

NOV. 197

HUMAN RIGHTS BOARDS OF INQUIRY

REFUSAL TO HIRE

Janice Foster,
(Complainant)

- and -

BC Forest Products Limited
(Cowichan Wood Products Division)

- and -

Director, Human Rights Code

Board:

Date of Hearing:

Effective Date of Decision:

Date of Appeal:

James MacPherson

February 27, 28; March 5, 19, 1979

April 17, 1979

September 21, 1979

A Human Rights Board of Inquiry was appointed by the Minister of Labour to hear the complaint of Janice Foster that the respondent, BC Forest Products Limited, (Cowichan Wood Products Division) refused to employ her at its mill at Youbou on Vancouver Island because of her height and weight. It was argued that this constituted discrimination without reasonable cause and sex discrimination, both of which are proscribed by Section 8 of the Human Rights Code.

The factual background is described by the Board in its decision as follows:

Janice Foster, who is five feet tall and weighs 115 pounds, applied for an entry labouring job at the company's mill at Youbou in November 1977. She subsequently visited the mill on more than a dozen occasions and telephoned to inquire about the status of her application. She had worked previously as a labourer for another sawmill operation on Vancouver Island.

The company at Youbou mill employs over 500 people; entry positions require the labourer to manually remove lumber from a conveyor belt (a chain) and place the lumber in a pile near the chain.

Between the date of Ms. Foster's application for work in November 1977, and February 1978, when the Human Rights Branch became involved in the case, 31 new employees were hired for entry positions. Between February 1978, and April 1979, more than 100 new employees were hired.

The company argued that it had not refused to hire the complainant but had retained her application on file and had preferred to hire better qualified people. The Board ruled that the distinction between 'refusal' and 'preference' is illusory, and that the company's preference for other applicants constituted a refusal to hire the complainant within the meaning of Section 8(1)(a)

of the Human Rights Code.

The company argued that the complainant's size was only one of the factors contributing to its decision not to hire her. Other factors were mentioned by the company, however the Board found that these were not supported by evidence.

Representatives of the company testified that personnel staff are instructed to give preferences to applicants who are five feet six inches and over and weigh a minimum of 140 pounds, and stated that the primary reason Ms. Foster had not been hired was, in fact, her size.

The Board determined that the size preference stated by the company "created a class of people — 'small people' — whom it prefers not to employ". In determining whether this constitutes discrimination, the Board stated:

"a Company . . . can establish general rules in its hiring process. And the Company can legitimately apply these rules as threshold requirements, thereby weeding out many applicants for employment. The Company, however, can only formulate and apply these rules if they have a basis in reality, if they are relevant for the job to be performed. General rules based on meaningless attributes and not rationally related to the qualifications necessary to do the job are inimical to the equality of opportunity which Section 8 of the Code mandates."

The company, in defence of its height and weight requirement, argued that strength is a key component of all entry-level jobs at the mill, and that the five foot six inch, 140 pound standard is a good indicator of sufficient strength to do the job.

The Board determined, on the basis of viewing

the worksite and hearing testimony, that strength was only one of four factors important in the job (fitness, stamina and techniques being the others), and that the five foot six inch, 140 pound standard as an indicator of sufficient strength to do the job was not reasonable. The Board made reference to the evidence that Chinese people and women in general historically have played important roles in the British Columbia forest industry, and to the evidence of the safety and health inspector of the IWA Regional Council #1 to the effect that injuries are primarily the result of poor manual dexterity, not insufficient strength.

The Board determined that the hiring process of the company discriminates against small people without reasonable cause, contrary to Section 8(1)(a) of the Code. In making this decision, the Board stated:

"I am conscious that a Board should not easily second guess the hiring practices of honest men with long experience in the industry. Hiring is not an exact science and, therefore, management must be given discretion to exercise its judgment based on knowledge and experience. . . . But a Board does have the duty to insist that hiring not be done on the basis of meaningless, or near-meaningless, factors. And the Board has a duty to protect individuals who are denied employment on the basis of those factors."

The Board also stated, with respect to the allegation of sex discrimination, that, following American and Ontario decisions cited:

"I think it is discrimination on the basis of sex contrary to the BC Code if an *unreasonable* employment standard, although neutral on its face, has the *effect* of excluding a large percentage of a particular class of applicants who would, but for the unreasonable standard, be qualified for the job."

Citing Federal Department of Health and Welfare statistics showing that among 24 year old Canadians, ninety-five percent of the men are taller than five feet six inches while only twenty-five percent of the women meet this standard, the Board concluded that the company's height and weight standard has a disproportionate impact on women. Given that the standard was already found to be unreasonable, application of the standard was also found to constitute discrimination on the basis of sex.

The Board ordered that Janice Foster be employed by the company at the Youbou Mill as a

regular full-time employee by May 1, 1979. The Branch was awarded costs.

Appeal

The Board of Inquiry decision was appealed by BC Forest Products Ltd. to the BC Supreme Court on a question of law. The case was heard September 21, 1979. Honourable Chief Justice Allan McEachern upheld the decision of the Board of Inquiry, and costs were awarded to Ms. Foster and the Human Rights Branch.