

Ardena, Trinidad v. 2. Peua River Block. Acquired at (May 30, 1977) from Commercial Guaranty.

2-43

PLEASE RETAIN ORIGINAL ORDER

Vancouver State of Women June 21, 77

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

and

IN THE MATTER OF A COMPLAINT BY  
DARLENE DRIEDIGER AGAINST GLEN DALKE,  
DON MARSHALL AND PEACE RIVER BLOCK  
NEWS LTD.

JUDGMENT

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 (hereinafter referred to as the "Code") to hear and decide upon the complaint of Mrs. Darlene Driediger.

The Board of Inquiry convened at Dawson Creek, British Columbia and the hearing took place on the 9th and 10th days of March, 1977. The complainant, Mrs. Darlene Driediger, and the two personal Respondents, Mr. Glen Dalke and Mr. Don Marshall, were present at the hearing. Mr. R. S. Cosburn, Esq. appeared as counsel on behalf of Messrs. Dalke and Marshall and the corporate Respondent, Peace River Block News Ltd. (hereinafter referred to as the "News"). Ms. Kathleen Ruff, the Director appointed under section 12(1) of the Code and the chief executive officer of the Human Rights Commission, appeared and was represented by Mr. S.F.D. Kelleher, Esq.

The allegation of the complainant is that, contrary to the provisions of section 8 of the Code, the Respondents have denied to her the right of equality of opportunity based upon her bona fide qualifications in respect of her employment. In particular, Mrs. Driediger alleges that her former employer, the News, refused to

continue to employ her or discriminated against her in respect of her employment without reasonable cause. She alleges that her employment was terminated because she had been charged with trafficking in marihuana and with possession of marihuana and she submits that termination of her employment at the News because of these charges did not constitute reasonable cause under section 8 of the Code. The position taken before this Board by the Director, Kathleen Ruff, is the same as that of the complainant.

At the outset, counsel for the Respondents raised a number of preliminary matters unconnected with the substance of the actual complaint upon which the Board ruled before any evidence was heard upon the complaint. It is convenient to record those rulings here.

Mr. Cosburn requested the Board to adjourn the proceedings to permit the Respondents to apply to the courts for an order prohibiting the Board from conducting any inquiry into the allegations made by the complainant. The substance of counsel's submission was that the Code was enacted in such a form that proceedings taken thereunder in this case prior to the date of the hearing and any hearing and decision by this Board would result in a denial to the Respondents of the principles of natural justice. In this connection, he points to the fact that under the Code the Respondents are given no independent power to compel the attendance of witnesses at the hearing, whereas the Director, when acting pursuant to section 15 of the Code, has certain powers to require disclosure of information. On this point, it will first be observed that the powers of the Director just mentioned are conferred for the limited purposes set forth in section 15, namely, for the



purpose of an inquiry, investigation or settlement attempt under subsection (1) of section 15. Those powers are exhausted at the stage of a hearing before a Board of Inquiry. Mr. Cosburn also points to section 12(3) of the Code which grants to the Director the power of a commissioner appointed under the Public Inquiries Act for the purposes of an inquiry under the Code. Whether or not such an inquiry includes an inquiry conducted by this Board (as opposed to an inquiry under section 15 of the Code) does not, in the opinion of the Board, control the outcome of counsel's objection. The central fact is that before this Board the Respondents may request the Board to compel the attendance of witnesses, the Board having such a power by virtue of section 16(2) of the Code and Regulation 20 of the regulations enacted under the Code. Counsel has not made any such request of this Board nor did he suggest that he was unable to obtain the attendance of any potential witness. His objection focuses on the form of the Code and not on the facts of the Respondents' circumstances. The Board ruled on this point that there was no denial of natural justice.

Mr. Cosburn also submitted that there was a denial of natural justice and a reasonable apprehension of bias because the Director and the Board of Inquiry were both appointed by the Minister of Labour, the Minister responsible for the administration of the Code. Section 12(1) of the Code provides for the appointment of the Director and section 16(1) of the Code provides for the appointment of the Board of Inquiry. Mr. Cosburn was very careful to point out that he was not suggesting that there was in fact in this case any bias, but he submitted that the Code being framed in this way raises a reasonable apprehension of bias. The Board did not agree with this view of the Code and rejected this submission.

There is an alternative reason, in the opinion of the Board, to reject the above objections which, to repeat, were based upon the form of the Code and not upon the actual facts of this case. Even if it could be said that the form of the Code does not conform to common law principles of natural justice, the Legislature is free to alter common law principles and, assuming the Legislature was acting within the ambit of section 92 of the British North America Act, it has ample authority to enact the Code in the form it did. The Legislature is supreme within the ambit of its legislative authority.

Mr. Cosburn also raised the following objection about the presence of the Director and her counsel. He submitted that the Director was entitled to be present in the capacity of a registrar, but that she was not entitled to actively press a point of view one way or the other before this Board of Inquiry. The Board made the following ruling in respect of this submission. Under section 12(2) of the Code, the Director shall act as chief executive officer of the British Columbia Human Rights Commission and under section 11(4) of the Code one of the functions of the Commission is to promote compliance with the Code. It would therefore be part of the Director's duties to carry forward the above function of the Commission. In addition, the Board found that the Director was entitled to be present, to be represented by counsel, to present evidence and to make submissions by virtue of section 16 of the Code.

The following objection was also raised by counsel for the Respondents. Mr. Cosburn submitted that, while Mr. Kelleher had been retained by the Ministry of the Attorney General to appear and represent the Director before the Board, he was also, in effect, representing the

complainant as well, because it was Mr. Kelleher's intention to call and examine the witnesses upon which the Director and the complainant would rely, to cross examine the Respondents' witnesses and to make the submissions upon which the complainant and the Director would rely. Mrs. Driediger's intended participation was to appear as a witness. Counsel submitted that this arrangement was a denial of natural justice to the Respondents. In reply, Mr. Kelleher reiterated that he was retained to act for the Director, but that the above arrangement was proposed to be followed because, in this case, the position taken by the Director and the complainant were the same. He indicated that he was not in the position of taking instructions from the complainant should it develop that the interests of the Director and the complainant were to diverge. The Board observed that whether, in law, Mr. Kelleher was proposing to act as counsel merely for the Director or for the complainant as well, it could see no prejudice to the Respondents in the arrangement. The Board asked Mr. Cosburn how this arrangement could prejudice his clients. Counsel's reply was that when taken together with the objections previously mentioned, the administration of the Code resembled an "inquisitorial" system as contrasted with our familiar "adversarial" system. The Board did not find itself in agreement with Counsel's submission and accordingly rejected it.

Finally, the Respondents objected to the printed form of complaint signed by the complainant. Mr. Cosburn observed that Regulation 3 under the Code provides that a complaint under the Code shall be in writing on Form One of these Regulations. The Regulations display a complaint form printed on a single page, whereas the printed form signed by Mrs. Driediger contained printing and completed information on both sides of the page. The Board found the objection to be without substance, and further relies on Regulation 13 in rejecting this submission.



The Board will now turn to a consideration of evidence tendered at the hearing.

In the summer of 1976, Mr. William Loiselle was in the process of being transferred and promoted from his position as advertising sales manager at the News to that of publisher at an affiliated newspaper. Mr. Dalke, then an advertising sales person at the News, was to assume the role of sales manager being vacated by Mr. Loiselle. Because of the vacancy thereby created on the sales force, Mr. Loiselle placed an advertisement in the News inviting applications for the position of advertising salesperson at the News.

The Complainant submitted an application for the position along with ten or eleven competing applicants. For a brief period of time ending when she moved to Vancouver, Mrs. Driediger had worked in a similar position at a neighbouring newspaper in Fort St. John which she gave as a reference. In selecting Mrs. Driediger for the position at the News, Mr. Loiselle was influenced, in part, by this previous experience. Mr. Loiselle explained to her that her function would be to prepare advertising "layouts" (sample forms of advertisements) which she would then endeavor to sell to prospective advertisers for inclusion in the News. Mrs. Driediger was offered a salary of \$525 per month and it was agreed that she would commence her employment on the first working day in August. Mr. Loiselle testified that he explained to her that she was being employed on the basis of a ninety day probationary period, at the end of which her capabilities would be discussed and a decision would be made as to future employment and salary increase.

Mrs. Driediger did not appear for work on the

scheduled commencement date and, on the following day, Mr. Loiselie telephoned Mrs. Driediger to inquire about her absence. The Complainant informed him that she was ill and that her doctor had advised her to remain at home to recuperate for a week or so. Mr. Loiselie testified that he agreed to her beginning work on August 15, 1976, which she did. From that date until September 13, 1976 when he actually left the News for his new position, Mr. Loiselie testified in cross examination that he had no occasion to complain about her work, although it should be added that he was spending part of his time during that period at the newspaper of which he became publisher.

There is a further absence from work to be mentioned here, because of the reliance placed upon it by the Respondents. In cross examination by Mr. Cosburn, Mrs. Driediger testified that she flew to Vancouver one weekend and missed the return flight on the Sunday evening. She explained that she was endeavoring to fly on a "Youth Plan" in respect of which reservations are not accepted and that, the flight being fully booked with regular passengers, she was unable to obtain a seat on a standby basis. The complainant further testified that she returned to Fort St. John Monday morning, departing Vancouver at 7:30 a.m., and upon arrival telephoned the News to indicate she would be in for work in the afternoon. In this connection, Mr. Dalke testified that on the morning in question he received a message indicating that the complainant had telephoned from Fort St. John, explaining that she had missed her flight and would arrive for work in the afternoon. The complainant did appear for work that afternoon.

It should also be mentioned that the complainant was awarded a fifty dollar per month increase in salary effective as of October 1, 1976, a date approximately two



weeks prior to her termination. Mr. Dalke testified that the complainant did not request this increase and he further testified that no reason for the increase was communicated to Mrs. Driediger. He testified to this Board, however, that the increase was intended to operate as an inducement to Mrs. Driediger to improve her sales performance, which he regarded as being unsatisfactory. More will be said about sales performance later, but the Board here observes Mr. Dalke's testimony that, while he regarded Mrs. Driediger's advertising layouts as being "very good", he was not satisfied with her actual volume of sales. In this connection, Mr. Dalke formed an apprehension that the complainant may not have been calling upon her designated accounts to solicit sales. Accordingly, he interviewed a number of her accounts, but he testified that she was in fact maintaining her call frequency upon the accounts he checked.

The Board now turns to the events more immediately surrounding the complainant's termination.

Mrs. Driediger testified that on Sunday, October 10, 1976, she learned that she was being charged with trafficking in marihuana and possession of marihuana and that she was required to make a court appearance Tuesday, October 12, 1976 in respect of these two separate charges. Copies of the two Informations upon which the charges were based were tendered to the Board. The first Information in point of time, sworn July 21, 1976, alleges that Darlene Driediger did unlawfully traffick in marihuana on or about July 10, 1976. There is an endorsement dated February 3, 1977 on this Information indicating that a stay of proceedings was entered by the Crown in respect of the trafficking charge. The second Information, sworn October 12, 1976, alleges that Darlene Driediger and one

Brian James Driediger did unlawfully possess marihuana on or about October 9, 1976. There is also an endorsement dated February 3, 1977 on this information indicating that the Crown entered a stay of proceedings in respect of the possession charge. In summary then, Mrs. Driediger was alleged to have trafficked in marihuana on or about July 10, 1976 and to have possessed marihuana on or about October 9, 1976. The complainant did appear on October 12 in respect of the charges and was, therefore, absent from work at the News.

Mr. Dalke testified that, upon his arrival at work the morning of October 12, he found on his desk a message indicating the complainant would be absent that day, but giving no explanation for the absence. That evening, on the newscast, he heard mention of the complainant's name along with other names in connection with drug charges. He thereupon telephoned the editor of the News, Mrs. Judy Thompson, whom he requested to check into the matter. One of Mrs. Thompson's regular duties was to collect items for a column in the News described as "Police Beat".

Still on the evening of October 12, Mrs. Marshall, wife of the Respondent Mr. Don Marshall, received a telephone call from the complainant who asked to speak with Mr. Marshall. Upon being told that Mr. Marshall was in the hospital, Mrs. Driediger informed Mrs. Marshall of the above noted charges. Mrs. Driediger went on to say that "it was a stupid charge" and, according to Mrs. Marshall's testimony, the complainant also said that she "had only passed a joint to a narc" at a party.

Following her conversation with Mrs. Driediger, Mrs. Marshall telephoned Mr. Dalke and relayed to him her conversation with the complainant. Thereafter, Mr. Dalke telephoned Mrs. Driediger who repeated to him the

the information she had previously related to Mrs. Marshall, including, Mr. Dalke said, the remark about passing a "joint" to a "narc". Mrs. Driediger also expressed concern about her job at the News. Mr. Dalke instructed the complainant not to come to work for a few days until he "had a chance to check out the seriousness of the charges".

On Wednesday morning October 13, 1976, Mr. Dalke conferred with Mrs. Thompson, who related that she had contacted the police who had indicated that the prospect of Mrs. Driediger avoiding conviction was unlikely in the extreme. Later that day Mr. Dalke met with Mr. Marshall and it was then decided to terminate the complainant.

Mr. Marshall is the Publisher of the News and was the person with ultimate decision making authority with respect to terminating the complainant. Although Mr. Dalke conferred with Mr. Marshall about the decision, based on Mr. Marshall's testimony, the Board has little difficulty in holding that Mr. Marshall alone made the decision to terminate and that Mr. Dalke was merely entrusted with the task of communicating to the complainant Mr. Marshall's decision. Mr. Dalke then telephoned the complainant with the news of termination. Mr. Dalke testified that he stated to her "under the circumstances, we're forced to terminate your employment". He further testified that he said to her that he "could see some of the advertisers being cruel enough to ask -- what are you selling today" if she were to continue in her job at the News. The conversation ended with an arrangement for Mrs. Driediger to pick up her final paycheck on Friday, October 15, 1976, which is what later occurred.

Pausing here, it is clear that a reasonable person in the position of the complainant would conclude from the telephone conversation just mentioned that the



decision to terminate was made because of the drug charges and for that reason alone. Indeed, on cross examination, Mr. Dalke agreed that she could draw no other conclusion. Yet, the Board heard evidence, particularly from Mr. Dalke, that the charges were but one of the reasons for the dismissal. Mr. Dalke testified, and it was the submission of the Respondents, that there were three reasons for the termination, namely, the drug charges, inadequate sales performance and the absences from work referred to earlier herein. In Mr. Dalke's words, the charges were the "straw that broke the camel's back". Because the complainant and the Respondents have taken conflicting positions on the cause of termination, it will be necessary to consider the evidence on this issue at some length.

With regard to the matter of absences described earlier herein, the Board would make the following observations. A significant fact is that this matter was not mentioned when notice of termination was communicated to the complainant. Although Mr. Dalke testified that absenteeism was in his mind and was discussed when he conferred with Mr. Marshall about termination, the first expression of it to anyone outside the News occurred October 28, 1976 when Mr. Dalke gave absence as a reason to Mr. Raymond Stea, an Industrial Relations Officer with the Ministry of Labour, who had been designated by the Director, Ms. Ruff, to investigate the matter pursuant to section 15 of the Code. With regard to Mrs. Driediger's failure to appear on the first working day in August, it will be recalled that Mr. Loisel agreed to postpone the commencement date of her employment when the reason for the absence was explained. With regard to the absence on the Monday morning following the Vancouver trip, while it is of course reasonable to

expect an employee to arrange her affairs in such a way as to make herself available for work, she did telephone the office upon her arrival at Fort St. John. There was no evidence to show that she was ever criticized or cautioned about this event, or about absenteeism in general. Finally, her absence on October 12, the date of her court appearance, was both unavoidable and preceded by a message to the office.

Turning to the matter of the complainant's job performance, the evidence of Mr. Dalke is that, although he regarded her advertising layouts to be very good, he believed her sales to be inadequate. There are several things to be said about this. The complainant was a young woman, twenty years of age, who had but one brief previous experience in advertising sales prior to joining the News. She was started at a salary which Mr. Marshall described as being not "tremendous" and which was significantly less than the starting salary granted to a fellow advertising salesperson employed by the News previous to the complainant. There is Mrs. Driediger's uncontradicted evidence that she was given the smaller, less lucrative accounts to solicit, although it is to be expected that the newest addition to the sales force would start at the bottom. There is also Mrs. Driediger's uncontradicted evidence that she brought in a number of new accounts, the names of which were specified to the Board. There may be much truth in the adage "salespersons are born, not made", but the complainant was in the job only two months when terminated.

Then there was the salary increase granted two weeks prior to termination, an increase which was not requested by the complainant and the reason for which was not communicated to her when it was given, although Mr. Dalke testified that he intended it to act as an incentive to improve sales. When questioned by Mr. Kelleher about his failure to communicate this reason for the increase, Mr. Dalke replied "I don't know why not. Perhaps we got busy, I can't recall why we didn't have that conversation, specifically with Darlene". Mr. Dalke went on to say that perhaps such a conversation was not needed, because the sales force would gather for coffee breaks at a local hotel where discussion would take place as to how sales were going as a group. On these occasions, Mr. Dalke would single out specific accounts, belonging to one or another of the salespersons, and suggest that they be actively pursued. However, the central fact remains that at no time was Mrs. Driediger taken aside and advised that her performance was wanting. Further, in cross examination, Mr. Dalke conceded that Mrs. Driediger was given no goals to achieve or quotas to meet and that, although the previous year's sales figures were known to him and his goal was to exceed those figures, they were never made known to the complainant. Finally, again in cross examination, Mr. Dalke agreed that the complainant had a personality suited for sales.

The Board also refers to the evidence of the previous sales manager, Mr. Loiselle, whose testimony was mentioned earlier in this judgment. Mr. Loiselle testified that from August 15, 1976 to September 13, 1976, when he was partially in attendance at the News, he had no occasion to complain about Mrs. Driediger's work.



Finally, the Board turns to the testimony of the Publisher, Mr. Marshall. During his examination in chief he testified that, while he was not in direct contact with Mrs. Driediger, he was personally satisfied with her work, although he was aware that Mr. Dalke wasn't "quite as happy as he could have been". When questioned by Mr. Cosburn as to whether anything was said by Mr. Marshall to Mrs. Driediger on the occasion of the salary increase with regard to that increase indicating the end of the probationary period or complete satisfaction with her work, Mr. Marshall stated "No, we were not really at a point of her development with our organization at that time (October 1, 1976) to make a full evaluation of her performance". Subsequently, when questioned by Mr. Cosburn about the meeting between Mr. Dalke and Mr. Marshall where the decision to terminate was made, Mr. Marshall testified as follows:

- Q. And on the basis of that information (the information obtained by Mrs. Thompson from the local police) what happened next?
- A. Well I had further consultations with Mr. Dalke and we came to the conclusion that because of her own admitted guilt, confirmed by the police in question, that we simply couldn't lay her off under the circumstances, depending the outcome of a trial, and we felt it necessary to terminate her employment.
- Q. All right, and can you advise the Board the thoughts that went through your mind upon the basis that you made that decision? Or let me ask you this, was it a decision you made lightly without giving it any thought?
- A. No, Most certainly not. I was very, very surprised, because up to that point I had had a great deal of faith in Mrs. Driediger staying in our employment, and I personally felt, at that point, that given time, she might come along and improve in her sales. And I wanted to give her more time at that point.
- Q. And that was the reason the advance, or no, the raise was provided?
- A. That was the reason the raise was provided, yes. And I found it very hard to believe, as a matter of fact, that she had indeed been picked up for trafficking and possession. And in fact that she had admitted to her own guilt, saying that it was a foolish charge. So I was very surprised indeed.

- Q. And was that the only basis upon which you made your decision to terminate her? Or did you have any other thoughts?
- A. No, naturally I believe that a community newspaper should reflect the moral and ethical standards in the community, and I knew that should I keep her in our employ, that I would have a severe castigation by the general public, which I didn't feel the newspaper should have that type of stigma attached to it.
- Q. Were there any other factors that you considered in making that decision?
- A. Well, my own feelings are that what a person does after their normal hours of work, is really none of my business. But for example in the use of alcohol, but alcohol is a legal thing . . . the trafficking thing was more unacceptable to me than anything, and I was very concerned that the association of other members of our staff, and our news carriers, with the people touring our business, the general reflection by our advertisers, it would totally prohibitive to keep her on our staff.
- Q. Would your decision have been any different if you had not understood Mrs. Driediger to have admitted the fact as you said, passing a joint to a narc at a pot party?
- A. Yes, my decision would have been different. I would have advised her, you know, that we would lay her off for a period of time, pending the outcome of her trial proving either her guilt or her innocence. I wasn't in a position to establish that myself.

Having reviewed the evidence in the context of the Board's earlier finding that it was Mr. Marshall who made the decision to terminate, the Board is driven to the conclusion and holds that Mr. Marshall decided to terminate the complainant because of the possession and, particularly, the trafficking charges. The Board finds that Mr. Marshall was influenced, not only by the fact of the charges having been made, but also by the complainant's statements made in her telephone conversations of October 12 with Mrs. Marshall and Mr. Dalke, and by the report Mrs. Thompson received from the local police. The Board rejects the contention that sales performance and absenteeism were reasons for the termination.



Having concluded that Mrs. Driediger was terminated because of the drug charges, the issue arises as to whether the termination amounted to a violation of section 8 of the Code, as was submitted by the complainant. For ease of reference section 8 is set out below.

8.(1) Every person has the right of equality of opportunity based upon bona fide qualifications in respect of his occupation or employment, or in respect of an intended occupation, employment, advancement, or promotion; and, without limiting the generality of the foregoing,

(a) no employer shall refuse to employ, or to continue to employ, or to advance or promote that person, or discriminate against that person in respect of employment or a condition of employment; and

(b) no employment agency shall refuse to refer him for employment,

unless reasonable cause exists for such refusal or discrimination.

(2) For the purposes of subsection (1),

(a) the race, religion, colour, age, marital status, ancestry, place of origin, or political belief of any person or class of persons shall not constitute reasonable cause;

(a1) a provision respecting Canadian citizenship in any Act constitutes reasonable cause;

(b) the sex of any person shall not constitute reasonable cause unless it relates to the maintenance of public decency;

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

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

As the Board indicated at the outset, the submission of the complainant and the Director is that the Respondents refused to employ or continue to employ the complainant without reasonable cause.

In determining whether or not reasonable cause existed in this case within the meaning of "reasonable cause" as used in section 8, assistance may be gained from



the provisions of paragraph (c) of subsection 2 of section 8. Mr. Kelleher submitted that, even if Mrs. Driediger had been tried and convicted of possession of marihuana and trafficking in marihuana, such convictions would not constitute reasonable cause in this case because the charges would not relate to the occupation or employment of a person (i.e. Mrs. Driediger). In making this submission, counsel is, of course, tracking the language of paragraph (c). By way of contrast with this case, counsel suggested that if a bookkeeper were convicted of fraud, or a cashier were convicted of theft, such convictions would relate to the respective employments and provide reasonable cause for termination. In Mrs. Driediger's case, counsel submitted that convictions for possession or trafficking in marihuana would not denote an inability to perform her job function. Having taken that position, counsel goes on to say therefore mere charges, as opposed to convictions, could not provide the Respondents with reasonable cause. He also cautions that the presumption of innocence until conviction is fundamental to our system of justice. In what would appear to be a kind of companion submission, counsel suggests that a proper test to use when applying paragraph (c) is whether the employer is being asked to undertake an undue risk in that the repetition of the events (i.e. assuming convictions) could hurt him unduly.

The Respondents, however, submit that conviction for possession and trafficking in marihuana would, in this case, constitute reasonable cause for termination. In this connection, the Respondents relied on evidence from two residents of Dawson Creek. Dr. Brown, a minister of the United Church of Canada in Dawson Creek and the father of a son who aspires to be a newspaper carrier at the News, testified that he would

not wish his son to take that job if he knew that a person who trafficked in drugs were an employee at the News. Dr. Brown said he would be concerned, but less so, if the person were a user of drugs but did not traffick in them. Mrs. Epp, a schoolteacher and mother of eight children, one of whom is a newspaper carrier at the News, also gave evidence. Mrs. Epp testified that if it were known that an employee of the News used and trafficked in marihuana, she would not want her son to be near the offices of the News. On cross examination she agreed that if a person were convicted of such offences, had served the required sentence and wished an opportunity to work at the paper again, such a person should be given an opportunity to do so. Evidence was also tendered that classes from local schools would periodically tour the premises of the News and that, since the date of the complainant's termination, the News had instituted a journalists training program for seven teen age students which is conducted in the News premises as an adjunct to the school journalistic club.

As the Board understands Mr. Cosburn's submission, he says that, whether or not convictions would affect the ability of the person convicted to perform his or her job function, such convictions would relate to the employment of "a person" (the words used in paragraph (c)), namely, the younger employees referred to above. Mr. Cosburn goes on to say that, while Mrs. Driediger was not convicted by a court of law, the word "conviction" as used in paragraph (c) of section 8 was intended by the Legislature to bear a different and less restrictive meaning. He says the facts disclosed in this case amount to the equivalent of a conviction for the purposes of paragraph (c) because: there were charges; there were statements made by the complainant which he describes

an admissions (though he doesn't indicate whether those statements should be taken as admissions as to both charges or to only one and, if so, to which one -- the evidence itself is not entirely clear on this point); and finally there was the information obtained by Mrs. Thompson from the police. Accordingly, counsel submits that the requirements of section 8 have been complied with and reasonable cause for termination existed. The Board rejects this interpretation of paragraph (c), being of the opinion that the word "conviction" means conviction by a court of law.

In the alternative, and on the assumption that the word conviction in paragraph (c) bears the meaning ascribed to it by the Board, the Respondents submit that, because there were not convictions, paragraph (c) is inapplicable to this case, and therefore a determination of whether reasonable cause existed must be made from a general review of the circumstances, including, inter alia, the nature of the community, the nature of the News' enterprise, and the views of the populace with respect to that enterprise. The Board does not find it necessary to deal with Mr. Cosburn's submission on this point, because it finds that paragraph (c) of section 8 of the Code is applicable.

With regard to paragraph (c) of section 8(2) of the Code, the Board is not prepared to decide, on the evidence that has been placed before it, that conviction for trafficking in marihuana would necessarily be unrelated to the occupation or employment of a person such as the complainant at the News. In making this observation, the Board has in mind the news carriers and other young people who frequent the offices of the News and the possible effect upon them, assuming that a person so convicted determined to resume trafficking. However,



those are not the facts before this Board. At the time of her termination, Mrs. Driediger was not convicted of the charges which had been brought against her. As noted earlier herein, some time after her termination a stay of proceedings was entered in respect of each charge; however, the Board draws no inference about innocence or guilt from this disposition of the charges and places no reliance upon such disposition in deciding this complaint. Indeed, the Board does not consider it to be its function or duty to determine the innocence or guilt of the complainant, nor would it be prepared to do so only on the evidence adduced at the hearing; all that is for a court of law to decide.

Accordingly, the question is whether, the complainant being charged with possession of and trafficking in marihuana but not tried or convicted, there was reasonable cause to terminate her. This Board holds that termination in these circumstances did not constitute reasonable cause and that section 8 of the Code was therefore violated. In reaching this conclusion reliance is placed upon paragraph (c) of section 8(2) which provides that "conviction for a criminal or summary conviction charge shall not constitute reasonable cause" except in the circumstances set out. From this the Board infers that a mere charge would not constitute reasonable cause for termination.

What course, then, might the News have lawfully adopted in the circumstances with which it was faced? While it is for a court to determine the innocence or guilt of an accused, and not the employer, yet circumstances may exist where an employer might sincerely consider it inappropriate for the employee to continue in his duties pending such a determination. If such circumstances were

shown to exist and if the employer were acting bona fide upon those circumstances, this Board is of the opinion that it may be lawful under the Code to suspend, as opposed to terminate, the employee pending the disposition of the charges. In this connection, reference is made to section 130 of the Public Schools Act of British Columbia which provides in part that a School Board may suspend a teacher from the performance of his duties where the teacher has been charged with a criminal offence and, in the opinion of the Board, the circumstances thereby created render it inadvisable for him to continue his duties. The section goes on to require reinstatement in the event of acquittal and empowers the School Board to dismiss in the event of conviction. This Board is certainly not suggesting that the provisions of the Public Schools Act just mentioned would provide any sort of general guideline for the interpretation and application of paragraph (c) of section 8 of the Code, particularly when regard is had to the differing provisions regarding dismissal. It is mentioned because it illustrates a course which steers between retaining an employee in his duties and terminating him and which may be appropriate in some circumstances.

There is a further matter to be disposed of at this juncture. The Board has held, for reasons expressed previously herein, that the matters of sales performance and absence from work were not in fact reasons for which the complainant was terminated. Assuming that the Board was wrong in so deciding and that there were in fact three reasons, namely, the charges, sales performance and absenteeism, this Board would still be of the opinion that a violation of section 8 of the Code occurred. In the opinion of the Board, termination because



of the charges did not constitute reasonable cause and this factor cannot be brushed aside even if it were not the only reason for termination. In other words, as long as the charges constituted one of the reasons for termination, this factor would have been sufficient to constitute a violation of the Code. In so deciding, the Board finds itself in agreement with the statements of principle to this effect found in The Matter of the Complaint of Naugler Against The New Brunswick Liquor Corporation, a decision of a Board of Inquiry constituted under the Human Rights Code of New Brunswick (unreported) and in The Matter of the Complaint of Jones against Huber, a decision of a Board of Inquiry constituted under the Ontario Human Rights Code (unreported).

It will also be necessary to dispose of the Respondents' submission that Mrs. Driediger was not, in law, an employee because she was retained on the basis of a ninety day probationary period which had not expired. The Board has no difficulty in holding that the complainant was an employee, particularly in light of the wide definition of "employment" found in section 1 of the Code.

There is also the further issue of whether liability should attach to all three Respondents. Based on the evidence, the Board earlier in this decision accepted Mr. Cosburn's submission that Mr. Dalke did not in fact participate in the actual decision to terminate; Mr. Dalke was merely the messenger who communicated Mr. Marshall's decision to the complainant. Accordingly, the Board finds the Respondent, Mr. Dalke, not to have been in violation of the Code. On the other hand, the Board finds the Respondent, Mr. Marshall, the man who made the decision to terminate, to have acted in violation of the Code. Based upon the well known principles of



vicarious liability, the Board finds that Mr. Marshall was acting within the scope of his employment when he made the decision to terminate and that the corporate Respondent, the News, was also in violation of section 8 of the Code.

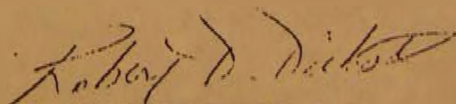
Turning to the matter of remedies set forth, in part, in section 17 of the Code, subsection 2 thereof contains a mandatory requirement that the Board shall order any person who contravened the Code to cease such contravention and to refrain from committing the same or a similar contravention. The Board so orders Mr. Marshall and the News. It is to be observed that Mrs. Driediger did not seek reinstatement to her former position at the News.

Unlike the foregoing order which is mandatory, the remainder of subsection 2 of section 17 is permissive in its authority. Paragraph (b) permits the Board to order compensation to a person discriminated against for all or such part as the Board may determine of wages or salary lost by reason of the contravention of the Code. Mrs. Driediger seeks compensation under this paragraph, but no specific amount was claimed at the hearing. The Board heard uncontradicted evidence from the complainant that since her termination from the News she made a number of attempts to secure replacement employment, the details of which attempts were specified to the Board, but that she had been unsuccessful as of the date of the hearing. Had she remained in the employment of the News to the date of the hearing, it was agreed that she would have earned a gross salary of approximately \$2,875 calculated on her wage rate existing at the date of termination. However, it was generally agreed that she would have had to expend approximately \$500 during this period for the services of a babysitter for her infant child. In

addition, it was agreed that the complainant had received approximately \$1,722 in Unemployment Insurance benefits during this same period. Accordingly, it was generally agreed that her loss from date of termination until the date of the hearing, calculated on the above basis, was approximately \$650.

However, the Board proposes to grant an award of less than \$650, and in doing so it has been influenced by the following considerations. First, the complainant was not a long term employee when terminated, having served approximately two months. While this is not a wrongful dismissal case under the common law, the Board has in mind that in such cases the amount of compensation payable is to some extent based upon length of service. From the Respondents' viewpoint, it is clear to this Board that the decision to terminate was not made capriciously, vengefully or with any intent to prejudice the complainant. Mr. Marshall impressed the Board as a sincere man who acted in what he conceived to be the best interests of his company. While the genuineness of his motives cannot, of course, erase the contravention of the Code, in the opinion of the Board it may be relevant to the question of redress. Accordingly, the Board awards compensation to Mrs. Driediger in the amount of \$400.

Finally, although section 17(3) of the Code makes provision for an order for costs, the complainant and the Director specifically indicated that costs were not being asked for. Accordingly, there will be no order as to costs.



ROBERT D. DIEBOLT  
Chairperson of the Board  
of Inquiry.

May 30 1977