IN THE MATTER OF THE HUMAN RIGHTS

CODE OF BRITISH COLUMBIA, S.B.C. 1973

(2d. Session), Chapter 119

AND

THE COMPLAINT OF:

KATHLEEN L.A. GRAFE

COMPLAINANT

AGAINST

SECHELT BUILDING SUPPLIES (1971) LTD.

RESPONDENT

REASONS FOR DECISION

DATES OF HEARING: March 7, 1979

PLACE OF HEARING: Vancouver, British Columbia

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

EFFECTIVE DATE OF DECISION: May 17, 1979

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I INTRODUCTION:

This Board of Inquiry is regularly constituted pursuant to Section 16(1) of the Human Rights Code, Statutes of British Columbia, 1973. Notices of hearing dated February 6, 1979 were sent to the parties and the inquiry convened, as scheduled on March 7, 1979, at the offices of the Labour Relations Board in Vancouver. The Complainant was present and represented by Mr. J.J. Camp. Mr. Reginald Newkirk appeared on behalf of the Human Rights Branch. The Respondent, which I shall hereafter refer to as the Company, did not appear, nor did anyone appear on its behalf.

The subject of the Inquiry was a Complaint and amended Complaint dated May 1, 1978 and August 15, 1978 respectively, made by Kathleen L.A. Grafe against the Company. The amended Complaint alleges discrimination by Sechelt Building Supplies (1971) Ltd. against the Complainant on the basis of her sex.

II MOTION TO PROCEED IN THE ABSENCE OF THE RESPONDENT

At the commencement of the hearing, it became apparent that the Company was neither present or represented. Counsel for the Complainant moved that the hearing should proceed in the absence of the Respondent pursuant to Regulation 16 of the Regulations enacted February 18th, 1975 under Order-in-Council No. 593 pursuant to Section 16(6) of the Human Rights Code. I ruled that the hearing should proceed in the Respondent Company's absence, stating that I would deliver my reasons when I rendered its decision on the merits. I now do so.

I first turn to a consideration of the legal principles and enactments bearing on the matter. It is fundamental that a tribunal in the position of this Board must accord to both sides the right to be heard: see Board of Education v. Rice (1911) A.C. 179 at 182, per Lord Loreburn L.C. This basic principle of natural justice is expressed in the maxim audi alteram partem. The Human Rights Code, Section 16(4) confirms this right:

> (4) A board of inquiry shall give the parties opportunity to be represented by counsel, to present relevant evidence, to cross-examine any witnesses, and to make submissions.

It is important to note that the common law principle audi alteram partem and Section 16(4) of the Code confer a right or opportunity to be heard, not a guarantee of being heard. Thus S.A. de Smith, Judicial Review of Administrative Action, 3rd Ed., p. 176, states:

> What the audi alteram partem rule guarantees is an adequate opportunity to appear and be heard... the rule does not guarantee that a hearing or inspection shall never proceed or that action shall never be taken to a person's detriment unless everyone entitled to appear does in fact appear.

Provided that an interested party has been accorded a reasonable opportunity to be heard, the hearing may proceed despite the fact he has elected not to avail himself of this right. If the law were otherwise, parties would be able to prevent a matter from ever being heard or determined merely by refusing to attend. This corollary of the audi alteram partem rule is reflected in Regulation 11 of the Human Rights Code Regulations:

> Where a party who has been given notice of hearing fails to attend before the Board in accordance with the notice, the Board may proceed with the hearing and dispose of the matter in the absence of that party.

Regulation 11 requires the Board to answer two questions. First, the Board must determine whether the absent party was given notice of the hearing. Second, if the Board finds that he was given reasonable notice,

it must determine whether in the case before it, the hearing ought to proceed; the provision that the Board "may proceed. . ." presumably confers a discretion on the Board to refuse to proceed despite notice should justice so require.

This is the law as I apprehend it. What is the result of its application to the facts in this case? The first question is whether the Respondent was given notice of the hearing. The Company's letter of March 2, 1978 to the Director of the Human Rights Branch filed at Exhibit 3 clearly indicates that it was aware of the date and place fixed for the hearing. Exhibit 2, a Certified Mail card, suggests that the Company received the Notice of Hearing February 7. Further notice was given in Mr. Camp's letter to the Respondent of February 23rd, filed as Exhibit 4. In addition, there were telephone calls with Mr. Hayden Killam, who appears to have been in charge of the Respondent's affairs, about the hearing. I conclude that the Company was served with notice in accordance with the requirements of the Code well in advance of the hearing.

The second question is whether, notice having been established, the hearing should proceed in the absence of a representative of the Company. The question, in my view, is whether the absent party has been given a fair and reasonable opportunity to be heard. In this connection, the Company's reasons for not appearing must be examined. In its letter of March 2, 1979,to the Director of Human Rights, the Company states (1) that "March 7th is not an acceptable date for us" and (2) that the hearing should be held in Sechelt as all participants are from that area and "it would be impossible for our staff to close the business in order to attend as witnesses". Similar contentions were repeated in the Company's

telegram of March 5, 1979, marked Exhibit 6. It is significant that no explanation was offered as to why March 7th was unsuitable. In the letter from counsel for the Complainant to the Company (directed to the attention of Mr. Killam) marked Exhibit 5, it was stated that Mr. Killam had taken the position in a telephone conversation of the same date that any date would be inconvenient since the Company took the strongest possible exception to the whole matter and was not prepared to attend and defend itself against baseless charges. Counsel states this letter was hand delivered and the Board has no reason to assume that it did not promptly come to the attention of Mr. Killam. The Company did not deny that this was its position in its telegram of March 5, but merely reiterated without reasons that the date of the hearing was "unsuitable". The Board considers that in order to justify cancellation of a hearing on grounds that the date selected is unsuitable, a reasonable basis for the alleged unsuitability must be shown. The evidence in this case provides no grounds whatsoever for concluding that March 7 was in fact unsuitable.

The second objection related not to the date, but the place, of the hearing. The Board concludes that while it may have been more convenient for the Company to have the hearing in Sechelt, the Company could have arranged its affairs so as to make its witnesses available in Vancouver. In my view, the fact that the designated place of the hearing may be inconvenient to one of the parties does not justify refusal to proceed under Regulation 11, particularly, where, as here, the location chosen appears to have been convenient for the other witnesses involved: see Exhibit 6.

I concluded that on the principles and in the circumstances reviewed above, the hearing must proceed. The Respondent Company had not been denied an opportunity to be heard. No good reason for its failure to appear had been shown. For a previous case where a Board of Inquiry ordered an inquiry under the Human Rights Code to proceed in the absence of a party on the ground that he had been properly served and that no good reason for his non-appearance had been shown, see In the Matter of a Complaint by Jean Sam against Paul Tymchischin and the Tweedsmuir Hotel Ltd. at p. 6.

I was nevertheless concerned that the Company have an opportunity to review the proceedings and make a later submission should one be appropriate. To this end, and upon the request of the Respondent (Exhibit 6), a transcript of the evidence taken at the proceedings was made. Mr. Killam in an unsolicited telephone call to me, acknowledged its receipt, and indicated that he might consider making a submission, although it was not clear to the Board whether it would consist of new evidence or law. He was advised in that conversation and in a letter sent to him by the Board on April 3, 1979 that I would be prepared to hear an application to make a submission upon notice to counsel for the Complainant. The Company was asked to give notice by April 10 if it wished to make a submission. No such notice has been received, and I accordingly conclude that it does not wish to make a submission.

III WHETHER A VIOLATION OF THE HUMAN RIGHTS CODE HAS BEEN ESTABLISHED

I now turn to the merits of the Complaint. The Complainant alleges that a "limitation, specification and preference as to sex" was expressed

at the time of her application for work with the Respondent, and that she was denied employment because of her sex contrary to Section 8 of the Human Rights Code. Thus she makes two charges, under Sections 7 and 8 of the Code respectively. The Respondent Company, as has been noted, made no submission.

I will consider each of these charges in turn.

(1) Violation of Section 7 of the Code.

Section 7 of the Code states:

> 7. No person shall use or circulate any form of application for employment, publish or cause to be published any advertisement in connection with employment or prospective employment, or make any written or oral inquiry of an applicant that
>
> (a) expresses either directly or indirectly any limitation, specification, or preference as to the race, religion, colour, sex, marital status, age, ancestry, or place of origin of any person; or
>
> (b) requires an applicant to furnish any information concerning race, religion, colour, ancestry, place of origin, or political belief.

The Company listed its position with the Canada Manpower Office in Sechelt. For the purpose of these reasons I will assume that such a listing is considered an "advertisement in connection with employment" under Section 7. In addition, its employees made certain oral inquiries of the applicant when she attended at the company's place of business to apply for employment which might fall within Section 7. The question is

whether these communications expressed a limitation, specification or preference as to the sex of the applicant.

The listing at Canada Manpower can be dealt with shortly. It contains nothing that could be construed to be a limitation, specification or preference as to sex. Even the space for minimum and maximum weight is left blank. The job card was filled out by a Canada Manpower Counsellor, Mr. Nishamura, on the basis of a conversation he had with Mr. Killam, who on the evidence was in charge of the Company's affairs. He testified that there was no mention of gender of the applicant by Mr. Killam (Transcript, p. 29,32). Mr. Nishamura further stated that he might have mentioned to Mr. Killam that the job would be open to both male and female, and that Mr. Killam "said something to the effect by all means, if they think they can do the job." (Tr. p. 32). I must accept Mr. Nishamura's evidence as to what Mr. Killam said over the hearsay comment of Mr. Killam introduced through the investigating Human Rights officer that he had told Mr. Nishamura to send over males only (Tr. p. 40). I therefore conclude that there was no violation of Section 7 in the company's dealings in and through Canada Manpower.

Did the oral enquiries made by the Company of the Complainant when she attended at Sechelt Building Supplies violate Section 7? The only evidence of what took place is that of the Complainant. I have extracted and numbered every statement reviewed in the Complainant's evidence with a view to determining whether any of them, singly or in combination, constitute a written or oral enquiry of the applicant expressing either directly or indirectly a limitation, specification or preference as to sex contrary to Section 7 of the Code.

Kathleen Grafe stated she explained to a man at the front counter of the company's place of business that she had been sent by the Manpower Office and was there to apply for a job. (Tr. p. 17). There were "quite a few" men around (Tr. p. 17) and since they were behind the counter (Tr. p. 19) she suspected they were employees. Asked what the man's response to her statement was, she said (1) "He was very surprised and shocked.... it was as if he didn't know what to do". After she asked whether she could leave her name and number or fill out an application (2) "he yelled to the back to someone behind another office and asked what they had done with the girl that had come yesterday". The voice in the back said (3) "Oh, just take her name and number." This was done (Tr. p. 19,20). The "interview" progressed further. (4) Miss Grafe could not recall whether any questions were asked as to her background and qualifications but said it was possible (Tr. p. 18). (5) the first man behind the counter said "I wouldn't hold my breath about getting a job here." (6) The second man said she would have to show them her muscles and asked her how much she weighed. She was also asked if she could carry a specific weight and lift some amount of gyproc off the back of trucks. (She stated she had never had the opportunity to do so but was willing to give anything a try.) (7) The only other comment Miss Grafe related was that when she said she was quite desperate for a job, "they" thought this was funny and a statement was made by someone that she "shouldn't make a comment like that around here" (Tr, p. 18, 19).

First, it must be noted that the portion of Section 7 with which we are here concerned is confined to a "written or oral inquiry of an

applicant." Conversation between employees or abusive or embarrassing comments not amounting to inquiries of the applicant do not fall within section 7. This eliminates a number of the statements reviewed above. Statement (1), the Complainant's opinion that the man behind the counter was "surprised and shocked" is not a written or oral inquiry. Statements (2) and (3), the inquiry of the person at the back as to what had been done with the other girl and the reply, must be discarded because they were not inquiries of the applicant. Statement (4) and (6) can properly be considered inquiries of the applicant. Statements (5) and (7) are comments rather than inquiries and hence do not fall under Section 7.

Statements (4) and (6) require further consideration. Do they express "directly or indirectly" any limitation, specification, or preference as to sex? Statement (4) merely recites the possibility that Miss Grafe was asked questions as to her background and experience. Statement (6) is comprised of the comment that she would have to show her muscles and inquiries as to what she could carry and what she weighed.

The inquiries represented by Statements (4) and (6) clearly do not constitute <u>direct</u> expressions of limitation, specification or preference as to the sex of the applicant. Can they reasonably be construed as <u>indirect</u> expressions of such a limitation, specification or preference? In other words, do they indirectly indicate the company's preference for men as a class, or do they merely bespeak the company's legitimate concern with whether the individual applicant can do the work? In my view, the statements might quite legitimately have been directed to the latter concern. As will be discussed later, lifting appears to have been part of the job. One can visualize without difficulty the inquiries represented by Statements (4) and (6) being made to a small man applying for the job.

I therefore conclude that on a balance of probabilities violation of Section 7 has not been established.

I have confined the applicable statements to "written and oral inquiries of the applicant" not only because, in my view, the plain wording of the Code so requires, but because to do otherwise would produce results which I cannot think the drafters of the legislation intended. Employers employ many people, some of whom can be expected to make sexist, racist or otherwise discriminatory remarks from time to time. It would be harsh indeed to hold the employer responsible for all such comments made to or in the presence of applicants for employment. Section 7 has taken a narrower territory. Its concern is with the formal process of selecting employees; hence it specifically applies only to a "form of application" for employment, an "advertisement" with regard to employment, or "inquiries" made of applicants for employment. These are all matters over which an employer may reasonably be expected to exercise control and for which he should reasonably take responsibility.

(2) Discrimination on the Ground of Sex

(a) The Elements of the Offence

Section 8 of the Code (in part) states:

> 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.
(2) For the purposes of subsection (1), . . .
(b) the sex of any person shall not constitute reasonable cause unless it relates to the maintenance of public decency;

An offence under section 8(1) of the Code consists of two elements, one positive and one negative. The first requirement is that it be shown that the employer is in breach of Section 8(1)(a) by "refus[ing] to employ, to continue to employ, or to advance or promote that person, or discriminat[ing] against that person in respect of employment or a condition of employment." If one or more of these proscribed acts is established, then the Board must consider whether the second element is established. This element is introduced by the proviso modifying Section 8(1), "unless reasonable cause exists for such refusal or discrimination." If the "cause" or reason for the prohibited conduct is "reasonable", or "relevant" to the employment in question, the offence is not made out: see Foster v. British Columbia Forest Products Ltd. (HRBI, April 17, 1979). Section 8(2)(a) specifies some things which cannot constitute reasonable cause. Sex is not among them. However, Section 8(2)(b) states that the sex of a person shall not constitute reasonable cause unless it relates to the maintenance of public decency.

(b) Burden of Proof

Section 8 of the Code dealing with discrimination in respect of employment is drafted in the same form as Section 3, which deals with discrimination in public facilities or services. In each case, certain conduct is prohibited, subject to reasonable cause being established.

It has repeatedly been held of Section 3 of the Code that the onus of establishing the prohibited conduct (i.e. a denial or discrimination)

rests on the Complainant. If the Complainant does so the onus of establishing the "cause" for the conduct and that it was "reasonable" under the proviso rests with the Respondent. (See Gate & The Sun (HRBI, 1975); Heerspink v. I.C.B.C. (HRBI, 8 March, 1979).) In Bremer v. Board of School Trustees of School District No. 62 (HRBI, 10 June, 1977) the Board reached the same conclusion as to the onus of proof under Section 8. I agree with the reasoning in Gates and Bremer that to place the onus of proving the absence of reasonable cause on the Complainant would make it difficult if not impossible to establish discrimination where the Respondent chooses not to give reasons for his conduct. Moreover, as a matter of statutory construction, it seems necessary to construe Sections 3 and 8 of the Code as placing the burden of establishing reasonable cause on the Respondent. First, the sections fall with the principle in R. v. Turner,(1816), 5 M & S at p. 211 where Bayley J. stated that he had always regarded it as a general rule that:

> "If a negative averment be made by one party, which is peculiarly within the knowledge of the other party, the party within whose knowledge it lies, and who asserts the affirmative, is to prove it, and not he who asserts the negative."

Under Sections 3 and 8 the Complainant would be asserting lack of reasonable cause, a negative. The cause and factors governing its reasonableness are typically within the knowledge of the Respondent. It follows that the burden of proving the cause and its reasonableness should rest with the Respondent. Second, the arrangement of the clauses in Sections 3 and 8, suggests that reasonable cause was seen by the drafters of the legislation as a matter of defence to be proved by the Respondent. Sections 3(1)(a) and (b) and 8(1)(a) and (b) respectively describe the offending conduct without reference to reasonable cause; reasonable cause

is expressed separately as an exception or excuse to the offence previously established. Where the arrangement of clauses suggests that a matter is not part of the offence per se but a proviso, excuse, or exception to it, the the burden of proving that matter falls on the Respondent: Cross on Evidence, 4th Ed. p. 89, 90.

It may seem harsh that if a Respondent chooses not to appear, the result may be an order against him even though no proof as to the reasonableness of his conduct has been adduced. On the other hand, this result may be argued to be justifiable on the ground that if the legislation required the Complainant to establish reasonable cause, it would be very easy for Respondents to circumvent the Code merely by refusing to give reasons for their conduct. Whatever view one may take of the merits of the provisions, it seems to me that on the legislation as presently drafted no other conclusion is possible.

The question arises of what is required to shift the onus of showing reasonable cause to the Respondent. On the reasoning set out above, it would seem that once any one of the offending types of conduct under Section 8(1)(a) or (b) is established, the onus shifts to the Respondent to show the cause and that it was reasonable. This was clearly the reasoning in the Gates case where it was said that a denial of service under Section 3(1)(a) or discrimination under Section 3(1)(b) would suffice to shift the onus. On this interpretation, once the Complainant has established a refusal to employ under Section 8, the onus of showing its "cause" and that it was reasonable would shift to the Respondent. I am aware, however, that some decisions have suggested that a prima facie case

of discrimination must be made out before the onus shifts and reasonable cause becomes an issue. Thus in Heerspink v. Insurance Corporation of British Columbia [1978] 6 W.W.R. 702 (B.C.C.A.), it was suggested that under Section 3 of the Code the question of reasonable cause arises only if discrimination, in the sense of a distinction based on class or category, is first established. In Bremer, with respect to Section 8, it was said that the onus shifted upon it being established (1) that there was a vacant position at the time of the application for employment; (2) that the applicant was qualified to fill the position, and (3) that the applicant's application was rejected. In the dissenting reasons in Linton v. Nabob Foods Ltd. (HRBI, 31 October, 1977), another inquiry under Section 8, it was said that "once a prima facie caseof discrimination is established, the onus of proving a non-discriminatory cause as well as the reasonableness of the cause shifts to the Respondent."

While I would incline to the view that the onus shifts upon any of the conduct set out in Section 8(1) being established, regardless of whether it is shown to amount to discrimination, it is not necessary for me to resolve the question for the purposes of this Complaint, since, as discussed below, the evidence establishes a prima facie case of discrimination.

One final point should be mentioned in connection with burden of proof. If the Complainant chooses to introduce evidence as to the cause for the Respondent's conduct, he may discharge the burden which technically lies on the Respondent. Thus the possibility exists that reasonable cause may be established even though a Respondent fails to cross-examine or adduce any evidence.

(c) Whether Discrimination on the Ground of Sex Contrary to Section 8(1) of the Code is established

There is no doubt that Kathleen Grafe was refused employment within the meaning of Section 8(1)(a). She was unemployed for a period of two weeks after her application, and was not called. The two positions available were filled by men on the day of her interview and the following day, respectively. She met the qualifications on the Canada Manpower Form, Exhibit 7.

In addition to calling evidence to establish that she had been effectively refused employment by the Respondent the Complainant called evidence as to the reasons why she was not hired. While this evidence may be hearsay, that does not preclude it being received or considered by the Board: section 16(5), Human Rights Code.

I turn then to a review of the evidence as to the "cause" of the Company's refusal to employ Kathleen Grafe. Miss Grafe's contention was that the Respondent refused to hire her because of her sex.
The sex of the applicant was only mentioned twice in the evidence. The first mention of sex occurred in the question directed by the Company employee interviewing Miss Grafe to someone in the back as to what was done with the last girl who applied. The answer was to take Miss Grafe's name and number. The question may have disclosed prejudice on the part of the employee who asked it. But it is the answer - not the question - which is critical. If the answer had been to tell Miss Grafe she need not bother applying, an inference of discrimination on the basis of sex might be made. But this was not the answer. The answer was to take her name and number. The answer is at best equivocal. It might mean that the applicant would be considered, along with other persons whose names and

numbers were taken. Or it might mean that the applicant would not be given serious consideration. Again, the instruction to take a name and number might have been elicited by factors other than the sex of the applicant, for example, that the usual interviewer was busy at that time. This exchange is too weak a foundation for a finding of discrimination on the ground of sex, in my view.

The second mention of sex was Mr. Nishamura's comment to Kathleen Grafe and her father after his call to Mr. Killam to the effect that he was inclined to agree that girls need not apply with the company. I accept the evidence of Kathleen Grafe and her father that Mr. Nishamura said something to this effect. Mr. Nishamura stated that he may have said something along the line that he wouldn't send any more girls there. His evidence before this Inquiry, however, makes it clear that this was <u>his</u> conclusion, and not a paraphrase of what Mr. Killam had told him. What Mr. Killam had said, according to Mr.Nishamura, was that the job involved unloading gyproc board and that neither Kathleen "or anybody light" would be suitable. Mr. Nishamura further testified that Mr. Killam had said something "which I probably did not mention to Kathy, that if she thinks she can do the job, by all means have her come over. . ." (Tr. p. 34). No doubt Miss Grafe and her father drew from Mr. Nishamura's comment the inference that she had not been hired because she was a woman. Mr. Nishamura's testimony at the hearing, however, did not support this inference. The Company's position that anyone light would be unsuitable for the job is confirmed by Mr. Killam's statements to the Human Rights officer who interviewed him (Tr. p. 39). He stated that he rejected Miss Grafe after making a physical assessment of her by visually examining her:

he felt that only a woman "Herculean in size" could handle the job. In conclusion, I find that the Complainant was not rejected for employment by the Company because she was a woman, per se, but rather because of her supposed light weight (135 pounds).

This, however, does not conclude the question of whether the Complainant has been discriminated against on the ground of sex. It is well established that unreasonable standards which are facially neutral but in fact have the effect of excluding a disproportionate number of a certain class of people may be held to discriminate against that class of people: Foster v. British Columbia Forest Products Ltd. (HRBI, April 17, 1979, Apr. 27-29, citing Griggs v. Duke Power Company, 401 U.S. 424 (1971); Dothard v. Rawlinson 14 E.P.D. (1977), Colfer v. Ottawa Board of Commissioners of Police (Ont. HRBI, January 12, 1979).

To establish discrimination on the ground of sex by this indirect route, it must be shown (1) that the standard (in this case light weight) has a disproportionate impact on the sex against which discrimination is alleged (in this case women), and; (2) that the standard is unreasonable: Foster v. British Columbia Forest Products (HRBI, April 17, 1979, at p. 28). As discussed above, the onus of disproving the second requirement rests with the Respondent.

In essence, this amounts to establishing discrimination on a ground other than sex under Section 8(1) of the Code, and then making a further inference that since the discriminatory conduct affects a disproportionate number of one sex , it also constitutes sex discrimination. As pointed out in the Foster decision, (p. 29), the second inference is strictly speaking superfluous in British Columbia since Section 8(1) permits Boards

of Inquiry to say that any unreasonable standard is discriminatory and does not confine discrimination to a series of categories: "To go further and say that the standard also constitutes sex discrimination . . . adds nothing to the decision."

Applying this approach to the facts in the case at bar, the evidence shows that the "cause" of the Company's refusal to employ Kathleen Grafe was her light weight. A negative decision was made against her on the basis of a class or category to which she supposedly belonged - the category of relatively light people - rather than on her individual ability. This raises a prima facie case of discrimination. Moreover, a standard precluding employment of persons of light weight has a disproportionate effect upon women. This is clear from the statistical evidence reviewed in the Foster case, which I may adopt pursuant to Section 16(5) of the Code. It is also a matter of common knowledge. In the absence of evidence from the parties, I, like other Boards before me, may rely on my own understanding of such matters: see Gibbs v. Board of School Trustees No. 36, (Surrey),(HRBI, 11 July, 1978, at p. 4). Thus, I conclude that refusal to hire on the ground of small size can constitute indirect sex discrimination.

The only remaining question is whether this "cause"- namely light weight or small size - was reasonable. Section 8(2)(b) which says that sex is not reasonable cause unless it relates to public decency is not applicable since the "cause" in question on this indirect approach is not sex, but weight, or size. Indeed, none of the special provisions of Section 8(2) relating to reasonable cause are applicable. Consequently, whether the "cause" was reasonable is left for the Board to answer on the basis of the facts before it. This was the approach taken in determining

the same question in Foster v. British Columbia Forest Products Ltd. (HRBI, 17 April, 1979).

In order to establish that the hiring criterion was reasonable it must be shown to be "relevant" to the job in question, to be a "meaningful" criterion. Provided that a significant correlation between the requirements and the job is demonstrated, a Board of Inquiry should not scrutinize too closely the hiring policies of experienced businessmen. On the other hand, if no correlation between the employment criterion and the job is demonstrated, or if the criterion is only of minor importance relative to other skills required for the job, it will not be held to be a reasonable criterion. These principles were set out and applied in Foster v. British Columbia Forest Products Ltd. (HRBI, 17 April, 1979) and I agree with them and adopt them.

Bearing in mind the foregoing principles, was the criterion of size employed by the Company in this case reasonable? The evidence is not as complete as might be desired. First we do not know precisely what the criterion employed was. However, since the Complainant was rejected, we may assume that there was a minimum requirement that applicants weigh more than 135 pounds. Second, we do not know precisely what the job entailed. Mr. Nishamura said he assumed that it did not entail heavy lifting from his visits to the store, but this was clearly only his assumption, not a matter of fact. The Company might have had quite a different job in mind than store clerking. The Respondent's manager, Mr. Killam, told Mr. Nishamura the job involved unloading heavy gyproc and that it was unsuitable for "anybody light". (Tr. p. 33). He asked Miss Sutherland, a previous applicant, whether she could lift 90 pound bags of cement and

carry lumber all day (Tr. p. 13). Miss Grafe recalled being asked whether she could lift a certain weight and in particular gyproc off trucks. (Tr. p. 19). Finally, Mr. Killam told the investigating officer from the Human Rights Branch that unloading gyproc was one of the aspects of the job (Tr. p. 38). It thus appears that despite the absence of any mention of required heights and weights on the Canada Manpower form (Exhibit 7), some ability to lift was a requirement for some aspects of the job. However, I do not know what weights had to be lifted. The Company's statements concerning Miss Grafe's application focused on the need to be able to lift gyproc. There is no evidence as to what gyproc weighed or how many people might be available to assist in lifting it. Nor was it established how much of the job involved lifting and what other skills might be important to the job, such as was presented in the Foster case. Mr. Killam told the Human Rights officer who interviewed him that unloading gyproc was only one aspect of the job, but gave no statement as to the frequency of that duty (Tr. p. 38, 39).

Finally, there is no evidence that a person weighing 135 pounds could not do the job. Indeed, there is no evidence of what weight 135 pound people can be expected to lift. Mr. Killam told the investigating Human Rights officer that only a woman "Herculean in size" could do the job (Tr. p. 39). While this was evidence of the Company's opinion it did not establish its reasonableness. I might be prepared to take notice without evidence of a general correlation between weight and strength, but I cannot without evidence conclude that persons of 135 pounds would be unlikely to be able to perform the duties involved in this job.

As noted above, the Code places the onus of establishing that its

hiring criterion is reasonable upon the employer. Had the Company chosen to present evidence in this case, it might have been able to establish that its criterion for hiring was reasonable. It chose not to do so, however, and must bear the consequences of the deficiencies in the evidence.

I must therefore conclude that the onus upon the Company of establishing that its hiring practice was reasonable has not been discharged. It follows that a violation of Section 8 of the Code has been established. Since the criterion in question, namely, light weight, is one affecting a disproportionate number of women, it can be said to constitute discrimination on the ground of sex in accordance with the reasoning of the Foster case, and within the terms of the Complaint.

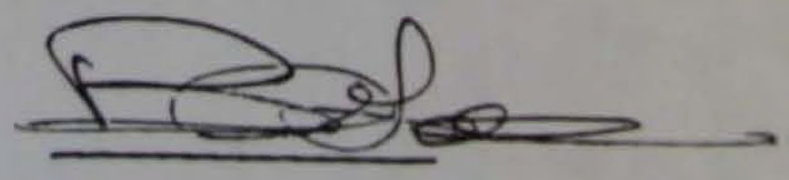
IV AWARD

I award the Complainant what she would probably have earned from the date that another person was hired for the job with the Respondent and the time she secured other employment, pursuant to Section 17(b) of the Code. The period indicated by the evidence is about two weeks at a rate of $4.00 per hour. On the basis of an assumed 35-hour week I award the Complainant $280. I have not overlooked the fact that had it hired the Complainant, the Company would only have paid $2.00 per hour; the remaining $2.00 would have been paid by the Province under its Student Work Program. However, the emphasis in Section 17(2)(b) is not on what the Respondent would have paid for the Complainant's services, but rather on what the Complainant has lost.

I award no other compensation. While the Company failed to discharge the onus upon it of demonstrating that its practices were reasonable and hence must be found to have contravened Section 8(1) of the Code, the evidence did not not establish affirmatively that the hiring criterion it used was unreasonable, much less that its use amounted to a knowing or wanton disregard for the Complainant's rights. In my opinion, the conduct of the Company has not been shown to fall within the requirements for additional compensation under Section 17(1)(c).

The question of costs has caused me some concern. A review of prior awards indicates that costs have typically been awarded by Boards of Inquiry where the Respondent has refused to settle an obvious breach of the Code. I have concluded that this is not such a case. Accordingly, there will be no order as to costs.

Finally, pursuant to Section 17(2) of the Code I must order that the Company cease contravention of the Act and refrain from committing the same or a similar contravention in the future.



B.M. McLachlin
Chairperson, Board of Inquiry

ORDER

This Board of Inquiry concludes that the Complaint under Section 7 of the Human Rights Code of British Columbia is not established and that the Complaint under Section 8 of the Human Rights Code of British Columbia is established, and orders that the Respondent cease contravention of Section 8 of the Human Rights Code of British Columbia and refrain from committing the same or similar contraventions, and further orders that the Respondent pay to the Complainant the sum of $280.00.

DATED at Vancouver this 17th day of May, 1979.

Board of Inquiry

per B.M. McLachlin