Public Service Commission of Canada
Commission de la Fonction publique du Canada

Chairman
Président

Ottawa, Ontario
K1A 0M7

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•CONFIDENTIAL

Mr. B.L. Strayer
Assistant Deputy Minister
Department of Justice
Ottawa, Ontario
K1A 0H8

Dear Mr. Strayer,

Thank you for your letter of August 6, 1980, regarding the possibility of amending the Canadian Human Rights Act in order to add to the existing list of prohibited grounds of discrimination.

I would like to reiterate the views we expressed to you on July 25, 1979. It is the raison d'être of the Public Service Commission to make appointments to and from within the Public Service on the basis of "selection according to merit" as provided for in the Public Service Employment Act. Since enactment of the Civil Service Act of 1918, selection according to merit means selection on the basis of the objective assessment of candidates in terms of their qualifications such as relevant education, experience, knowledge, ability and potential, having regard to the nature of the duties to be performed.

In applying the merit principle to staffing, the Public Service Commission and its delegates are duty bound to ensure that decisions about individuals are based only on considerations pertinent to the evaluation of their capability to perform the jobs concerned. Discrimination is automatically precluded in relation to recruitment, promotion, transfer, demotion or release on any of the grounds currently covered by the Canadian Human Rights Act, as well as on other grounds, including those being considered for inclusion under that Act.

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We continue to believe that, as far as staffing the Public Service under the Public Service Employment Act is concerned, the enumeration of prohibited grounds of discrimination in the Canadian Human Rights Act gives persons employed in, or aspiring to, positions in the Public Service no greater protection than they now enjoy under the merit principle. Thus, from the staffing point of view, the position of the Public Service Commission on this matter is that, while the proposed changes might have symbolic value, they would constitute duplication and would be redundant.

Another point which I would like to call to your attention is that, where an existing administrative statutory redress mechanism is available to employees, only in very special circumstances should we consider instituting yet another avenue. Duality of redress mechanisms covering the same grounds could result in such confusion as to effectively deny the protection being sought by individuals; moreover duplication could give rise to conflicts of jurisdiction which would effectively negate the exclusive authority given by law.

Finally, another comment appears warranted: many of the new prohibited grounds of discrimination are proposed as a result of the accession by Canada to international covenants on Human Rights. Of course, we agree with the objectives pursued by the convenants, but it should be noted that countries participating are encouraged to realize those objectives by adopting legislation or other measures assuring protection of individuals. We submit that the Public Service of Canada has established measures to permit administrative redress against discrimination on any ground.

I would like to refer to particular points of the paper that accompanied your letter.

Opinion, Belief or Creed

It is difficult for us to envisage the inclusion of "opinion" as a ground of discrimination prohibited by law. It was Montaigne who said: "Il ne fut jamais au monde deux opinions semblables". Without enshrining limitations in the legislation, opinion could be invoked for anything, and its use could vary widely. In the field of staffing, the opinions of candidates could be evaluated as important factors in the selection process, having regard to the functions to be performed. At present, if opinion were invoked by a candidate or an employee as having been a discriminatory factor for not being properly evaluated during a competition, or for being released under section 31 of the Public Service Employment Act, administrative redress mechanisms exist through boards of inquiry established by the Public Service Commission. This is one example where the addition of a redress mechanism would cause confusion and debasement. Resulting decisions could give rise to jurisdictional conflicts. This raises questions about responsibility and power given to the Canadian Human Rights Commission. Would that Commission be empowered to order that the employee who claimed discrimination be appointed to the position he/she applied for or be reinstated in that position?

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As you are aware, there have been occasions where public servants have been released from the Public Service for having expressed their opinions publicly. They then availed themselves of the redress mechanism (adjudication) available for such cases under the Public Service Staff Relations Act. (The Stewart case, where an employee questioned the management practices of the minister and senior officials of his department, and the Brewer case, where the employee publicly expressed political opinions, are two examples). If opinion had been mentioned in the Canadian Human Rights Act as a prohibited ground of discrimination, another redress mechanism would have been available causing the conflicts mentioned above.

Should the proposed ground be restricted in the legislation to political opinion, it would be necessary to take into consideration the potential conflict with section 32 of the Public Service Employment Act proscribing partisan political activities of public servants. Two different processes already exist to deal with possible violations of that section: the one given to the Public Service Commission by paragraph 32(6) of the Public Service Employment Act, and the one given by the Public Service Staff Relations Act to the adjudicator regarding possible disciplinary action exercised by the employer under the Financial Administration Act. The Brewer case is an example of the latter. If, indeed, political opinion were enshrined in the Canadian Human Rights Act, Parliament would have to amend Section 32 of the Public Service Employment Act. Otherwise, the Public Service Commission and adjudicators under the Public Service Staff Relations Act could have their decisions annulled by the Canadian Human Rights Commission.

Section 37 of the Public Service Employment Act, which has a dual purpose, could also be in conflict with such a new prohibited ground of discrimination. It gives a minister the authority to appoint the personnel of his office and grants these personnel, in certain circumstances, priority for appointment to a position in the Public Service. It may be difficult to justify many of the appointments that take place by virtue of that section, by stating that political opinions are a bona fide occupational requirement.

Concerning the matter of opinion in relation to the security of the nation, the Financial Administration Act and the Public Service Security Inquiry Regulations already provide for a mechanism in case of release of a public servant in the interest of the safety or security of Canada. I fail to grasp the need for another mechanism. Finally, the discussion paper suggests, with respect to opinion, the possibility of exempting some departments or agencies from the prohibited grounds. I suggest, and this could be argued for other prohibited grounds as well, that it would be highly desirable for the legislation to provide also for the exemption of positions from those sections of the law where the duties and functions make exemption necessary.

Sexual harrassment

It is our opinion that this is quite a different matter from other prohibited grounds of discrimination. Instead, it resembles actions such as blackmail. Such activities are not closely related to discrimination, and people suffering from them have other recourse provided in law.

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The ground for discrimination apparently would be that a person suffered discrimination after sexual harrassment. Such actions should not be considered as ground for discrimination and should be dealt with in another fashion. If sexual harrassment is invoked regarding an appointment, a promotion or a release, the Public Service Employment Act provides for a redress mechanism that will examine the case. The grievance procedure, covering other situations during employment, can also be used to protect employees against such practices.

Under its general role of ombudsman, the Public Service Commission has investigated several cases of this kind, which were noteworthy for a lack of reputable evidence, lack of witnesses, and difficulty in arriving at a clear conclusion as to guilt or innocence. It was apparent, however, that management is ready to take strong measures to deal with any such incident that is supported by reasonable evidence. Those who are sexually harrassed are reluctant to complain and, in our opinion, legal provisions such as those proposed would not make them less reticient. The redress already available should be strengthened, and all employees should be made aware of its availability and of the serious view management takes of such incidents.

Criminal or penal convictions

Undoubtedly, there are good intentions behind the proposal to include such a prohibited ground. However, as for other grounds for discrimination, the measures provided in the Public Service such as through the ombudsman role of the Public Service Commission permit adequate and effective redress where needed.

Mental and Physical Handicaps

We support the inclusion of mental handicap in combination with physical handicap. However, if proscribed, it should not be defined so that an interpretation can be made in any case concerning employment to cover handicap which is not job related. Bearing in mind operational needs, sufficient judgmental leeway is necessary to enable managers to give proper consideration to handicapped employees and applicants when filling positions.

Sexual orientation

In the Public Service, it is our opinion that adequate measures are taken to deal with the few registered cases of discrimination based on sexual orientation. The arguments stated in the discussion paper are far from convincing concerning the necessity to enshrine in the Canadian Human Rights Act such a prohibited ground. Sexual orientation is an expression of behavior related to the evolving likes and dislikes of a specific society. It is not within our competence or mandate to evaluate the degree of acceptance by Canadian society in this regard.

Definition of sex

What is proposed seems to define disqualification on grounds of sex to include discriminatory practices based on pregnancy and childbirth. It is important to realize that, if the Canadian Human

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Rights Act supersedes other acts and the Canadian Human Rights Commission is empowered to enquire into alleged discriminatory practices on grounds authorized in other acts of Parliament, there would be important consequences for laws such as the Unemployment Insurance Commission Act, which contains provisions relating to pregnant women, and for certain parts of the Immigration Act and the Indian Act. Discussions on this point have not been completed, and a suitable forum should be provided for different parties to be heard. The Public Service Commission would be pleased to participate in such discussions.

Powers of the Canadian Human Rights Act

I wish to offer a few comments on the effects of the proposed amendments on the powers of the Canadian Human Rights Commission and the possible conflict with other agencies which could result when the Canadian Human Rights Commission ordered remedial action. If the Canadian Human Rights Act is granted paramount status over other acts of Parliament, will this mean, with respect to the Public Service of Canada, that the Canadian Human Rights Commission will be in a position to order appointments, reinstatements, transfers, and other actions? We submit that there cannot be two agencies having exclusive powers to make appointments, nor two different organizations responsible to establish merit and see that it is observed.

It is our strong impression, after careful study, that the proposed additions and amendments go well beyond the original concept of the areas to be assigned to the Canadian Human Right Commission. The powers involved are immense, providing many opportunities for increasing delay and inflexibility, to the point of denying management auhority commensurate with management responsibility and, effectively, denying justice to individuals. Furthermore, the implementation of the proposals would multiply the possibilities for inter-agency friction and duplication of mechanisms.

We firmly believe that the solution lies not in increasing barriers by legislative measures, but in developing better ways to make existing administrative measures known, and to ensure their effectiveness by improving management. Such an approach reaches the heart of the government's concern to try to de-regulate the system wherever possible. New grounds enshrined in legislation would only serve a purpose that contradicts to the government's stated intention.

Yours sincerely,

[redacted]

Edgar Gallant
Chairman