IN THE MATTER OF THE HUMAN RIGHTS CODE OF BRITISH COLUMBIA, S.B.C. 1973 92nd Session), CHAPTER 119, AND

IN THE MATTER OF JANE GAWNE, (COMPLAINANT) AND RICHARD CHAPMAN & ASSOCIATES LTD. (MR. RICHARD CHAPMAN), (RESPONDENTS)

## REASONS FOR DECISION AND ORDER

DATE OF HEARING: December 8, 1978
PLACE OF HEARING: Penticton Inn, Penticton, B.C.
BOARD OF INQUIRY: Beverley M. McLachlin
EFFECTIVE DATE OF DECISION: February 12, 1979

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 Ms. Jane Gawne.

The hearing took place in Penticton, British Columbia, on the 8th day of December, 1978. The Complainant and the personal Respondent, Mr. Richard Chapman, were present at the hearing. Mr. D.C. Harbottle appeared on behalf of the Respondents, Mr. Richard Chapman and Richard Chapman and Associates Ltd.. Mr. Reginald Newkirk, the Assistant Director appointed under Section 12(1) of the Code, appeared and was represented by Mr. D.H. Vickers.

The complaint is that Richard Chapman and Associates Ltd. refused to employ Jane Gawne as a chainperson for survey work on the ground of her sex, without reasonable cause, contrary to Section 8 of the Code.

It is convenient to record at the outset matters which were admitted by the Respondents. First, it was admitted that at the time of the Complainant's application and interview for employment with the Respondents she was qualified for the position which she sought. Second, it was admitted that Canada Manpower prior to November 30th, 1976, received a request for employment from someone, ostensibly calling on behalf of Richard Chapman and Associates Ltd., and that in response to this request, the Complainant was sent for an interview. It should be noted that the Respondents do not admit that the request was placed or authorized by Mr. Chapman. Third, it was agreed in the course of the proceedings that no objection would be made on the ground that the complaint was cited against Richard Chapman and Associates Ltd. instead of against Similkameen Survey Services Ltd. which employed all persons working for the several businesses in which Mr. Chapman had an interest. In these reasons I shall use the word "Respondents" as including Similkameen Survey Services Ltd..

The relevant portion of Section 8 of the Code is 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 and 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.

The facts of this case raise two basic questions. First, did the Respondents refuse to employ Jane Gawne in violation of her right of equality of opportunity based upon her qualifications in respect of the position she sought, or more particularly discriminate against her in respect of employment under Section 8(1)(a) of the Code? Second, if the Respondents did so refuse or discriminate, did reasonable cause exist for such refusal or discrimination? The Complainant to succeed must establish a violation on a balance of probabilities: Kesterton and the Spinning Wheel Restaurant et al. (BC HRBI, October 22, 1975).

Refusal to Employ

The refusal to employ is admitted by all parties. The only question is whether the refusal was wrongful. In order to establish wrongful refusal under Section 8 of the Code, it must be shown that the Respondents discriminated against the Complainant. The meaning of "discriminate" in the Code has recently been considered by the British Columbia Court of Appeal in Insurance Corporation of British Columbia v. Heerspink et al. (1978) 6 WWR 402, where it was said, per curiam:

> "I think that this definition of the noun 'discrimination' in the Random House Dictionary fits the corresponding verb:
>
> 3. treatment or consideration 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."

Applying this definition, the essential question is whether the Respondents declined to hire Jane Gawne on the basis of "the group, class or category"

to which she belonged. The Complainant states that she was not hired because she was a woman, which, if established, would constitute discrimination. The Respondents, on the other hand, state that Jane Gawne was not hired because there was no position available at the time of her application, not because of her sex. The task of the Board is to determine which of these two conflicting positions the evidence supports.

The Complainant testified that she had worked during three summers as a chainperson doing survey work. As noted above, her qualifications are not denied. On November 30th, 1976, she was unemployed and seeking work. A posting appeared about this time in the Canada Manpower office in Penticton, where she was living, for an experienced chainman with knowledge of plumb ball work. It is not clear exactly how she became aware of the position. However, Mr. Chapman's evidence, based on his conversation with her father-in-law, indicated that her father-in-law may have told her of the position. In any event, she attended at the Canada Manpower office. After leaving that office, she and her husband were "flagged down" by her father-in-law, who told them to go see Mr. Chapman right away because there was a chance that someone else might get the job. Accordingly, they attended at the Respondents' office to apply for the position.

There was a difference of opinion about when the interview occurred. The Gawnes maintained it was early afternoon. Mr. Chapman said it took place in the late morning. He based his evidence on an entry in his

diary that he had to be in Princeton for a noon luncheon meeting. In any event, little turns on the time of the meeting.

The Complainant and her husband stated they waited in the outer office for a few minutes, since Mr. Chapman was on the telephone. They were then invited into his private office for an interview. The Complainant testified that Mr. Chapman first enquired as to her husband's experience. He replied that he did not have experience chaining, but had done acoustical survey work. Mr. Chapman stated that he was looking for someone who had experience in chaining and plumb ball work. He then interviewed Jane Gawne, who advised him of her experience in this type of work. The Complainant's recollection was that Mr. Chapman did not persue her experience. According to her, he stated that he had hired a woman before and that there had been problems - it hadn't worked out. He felt that hiring a woman would create two problems: first, the extra cost to the company of obtaining an extra room for out of town trips and; second, the fact that hiring a woman might upset the wives of other crew members. He asked her husband whether he would object to her going out of town with other men for periods of time and was advised by him that that would not be a problem. At the end of the interview, Mr. Chapman consulted with another male person in the office, after which he advised her that the other man agreed that it was

impractical to hire her to go out of town. He stated however that if any jobs came up in town he would give her a call. She was never called. The Complainant's evidence was generally confirmed by her husband, Mr. Jim Gawne.

It was established that on December 2, 1976, Mr. James Fead commenced work with the Respondents as an assistant chainman, and that he worked in that position until May of 1977. Like Jane Gawne, he contacted the Respondents in response to the posting at the Canada Manpower office.

The individual Respondent Richard Chapman does not dispute the fact that a posting for an experienced chainman appeared in the office of Canada Manpower at Penticton on November 30th, 1976, nor that he interviewed Mr. and Mrs. Gawne on that date. He confirmed that he enquired as to the survey experience of both, and was advised by Mr. Gawne that he had done only acoustical survey work. More significantly, he stated that he had commented about the extra expense of hiring a woman and that it might create difficulties with the wives of his employees. He also agreed he told Mr. and Mrs. Gawne that he had hired a woman and that it hadn't worked out. Finally, he confirmed that toward the end of the interview he consulted with another person in his office, Mr. Holtz. The subject of that conversation, he stated, was the performance of the woman he had previously had working as a chainperson.

It is thus clear that the Complainant and the personal Respondent agree on much of what took place on November 30th, 1976. One discrepancy arises out of Mr. Chapman's statement that he was sure he told the Complainant's father-in-law when he spoke with him on the telephone before the interview that there was no job available. Jane and Jim Gawne, however, said that their father-in-law had said there was a job available. Mr. Gawne Sr. was not called to testify. As to what happened at the interview, Mr. Chapman was certain that he said things which neither Jane nor Jim Gawne could recall. For example, he stated that he asked Jane whether she could drive a tractor, since he was interested in hiring her the following summer to look after his golf course, a job which he felt was more suitable for a woman than a man. Neither Jane nor Jim Gawne could remember this, which may be attributable to the fact that they were interested in an immediate surveying job for Jane, not a job on a golf course at some future date. Again, Mr. Chapman testified that his recollection was that he advised the Gawnes that there was no job available at that time and that they should get back in the spring. The Gawnes did not remember him saying this.

As noted above, Mr. Chapman's defence was that he did not hire Jane Gawne because there was no job as chainperson for anyone - male or female - on November 30th when she was interviewed. Mr. Chapman testified that he was unaware of the listing at the Canada Manpower office until so advised by Mr. Gawne Sr. on the morning of November 30th. Affidavit evidence was introduced indicating that the listing was placed by Mr. Daniel Houle when he decided to leave the Respondents' employ without the knowledge

of Mr. Chapman. In the absence of any contrary evidence, I accept Mr. Chapman's statement that he did not place the listing at Canada Manpower. It follows that the existence of the listing does not establish that the position of chairperson was available on November 30, 1976.

In support of their contention that the position of chairperson was not open on November 30th, the Respondents sought to establish: first, that Daniel Houle occupied that position on that date and had not given notice and; second, that in any event there were no major jobs on November 30th for which a chairperson was required. The first point is the more important, since Mr. Chapman testified that it was the Respondents' practice to keep a chairperson on their staff regardless of whether work was available or not, and to employ him in the office when he was not busy in the field.

On the first point, it may be noted that the critical date is not when Mr. Houle left, nor even when he gave formal notice, but when the Respondents concluded that he intended to leave. Unfortunately, the evidence is not as clear as one might wish on this critical point. Mr. Chapman testified that he was first advised of Mr. Houle's decision to leave on the morning of December 1st, 1976. Since Mr. Fead was the first applicant who came by after that advice was received, he was given the position. However, the surveyor employed by the Respondents, Mr. Holtz, testified that Mr. Houle quit a day or two before the Skaha job, which came

in on December 1st, "without even telling". In cross-examination he took the position that on December 1st, Daniel Houle was still around, explaining that he may have "popped in". Daniel Houle in his affidavit stated that "I did not advise my employer of my intentions until December 1, which is when I ceased that employment." However, since Mr. Houle was not available for cross-examination, although capable of being subpoenaed, I am reluctant to give much weight to his statement on as difficult a matter as recalling exactly when he told his employer he was leaving more than two years earlier. It may also be noted that Mr. Houle states only when he advised his employer he was leaving, not when his employer might otherwise have concluded that he would be leaving.

Faced with this discrepant evidence, I turn to the Respondents' employment records. They too are not as clear as one might wish. Despite Mr. Chapman's contention that Mr. Houle worked four hours December 1st, the wage book (Exhibit E) does not show any time for Mr. Houle on that date; the last day of employment for him is shown as November 30th. It shows a six hour entry for November 11th, a holiday. Mr. Chapman stated that this represented the four hours of December 1st plus two hours for November 29th and 30th when Houle worked eight hours instead of the seven shown for each of those days. The time record (Exhibit K) showed four hours for December 1, 1976.

It is the Board's conclusion that reconciliation of these superficially disparate strands of evidence lies in recognition of the fact that

the critical question to determine is not when Houle last worked or when he gave formal notice, but when his employer recognized that he would be leaving. It is the Board's view that the only conclusion which is consistent with the evidence as a whole is the view that by November 30th Mr. Chapman had concluded that Daniel Houle was no longer interested in the job. This is supported by Mr. Chapman's evidence. In cross-examination he stated that it was his recollection that Mr. Houle was not happy working in the office, as he had been doing when there was no field work in late November. He stated that Mr. Houle's dissatisfaction was apparent to him, although he could not recall Mr. Houle giving any formal notice prior to December 1st. This conclusion also fits with the facts relating to notice considered above. Even if formal notice was given only on December 1st, Mr. Houle's conduct prior to that date might well have indicated to his employer that he did not intend to stay with the job. This would account for Mr. Holtz' recollection of Mr. Houle quitting without telling a few days before the December 1st.

This conclusion is also supported by the personal Respondent's conduct on November 30th, 1976 and shortly thereafter. For example, Mr. Chapman made no attempt to cancel the notice showing a position for a chainperson with his firm after learning of it on November 30th, as one might have expected had there been no opening. His explanation that he did not cancel because he assumed the listing had been there for some time does not satisfactorily account for this conduct. The view that Mr. Chapman regarded the position as open is also supported by the fact that he took time on an admittedly busy day to interview Mr. and Mrs. Gawne. Mr. Chapman stated

the critical question to determine is not when Houle last worked or when he gave formal notice, but when his employer recognized that he would be leaving. It is the Board's view that the only conclusion which is consistent with the evidence as a whole is the view that by November 30th Mr. Chapman had concluded that Daniel Houle was no longer interested in the job. This is supported by Mr. Chapman's evidence. In cross-examination he stated that it was his recollection that Mr. Houle was not happy working in the office, as he had been doing when there was no field work in late November. He stated that Mr. Houle's dissatisfaction was apparent to him, although he could not recall Mr. Houle giving any formal notice prior to December 1st. This conclusion also fits with the facts relating to notice considered above. Even if formal notice was given only on December 1st, Mr. Houle's conduct prior to that date might well have indicated to his employer that he did not intend to stay with the job. This would account for Mr. Holtz' recollection of Mr. Houle quitting without telling a few days before the December 1st.

This conclusion is also supported by the personal Respondent's conduct on November 30th, 1976 and shortly thereafter. For example, Mr. Chapman made no attempt to cancel the notice showing a position for a chain-person with his firm after learning of it on November 30th, as one might have expected had there been no opening. His explanation that he did not cancel because he assumed the listing had been there for some time does not satisfactorily account for this conduct. The view that Mr. Chapman regarded the position as open is also supported by the fact that he took time on an admittedly busy day to interview Mr. and Mrs. Gawne. Mr. Chapman stated

that he granted the interview as a favour to Mr. Gawne Sr. But it is hard to see how this was a favour if there was no position available. Furthermore, if Mr. Chapman wanted to do a favour for Mr. Gawne Sr., one wonders why he did not call Jane Gawne on December 1st, instead of hiring Mr. Fead for the position. What was said at the interview also supports the view that Mr. Chapman regarded the position as open. The Gawnes testified that in response to Jim Gawne's statement that he had done acoustical survey work, Mr. Chapman stated that he was looking for someone with plumb ball experience. It is also of significance that Mr. Chapman found it necessary in the course of the interview to go into detail as to why he did not wish to hire a woman for the position of chainperson. If his explanation were accepted, there would have been no need to say more than that he had a chainman already and that he didn't know how the listing came to be placed at Canada Manpower. Questioned on this in cross-examination, Mr. Chapman stated that his observations about the suitability of women for the position were really only "fictitious reservations". He had no answer for why he raised the factor of the additional cost involved in employing a woman in this position, but states "It just came out." He admitted that his statement to Mr. and Mrs. Gawne that the woman he had previously employed in this position hadn't worked out was untrue. He maintained that while these things were in his mind at the time, they weren't factors in his decision. However that may be, it seems improbable that Mr. Chapman would have discussed these matters at length had the position not been available. Finally, both the Complainant and the personal Respondent agreed that as the interview was concluding Mr. Chapman took time for a personal discussion with his chief surveyor, Mr. Holtz. The subject of this dicussion, Mr.

Chapman admitted, was how well the woman previously employed as chairperson had worked out. Mr. Chapman testified that he was hurrying to get out of the office at this point to keep his noon appointment in Princeton. It is unlikely that he would have taken the time for what must have been a purely academic discussion if there was no job.

The Board concludes that the evidence considered as a whole permits only one conclusion - that Mr. Chapman was of the view on November 30th, 1976, that he needed an assistant chairperson. Mr. Chapman by his conduct treated the position posted at Canada Manpower as open; this Board can do no less.

Why then did the Respondents fail to hire Jane Gawne? Her qualifications are admitted. Apart from the availability of the position, the only reasons given by Mr. Chapman at the time of the interview related to Jane Gawne's sex. Mr. Chapman asks the Board to accept that while these things were in his mind, they were not factors in the decision. No other factors, however, have been demonstrated. The Board cannot peer into Mr. Chapman's mind. It must base its decision on the evidence objectively viewed. Consequently, it has no alternative but to conclude that the fact that Jane Gawne was a woman was a reason for Mr. Chapman's refusal to employ her. In the result, the Board finds that the Respondents discriminated against Jane Gawne in respect of employment contrary to Section 8(1) of the Code.

Reasonable Cause

The Code provides that discriminatory conduct is to be excused if reasonable cause existed for the refusal to employ or the discrimination: Section 8 (1). It remains therefore to be determined whether the Respondents in this case had reasonable cause for their conduct.

The personal Respondent's reasons for not hiring Jane Gawne as stated in his interview with her were that her sex would cause problems on out of town jobs in two respects. First, the fact that she was a female would impose on the Respondents the cost of renting an extra hotel room on out of town jobs. Second, the wives of other employees might be jealous. The Respondents led no evidence that either of these problems would have arisen. Mr. Chapman himself labelled them "fictitious reservations". He admitted his statement to Mr. and Mrs. Gawne that the woman previously employed as chainperson had not worked out was untrue. It must be concluded that the evidence establishes no basis for a finding of reasonable cause in this case. It is therefore unnecessary to determine whether these factors, had they been established, would have constituted reasonable cause under Section 8 (1) of the Code.

While the foregoing comments are sufficient to dispose of the question of whether there was a violation of the Code, the Board wishes to note that throughout these proceedings Mr. Chapman has maintained that he acted with the best of personal intentions and as a fair-minded person. He

impressed the Board as a person who acted throughout in a manner which he considered to be fair. This, however, does not provide a defence. As noted in Bremer v. Board of School Trustees, School District No. 62 (Sooke) (BC HRBI, June 10, 1977), p. 12, a "person may have the best of personal intentions and nevertheless contravene the Code."

As for the conduct of the investigating officers of the Human Rights Branch, Counsel for that Branch sought a finding that there was nothing on the evidence to suggest that either of the two officers had conducted themselves improperly in the course of their investigation of this fact. This finding was sought in view of Mr. Chapman's comments in a letter, copies of which were sent to his M.L.A. and to the Attorney-General's Department, and in particular his statement that he was beginning to wonder whether he was the victim of some kind of conspiracy. Mr. Chapman explained at the hearing that when he used the word "conspiracy", he was referring to the origin of the problem, as he then viewed it, in the listing for the position at Canada Manpower without his knowledge. He made no allegation at the hearing of improper conduct on the part of the officers, nor does the evidence adduced lend any support to such a contention.

RELIEF

Section 17 of the Code requires that the Board shall order a person found to have contravened the Code to cease such contravention and to refrain from committing the same or a similar contravention. The Board so

orders the Respondents. It is to be noted that Jane Gawne did not seek an order requiring the Respondents to employ her.

The remainder of subsection 2 of section 17 is permissive in its authority. Section 17 (2)(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. The Board awards Jane Gawne $280.00, which would have been her earnings for ten days had she been hired instead of Mr. Fead. Counsel for the Complainant conceded that this was not a situation warranting aggrevated damages under section 17 (2)(c) of the Code.

Section 17(3) of the Code makes provision for an order for costs, if the Board deems costs appropriate. Costs may be appropriate where the Board concludes that settlement was precluded by the intransigence of one of the parties: In the Matter of a Complaint by the Gay Alliance Toward Equality against the Vancouver Sun, (BC HRBI, 1975), p. 41; In the Matter of a complaint by Douglas Orum and Marian Joan McLaren against Frank Pho, (BC HRBI, 1975), p. 40. Counsel for the Human Rights Branch submitted that an award of at least $1000.00 plus all disbursements including travel costs and hotel expenses would be appropriate. In this case, as in the Gay Alliance and Orum cases, much time passed between the violation and the hearing. Repeated attempts were made by the officers of the Human Rights

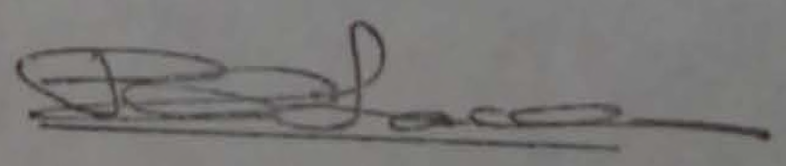
Branch to effect a settlement. The personal Respondent admitted that he did not take these attempts very seriously. Under these circumstances, this Board finds that an award of costs would be appropriate.

Determination of the amount of such costs is more difficult. As noted in the Gay Alliance decision, the Code does not provide any guide as to the scale on which costs are to be awarded. Moreover, it is unclear whether the Board may make an award on account of disbursements; there is no express provision for disbursements and there is no jurisdiction in the Board to order a taxation in the event the parties are unable to agree on what constitute reasonable disbursements, as for example there is under the British Columbia Rules of Court, Rule 57(4). Appendix N of the Supreme Court Rules appears not to be totally applicable. Previous decisions of Boards appointed under the Human Rights Code demonstrate a conservative approach to awarding damages. For example, in the Oram decision,where the hearing was held in Nelson and lasted several days, $375.00 was awarded by way of costs. In the Gay Alliance case, costs of $500.00 were awarded. In the circumstances of this case, the Board concludes that the sum of $500.00 should be awarded as costs exclusive of disbursements and orders that the Respondents pay that sum forthwith to the Complainant. There will be no order with respect to disbursements.

Beverley M. McLachlin

## ORDER

Upon hearing the evidence adduced on behalf of the parties on December 8, 1978, and upon hearing counsel for the parties on the foregoing date, this Board of Inquiry concludes that the complaint is established, and orders that the Respondents cease such contravention and refrain from committing the same or a similar contravention, and further orders that the Respondents pay to the Complainant damages in the sum of $280.00, and costs in the sum of $500.00. For the purposes of this Order, "Respondents" shall be read as including Similkameen Survey Services Ltd.



Beverley M. McLachlin