NO. A791119

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE HUMAN RIGHTS CODES OF BRITISH COLUMBIA, S.B.C. 1973, (SECOND SESSION), CHAPTER 119, AND AMENDMENTS THERETO

AND IN THE MATTER OF A COMPLAINT BY JANICE LYNN FOSTER AGAINST BRITISH COLUMBIA FOREST PRODUCTS LIMITED (COWICHAN WOOD PRODUCTS DIVISION) MADE PURSUANT TO SECTION 8 OF THE HUMAN RIGHTS CODE OF BRITISH COLUMBIA

AND IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 18 OF THE HUMAN RIGHTS CODE OF BRITISH COLUMBIA

BETWEEN:

BRITISH COLUMBIA FOREST PRODUCTS LIMITED (COWICHAN WOOD PRODUCTS DIVISION)

APPELLANT (RESPONDENT)

AND:

JANICE LYNN FOSTER

RESPONDENT (CLAIMANT)

AND:

KATHLEEN RUFF, DIRECTOR APPOINTED UNDER SECTION 12 (1) OF THE HUMAN RIGHTS CODE OF BRITISH COLUMBIA

PARTY

REASONS FOR JUDGMENT

OF THE HONOURABLE

THE CHIEF JUSTICE

Stephen F.D. Kelleher, Esq., : Counsel for the Appellant (Respondent)

John W. Horne, Esq., : Counsel for the Respondent (Claimant)

Hearing at Vancouver, B.C. : Friday, September 21st, 1979.

By a Case stated pursuant to Section 18 of the Human Rights Code of British Columbia, 1973 (Second Session) Chapter 119, as amended, I am asked to review a decision of

a Board of Inquiry established under the said Code. The appeal authorized by Section 18 against the decision of a Board of Inquiry may only be upon a point or question of law or jurisdiction or "...upon any finding of fact necessary to establish (the Board's) jurisdiction that is manifestly incorrect". It is only the former ground of Appeal that is invoked herein.

This case concerns an allegation that the Respondent has been discriminated against in respect of an intended employment contrary to Section 8 of the Code, which provides 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;

(al) 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. 1973 (2nd Sess.), c.119, s.8; 1974, s.6."

It is first necessary to determine what material is available on the Appeal. I conclude from the authority of The Vancouver Sun v. Gay Alliance Towards Equality, [1977] 5 W.W.R. 198; (affirmed [1979] 10 B.C.L.R. 257), particularly the judgment of Robertson, J.A., at page 210-211, that I am limited to the Stated Case in determining whether there has been an error of law or jurisdiction.

I shall attempt to summarize the facts which are stated in the Case. The Appellant operates a sawmill at Youbou, B.C. The Respondent who had previously been employed successfully on a green chain in a sawmill operated by the Tahsis Company, applied for work at the Appellant's sawmill. If employed she would have been assigned to one of the four green chains at the said mill which are the entry jobs to other

positions in the mill. There is an apparent conflict in two facts which are stated. In one, the Respondent is said to have stated in evidence that she did not think she could pull heavy hemlock off a green chain all day. The mill cuts a considerable quantity of hemlock. The other fact is that the Respondent "...in reply stated that she had no reservations about her ability to do the work at the Youbou mill". I was informed by counsel that the second statement was given by the Respondent in reply evidence after she was taken on a view of the mill during the course of the hearing. I therefore propose to resolve this apparent conflict on the basis that at the end of the evidence there was no admission by the Respondent that she could not do the work in question.

The Respondent, in her application for employment, replied negatively to a question, "Have you ever suffered any back weakness or strain?" In fact, the Respondent twice sought chiropractic treatment in 1977 for a work related condition incurred at Tahsis which she described as being a vertebra "...knocked out of alignment, and one hip was one-half inch lower than the other".

The Respondent did not disclose to the Appellant that she was not eligible for re-hire with the Tahsis Company because of her outspoken nature even though she performed her work satisfactorily. The Appellant was not aware of the Respondent's chiropractic treatment or injury, or that she was not eligible for re-hire, or the reason why she was not eligible for re-hire.

The Appellant had established a general rule that preference for employment should be given to persons who are at least 5' 6" tall and 140 lbs. in weight. The Respondent is 5 feet tall and weighs 115 lbs.

The entry jobs at the Youbou Mill are arduous and require some strength, but there is no particular strength requirement. Prospective employees are not tested for fitness, stamina or technique.

Although the Respondent was classified in the "most desirable" category, she was not offered a position with the Appellant, and, during the period of the Respondent's application for employment, the Appellant hired 30 new employees, 20 of whom had less mill experience than the Respondent and all of whom were larger than her.

The Board of Inquiry made two further important findings which are stated in the Case;

(a) "The Appellant's main reason for refusing to hire Janice Foster was her height and weight...";

(b) "The fact that Janice Foster was a woman was irrelevant to the hiring decision." By this I understand the Board to be referring to the decision not to hire.

On these facts the Board of Inquiry concluded:-

> "(i) The five feet six inch, one hundred forty pound size standard is unreasonable;
>
> (ii) The emphasis placed on size by the Company in its hiring process is unreasonable;
>
> (iii) Any size standard is unreasonable if it completely deflects the Company's attention from other more important job qualifications;
>
> and ordered that the Appellant cease contravening the Human Rights Code and refrain from committing the same or a similar contravention in the future, (and) further ordered that the Appellant hire Janice Foster as a regular full time employee at its Youbou mill no later than May 1, 1979. "

The Appellant appealed against this decision on the following grounds:-

> "(a) Was the Board of Inquiry correct in law in holding that the Appellant violated the Human Rights Code of British Columbia by basing its decision not to hire the Respondent in part on the fact that the Respondent's height was five feet and her weight one hundred fifteen pounds?
>
> (b) Was the Board of Inquiry correct in law in holding that the Appellant violated the Human Rights Code of British Columbia in refusing to employ the Respondent when it had not tested the fitness, technique and stamina of the Respondent?
>
> (c) Did the Board of Inquiry err in failing to dismiss the Respondent's complaint by reason of:
>
> (i) the Respondent's admission during the hearing that she did not think that she was capable of performing an essential part of the job for which she was applying; or

(ii) the fact that the Respondent's employment record at the only sawmill where she previously had been employed was such that this previous employer considered her ineligible for rehire; or

(iii) the fact that in 1976 the Respondent experienced a back injury which resulted in two visits to a chiropractor;

(iv) the fact that the circumstances in paragraph (iii), supra, were not disclosed by the Respondent to the Appellant in the Respondent's application form, which application form asks whether the applicant suffers back weakness or strain and whether the applicant had suffered any injuries? "

At the opening of the appeal Mr. Horne raised the objection that the appeal was not in order because it does not, on its face, disclose any point or question of law or jurisdiction. His principal ground was that, "reasonable cause", is purely a question of fact. He relied on the judgment of Macdonald, J., (as he then was), in the Gay Alliance case, (supra), which is quoted at [1977] 5 W.W.R. at p.203; and he also relied upon an unreported decision of Kirke Smith, J., in Re Jefferson v. B.C. Ferries Service (No. C65173, Vancouver Registry, December 20th, 1977), where that learned Judge said, in relation to the Code:-

> "...The issue of 'reasonable cause' is a question of fact which is exclusively within the jurisdiction of the Board of Inquiry unless the Appellant can show that that question was decided perversely."

Mr. Horne also relied upon certain passages in the dissenting judgments in the Gay Alliance case, (supra), particularly Seaton, J.A., at page 216; Laskin, C.J.C. at page 270; and Dickson, J., with whom Estey, J., concurred, at page 286.

The majority of the Court of Appeal in the Gay Alliance case disagreed with the Board of Inquiry on the question of reasonable cause, because, as Branca, J.A., said at page 209, "The Board did not consider whether the policy of the newspaper, apart from bias, constituted reasonable cause". In other words, Branca, J.A., with whom Robertson, J.A. concurred, held that the Court has jurisdiction to review a Board's reasoning, and, if it finds the reasoning defective, then a question of law is raised. The majority decisions in the Supreme Court of Canada in the Gay Alliance case do not deal with this question so I believe the proper course for me to follow is to accept the Board's factual findings as conclusive, but to examine its reasoning and determine whether the conclusions of the Board disclose any faulty reasoning which can be regarded as an error in law or jurisdiction.

I propose to examine the Appellant's submissions and to decide them in the order in which they were argued.

1. Mr. Kelleher for the Appellant points out that Section 8 of the Code does not mention size or weight, but merely prohibits discrimination against qualified persons unless reasonable cause is shown by the employer. He says that Section 8 (2) has no bearing on this case because none of the enumerated heads of discrimination were relied upon by the Respondent. Mr. Kelleher then argued that the Board erred in assuming that the Respondent was qualified having regard to the finding that there is a strength requirement for the entry positions at the Appellant's mill. He says further that the Board, having found that the Appellant's preference for size was unreasonable, concluded from that finding that there had been discrimination without reasonable cause without going on to consider the equally important question of qualification. His argument may be summarized by saying that even if the 5' 6", 140 lb. requirement is unreasonable, it does not follow that the refusal to employ a smaller person is unreasonable.

This submission is a beguiling one, but I cannot accept it. The Board found:-

> "The Appellant's main reason for refusing to hire Janice Foster was her height and weight ..."

The Board also viewed the proposed place of employment and had in mind, or must be assumed to have had in mind, the evidence given by the Respondent that she had no reservation about her ability to do the work at the Youbou mill. All this, together with her "successful" previous employment in a similar position, is sufficient to persuade me that the question of qualification was not overlooked.

I agree with Mr. Kelleher that qualification is not necessarily implied by the establishment of an unreasonable preference, but when the facts establishing qualification are stated, then I do not think it is fatal that the Stated Case does not include a specific finding on qualification. When qualification is properly inferred, as I think it is, then the predominant reason for the failure to hire in these circumstances constitutes a breach of Section 8 (1).

2. Next, Mr. Kelleher argues that the Board's reasoning implies an obligation on the part of the Respondent to test for fitness, technique and stamina. I do not propose to say anything further about this ground because I do not find in the case anything to support the argument that the Board imposed any such obligation upon the Respondent. The Board, in my view, merely recorded the fact that such testing was not carried out.

3. Mr. Kelleher's third main submission is similar in kind to his first point. He says that the Board equated the reasonableness of the Appellant's size preference to reasonable cause, and then proceeded to conclude from the unreasonableness of the preference that no reasonable cause had been shown without regard to -

(a) Respondent's alleged admission that she was not capable of performing an essential part of the job. I have already disposed of the factual basis for this submission, and I will not consider it further.

(b) That she was considered ineligible for re-employment by her previous employer. (I do not propose to give effect to this submission in view of the fact that this ineligibility was found to be based upon her "outspoken nature").

(c) That she had suffered a back injury in 1976 requiring two visits to her chiropractor and she failed to disclose these facts in her application for employment.

The latter submission causes me more difficulty. It seems clear from the authorities that to determine whether reasonable cause exists, it is necessary to apply an objective test, and

the Appellant would have reasonable cause to refuse to employ the Respondent if facts existed which would constitute reasonable cause even if such facts were not known at the time of the application for employment.

All that the Stated Case discloses on this issue is:-

(a) The application for employment contains the question, "Have you ever suffered any back weakness or strain?"

(b) Such question was answered "No".

(c) The Respondent sought treatment from a chiropractor on at least two occasions in 1977, and she indicated that her vertebrae "...were knocked out of alignment and one hip was one-half inch lower than the other."

For there to be reasonable cause it would be necessary for the Appellant to establish that the Respondent, in answering the said question as she did, mis-stated facts relevant to the question of employment. In my view the Appellant has not established a sufficient factual basis for such a conclusion. A misaligned vertebra does not necessarily indicate back weakness, and the word "strain" usually connotes

a soft tissue injury. I have no way of knowing if a hip condition such as is described in the Stated Case constitutes a back weakness or strain, but I would surmise, which is the best I can do, that it would not. The Stated Case discloses that the Board of Inquiry conducted hearings in Victoria on the 27th and 28th days of February 1979 and on the 5th and 19th days of March 1979 when I assume these matters were fully canvassed. Even though the full reasons for a decision of the Board are "attached" to the Stated Case I have already held that I do not think I can look at those reasons, and the scanty information contained on this point in the Stated Case is not sufficient to establish, to my satisfaction, that the Appellant has discharged the onus of proving that the Respondent mis-stated any relevant facts in her application for employment.

In closing, even though it is not necessary to this decision, I wish to say that I agree entirely with Mr. Horne's very frank submission that there would be no discrimination which offends against the Code if the Appellant had declined to employ the Respondent because of an honest belief that her size or weight made it, in the Appellant's judgment, unlikely or impossible that she could do the job. It is to the Appellant's credit that it did not take that position. Instead the Appellant sought to support its decision not to employ

the Respondent on the ground that it was reasonable to prefer employees who meet its size and weight criteria. On this ground the Board found against the Appellant after a full hearing and argument. I would be substituting my opinion for that of the Board if I were to review the evidence and reach a different conclusion.

The Petition is accordingly dismissed with costs to the Respondent Janice Lynn Foster against the Appellant.

C. J. S.C.

October 9th, 1979.

IN THE MATTER OF THE HUMAN RIGHTS
CODE OF BRITISH COLUMBIA, S.B.C. 1973
(2d. Session), Chapter 119

AND

THE COMPLAINT OF:

JANICE LYNN FOSTER

COMPLAINANT

AGAINST:

BRITISH COLUMBIA FOREST PRODUCTS LTD.
(Cowichan Wood Products Division)

RESPONDENT

REASONS FOR DECISION

DATES OF HEARING: February 27, 28, March 5, 19, 1979

PLACE OF HEARING: Victoria, British Columbia

APPEARANCES: J.W. Horn for the Complainant and the Director of the Human Rights Branch of the Ministry of Labour

S.F.D. Kelleher and Donald Jordan for the Respondent

EFFECTIVE DATE OF DECISION: April 17, 1979.

I. Introduction

This Board of Inquiry was appointed pursuant to section 16(1) of the Human Rights Code of British Columbia, S.B.C. 1973 (2nd Session), Chapter 119, as amended to hear and decide upon the complaint of Ms. Janice Lynn Foster against British Columbia Forest Products (Cowichan Woods Products Division) (hereafter referred to as "the company"). At the beginning of the hearing all parties acknowledged that the Board was properly constituted and had jurisdiction to hear the case.

The complaint is that the company refused to employ Janice Foster as an "entry" employee at its mill at Youbou on Vancouver Island. The complainant alleges that this refusal was based on her size and that this constitutes discrimination on two bases -- first, it is unreasonable; secondly, this differentiation results in sex discrimination. The complainant contends, therefore, that she was discrimated against "without reasonable cause" and "on the basis of her sex", both of which are proscribed by s.8 of the Code.

The basic factual background is as follows: Janice Foster, who stands 5' 0" in height and weighs 115 pounds, applied in November, 1977 for an "entry" labouring job at the company's mill at Youbou. She had worked previously as a labourer for the Tahsis Company which operates a sawmill on Vancouver Island.

The company operates a reaonably large mill at Youbou. There are over 500 employees at the mill. Almost without exception, the company hires new employees to fill what are called "entry jobs". There are five entry positions, all involving manual labour. These jobs will be described more fully later, but basically they require the labourer to manually remove lumber from a conveyor belt (called a "chain" because it consists of rollers placed on top of moving chains) and place the lumber in a pile near the chain.

Janice Foster applied for work with the company. If successful she would have been placed on a "spare board" from which

she would have been assigned to any of the five entry jobs as the need arose. If she performed these jobs successfully, in the normal course of events she would then have been given a full time position at one of these stations.

Janice Foster has not been hired by the company. She has had numerous and regular dealings with three of the company's Personnel people -- Messrs. McRae, Ostrom, Mergens -- but has not been offered a job. It is clear that the reason for this is not that there are no positions at the mill. The turnover at the mill is rapid -- about 1.8 per cent per month or about 100 employees per year -- and the company has in fact hired a fairly large number of employees since the complainant applied for a job.

Obviously, the complainant and the company disagree as to the reasons contributing to the fact that the complainant is not today an employee of the company. The complainant's case can be summarized in the following propositions:

(1) The company has refused to hire me or has discriminated against me in respect of employment.
(2) This refusal or discrimination has been based, either entirely or primarily, on my small size.
(3) Discrimination on the basis of small size does not constitute reasonable cause under s.8 of the Code.
(4) In addition, discrimination on the basis of small size does constitute sex discrimination under s.8 of the Code.

The company's response advances these propositions:

(1) The company has never refused to hire the complainant or discriminated against her with respect to employment; rather the company has preferred to hire other better qualified applicants.
(2) The company's failure to hire the complainant is based on a number of factors, only one of which is her small size.
(3) Even if the Board should find that, on the facts, the

complainant's small size was the sole or the major reason for the company's failure to employ her, this would be "reasonable" given the nature of the jobs in question.

(4) In addition, differentiation on the basis of size does not constitute sex discrimination.

Based on these propositions, I believe that the issues which I must decide in this case are the following:

(1) What is the conduct of the company about which the complainant complains? Has the company "refused to hire" the complainant or "discriminated against her with respect to employment"?
(2) If the company has refused to hire the complainant, then what, on the facts, has been the basis for, or cause of, this refusal?
(3) Is the cause (or causes) so identified "reasonable" in the context of s.8 of the Code?
(4) Does the cause (or causes) so identified constitute discrimination on the basis of sex in the context of s.8 of the Code?
(5) If the company's failure to hire the complainant has been without reasonable cause or constitutes discrimination on the basis of sex, then what remedy should be granted to the complainant?

I will consider each of these issues in turn.

The Company's Conduct

The complainant contends that the company has discriminated against her. The first question that arises is: what conduct or action on the part of the company is the basis for this claim?

Section 8(1) of the Code provides, in part:

> 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...
> unless reasonable cause exists for such refusal or discrimination. (my underlining)

Does the company's conduct come within any of the four classes of conduct underlined above. The complainant submits that the company has refused to hire her and has discriminated against her with respect to employment. The company responds that it has not refused to hire the complainant; rather it has simply preferred to hire better candidates.

I have no hesitation in finding that the company has refused to hire Janice Foster. She applied for a job in November, 1977. She has also visited the mill on more than a dozen occasions to inquire about the status of her application. She has phoned the company to ask the same question on several occasions. She has had interviews with three Personnel employees at the mill, including Mr. Mergens, the Industrial Relations Supervisor. Most significantly, a large number of new employees have been hired by the company during the time the complainant was seeking a position. In particular, between November 23, 1977 (the date of the complainant's application for employment) and February 9, 1978 (the date on which the Human Rights Branch became involved in the case) over twenty new employees were hired for entry positions at the mill. And between February, 1978 and April, 1979 more than one hundred new employees have been hired.[1] At no time has Janice Foster been offered a position at the mill.

The company argues that Janice Foster's application is still on file; that it has not refused to hire her; that it has preferred to hire better qualified people; and that if there were

1 I base this conclusion on the testimony of Mr. W.J. Connery who stated that there was about a 1.8 per cent per month turnover at the mill. See Proceedings, Vol. 2, pp. 39-40.

no better qualified people the company would offer the complainant a job.

In this case I think the distinction between "refusal" and "preference" is illusory and turns on a subtle verbal distinction which I am not prepared to accept. The company keeps all applications on file; yet a great many people do not get jobs at the mill. Although they are never told, in absolute terms, that they will not be hired, the reality is that they do not obtain jobs. The company can contend that this does not constitute "refusal". But, viewed from the applicant's perspective, the distinction between a firm "No, we have decided not to hire you" and "We have decided to hire someone else but will keep your application on file" is irrelevant, and becomes more irrelevant as time goes on and the company continues to prefer more and more people to the applicant. The reality is that the company's preference for some employees constitutes a refusal to hire other employees. In Janice Foster's case the patterm of prolonged and regular dealings between her and the company when combined with the fact that the company has hired over one hundred new employees since she first applied leads inevitably to the conclusion that the company has refused to hire her and that any possibility of the company hiring her in the future is extremely remote. Accordingly, I find that the company has refused to employ Janice Foster within the meaning of s.8(1)(a) of the Code.

Of course, there is nothing wrong with a company refusing to hire prospective employees. Employers have to make these decisions all the time. The more important questions raised by a refusal to hire are: What were the reasons for the refusal? Do those reasons run contrary to the provisions of the Code? It is to these questions that I now turn.

III. Why did the Company refuse to hire the Complainant?

In some cases there is little question as to the reasons for a refusal to hire or a failure to provide services to a person. The reasons are admitted or are readily apparent and the only question concerns the legal consequences that should be attached to those reasons (see, for example, Board of Inquiry decisions in Jefferson v. B.C. Ferries Service, 29 September, 1976 and Heerspink v. I.C.B.C., 8 March, 1979). In other cases the preliminary factual issue -- namely, why was the person not hired or the service not provided -- is more difficult (see Bremer v. Board of School Trustees, School District No. 62, 10 June, 1977). This case falls within the Bremer category -- the reason or reasons for the company's refusal to hire the complainant are disputed and are difficult to assess.

The company's basic contention is that it did not hire the complainant because there were better applicants available. And indeed, between November 23, 1977 and February 3, 1978 (I choose these dates because they cover a time period in which the relationship between the complainant and the company was not colored by the involvement of the Human Rights Branch) the company hired thirty-one new employees (Exhibit U). The company says that a variety of factors led to the decisions to hire these thirty-one employees and not to hire the complainant. In order to assess the company's claims it is necessary to examine three matters -- first, the hiring process at the mill; secondly, the factors the company takes into account in making hiring decisions; thirdly, Janice Foster's movement through that process and the application by the company of its hiring factors to her.

The company's evidence (primarily from Mr. Wayne Ostrom, the Assistant Industrial Relations Supervisor at the mill from November 1977 to February, 1978) is that the normal hiring process is as follows. Most applicants appear in person at the

mill. An applicant is given an application form to fill out. When it is completed he hands it to a Personnel employee. This employee looks at the form to make sure all the required information has been provided. The employee also looks at the applicant to assess size and appearance. Based on this brief contact and following close examination of the form the Personnel employee assigns a rating to the applicant. This rating is usually placed in the bottom right hand corner of the application form. The scale for this rating is 1 to 10 with 1 being the top. Following this rating the form is then put in a file. Apparently, not all Personnel employees use the same filing system. Mr. Ostrom testified that some would keep two files. In File 1 would be placed those applicants who were rated 1. File 2 would contain all applicants rated 2,3,4,5,6,7,8,9,10. Mr. Ostrom testified that he personally maintained three files. File 1 contained applicants rated 1; File 2, applicants rated 2; File 3, applicants rated 3-10. I do not think anything turns on this difference in filing practices; the relevant points are that all applicants are graded on a sliding scale of 1 to 10 and that those rated as 1 are placed in a separate file.

The company's evidence was that there are two subsequent steps in the hiring process. As positions come open at the mill, prospective employees are called in for interviews. They are called in on the basis of their initial rating - 1s are called first, then 2s and so on. After the interviews the company runs a reference check on the applicant. On the basis of the interview and reference check the company makes a final rating of the employee and hires those with the best rating.

This, then, is the company's description of its hiring process. I will have more to say later about this description.

The next question is: what factors does the company take into account in rating prospective employees? On this point I accept the careful and thorough description of Mr. W.J. Connery, now the Vice-President, Wood Products Production, B.C. Forest Products and formerly the manager of the Youbou mill, whose

testimony and demeanour impressed me. Mr. Connery testified that seven factors influence hiring decisions -- (1) the physical capability to perform the job; (2) intelligence and ability to develop (this is important because the skilled jobs at the mill are filled on a seniority basis -- entry employees "bid up" to them); (3) regularity of attendance; (4) ability to take instructions and co-operate with management and fellow employees; (5) past experience in a mill; (6) proximity of the applicant's home to the mill; (7) whether the applicant is a son or daughter of a present or former employee.

This brings me to a crucial point in the case. Against the background of the hiring process and hiring factors just described, what was the company's rating of Janice Foster. The company's evidence was that she was given a rating of 4 and, indeed, there is a 4 pencilled in on the bottom right hand corner of her application form.

I am not prepared to accept the company's claim. I find as a fact that Janice Foster was given a rating of 1 and that this rating existed at least from November 23, 1977 to early February, 1978. I make this finding for three reasons.

First, I accept the evidence of Alan Andison, the Human Rights Officer responsible for investigating this case. Mr. Andison said that he met with Personnel employee Rick McRae at the mill, that Mr. McRae told him that there were two classes of applicants, that experience was the major consideration in placing an applicant in Class 1 and that "Miss Foster had been placed in the Class 1 category." (Proceedings, Vol. 1, p. 105). If experience is the key factor in the hiring process it is not surpising that Janice Foster was assigned a rating of 1 -- there is no doubt that the complainant had substantially more mill experience than most of the people actually hired during the three months in question.

Secondly, the company concedes that her application was kept in File 1. Since, under both Mr. Ostrom's three-file system and the more normal two-file system, only those applicants rated 1 are placed in File 1 this raises an inference that Janice Foster was in fact rated 1 on the 1 - 10 scale. The company attempted to rebut this inference by saying that Foster's application was kept in File 1 "so that we could readily put our finger on it." (Proceedings, Vol. 3, p. 79). I am unable to accept this claim that the reason her application was kept in File 1 was for ease of access. If ease of access was a goal the application could have been kept in a separate file rather than being mixed in with all the other applicants with 1 ratings. I conclude that the company's concession that her application was kept in File 1 is strong evidence that the company had rated her as a 1.

Thirdly, I am not prepared to accept the company's contention that the small number 4 pencilled in on the bottom right hand corner of the complainant's application is evidence that the company rated her at 4 on its 1 - 10 scale. There is no doubt that there is a 4 on the complainant's application form in the place where company ratings are usually found. But the 4 does not appear on a copy of that application which Mr. Andison, the Human Rights Officer, requested and received from the company on March 23, 1978. The 4 on the original is, admittedly, faint and it is possible that a copying machine might not reproduce it. On the other hand, it is equally possible that a copier would have reproduced the 4 -- if in fact the 4 had been on the original on March 23. The company's initial rating of the complainant is obviously a key piece of evidence in this case. Only the company knows who put the 4 on the application -- and when. Yet the company led no evidence on this crucial point. Combining the fact that there is no 4 on the copy of the application with the company's failure to lead evidence concerning the 4 on the original I conclude that the 4 was probably placed on the original some time after March 23.

My conclusion, therefore, is that the company initially rated the complainant as a 1 -- that is, as a member of the "most desirable employee" category. This conclusion is based on Mr. Andison's direct testimony and the inferences I draw from the company's concession that her application was kept in File 1 and the company's failure to convince me of the authenticity and relevance of the faint 4 on the original application.

I have found that the company gave the complainant an initial rating of 1. I also find that this rating definitely persisted until early February, 1978 and probably stood until after March 23, 1978. During this time a large number of new employees, including many with ratings below 1, were hired. The complainant was not hired. Why?

The company's evidence was that an amalgam of factors contributed to its decision not to hire the complainant. The factors to which the company claimed it attached significance were -- her lack of relevant mill experience, absenteeism caused by menstrual pains at her previous job, her lack of a driver's licence, the existence of a "No Rehire" slip at her previous employment, and her size.

Before considering these contentions, it is important to state that I consider the crucial time period to be November 23, 1977 to early February (approximately the 10th), 1978. This is the time period during which the company and complainant dealt with each other in a normal employer/prospective employee context. During this time the company hired thirty-one new employees (excluding Christmas help) and, I have concluded, "refused" to hire the complainant. After February 10th or so the Human Rights Branch was injected into the relationship and the picture becomes more cloudy. I do not think anything turns on this. By early February the company had definitely refused to hire the complainant.

Events since then add only the dimension that the refusal has been continuing.

Although not stated directly, the company's evidence led to an inference that it did not hire the complainant because she had worked on a resort chain, not a green chain, at Tahsis. A resort chain processes smaller lumber and therefore provides easier jobs than those on the green chain. Hence the complainant's experience was not relevant. This conclusion is unwarranted -- for three reasons. First, the company did not believe that the complainant had worked on a resort chain until early February. The complainant's application form stated that she had worked on a green chain and the company had no reason to disbelieve her. Secondly, when the company indicated to Mr. Andison that she had worked on a resort chain at Tahsis, Mr. Andison made inquiries and immediately informed the company that she had worked on a green chain. Thirdly, and most significantly, of the 31 employees hired between November 23 and February 10, approximately 21 had no mill experience whatsoever. I conclude that the complainant's lack of relevant experience was not a factor in the company's decision not to hire her. Indeed I suspect that her rating of 1 was based largely on the company's awareness that she was an experienced mill worker.

The company led evidence that the complainant had missed work at her previous job because of menstrual pains. But this contention is rebutted by the reference provided, at the company's request, by the personnel supervisor at the Tahsis Mill (Exhibit N). To the question "Attendance?" the response was "Good". In any case, the information about absenteeism based on menstrual pains was not received by the company until early February and hence could not have influenced the hiring decision in the time frame under consideration.

I accept the company's claim that the complainant's lack of a driver's licence was a factor in its hiring decision between November 23 and February 10. New employees are placed on a spare board and are required to work irregular hours and on short notice. Hence transportation to the mill is essential. I do not, however, think that this was a major factor in the company's decision. The complainant told the company that she would be a regular employee (her previous work record confirms this) and, as Mr. Ostrom testified on cross-examination, he had no reason to disbelieve her (Proceedings, Vol. 3, p. 52). In any case, many employees at the mill live as far away as Duncan and Honeymoon Bay which indicates that the company trusts the judgment of its employees and relies on them to be regular in attendance -- wherever they live and however they get there. The absence of a driver's licence was a factor which counted with the company -- but not for much.

Janice Foster has a No-Rehire slip against her at the Tahsis Mill. The reason for this slip is that "on the last day made mess of chip scow - left with a 10 inch list. Was very outspoken and liked to tell company how things should be done." (Exhibit C). The company contends that this No-Rehire status was a major reason for its refusal to hire her. The evidence does not support this contention. First, in all the times the complainant called on the company, not once was this factor mentioned to her by anybody. Secondly, Mr. Andison testified that Mr. Mergens had told him that the poor reference from Tahsis was not "very important". (Proceedings, Vol. 3, p. 117). Thirdly, the company hired, just two weeks before Ms. Foster applied, a new employee with a No-Rehire slip. Fourthly, the company did not become aware of her No-Rehire status until early February; accordingly, this factor would not have influenced the hiring decision in the relevant time frame.

The fifth factor which the company says influenced its decision was the complainant's small size. The evidence and

exhibits persuasively support the importance of size as a factor in the company's decision. Indeed, I conclude that Janice Foster's small size was the major -- and almost the only (I think that the lack of a driver's licence was a very minor consideration) -- factor in the company's decision not to hire her. I base this conclusion on three considerations -- the testimony of Mr. Ostrom, the testimony of Mr. Mergens and an examination of the application forms of many of the people hired by the company between November and early February.

Mr. Ostrom, the Assistant Industrial Relations Supervisor at the mill at the relevant time said concerning the initial rating of applicants: "Initially the individual is assessed as to their potential physical capabilities, considering their height and weight factors." (Proceedings, Vol. 3, p. 6). The following exchange also indicates the importance of size to Mr. Ostrom:

> "Q. Now, is there any instructions given to him [the Personnel employee] as to the standards he is to apply in accepting or rejecting applicants on their potential physical capabilities?
>
> A. There is.
>
> Q. What are those instructions?
>
> A. That preference should be shown to individuals with a minimum of 5' 6" and 140 lbs." (Proceedings, Vol. 3, p. 39).

Mr. Mergens, the Industrial Relations Supervisor, confirmed the 5'6", 140 lbs. standard (Proceedings, Vol. 3, p. 94) and said that he equated small size with greater risk of injury (p. 99). Two other responses are indicative of Mr. Mergens thinking on this point:

> "Q. And that the primary reason that Miss Foster had not been hired was her size?
>
> A. That is right." (p. 107).

"Q. You would say that size -- the fact that Janice Foster is not 5' 6" and 140 lbs. -- is the main reason that she is not working at the mill today?

A. Yes." (pp. 127-128).

Finally, an analysis of the 31 new employees hired between November 23 and February 10 indicates that 20 of those employees had no mill experience. The average height of those 20 employees was 5'10"; the average weight 162 pounds. The conclusion is inevitable -- those 20 men were hired instead of Janice Foster because of their large size and in spite of the fact that they had no experience.

In summary, my factual conclusions in this case are the following. The company initially rated Janice Foster 1 on its 1-10 scale. This rating persisted at least until early February and probably until late March or longer. Between November 23, 1977 and February 10, 1978 the company hired 31 new employees, 20 of whom had no mill experience. During the same period Janice Foster was not hired. The primary reason (and almost the only one) for this refusal to hire was the complainant's small size. Specifically, the company did not hire her because she did not measure up to the company's 5'6", 140 lb. standard. A remote and minor second reason for not hiring her was the fact that she did not have a driver's licence.

IV. Was refusal to hire the complainant because of her small size 'without reasonable cause' and hence contrary to s.8 of the Code?

In order to answer this question it is necessary to consider s.8 of the Code. That section provides:

> 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.
>
> (My underlining).

The first point to be made about s.8 is that it provides that discrimination on certain bases -- namely, those listed in s.8(2) -- is presumptively illegal. It does not follow, however, that discrimination on other grounds is automatically legal. Rather the legislature, by inserting the words "unless reasonable cause exists" in s.8(1), has left the door open for boards of inquiry and courts to find that discrimination on other grounds is illegal. Basically s.8 deals with two categories of employment discrimination. First, discrimination on the basis of any of the named heads in s.8(2) is always illegal. Secondly, discrimination on other grounds may be illegal in some employment situations. The authorities to support this interpretation of s.8(1) are discussed by the Board of Inquiry in Gibbs. v. Board of School Trustees, School District No. 36 (11 July 1978), at p. 12:

"I conclude that complainants who do not fall within the section 8(2) categories can claim the reasonable cause protections of section 8(1). In my view this conclusion is compelled by the reasons for judgment of Hutcheon, J. in Russell Daniel Burns v. United Association of Journeyman of the Plumbing and Pipefitting Industry, Local 170 and Piping Industry Apprenticeship Board. Further support for the proposition can be found in the dicta of Kirke Smith, J. in the Jefferson case. These judicial decisions support the decisions of nine boards of inquiry established under the Rights Code which had concluded that the reasonable cause protections in sections 3, 8 and 9 extended beyond the protected categories in sections 3(2), 8(2) and 9(2) respectively."

It is open to me, therefore, to ask whether differentiation on the basis of small size in the context of the entry jobs at the company's mill at Youbou is unreasonable and contrary to s.8(1) of the Code.

In order to answer that question it is necessary to define the key word "discrimination". Fortunately, the case law in British Columbia provides several useful definitions. In Nelson and Atco Lumber Company Ltd. v. Borho, (1976) 1 B.C.L.R. 207 (B.C.S.C.), Mr. Justice Toy said, at p. 214:

> "The verb 'to discriminate' was considered...in Post Office v. Crouch...[1974] 1 All E.R. 229...In the House of Lords, Lord Reid said at p. 238:
>
> > 'Discrimination implies a comparison. Here I think that the meaning could be either that by reason of the discrimination the worker is worse off in some way than he would have been if there had been no discrimination against him, or that by reason of the discrimination he is worse off than someone else in a comparable position against whom there had been no discrimination'."

In Insurance Corporation of British Columbia v. Heerspink, [1978] 6 W.W.R. 702 (B.C.C.A.), Mr. Justice Robertson said, at pp. 707-708.

> "The first thing to be considered is the meaning of 'discriminate'. I think that this definition of the noun 'discrimination' in the Random House Dictionary fits the corresponding verb: '3. treatment or con-

sideration of, or making a distinction in favour of or against, a person or thing based on the group, class or category to which that person or thing belongs rather than on individual merit.'

If any one person does to a second person something that displeases or is against the interest of the second person and there is nothing more, the first person does not thereby discriminate against the second person."

This focus on the need for individual assessments based on merit was emphasized by the Board of Inquiry in Bremer v. Board of School Trustees, School District No. 62 (10 June 1977) at p. 7:

> "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."

Drawing assistance from these judicial statements I think that discrimination contrary to s.8 of the B.C. Human Rights Code occurs when the following factors exist:- (1) an individual is treated more harshly than other individuals; (2) this harsh treatment does not flow from an assessment of the individual's merits; (3) rather it is based on the individual's possession of a general class characteristic; (4) this class characteristic is one which is irrelevant in relation to the employment the individual is seeking. In other words, an employer discriminates when he refuses to hire a person based on a priori assumption that a person cannot perform the work because of his possesion of a class characteristic provided that this assumption is not correct.

I think it is important to emphasize this proviso. The formulation by an employer of general rules is not presumptively inconsistent with giving all applicants an individual assessment. The size of many industrial undertakings, the number of applicants for employment and the need at times to make quick hiring choices combine to make the formulation of general rules necessary in many employment situations. An airline company which says that only licensed pilots are eligible for employment, a hospital insisting that only qualified doctors need apply, a university insisting on a graduate degree as a condition precedent for employment, a beauty salon insisting on completion of a recognized course - these and other general rules do not constitute discrimination. A person who applies for these jobs without those qualifications cannot complain when his application is sent back with a cursory "Unqualified" stamped on it. Nor can he complain that these class differentiations mean that his application was not individually assessed. He was given an individual assessment, but failed to measure up to even the most basic threshold requirements for the job.

A company, therefore, 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 s.8 of the Code mandates.

The company has established a general rule in this case. The touchstone for this rule is the company's belief that size is a job qualification for mill workers. The specific rule is that preference should be given to persons who are 5'6" tall and 140 pounds. All other factors being equal, persons under that size are not hired. Therefore the company has created a class of people -- "small people" - whom it prefers not to employ. In

its hiring process the company clearly differentiates on the basis of this class factor. The facts support the conclusion that a large number of inexperienced people are hired because they are large whereas some experienced people, including the complainant, are refused employment because they are small.

Admittedly, occasionally the company does hire a person who does not meet the size standard. But this does not deny the conclusion that the company applies a size standard. A landlord who says openly: "As a general rule I do not allow Indian tenants" will not be saved from a finding that he discriminated against an Indian who he didn't admit by pointing to the occasional Indian he does admit. Likewise a cabaret that establishes a general rule of "No Blacks admitted" but occasionally admits a few preferred blacks is also guilty of discrimination. If the general standard is illegal, the only relevant question is whether that standard has been applied to the person alleging that he has been discriminated against. If the answer is 'yes', the person committing the discrimination will not be saved by showing that he did not apply his own illegal standard in other situations.

In this case size is a dominant differentiating feature in the company's hiring process. This creates a class of persons -- "small people" -- who almost always are not hired by the company. Janice Foster comes within this class. She was not hired, almost solely on the basis of her membership in this class. The question for this Board is whether the company's creation and application of its size standard is "reasonable" in the context of the entry jobs at its Youbou mill.

The company's submission is that its size standard is reasonable. The submission hinges on four propositions:

(1) There is a strength requirement in the entry jobs at the Youbou mill.

(2) A person's size is a good indicator of his strength.

(3) The 5'6", 140 pound standard is a good indicator of sufficient strength to do the job -- as a general rule.

(4) Strength is the key component of the entry jobs at the Youbou mill.

I accept the company's first proposition. I visited the mill and watched employees perform all five entry jobs. Although I do not think that strength is very necessary in the veneer plant or on the 1-inch green chain I have no doubt that some degree of strength is an important qualification on the planer chain (often) and the 2-inch green chain (always).

I accept the company's second proposition. All other things being equal (e.g. fitness, stamina, good technique), a large person should be able to perform a job requiring strength more easily than a small person. Even Verne Ledger, the expert witness who testified on behalf of the complainant, conceded this point (see Proceedings, Vol. 3, p. 150).

The company's case founders on its key third proposition -- namely, that its 5'6", 140 lb. standard is a good indicator of sufficient strength to do the job. The evidence led by the company does not support this proposition and, indeed, the complainant led persuasive evidence to indicate this standard was not reasonably related to the green chain jobs at the Youbou mill.

Turning to the evidence, Mr. Connery, the company's Vice-President and a former manager of the Youbou mill, testified that the company has never undertaken any investigations to determine the ideal height and weight of an employee on a green chain (Proceedings, Vol. 2, pp. 24-25). Mr. Ostrom, the Assistant Industrial Relations Supervisor, stated that company policy was that preference should be shown to people with a minimum of 5'6" and 140 pounds. He was then asked how the company arrived at these figures. His reply was "I have no idea". (Proceedings, Vol. 3, p. 40). Mr. Mergens, the Industrial Relations Supervisor,

confirmed the 5'6", 140 pound standard (p. 94) and said that he equated small size with greater risk of injury (p. 99). There is no evidence to support this equation. Mr. Mergens himself admitted that he had never discussed the correlation between injuries and size with either the Workers' Compensation Board or the International Woodworkers of America (the union at his mill). He further admitted that he was not aware of any studies done by the W.C.B. or I.W.A. which would support his conclusion (pp. 100-101).

The evidence led by the complainant established that there is no correlation between small size and susceptibility to injury on green chain jobs. Verne Ledger, the safety and health director of the I.W.A. Regional Council No. 1, testified that there was no evidence to support this correlation (p. 137) and that injuries were the result of poor technique in pulling lumber off the chains (p. 138). Poor manual dexterity, not insufficient strength, was the primary cause of injuries, she testified. I accept her evidence.

Finally the reasonability of the 5'6", 140 pound standard is denied by some important historical and current extrinsic evidence. Mr. Connery admitted that there was a Chinese bunkhouse at the Youbou mill and that Chinese people were basically employed in labouring positions (Proceedings, Vol. 2, pp. 21-22). Verne Ledger confirmed that Chinese people have worked and continue to work, without difficulty, on green chains in the province. She further testified that during the war "there were many many women in the industry...because the men just were not here. So they did all those jobs". She continued, "in my experience with the women that I know who have handled that job, they have had no problems in handling it". (Proceedings, Vol. 3, pp. 135-136). Acknowledging that the average size of women and Chinese people is well below that of white males (see Exhibits M and AA), it is clear that, in the past, mills have employed a huge number of persons who would not meet the company's present-day size standard. Yet there is no

evidence that the forest industry in British Columbia suffered from substantial employment of small people. Indeed the evidence is all the other way.

On the basis of the foregoing, I conclude that the company's belief that a 5'6", 140 pound size standard is a good indicator of sufficient strength to perform the entry jobs at its Youbou mill is not supported by the evidence. It is unreasonable.

There is a second problem with the company's size standard. I have found that the specific size standard adopted by the company is unreasonable. I further think that <u>any</u> size standard, if it is the company's sole or major hiring criterion, is unreasonable. Although the company denies it, in this case I think the company's hiring process and practice point inevitably to its adherence to the proposition that strength is the key component of the entry jobs at the Youbou mill. That this is the fourth, albeit implicit, proposition on which the company bases its case is evident from an examination of the company's hiring process and a comparison of the complainant with the people hired between November 23 and February 10.

The company's evidence was that it had a three-stage hiring process -- application, interview, reference check. An employee who cleared these three hurdles would be hired. I am not convinced, however, that the interview and reference check stages are either invariable or important parts of the hiring process. I accept that all new employees are actually interviewed, but I think that the interview is merely confirmatory of a hiring decision that has already been made. As Mr. Mergens stated: Normally when they are called in for the interview, we have in our mind that he is the one that we want... Generally though when they are called in for the interview it is because we have a hiring setup and those are the people that we will select". (Proceedings, Vol. 3, p. 126). As for the reference check, its importance is belied by two facts -- first, a number of the employees who were hired during the relevant time did not even fill in the "Reference" part of the application form;

secondly, some employees were hired between 2 and 7 days after they applied which makes it unlikely that a reference check was performed (see Exhbit 2). My conclusion, therefore, is that the key part of the hiring process is evaluation of the application form. Interviews may be invariable, but they are probably not particularly important. Reference checks are not invariable and, I suspect, are very insignificant.

The next question, then, is what factors does the company take into account in its evaluation of the application forms? I have no hesitation in finding that size is the primary factor and that the company emphasizes this factor because it equates size with strength. The direct testimony of Mr. Ostrom and Mr. Mergens and a comparison of the complainant with the employees hired instead of her indicate that size is the dominant feature in the hiring process (supra, pp. 13-14).

Accepting that strength is a component of the job and also accepting that there is some correlation between size and strength, is the very heavy, almost exclusive, emphasis placed on size by the company in its hiring process "reasonable"?

The answer to this question is "no". Having watched employees perform the entry jobs at the mill and having heard testimony about those jobs, I think that there are four factors which are important for success in those jobs -- fitness, stamina, strength, technique.

Of these factors, strength is not the most important. Indeed it may be the least important. Mr. Connery testified that "an experienced operator can avoid lifting almost any piece." (Proceedings, Vol. 2, p. 37) Mr. Mergens gave Mr. Andison a copy of an article from Forest Industries magazine (Exhibit H). That article describes a new machine which has been developed in the United States to test the strength of applicants for green chain jobs. The interesting feature of this machine is that it tests

applicants' ability to pull 40 pounds -- not a heavy weight at all. And, finally, it bears repeating that women and Chinese people have played, historically, an important role in the British Columbia forest industry. Since they are substantially smaller than normal while males and since I accept that there is a correlation between size and strength it follows that strength is not a primary qualification for these mill jobs.

I accept the testimony of Verne Ledger that the most important qualification for green chain employees is good technique (Proceedings, Vol. 3, pp. 135-138). The green chain is set up so that, once the mployee starts the piece of lumber moving, the power rollers keep it moving and the job of the employee becomes one of steering the lumber onto the proper place in the pile below the platform. There is no doubt that this is arduous work, nor that it requires some strength to get the lumber moving. But to do the job well and safely all day requires good technique and stamina. These, in my opinion, are far more important than strength as qualifications for the job. Yet the company admitted that it did not test for fitness or stamina (Proceedings, Vol. 2, p. 30) and it is clear that they do not test for technique. In my view, this is because the company puts such a high premium on strength, and hence size, that it does not recognize the great importance of other relevant factors and hence makes little attempt to assess applicants on the basis of those factors. That, I believe, is unreasonable.

In summary, I find that assessment of the application form and a quick initial evaluation of the applicant as he hands in that form are the essence of the company's hiring process. The key factor in that assessment is the applicant's size. The company applied that criterion to the complainant and did not hire her because she was too small. At the same time the company hired 21 large male workers who were inexperienced. Is that reasonable?

Although I accept the company's propositions that strength

is a qualification for green chain jobs and that size is an indicator of strength, I find that the company's application of its size standard to the complainant is unreasonable in two respects. First, the actual size standard chosen by the company -- 5'6", 140 pounds -- is not supported by any evidence. Secondly, any size standard is unreasonable if it completely deflects the company's attention from other more important job qualifications. In this case the company's blinkered reliance on size has resulted in its failure to take account of fitness, stamina and technique, all of which are essential qualifications.

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. A judicial body should not put the hiring practices of an employer under a microscope with a view to detecting minor irregularities. 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. In this case, although impressed with the honesty, sincerity and good intentions of the company representatives, I think that they have adopted an eclectic hiring process which discriminates against small people -- without reasonable cause. I find, therefore, that the company has acted contrary to s.8(1)(a) of the Code.

Two final, ancillary issues need to be considered. Earlier in this judgment I found that the company refused to hire Janice Foster primarily because of her size. I also found that a second, but very remote, factor influencing the company was the fact that she did not have a driver's licence. What is the effect of this secondary factor? I think it has no effect. In Bremer (supra, p. 6) the Board reviewed judicial and board decisions in British Columbia, Ontario and New Brunswick (pp. 13-14) and concluded, at p. 14: -

> "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 thought 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."

I agree with this conclusion. Its application to this case is easy -- size was not just a significant reason for refusing to hire the complainant; it came very close to being the only reason.

Secondly, there is some debate as to the burden of proof in these "reasonable cause" cases. Mr. Kelleher, for the company, contended that the burden stays on the complainant throughout the case. This would mean that the complainant would have to establish that she was discriminated against on the basis of size and that this was unreasonable. Mr. Horn, for the complainant, agreed that the complainant must establish the cause but contended that the burden then shifted to the company to establish that the cause was reasonable. He urged this shifting burden on two grounds -- first, that the company has knowledge of its hiring practices and therefore should bear the onus of leading evidence concerning them; secondly, that to leave the burden of proof on the complainant would force her to prove a negative -- viz. that the company's policy was not reasonable -- and that, generally, courts imposed the burden of proof on the party trying to establish an affirmative proposition.

Although I am inclined to accept Mr. Horn's submission and although a number of Board of Inquiry decisions (including the most recent, Heerspink v. I.C.B.C., 8 March 1979) support it, I do not find it necessary to decide the point in this case. If the burden of proof rested on the complainant throughout, she led ample evidence to discharge it; if the burden shifted to the company to establish that its hiring policy was reasonable, its

evidence failed to support such a conclusion.

. Did refusal to hire the Complainant because of her small size constitute discrimination on the basis of sex contrary to s.8(2)(b) of the Code?

Section 8(1) of the Code provides that it is unlawful to discriminate against persons unless reasonable cause exists. Section 8(2)(b) declares that "the sex of any person shall not constitute reasonable cause unless it relates to the maintenance of public decency."

The complainant does not allege tht the company consciously discriminated against her because she was a woman. Nor could she. Mr. Mergens testified that the fact that the complainant was a woman was irrelevant. I accept that testimony without reservation.

The complainant's claim of sex discrimination is more sophisticated than that. The claim is that the company's 5'6", 140 pound standard, although neutral on its face, in fact excludes far more women than men from jobs and is therefore discriminatory.

There is ample judicial authority for the proposition that facially neutral standards which have the effect of excluding a disproportionate number of certain classes of people from employment are discriminatory. Two decisions of the United States Supreme Court illustrate this point. In Griggs. v. Duke Power Company, 401 U.S. 424 (1971), the Court held that the Civil Rights Act prohibited an employer from requiring a high school education or passing of a standardized general intelligence test as a condition of employment when (a) the standards were not shown to be significantly related to successful job performance and, (b) the standards operated to disquality blacks at a substantially higher rate than white applicants. More recently, in Dothard v. Rawlinson, 14 E.P.D. 5103 (1977), the Court held that the application of height and weight standards to applicants for the position of prison guard amounted to unlawful sex discrimination by having a disproportionate impact on females where the employer failed to show that the standards were related to job performance.

A recent decision of an Ontario Board of Inquiry makes the same point. In Colfer v. Ottawa Board of Commissioners of Police, (12 January 1979) the Board decided that the facially neutral height and weight requirements of the Ottawa police force discriminated against women applicants.

The Board said, at p. 37:

> "An employment regulation neutral on the face of it, i.e. one that applies to all prospective employees equally but has the effect of excluding women, is valid if it is shown that the regulation is in good faith and is reasonably necessary to the employer's business operations".

I am prepared to follow these American and Ontario decisions. I think that it is discrimination on the basis of sex contrary to the B.C. Code if an unreasonable employment standard, although neutral on its face, has the effect of excluding a large percentage of women applicants who would, but for the unreasonable standard, be qualified for the job. In this case I have already determined that the almost exclusive emphasis by the company on size and the specific size standard adopted by the company are both unreasonable.

What about the effect of the standard? Does it exclude disproportionately more women than men? It clearly does. Statistics compiled by the federal Department of Health and Welfare (Exhibit M) show that, amongst 24 year old Canadians, 95 per cent of the men are taller than 5'6" whereas only 25 per cent of the women meet this standard. Approximately 80 per cent of the men weigh more than 140 pounds whereas only 30 per cent of the women meet this standard. Clearly, the 5'6" standard excludes a very large number of women, but not many men. Therefore the second element of the test enunciated above is met.

I conclude, therefore, that the company's height and weight standard is unreasonable and has a disproportionate impact on women. Accordingly, application of the standard constitutes discrimination on the basis of sex. This is contrary to s.8(2)(b) of the Code.

I would like to make one final point. I have not dwelled at length on this aspect of the case. There is a reason for this. In Ontario and the United States the courts have been forced to deal with height and weight standards in "sex discrimination" terms. They have concluded that "unreasonable" standards constitute sex discrimination. In British Columbia it is not necessary for boards of inquiry or courts to make this equation in order to invalidate these size standards. In British Columbia, if a standard is "unreasonable" it is discriminatory under s.8(1) of the Code. There is no need to attach the unreasonability to a specific ground of discrimination such as sex. In the United States such a connection is necessary. A court cannot say that an "unreasonable" standard is discriminatory per se; it must then go further and say that the standard discriminated on the basis of sex or rule or some other protected category. In British Columbia it is open to boards and courts to say that an "unreasonable" standard is "unreasonable" and contrary to s.8(1) of the Code. This Board has done that in this case. To go further and say that the standard also constitutes sex discrimination, when a key component of that conclusion is unreasonability of the standard, adds nothing to the decision. If the standard is reasonable there will be breach of neither s.8(1) nor s.8(2)(b). If the standard is unreasonable s.8(1) will automatically be breached and the fact that s.8(2)(b) is also breached adds nothing to the complaint's case. Accordingly, although I agree with the decisions in Ontario and the United States and although I acknowledge the tremendous importance of those decisions as vehicles for overcoming sex discrimination in those jurisdictions, their relevance to British Columbia is limited by the fact that our legislature, unlike all other Canadian legislatures, has given boards and courts the "reasonable cause" lever to solve these problems.

VI. Remedy

The complainant has asked for four remedies -- an order compelling the company to cease its discrimination, an order compelling the company to employ the complainant at its Victoria

mill, an award of back pay (approximately $23,000), and an order for costs.

The complainant is entitled to the first remedy as of right. Section 17(2) compels the Board to order any person who contravened the Act to cease such contravention and to refrain from committing the same or a similar contravention in the future.

Section 17(2)(a) empowers the Board to order the person who contravened the Act to make available to the person discriminated against such rights and opportunities as he was denied. Section 17(2)(b) permits the Board to order compensation for wages lost.

I will not order the company to employ the complainant at its Victoria mill. The opportunity wrongfully denied the complainant was employment at the Youbou mill.

I do not think this is an appropriate case to award back pay. I base this conclusion on three factors -- the extreme mobility of many mill workers (see Exhibit X) which makes it unfair to surmise that any particular employee would have continued to work in the mill for the seventeen months this case has continued, the fact that Janice Foster quit her last mill job to take a month's vacation which makes me question the likelihood that she would still be at the mill if she had been given the job to which she was entitled, and the fact that the company co-operated completely with the Human Rights Branch throughout the seventeen months and did everything possible to expedite matters.

I am also sympathetic to the complainant's current situation. She says that an order compelling the company to give her a normal entry job at the Youbou mill would be useless. New employees are placed on the spare board for about three months and are called out for part-time work as the need arises. The complainant says that her resources do not permit her to do only part-time work at the mill at this time.

Balancing all of these factors, I conclude that an equitable solution is to compel the company to employ Janice Foster as a regular full time employee at its Youbou mill no later than May 1, 1979. Janice Foster is thus given a job which, in the normal course of events, she would have earned within about three months of initial employment. The company does not have to employ her at its Victoria mill and does not have to pay her compensation for lost wages.

This is not an appropriate case for awarding aggravated damages pursuant to s.17(1)(c) of the Code. Indeed the company's co-operation was complete and its conduct exemplary throughout this case. I was impressed with the honest and professional conduct of Messrs. Connery, Mergens and Ostrom in their dealings with the Human Rights Branch and the Board.

Both counsel asked for costs. I see no reason why costs should not follow the event. If counsel cannot agree on a proper amount they may speak to the Board.

ORDER

This Board of Inquiry concludes that the complaint is established and orders that the Respondent cease such constravention and refrain from committing the same or a similar contravention and further orders that the Respondent hire the complainant as a regular full time employee at its Youbou mill no later than May 1, 1979 and further orders that the Respondent pay costs in a sum to be agreed by counsel, or failing agreement, to be set by the Board.

DATED at Victoria this 17th day of April, 1979.

James MacPherson

Board of Inquiry
per James MacPherson