BOARD OF INQUIRY

PURSUANT TO THE HUMAN RIGHTS CODE, s. 16, R.S.B.C. 1979, Chapter 186

July, 1984

Vancouver, B.C.

BETWEEN:

RENEE CARIGNAN

COMPLAINANT

AND:

MASTERCRAFT PUBLICATIONS LTD.

RESPONDENT

REASONS FOR DECISION

MURRAY RANKIN: Chairperson and Sale Member

APPEARANCES:

DEREK FINALL, Esq. -- Appearing for the Complainant and for the Acting Director, Human Rights

No other appearances

On July 21, 1983, the Honourable R.B. McClelland, Minister of Labour, appointed me a one-person board of inquiry in respect of complaints launched by two individuals against Mastercraft Publications Ltd. and its owner/subscriber Mr. Bhan Sharma. One of the complainants, Ms. Kelly Champion was unable to attend the scheduled hearing of her complaint. A statutory declaration was provided by her mother who indicated that Ms. Champion had been married in England recently and would be unable to attend the hearing scheduled for her complaint. In the absence of evidence concerning her complaint, it is hereby dismissed.

With respect to the complaint of Ms. Carignan, two other preliminary issues arise. First, neither Mr. Sharma nor any representative of the corporate respondent appeared at the hearing scheduled for these complaints which was held in Vancouver on April 25, 1984. Efforts were made to locate Mr. Sharma or some agent of the respondent in the building while the hearing was adjourned. Counsel for the complainant, Ms. Carignan, filed an affidavit of service indicating that a notice of hearing had been sent to Mr. Sharma, owner and sole subscriber of Mastercraft Publications Ltd. by double registered mail. A copy of the card by which Mr. Sharma acknowledged receipt of the letter was also filed as an exhibit to the affidavit. Accordingly, I am satisfied that the respondent was duly served. I am equally satisfied that I have jurisdiction to proceed in the absence of the respondent. B.C. Regulation 151/75 made pursuant to the section 16(6) of the Human Rights Code explicitly empower a board of inquiry to proceed in the absence of a party who has been given notice of a hearing yet fails to attend (Regulation 11) •

Second, a certificate of registration of the corporate respondent was filed. The memorandum of Mastercraft Publications Ltd. indicates Mr. Bhan Pratap Sharma to be the sale subscriber to this company. The complaint filed with the Human Rights Branch by Ms. Carignan and filed as an exhibit to these proceedings is a formal complaint against Mr. Sharma, carrying on business as Mastercraft Publications Ltd. However, the "style of proceeding" drafted for this hearing contemplates the corporate respondent alone. I do not think that anything turns on technical concerns of company law. It would appear that the corporate defendant is merely the alter ego of Mr. Sharma and that any order may be made against Mr. Sharma in both his individual and corporate capacity.

Findings Of Fact

On September 2, 1980 the complainant began to work for the respondent. At all relevant times, Mr. Sharma's company published the Mid-Vancouver News and the Overseas Times. She was hired to work on a full-time basis. Her duties included some clerical work, telephoning and advertisement promotion. In addition, she was called upon to do some graphic art, work which she had enjoyed doing in college and contemplated studying later. She was anxious to take the job, not only because it related to a major field of interest but also because she had been unemployed and was anxious for any kind of job.

Things began to go sour almost immediately. She had lunch with Mr. Sharma on the first day, ostensibly to discuss the job. He asked if she liked strippers or enjoyed sex with different people. She tried to steer the conversation back to work-related topics. During

the first few days at work, he brushed by the complainant very closely and may have run his hand across her bottom. Since it was a small office and the employer and employee worked in very close quarters, the complainant could not be certain that the contact had been deliberate. However, in light of his earlier conversation, she was somewhat leery.

Shortly after this incident, she was working at her desk when Mr. Sharma, apparently inspecting her work, pressed his knee against hers for almost a full minute. After she had stared at his knee constantly, he finally moved it away. This time, there was no possible ambiguity in his actions. She remarked that he normally stood very close to her. However, she allowed for the fact that Mr. Sharma was not Canadian by origin and that different cultures have different conceptions of personal space. Nevertheless, since she was the only employee at his office she became somewhat anxious. Shortly after this incident, while she was typing at her desk, Mr. Sharma came up behind her and put his arms around her. When she tried to shrug off his embrace, Ms. Carignan testified that the following occurred: "When he drew his arms back, he sort of ran them over my chest". The complainant forcefully asked him to stop this kind of conduct and said that she was there to work. She was fearful that she would lose her job.

On another occasion, after she had made a good advertising sale, he came out of his office and embraced her in a bear hug. He feigned innocence when she complained, stating that he was merely congratulating her. Once again, the complainant recognized some ambiguity in this particular conduct on this occasion. However, she recalled yet

another incident when he sneaked up behind her and put his arms around her waist for no apparent, work-related reason.

During her employment he continuously asked her out for drinks at least every other day. Although she continuously stated that she did not want to socialize with her employer, he paid no attention. He would not acknowledge that he had done anything improper in embracing her, feigned innocence or acted as though she was hysterical. Finally, on September 12th, the day after he had embraced her in a bear hug, she quit. She testified: "It was taking all the energy I had just to be on my guard, and I couldn't even do my work properly ••• "if he came into the room, I got far, you know, anything like that, if he came in, I was out for stamps, if he came into my office, I was in the washroom. I was really frightened." When he asked her yet again to go out for drinks on September 12, she recognized the futility of trying to continue in a normal work relationship in his office. He could not understand why she was upset.

Since there was no representative for the respondent at the hearing I tried to compensate for this deficiency by closely cross-examining the complainant. She impressed me as a completely trustworthy witness. I am likewise satisfied that she did nothing to encourage Mr. Sharma. She also testified that she dressed conservatively and conducted herself in a professional manner.

Legal Conclusion

In her formal complaint, Ms. Carignan states that she was subjected to discriminatory conditions in her employment and dismissed on the basis of "sex and without reasonable cause (sexual harassment)".

Complaints about sexual harassment have only recently reached the board of inquiry stage in British Columbia. Professor Lynn Smith has thoroughly analyzed sexual harassment as a human rights issue in Za.-ankin v. JQbnstQoe, a decision released in July, 1984. I do not propose to repeat her lucid analysis of the sexual harassment issue. She draws both from precedents in other jurisdictions and upon the growing jurisprudence in this field; I fully adopt Professor Smith's analysis.

Section 8(1)(a) of the Human Rights Code provides as follows:

> Every person has the right of equality of opportunity based on bona fide qualifications in respect of his occupation and employment •••; and, without limiting the generality of the foregoing, •••no employer shall •••discriminate against that person in respect of employment or a condition of employment.

I do not think that the exception contained in section 8(2) is applicable in these circumstances.

Can sexual harassment constitute a contravention of this provision? Can it amount to a "condition of employment"? In a leading u.s. decision, BUndy v. Jack~On, 641 F. (2d) 934 (D.C. eir., 1981), Chief Judge Skelly Wright held as follows:

> The employer can thus implicitly and effectively make the employee's endurance of sexual intimidation a "condition" of her employment. The woman then faces a "cruel trilemma". She can endure the harassment. She can attempt to oppose it, with little hope of success, either legal or practical, but with every prospect of making the job even less tolerable for her. Or she can leave her job, with little hope of legal relief and the likely prospect of another job where she will face harassment anew. (at page 946).

Perhaps the leading Canadian case of sexual harassment is Bell ana Korczak v. Ladas and the Flaming Ste~, Steak House Tavern Inc. (1980) 1 C.H.R.R., D/155. In this case, Chairman Owen Shime, Q.C. defined the issue as follows:

> The evil to be remedied is the utilization of economic power or authority so as to restrict a woman's guaranteed and equal access to the workplace, and all of its benefits, free from extraneous pressures having to do with the mere fact that she is a woman •••• The forms of prohibited conduct that, in my view, are discriminatory run the gamut from overt gender based activity such as coerced intercourse to unsolicited physical contact to persistent propositions to more subtle conduct such as gender based insults and taunting, which may reasonably be perceived to create a negative psychological and emotional work environment. There is no reason why the law, which reaches into the workplace so as to protect the work environment from physical or chemical pollution or extremes of temperature, ought not to protect employees as well from negative psychological and mental effects where adverse and gender-directed conduct emanating from a management hierarchy may reasonably be construed to be a condition of employment." (paragraphs 1388, 1389.)

Of course, the application of these principles must not inhibit normal social contact between management and employees. The danger is the coerced nature of the social contact. "Such coercion or compulsion may be overt or subtle but if any feature of employment becomes reasonably dependent on reciprocating a social relationship proffered by a member of management, then the overture becomes a condition of employment and may be considered to be discriminatory." (Ibid, paragraph 1390.)

In this case, I have concluded that the complainant quit her job as a result of this kind of coercion, that it was coercion based upon her sex and that it had become a condition of her continuing employment that she endure the sort of harassment set forth above. Her failure to acquiese to sexual harassment resulted in her quitting her job. I do not think that it was unreasonable for her to have left in the circumstances which have been recounted. I am convinced that but for the conduct of Mr. Sharma, the complainant would have remained as his employee. Put another way, I believe that the complainant had

discharged her onus of establishing that compliance with Mr. Sharma's sexual advances was, in effect, a term or condition of her employment. (See, Graesser v. Porto (1983), 4 C.H.R.R. D/1569 (Ont.»;

The present case arose under the Human Rights Code of British Columbia. Section 8 of the Code prohibits discrimination "unless reasonable cause exists for the refusal or discrimination." Where an employer makes a decision which is unfavourable to a complainant and is based upon a factor that has little to do with the object of the decision, such as a decision not to hire those with certain physical disabilities in certain circumstances, under the Human Rights Code a board of inquiry has been able to afford appropriate relief to the complainant by finding that the employer had no "reasonable cause" for this discrimination. The new Human Rights Act (Bill 11, 1984) does not contain this "reasonable cause" provision. Since this case arises under the Human Rights Code I find, as an alternative conclusion, that sexual harassment is discrimination without reasonable cause, within the meaning of that term in the Human Rights Code. In this respect, I adopt the reasoning of Professor Lynn Smith in Zaf{ankin v. JObnstooe.

Conclusion

I have found that the complainant is a victim of discrimination in respect of a condition of employment, contrary to section 8 of the Human Rights Code. I have also concluded that there was no "reasonable cause" for the discrimination arising in the circumstances described above. She has made out a prima facie case with respect to a contravention of the Human Rights Code. The respondent, although duly served, has chosen not to attend and offer any explanation for Mr. Sharma's conduct. The Supreme Court of Canada has held:

> Once a complainant has established before a board of inquiry a prima facie case of discrimination •••he is entitled to relief in the absence of justification by the employer. (Ontario Human Rights Commission et ala v. Borough of Etobicoke (1982) 132 D.L.R. (3d) 14 at 19.)

Accordingly, this board orders that the respondent and Mr. Bhan Pratap Sharma cease to contravene s. 8 of the Human Rights Code and refrain from committing the same or a similar contravention.

In addition, I think that the complainant should be compensated for her loss of earnings for a four week period after she quit her job on September 12, 1980. There is evidence that she was earning $4.00 per hour for a forty hour work week at that time. She found work in a restaurant four weeks afterward. Based upon a salary of $160.00 per week, she therefore lost $640.00. However, in order to compensate her fully under section 17(2) (b) of the Code, I believe that some award of interest must be included under this heading. Although there appears to be no decision of a B.C. board of inquiry specifically on point, several Ontario boards of inquiry have determined that they have jurisdiction to award interest. For example, in Olarte et ala v. DeFilippis et ala (1983) 4 C.H.R.R. at D/1705 Chairman Cumming referring to a similar provision in the Ontario Human Rights Code, *R.S.O.* 1970, c. 318, stated as follows:

> In my opinion, the notion of "compensation" includes an interest value component for the period of time from the date of notification of the injury to the date of the order of compensation being made by the tribunal. (paragraph 14909).

This case is currently on appeal to the Ontario Divisional Court.

In another Ontario decision, Chairman Zemans was faced with a situation similar to that which occurred in this decision. The com-

plaint was launched on December 18, 1980 not long after the complainant left her employment. Over three and a half years have gone by - through no fault of hers. Chairman Zemans said as follows:

> As the length of delay in this case was totally beyond the control of the complainants, I believe that they are entitIed to interest for four years on their awards. Mears et al, v. OntariO Hydro et ala (1983) 5 C.H.R.R. D/1927 at paragraph 16612.

He goes on to award interest at the rate of 11%, using the standard of the Ontario Judicature Act as the appropriate standard for human rights proceedings. Similarly, I order interest on the sum of $640.00 be paid in accordance with the rates of interest payable pursuant to the Court Order Interest Act, R.S.B.C. 1979, c. 76. I order that this interest be paid at this fluctuating rate on a a non-compounded basis from December 18, 1980 when the complaint was launched until the date of this order.

Finally, the board will order that aggravated damages be paid pursuant to section 17(2)(c) of the Code which provides:

> (c) Where the board is of the opinion that
> (i) the person who contravened this act did so knowingly or with a wanton disregard; and (ii) the person discriminated against suffered aggravated damages in respect of his feelings or self-respect,
> the board may order the person who contravened this act to pay to the person discriminated against such compensation, not exceeding $5,000, that the board may determine.

The purpose of awards under this provision is to compensate the plaintiff for non-pecuniary losses, usually in the nature of emotional distress. I adopt the analysis of this provision set out by Chairman Black in Holloway v. MacDOoalg and ClaircO Foods Ltd. (1983) 4 C.H.R.R. D/1454 at paragraph 12525-12536. There, Chairman Black was of the following view:

> If, however, the respondent knowingly did an act (such as refusal to continue to employ) specified in section 8 and knowingly took into account the fact that the complainant was a member of a protected group, or if there was wanton disregard as to that matter, I believe that the first criterion for applying section 17(2) (c) has been met. (Paragraph 12531.)

Here, the undercontroverted evidence of the complainant established that Mr. Sharma, for the respondent, was aware by his words or actions that unsolicited physical contact was unacceptable. Despite continuous remonstrations, his behaviour remained unchanged. The respondent's principal, therefore knew or ought to have known that this impugned conduct of sexual harassment created a negative psychological and emotional work environment which became intolerable for the complainant. At the very best, Mr. Sharma exhibited a wanton or reckless disregard as to the affect of his conduct on the complainant and her work environment. Accordingly, an award of $1,000 under this heading is ordered.

Costs are also ordered for the complainant.

By way of summary this board orders as follows:

1. That Mastercraft Publications Ltd. and Mr. Bhan Pratap Sharma cease to contravene section 8 of the Human Rights Code and refrain from committing the same or a similar contravention;
2. That the respondent or Mr. Sharma pay the complainant the sum of $640.00 for lost earnings, which sum is to be increased by the payment of uncompounded interest at the rates stipulated pursuant to the Court Order Interest Act, R.S.B.C. 1979, c. 76 from the date of the complaint herein, December 18, 1980 to the date of this order;
3. The sum of $1,000 under section 17(2) (c) of the Code;

4. Costs.

Costs shall be paid in an amount to be settled by agreement of the parties. Failing agreement costs shall be paid by the respondent in an amount which will be determined by this Board in accordance with the party and party costs provisions of the B.C. Supreme Court Rules. This Board will also be available if the parties are unable to reach agreement respecting the exact sum payable for lost earnings in light of the interest principles stated above.

DATED at Victoria, British Columbia, this ~O~day of July, 1984.

Murray Rankin