Court Cases-
Human Rights Commission vs. Board of School Trustees June 13, 1977 Urban Environment 2-44

IN THE MATTER OF THE HUMAN RIGHTS CODE
OF BRITISH COLUMBIA

AND

THE COMPLAINT OF:

GEORGINA ANNE BREMER

COMPLAINANT

AGAINST:

BOARD OF SCHOOL TRUSTEES, SCHOOL DISTRICT NO. 62 (SOOKE) AND PERCY B. PULLINGER

RESPONDENTS

REASONS FOR DECISION

DATES OF HEARING: January 31, February 13, May 5 and 6, and August 3, 4, 5, 6, 1976

PLACE OF HEARING: Victoria, British Columbia

BOARD OF INQUIRY: Robert Moore
Lou Demerais
Rod Germaine

APPEARANCES: Mr. D.S. Lisson for the Complainant and the Director of the Human Rights Code

Mr. L.F. Lindholm for the Respondents

EFFECTIVE DATE OF DECISION: Friday , JUNE 10, 1977.

I.

On May 20, 1975, the Complainant, Mrs. Anne Bremer, applied for a teaching position in the Sooke School District. One of the supervisors of the Sooke School District recommended to Mr. Percy B. Pullinger, District Superintendent of Schools for the Sooke School District, that Mrs. Bremer be appointed. Mrs. Bremer had two interviews with Mr. Pullinger. At the second of these interviews on June 23, 1975, Mr. Pullinger informed Mrs. Bremer that she would not be offered a teaching position because, in his opinion, she did not have sufficient experience in elementary schools in British Columbia. Ultimately, Mrs. Bremer's application was rejected.

Mrs. Bremer did not accept the reason given her for her failure to be appointed and she filed a complaint under the Human Rights Code against the Respondent Pullinger and the Respondent School Board. Mrs. Bremer alleges that, contrary to Section 8 of the Human Rights Code, the Respondents refused to employ her without reasonable cause. The Director of the Human Rights Code of British Columbia has joined Mrs. Bremer in the complaint.

The specific nature of Mrs. Bremer's complaint is related to her husband, Mr. John Bremer. In 1973 Mr. Bremer was appointed by the Provincial Government to the senior position of Commissioner of Education for the Province. In early 1974 he was dismissed from that position publicly and abruptly by the then Premier of the province. Mr. Bremer's dismissal received considerable attention in the media as did

the subsequent litigation initiated by him in respect of his dismissal. It is Mrs. Bremer's position that she was not employed by the Sooke School District because of the public controversy surrounding her husband's dismissal and she therefore alleges that she was discriminated against because of her name and her husband's dispute with the government.

The nature of this complaint raises important issues about the scope and meaning of "reasonable cause" as that term is used in the Human Rights Code. There have been a number of relevant Human Rights Board of Inquiry and Supreme Court decisions since the Code was proclaimed in October, 1974. The issues raised by Mrs. Bremer's complaint have given this Board an opportunity to examine the concept of "reasonable cause" as it has developed in the British Columbia decisions and in light of pertinent decisions from other jurisdictions. That discussion is contained in the second part of this decision. The Board's findings of fact are recorded in the third part of this decision. These findings include a description in some detail of the evidence heard by the Board. This detail is necessary in order to set out adequately the Board's response to a motion for a directed dismissal of the complaint made during the hearing. That motion also raises significant issues for the conduct of Human Rights Board of Inquiry hearings and the fourth part of this decision will set out the precise nature of the motion as well as the Board's reasons for denying it. Finally, in the fifth part of this decision, the Board will record its reasons for dismissing the complaint filed by Mrs. Bremer.

II.

The Human Rights Code of British Columbia is the first human rights legislation in Canada incorporating the concept of "reasonable cause". The concept is found in Section 3 dealing with discrimination in relation to public facilities and in Section 9 dealing with discrimination by trade unions or other occupational associations as well as in Section 8. Each of the sections prohibits certain conduct "... unless reasonable cause exists ...". Section 8 in its entirety reads as follows:

> "8(1) Every person has the right of equality of opportunity based upon bona fide qualifications in respect of his occupation or employment, or in respect of an intended occupation, employment, advancement, or promotion; and, without limiting the generality of the foregoing,
>
> (a) no employer shall refuse to employ, or to continue to employ, or to advance or promote that person, or discriminate against that person in respect of employment or a condition of employment; and
> (b) no employment agency shall refuse to refer him for employment,
>
> unless reasonable cause exists for such refusal or discrimination.
>
> (2) For the purposes of subsection (1),
>
> (a) the race, religion, colour, age, marital status, ancestry, place of origin, or political belief of any person or class of persons shall not constitute reasonable cause;
> (a1) a provision respecting Canadian citizenship in any Act constitutes reasonable cause;
> (b) the sex of any person shall not constitute reasonable cause unless it relates to the maintenance of public decency;

c) a conviction for a criminal or summary conviction charge shall not constitute reasonable cause unless such charge relates to the occupation or employment, or to the intended occupation, employment, advancement, or promotion, of a person.

3) No provision of this section relating to age shall prohibit the operation of any term of a bona fide retirement, superannuation, or pension plan, or the terms or conditions of any bona fide group or employee insurance plan, or of any bona fide scheme based upon seniority".

Subsection 2 of each of the sections incorporating the reasonable cause concept provides some definition of reasonable cause. In Section 8(2), for example, as might be expected in the context of a human rights statute, such things as race, religion, colour, age, etc. are defined as matters not constituting reasonable cause. But the factors which expressly do not constitute reasonable cause are not a complete definition in a negative fashion of what reasonable cause is unless the Legislature intended that subsection 2 contain an exhaustive list of matters which do not represent reasonable cause in respect of discrimination in employment. Of course, had the Legislature so intended, it would not have been necessary to resort to the reasonable cause concept at all. It is well established that the factors listed in subsection 2 do not represent an exhaustive list. This conclusion was reached in Jefferson and the B.C. Ferries et al (BC HRBI, September 29, 1976) and in a case under Section 3 of the Code, GATE and The Sun (BC HRBI, 1975). The latter decision has been sustained on appeal in the Supreme Court (BCSC, Vancouver Reg. No. A760171, August 16, 1976).

If subsection 2 of each of the "reasonable cause" sections is not an exhaustive definition, then what are the principles upon which a reasonable cause determination is to be made outside the confines of the partial definition in subsection 2? Is such a determination simply a question of fairness or are the governing principles more specific? These questions are largely answered by an examination of the basis upon which the decisions to date have added to the expressly enumerated matters which do not constitute reasonable cause.

In the GATE case, the Board held there was no reasonable cause in circumstances in which the respondent was found to have a bias against homosexual persons. Such persons, it was held

constitute a "class of persons" within the meaning of that term in the Code because they represent a collection of individuals bound together by a differentiating characteristic which distinguishes members of the group from others in society. The majority found that there was a contravention of Section 3 in that a facility customarily available to the public had been denied the complainant because of the respondent's bias against that class of persons. This approach was echoed in the Oram et al and Pho (BC HRBI, 1975) decision which held reasonable cause did not exist for a denial of a public service because of the complainants' personal appearance and lifestyle. The decision speaks in terms of the Code affording protection for minorities comprised of persons who are possessed of a differentiating characteristic which attracts to them prejudicial discriminatory conduct. In the Jefferson case, the Board ruled that subsection 2 of Section 8 enumerates factors describing categories of persons expressly protected from prejudicial conduct and the Board added the physically handicapped to the list of protected categories. The Board in H.W. and Riviera Reservations of Canada Ltd. et al (BC HRBI, July 22, 1976) determined that pregnancy is a status protected by the Code. Finally, the Board in The Human Rights Commission of British Columbia and the College of Physicians and Surgeons (BC HRBI, May 27,1976) held that the policy of the College to place a geographic restriction on the right of non-Canadians to practice medicine, a restriction not applied with equal force to Canadians, was a form of discrimination on the grounds of citizenship. By this conclusion, non-Canadian citizens became a group or a class protected by Section 9 of the Code although the Board was careful, in view of Section 8(2)(a1), to point out that some forms of discrimination on the basis of citizenship are not prohibited by the Code.

These various approaches to the meaning of reasonable cause are, it seems to this Board, essentially the same and this Board, with minor reservations, is in basic agreement with the

analysis inherent in all of the decisions to date. The principle that emerges from these decisions is that the reasonable cause concept is intended to protect classes or categories of persons and individual members of such classes or categories from prejudicial conduct related to the differentiating group characteristic which distinguishes the class or category from others in society. With this principle we agree although we see some relatively unimportant difficulties in certain of the decisions.

First, the use of the term "minority" in the Oram decision may be slightly misleading inasmuch as women, who suffer from widespread discriminatory practices, in fact constitute a majority of our society. Indeed, it is conceivable that members of other classes who are in the majority might be the subject of a violation of the Code. For example, although the possibility is remote, it is conceivable that a caucasian might be denied a certain opportunity for no other reason than his or her race. Second, it would not seem necessary to describe pregnancy as a separate "status" protected by the Code as the Board in the Riviera case did. Discrimination due to pregnancy, it seems to this Board, is but a manifestation of discrimination on the basis of sex. Finally, in the Jefferson case, the Board was fortified in its conclusion that physically handicapped persons are a protected class by the fact that a physical handicap is a characteristic over which a person has no control. That is a feature of a physical handicap which makes that characteristic identical to such expressly protected group characteristics as race, colour, age, ancestry and others enumerated in subsection 2. This feature may assist in a determination about whether a particular characteristic distinguishes a class of persons protected by the Code but should not be strictly construed or considered necessarily conclusive. It is certainly arguable that a person does have control over such expressly prohibited group characteristics as marital status and political belief. In addition, we would refer again to the Oram decision in which it was held that there was no reasonable cause for the denial of a public facility due to personal appearance and lifestyle. A person obviously does exercise some control over his or her personal appearance and lifestyle.

It is, of course, implicit in all of the cases to date that the list of prohibited considerations is never closed and in this context the Board is of the opinion that some further definition of the reasonable cause concept is desirable. In every contravention the respondent's reasons for the prohibited conduct are related to the failure of the respondent to make an individual assessment of the person discriminated against. The reasonable cause standard requires a consideration of the individual in relation to the pertinent employment or other protected opportunity, a consideration free of any reference to the individual's "differentiating characteristic". A contravention of the reasonable cause standard will manifest a refusal to engage in such an individual assessment. In every contravention the respondent's reasons for the prohibited conduct involve a consideration by the respondent of the complainant's group factor or characteristic such as, for example, race or religion. Such group factors are, of course, totally irrelevant and unrelated to the opportunity denied or in respect of which the complainant is treated unequally. All too frequently, a contravention will be recognizable by a quality of preconceived and unreasonable opinion held by the respondent in relation to the irrelevant and unrelated factor.

An example will illustrate these indicia of a contravention of the reasonable cause standard. A refusal to employ a woman in a sawmill because the particular applicant is not physically strong enough to perform the required work is not a violation of the Code. On the other hand, a refusal to employ a woman in a sawmill for the reason that women are not physically strong enough to do the required work is a classic contravention. The refusal for the latter reason precludes any assessment of the physical strength of any particular woman seeking the work. Even if physical strength is a requirement of the employment opportunity, the sex of the person seeking work is irrelevant and unrelated to that person's ability to perform the work. A denial because of the factor of sex stems from the unreasonable preconceived notion that women are, by virtue of being women, physically weak. The basis of the element of prejudgment is an unwarranted and illogical assumption. Some other prejudgments originate in irrational and odious biases such as racial prejudice.

It is worth adding that no amount of statistical analysis suggesting the average female has a lower level of physical strength than the average male will serve to make the sex of a particular person relevant to a decision concerning an employment opportunity requiring a certain level of physical strength. Such statistics would not alter the logical fallacy inherent in an assumption about a particular individual due to the individual's sex. It is to be noted that, in describing a statistical analysis of this nature as irrelevant, we are not saying that for other purposes statistical analyses could never be of assistance in human rights proceedings.

The logic of the matters enumerated in subsection 2 is that any denial or unequal treatment because of any of those factors will in every case manifest a refusal to make an individual assessment. Subject to certain qualifications expressed in the provisions of subsection 2, the Legislature has accurately characterized those factors as totally irrelevant and unrelated to any decision in relation to an employment opportunity. Judgments made on the basis of the enumerated factors are likely to be "... fostered by preconceived and unreasonable judgments or opinions marked by suspicion, fear, intolerance or hatred" (the GATE case).

The strength of the reasonable cause standard is in the flexibility it provides the entire statute. Racial discrimination is relatively easy to define as a prohibited form of conduct because the factor of race is always irrelevant. Other characteristics are not always totally irrelevant or unrelated to an employment opportunity. A physical handicap, for example, will obviously preclude a person from taking certain jobs. If a job requires a certain physical skill which a handicap prevents a person from performing then the handicap of that person is of course relevant to that particular job opportunity. However, if the handicap does not prevent a person from performing all of the skills necessary for a particular job and the person nevertheless is denied the job for the reason that the person is handicapped, then the denial is equally as injurious and damaging as discrimination on the basis of race. The individual assessment

is absent; the handicap is irrelevant; and the decision to deny is actually based on a prejudgment originating in the illogical and repulsive assumption that handicapped people somehow are not able to measure up. Therefore, the indicia of a contravention are present and when a physically handicapped person is denied, because of the handicap, a job the person is able to perform, the denial is a contravention of Section 8. Thus, the concept of reasonable cause is flexible enough to catch the hurtful and damaging conduct which may result from decisions made on the basis of such factors as a physical handicap and, at the same time, to recognize that some of those decisions are job related and therefore not discriminatory.

It can be seen that the judgment about whether one of the sections incorporating the reasonable cause concept has been contravened requires an analysis of whether the conduct complained of is governed by the section and, if so, whether the conduct was motivated by one of the factors expressly enumerated in subsection 2 or any other analogous consideration. The enumerated factors are essentially group characteristics and so are the factors which have to date been added to the list of prohibited considerations by the Boards in the GATE, Oram, Riviera, College of Physicians & Surgeons and Jefferson decisions. This, it seems to this Board, is consistent with the purpose and object of human rights legislation. In the words of the Board which heard the Oram case:

> "The Code was obviously enacted by the Legislature of B.C. in an effort to afford protection to those persons who for reasons of race, colour, religion, sex, or other differentiating characteristic attract to themselves prejudicial conduct exercised by some less civilized members of our society".

In the case of Gilbert Nelson et al and Borho et al (BCSC, Vancouver Registry No. A760749, November 4, 1976), a decision on appeal from a Human Rights Board of Inquiry decision, The Honourable Mr. Justice Toy held that a person cannot complain of discrimination under the Code if the person has been treated equally with others. That conclusion is consistent with the statement of the purpose of the Code in the Oram decision; the

Act prohibits discrimination which results in unequal treatment of a person or a class of persons because of a characteristic of the person or class, a characteristic the consideration of which is prohibited either expressly or under the umbrella of reasonable cause.

The point of this reference to the purpose of the statute is that the Code does not impose upon the citizens of British Columbia a standard of absolute fairness against which all conduct is to be measured. Indeed, with respect to employment, the right of equality of opportunity is qualified in the sense that "discrimination" based upon bona fide occupational qualifications is not contrary to the Code. The discrimination which is prohibited is not the mere activity of differentiating and distinguishing which is a part of virtually every decision a person makes.

There are, of necessity, further limitations upon the scope of the Code. The equality the Code seeks to provide is in no sense an abstract, perfect form of equality. For example, a person who in every respect is representative of a community norm and thus immune from discrimination on the basis of race or religion or political belief, etc. may fail in an employment competition because the interviewer has a headache and is unimpressed by the applicant's tendency to talk too loudly and too long. The applicant may otherwise be the superior candidate for the position sought. With or without the element of the interviewer's headache, it is manifestly clear that the Human Rights Code cannot hope to regulate unfair treatment suffered by that unsuccessful candidate. The point is, however, that the candidate was accorded an individual assessment of his or her qualifications and in those circumstances the Code is not operative simply because of an arguably unfair result suffered by the applicant.

Certain facts surrounding the complaint before this Board are illustrative of another limitation upon the scope of

the Human Rights Code. For the 1974/75 school year, the Sooke School Board received in excess of 4,000 applications for approximately 60 available positions. A staff of about six was available to process the applications, assess the merits of each applicant and select the 60 to be appointed. In such circumstances, it is extremely probable that among the several thousand unsuccessful applicants there were persons superior to those who succeeded. The existence of those superior but unsuccessful applicants represents error on the part of the staff selecting the persons to fill the vacant positions. Those errors reflect not only the fact that the staff of the Sooke School District are human but also the extreme circumstances in which the staff were obliged to judge among the applicants. In these circumstances, the failure of some superior candidates to succeed, however, has nothing whatever to do with a statute seeking to provide an equality of opportunity despite characteristics such as race, religion, colour, sex, etc.. It may well be unfair that the superior candidates failed to obtain employment but unless a particular unsuccessful candidate was rejected because of a consideration by the Sooke School Board staff of one or more of the factors prohibited either expressly or by virtue of the concept of reasonable cause, the Code has no role to play. The Code does not prohibit mistaken judgment where individual assessments are made; the Code only makes such individual assessments mandatory. It follows that this Board, like the Board in the Jefferson case, would decline to follow the decision in Lopeterone et al and Harrison et al (BC HRBI, March 31, 1976).

We would add some further observations about the scope of the Human Rights Code. In the Borho decision already referred to, the learned judge held:

> "There is nothing in the Human Rights Code of B.C. that suggests to me that in the field of civil rights or provincial crime that a person can be held civilly accountable or responsible in a summary conviction court for his thoughts, intentions or a state of mind. There must be, in my view, an overt act or a result flowing from the person's thoughts or state of mind before another person's civil rights can be invaded or the state needs protection".

The same conclusion was expressed by Mr. S.M. Lederman, Chairman of an Ontario Human Rights Board of Inquiry in Jones et al and Huber et al (June 29,1976):

> "...the holding of opinions which have racial overtones does not amount to a contravention of the Code. The legislation does not forbid discriminatory thinking but only discriminatory conduct...".

The force of this proposition is undeniable but there is a related and equally valid proposition. A person may have the best of personal intentions and nevertheless contravene the Code. This is illustrated by the example of an employer who refuses to hire a person of a certain race because the employer has reason to believe that the employment of a person of that race will not be accepted by the customers of the business and as a result the profitability of the business may be affected. Such a refusal is motivated by the prohibited consideration of race just as much as it would be if the racist views were those of the employer and not the customers. In the words of Mr. Lederman in the Jones decision:

> "A person cannot avoid liability under the Code by arguing that he has discriminated against an individual, not because he himself objects to his race or colour, but because others do. The provisions of the Ontario Human Rights Code cannot be circumvented by discriminatory acts performed by proxy."

For this reason we would not have been as impressed as the Board in the Jefferson case by the fact that the personal respondent in that case was a "fair-minded person". That the fair-mindedness of a respondent is not a defence under Title VII of the U.S. Civil Rights Act of 1964 was established in Rogers vs. E.E.O.C. (1975), 10 E.P.D. para. 10,416 in which the United States District Court, District of Columbia, found the Philadelphia District Office of the Equal Employment Opportunity Commission guilty of a contravention of the statute.

Finally, we would record our firm conviction that the prohibited consideration need not be the only motivation in order for a contravention to occur. In this respect we note that in the Riviera decision, the Board concluded that the prohibited consideration was the "effective cause" and the Board declined to adopt the argument that the prohibited consideration need be only one of a number of motivating considerations in order to support a finding of contravention. In our opinion, the search for the "effective cause" will be an elusive and unnecessary exercise. Nothing in the language of the Code requires the prohibited consideration to be the "effective cause" and there is ample authority for the proposition that in the absence of express language directing a tribunal or court to find the "sole cause" or the "effective cause", a contravention will occur if the prohibited consideration is only one of the motivating factors. One such authority is R. vs. Bushnell Communications Ltd. (1973), 45 DLR (3d) 1218, affirmed (1974) 47 DLR (3d) 668 (Ont. C.A.). Of more relevance is the following passage from the Jones et al and Huber at al decision:

> "In any event, race is an impermissible factor in an apartment rental decision and cannot be brushed aside because it was not the sole reason for the discrimination. So long as it was one of the considerations, it will constitute a violation of the Ontario Human Rights Code."

Further support is found in Naughler and the New Brunswick Liquor Commission (NB HRBI, May 25, 1976):

> "... it is sufficient to constitute a violation of the Human Rights Code if one of the reasons for a decision challenged under the Code was based on the sex of the individual affected".

The Board in that case, chaired by Robert W. Kerr, went on to consider the validity of the other reasons offered for the challenged decision on the basis that the existence of other valid reasons for the decision would be relevant in the determination of the appropriate remedy.

It is thus the view of this Board that a prohibited consideration need not be the "sole" or even the "effective" reason for the denial or other discriminatory conduct in order for a contravention to have occurred. It is sufficient if the prohibited consideration was a significant reason even though it may be only one of perhaps several factors and even though it may not be the most important factor of the several which together triggered the impugned conduct. It is for this reason that this Board, while agreeing with much of the preceding general analysis of the Board in the Jefferson case, would have reached a different result on the evidence set out in the reasons for that decision. The Jefferson Board determined that physically handicapped persons are protected by the Code and found that the complainant's physical ability was at least equal to the average person's and his mental and mechanical aptitude were superior. The Jefferson Board went on to recite evidence establishing that the decision not to place the complainant's name on an employment eligibility list was in part as a result of a consideration of the extent of the complainant's handicap. Despite these conclusions and findings, the Board held there was no contravention. It is the opinion of this Board that, having once determined a prohibited consideration was one of the reasons for the refusal, there should have followed a finding that a contravention had occurred.

The Jefferson Board supported its result by reliance upon an "objective standard" and a concept of "reasonable managerial discretion". As we have said, the respondent's fair-mindedness is not relevant if one of the reasons for a denial is a prohibited consideration. To conclude otherwise would be to invite an inevitable erosion of the force of the Code. The underlying policy is succinctly set out in the following passage from the decision in Rogers vs. E.E.O.C.:

> "EEOC argues that even if the court finds some evidence of discrimination plaintiff should not recover because he was not the best qualified applicant for the job. The purpose of Title VII cannot be so easily turned aside, even by an agency charged with special responsibility to enforce the statute. Race played a part in the challenged selection decision. To accept EEOC's view that if this factor is one of two mixed motives governing the selection but is less than the controlling one it should be ignored would be to allow race prejudice to again raise its ugly head. Those who suffer from its effects would again face the constant refrain of "unqualified" so often used in the past to conceal the subtle effect of race bias. Where selection is based on a subjective appraisal and race plays a part, no matter how weighed, in the total factors said to govern choice, the selection is tainted and the rejected party must be made whole".

Against this background of the reasonable cause concept, should a finding that the rejection of Mrs. Bremer's application was in part motivated by her name or her husband's dispute with the government result in a determination that there has been a contravention of the Code? Should the notoriety attached to her husband's tenure with and dismissal from the Department of Education, the factors which are inherent in Mrs. Bremer's complaint that she was rejected because of her name, constitute a consideration prohibited by the Human Rights Code? The answer to this question is not simple. Although Mrs. Bremer shares her name with at least her husband, it may be stretching logic somewhat to say her name is a group characteristic. However, even though we have expressed the view

that a prohibited consideration will always be a group characteristic, we are not of the view that this criterion should be too rigidly applied in every case. Indeed, some of the expressly enumerated prohibited considerations may be slightly obscure in terms of whether they qualify as a group characteristic. For example, a person's religion or political belief may be unique to one person only.

While Mrs. Bremer's name and its connotations in relation to her husband may not be the most obvious group characteristic, the other indicia of a contravention of the Code would be manifestly present in any refusal to employ Mrs. Bremer because of her name. Mrs. Bremer's name is certainly completely irrelevant and unrelated to her ability to perform the duties of a teacher. A refusal to employ Mrs. Bremer because of her name would mean that Mrs. Bremer was not accorded an assessment as an individual. Furthermore, her husband's dispute with the government and the degree of publicity accorded that dispute are not matters over which Mrs. Bremer had any control. Nor is either a minor personal characteristic which may or may not be a feature of an individual in any class of persons. In view of these considerations and particularly in view of the absence of any individual assessment of Mrs. Bremer which would have been inherent in such a decision, had the Board concluded that Mrs. Bremer's application was rejected because of her name, the Board would have held there was no reasonable cause for the rejection.

III.

Within this statutory framework, we turn to a more detailed account of the facts surrounding the rejection of Mrs. Bremer's application for a teaching position in the Sooke School District.

Mrs. Bremer is an accomplished and highly qualified teacher. She has several years of teaching experience, mostly at the primary level in Great Britain and the United States. In addition, she has participated in education workshops and conferences, she has published, she has held various university positions in education faculties and she has performed the services of a consultant in education. In the course of her career, Mrs. Bremer has developed a particular expertise in a discipline known as special education. Roughly stated, special education consists of alternative educational programs for children who are unable to function in the conventional classroom setting as a result of such causes as learning disabilities or emotional problems. It was in this field of expertise that Mrs. Bremer was employed at the time she applied to the Respondents for a teaching position. From September of 1973 to June of 1975 Mrs. Bremer was a senior staff member at the Pacific Centre for Human Development, a residential setting for disturbed children unable to function in the public school system or to cope with a family setting.

At Pacific Centre Mrs. Bremer was involved in educational planning and staff training. Her duties included direct contact with the children in connection, in particular, with the development of a video tape therapy technique. The then Principal of Pacific Centre, Mr. Harold Seybold, described her performance in these areas and in the development of alternative educational

materials as creative in terms of motivating the learning process.

Another feature of Mrs. Bremer's employment with Pacific Centre was her involvement with the schools and the administration of the Sooke School District. Children leaving Pacific Centre were integrated into Sooke School District schools and, in the 1974/75 school year, the Pacific Centre contracted with the Sooke School District to take educational responsibility for 15 children in the Sooke School District public schools who were identified as having particular learning problems. Mrs. Bremer acted as a liaison between the Pacific Centre staff and the Sooke School District staff in relation to the students either leaving Pacific Centre or attending the Pacific Centre under the latter arrangement, known as Project 15. These contacts with the Sooke School District included considerable communication with the District Supervisor for Special Education, Mr. William Fleming. Mr. Fleming clearly respected Mrs. Bremer's expertise in special education. In 1974, at the invitation of Mr. Fleming, Mrs. Bremer with Mr. Fleming and others in the Sooke School District, organized and presented a conference, entitled "Educational Rehabilitative Alternates", the purpose of which was to display developments in special education in the Sooke School District.

On May 14, 1975 Mrs. Bremer learned she would lose her position at Pacific Centre due to program cutbacks necessitated by reduced government funding. Not surprisingly, the first prospect for new employment that Mrs. Bremer explored was the possibility of a position in the Sooke School District. She immediately sought the advice of Mr. Fleming and on May 20th Mrs. Bremer delivered two employment applications to the office of the Sooke School District.

One of the applications was for the position of Resource Centre or Resource Person Co-ordinator, the status of which was unclear at the time the application was made. The evidence pertaining to the fate of this application was also unclear. It would appear that the position was filled some two or three months later by which time the relationship between Mrs. Bremer and the Sooke School Board had been overtaken by the events surrounding the other application. In any event, Mrs. Bremer testified her complaint did not turn on the Resource Centre or Resource Person Co-ordinator application and the Board is unable to draw any inferences from the partially unexplained absence of any response to that application.

The other application was an open application for a teaching position and it was directed to Mr. Fleming. A few days after she submitted her application, Mr. Fleming recommended to Mr. Pullinger that Mrs. Bremer be appointed teacher of the Observation Class at Glen Lake School. The Observation Class is a special education class comprised of students selected because of learning disabilities and emotional problems. The teacher of such a class faces the demanding task of both teaching the sometimes troublesome students and, at the same time, attempting a diagnosis of the students' problems.

A complete account of what happened to Mrs. Bremer's application requires an understanding of the recruitment procedures of the Sooke School District. Each of the several thousand applications received annually is coded on a punch card and the cards are filed for quick and easy retrieval according to position sought and the particular qualifications of the applicant. A file is also opened for each application and the file may be supplemented by the results of an interview. Mr. Fleming apparently

plays a limited role in the interviewing efforts of the Sooke School District staff not only because only 5% of the teaching positions are in special education but also because he is not interested in the task. The determination of whether a vacant position exists for recruitment purposes is made by the Director of Instruction for the Sooke School District, Mr. Ray Warburton, who is in a line position superior to the supervisors and responsible to the Superintendent. The determination is made in accordance with budgetary and Provincial Department of Education criteria and in consideration of existing teaching staff who may wish to transfer to other positions. When the determination is made, the initial recruitment responsibilities fall to the appropriate supervisor. In addition to Mr. Fleming, there is a supervisor for each of three levels of education: primary, intermediate and secondary. The supervisor retrieves from the filing system a number of files containing applications of persons qualified for the position. The supervisor reduces the number of applications to a short list and consults with the principal of the school involved. The principal may conduct further interviews and when a candidate has been chosen, the principal and the supervisor will make a recommendation for appointment to Mr. Warburton. He normally passes it on to Mr. Pullinger who, in turn, normally recommends appointment to the Sooke School Board. Although the occasion does not arise often, the recommendation may be turned down by either Mr. Warburton or Mr. Pullinger.

Mr. Fleming testified that his responsibilities include the selection of applicants for teaching positions in special education. The Board accepts this evidence but, like the situation in relation to interviewing, his role is limited. If a vacancy exists in special education at the primary level, for example, it would normally be the Supervisor for Primary Education, Mrs. Cleugh, who would have interviewed most of the applicants and who would process the applications and make a joint decision with the principal of the school involved. Because the position is one in special education, Mrs. Cleugh, in the course of these procedures would probably consult with Mr. Fleming. With only a limited

number of exceptions involving primarily an apprentice type position called "Learning Assistants", none of the supervisors would make appointment recommendations directly to Mr. Pullinger.

It was Mr. Fleming's evidence that Mr. Warburton had requested him to fill the position of teacher of the Glen Lake Observation Class. Consultation with the principal of Glen Lake in the normal course was not possible because at that time there was no principal of Glen Lake School. Mr. Fleming said he compared Mrs. Bremer's applications with others he had personally retrieved from the bank of applications and he concluded Mrs. Bremer was the most qualified applicant. On June 2, 1975 he forwarded to Mr. Pullinger's desk Mrs. Bremer's application together with his brief recommendation for her appointment and he so informed Mrs. Bremer. Mr. Warburton denied that he had requested Mr. Fleming to make the selection.

The recommendation for appointment which Mr. Fleming made directly to Mr. Pullinger must be placed in a certain context. It occurred before the working atmosphere at the offices of the Sooke School District had entirely recovered from a dispute concerning an appointment in special education earlier in the spring of 1975. Mr. Fleming had sought to persuade Mr. Pullinger, Mr. Warburton and others that a particular applicant be appointed even though, at the time, there existed no suitable vacant position for the applicant. It had been Mr. Fleming's position that the applicant was of such a high caliber that the opportunity to recruit should not be lost. Mr. Fleming's position did not prevail and some sharp words had been uttered. Mr. Fleming acknowledged the difference had occurred in his testimony to the Board; he described the difference as a "blue". Mr. Fleming did not agree that the incident had any continuing impact on working relationships at the Sooke School District office at the time he made the

recommendation to appoint Mrs. Bremer but it is apparent from the evidence of others that the atmosphere generated by the "blue" had not dissipated entirely. Mr. Warburton, for example, said at the time of Mr. Fleming's recommendation concerning Mrs. Bremer, his communications with Mr. Fleming consisted of an occasional written memo only.

Mr. Fleming did not seek to meet with Mr. Pullinger to support his recommendation that Mrs. Bremer be appointed. Mr. Pullinger testified that his initial reaction to Mr. Fleming's recommendation was that Mrs. Bremer was more suited to a position at the secondary level or in a supervisory capacity. Mr. Pullinger consulted with Mrs. Cleugh who expressed doubts as to whether Mrs. Bremer had the requisite warmth and compassion necessary for a teacher in an observation class. Mrs. Cleugh also informed Mr. Pullinger that she had interviewed other applicants who would be suited to the position and she had some particular applicants in mind. Mr. Pullinger then consulted with another supervisor and the principal of one of the schools in the district. One of these people expressed reservations concerning Mrs. Bremer but did not detail the nature of those reservations. The other person echoed Mrs. Cleugh's concern about Mrs. Bremer's qualities of warmth and compassion and expressed the opinion that Mrs. Bremer might be frustrated at the absence of any leadership role. The Board would observe that all three of the people consulted by Mr. Pullinger voiced their opinions on the basis of only brief opportunities to assess Mrs. Bremer's character. However, on the evidence given by Mr. Pullinger and the three people he consulted, the Board has no basis upon which it could conclude that the opinions were not honestly held.

In a memo dated June 4, 1975, Mr. Pullinger advised Mr. Fleming that he could not approve Mr. Fleming's recommendation and Mr. Pullinger requested Mr. Fleming to consider some further

applications for the position. Mr. Pullinger testified he personally placed the memo in a conspicuous place on Mr. Fleming's desk but Mr. Fleming gave evidence that he never received this memo. In the Board's opinion, nothing turns on the mysterious disappearance of the original of that memo. In any event, on June 6 or 7, Mr. Pullinger told Mr. Fleming that he could not support the recommendation to appoint Mrs. Bremer and, according to Mr. Pullinger, Mr. Fleming offered little in the way of argument. At the same meeting Mr. Pullinger agreed to Mr. Fleming's request that Mr. Pullinger meet with Mrs. Bremer for an interview. Meanwhile, Mr. Fleming had suggested to Mrs. Bremer that she arrange for an interview with Mr. Pullinger.

That interview took place on June 12, 1975. Mr. Pullinger interviews applicants only infrequently and only if requested to do so by a supervisor. It was Mr. Pullinger's testimony that he agreed to interview Mrs. Bremer out of courtesy to her and because, despite his indication to Mr. Fleming that he could not approve the appointment, he had not entirely made up his mind. At the interview, there was some general discussion in which Mr. Pullinger spoke favourably of the abilities of Mrs. Bremer's husband. Mr. Pullinger then asked Mrs. Bremer whether she would be interested in a teaching position in a class of older children and Mrs. Bremer indicated she did not feel competent to teach such a class. At that point, Mr. Pullinger indicated to Mrs. Bremer that he was not sure a position was vacant at the Glen Lake School. The interview concluded with Mr. Pullinger stating he would have to consult his colleagues and promising to let Mrs. Bremer know his conclusions.

Mr. Pullinger's conclusions at the end of this interview were that he was unable to confidently envisage Mrs. Bremer responding to the Glen Lake Observation Class with the necessary warmth and compassion and that Mrs. Bremer did not have sufficient

experience as a teacher at the primary level. On June 16,1975 he forwarded to Mrs. Bremer a letter indicating he had consulted his staff and was unable to offer her a position at that time. At the conclusion of the interview on June 12 Mrs. Bremer had confirmed with Mr. Fleming that there was a position vacant at the Glen Lake School and that, in Mr. Fleming's opinion, she was the outstanding candidate for that position. When Mrs. Bremer received Mr. Pullinger's letter of June 16th she contacted Mr. Fleming again and again received the same assurances. Mrs. Bremer then contacted Mr. A. Littler, Chairman of the Sooke School Board, and met with him on June 17. At the meeting she explained to Mr. Littler the conflicting positions of Mr. Pullinger and Mr. Fleming as to whether a vacant position existed at the Glen Lake School. Mr. Littler promised to have a meeting with Mr. Fleming and Mr. Pullinger as soon as possible.

Mr. Littler testified that he met with Mr. Pullinger and Mr. Fleming on June 18. At that meeting Mr. Pullinger articulated three reasons for his rejection of Mrs. Bremer's application. Those were, first, her strong personality; second, her personality as it might relate to children; and, third, her lack of experience with primary school age children in British Columbia. Mr. Littler questioned Mr. Pullinger specifically as to whether Mrs. Bremer's name or her husband's dispute with the government had contributed to Mr. Pullinger's decision and Mr. Littler was satisfied that neither had been a factor in the rejection. Mr. Fleming's participation in the meeting was confined to his reiteration of his recommendation and an acknowledgment by him that the ultimate decision to reject or recommend appointment to the Board was Mr. Pullinger's. At the request of Mr. Littler, Mr. Pullinger agreed to interview Mrs. Bremer a second time. It was Mr. Pullinger's evidence that he did so out of deference to the Chairman of the Board. All three of the participants at that meeting testified at the

hearing and, on the basis of all of the evidence, it is impossible for this Board to conclude the meeting involved any heated or angry discussion.

Mr. Pullinger contacted Mrs. Bremer and suggested a second interview on the basis that he felt something could be worked out. At the interview on June 23, 1975 Mr. Pullinger informed Mrs. Bremer that he had consulted with his colleagues and he was sorry but he had nothing to offer. Mrs. Bremer sought an explanation of the reason and Mr. Pullinger answered that it was her lack of experience in elementary schools in British Columbia. In giving evidence, Mr. Pullinger acknowledged that he offered that reason for his position but, unlike Mrs. Bremer in her evidence, it was Mr. Pullinger's testimony that he told Mrs. Bremer that her lack of experience in British Columbia was only one of his reasons. Mrs. Bremer informed Mr. Pullinger that she found that reason unacceptable. Following this interview Mrs. Bremer again confirmed with Mr. Fleming that the position at the Glen Lake School was still open and that Mr. Fleming continued to regard her as an applicant and would not recommend anyone else.

In his testimony, Mr. Pullinger denied that he was attempting to mislead Mrs. Bremer in either of the two interviews he had with her. Mr. Pullinger gave evidence that he had two reasons for failing to simply tell Mrs. Bremer he was rejecting her application because of his reservations concerning her personality. First, he was unsure of his position insofar as the law of defamation was concerned and, second, he was personally unwilling to inform anyone of such a negative personal appraisal.

Following her second interview with Mr. Pullinger, Mrs. Bremer contacted Mr. Littler and complained that Mr. Pullinger had misled her by indicating something could be worked out and then at the interview informing her he could offer her nothing. Prior to the regular meeting of the Sooke School Board on June 24, 1975,

the Education Committee of the Board met with Mr. Pullinger and questioned him concerning his response to Mrs. Bremer's application. At the regular meeting the Chairman of the Education Committee informed the Board that the Education Committee had upheld Mr. Pullinger's decision.

On June 26, 1975 the Sooke School Board held a special meeting to discuss the matter of Mrs. Bremer's application. This was the only item on the agenda for that meeting. Mr. Warburton and Mr. Fleming were in attendance at the meeting and, again, Mr. Fleming apparently offered little argument in support of his recommendation and he acknowledged that the final decision was up to Mr. Pullinger. Mr. Pullinger offered his reasons for the rejection of Mrs. Bremer in the same fashion he had articulated his reasons for Mr. Littler at the earlier meeting between Mr. Littler, Mr. Fleming and himself. The School Board upheld Mr. Pullinger's decision and Mrs. Bremer was so informed in writing. On July 8, 1975 the Sooke School Board accepted Mr. Pullinger's recommendation for the appointment of another applicant to the position of teacher of the Observation Class at the Glen Lake School. That applicant had been recommended to the Superintendent by Mrs. Cleugh inasmuch as Mr. Fleming had refused to take part in any further processing of applications for the position.

The foregoing completes the narration of the events surrounding the rejection of Mrs. Bremer's application. However, the Board would add the following more detailed account of certain testimony given by witnesses called on behalf of the Complainant at the hearing. This detailed account is warranted because of the Respondents' motion for a directed dismissal of the complaint at the close of the case for the Complainant.

Mrs. Bremer's evidence as to certain crucial conversations with Mr. Fleming in the period after she had made her application is as follows. When Mr. Fleming told her he had recommended her for the Glen Lake position, Mr. Fleming also said there was something strange about it because Mr. Pullinger had said there may be problems with Mrs. Bremer's name. In a subsequent conversation, Mr. Fleming informed Mrs. Bremer that there was a lot of talk at the Department of Education and that the pending litigation between Mr. Bremer and the Government could affect her application. Later, following Mrs. Bremer's first interview with Mr. Pullinger on June 12, 1975, Mr. Fleming told Mrs. Bremer that he had been informed by Mr. Warburton that Mr.Pullinger was looking for excuses not to appoint Mrs. Bremer. Subsequent to that and following the meeting between Mr. Pullinger, Mr. Fleming and Mr. Littler, Mr. Fleming told Mrs. Bremer that the meeting had been tense and that Mr. Pullinger was annoyed.

It is to be noted that counsel for the Respondents objected to Mrs. Bremer giving this and other hearsay evidence. The Board heard the evidence pursuant to its power in Section 16(5) of the Human Rights Code because counsel for the Complainant undertook to produce both Mr. Fleming and Mr. Warburton as witnesses thus giving counsel for the Respondents the opportunity to cross-examine in relation to the statements attributed to them in the testimony of Mrs. Bremer. Both Mr. Fleming and Mr. Warburton were called as witnesses for the Complainant and both denied the statements we have just summarized from Mrs. Bremer's evidence.

Mr. Fleming did not deny that he had informed Mrs. Bremer on several occasions that she was the most qualified

applicant. In addition, Mr. Fleming did not deny that he was astounded when, on June 12, following her interview with Mr. Pullinger, Mrs. Bremer informed him that Mr. Pullinger did not appear to know of the vacant position at the Glen Lake School. Furthermore, Mr. Fleming acknowledged that when Mrs. Bremer informed him Mr. Pullinger was of the opinion she did not have sufficient experience with children at the primary school level in British Columbia, he had reacted with disappointment and had said to Mrs. Bremer that it was the first time in ten years the Superintendent had refused one of his recommendations. No doubt this remark reinforced Mrs. Bremer's suspicions as to the reasons for her rejection. This is regrettable because the remark was misleading although the Board is convinced Mr. Fleming did not deliberately intend to mislead Mrs. Bremer. The remark was misleading because it overstated Mr. Fleming's responsibility and authority in relation to recruitment by the Sooke School District. Mr. Fleming had been a supervisor at that time for only five years and prior to that time he would have had no input into the hiring process at the Sooke School District. In addition, the Board has already recorded Mr. Fleming's limited role in the recruitment procedures during the five years he was in a position to play some part in that process.

Mr. Fleming's evidence went further than a mere denial of the statements attributed to him by Mrs. Bremer. Mr. Fleming firmly denied any knowledge that Mrs. Bremer's name had been a factor in the decision to reject Mrs. Bremer's application. Although he remained perplexed as to why the application had been rejected, he testified that in various meetings with Mr. Pullinger concerning the application Mr. Pullinger had mentioned Mr. Bremer's strong personality and had expressed reservations as to Mrs. Bremer's experience in British Columbia with primary school children. Finally, Mr. Fleming admitted that around the time Mrs. Bremer made her application, he had been told by Mr. Pullinger that Mr. Pullinger had been impressed by Mr. Bremer on an occasion when he had met him and would be

interested in Mr. Bremer if a suitable position became available in the Sooke School District.

Mr. Warburton was also called as a witness on behalf of the Complainant and his testimony was similar to Mr. Fleming's. When asked about his knowledge of the reasons for the rejection of Mrs. Bremer, Mr. Warburton gave evidence that he had no knowledge of Mrs. Bremer's name or her husband's dispute with the Government being a consideration in the rejection and that, in his discussions with the Superintendent, Mr. Pullinger had mentioned Mrs. Bremer's strong personality. Mr. Warburton also testified that, to the best of his recollection, Mr. Pullinger also thought a younger person than Mrs. Bremer was required for the Glen Lake Position. Another witness for the Complainant was Mr. Littler. He testified that the subject of whether a younger person was needed had been a topic of discussion at one of the Sooke School Board meetings with Mr. Pullinger concerning Mrs. Bremer's application.

IV.

At the conclusion of the Complainant's case, counsel for the Respondents moved that the Board direct that the complaint of Mrs. Bremer be dismissed because of the absence of any evidence upon which the complaint could succeed. The motion was denied but it raises significant issues for the conduct of Human Rights Board of Inquiry hearings and this Board is of the opinion that its response to the motion warrants some elaboration.

In order to appreciate the force of the Respondents' motion it is worth reiterating that the foundation of the Complainant's allegation that the Respondents did not have reasonable cause was the Complainant's belief that her application had been rejected because of her husband's widely reported differences with the Provincial Government. Mrs. Bremer admitted this in her testimony. To confirm that this was the nature of the allegation against his clients, counsel for the Respondents prior to the hearing requested particulars of the complaint from the Director of the Human Rights Code. In her evidence at the hearing, the Director acknowledged that in response to that request she informed counsel that the basis of the alleged discrimination was the Complainant's name and her husband's political difficulties.

Counsel for the Respondents urged upon the Board that, having obtained particulars of the complaint from the Director of the Human Rights Code prior to the hearing, the Complainant could not thereafter rely upon an allegation that reasonable cause was absent for any reason except the Complainant's name and her husband's dispute with the Government. In particular,

it was argued that the Board would be in excess of its jurisdiction if it decided to consider whether the Complainant's age had been a factor and whether, if it had been, such a consideration would have constituted a violation of Section 8 of the Human Rights Code. It was also argued that a consideration of the Complainant's age could not represent a contravention of the Code, in any event, because Mrs. Bremer had testified she was 43 years of age and therefore, by virtue of the definition of age in the Code, it was not possible for a consideration of Mrs. Bremer's age by the Respondents to constitute a contravention of Section 8. Counsel for the Respondents contended that since the complaint must be confined to the particulars given, there was no evidence to support a conclusion that a contravention had occurred. In this respect, counsel argued that the only evidence which would directly support a conclusion that Mrs. Bremer's application had been rejected because of her name or her husband's dispute with the Government was hearsay evidence given by Mrs. Bremer. That evidence had been denied by the persons said to have made the statements in question. Counsel acknowledged that the Board had power to admit hearsay testimony under Section 16(5) of the Code but urged that the Board was precluded by legal authorities from relying upon that evidence. The motion was, in effect, a no-evidence motion.

The motion was denied. At the point in the proceedings at which the motion was made, the onus of proving the cause for the rejection of Mrs. Bremer's application as well as the reasonableness of that cause had shifted to the Respondents. The rationale for and the basis upon which a respondent may acquire this onus are articulated in the GATE case:

> "Once a denial or a discrimination with respect to a service or facility customarily made available to the public is established the onus rests upon the respondent to satisfy the Board of Inquiry that reasonable cause existed for the refusal and/or discrimination. Were it otherwise a complainant would be required to establish a cause for the denial or discrimination which would be a difficult

> if not impossible enterprise under those circumstances where a respondent has denied a service without giving reasons. Requiring the complainant to both establish the cause for the denial or discrimination as well as the lack of reasonableness of same would in such circumstances enable the respondent to avoid responsibility for what would otherwise be a discriminatory act, by simply remaining silent. The very expression "reasonable cause" impels one to the conclusion that no cause at all would, prima facie, be unreasonable. Accordingly a respondent faced with proof of a denial of a service or discrimination in respect thereof must of necessity establish two things if he is to avoid the consequences of a finding that the allegation is justified under Section 17(2) of the Code. He must first establish the cause of the discrimination and secondly he must satisfy the Board of Inquiry that the cause was a reasonable one."

In this case, the elements necessary to shift the onus to the Respondents were clearly present in the evidence adduced on behalf of the Complainant. The elements to which we refer and which represent a parallel to the elements referred to in the GATE decision in respect of a Section 3 complaint are the following:

> First, there was a vacant position at the time Mrs. Bremer made her application;
>
> Second, Mrs. Bremer was qualified to fill that position; and
>
> Third, Mrs. Bremer's application was rejected.

Counsel for the Respondents did not suggest that there was no evidence of any of these elements. Rather, the gist of counsel's arguments was that there was no evidence of the alleged prohibited consideration which is not an element necessary to establish a prima facie case for the Complainant. Since there was evidence of the elements necessary to shift the onus to the Respondents, the burden was then on the Respondents and thus the motion for a directed dismissal of the complaint failed.

The onus which then rested on the Respondents is neither complicated nor unduly burdensome. The Respondents,

on the authority of the GATE decision, were merely required to lead evidence to show the reason for the rejection of Mrs. Bremer's application and to satisfy the Board that that reason constituted reasonable cause within the meaning of the Code. To establish the latter, the Respondents were required to show that the rejection was not affected by any prohibited consideration either set out expressly in subsection 2 of Section 8 or inherent in the reasonable cause concept.

Although no further comment is necessary in order to outline the reason for the Board's disposition of the motion for a directed dismissal of the complaint, counsel's arguments in support of the motion which we have already described do raise important issues warranting some response.

With regard to whether a complaint of a contravention of the Code is confined to particulars given prior to a Board of Inquiry hearing, it is apparent at the outset that such a restriction is entirely inconsistent with the principles upon which the onus may shift to the respondent in human rights proceedings. To confine a complaint in this manner would be to place upon the complainant the burden of establishing the cause for the impugned conduct, the very burden from which the complainant is relieved by establishing a prima facie case. Second, if complaints under the Code could be narrowed in this fashion, the result would be that an allegation of race discrimination could be successfully defended by proof that it was in reality sex discrimination.

There is certainly no doubt that these proceedings are bound by the principles of natural justice and thus respondents are entitled to be made aware of the nature of the complaint and respondents are entitled to a full opportunity to prepare a case in reply. Where, during a hearing, a new but potentially prohibited consideration emerges in the evidence for the first time,

the Board is of the view that such an event should be treated like any other situation in which the respondent may not have obtained sufficient details of a complaint to adequately present its case. In the Oram decision, the Board of Inquiry said that in such circumstances the respondent would be entitled to an immediate adjournment. Such an adjournment would provide the respondent with an opportunity to prepare its case to answer any allegation which might have taken the respondent by surprise. The Respondents in these proceedings did have the benefit of adjournments including a particularly long one just prior to the presentation of the Respondents' case.

Since Mrs. Bremer was not precluded from arguing that a consideration of her age constituted a contravention, it is worth adding that the emergence at the hearing rather than earlier of the possible consideration by the Respondents of the factor of age was not through any failure or oversight on the part of the Complainant. The possibility that age was a factor in the decision to reject did not arise until two very senior officers of the Respondent School District, Mr. Warburton and Mr. Littler, gave evidence at the hearing, having been sommoned to do so at the request of counsel for Mrs. Bremer.

The Board also does not accept the argument that since Mrs. Bremer's age was not within the years specified in the definition of "age" in Section 1 of the Code, a consideration of her age could not constitute a contravention of the Code. The answer to this argument lies in the reasonable cause scheme of Section 8 discussed in Part II of these Reasons for Decision. By virtue of the express mention of age in subsection 2 together with the definition of age, any decision to deny an employment opportunity or to discriminate in respect of an employment opportunity because of a person's age is, if the person happens to be 45 years or more but less than 65 years, a contravention of Section 8. Under the statutory scheme of reasonable cause, such decisions, like decisions motivated by a consideration of

race, in every instance are contrary to the Code. Under that same statutory scheme, it is arguable that conduct motivated by a consideration of age outside the years specified in the definition of age, like conduct motivated by a consideration of a physical handicap, may in some circumstances constitute reasonable cause and in other circumstances a contravention of the reasonable cause standard. This Board was not required to make a determination of whether that argument is a good one in law.* On the facts of this case, the Board concluded that Mrs. Bremer's age was not a consideration in the decision to reject her application. The point is, however, that the evidence in the case for the Complainant that age was a consideration did represent some evidence of a potentially prohibited consideration.

The Board also declines to accept the argument that at the close of the Complainant's case there existed no evidence that the rejection of Mrs. Bremer's application was motivated in part by her name and her husband's dispute with the Government. It is undeniable that the evidence which could be said to support, either directly or circumstantially, the proposition that either of these factors entered into the decision to reject was found in the testimony of Mrs. Bremer as to statements she said were made to her by Mr. Fleming. It is also undeniable that Mr. Fleming, in his testimony at the hearing, denied making all of the crucial statements attributed to him by Mrs. Bremer. Counsel for the Respondents argued that, notwithstanding the Board's authority in Section 16(5) to "receive and accept" such evidence, the evidence was hearsay and amounted to no

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*The Board perceives real practical and policy difficulties in the conclusion that discrimination against persons under 45 or over 64 years may in some circumstances be contrary to the Code but it must be noted that this proposition has been accepted in the recent decision in Burns and the Piping Industry Apprenticeship Board et al (BC HRBI, April 20, 1977).

evidence at all because it had been contradicted by Mr. Fleming. The Board does not accept that submission.

Counsel's argument depends upon the characterisation of the pertinent testimony of Mrs. Bremer as hearsay evidence. In one respect, however, Mrs. Bremer's testimony in this regard was not hearsay. The Board was entitled to consider Mrs. Bremer's testimony as evidence that Mr. Fleming had made the statements she attributed to him. If the Board had concluded, despite Mr. Fleming's denials, that Mr. Fleming had made those statements, then the Board also would have been entitled to consider the value of those statements as evidence of Mr. Fleming's attitude rather than as evidence of the truth of the statements. Since Mr. Fleming was a senior employee of one of the Respondents, the Sooke School District, his attitude could have been considered probative in relation to the motivating considerations of that Respondent. On this basis alone, Mrs. Bremer's testimony was therefore some evidence that her name and her husband's dispute with the Government had been considerations in the rejection of her application. The value of that evidence could only be determined upon a weighing of all the evidence.

As to the hearsay quality of Mrs. Bremer's testimony, there is a further reason why that testimony does constitute some evidence. This Board is not prepared to incorporate into Human Rights Boards of Inquiry proceedings without reservation the evidentiary principles of formal court proceedings. Specifically in this instance, the Board is not prepared to adopt the authorities referred to by counsel for the Respondents. Among the authorities relied upon for the proposition that hearsay statements subsequently contradicted constitute no evidence are Deacon v. The King, (1947) SCR 531, Teper v. The Queen (1952) AC 480, and Re Sisters of Charity, Providence Hospital, and the Labour Relations Board et al (1951) 3 DLR 735.

The Board's reasons for not following these authorities are rooted in the nature of human rights complaints and the inherently subtle character of the evidence which may establish a contravention of the Code. It was because of this reason that Section 16(5) was enacted. The policy reasons for the kind of authority provided Human Rights Boards of Inquiry by that provision of the Code are stated admirably in David Bird and Ronald Gabel et al (Sask. HRC, Sept. 16, 1974):

> "It is not very often that it will be possible for the Commission to find direct evidence of discrimination. Since the basis of discriminatory behaviour, especially where matters of race are concerned, lies in prejudiced attitude, it will seldom be possible to look into the mind of the prejudiced person except in the rare case where such prejudice is openly articulated. As was said by His Lordship Mr. Justice Hughes in his September 9, 1974 decision previously mentioned (Prince Albert Pulp Company Ltd. vs. Saskatchewan Human Rights Commission and William J. Turner, Saskatchewan), one must be conscious of the fact that racial discrimination (can) be of an insidious and concealed nature."

While this "insidious and concealed nature" may be particularly true of racial discrimination, that nature is not confined to that form of discrimination. Boards of Inquiry will frequently be required to make conclusions of fact based upon circumstantial evidence and, perhaps, with the assistance of evidence which may be inadmissible in a superior court: At the heart of a contravention of the Code is the determination of whether the respondent's conduct was motivated by a consideration which constitutes the absence of reasonable cause; the factual issue of motivation will in most cases not be a matter about which there exists any direct evidence.

For these reasons this Board is of the opinion that it would represent an unwarranted and potentially restrictive limitation on Boards of Inquiry if we were to determine that hearsay evidence subsequently contradicted will in all circumstances constitute no evidence. However, the Board would

hasten to add that the use of hearsay evidence must of course be approached with great caution. In this regard, the approach the B.C. Labour Relations Board has directed that labour arbitration boards follow is instructive. In Board of School Trustees of School District No. 68 (Nanaimo) and CUPE Local No. 606 (BC LRB 68/76, October 7, 1976), the Board offered the following two succinct rules for the guidance of labour arbitrators:

> "(a) uncorroborated hearsay evidence should not be preferred to direct sworn testimony;
>
> (b) hearsay evidence alone should not be admitted to establish the crucial and central question".

The question of whether the rejection of Mrs. Bremer's application was motivated in part by a consideration of her name or her husband's difficulties with the Government is of course a pivotal issue of fact in a determination of whether the Respondents have contravened the Code. Therefore, given that Mr. Fleming refuted Mrs. Bremer's testimony as to the crucial statements attributed to him, Mrs. Bremer's testimony alone, on the basis of the foregoing rules concerning hearsay evidence, could not constitute sufficient proof of the truth of those statements. It is to be noted, however, that once again the final determination as to the evidence involves a weighing of evidence and thus the inevitable point remains that Mrs. Bremer's testimony did constitute some evidence.

To summarize, the Board rejects each aspect of the argument in support of the motion for a directed dismissal of the complaint. First, it is the Board's view that the complaint was not confined to the particulars given prior to the hearing; second, the Board considers that the evidence adduced on behalf of the Complainant that age was a consideration in the decision to reject was some evidence of a potentially prohibited consideration; third, the evidence of Mrs. Bremer concerning the statements made to her by Mr. Fleming did constitute some evidence that her name and her husband's political difficulties

were factors in the decision to reject her application. We would reiterate, however, that the motion was denied simply because at the close of the Complainant's case the onus to prove cause and the reasonableness of that cause had shifted to the Respondents. We would add that the policy underlying the principles upon which this onus may shift to the respondent proved to be a sound one in the circumstances of this case for the reason that it was on the basis of the evidence adduced on behalf of the Respondents that the Board was able to assess the extent to which the potentially prohibited consideration of age was in fact a consideration in the decision to reject Mrs. Bremer's application.

V.

The Board is unanimously unimpressed, as was Mrs. Bremer in the spring of 1975, with the proposition that Mrs. Bremer's lack of experience in B.C. with children at the primary level was a major reason for the rejection of her application. The Sooke School District annually hires a number of new teachers who have just graduated from teacher training programs at universities. If experience in B.C. were a major prerequisite to obtaining employment in the Sooke School District, these new graduates would not have obtained employment. Furthermore, there was evidence at the hearing of a person who had been hired from Alberta as a teacher in special education earlier in the spring of 1975.

The Board is also of the view that Mr. Pullinger's lack of candor in both of his interviews with Mrs. Bremer does arouse some suspicion as to Mr. Pullinger's motives. This suspicion is reinforced by Mr. Pullinger's reliance from the outset and continued reliance upon the shallow justification that Mrs. Bremer did not have sufficient experience in B.C..

What can this element of suspicion mean in terms of whether or not the Respondents contravened Section 8 of the Human Rights Code in rejecting Mrs. Bremer's application? The Board would observe that it is not possible to be satisfied that a contravention has occurred on the basis of conduct giving rise to some suspicions. Rather, the Board must be satisfied that the rejection of Mrs. Bremer's application resulted from a consideration of a prohibited factor, a factor either specifically enumerated in subsection 2 of Section 8 or a factor inherent in the reasonable cause concept. A Board may have to reach such a conclusion on the basis of circumstantial evidence but the circumstantial evidence must go further than merely raising suspicions.

In order to decide whether the rejection of Mrs. Bremer's application was affected by a prohibited consideration, we turn first to an assessment of whether, as originally alleged, the decision to reject was made because of Mrs. Bremer's name or her husband's dispute with the Government. The Board has already recorded its conclusion that Mrs. Bremer's testimony concerning statements made to her by Mr. Fleming, even though Mr. Fleming denied making those statements, constituted some evidence that her name and her husband's difficulties were factors in the decision to reject her application. There was, however, no further evidence heard by the Board to the effect that either of these factors entered into the decision. Even though we are not bound by the evidentiary principles of formal court proceedings, in the absence of any further evidence the Board is obliged to conclude that there is insufficient reliable evidence which could persuade the Board that Mrs. Bremer's application was rejected because of her name or her husband's dispute with the government. In order to conclude that the statements attributed to Mr. Fleming were true, the Board would be required to overlook Mr. Fleming's denial that he had ever made the statements. In such circumstances, as previously indicated, the hearsay evidence must not be preferred and, in any event, hearsay evidence cannot by itself establish such an important and central aspect of a contravention. It is also unnecessary for the Board to decide whether Mr. Fleming made the statements regardless of whether the statements were true or false. Such a decision could only assist the Board to ascertain Mr. Fleming's state of mind. Since it is clear on all of the evidence that Mr. Fleming did not participate in the decision to reject Mrs. Bremer, an understanding of Mr. Fleming's state of mind would not shed any light on the crucial issue of whether either of the Respondents considered Mrs. Bremer's name or her husband's dispute with the Government. The Board therefore finds that the initial allegation made by Mrs. Bremer fails.

The other potentially prohibited consideration which emerged in the evidence called on behalf of the Complainant was the factor of Mrs. Bremer's age. There were but two hints in the evidence that this factor was a motivating consideration in the rejection of Mrs. Bremer's application. On the whole of the evidence, we are convinced that other reasons motivated the rejection and that age was an afterthought rather than a motivating consideration. Mrs. Bremer's age was therefore not a reason for the rejection of her application and the Board makes no finding as to whether, in the circumstances, a consideration of Mrs. Bremer's age would have contravened the reasonable cause standard.

The Board has concluded that there were two basic reasons for Mrs. Bremer's failure to obtain the teaching position at the Glen Lake School. The first of those reasons lies in the procedure by which she was recommended for the position. The Board has concluded that Mr. Fleming's extraordinary direct recommendation to Mr. Pullinger combined with the lingering strained relationships between Mr. Fleming and the other employees in the Sooke School District office contributed significantly to Mr. Pullinger's negative response to Mrs. Bremer's application. Mr. Pullinger denied that this factor was one of his considerations and he stated flatly that he did not penalize Mrs. Bremer because of the manner in which Mr. Fleming had recommended her appointment. However, even though that may be Mr. Pullinger's firm conviction as to his own conduct, the Board is mindful of several of Mr. Pullinger's answers in both direct and cross examination. He said he did not appreciate a supervisor failing to communicate with him for a long period of time. He said more than once that from the outset he simply wanted to ensure that "proper procedures" were followed. Furthermore, on one occasion, he stated that the thought had "flashed across his mind" that Mr. Fleming was trying to find jobs in the Sooke School District for his friends

at Pacific Centre. The Board is convinced that Mr. Fleming's recommendation for her appointment and the unusual direct route by which that recommendation came to Mr. Pullinger did influence Mr. Pullinger to the detriment of Mrs. Bremer.

The Board has concluded that the second major reason for the rejection of Mrs. Bremer's application is discernible in the several references throughout the evidence to Mr. Pullinger's concern about Mrs. Bremer's "strong personality" or "strong will". The Board perceives that Mr. Pullinger was concerned at the prospect of placing in a teaching position in a primary school a person whom he considered to have a very forceful personality. Whether Mr. Pullinger's particular concern was as to Mrs. Bremer's ability to take direction, her ability to relate with less forceful personalities on the school staff, the potentially disruptive impact on policies and programs in the school or some other imagined consequence is a matter about which the Board declines to speculate. In short, the Board has concluded that the prospect of Mrs. Bremer's employment as a primary school teacher in the Sooke School District was simply too unsettling a prospect in the mind of Mr. Pullinger. The views expressed as to Mrs. Bremer's qualities of warmth and compassion by both Mr. Pullinger and his staff, views with which this Board does not agree, may simply reflect an aspect of this concern.

If these two factors were in fact the reasons that Mrs. Bremer's application was rejected, do they constitute the absence of reasonable cause? The Board is of the unanimous view that they do not. A consideration of either of these factors is not remotely akin to a consideration of any of the factors enumerated in subsection 2 of Section 8. One of the factors, Mr. Pullinger's negative response to Mr. Fleming's direct recommendation, may suggest some element of a personal bias on the part of Mr. Pullinger. However, in no way is that bias in the nature of the types of prejudice the Code seeks to regulate. If Mr. Pullinger's attitude indicates a bias, it

was a bias against irregular office procedures and strained office relationships; it was not a bias which stemmed from any "differentiating characteristic" of Mrs. Bremer. The other of the two factors, Mr. Pullinger's concern about Mrs. Bremer's strong personality, suggests that Mrs. Bremer was accorded an assessment of her individual qualifications. The conclusions reached following that assessment may not reflect the best judgment but, as the Board has said, the Code is not intended to prohibit mistaken judgment. A consideration of either factor does not represent the kind of conduct which is prohibited by a Human Rights Code aimed at proscribing discrimination.

It should be noted that the impact of Mr. Fleming's role upon Mr. Pullinger's decision was a phenomenon which the Board believes Mrs. Bremer had no means of appreciating. No doubt Mrs. Bremer believed, on the basis of her communications with Mr. Fleming, that she was receiving valuable assistance from Mr. Fleming in her attempt to obtain employment with the Sooke School District. There is also little question but that Mr. Fleming overstated his role in the Sooke School District hiring process in his communications with Mrs. Bremer. As regrettable as the decision to reject Mrs. Bremer may have been, the Board would reiterate its conclusion that on the whole of the evidence it is unable to conclude the rejection constituted a violation of Section 8 of the Human Rights Code.

Therefore, the Board has concluded that the Respondents have discharged the onus of proving the reason for Mrs. Bremer's failure to obtain a teaching position as well as its reasonableness in the sense intended by the Human Rights Code. The Board is fortified in its conclusion by the position adopted by counsel for the Complainant at the conclusion of the hearing. In argument, counsel abandoned any suggestion that Mrs. Bremer's name, her husband's difficulties, or her age were considerations in the decision to reject Mrs. Bremer's application. Rather,

counsel rested his entire case on the authority of the Lopeterone et al and Harrison et al (BC HRBI, March 31, 1976) case and the proposition that a Board of Inquiry under the Human Rights Code need only conclude that there was an element of arbitrariness or unfairness in the respondent's conduct in order to find for the complainant. For the reasons set out at length earlier in this decision as to the purpose and scope of the Human Rights Code, the Board rejects the authority of the Lopeterone case and the argument of counsel in this respect.

The complaint is dismissed.

Rod Sterman

CHAIRPERSON FOR THE BOARD OF INQUIRY