

IN THE MATTER OF a Complaint
Pursuant to section 11 of the *Human
Rights Act, 2010* SNL 2010, c. H-13.1

BETWEEN:

TANVIR HASNAIN

COMPLAINANT

AND:

INDIA GATE INC.
(o/a India Gate Restaurant)

RESPONDENT

AND:

Newfoundland and Labrador Human
Rights Commission

COMMISSION

Gladys H. Dunne (Adjudicator)

Hearing Date: March 14, 2017

Decision: July 16, 2018

Appearances:

On Behalf of the Complainant:

Tanvir Hasnain

On Behalf of the Respondent:

Bob Buckingham & Robert Hoskins

On Behalf of the Commission:

Donna Strong

DECISION OF THE ADJUDICATOR

INTRODUCTION

1. A complaint was filed by Tanvir Hasnain on June 6, 2014 pursuant to Section 11 of the *Human Rights Act, 2010*, hereinafter referred to as the "Act", alleging discrimination on the basis of nationality and ethnic origin. The complaint was laid against the Respondent, India Gate Inc., operating as India Gate Restaurant.

NATURE OF THE COMPLAINT

2. On June 16, 2014 a complaint form was signed by Tanvir Hasnain wherein he described his complaint as follows:

“The next time we all went to India Gate was on Canada’s Thanksgiving holiday in October, 2013. We asked for a table and were lead to one by a waitress. She gave us the menus and we proceeded to order. No comment about any rules regarding a ‘minimum order’ was mentioned, nor was it written on the menu.

Soon after we received our beverages and were waiting for our food the person who we know as the owner of the restaurant, Mr. David Sood, came to us and told us we had to leave. He told us he could not make any money at his business if we only ordered \$35.00 between us. He gave us our bills and told us we must leave. He said “I’ll meet you at the counter.” We gathered up our jackets and proceeded to the front desk (counter) where the cash register is and where you have to pay. I started recording the conversation on my friend Khalid’s cellphone once we got to the front desk. At that point the owner started talking on his phone and wouldn’t even look at us. We were trying to ask him for a reason as to why he was treating us this way and why, all of a sudden, there was a rule about a ‘minimum’ order. Then a man who we understand to be either Mr. Sood’s brother or cousin, came out and started talking to us. He told us: “Don’t come here anymore, sir.” He also said: “The next time you come here you have to pay \$20 each, but please don’t come here, you will not be served. If you come to us, we will not serve you.” We asked this man: “Is this how you treat people? This is not India or Bangladesh; this is Canada. You cannot do this in Canada. What are you saying?” He then started to lower his voice and said “Yes.” Also present throughout this conversation were Mr. Sood and the waitress ringing in our bills on the cash register. We understand that the waitress couldn’t say anything against her bosses, but Mr. Sood – who initially removed us from our table – said nothing to contradict what his brother/cousin was telling us.

Also, there was a long line-up of people behind us waiting to be seated in the restaurant. Many of them heard the comments which were being made towards us. We felt completely humiliated and embarrassed. We did nothing wrong. We did not misbehave to start a ruckus at the restaurant. We would understand being kicked out if we acted poorly, but we didn’t. All we wanted was a nice meal and an evening out for Canada’s Thanksgiving. Instead, it was completely upsetting.

My friends and I believe we were treated in such a disrespectful manner as the owner of the restaurant now knew we are from Bangladesh. People in Newfoundland may not know this, but there is a history of Bangladeshis being treated poorly by some people from India as some Indians have a feeling of superiority over us (that is, some people from India view people from Bangladesh being ‘lower’ than them) and there is also a perceived lower socio-economic status, and there are differences of religion.

Thankfully, not all Indian people think and feel this way, but some do, and I believe Mr. Sood and his brother/cousin think and feel this way. That's certainly the impression I was left with based on how I, as well as my friends, were treated at India Gate Restaurant that Thanksgiving night.

I believe that by kicking me out of India Gate Restaurant, the person I know as David Sood, his brother/cousin, and India Gate Inc. discriminated against me on the basis of my ethnic origin and nationality contrary to section 11 of the *Human Rights Act*."

3. The Respondent denies having asked Tanvir Hasnain to leave his restaurant because of his ethnic origin and nationality. Mr. Sood submits that they have a minimum order policy of \$20.00 per person and because the complainant did not meet the terms of this policy by ordering the minimum amount required, he was asked to leave. The Respondent denies that is discriminated against Tanvir Hasnain.

ISSUES

4. The issues to be resolved are:
 - (i) Is there sufficient evidence, on a balance of probabilities, that India Gate restaurant discriminated against Tanvir Hasnain, by asking him to leave their restaurant, on the basis of his ethnic origin and nationality?
 - (ii) If discrimination has been proven, what is the appropriate remedy?

EVIDENCE AT THE HEARING

Testimony of Tanvir Hasnain

5. Tanvir Hasnain has lived in Newfoundland and Labrador for seven years and he is a student at Memorial University. He is a Muslim from Bangladesh.
6. Tanvir visited India Gate Restaurant on four occasions, and he testified that there was never any given time in which he felt welcomed to the restaurant by the owner, Mr. Sood. He claimed that as a minority in the province, he knows when he is being singled out.
7. Tanvir's first visit to India Gate Restaurant was between the years 2011-2012. He was alone with nobody accompanying him, and the waitress seated him at a table, despite having no reservation. Tanvir recalls Mr. Sood coming to his table and asking him where he was from, what language he spoke, and if he was Muslim. Tanvir thought the questions were too personal, but he answered them. Tanvir found the conversation with Mr. Sood to be unusual and he testified that the expression on Mr. Sood's face was unfriendly and he looked complexed.

8. Several months later, Tanvir attended the restaurant on a second occasion with his roommate from Bangladesh. Again Tanvir had no reservation and arrived at 5:00 p.m. Mr. Sood met him in the front of the restaurant and asked Tanvir to come back in 30 minutes. Tanvir recalls that the restaurant was empty. When he and his roommate returned between 5:30 p.m. – 5:45 p.m., Mr. Sood told them that they could not come in because they had no reservation. There were only a few people seated in the restaurant. Tanvir and his roommate left.
9. Tanvir's third visit to India Gate Restaurant was a few months later, when he went by himself, having no reservation. He was seated by a waitress, ate his meal and he does not recall seeing Mr. Sood at this visit. The restaurant was not overly busy.
10. The last visit Tanvir made to India Gate was on Thanksgiving Day in October, 2013. He and his two roommates from Bangladesh arrived and were seated at a table by a friendly waitress at approximately 6:00 p.m. Again they had no reservation. Tanvir testified that they ordered three mango drinks, and a naan bread, a chicken dish and a salad to share. They told the waitress that they were sharing the meal and needed utensils.
11. Tanvir further testified that Mr. Sood was pacing back and forth and he then approached their table. He told Tanvir that their order of \$35.00 did not comply with the restaurant's \$20.00 per person policy and therefore they had to leave. Tanvir testified that Mr. Sood would not make eye contact with him. Tanvir met Mr. Sood at the cash register and Tanvir began to record their discussion on his friend's cellphone. Tanvir described Mr. Sood as being rude and mean.
12. At the cash register, Tanvir recalls asking Mr. Sood if he had the minimum order policy posted anywhere in the restaurant. Tanvir testified that the restaurant's policy was not printed on their menu, nor was it posted on their website. Tanvir testified that he was treated poorly by Mr. Sood and he was treated like a fool; Mr. Sood talked down to him and made him feel inferior. This embarrassed and insulted Tanvir.
13. Tanvir claims that Mr. Sood has a problem with Tanvir's ethnic origin and nationality because Indians feel superior over Muslims. Tanvir testified that there is tension and conflict between India and Bangladesh and he wanted me to accept literature on this issue of the history of conflict between the two countries. Counsel for the Respondent objected to the literature being submitted, as it consisted only of authors providing their opinions. I was not prepared to accept this literature as evidence of conflict between the two countries and I am not weighing evidence of the history between India and Bangladesh.
14. Tanvir testified that the fact that Mr. Sood questioned him on his very first visit to the restaurant, as to where he was from, was odd, strange behavior and suspicious in

nature. He claims that the minimum order policy is only an excuse for Mr. Sood's discriminatory conduct towards him.

15. Tanvir testified that Mr. Sood's first introductory comments to him were "...do you speak my language?" he said that Mr. Sood looked at him like he was a "poor Bangladesh". Mr. Sood then questioned if he was a Muslim. Tanvir testified that it was only on his first visit to the restaurant that he was questioned about his language and religion by Mr. Sood and on no other occasion.
16. On the evening of Thanksgiving in October, 2013 when Mr. Sood asked Tanvir and his roommates to leave the restaurant, Tanvir testified that he recorded their discussion with his friend's cellphone, because he wanted an accurate recording. He said he has never felt so much shame and the incident caused him severe anxiety. Tanvir further testified that from the anxiety, he could not eat or sleep for a few weeks after the incident. He could not drive home that evening and he still cannot pass by the restaurant without feeling anxious.

Audio Tape Recording

17. Tanvir presented a transcription of the recording of the discussions between the parties as they were asked to leave the restaurant. Counsel for the Respondent objected to the Complainant's transcription of the recording being entered as evidence, as it was only his transcription. After listening to the tape several times at the hearing, it was evident that some of the discussions on the tape were not transcribed. Therefore, I am not prepared to put any weight on the transcription itself, as it does not accurately reflect all of the discussions between the parties at India Gate Restaurant on that evening in October, 2013. In particular, some of Mr. Sood's comments to Tanvir are not transcribed; therefore, they do not form a part of the transcription. His comments were omitted.
18. After a thorough listening of the tape, we can hear Mr. Sood saying the following to Tanvir:

"Sorry about that...we forgot to mention that...Thank you. We appreciate it.

Sorry about that...the next time we will offer you...if you come back we will offer you.

Please do come...Thank you for coming...have a good evening."

Testimony of David Sood

19. David Sood is from India and he co-owns the local restaurant operating under the name of India Gate. He has lived in St. John's for the last 28 years and he has co-owned and managed India Gate since 1991.

20. Mr. Sood testified that India Gate Restaurant offers dinner time sittings throughout the week, two lunch buffets per week and has a very busy takeout system. The restaurant also offers catering and it hosts functions for various groups in the province.
21. India Gate also prepares Halal versions of their menu items for the local Mosque and they accommodate reasonable requests based on cultures and religions. Mr. Sood testified that for the past 15 years, India Gate has worked with the Muslim community to prepare their food for special functions. Mr. Sood stated that he has never declined a Muslim or someone from Bangladesh service in his restaurant.
22. Mr. Sood further testified that his patrons regularly ask him where he is from. Likewise, in making conversation, he normally asks his customers... "where are you from?" This is a regular greeting from Mr. Sood and a means of starting a friendly conversation with his customers at the restaurant.
23. Mr. Sood does not recall having a conversation with Tanvir Hasnain about him being from Bangladesh and not speaking Hindi. Mr. Sood does, however, acknowledge that he often engages in "small talk" with his patrons once they are seated at their table, to welcome them and make them feel comfortable in his restaurant.
24. Mr. Sood testified that he is a minority himself in Newfoundland and Labrador and he does not discriminate against any race, religion, sexual orientation, social origin, political opinion, gender expression, age, disability, colour, nationality, family status or how someone earns their income.
25. On Thanksgiving Day in October, 2013, Mr. Sood testified that India Gate opened for business at 5:00 p.m. To his recollection, Tanvir arrived at the restaurant at approximately 5:15 p.m., and numerous reservations were due to start at 5:45 p.m.
26. Mr. Sood further testified that India Gate has a minimum order policy of \$20.00 per person. The policy is not posted on their website nor their menu and it is not regularly told to customers because the policy is discretionary. Mr. Sood testified that he and his staff at India Gate use this policy as a rationale for asking people to leave when they are either loitering or ordering minimal food, in situations where large groups of people are waiting for a table.
27. Mr. Sood testified that the average table for two at India Gate will spend \$100.00. The restaurant typically denies walk-ins on busy nights. The staff have been informed to restrict walk-ins, but occasionally they do not follow this policy and they try to accommodate the walk-in who has no reservation.

28. Mr. Sood further testified that India Gate has several items on their menu that require additional time for preparation and are often cooked only with advance notice. One of these items is the stuffed naan which takes an average of 30 minutes to prepare. Mr. Sood stated that India Gate will often inform their customers that certain items cannot be prepared within a timely manner and they have lost some customers because of this. The restaurant has also turned down large take-out orders simply because of their inability to complete it efficiently.
29. Mr. Sood testified that as co-owner of India Gate, he must balance customer requests with profit generation. As the manager, he must determine if the costs associated with preparing the dish outweigh the costs of production. Mr. Sood advised that he typically advises customers of alternative food items that are available, or he will kindly turn the customer away.
30. Mr. Sood testified that on Thanksgiving Day in October, 2013, he had to make a similar decision with Tanvir and his roommates. Tanvir did not have a reservation and they placed their order, just before the evening rush began. Mr. Sood explained that Thanksgiving was a very busy night for the restaurant. He assumes that a waitress seated Tanvir and his friends in anticipation of an extra gratuity and that the waitress failed to properly consider the many reservations due within the hour of Tanvir being seated. On this very busy night, Mr. Sood testified that Tanvir and his friends ordered the stuffed naan, which is one of the menu items which takes additional time to prepare.
31. Mr. Sood was monitoring the kitchen and balancing the take-out orders. The waitress came into the kitchen around 5:35 p.m. and informed Mr. Sood that a customer ordered the stuffed naan. He was unaware that a walk-in customer had been seated and he had to quickly assess whether or not he could prepare this menu item. Mr. Sood testified that he did not leave the kitchen, nor did he view the camera into the dining area, before he made his decision. Mr. Sood did not know who the customer was, but was only told the order and that it was a non-reservation.
32. Recognizing that numerous reservations were soon to start, Mr. Sood testified that he decided he could not fulfill this order and he realized that the customers should not have been seated in the first place, considering the circumstances with such a busy evening on a holiday. Mr. Sood went to the dining area to inform the customer of the situation and to apologize for the inconvenience. Mr. Sood testified that he did not recognize Tanvir Hasnain at this time.
33. Mr. Sood further testified that he did not ask Tanvir to leave the restaurant because he was a Muslim from Bangladesh; rather, he asked him to leave because he had upcoming reservations that would generate more income and it was strictly a business decision. Due to the restaurant's minimum order policy, and the fact that a large number of reservations were due to start very soon, preparing one appetizer for

a table of three people that required 30 minutes to prepare, was not financially feasible for Mr. Sood.

34. Mr. Sood testified that he is a prudent business person and he has to make many hard decisions. His decision to ask Tanvir Hasnain to leave the restaurant was based on the economics of the situation. Mr. Sood acknowledged that the use of a minimum order policy may be considered a poor business decision by some other restaurateurs in the market, but he submits that it does not make it a discriminatory policy.
35. Mr. Sood considered himself to be accepting of all people. He describes himself as being “sympathetic” to minorities in Newfoundland and Labrador and he is always looking for opportunities to expand his business in the community. Mr. Sood further submits that he has close friends of both religions, Hindu and Muslim, and he does not limit his association with people based on their religious beliefs.

THE LAW

36. Pursuant to section 9(1) of the Act, nationality and ethnic origin are prohibited grounds of discrimination. It states as follows:

“9. (1) For the propose of this Act, the prohibited grounds of discrimination are race, colour, nationality, ethnic origin, social origin, religious creed, religion, age, disability, disfigurement, sex, sexual orientation, gender identity, gender expression, marital status, family status, source of income and political opinion.”

37. Section 11 (1) of the Act defines discrimination as follows:

“11. (1) A person shall not, on the basis of a prohibited ground of discrimination,

(a) deny to a person or class or persons goods, services, accommodation or facilities that are customarily offered to the public; or

(b) discriminate against a person or class or persons with respect to goods, services, accommodation or facilities that are customarily offered to the public.”

38. The burden of establishing a *prima facie* case of discrimination is on the Complainant. The onus then shifts to the Respondent to prove otherwise, as stated by the Supreme Court of Canada:

“A *prima facie* case in this context is one which covers the allegations made in which, if they are believed, is complete and sufficient to justify a verdict in the complainant’s favour in the absence of an answer from the respondent/employer.

If these elements are proved, there is an evidentiary onus on the respondent to provide an explanation of events equally consistent with the conclusion that discrimination on the basis prohibited by the Code is not the correct explanation. If the respondent does proffer an equally consistent explanation, the complaint of discrimination must fail for the onus of proving discrimination ultimately rests on the Commission (*Shakes v. Rex Pak Ltd.*, (1981) 3 C.H.R.R. D/1001 (Ont. Board of Inquiry) *Ontario Human Rights Commission v. Simpson –Sears Ltd.* [1985] 2 SCR 536”.

39. As identified in *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143, in the context of human rights, the meaning of discrimination has been widely recognized to mean the following:

“I would say then that discrimination may be described as a distinction, whether intentional or not based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual’s merits and capacities will rarely be so classed.”

40. The terms “ethnic origin” and “nationality” are not defined in the Act and they have not been the subject of judicial comment in human rights law in Canada. However, the House of Lords defined both terms and it is a useful guide to Canadian jurisdictions.

“The term ‘nationality’ describes a person’s connection, or state of ‘belonging’ to a ‘nation’. It has ethnic and sociological dimension, and not infrequently a spiritual sense as well. The latter is particularly noticeable where the ‘nation’ to which a person feels an allegiance does not currently exist as an independent political unit.

Apart from the political realities of nationhood, the term ‘nation’ can probably be defined as a people, ...generally inhabiting a distinct portion of the earth, usually sharing the same language and customs, possessing historical continuity, probably distinguished from other like groups by their racial origins and characteristics, and increasingly, although not invariably, living under the same government and sovereignty.” (Tarnopolsky and Pentney, *Discrimination and the Law (Vol. 2)*, Carswell (Looseleaf), pp. 5-53; 5-54.

41. For a group to constitute an “ethnic” group, they must be regarded by others, as a “distinct community by virtue of certain characteristics.” The two (2) conditions which appear to be essential are these:

- (1) “a long shared history, of which the group is conscious as distinguishing it from other groups, and the memory of which it keeps alive; and,
- (2) a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance.” *Supra.*, pp. 5-43 - 5-44.

ANALYSIS

ISSUE ONE

42. Has the Complainant established, on a balance of probabilities, that the Respondent discriminated against him on the basis of his ethnic origin or nationality, contrary to Section 11 of the Act? Was the denial of service experienced by the Complainant based on his ethnic origin or nationality?
43. A *prima facie* case is established when the allegations made are believed to be discriminatory in nature and the evidence is complete and sufficient to justify a verdict in the Complainant’s favour. The burden of establishing a *prima facie* case of discrimination is on the Complainant.
44. Following a review of all the evidence, I am satisfied that the Complainant was denied services by the Respondent, as he was asked to leave the restaurant; however, the denial of service experienced by the Complainant was not based on his ethnic origin or nationality.
45. Clearly, the Respondent asked the Complainant to leave because he had upcoming reservations on this busy holiday evening that would generate more income for the Respondent. The denial of service was purely business in nature and while the Respondent’s minimum order policy may be a poor business decision, it is not discriminatory based on the Complainant’s ethnic origin or nationality.
46. The Complainant testified that despite not feeling welcome by the Respondent, he visited the restaurant on four previous occasions. He had been served meals on previous visits when the restaurant was not overly busy. I believe that if the Respondent after his initial conversation with the Complainant, did not want to serve him meals because of his ethnic origin or nationality, the Complainant would not have felt comfortable revisiting the restaurant on three subsequent occasions. Had he been singled out because of his nationality or ethnic origin, as claimed by the Complainant, I do not believe that he would have returned on three subsequent visits, nor would he have been served a meal by the Respondent. On the contrary, the Complainant continued to go to the Respondent’s restaurant, and I believe that if he had found his initial conversation with the Respondent on his first visit to be intrusive

and rude, and focused on his ethnic origin or nationality, the Complainant would not have returned.

47. From carefully listening to the audiotape recording of the incident in question, it is very evident that the Respondent was apologetic to the Complainant for having to ask him to leave the restaurant. We hear the Respondent apologizing to the Complainant, thanking him for coming, asking him to come again and stating that he will be served at the restaurant the next time he visits. These statements by the Respondent to the Complainant are not indicative of discrimination.
48. Had the Respondent been denying services to the Complainant because of his ethnic origin or nationality, he would not have been inviting him back nor would he have been apologetic for asking him to leave. The denial of service by the Respondent was purely a business decision and business in nature only, not discriminatory on the basis of the Complainant's ethnic origin or nationality.
49. I further accept the Respondent's evidence that his restaurant regularly serves and caters for gatherings at the local Mosque and works with the Muslim community to prepare their food for special functions. This supports my finding that the Respondent was not discriminating against the Complainant because of his ethnic origin or nationality as the Respondent works together with Muslims in a respectful manner and he has been associated with Muslims, for over 15 years, with his restaurant.
50. I am satisfied, therefore, that the Complainant has not established a *prima facie* case of discrimination against him by the Respondent on the basis of his ethnic origin or nationality, contrary to Section 11 of the Act. He has not proven, on a balance of probabilities, that the denial of service that he experienced by the Respondent was based on his ethnic origin or nationality.

CONCLUSION

51. I find that there has been no discrimination against the Complainant by the Respondent, and his complaint is dismissed.

Adjudicator