent

As with Case Pattern E, in relation to the defence of reasonable and *bona fide* justification, an affirmative answer to any one of these four questions is a sufficient basis to leave the determination of whether the respondent can establish the BFJ defence to the Tribunal.

H. Services – Transportation (s. 5)

Overview

These cases primarily would arise from allegations of racial discrimination in relation to how a claimant was treated while using an airplane, train or inter-provincial bus.

In the context of race-based complaints, these cases will largely arise from situations where the claimant alleges that they were subjected to excessive scrutiny or monitoring because of their race or were treated negatively because of their race.

If the transportation provider is relying on a policy, procedure or practice as an explanation for its actions, you will need to assess the extent of any discretion under that policy and whether any such discretion was exercised in a discriminatory manner.

Questions for Claimant

When dealing with a complaint alleging discriminatory treatment in relation to transportation services, there generally is no issue arising from the first three questions posed at Step 1 of the Criteria, given that the service at issue is transportation, the respondent transportation company provides the service, and transportation services generally are customarily available to the general public.

The real issues for assessment are: (1) determining the nature of the negative treatment alleged to have been experienced by the claimant; and (2) exploring the link or connection between the negative treatment and the claimant's race.

Evidence re negative treatment

The first task is to obtain from the claimant their detailed and particularized version of events regarding the incident(s) of negative treatment that they allege to be race-related, including specific date(s) and time(s), what happened, where, and who was involved. Much of this basic factual information should be in the complaint. However, especially in a self-drafted complaint, there is sometimes a tendency to focus on the aspects of the incident that were most upsetting to the claimant, and not provide as much detail in relation to the connecting pieces. In your interview with the claimant, you should endeavour to obtain as much detail as you can about the incident(s) from start to finish. Generally, in a transportation services case, there is only one principal incident, so obtaining this level of detail should not be too time-consuming.

As also stated above, you need to be clear about what specific aspect(s) of the incident the claimant is alleging violated their rights under the Act. For example, when the complaint arises from the denial of a transportation service, the claimant obviously will

be alleging that they were subjected to racial discrimination as a result of the transportation company's denial of the service they were requesting. But you also would want to clarify with the claimant whether, in addition to alleging discrimination as a result of the denial of service, they also are alleging discrimination because of other ways in which they were treated in the course of the incident. You should seek this clarification in relation to aspects of the incident apart from the denial of the service that seem particularly troubling or upsetting to the claimant. For example, you could ask questions like:

- Apart from the denial of the transportation service, are you also alleging that you experienced racial discrimination because of how you were spoken to by the transportation company representative?
- Apart from the denial of the transportation service, are you also alleging that you experienced racial discrimination because of the transportation company's decision to call the police?

In transportation services cases, the claimant may not have many documents, but you should request and obtain what documents they have, including:

- Any notes they made of the incident
- Any records they made of any attempts to report the incident
- Any social media postings or texts they may have made or sent regarding the incident
- Any ticket or travel information they have regarding the trip they took or wanted to take
- Any other documents in their possession relevant to the transportation service they were requesting and to the incident(s)

Exploring the link to race

Unlike in employment cases, the claimant in a transportation services case is unlikely to be able to provide you with specific examples of differential treatment of White passengers or similar treatment of other racialized passengers. Nonetheless, it is good investigative practice to at least ask the claimant these questions, in the event that they observed something in the course of any previous use of the transportation service at issue.

In most cases, the questions you will want to ask the claimant will be directed to exploring the basis for their belief that they experienced racial discrimination. As we have seen in other Case Patterns, you should start with the general question about why the claimant believes that how they were treated was linked or connected to their race, and then proceed to ask more specific questions to explore other common manifestations of racial discrimination.

You should ask questions like:

- Why do you believe that your race was one of the reasons the transportation company treated you the way it did?
- Do you believe that you were targeted by the transportation company for excessive scrutiny? If so, explain why.
- Do you have any reason to believe that how you were treated by the transportation company deviated from its normal practice in relation to the service you were requesting? If so, explain what you mean by this.
- Do you believe you were treated in an unprofessional or discourteous manner by the transportation company? If so, explain why.
- Do you believe the transportation company regarded you as being rude, aggressive, confrontational or inappropriate for what would be regarded as acceptable conduct by a White passenger? If so, explain why.
- Do you believe that how you were treated is connected to any stereotypical beliefs about you as a member of your particular racialized group? If so, please explain what stereotypes you believe may have been involved, and how they are connected to how you were treated.
- Do you believe that a White passenger would have been treated in the same way that you were? If not, why not?

Be sure to ask these kinds of questions in relation to each aspect of the incident(s) that the claimant alleges constitutes racial discrimination.

Questions for Respondent

Evidence re treatment of claimant and respondent's explanation

Obviously, the start for your questioning of the respondent is to obtain from the transportation company employees who were involved in the incident(s) their version of the events. You should make sure that you obtain the same level of detail from these employees as you did from the claimant, and specifically seek their response to the claimant's evidence on key points. You should specifically be alert to any differences between the respondent's and the claimant's version of events that raise credibility issues on important points of evidence.

Primarily, you will want to obtain the transportation company's explanation for why it treated the claimant in the way that it says it did. You will want to obtain the transportation company's explanation not only for any denial of service at issue, but for any other actions taken by the transportation company that the claimant alleges constitute racial discrimination.

In obtaining the transportation company's explanation, you specifically will want to ask about what policies or practices it may have relied upon in denying the service

requested by the claimant, and/or in relation to any other aspects of alleged racial discrimination.

And you will want to request and obtain from the respondent all documents relating to the incident(s) at issue, including:

- Any notes, records or reports made of the incident
- Any policies or practices that are relied upon by the transportation company
- Any documents relevant to the transportation service the claimant was requesting and to the incident(s)

Exploring the link to race

In services cases, the key issue often involves the scrutiny of the respondent's explanation, and the extent to which the explanation is reasonable, rational, consistent, credible and non-discriminatory. Remember that it is not the Commission's role to decide this issue, but only to assess whether there is a reasonable basis in the evidence to question whether the respondent's explanation is reasonable, rational, consistent, credible and non-discriminatory.

When questioning transportation company employees, you will want to ask about specific examples of other situations where a passenger was denied the transportation service requested by the claimant in similar circumstances, and if so, obtain the details of this situation and the employee's perception of the racial identity of the person involved. In addition to the specific transportation company employees who were directly involved in the incident with the claimant, you also will want to question other non-involved employees, and ask them the same questions. You also will want to ask whether the transportation company employees can recall any situations where the service at issue was provided in circumstances similar to the claimant's, and if so, obtain the details of those situations and the employee's perception of the racial identity of the passenger. What you are exploring here is whether there is any reasonable basis to question the consistency of the transportation company's stated policy or practice.

Sometimes you will encounter a situation where the explanation for the transportation company's actions as provided in its written response to the complaint differs from the explanation provided by the employees being interviewed. In such situations, you should question the employees about the explanation provided in the written response, and ask why their explanation differs. What you are exploring here is whether there is any reasonable basis to question the consistency or credibility of the transportation company's explanation.

Another area that you should explore in your interviews with transportation company employees is whether the company's explanation makes sense and whether there were alternatives to the actions it took. Here, you may be assisted by the claimant's evidence, who may have questioned why the transportation company didn't just accept the

identification they provided or allow them to board the train with the baggage they were carrying. There also may be alternatives that seem evident to you. You should put these alternatives to transportation company employees you interview or any other basis for questioning whether the respondent's explanation makes sense, and hear their evidence in response. You should also question these employees as to whether they have taken any alternative steps you or the claimant may have identified with other passengers, and if so, obtain the details and the employee's perception of the racial identity of this passenger. What you are exploring here is whether there is any reasonable basis to question the reasonableness or rationality of the transportation company's explanation.

Finally, you also will want to explore with the respondent the specific bases on which the claimant alleges the link or connection to race as stated in their evidence, by asking the kinds of questions identified in Case Pattern A. For example, you could ask:

- The claimant believes that they were targeted by the transportation company for excessive scrutiny because [provide the claimant's reason]. Do you believe that your actions exposed the claimant to excessive scrutiny? If not, why not? Can you identify any White passengers who were exposed to the same level of scrutiny as the claimant? If so, please provide the details.
- The claimant believes that how they were treated by the transportation company deviated from its normal practice in relation to the service they were requesting because [provide the claimant's reason]. Do you agree that the company's actions deviated from its normal practice? If not, why not? Can you provide any specific examples of White passengers to whom the company's practice was applied in the same way? If so, please provide the details.
- The claimant's evidence is that they were treated in an unprofessional or discourteous manner by the transportation company because [provide the claimant's reason]. Do you disagree that you treated the claimant in an unprofessional or discourteous manner? If so, why? Can you think of any specific examples where you treated a White passenger in the same manner as the claimant? If so, please provide the details.
- The claimant believes the transportation company regarded them as being rude, aggressive, confrontational or inappropriate for what would be regarded as acceptable conduct by a White passenger because [provide the claimant's reason]. Do you disagree? If so, why? Can you think of any specific example where a White passenger behaved in the same way as the claimant, and was treated in the same fashion? If so, please provide the details.
- The claimant believes that how they were treated is connected to stereotypical beliefs about them as a member of their particular racialized group because [provide the claimant's reason]. Do you believe that a stereotype of this nature played a role in the company's actions, and if not, why not?
- The claimant believes that a White passenger would not have been treated in the same way that they were because [provide claimant's reason]. Do you believe

that a White passenger would have been treated in the same way in the same circumstances, and if so, why? Can you think of specific examples where a White passenger engaged in similar conduct, and was treated the same way as the claimant? If so, please provide the details.

Step 2 – Defence of reasonable and bona fide justification (s. 15(1)(g))

In some cases, the transportation company may raise the defence of reasonable and *bona fide* justification for its actions. This typically would arise if the company's actions were based on a specific policy or practice.

Like the BFOQ defence in employment cases, the defence of reasonable and *bona fide* justification in service cases has three elements, namely that the policy or practice:

1) was adopted for a purpose or goal that is rationally connected to the function being performed;
2) was adopted in good faith, in the belief that it is necessary for the fulfilment of the purpose or goal; and
3) is reasonably necessary to accomplish its purpose or goal, in the sense that it is impossible to accommodate the claimant without undue hardship.

So where a transportation company is raising the defence of reasonable and *bona fide* justification based on the application of a specific policy or practice, you should ask the respondent the following kinds of questions:

- When was the policy or practice developed?
- Why was the policy or practice developed?
- What purpose was it intended to serve?
- How is this purpose connected to the service being provided?
- Are there any alternatives to the policy or practice that would still achieve this purpose?
- Has the policy or practice been consistently applied over the years? If not, obtain details.
- Have there been any exceptions to the policy or practice? If so, obtain details.
- Would there be any way to accommodate the claimant's inability to meet the requirements of the policy or practice?
- If so, how would any such accommodation cause undue hardship to you?

To the extent that the respondent has any documents related to the development of the policy or practice, its implementation, or any exceptions that may have been made, these should be obtained.

Assessment

In determining whether to recommend referral to the Tribunal, you should consider the following matters:

- Whether there is a reasonable basis in the evidence to support that the claimant's race could have been a factor in how they were treated, based on potential differential treatment of White passengers, potential similar treatment of racialized passengers, or other more subtle manifestations of racial discrimination
- Whether there is a reasonable basis in the evidence to question whether the respondent's explanation for its actions is consistent with its normal policies or practices
- Whether there is a reasonable basis in the evidence to question whether the respondent's explanation for its actions has been consistent and credible, or has changed over time
- Whether there is a reasonable basis in the evidence to question whether the respondent's explanation for its actions is reasonable and rational, or whether there were alternative steps the company could have taken or other ways in which its explanation may not make sense
- Even if there is no reasonable basis in the evidence to support that race could have been a factor in any initial denial of service, is the claimant raising allegations of racial discrimination arising from other aspects of the incident(s) and is there a reasonable basis in the evidence to warrant referral in relation to those allegations?
- Does the evidence from the claimant and the respondent differ on key points relating to the incident(s) at issue, such that a significant issue of credibility arises that should be dealt with by the Tribunal?

As with previous Case Patterns, you don't need to answer all of these questions in the affirmative to support a referral recommendation.

If the transportation company is raising the defence of reasonable and *bona fide* justification based on its reliance on a specific policy or practice, then you will also want to consider the following:

- Whether there is a reasonable basis to question whether the purpose of the policy or practice is rationally connected to the service at issue
- Whether there is a reasonable basis to question whether the policy or practice was adopted in the belief that it was necessary for the fulfilment of the stated purpose
- Whether there is a reasonable basis to question whether the policy or practice is reasonably necessary to accomplish the stated purpose

- Whether there is a reasonable basis to support that the claimant could have been accommodated without causing undue hardship to the respondent

As with Case Pattern E, in relation to the defence of reasonable and *bona fide* justification, an affirmative answer to any one of these four questions is a sufficient basis to leave the determination of whether the respondent can establish the BFJ defence to the Tribunal.

I. Services – Corrections (s. 5)

Overview

These cases primarily would relate to inmates alleging racial discrimination against corrections guards or other employees. One of the primary challenges in investigating these kinds of cases is getting consistent access to the claimant, as well as to any other inmates who may have relevant evidence.

In the context of race-based complaints, these cases will largely arise from situations where the claimant alleges that they were subjected to excessive force or excessive scrutiny or monitoring because of their race, were denied rights or privileges because of their race, or were otherwise treated negatively because of their race.

If the corrections facility is relying on a policy, procedure or practice as an explanation for its actions, you will need to assess the extent of any discretion under that policy and whether any such discretion was exercised in a discriminatory manner.

Questions for Claimant

When dealing with a complaint alleging discriminatory treatment in relation to correctional services, there generally is no issue arising from the first three questions posed at Step 1 of the Criteria, given that the service at issue is corrections, the respondent correctional facility provides the service, and correctional facilities are treated as being customarily available to the general public within the meaning of s. 5 of the Act.

The real issues for assessment are: (1) determining the nature of the negative treatment alleged to have been experienced by the claimant; and (2) exploring the link or connection between the negative treatment and the claimant's race.

Evidence re negative treatment

As stated above, if the claimant is still incarcerated at the time of the assessment, you often will experience challenges in gaining access to the claimant, which typically would be by phone. At the HRTO, we developed a protocol with the provincial corrections ministry for a process to facilitate access to inmates, together with a designated point person to be available to intervene if difficulties arose. Even where you are corresponding with an inmate by mail, challenges often are experienced in ensuring that the mail actually gets to the inmate. Having a protocol with Correctional Service Canada regarding the delivery of CHRC mail to inmates and a designated point person to intervene if there are problems can help. E-mail is not an effective way to communicate with an incarcerated claimant, as they do not have regular access to computers.

After establishing a means of communicating with the claimant, the next task is to obtain from the claimant their detailed and particularized version of events regarding the incident(s) of negative treatment that they allege to be race-related, including specific date(s) and time(s), what happened, where, and who was involved. Much of this basic factual information may be in the complaint. However, in may experience with self-drafted inmate complaints, there is often a significant lack of detail. In your interview with the claimant, you should endeavour to obtain as much detail as you can about the incident(s) from start to finish.

In corrections cases, the claimant often will raise a series of events describing various things that are alleged to have occurred, and it is not always clear which of these various events is being advanced as an allegation of racial discrimination. So when you are questioning the claimant, you should clarify with respect to each event raised in the complaint, whether they are alleging that this particular event represents an alleged incident of racial discrimination, and if so, on what basis. That way, by the end of your interview with the claimant, you will be clear on what specific allegations require assessment and need to be addressed in your Assessment Report.

In corrections cases, the claimant may not have many documents, but you should request and obtain what documents they have, including:

- Any notes they made of the incident(s)
- Any records they made of any attempts to report the incident(s) – inmates often will have access to internal complaint forms that they can fill out to report an incident, where they are able to retain a carbon copy – if the claimant no longer has possession of any such incident reports, you should get the claimant to identify the specific incidents where they believe a report was filed
- Any correspondence or other documents received from the correctional facility regarding the incident(s)
- Any other documents in their possession relevant to the incident(s)

Exploring the link to race

As in employment cases, the claimant in a corrections case often will be able to provide you with examples of White inmates who were treated differently in similar circumstances, or other racialized inmates who also were subjected to racial discrimination. This information is even more helpful if the same guard or correctional facility employee involved in the claimant's allegations also was involved in the differential treatment of the White inmate(s) or the adverse treatment of other racialized inmate(s).

You should ask questions like:

- Can you identify any White inmates who were treated differently in similar circumstances? What can you tell me about what happened, when, and who was

involved? Was the same guard or correctional facility employee involved in any of the incident(s) raised in your complaint?

- Can you identify any racialized inmates who you believe were also subjected to incidents of racial discrimination? What can you tell me about what happened, when, and who was involved? Was the same guard or correctional facility employee involved in any of the incident(s) raised in your complaint?

You also will want to ask the claimant questions directed to exploring any more subtle bases for their belief that they experienced racial discrimination. You should start with the general question about why the claimant believes that how they were treated was linked or connected to their race, and then proceed to ask more specific questions to explore other common manifestations of racial discrimination.

Depending on the specific allegations raised in the complaint, you should ask questions like:

- Why do you believe that your race was one of the reasons you were treated the way you were?
- Do you believe you were subjected to excessive force in the circumstances? If so, explain why.
- Do you believe that you were targeted for excessive scrutiny or monitoring? If so, explain why.
- Do you believe you were regarded as being rude, aggressive, confrontational or inappropriate for what would be accepted conduct by a White inmate? If so, explain why.
- Do you believe that the discipline imposed on you was out of proportion to the underlying incident? If so, explain why.
- Do you have any reason to believe that how you were treated deviated from the correctional facility's normal policies, procedures or practices? If so, explain what you mean by this.
- Do you believe that how you were treated is connected to any stereotypical beliefs about you as a member of your particular racialized group? If so, please explain what stereotypes you believe may have been involved, and how they are connected to how you were treated.
- Do you believe that a White inmate would have been treated in the same way that you were? If not, why not?

Be sure to ask these kinds of questions in relation to each of the incident(s) that the claimant alleges constitutes racial discrimination.

Questions for Respondent

Evidence re treatment of claimant and respondent's explanation

Obviously, the start for your questioning of the respondent is to obtain from the correctional facility employees who were involved in the incident(s) their version of the events. You should make sure that you obtain the same level of detail from these employees as you did from the claimant, and specifically seek their response to the claimant's evidence on key points. You should specifically be alert to any differences between the respondent's and the claimant's version of events that raise credibility issues on important points of evidence.

Primarily, you will want to obtain the correctional facility's explanation for why it treated the claimant in the way that it says it did in relation to all actions taken that the claimant alleges constitute racial discrimination.

In obtaining the correctional facility's explanation, you specifically will want to ask about what policies or practices it may have relied upon in relation to the incidents at issue.

And you will want to request and obtain from the respondent all documents relating to the incident(s) at issue, including:

- Any notes, records or reports made of the incident(s)
- Any policies or practices that are relied upon by the correctional facility
- Any correspondence sent to the claimant regarding any incidents at issue
- Any other documents relevant to the incident(s)

Exploring the link to race

In services cases, the key issue often involves the scrutiny of the respondent's explanation for its actions, and the extent to which the explanation is reasonable, rational, consistent, credible and non-discriminatory. Remember that it is not the Commission's role to decide this issue, but only to assess whether there is a reasonable basis in the evidence to question whether the respondent's explanation is reasonable, rational, consistent, credible and non-discriminatory.

When questioning correctional facility employees, you will want to ask about specific examples of other situations where an inmate was treated in the same way as the claimant in similar circumstances, and if so, obtain the details of this situation and the employee's perception of the racial identity of the inmate involved. In addition to the specific correctional facility employees who were directly involved in the incident(s) with the claimant, you also will want to question other non-involved employees, and ask them the same questions. You also will want to ask the correctional facility employees about any specific examples of alleged differential treatment of White inmates as

identified by the claimant, or any specific examples of similar treatment of other racialized inmates as identified by the claimant.

Where the correctional facility is relying on a policy, procedure or practice as the explanation for its actions, you will want to ask the correctional facility employees who were involved in the incident(s) with the claimant and other non-involved correctional facility employees to provide specific examples of White inmates to whom the policy, procedure or practice was applied in the same way as it was to the claimant in similar circumstances. Consider asking the correctional facility for records of inmates to whom the policy, practice or procedure was applied in this manner over a reasonable period of time, and obtaining their perception of the racial identity of the inmates involved. This may provide you with a statistical basis to assess the potential disparate impact of the policy, procedure or practice when compared to the representation of racialized inmates in the overall correctional facility population.

Sometimes you will encounter a situation where the explanation for the correctional facility's actions as provided in its written response to the complaint differs from the explanation provided by the employees being interviewed. In such situations, you should question the employees about the explanation provided in the written response, and ask why their explanation differs. What you are exploring here is whether there is any reasonable basis to question the consistency or credibility of the respondent's explanation.

Another area that you should explore in your interviews with correctional facility employees is whether the company's explanation makes sense and whether there were alternatives to the actions it took. Here, you may be assisted by the claimant's evidence, who may have suggested alternative measures that could have been taken. There also may be alternatives that seem evident to you. You should put these alternatives to correctional facility employees you interview or any other basis for questioning whether the respondent's explanation makes sense, and hear their evidence in response. You should also question these employees as to whether they have taken any alternative steps you or the claimant may have identified with other inmates, and if so, obtain the details and the employee's perception of the racial identity of these inmates. What you are exploring here is whether there is any reasonable basis to question the reasonableness or rationality of the correctional facility's explanation.

Finally, you also will want to explore with the respondent the specific bases on which the claimant alleges the link or connection to race as stated in their evidence, by asking the kinds of questions identified in Case Pattern A. For example, you could ask:

- The claimant believes that they were subjected to excessive force because [provide the claimant's reason]. Do you believe that your actions subjected the claimant to excessive force? If not, why not? Can you identify any White inmates who were subjected to the same level of force as the claimant in similar circumstances? If so, please provide the details.

- The claimant believes that they were targeted for excessive scrutiny or monitoring because [provide the claimant's reason]. Do you believe that your actions exposed the claimant to excessive scrutiny or monitoring? If not, why not? Can you identify any White inmates who were exposed to the same level of scrutiny or monitoring as the claimant? If so, please provide the details.
- The claimant believes they were regarded as being rude, aggressive, confrontational or inappropriate for what would be accepted conduct by a White inmate because [provide the claimant's reason]. Do you disagree? If so, why? Can you think of any specific example where a White inmate behaved in the same way as the claimant, and was treated in the same fashion? If so, please provide the details.
- The claimant believes that the discipline imposed on them was of proportion to the seriousness of what occurred because [describe the reason(s) given by the claimant]. Do you agree, and if not, why do you believe that imposing this discipline on the claimant was proportional to what you say they had done? Can you think of situations where a White inmate was disciplined for similar conduct? If so, please provide the details.
- The claimant believes that how they were treated deviated from the correctional facility's normal policies, procedures or practices because [provide the claimant's reason]. Do you agree that the correctional facility's actions deviated from its normal policies, procedures or practices? If not, why not? Can you provide any specific examples of White inmates to whom the policy, procedure or practice at issue was applied in the same way? If so, please provide the details.
- The claimant believes that how they were treated is connected to stereotypical beliefs about them as a member of their particular racialized group because [provide the claimant's reason]. Do you believe that a stereotype of this nature played a role in the correctional facility's actions, and if not, why not?
- The claimant believes that a White inmate would not have been treated in the same way that they were because [provide claimant's reason]. Do you believe that a White inmate would have been treated in the same way in the same circumstances, and if so, why? Can you think of specific examples where a White inmate engaged in similar conduct, and was treated the same way as the claimant? If so, please provide the details.

Step 2 – Defence of reasonable and bona fide justification (s. 15(1)(g))

In some cases, the correctional facility may raise the defence of reasonable and *bona fide* justification for its actions. This typically would arise if the facility's actions were based on a specific policy, procedure or practice.

Like the BFOQ defence in employment cases, the defence of reasonable and *bona fide* justification in service cases has three elements, namely that the policy or practice:

1) was adopted for a purpose or goal that is rationally connected to the function being performed;
2) was adopted in good faith, in the belief that it is necessary for the fulfilment of the purpose or goal; and
3) is reasonably necessary to accomplish its purpose or goal, in the sense that it is impossible to accommodate the claimant without undue hardship.

So where a correctional facility is raising the defence of reasonable and *bona fide* justification based on the application of a specific policy or practice, you should ask the respondent the following kinds of questions:

- When was the policy or practice developed?
- Why was the policy or practice developed?
- What purpose was it intended to serve?
- How is this purpose connected to the service being provided?
- Are there any alternatives to the policy or practice that would still achieve this purpose?
- Has the policy or practice been consistently applied over the years? If not, obtain details.
- Have there been any exceptions to the policy or practice? If so, obtain details.
- Would there be any way to accommodate the claimant's inability to meet the requirements of the policy or practice?
- If so, how would any such accommodation cause undue hardship to you?

To the extent that the respondent has any documents related to the development of the policy or practice, its implementation, or any exceptions that may have been made, these should be obtained.

<u>Assessment</u>

In determining whether to recommend referral to the Tribunal, you should consider the following matters:

- Whether there is a reasonable basis in the evidence to support that the claimant's race could have been a factor in how they were treated, based on potential differential treatment of White inmates, potential similar treatment of racialized inmates, or other more subtle manifestations of racial discrimination
- Whether there is a reasonable basis in the evidence to question whether the respondent's explanation for its actions is consistent with its normal policies, procedures or practices

- Whether there is a reasonable basis in the evidence to question whether the respondent's explanation for its actions has been consistent and credible, or has changed over time
- Whether there is a reasonable basis in the evidence to question whether the respondent's explanation for its actions is reasonable and rational, or whether there were alternative steps the facility could have taken or other ways in which its explanation may not make sense
- Does the evidence from the claimant and the respondent differ on key points relating to the incident(s) at issue, such that a significant issue of credibility arises that should be dealt with by the Tribunal?

As with previous Case Patterns, you don't need to answer all of these questions in the affirmative to support a referral recommendation.

If the correctional facility is raising the defence of reasonable and *bona fide* justification based on its reliance on a specific policy or practice, then you will also want to consider the following:

- Whether there is a reasonable basis to question whether the purpose of the policy or practice is rationally connected to the service at issue
- Whether there is a reasonable basis to question whether the policy or practice was adopted in the belief that it was necessary for the fulfilment of the stated purpose
- Whether there is a reasonable basis to question whether the policy or practice is reasonably necessary to accomplish the stated purpose
- Whether there is a reasonable basis to support that the claimant could have been accommodated without causing undue hardship to the respondent

As with Case Pattern E, in relation to the defence of reasonable and *bona fide* justification, an affirmative answer to any one of these four questions is a sufficient basis to leave the determination of whether the respondent can establish the BFJ defence to the Tribunal.

J. Services – Border Security (s. 5)

Overview

These cases primarily relate to allegations of racial profiling, whether by airport security, immigration officials, or at land border crossings. These cases may allow for greater access to documents or even statistics, including applicable policies or procedures, documentation regarding who is stopped and for what reason, documentation regarding incidents that occurred during the stop at issue, and perhaps documentation regarding the racial profile of people stopped by a particular border security official during a particular period of time.

Questions for Claimant

When dealing with a complaint alleging discriminatory treatment in relation to border security services, there is no issue arising from the first three questions posed at Step 1 of the Criteria, given that the service at issue is border security, the respondent provides the service, and border security services are customarily available to the general public.

The real issues for assessment are: (1) determining the nature of the negative treatment alleged to have been experienced by the claimant; and (2) exploring the link or connection between the negative treatment and the claimant's race.

Evidence re negative treatment

The first task is to obtain from the claimant their detailed and particularized version of events regarding the incident(s) of negative treatment that they allege to be race-related, including specific date(s) and time(s), what happened, where, and who was involved. Much of this basic factual information should be in the complaint. In your interview with the claimant, you should endeavour to obtain as much detail as you can about the incident(s) from start to finish. Generally, in a border security case, there is only one principal incident, so obtaining this level of detail should not be too time-consuming.

In border security cases, the claimant may not have many documents, but you should request and obtain what documents they have, including:

- Any notes they made of the incident
- Any records they made of any attempts to report the incident
- Any social media postings or texts they may have made or sent regarding the incident

- Any ticket or travel information they have regarding the trip they took that led to the incident(s)
- Any identification documents that were reviewed by the border security officials or otherwise involved in the incident
- Any other documents in their possession relevant to the incident(s)

Exploring the link to race

As in other types of service cases, the claimant in a border security case is unlikely to be able to provide you with specific examples of differential treatment of White travellers or similar treatment of other racialized travellers. Nonetheless, it is good investigative practice to at least ask the claimant these questions, in the event that they observed something in the course of the incident or any previous experience at that border crossing.

In most cases, the questions you will want to ask the claimant will be directed to exploring the basis for their belief that they experienced racial discrimination. You should start with the general question about why the claimant believes that how they were treated was linked or connected to their race, and then proceed to ask more specific questions to explore other common manifestations of racial discrimination.

You should ask questions like:

- Why do you believe that your race was one of the reasons the border security official treated you the way they did?
- Do you believe that you were targeted by the border security official for excessive scrutiny? If so, explain why.
- Do you believe that you were subjected to excessive force by the border security official? If so, explain why.
- Do you have any reason to believe that how you were treated by the border security official deviated from the agency's normal policies, procedures or practices? If so, explain what you mean by this.
- Do you believe you were treated in an unprofessional or discourteous manner by the border security official? If so, explain why.
- Do you believe the border security official regarded you as being rude, aggressive, confrontational or inappropriate for what would be regarded as acceptable conduct by a White traveller? If so, explain why.
- Do you believe that how you were treated is connected to any stereotypical beliefs about you as a member of your particular racialized group? If so, please explain what stereotypes you believe may have been involved, and how they are connected to how you were treated.
- Do you believe that a White traveller would have been treated in the same way that you were? If not, why not?

Questions for Respondent

Evidence re treatment of claimant and respondent's explanation

Obviously, the start for your questioning of the respondent is to obtain from the border security officials who were involved in the incident(s) their version of the events. You should make sure that you obtain the same level of detail from these officials as you did from the claimant, and specifically seek their response to the claimant's evidence on key points. You should specifically be alert to any differences between the respondent's and the claimant's version of events that raise credibility issues on important points of evidence.

Primarily, you will want to obtain the border security agency's explanation for why it treated the claimant in the way that it says it did.

In obtaining this explanation, you specifically will want to ask about what policies, procedures or practices the border security officials may have relied upon in their treatment of the claimant.

And you will want to request and obtain from the respondent all documents relating to the incident(s) at issue, including:

- Any notes, records or reports made of the incident
- Any copies of any identification or other documents provided by the claimant in relation to the incident(s)
- Any policies, procedures or practices that are relied upon
- Any other documents relevant to the incident(s)

Exploring the link to race

In border security cases, as in other types of services cases, the key issue often involves the scrutiny of the respondent's explanation, and the extent to which this explanation is reasonable, rational, consistent, credible and non-discriminatory. Remember that it is not the Commission's role to decide this issue, but only to assess whether there is a reasonable basis in the evidence to question whether the respondent's explanation is reasonable, rational, consistent, credible and non-discriminatory.

When questioning border security officials, you will want to ask about specific examples of other situations where a White traveller was treated in the same manner as the claimant in similar circumstances, and if so, obtain the details of this situation and any documents relevant to this situation. In addition to the specific border security officials who were directly involved in the incident with the claimant, you also will want to question other non-involved border security officials, and ask them the same questions.

You also will want to ask whether the border security officials can recall any situations where a White traveller was treated differently in circumstances similar to the claimant's, and if so, obtain the details of those situations. What you are exploring here is whether there is any reasonable basis to question the consistency of the border security agency's stated policy, procedure or practice.

Sometimes you will encounter a situation where the explanation for the border security agency's actions as provided in its written response to the complaint differs from the explanation provided by the individual officials being interviewed. In such situations, you should question these officials about the explanation provided in the written response, and ask why their explanation differs. What you are exploring here is whether there is any reasonable basis to question the consistency or credibility of the border security agency's explanation.

Another area that you should explore in your interviews with border security officials is whether the agency's explanation makes sense and/or whether there were alternatives to the actions it took. Here, you may be assisted by the claimant's evidence, who may have questioned why the border security official didn't just accept the identification they provided or allow them to proceed through the border crossing without stopping and questioning them, or searching their car or belongings. There also may be alternatives that seem evident to you. You should put these alternatives to border security officials you interview or any other basis for questioning whether the respondent's explanation makes sense, and hear their evidence in response. You should also question these officials as to whether they have taken any alternative steps you or the claimant may have identified with other travellers, and if so, obtain the details and the official's perception of the racial identity of this passenger. What you are exploring here is whether there is any reasonable basis to question the reasonableness or rationality of the border security agency's explanation.

You should ask whether there are any records that could be reviewed in order to obtain statistical information to assess whether there is evidence of disparate treatment. For example, if the complaint is about being stopped and having a vehicle searched at a land border crossing, there may be records in relation to the specific border security official at issue that could establish the racial identities of those who crossed that land border during their shift (or depending on the numbers, series of shifts) and of those who were stopped and had their vehicle searched. Similar records may be available at airports or ports of entry. If this kind of statistical information is available or could be compiled, it could be analyzed for disparate impact using the 80% rule (see Case Pattern G – Systemic Discrimination).

Finally, you also will want to explore with the border security official responsible for how the claimant was treated the specific bases on which the claimant alleges the link or connection to race as stated in their evidence, by asking the kinds of questions identified in Case Pattern A. For example, you could ask:

- The claimant believes that they were subjected to excessive force by you because [provide the claimant's reason]. Do you believe that your actions subjected the claimant to excessive force? If not, why not? Can you identify any White travellers who were subjected to the same level of force as the claimant in similar circumstances? If so, please provide the details.
- The claimant believes that they were targeted by you for excessive scrutiny because [provide the claimant's reason]. Do you believe that your actions exposed the claimant to excessive scrutiny? If not, why not? Can you identify any White travellers who were exposed to the same level of scrutiny as the claimant? If so, please provide the details.
- The claimant believes that how they were treated by you deviated from the border security agency's normal policies, procedures or practices because [provide the claimant's reason]. Do you agree that your actions deviated from the agency's normal policies, procedures or practices? If not, why not? Can you provide any specific examples of White travellers to whom the agency's policies, procedures or practices were applied in the same way? If so, please provide the details.
- The claimant's evidence is that they were treated in an unprofessional or discourteous manner by you because [provide the claimant's reason]. Do you disagree that you treated the claimant in an unprofessional or discourteous manner? If so, why? Can you think of any specific examples where you treated a White traveller in the same manner as the claimant? If so, please provide the details.
- The claimant believes you regarded them as being rude, aggressive, confrontational or inappropriate for what would be accepted conduct by a White traveller because [provide the claimant's reason]. Do you disagree? If so, why? Can you think of any specific example where a White traveller behaved in the same way as the claimant, and was treated in the same fashion? If so, please provide the details.
- The claimant believes that how they were treated is connected to stereotypical beliefs about them as a member of their particular racialized group because [provide the claimant's reason]. Do you believe that a stereotype of this nature played a role in your actions, and if not, why not?
- The claimant believes that a White traveller would not have been treated in the same way that they were because [provide claimant's reason]. Do you believe that a White traveller would have been treated in the same way in the same circumstances, and if so, why? Can you think of specific examples where a White traveller engaged in similar conduct, and was treated the same way as the claimant? If so, please provide the details.

Step 2 – Defence of reasonable and bona fide justification (s. 15(1)(g))

In some cases, the border security agency may raise the defence of reasonable and *bona fide* justification for its actions. This typically would arise if the agency's actions were based on a specific policy or practice.

Like the BFOQ defence in employment cases, the defence of reasonable and *bona fide* justification in service cases has three elements, namely that the policy or practice:

1) was adopted for a purpose or goal that is rationally connected to the function being performed;
2) was adopted in good faith, in the belief that it is necessary for the fulfilment of the purpose or goal; and
3) is reasonably necessary to accomplish its purpose or goal, in the sense that it is impossible to accommodate the claimant without undue hardship.

So where the border security agency is raising the defence of reasonable and *bona fide* justification based on the application of a specific policy or practice, you should ask the respondent the following kinds of questions:

- When was the policy or practice developed?
- Why was the policy or practice developed?
- What purpose was it intended to serve?
- How is this purpose connected to the service being provided?
- Are there any alternatives to the policy or practice that would still achieve this purpose?
- Has the policy or practice been consistently applied over the years? If not, obtain details.
- Have there been any exceptions to the policy or practice? If so, obtain details.
- Would there be any way to accommodate the claimant's inability to meet the requirements of the policy or practice?
- If so, how would any such accommodation cause undue hardship to you?

To the extent that the respondent has any documents related to the development of the policy or practice, its implementation, or any exceptions that may have been made, these should be obtained.

<u>Assessment</u>

In determining whether to recommend referral to the Tribunal, you should consider the following matters:

- Whether there is a reasonable basis in the evidence to support that the claimant's race could have been a factor in how they were treated, based on potential differential treatment of White travellers, potential similar treatment of racialized travellers, any statistical evidence, or other more subtle manifestations of racial discrimination
- Whether there is a reasonable basis in the evidence to question whether the respondent's explanation for its actions is consistent with its normal policies, procedures or practices
- Whether there is a reasonable basis in the evidence to question whether the respondent's explanation for its actions has been consistent and credible, or has changed over time
- Whether there is a reasonable basis in the evidence to question whether the respondent's explanation for its actions is reasonable and rational, or whether there were alternative steps the respondent could have taken or other ways in which its explanation may not make sense
- Whether the evidence from the claimant and the respondent differs on key points relating to the incident(s) at issue, such that a significant issue of credibility arises that should be dealt with by the Tribunal

As with previous Case Patterns, you don't need to answer all of these questions in the affirmative to support a referral recommendation.

If the respondent is raising the defence of reasonable and *bona fide* justification based on its reliance on a specific policy or practice, then you will also want to consider the following:

- Whether there is a reasonable basis to question whether the purpose of the policy or practice is rationally connected to the service at issue
- Whether there is a reasonable basis to question whether the policy or practice was adopted in the belief that it was necessary for the fulfilment of the stated purpose
- Whether there is a reasonable basis to question whether the policy or practice is reasonably necessary to accomplish the stated purpose
- Whether there is a reasonable basis to support that the claimant could have been accommodated without causing undue hardship to the respondent

As with Case Pattern E, in relation to the defence of reasonable and *bona fide* justification, an affirmative answer to any one of these four questions is a sufficient basis to leave the determination of whether the respondent can establish the BFJ defence to the Tribunal.

K. Services – Policing (RCMP) (s. 5)

Overview

The Commission assumes jurisdiction over complaints filed against the R.C.M.P. regardless of the nature of the policing services it is providing in the context of the specific complaint. For example, in addition to providing law enforcement and policing services for the federal government, the R.C.M.P. also contracts with provinces and some municipalities to provide policing services in contexts that otherwise would fall under provincial jurisdiction. Even if the policing services at issue in the complaint were provided by the R.C.M.P. in the context of a policing contract or agreement with a province or municipality, the Commission will still assume jurisdiction over such complaints.

Race-based policing complaints against the R.C.M.P. are typical of human rights claims made in provincial jurisdictions such as Ontario and Quebec, and primarily relate to allegations of racial profiling arising from vehicle or pedestrian stops, excessive use of force, or other types of negative treatment towards racialized citizens.

As in border security cases, there are opportunities for access to documentation in policing cases not only about the specific incident(s) at issue, but that also could provide a basis to assess differential treatment. There also is a host of social science research and literature that may be referenced in support of a referral recommendation.

Questions for Claimant

When dealing with a complaint alleging discriminatory treatment in relation to policing services, there is no issue arising from the first three questions posed at Step 1 of the Criteria, given that the service at issue is policing, the respondent provides the service, and policing services are customarily available to the general public.

The real issues for assessment are: (1) determining the nature of the negative treatment alleged to have been experienced by the claimant; and (2) exploring the link or connection between the negative treatment and the claimant's race.

Evidence re negative treatment

The first task is to obtain from the claimant their detailed and particularized version of events regarding the incident(s) of negative treatment that they allege to be race-related, including specific date(s) and time(s), what happened, where, and who was involved. Much of this basic factual information should be in the complaint. In your interview with the claimant, you should endeavour to obtain as much detail as you can

about the incident(s) from start to finish. Generally, in a policing case, there is only one principal incident, so obtaining this level of detail should not be too time-consuming.

You need to be clear about what specific aspect(s) of the incident the claimant is alleging violated their rights under the Act. For example, when the complaint arises from a vehicle or pedestrian stop, the claimant likely will be alleging that they were subjected to racial profiling in relation to the stop. But you also need to clarify with the claimant whether, in addition to alleging discrimination as a result of stop, they also are alleging discrimination because of other ways in which they were treated in the course of the incident. You should seek this clarification in relation to aspects of the incident apart from the stop that seem particularly troubling or upsetting to the claimant. For example, you could ask questions like:

- Apart from the allegation of racial profiling when you were stopped, are you also alleging that you experienced racial discrimination because of how you were treated or spoken to by the RCMP officer after the stop? If so, on what basis?
- Apart from the allegation of racial profiling when you were stopped, are you also alleging that you experienced racial discrimination because you believe that the RCMP subjected you to excessive force? If so, on what basis?

In policing cases, the claimant may not have many documents, but you should request and obtain what documents they have, including:

- Any notes or audio or video recordings they made of the incident
- Any records they made of any attempts to report or complaint about the incident
- Any social media postings or texts they may have made or sent regarding the incident
- If the claimant was charged or ticketed as a result of the incident, any offence notice or ticket provided to them and any other documents pertaining to the alleged offence
- Any other documents in their possession relevant to the incident(s)

Exploring the link to race

As in other types of service cases, the claimant in a policing case is unlikely to be able to provide you with specific examples of differential treatment of White citizens or similar treatment of other racialized citizens. Nonetheless, it is good investigative practice to at least ask the claimant these questions, in the event that they observed other such policing interactions, for example, in their neighbourhood. Of greatest relevance would be any evidence of differential treatment of White citizens or similar treatment of other racialized citizens by the same police officer.

In most cases, the questions you will want to ask the claimant will be directed to exploring the basis for their belief that they experienced racial discrimination. You

should start with the general question about why the claimant believes that how they were treated was linked or connected to their race, and then proceed to ask more specific questions to explore other common manifestations of racial discrimination.

You should ask questions like:

- Why do you believe that your race was one of the reasons the RCMP officer treated you the way they did?
- Do you believe that you were targeted by the RCMP officer for excessive scrutiny? If so, explain why.
- Do you believe that you were subjected to excessive force by the RCMP officer? If so, explain why.
- Do you have any reason to believe that how you were treated by the RCMP officer deviated from the RCMP's normal policies, procedures or practices? If so, explain what you mean by this.
- Do you believe you were treated in an unprofessional or discourteous manner by the RCMP officer? If so, explain why.
- Do you believe the RCMP officer regarded you as being rude, aggressive, confrontational or inappropriate for what would be regarded as acceptable conduct by a White citizen? If so, explain why.
- Do you believe that how you were treated is connected to any stereotypical beliefs about you as a member of your particular racialized group? If so, please explain what stereotypes you believe may have been involved, and how they are connected to how you were treated.
- Do you believe that a White citizen would have been treated in the same way that you were? If not, why not?

<u>Questions for Respondent</u>

Evidence re treatment of claimant and respondent's explanation

Obviously, the start for your questioning of the respondent is to obtain from the RCMP officer(s) who was involved in the incident(s) their version of the events. You should make sure that you obtain the same level of detail from this officer as you did from the claimant, and specifically seek their response to the claimant's evidence on key points. You should specifically be alert to any differences between the respondent's and the claimant's version of events that raise credibility issues on important points of evidence.

Primarily, you will want to obtain the RCMP officer's explanation for why they treated the claimant in the way that they say they did. Make sure you obtain the officer's explanation in relation to each aspect of the incident that is alleged by the claimant to constitute racial discrimination. For example, where a complaint arises out of a vehicle or pedestrian stop but the claimant also is alleging racial discrimination about the way they were treated or spoken to following the stop, you will want to obtain the officer's

explanation not only for the initial decision to stop the claimant, but for why they treated the claimant in the manner they did.

In obtaining the officer's explanation, you specifically will want to ask about what policies, procedures or practices the officer may have relied upon in their treatment of the claimant.

And you will want to request and obtain from the respondent all documents relating to the incident(s) at issue, including:

- Any notes, records or reports made of the incident – the RCMP officer is required to maintain a memo book note for all incidents that occur during their shift, so the relevant notes relating to the incident at issue should be requested
- If the claimant was charged or ticketed, then any internal RCMP documents relating to the charge or ticket – if charges were laid, there should be numerous police documents that would have been generated, including incident reports and the basis for the charges laid
- Any audio or video recording of the incident – some police cruisers now have dashboard cameras that capture police interactions with the public – some police officers also wear audio recording devices that should be activated when dealing with a member of the public – any such recordings should be requested – if you are told that there was a camera in the cruiser or an audio recording device on the officer but no recording was made, you should pursue why not as this typically is required by policy
- Dispatch records – if the officer was dispatched to the incident, these records will show what information was provided to the officer and when – even if the initial interaction was not a result of being dispatched, the officer may have reported in to dispatch during the course of the incident
- Officer vehicle search records – these are critical in the context of allegations of racial profiling in relation to vehicle stops – in a vehicle stop, the officer will have run the claimant's licence plate number at some point in the course of the incident – nailing down when this occurred and on the basis of what information is important to your assessment
- Video or audio recording at booking – if the claimant was charged and brought into the police station for booking, there should be a video and audio recording at the booking desk – this is significant especially if there is an allegation of injuries as a result of excessive force
- Any policies, procedures or practices that are relied upon
- Any other documents relevant to the incident(s)

Exploring the link to race

In policing cases, as in other types of services cases, the key issue often involves the scrutiny of the respondent's explanation, and the extent to which this explanation is reasonable, rational, consistent, credible and non-discriminatory. Remember that it is not the Commission's role to decide this issue, but only to assess whether there is a reasonable basis in the evidence to question whether the respondent's explanation is reasonable, rational, consistent, credible and non-discriminatory.

When questioning RCMP officers, you will want to ask about specific examples of other situations where a White citizen was treated in the same manner as the claimant in similar circumstances, and if so, obtain the details of this situation and any documents relevant to this situation. In addition to the specific RCMP officer(s) who was directly involved in the incident with the claimant, you also will want to question other non-involved RCMP officers, and ask them the same questions. You also will want to ask whether the RCMP officers can recall any situations where a White citizen was treated differently in circumstances similar to the claimant's, and if so, obtain the details of those situations. What you are exploring here is whether there is any reasonable basis to question the consistency of the RCMP's stated policy, procedure or practice.

Sometimes you will encounter a situation where the explanation for the RCMP's actions as provided in its written response to the complaint differs from the explanation provided by the individual officer(s) being interviewed. In such situations, you should question this officer(s) about the explanation provided in the written response, and ask why their explanation differs. What you are exploring here is whether there is any reasonable basis to question the consistency or credibility of the RCMP's explanation.

Another area that you should explore in your interviews with the RCMP officer(s) is whether their explanation makes sense and/or whether there were alternatives to the actions they took. Here, you may be assisted by the claimant's evidence, who may have questioned why the officer didn't just accept the identification they provided or why they were required to step out of their car. There also may be alternatives that seem evident to you. You should put these alternatives to the RCMP officers you interview or any other basis for questioning whether the respondent's explanation makes sense, and hear their evidence in response. You should also question these officers as to whether they have taken any alternative steps you or the claimant may have identified with other citizen(s), and if so, obtain the details and the officer's perception of the racial identity of any such citizen(s). What you are exploring here is whether there is any reasonable basis to question the reasonableness or rationality of the RCMP's explanation.

You should ask whether there are any records that could be reviewed in order to obtain statistical information to assess whether there is evidence of disparate treatment. For example, if the complaint is about a vehicle stop due to an "invisible offence" (e.g. driving with a suspended licence), the officer will sometimes say that the stop was not because of the claimant's race; they just did random searches of licence plates of cars

they encountered when they were out on patrol and pulled over drivers whose records showed these kinds of invisible offences. If so, then the RCMP should be able to generate records of what licence plates were searched by the RCMP officer, for example during their shift (or series of shifts) when the claimant was stopped. These search records often show the race of the vehicle owner. This kind of information can be analyzed to see if the officer was disproportionately searching the plates of vehicles with racialized owners. Similarly, if the allegation at issue is a pedestrian stop, the officer's memo book notes should record citizens who were stopped and questioned during the officer's shift (or series of shifts) and will often reference the citizen's race as perceived by the officer. Again, this kind of evidence could be analyzed to see if the officer was disproportionately stopping racialized pedestrians.

You also will want to explore with the RCMP officer(s) responsible for how the claimant was treated the specific bases on which the claimant alleges the link or connection to race as stated in their evidence, by asking the kinds of questions identified in Case Pattern A. For example, you could ask:

- The claimant believes that they were subjected to excessive force by you because [provide the claimant's reason]. Do you believe that your actions subjected the claimant to excessive force? If not, why not? Can you identify any White citizens who were subjected to the same level of force as the claimant in similar circumstances? If so, please provide the details.
- The claimant believes that they were targeted by you for excessive scrutiny because [provide the claimant's reason]. Do you believe that your actions exposed the claimant to excessive scrutiny? If not, why not? Can you identify any White citizens who were exposed to the same level of scrutiny as the claimant? If so, please provide the details.
- The claimant believes that how they were treated by you deviated from the RCMP's normal policies, procedures or practices because [provide the claimant's reason]. Do you agree that your actions deviated from the RCMP's normal policies, procedures or practices? If not, why not? Can you provide any specific examples of White citizens to whom the RCMP's policies, procedures or practices were applied in the same way? If so, please provide the details.
- The claimant's evidence is that they were treated in an unprofessional or discourteous manner by you because [provide the claimant's reason]. Do you disagree that you treated the claimant in an unprofessional or discourteous manner? If so, why? Can you think of any specific examples where you treated a White citizen in the same manner as the claimant? If so, please provide the details.
- The claimant believes you regarded them as being rude, aggressive, confrontational or inappropriate for what would be accepted conduct by a White citizen because [provide the claimant's reason]. Do you disagree? If so, why? Can you think of any specific example where a White citizen behaved in the

same way as the claimant, and was treated in the same fashion? If so, please provide the details.

- The claimant believes that how they were treated is connected to stereotypical beliefs about them as a member of their particular racialized group because [provide the claimant's reason]. Do you believe that a stereotype of this nature played a role in your actions, and if not, why not?
- The claimant believes that a White citizen would not have been treated in the same way that they were because [provide claimant's reason]. Do you believe that a White citizen would have been treated in the same way in the same circumstances, and if so, why? Can you think of specific examples where a White citizen engaged in similar conduct, and was treated the same way as the claimant? If so, please provide the details.

As stated above, policing is an area where there is a wealth of social science research and literature. You should consider this literature and assess whether either the data in that literature or the kinds or patterns of police conduct reported in that literature are consistent with the claimant's allegations.

Step 2 – Defence of reasonable and bona fide justification (s. 15(1)(g))

In some cases, the RCMP may raise the defence of reasonable and *bona fide* justification for its actions. This typically would arise if the RCMP's actions were based on a specific policy or practice.

Like the BFOQ defence in employment cases, the defence of reasonable and *bona fide* justification in service cases has three elements, namely that the policy or practice:

1) was adopted for a purpose or goal that is rationally connected to the function being performed;
2) was adopted in good faith, in the belief that it is necessary for the fulfilment of the purpose or goal; and
3) is reasonably necessary to accomplish its purpose or goal, in the sense that it is impossible to accommodate the claimant without undue hardship.

So where the RCMP is raising the defence of reasonable and *bona fide* justification based on the application of a specific policy or practice, you should ask the respondent the following kinds of questions:

- When was the policy or practice developed?
- Why was the policy or practice developed?
- What purpose was it intended to serve?

- How is this purpose connected to the service being provided?
- Are there any alternatives to the policy or practice that would still achieve this purpose?
- Has the policy or practice been consistently applied over the years? If not, obtain details.
- Have there been any exceptions to the policy or practice? If so, obtain details.
- Would there be any way to accommodate the claimant's inability to meet the requirements of the policy or practice?
- If so, how would any such accommodation cause undue hardship to you?

To the extent that the respondent has any documents related to the development of the policy or practice, its implementation, or any exceptions that may have been made, these should be obtained.

Assessment

In determining whether to recommend referral to the Tribunal, you should consider the following matters:

- Whether there is a reasonable basis in the evidence to support that the claimant's race could have been a factor in how they were treated, based on potential differential treatment of White citizens, potential similar treatment of racialized citizens, any statistical or other evidence of disparate treatment, or other more subtle manifestations of racial discrimination
- Whether there is a reasonable basis in the evidence to question whether the respondent's explanation for its actions is consistent with its normal policies, procedures or practices
- Whether there is a reasonable basis in the evidence to question whether the respondent's explanation for its actions has been consistent and credible, or has changed over time
- Whether there is a reasonable basis in the evidence to question whether the respondent's explanation for its actions is reasonable and rational, or whether there were alternative steps the respondent could have taken or other ways in which its explanation may not make sense
- Whether the evidence from the claimant and the respondent differs on key points relating to the incident(s) at issue, such that a significant issue of credibility arises that should be dealt with by the Tribunal

As with previous Case Patterns, you don't need to answer all of these questions in the affirmative to support a referral recommendation.

If the respondent is raising the defence of reasonable and *bona fide* justification based on its reliance on a specific policy or practice, then you will also want to consider the following:

- Whether there is a reasonable basis to question whether the purpose of the policy or practice is rationally connected to the service at issue
- Whether there is a reasonable basis to question whether the policy or practice was adopted in the belief that it was necessary for the fulfilment of the stated purpose
- Whether there is a reasonable basis to question whether the policy or practice is reasonably necessary to accomplish the stated purpose
- Whether there is a reasonable basis to support that the claimant could have been accommodated without causing undue hardship to the respondent

As with Case Pattern E, in relation to the defence of reasonable and *bona fide* justification, an affirmative answer to any one of these four questions is a sufficient basis to leave the determination of whether the respondent can establish the BFJ defence to the Tribunal.

Appendix C.1 - Complaint Criteria (updated April 30, 2020)

THE CRITERIA

1. ALLEGED DISCRIMINATION IN THE PROVISION OF A SERVICE (s. 5)

RELATED PROVISION:

> **5.** It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public
>
> (a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or
>
> (b) to differentiate adversely in relation to any individual,
>
> on a prohibited ground of discrimination.

STEPS IN THE INVESTIGATION

There are two steps in the investigation:

If there is sufficient information provided in Step 1A and Step 1B that supports the allegations in the complaint, and the respondent has **also** provided a *bona fide* justification defence, then it is necessary to consider information regarding this defence under Step 2.

If there is sufficient information provided in Step 1A and Step 1B that supports the allegations in the complaint, and the respondent has **not** provided a *bona fide* justification defence, the human rights officer will make a recommendation based on all of the circumstances for decision by the Commission.

If the information provided in Step 1A and Step 1B do **not** support the allegations in the complaint, the analysis ends at Step 1, and the human rights officer will recommend that the Commission dismiss the complaint.

Step 1:

The investigation will examine whether there is a reasonable basis in the evidence to support the complainant's allegation of discrimination in the provision of a service by considering the following:

Step 1A – Alleged discriminatory practice

a) What is the alleged service at issue?

b) Does the respondent provide the alleged service?

c) Is the service customarily available to the general public?

d) What is the negative treatment alleged and is there a reasonable basis in the evidence to support that it could have occurred?

e) Is there a reasonable basis in the evidence to support that the alleged treatment could be linked directly or indirectly to [insert applicable grounds of discrimination]?

Step 1B – Reasonable explanation

f) Has the respondent provided an explanation for what happened?

g) Is there a reasonable basis in the evidence to question whether the respondent's explanation is reasonable, rational, consistent, non-discriminatory?

Step 2:

Defence of *bona fide* justification (BFJ)

a) What is the justification relied on by the respondent to deny or deny access to services or to differentiate adversely in relation to the complainant in the provision of those services?

b) Is there a reasonable basis in the evidence to question whether the justification can be supported using the following test:

i. Is the general purpose of the justification rationally connected to the service provided?

ii. Did the respondent adopt the justification in an honest and good faith belief that it is necessary in order to fulfill the purpose or goal?

iii. Is the justification reasonably necessary to achieve the purpose or goal? To show that the justification is reasonably necessary, it must be demonstrated that it is impossible to accommodate individuals sharing the characteristics of the complainant without imposing undue hardship upon the respondent.

Complaints involving a possible failure to accommodate

In complaints where accommodation is in issue, the following questions may be considered at the beginning of Step 2 BEFORE the full *bona fide* justification defence is analysed. For most accommodation related complaints these questions are critical to the accommodation analysis.

a) Did the complainant require accommodation for reasons related to one or more prohibited grounds of discrimination; if so, what accommodation measures were required?

b) Did the complainant communicate his/her need for accommodation to the respondent or should the respondent have known of his/her need for accommodation from the circumstances?

c) Did the complainant cooperate with the respondent in the search for accommodation? and,

d) Was the required accommodation denied?

Appendix C.1 - Complaint Criteria (updated April 30, 2020)

2. ALLEGED DISCRIMINATION IN THE DENIAL OF COMMERCIAL PREMISES OR RESIDENTIAL ACCOMMODATION (s. 6)

RELATED PROVISION

> **6.** It is a discriminatory practice in the provision of commercial premises or residential accommodation
>
> (a) to deny occupancy of such premises or accommodation to any individual, or
>
> (b) to differentiate adversely in relation to any individual,
>
> on a prohibited ground of discrimination.

STEPS IN THE INVESTIGATION

There are two steps in the investigation:

If there is sufficient information provided in Step 1A and Step 1B that supports the allegations in the complaint, and the respondent has **also** provided a *bona fide* justification defence, then it is necessary to consider information regarding this defence at Step 2.

If there is sufficient information provided in Step 1A and Step 1B that supports the allegations in the complaint, and the respondent has **not** provided a *bona fide* justification defence, the human rights officer will make a recommendation based on all of the circumstances for decision by the Commission.

If the information provided in Step 1A and Step 1B do **not** support the allegations in the complaint, the analysis ends at Step 1, and the human rights officer will recommend that the Commission dismiss the complaint.

Step 1:

The investigation will examine whether there is a reasonable basis in the evidence to support the complainant's allegation of discrimination in the provision of commercial premises or residential accommodation by considering the following:

Step 1A – Alleged discriminatory practice

a) Does the respondent own, operate, control access to, or eligibility for the commercial premises or residential accommodation which is the subject of the complaint?

b) What is the negative treatment alleged and is there a reasonable basis in the evidence to support that it could have occurred?

c) Is there a reasonable basis in the evidence to support that the alleged treatment could have been linked directly or indirectly to [insert applicable grounds of discrimination]?

Step 1B – Reasonable explanation

d) Has the respondent provided an explanation for what happened?

e) Is there a reasonable basis in the evidence to question whether the respondent's explanation is reasonable, rational, consistent, credible and non-discriminatory?

Step 2:

Defence of *bona fide* justification (BFJ)

a) What is the justification relied on by the respondent to deny or deny occupation of a commercial premises or residential accommodation or to differentiate adversely in relation to the complainant?

b) Is there a reasonable basis in the evidence to question whether the justification can be supported using the following test:

i. Is the general purpose of the justification rationally connected to the provision of a commercial premises or residential accommodation?

ii. Did the respondent adopt the justification in an honest and good faith belief that it is necessary in order to fulfill the purpose or goal?

iii. Is the justification reasonably necessary to achieve the purpose or goal? To show that the justification is reasonably necessary, it must be demonstrated that it is impossible to accommodate individuals sharing the characteristics of the complainant without imposing undue hardship upon the respondent.

Complaints involving a possible failure to accommodate

In complaints where accommodation is in issue, the following questions may be considered at the beginning of Step 2 BEFORE the full *bona fide* justification defence is analysed. For most accommodation related complaints these questions are critical to the accommodation analysis.

a) Did the complainant require accommodation for reasons related to one or more prohibited grounds of discrimination; if so, what accommodation measures were required?

Appendix C.1 - Complaint Criteria (updated April 30, 2020)

b) Did the complainant communicate his/her need for accommodation to the respondent or should the respondent have known of his/her need for accommodation from the circumstances?

c) Did the complainant cooperate with the respondent in the search for accommodation? and,

d) Was the required accommodation denied?

Appendix C.1 - Complaint Criteria (updated April 30, 2020)

3. ALLEGED DISCRIMINATION IN EMPLOYMENT (s. 7)

RELATED PROVISION

7. It is a discriminatory practice, directly or indirectly,

(a) to refuse to employ or continue to employ any individual, or

(b) in the course of employment, to differentiate adversely in relation to an employee,

on a prohibited ground of discrimination.

Depending on the situation there are three sets of criteria which can apply when investigating complaints under s. 7. They are:

a. Alleged Adverse Differentiation in Employment

b. Alleged Discrimination in the Failure to Receive a Job, Promotion or Acting Assignment

c. Alleged Discrimination in the Termination of Employment

3.1 ALLEGED ADVERSE DIFFERENTIATION IN EMPLOYMENT (s. 7)

STEPS IN THE INVESTIGATION

There are two steps in the investigation:

If there is sufficient information provided in Step 1A and Step 1B that supports the allegations in the complaint, and the respondent has **also** provided a *bona fide* occupational requirement defence, then it is necessary to consider information regarding this defence at Step 2.

If there is sufficient information provided in Step 1A and Step 1B that supports the allegations in the complaint, and the respondent has **not** provided a *bona fide* occupational requirement defence, the human rights officer will make a recommendation based on all of the circumstances for decision by the Commission.

If the information provided in Step 1A and Step 1B do **not** support the allegations in the complaint, the analysis ends at Step 1, and the human rights officer will recommend that the Commission dismiss the complaint.

Appendix C.1 - Complaint Criteria (updated April 30, 2020)

Step 1:

The investigation will examine whether there is a reasonable basis in the evidence to support the complainant's allegation of discrimination in employment by considering the following:

Step 1A – Alleged discriminatory practice

a) What is the negative treatment alleged and is there a reasonable basis in the evidence to support that it could have occurred?

b) Is there a reasonable basis in the evidence to support that the alleged treatment could be linked directly or indirectly to [insert applicable grounds of discrimination]?

Step 1B – Reasonable explanation

c) Has the respondent provided an explanation for what happened?

d) Is there a reasonable basis in the evidence to question whether the respondent's explanation is reasonable, rational, consistent, credible and non-discriminatory?

Step 2:

Defence of *bona fide* occupational requirement (BFOR)

a) What is the policy, practice, rule or standard (all referred to hereafter as "the standard") relied on by the respondent to refuse to employ or continue to employ the complainant, or to differentiate adversely in relation to the complainant?

b) Is there a reasonable basis in the evidence to question whether the standard can be justified using the following test:

   i. Is the general purpose of the standard rationally connected to the performance of the job?

   ii. Did the respondent adopt the particular standard in an honest and good faith belief that it is necessary in order to fulfill the purpose or goal?

   iii. Is the standard reasonably necessary to achieve the purpose or goal? To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the complainant without imposing undue hardship upon the employer.

Complaints involving a possible failure to accommodate

Appendix C.1 - Complaint Criteria (updated April 30, 2020)

In complaints where accommodation is in issue, the following questions may be considered at the beginning of Step 2 BEFORE the full *bona fide* occupational requirement defence is analysed. For most accommodation related complaints these questions are critical to the accommodation analysis.

a) Did the complainant require accommodation for reasons related to one or more prohibited grounds of discrimination; if so, what accommodation measures were required?

b) Did the complainant communicate his/her need for accommodation to the respondent or should the respondent have known of his/her need for accommodation from the circumstances?

c) Did the complainant cooperate with the respondent in the search for accommodation? and,

d) Was the required accommodation denied?

Appendix C.1 - Complaint Criteria (updated April 30, 2020)

3.2 ALLEGED DISCRIMINATION IN THE FAILURE TO RECEIVE A JOB, PROMOTION OR ACTING ASSIGNMENT (s. 7)

STEPS IN THE INVESTIGATION

There are two steps in the investigation:

If there is sufficient information provided in Step 1A and Step 1B that supports the allegations in the complaint and the respondent has **also** provided a *bona fide* occupational requirement defence, then it is necessary to consider information regarding this defence at Step 2.

If there is sufficient information provided in Step 1A and Step 1B that supports the allegations in the complaint, and the respondent has **not** provided a *bona fide* occupational requirement defence, the human rights officer will make a recommendation based on all of the circumstances for decision by the Commission.

If the information provided in Step 1A and Step 1B do **not** support the allegations in the complaint, the analysis ends at Step 1, and the human rights officer will recommend that the Commission dismiss the complaint.

Step 1:

The investigation will examine whether there is a reasonable basis in the evidence to support the complainant's allegation of a failure to receive a job, promotion, acting assignment, training or other employment opportunity by considering the following:

a) **Step 1A – Alleged discriminatory practice** Did the complainant apply for or seek the employment opportunity?

b) Is there a reasonable basis in the evidence to support that the complainant could have met the essential qualifications or could otherwise have been eligible for the employment opportunity?

c) Did the complainant receive the employment opportunity? (AND either:)

d) If the complainant did not receive the employment opportunity, is there a reasonable basis in the evidence to support that someone no better qualified or more eligible but lacking the complainant's characteristic based upon [insert applicable grounds of discrimination] obtained the employment opportunity?

(OR)

e) Is there a reasonable basis in the evidence to indicate that the respondent could have continued to seek applicants or candidates for the employment opportunity, based on the same qualifications or eligibility criteria?

Step 1B – Reasonable explanation

f) Has the respondent provided an explanation for what happened?

g) Is there a reasonable basis in the evidence to question whether the respondent's explanation is reasonable, rational, consistent, credible and non-discriminatory?

Step 2:

Defence of *bona fide* occupational requirement (BFOR)

a) What is the policy, practice, rule or standard (all referred to hereafter as "the standard") relied on by the respondent to refuse to employ or continue to employ the complainant, or to differentiate adversely in relation to the complainant?

b) Is there a reasonable basis in the evidence to question whether the standard can be justified using the following test:

   i. Is the general purpose of the standard rationally connected to the performance of the job?

   ii. Did the respondent adopt the particular standard in an honest and good faith belief that it is necessary in order to fulfill the purpose or goal?

   iii. Is the standard reasonably necessary to achieve the purpose or goal? To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the complainant without imposing undue hardship upon the employer.

Complaints involving a possible failure to accommodate

In complaints where accommodation is in issue, the following questions may be considered at the beginning of Step 2 BEFORE the full *bona fide* occupational requirement defence is analysed. For most accommodation related complaints these questions are critical to the accommodation analysis.

a) Did the complainant require accommodation for reasons related to one or more prohibited grounds of discrimination; if so, what accommodation measures were required?

b) Did the complainant communicate his/her need for accommodation to the respondent or should the respondent have known of his/her need for accommodation from the circumstances?

c) Did the complainant cooperate with the respondent in the search for accommodation? and,

d) Was the required accommodation denied?

3.3 ALLEGED DISCRIMINATION IN THE TERMINATION OF EMPLOYMENT (s. 7)

STEPS IN THE INVESTIGATION

There are two steps in the investigation:

If there is sufficient information provided in Step 1A and Step 1B that supports the allegations in the complaint and the respondent has **also** provided a *bona fide* occupational requirement defence , then it is necessary to consider information regarding a defence at Step 2.

If there is sufficient information provided in Step 1A and Step 1B that supports the allegations in the complaint, and the respondent has **not** provided a *bona fide* occupational requirement defence, the human rights officer will make a recommendation based on all of the circumstances for decision by the Commission.

If the information provided in Step 1A and Step 1B do **not** support the allegations in the complaint, the analysis ends at Step 1, and the human rights officer will recommend that the Commission dismiss the complaint.

Step 1:

The investigation will examine whether there is a reasonable basis in the evidence to support the complainant's allegation of discrimination in the termination of employment by considering the following:

Appendix C.1 - Complaint Criteria (updated April 30, 2020)

Step 1A – Alleged discriminatory practice

a) Was the complainant employed by the respondent?

b) Did the respondent terminate the complainant's employment?

c) Is there a reasonable basis in the evidence to support that the termination could have been linked to [insert applicable grounds of discrimination]?

Step 1B – Reasonable explanation

d) Has the respondent provided an explanation for what happened?

e) Is there a reasonable basis in the evidence to question whether the respondent's explanation is reasonable, rational, consistent, credible and non-discriminatory?

Step 2:

Defence of *bona fide* occupational requirement (BFOR)

a) What is the policy, practice, rule or standard (all referred to hereafter as "the standard") relied on by the respondent to refuse to employ or continue to employ the complainant, or to differentiate adversely in relation to the complainant?

b) Is there a reasonable basis in the evidence to question whether the standard can be justified using the following test:

i. Is the general purpose of the standard rationally connected to the performance of the job?

ii. Did the respondent adopt the particular standard in an honest and good faith belief that it is necessary in order to fulfill the purpose or goal?

iii. Is the standard reasonably necessary to achieve the purpose or goal? To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the complainant without imposing undue hardship upon the employer.

Complaints involving a possible failure to accommodate

In complaints where accommodation is in issue, the following questions may be considered at the beginning of Step 2 BEFORE the full *bona fide* occupational requirement defence is analysed. For most accommodation related complaints these questions are critical to the accommodation analysis.

Appendix C.1 - Complaint Criteria (updated April 30, 2020)

a) Did the complainant require accommodation for reasons related to one or more prohibited grounds of discrimination; if so, what accommodation measures were required?

b) Did the complainant communicate his/her need for accommodation to the respondent or should the respondent have known of his/her need for accommodation from the circumstances?

c) Did the complainant cooperate with the respondent in the search for accommodation? and,

d) Was the required accommodation denied?

Appendix C.1 - Complaint Criteria (updated April 30, 2020)

4. ALLEGED DISCRIMINATION IN EMPLOYMENT APPLICATION, ADVERTISEMENT OR INTERVIEW (s. 8)

RELATED PROVISION

8. It is a discriminatory practice

(a) to use or circulate any form of application for employment, or

(b) in connection with employment or prospective employment, to publish any advertisement or to make any written or oral inquiry

that expresses or implies any limitation, specification or preference based on a prohibited ground of discrimination.

STEPS IN THE INVESTIGATION

There are two steps in the investigation:

If there is sufficient information provided in Step 1A and Step 1B that supports the allegations in the complaint and the respondent has **also** provided a *bona fide* occupational requirement defence, then it is necessary to consider information regarding this defence at Step 2.

If there is sufficient information provided in Step 1A and Step 1B that supports the allegations in the complaint, and the respondent has **not** provided a *bona fide* occupational requirement defence, the human rights officer will make a recommendation based on all of the circumstances for decision by the Commission.

If the information provided in Step 1A and Step 1B do **not** support the allegations in the complaint, the analysis ends at Step 1, and the human rights officer will recommend that the Commission dismiss the complaint.

Step 1:

The investigation will examine whether there is a reasonable basis in the evidence to support the complainant's allegation of discriminatory employment applications, advertisements or interviews by considering the following:

Step 1A – Alleged discriminatory practice

a) Is there a reasonable basis in the evidence to support that the respondent may have used or circulated a form of application for employment, or in connection with employment or prospective employment, may have published any advertisement or made an oral or written inquiry?

b) Is there a reasonable basis in the evidence to support that any of the above practices may have expressed or implied any limitation, specification or preference based on [insert applicable grounds of discrimination]?

Step 1B – Reasonable explanation

c) Has the respondent provided an explanation for what happened?

d) Is there a reasonable basis in the evidence to question whether the respondent's explanation is reasonable, rational, consistent, credible and non-discriminatory?

Step 2:

Defence of *bona fide* occupational requirement (BFOR)

a) What is the policy, practice, rule, standard (all referred to hereafter as "the standard") relied on by the respondent to differentiate adversely in relation to the complainant?

b) Is there a reasonable basis in the evidence to question whether the standard can be justified using the following test:

i. Is the general purpose of the standard rationally connected to the function being performed by the respondent?

ii. Did the respondent adopt the particular standard in an honest and good faith belief that it is necessary in order to fulfill the purpose or goal?

iii. Is the standard reasonably necessary to achieve the purpose or goal? To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individuals sharing the characteristics of the complainant without imposing undue hardship upon the respondent.

Appendix C.1 - Complaint Criteria (updated April 30, 2020)

5. ALLEGATIONS AGAINST EMPLOYEE ORGANIZATIONS (s. 9)

RELATED PROVISION

9. (1) It is a discriminatory practice for an employee organization on a prohibited ground of discrimination

(a) to exclude an individual from full membership in the organization;

(b) to expel or suspend a member of the organization; or

(c) to limit, segregate, classify or otherwise act in relation to an individual in a way that would deprive the individual of employment opportunities, or limit employment opportunities or otherwise adversely affect the status of the individual, where the individual is a member of the organization or where any of the obligations of the organization pursuant to a collective agreement relate to the individual.

A. STEPS IN THE INVESTIGATION

There are two steps in the investigation:

If there is sufficient information provided in Step 1A and Step 1B that supports the allegations in the complaint and the respondent has **also** provided a *bona fide* occupational requirement defence,, then it is necessary to consider information regarding this defence at Step 2.

If there is sufficient information provided in Step 1A and Step 1B that supports the allegations in the complaint, and the respondent has **not** provided a *bona fide* occupational requirement defence, the human rights officer will make a recommendation based on all of the circumstances for decision by the Commission.

If the information provided in Step 1A and Step 1B do **not** support the allegations in the complaint, the analysis ends at Step 1, and the human rights officer will recommend that the Commission dismiss the complaint.

Step 1:

The investigation will examine whether there is a reasonable basis in the evidence to support the complainant's allegation of discrimination by considering the following:

Step 1A – Alleged discriminatory practice

a) Was the complainant a member of the employee organization and/or was s/he qualified for membership and/or is the complainant an individual other than a member to whom obligations are owed under collective agreement?

b) Is there a reasonable basis in the evidence to support that the alleged treatment could have resulted in a denial or limitation of an employment opportunity or could have otherwise adversely affected the complainant's status?

c) Is there a reasonable basis in the evidence to support that the complainant could have been treated differently based on characteristics that relate to [insert applicable grounds of discrimination]?

Step 1B – Reasonable explanation

d) Has the respondent provided an explanation for what happened?

e) Is there a reasonable basis in the evidence to question whether the respondent's explanation is reasonable, rational, consistent, credible and non-discriminatory?

Step 2:

Defence of *bona fide* occupational requirement (BFOR)

a) What is the policy, practice, rule, standard (all referred to hereafter as "the standard") relied on by the respondent to differentiate adversely in relation to the complainant?

b) Is there a reasonable basis in the evidence to question whether the standard can be justified using the following test:

i. Is the general purpose of the standard rationally connected to the function being performed by the respondent?

ii. Did the respondent adopt the particular standard in an honest and good faith belief that it is necessary in order to fulfill the purpose or goal?

iii. Is the standard reasonably necessary to achieve the purpose or goal? To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individuals sharing the characteristics of the complainant without imposing undue hardship upon the respondent.

Complaints involving a possible failure to accommodate

Appendix C.1 - Complaint Criteria (updated April 30, 2020)

In complaints where accommodation is in issue, the following questions may be considered at the beginning of Step 2 BEFORE the full *bona fide* occupational requirement defence is analysed. For most accommodation related complaints these questions are critical to the accommodation analysis.

a) Did the complainant require accommodation for reasons related to one or more prohibited grounds of discrimination; if so, what accommodation measures were required?

b) Did the complainant communicate his/her need for accommodation to the respondent or should the respondent have known of his/her need for accommodation from the circumstances?

c) Did the complainant cooperate with the respondent in the search for accommodation? and,

d) Was the required accommodation denied?

Appendix C.1 - Complaint Criteria (updated April 30, 2020)

6. ALLEGATIONS OF A DISCRIMINATORY POLICY OR PRACTICE (s. 10)

RELATED PROVISION

10. It is a discriminatory practice for an employer, employee organization or employer organization

(a) to establish or pursue a policy or practice, or

(b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment,

that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

STEPS IN THE INVESTIGATION

There are two steps in this investigation:

If there is sufficient information provided in Step 1 that supports the allegations in the complaint and the respondent has **also** provided a *bona fide* occupational requirement defence, then it is necessary to consider information regarding this defence at Step 2.
If there is sufficient information provided in Step 1 that supports the allegations in the complaint, and the respondent has **not** provided a *bona fide* occupational requirement defence, the human rights officer will make a recommendation based on all of the circumstances for decision by the Commission.

If the information provided in Step 1 does **not** support the allegations in the complaint, the analysis ends at Step 1, and the human rights officer will recommend that the Commission dismiss the complaint.

Step 1:

a) Did the respondent establish or does it pursue a policy, rule, practice or standard? (all referred to as "the standard")

or

b) Has the respondent [enter pertinent activity as listed in section 10(b)]?

and

c) Is there a reasonable basis in the evidence to support that the standard or agreement could have deprived or tended to deprive an individual or class of individuals of any employment opportunities based on [insert applicable grounds of discrimination]?

Note: If the respondent alleges that it did not have the policy or practice, or that it did not rely on the policy or practice, then the respondent's position should be analyzed under s. 7.

Step 2:

Defence of *bona fide* occupational requirement

a) Is there a reasonable basis in the evidence to question whether the standard referred to in Step 1 can be justified using the following test?

i. Is the general purpose of the standard rationally connected to the performance of the job?

ii. Did the respondent adopt the particular standard in an honest and good faith belief that it is necessary in order to fulfill the purpose or goal?

iii. Is the standard reasonably necessary to achieve the purpose or goal? To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the complainant without imposing undue hardship upon the employer.

Complaints involving a possible failure to accommodate

In complaints where accommodation is in issue, the following questions may be considered at the beginning of Step 2 BEFORE the full *bona fide* occupational requirement defence is analysed. For most accommodation related complaints these questions are critical to the accommodation analysis.

a) Did the complainant require accommodation for reasons related to one or more prohibited grounds of discrimination; if so, what accommodation measures were required?

b) Did the complainant communicate his/her need for accommodation to the respondent or should the respondent have known of his/her need for accommodation from the circumstances?

c) Did the complainant cooperate with the respondent in the search for accommodation? and,

d) Was the required accommodation denied?

7. ALLEGED PUBLICATION OF DISCRIMINATORY NOTICES (s. 12)

RELATED PROVISION

> **12.** It is a discriminatory practice to publish or display before the public or to cause to be published or displayed before the public any notice, sign, symbol, emblem or other representation that
>
> a) expresses or implies discrimination or an intention to discriminate, or
>
> b) incites or is calculated to incite others to discriminate
>
> if the discrimination expressed or implied, intended to be expressed or implied or incited or calculated to be incited would otherwise, if engaged in, be a discriminatory practice described in any of sections 5 to 11 or in section 14.

STEPS IN THE INVESTIGATION

There are two steps in this investigation:

If there is sufficient information provided in Step 1A and Step 1B that supports the allegations in the complaint and the respondent has **also** provided a *bona fide* justification defence, then it is necessary to consider information regarding this defence at Step 2.

If there is sufficient information provided in Step 1A and Step 1B that supports the allegations in the complaint, and the respondent has **not** provided a *bona fide* justification defence, the human rights officer will make a recommendation based on all of the circumstances for decision by the Commission.

If the information provided in Step 1A and Step 1B do **not** support the allegations in the complaint, the analysis ends at Step 1, and the human rights officer will recommend that the Commission dismiss the complaint.

Step 1:

Step 1A – Alleged discriminatory practice

a) Is there a reasonable basis in the evidence to support that the respondent could have published or displayed or cause to be published or displayed before the public the notice, sign, symbol, emblem or other representation that is alleged to be discriminatory in the complaint?

b) Is there a reasonable basis in the evidence to support that the published or displayed material could express or imply discrimination or the intention to discriminate, or incite, or could be calculated to incite others to discriminate, as described in s. 5 – 11 & 14 of the *CHRA*?

c) Is there a reasonable basis in the evidence to support that the content of the allegedly discriminatory material could be linked to [insert applicable grounds of discrimination]?

Step 1B – Reasonable explanation

d) Has the respondent provided an explanation for the publication or display of the notice?

e) Is there a reasonable basis in the evidence to question whether the respondent's explanation is reasonable, rational, consistent, credible and non-discriminatory?

Step 2:

Defence of *bona fide* justification (BFJ)

a) Is there a policy, practice, rule, standard (all referred to hereafter as "the standard") relied on by the respondent to justify the publication of the discriminatory notice, and if so, what is it?

b) Is there a reasonable basis in the evidence to question whether the standard can be justified using the following test:

i. Is the general purpose of the standard rationally connected to the function being performed by the respondent?

ii. Did the respondent adopt the particular standard in an honest and good faith belief that it is necessary in order to fulfill the purpose or goal?

iii. Is the standard reasonably necessary to achieve the purpose or goal? To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individuals sharing the characteristics of the complainant without imposing undue hardship upon the respondent.

Appendix C.1 - Complaint Criteria (updated April 30, 2020)

8. ALLEGATIONS OF HARASSMENT (s. 14)

RELATED PROVISION

14. (1) It is a discriminatory practice,

(a) in the provision of goods, services, facilities or accommodation customarily available to the general public,

(b) in the provision of commercial premises or residential accommodation, or

(c) in matters related to employment,

to harass an individual on a prohibited ground of discrimination.

STEPS IN THE INVESTIGATION

There are two steps in the investigation:

In Step 1, the investigation will consider whether there is sufficient information that supports the allegations in the complaint.

In Step 2, the investigation will consider the respondent's awareness of the harassment and its conduct in response.

Step 1:

The investigation will examine whether there is a reasonable basis in the evidence to support the complainant's allegation of harassment by considering:

a) Is there a reasonable basis in the evidence to support that the alleged harassing conduct could have occurred?

b) Is there a reasonable basis in the evidence to support that the conduct was in relation to **one** of;

   i. the provision of goods, services, facilities or accommodation customarily available to the general public, [or]

   ii. the provision of commercial premises or residential accommodation, [or]

   iii. matters related to employment?

c) Is there a reasonable basis in the evidence to support that the conduct may have been persistent or repetitious or, in the case of a single incident, may have been very serious?

d) Is there a reasonable basis in the evidence to support that the conduct was unwelcome?

e) Is there a reasonable basis in the evidence to support that the conduct could have created a poisoned work environment or could have led to adverse consequences for the complainant?

f) Is there a reasonable basis in the evidence to support that the conduct could have been linked to [insert applicable grounds of discrimination]?

Step 2:

The investigation will also consider:

a) Is there a reasonable basis in the evidence to support that the complainant notified the respondent of the alleged harassment?

b) If not, is there a reasonable basis in the evidence to support that the respondent may have been aware, or should have been aware of the alleged harassment?

c) Is there a reasonable basis in the evidence to question whether the respondent took the appropriate action to deal with the alleged harassment and to prevent the conduct from continuing?

Appendix C.1 - Complaint Criteria (updated April 30, 2020)

9. ALLEGATIONS OF RETALIATION (s. 14.1)

RELATED PROVISION

> **14.1** It is a discriminatory practice for a person against whom a complaint has been filed under Part III, or any person acting on their behalf, to retaliate or threaten retaliation against the individual who filed the complaint or the alleged victim.

THE INVESTIGATION

The investigation will examine whether there is a reasonable basis in the evidence to support the complainant's allegation of retaliation by considering:

Step 1A – Alleged discriminatory practice

a) Did the complainant previously file a human rights complaint with the CHRC or was the complainant the alleged victim of a previously-filed complaint?

b) Is there a reasonable basis in the evidence to support that the respondent, or any person acting on their behalf, may have known that the complainant had filed a human rights complaint or was the alleged victim of a complaint?

c) Is there a reasonable basis in the evidence to support that the complainant could have been treated in an adverse differential manner?

d) Is there a reasonable basis in the evidence to support that such differentiation could have related to or resulted from the respondent's knowledge of the complainant's previously-filed complaint?

Step 1B – Reasonable explanation

e) Has the respondent provided an explanation for what happened?

Is there a reasonable basis in the evidence to question whether the respondent's explanation is reasonable, rational, consistent, credible and non-retaliatory?

Appendix C.2 – Guidelines for Race-based Complaints - Updated April 30, 2020

OVERVIEW OF KEY POINTS FOR THE ASSESSMENT/ASSESSMENT OF RACE-BASED COMPLAINTS

"Allegations of discrimination on the basis of race are notoriously difficult to prove because in most cases, discrimination because of race is not overt and manifests in subtle ways. People who honestly believe that they are not prejudiced can nevertheless treat racialized people differently based on responses which they may not be consciously aware of."

(Fitzgerald v Toronto Police Services Board, 2019 HRTO 22, para 96)

KEY POINTS RE: S. 41 SCREENING

- What is a bald assertion? An assertion of allegations without providing any basis upon which those allegations are made.
    - For example, the following statement may be a bald assertion: "*I believe my race had something to do with why I wasn't hired. I have a hunch that they are racist."*
    - However, the following statement is not a bald assertion: *"I believe my race had something to do with why I wasn't hired. The company has almost no racialized employees. I have the same or more qualifications than the three non-racialized candidates who were selected."*
- Race-based complaints often involve subtle and hidden sources of discrimination that may not be apparent without an assessment. Assessing whether race was likely a factor in a respondent's actions requires a nuanced analysis of all the facts and circumstances. It is often difficult to adequately assess this at the triage/intake stage. At least a partial assessment will often be required to assess whether there is any circumstantial evidence to support the allegations.

KEY POINTS AND TIPS RE: THE ASSESSMENT CRITERIA

➢ What is the negative treatment and is there a reasonable basis in the evidence to support that it could have occurred?

- Note that "negative" or "adverse" treatment can include a range of things, including being spoken to in a rude/aggressive manner by respondent staff; having police called unnecessarily; being singled out; etc. It includes conduct that injures a person's dignity.

➢ Is there a reasonable basis in the evidence to support that the alleged treatment could have been linked directly or indirectly to the ground of race/colour/national or ethnic origin?

- It is important to be aware of and consider the broader social context when assessing race-based complaints. Take note of recent social science studies/reports that discuss the experiences of those with similar characteristics as the complainant, or recent case law

where the courts have taken judicial notice of the types of racial discrimination alleged in the complaint. In some cases, it may be helpful to cite these sources in your report. (*Note: These sources do not amount to proof that the individual complainant experienced racial discrimination, but they serve as important background context. Policy and Legal may be asked for assistance in identifying these sources.)

- What must be shown is that the complainant's race/colour/national or ethnic origin/religion was a factor in the alleged treatment. It does not need to be the only factor or the dominant factor. It is possible for it to be just one of many factors that led to the alleged treatment.

- No need to establish that the respondent intended to discriminate. The case law recognizes that racial stereotyping is usually the result of unconscious beliefs, biases and prejudices.

- A complainant does not need to prove that his/her race was definitely a factor in the alleged treatment. It is sufficient to support a referral recommendation if there is a reasonable basis in the evidence to support that the claimant's race could have been a factor. A "subtle scent" of discrimination is all that is required. (Basi)

- Consider all alleged incidents and all the circumstances as a whole rather than only individually. Is there an overall pattern that suggests that race could have been a factor in the treatment?

- There is often no direct evidence of racial discrimination (e.g., often no documents or witnesses that can conclusively prove that the discrimination occurred).

- Circumstantial evidence must usually be relied on. This includes any details about the circumstances of the alleged incident(s) that makes it possible to conclude that there is a reasonable basis in the evidence to make an inference that the complainant's race could have been a factor in the alleged treatment. All of the circumstances must be assessed as a whole. In some cases, the following kinds of circumstances/factors have led courts and tribunals to infer that discrimination likely occurred:

    - Aggressive/discourteous/hostile/unprofessional treatment by respondent (*Pieters, Nassiah, Johnson, Radek*);
    - Other individuals with similar characteristics have experienced similar negative treatment by the respondent (*Radek*);
    - Deviation from normal practices (*Johnson*);
    - Lack of training received by respondent staff on human rights/anti-racism (*Davis*);
    - The situation unfolded differently than it likely would have if the person had been White (*Johnson*);
    - Very strict application of a discretionary policy;
    - Selective enforcement of policies or practices (Violation tolerated or condoned for non-racialized individual, but investigated and/or punished when done by racialized complainant);
    - Disproportionate or excessive reactions (e.g., termination for minor issues; calling police) (*Persaud* and *Radek*);

  - Failing to take expected steps to de-escalate a confrontation (*Abbott* and *Maynard*);
  - Exclusion from formal or informal networks;
  - Denial of mentoring or developmental opportunities available to others;
  - Characterizing normal communication from racialized persons as rude or aggressive (*Nelson*)

- It may be necessary to collect evidence on how other similarly situated individuals were treated by the respondent.
- Hypothesize how events might have unfolded if the complainant was White and therefore not subject to the same kinds of stereotypes that are applied to Indigenous, Black and other racialized people. (Abbott at para. 44*)*
- Ask the complainant what facts led him/her to believe that their race/colour/NEO/religion was a factor in the alleged treatment.
- Effort must be made to look at the evidence from the complainant's perspective (traits, history and circumstances of complainant). (*Fitzgerald*, paras. 66-67, *R v. Le* 2019 SCC)
- Consider asking if respondent staff have received any training on anti-racism/human rights policies.
- In employment cases, consider collecting statistical information about the composition of the respondent's workforce to identify policies or practices that may constitute barriers to racialized groups.
- If you find yourself struggling with a race complaint, try inserting a ground that you are more comfortable with – sex, age, disability, etc.

➢ **Is there a reasonable basis in the evidence to question whether the respondent has provided a reasonable, rational, consistent, credible and non-discriminatory explanation?**

- If the respondent's explanation is shown to be false, or if the respondent's explanation is contradictory or shifts from one thing to another, the case law states that this may be used to support an inference that the discrimination occurred. For our purposes, this casts doubt on the credibility and reasonableness of the respondent's explanation and may warrant a referral recommendation.
- The respondent may point to the complainant's angry behaviour as a defence for its conduct. However, note that a complainant's angry response to the respondent's actions does not necessarily prevent a finding that discrimination occurred. (See, for example, Davis and *Johnson*)
- The fact that the respondent's workforce includes racialized individuals does not constitute proof that the racialized complainant could not have been discriminated against.

- As an explanation for its conduct, the respondent may argue that it was applying a valid policy (e.g. an I.D. policy). If so, please keep in mind the following:
    - The fact that a respondent was applying a valid policy is not necessarily sufficient to prove that the complainant's race was not a factor in the alleged treatment. Remember that race need only be ONE of the factors in the treatment. It is possible that both the policy and the complainant's race may be factors in the alleged treatment. It is possible that although there is a valid policy, discretion may have been used to apply the policy more stringently towards the racialized complainant. (See, for example, Pieters)
    - Ask for copies of all relevant policies.
    - Consider asking if there is any discretion in the application of the policy.
    - Consider asking questions about the manner in which the policy was applied (e.g., why were staff so aggressive or rude in applying the policy?)
    - Consider asking why the policy was applied stringently in the complainant's case.

DEALING WITH COMPETING VERSIONS OF EVENTS AND ISSUES OF CREDIBILITY

- If the complainant and respondent have competing versions of the alleged incidents, and if there is no clear and reasonably indisputable evidence that supports one party's version of events over the other, an assessment of credibility will be required to determine whose version of events is more credible. The Commission has a limited ability to conduct assessments of credibility. We do not have the benefit of sworn oral testimony and cross-examinations like the Tribunal does. If the complaint requires credibility assessments on key issues to resolve the factual disputes between the parties, a recommendation to refer it to the Tribunal should be made.
- If you are accepting one party's version of events over the other, your report must clearly explain why and provide a valid reason. (For example, is it that you found one party to be more credible? Was there clear and reasonably indisputable evidence to support one party's version of events over the other?)

Appendix C.2 – Guidelines for Race-based Complaints - Updated April 30, 2020

REFERRAL VS. DISMISSAL

❖ **Referral of the complaint may be appropriate if:**	❖ **Dismissal of the complaint may be appropriate if:**
• No clear and reasonably indisputable evidence that proves one party's version of events over the other. • Evidence is unclear whether race was a factor. • Circumstantial evidence suggests race could be a factor • Complaint raises significant issues of credibility that are better dealt with by Tribunal. • Complaint suggests possible existence of a systemic issue (e.g., very similar to other complaints in system). • Complaint raises complex factual and evidentiary issues. • Complaint raises novel legal issues.	• There is no reasonable basis in the evidence to question whether the respondent has provided a credible and reasonable non-discriminatory explanation in response to central allegations raised in the complaint. • There is no reasonable basis in the evidence to question whether the respondent's explanation suffices to establish that race could not have been even one of the factors in its conduct (directly or indirectly; consciously or subconsciously). • There is clear and reasonably indisputable evidence that disproves the allegations of the complainant.

Appendix D

Summary of Recommendations

1. Review of Criteria

1.1: That the Criteria be amended to replace Step 1 questions that call for the human rights officer to make a factual finding or determination to instead state: "Is there a reasonable basis in the evidence to support that the negative treatment could have occurred?" and "Is there a reasonable basis in the evidence to support that the alleged treatment could be linked to [insert applicable grounds of discrimination]?"

1.2: In the Criteria, the consideration of whether the respondent has provided a reasonable, non-pretextual explanation should not be referred to as a "defence" and should be taken out of Step 2. Instead, as part of the questions to be considered under Step 1, the Criteria should include the following questions: "Has the respondent provided an explanation for what happened?" and "Is there a reasonable basis in the evidence to question whether the respondent's explanation is reasonable, rational, consistent, credible and non-discriminatory?"

1.3: That Criteria 3.2 be amended to incorporate the following changes to the Step 1 questions as follows: so that question (b) states, "Is there a reasonable basis in the evidence to support that the claimant could have met the essential qualifications or could otherwise have been eligible for the employment opportunity?"; so that question (d) reads, "If the claimant did not receive the employment opportunity, is there a reasonable basis in the evidence to support that someone who could be no better qualified or no more eligible but who lacks the claimant's characteristic based upon [insert applicable grounds of discrimination] obtained the employment opportunity?"; and so that question (e) reads, "Is there a reasonable basis in the evidence to indicate that the respondent could have continued to seek applicants or candidates for the employment opportunity, based on the same qualifications or eligibility criteria?" Criteria 3.2 should be further amended so that the consideration of whether the respondent has provided a reasonable, rational, consistent and credible non-discriminatory explanation should not be referred to as a "defence" and should be taken out of Step 2. Instead, as part of the questions to be considered under Step 1, Criteria 3.2 should include the following questions: (f) "Has the respondent provided an explanation for what happened?" and (g) "Is there a reasonable

basis in the evidence to question whether the respondent's explanation is reasonable, rational, consistent, credible and non-discriminatory?"

1.4: That the Criteria for s. 10 (allegations of a discriminatory policy or practice) be amended so that question (c) under Step 1 reads, "Is there a reasonable basis in the evidence to support that the standard or agreement could have deprived or tended to deprive an individual or class of individuals of any employment opportunities based on [insert applicable grounds of discrimination]?"

1.5: Consider removing reference to the respondent's explanation as a consideration under the Criteria for s. 10. Instead the Criteria for s. 10 should state, "If the respondent alleges that it did not have the policy or practice, or that it did not rely on the policy or practice, then the respondent's position should be analyzed under s. 7."

2. Review of Guidelines

2.1: That the Guidelines on page 2, 3rd bullet point should be amended to read as follows: "A complainant does not need to prove that his/her race was definitely a factor in the alleged treatment. It is sufficient to support a referral recommendation is there is a reasonable basis in the evidence to support that the claimant's race could have been a factor. A "subtle scent" of discrimination is all that is required. (*Basi*)"

2.2: That the language in the Guidelines at page 2, 6th bullet point be changed from "to make an inference that it is more likely than not that the complainant's race was a factor in the alleged treatment", to "to conclude that there is a reasonable basis in the evidence to make an inference that the claimant's race could have been a factor in the alleged treatment".

2.3: That the references to Step 1 and Step 2 be removed from the headings in the Guidelines; that the second main heading on page 1 be amended to read, "Key Points and Tips re: the Assessment Criteria"; and that the main heading on page 3 be removed. In addition, that the sub-headings in the Guidelines be changed as follows: that the first sub-heading on page 1 be changed to read "What is the negative treatment alleged and is there a reasonable basis in the evidence to indicate that it could have occurred?"; that the second sub-heading on page 1 be changed to read, "Is there a reasonable basis in the evidence to support that the alleged treatment could be linked directly or indirectly to the ground of race / colour / national or ethnic origin?"; and that the sub-heading on page

3 be changed to read, "Is there a reasonable basis in the evidence to question whether the respondent has provided a reasonable, rational, consistent, credible and non-discriminatory explanation?"

2.4 : That the following changes be made to the Guidelines at page 4, 1st bullet point: that the word "concrete" in the second line be replaced by "clear and reasonably indisputable"; that the word "complex" be removed from the fifth line; that the words "on key issues" be added after "assessments" in the 6th line; and that the final phrase "it is usually best to refer it to the Tribunal" be replaced with "a recommendation to refer it to the Tribunal should be made".

2.5 : That the Guidelines at page 4, 2nd bullet point be changed to replace the word "complex" with "clear and reasonably indisputable".

2.6 : That the Guidelines at page 4, 1st bullet point in the referral column in the chart be changed to replace the words "concrete / direct" with "clear and reasonably indisputable".

2.7 : That the Guidelines at page 4 in the dismissal column of the chart be amended as follows: that the 1st bullet point be replaced with "There is no reasonable basis in the evidence to question whether the respondent has provided a credible and reasonable non-discriminatory explanation in response to central allegations raised in the complaint"; that the 2nd bullet point be replaced with "There is no reasonable basis in the evidence to question whether the respondent's explanation suffices to establish that race could not have been even one of the factors in its conduct (directly or indirectly; consciously or subconsciously)"; and that the 3rd bullet point be replaced with "There is clear and reasonably indisputable evidence that disproves the key allegations of the claimant".

3. Intake and Initial Review

3.1 : That where a self-drafted race-based complaint is reviewed by a human rights analyst and it is their view that the link or connection to race is not sufficiently apparent, the analyst will interview the claimant (ideally in person but at least by phone) to ask the kinds of questions required to explore the link or connection to race, and then assist the claimant by amending the complaint to include this additional information. The Commission also should consider creating an intake analyst position that is dedicated to the role of helping racialized claimants draft their complaints. The person hired into such a position would

require significant and demonstrated critical race expertise and lived experience of racism in order to most effectively carry out this role.

3.2 : That the Commission explore with community groups and organizations representing racialized groups, the extent to which they are able to assist self-represented claimants with preparing human rights complaints, and then make a list of such organizations available to its intake staff to refer claimants to as may be appropriate, and on its website so that claimants can contact these groups and organizations directly.

3.3 : That before a decision is made to request s. 41 submissions from the parties on the basis that a race-based complaint does not sufficiently articulate a link or connection to race, a human rights officer should conduct a thorough and probing interview with the claimant in order to probe for the information required to support the link or connection to race, and then assist in amending the complaint to include that information. Following this interview, the complaint as amended should be returned to the triage table with a recommendation from the officer as to whether to proceed to invite s. 41 submissions, or whether the complaint should be referred to mediation or assessment, with the officer attending the meeting to present the complaint.

3.4 : That Rule 7.4 imposing the three-page limit for complaints be removed and replaced by the following: "The Commission has the discretion not to accept a complaint where the narrative is considered to be unnecessarily long. In such circumstances, the Commission has the power to impose a page limit on the complaint."

4. Mediation

4.1 : That the Commission consider requesting that respondents to race-based complaints provide their formal, written response prior to mediation, initially on a pilot or test basis for a defined period of time to study and assess the results.

5. Assessment under Section 41(1)(d)

5.1 : That no race-based complaint be subject to a s. 41(1)(d) assessment and decision unless the claimant has first been interviewed to obtain their full evidence as to the basis

for their allegation of racial discrimination. Any exception to this would require prior consultation with the Pilot Project team.

5.2: When considering whether it is appropriate to send a race-based complaint forward for an assessment under s. 41(1) and/or in making any recommendation under s. 41(1) on the basis that the support for a link to a race-based ground is viewed as insufficient, that the Commission be mindful of the fact that in many racial discrimination cases, evidence in the possession of the respondent is crucial in supporting the link to race and is not available to the claimant at that preliminary stage.

5.3: That when dismissing a complaint on the basis that the alleged adverse treatment is not sufficiently linked to a protected ground under the Act, the Commission rely on s. 41(1)(c) to find that the complaint is beyond its jurisdiction, rather than finding that the complaint is "frivolous" under s. 41(1)(d).

6. Assessment under Section 41(1)(a) and (b)

6.1: That when exercising discretion under s. 41(1)(a) in relation particularly to race-based complaints, the Commission should be alive to consideration of whether the racialized claimant has experienced or could experience barriers in getting their human rights issues addressed through grievance or review procedures.

6.2: That in considering whether a race-based workplace violence and harassment assessment under the *Canada Labour Code* can be a "grievance or review procedure" within the meaning of s. 41(1)(a) or as something that could more appropriately be dealt with according to a procedure under another Act pursuant to s. 41(1)(b), the Commission should consider HRTO caselaw which has held that an internal human rights assessment is not a "proceeding" that can provide justification for preliminary dismissal of a human rights claim.

7. Assessment

7.1: That the Commission's investigating officer commence every assessment of a race-based complaint under s. 43 of the Act by conducting a comprehensive, thorough and

probing interview with the claimant, preferably in person but at least by phone, in order to obtain a full understanding of the claimant's allegations and the basis for them.

7.2: That the Commission not expect the claimant to have possession of all of the evidence required to support a race-based complaint and recognize that relevant and sometimes crucial evidence that may support a race-based complaint often lies in the hands of the respondent. Accordingly, it is the responsibility of the Commission's investigating officer to actively pursue this evidence from the respondent, both when requesting the respondent's formal, written response to the complaint, and by interviewing witnesses and requesting documents.

7.3: That, wherever possible, in the assessment of race-based complaints, interviews with claimants and key witnesses be conducted by video-conference rather than by phone.

7.4: That the Commission consider conducting a review of race-based complaints under assessment at the stage where the Commission has the complaint, the record of the claimant's interview, and at least the respondent's formal written response, to assess whether or not any further assessment is required in order to warrant referral to the Tribunal, given the constraints on the Commission's administrative screening role. If referral to the Tribunal would be required regardless of the result of any further assessment, then the matter could be referred to the Commissioners for a referral decision under s. 44 and/or s. 49.

7.5: That the Commission's Information Sheet on Section 49 of the *Canadian Human Rights Act* be amended to insert the words "or further assessment" after the word assessment in factor (g), and to make clear that the Commission can rely on factor (g) to support referral to the Tribunal under s. 49 where a determination of whether there is a reasonable basis in the evidence that could support the allegations would require the Commission to resolve factual disputes, conflicts in the evidence or credibility issues on key matters or engage in a detailed review and weighing of the evidence, such that proceeding further with the assessment would make no difference to the end result.

7.6: That the Commission's Information Sheet on Section 49 be amended to indicate that it may refer complaints to the Tribunal pursuant to s. 49 where a respondent refuses or fails to cooperate with an assessment, either by failing to make relevant witnesses available for interview, or by failing to provide relevant information or documents as requested by the Commission.

8. Evidence from Claimant

8.1: That the Commission ensure that its staff are treating a racialized claimant's own statements about key factual matters as evidence, even in the absence of supporting documentary or witness evidence, and accepting these statements at face value unless there is clear and reasonably indisputable evidence to the contrary.

8.2: That the Commission ensure that its staff are aware of and actively challenge any anti-claimant bias, in a working environment where they are supported in doing so. This means starting from a place of hearing and accepting a racialized claimant's stated experience with an approach of openness and curiosity, rather than from a place of disbelief, skepticism, minimization and challenge, without abdicating the need to ultimately assess the evidentiary support for the allegation required by the legal process.

9. Supports for Claimants

9.1: That the Commission recognize that the experience of racial discrimination is a source of significant trauma for racialized claimants and can lead to mental health issues, and that the Commission take this trauma into account when dealing with racialized claimants, for example: by being prepared to provided additional information and assistance at the inquiry and intake stage; by recognizing the impact of trauma on the ability of a person to provide a clear narrative and providing assistance; by recognizing and taking into account the impact of trauma on memory; and by taking steps not to re-traumatize the claimant through the human rights process.

9.2: That, as part of its partnership with community groups and organizations representing racialized groups, the Commission inquire as to what resources are available to assist and support racialized claimants who are experiencing trauma or mental health issues, and compile a list of such services with contact information to post on its website and to make available to its staff to provide to claimants as may be appropriate.

10. Supports for Claimants before the Tribunal

10.1 : That the Commission provide full participation for all race-based complaints referred to the Tribunal, whether under s. 44 or s. 49.

11. Use of Social Science Research and Literature

11.1 : That the Commission refer to and rely upon relevant social science research and literature in assessing race-based complaints and determining whether to recommend referral to the Tribunal.

11.2 : That the Commission initiate a project to gather together social science research and literature on race-related issues to create on online library of these resources available to its staff, as supplemented by webinars describing the resources available.

11.3 : That the Commission make this online library of resources available to the public.

12. Systemic Discrimination

12.1 : That the Commission conduct an environmental scan to identify a list of large issues of systemic racial discrimination that it could address, and consult on this list with community groups and organizations to obtain their feedback as to whether the Commission has identified the right issues or whether some issues have been missed, to hear which of these issues should be given priority, and to find out what assistance these groups and organizations may be able to provide in pursuing these issues. With that feedback, the Commission then should identify the issue(s) of systemic racial discrimination that it has the resources to address in a particular fiscal year, and establish a plan of action to address the issue(s), including the potential initiation of a complaint under s. 40(3) or further to its powers under s. 27.

13. Data and Disaggregated Data

13.1 : That, in the assessment of race-based employment complaints alleging systemic discrimination and/or adverse effect discrimination, the Commission should request employment equity data from the respondent, as it relates to the representation of members of racial groups (referred to in the Employment Equity Act as "members of visible minorities") and equity groups relevant to any intersectional grounds of discrimination that may be alleged. Further, in the assessment of race-based cases, the Commission should request or compile data beyond what the employer may collect for employment equity purposes in the context of federally-regulated employers with less than 100 employees, who are not required to comply with the Employment Equity Act, and in the context of the need to examine disaggregated race data, in order to focus on the specific and unique disadvantages and discriminatory barriers confronted by particular racialized groups.

13.2 : That the Commission exercise its role under s. 27 of the Act to advocate for the appropriate collection and analysis of race data and disaggregated race data in other contexts, including for example in the contexts of border security, policing, and corrections.