JULY 1976

## HUMAN RIGHTS BOARDS OF INQUIRY

The following is an abridged version of a decision filed in July 1976 under the Human Rights Code of British Columbia.

### RIGHTS OF PREGNANT WOMEN

A complaint by H.W. against Jack R. Kroff and Riviera Reservations of Canada Ltd.

The complainant in this case is a woman who is referred to in the following decision only by her initials, H.W., for reasons that will be explained as the narrative unfolds.

H.W. was dismissed from her position as a reservations clerk by the respondent, Riviera Reservations of Canada Ltd., on July 25, 1975. The person who dismissed her was Jack R. Kroff, manager for Riviera in Vancouver since 1969. The complainant alleged that she was dismissed because she was pregnant. Both Kroff and Riviera claimed that she was dismissed because of incompetence.

H.W. began working for Riviera on March 21, 1975. She and Kroff were the only employees of Riviera in Vancouver. At that time, H.W. didn't know that she was pregnant. Her main job was to take reservations for a hotel in Las Vegas called the Riviera Hotel. Evidence revealed that the average number of reservations she might take in a day would be three or four.

The complainant stated that, after the initial period of two weeks to a month, Mr. Kroff never criticized her work. Even during that initial period, H.W. interpreted his comments as instruction, rather than as criticism for doing work badly. She was punctual and never missed a day's work.

Kroff's testimony conflicted with H.W.'s on the issues of the quality of work, and the extent to which Kroff communicated with her on this matter. He claimed that he criticized her performance many times because she never learned to be more than "adequate" receptionist, being incapable of going beyond the mere filling out of reservation forms.

Kroff expected her to ask questions concerning the number and ages of children, and to explain policies such as those concerning multiple occupancy of rooms. He also stated that H.W. did poorly when handling the slightly complicated situation arising from the hotel's requirement that no reservation be confirmed until a deposit in U.S. funds had been received.

There were also two separate versions of the events surrounding H.W.'s departure. Kroff testified that he asked the complainant a day or two prior to July 25 if she was pregnant. He claimed that she said she didn't know whether she was or not, and that he then told her that she could consult her doctor. H.W. did consult her doctor, and she informed Kroff on July 25 that she was pregnant.

The complainant's version differs only in that she claims the question was asked of her on the 25th, and that she replied that she was pregnant and that she had just found out about her condition. She stated that her pregnancy didn't affect her ability to work.

The complainant stated that when Kroff dismissed her on July 25, he told her that he would not have dismissed her had she not been pregnant, as he needed someone to work in the office in December. Kroff's version of this conversation was that he and H.W. had had a long discussion in which he had reviewed her deficiencies, and during which she had agreed that she was not really cut out to be a receptionist.

Kroff further testified that he did not mention needing help in December. He did, however, inform Mr. Frank Pasacreta, the investigating officer from the Department of Labour who visited him subsequently, that when he dismissed the complainant he was thinking that he would need assistance in the office during his busy season, which included October, November and December.

H.W. testified that, on July 25, she typed a letter of reference, postdated to August 1, for Kroff's signature, which letter was submitted as evidence. Kroff signed this letter and gave it to H.W., together with pay for the period ending August 1st, when she returned to the office on August 1st. He reported the termination to the controller's office in Las Vegas, where personnel matters are processed. That office subsequently issued a document called a separation slip, which is an Unemployment Insurance Commission Form. The reasons for termination of employment were shown as "pregnancy" and "other".

Pasacreta testified that Kroff told him the pregnancy was the straw that broke the camel's back. Kroff denied making this statement. Kroff did say under cross-examination, however, that the pregnancy was a factor in his decision to discharge the complainant.

and the Board of Inquiry was satisfied that pregnancy was the effective cause of the dismissal. The Board concluded this from several factors, chief of which was the timing of the dismissal and the entry "pregnancy" on the U.I.C. form. The Board concluded also that Kroff's permitting himself to be moved to action by the pregnancy was almost unthinking, rather than a conscious act of prejudice. It believed that Kroff had allowed the fact of the pregnancy to take him to his conclusion before he had analyzed how pregnancy of this particular woman would affect the performances of her duties at Riviera.

The question then arose: Is pregnancy one of the areas of protection covered by the Human Rights Code? The Code's purpose is to eliminate discrimination. The evil at which the Code is aimed is the making of decisions about individuals based on classes or categories, rather than upon individual performance. Society now believes that individuals should be evaluated on individual merit, and not on the category into which they fall--unless the category is related functionally to the evaluation.

If physical strength is needed for a job, it is not enough to say only men can apply. An employer must permit a woman applicant to demonstrate whether her strength is appropriate for the job in question. The category must be "strong people", not "strong men". Pregnant women are in a class of people who have suffered significant disadvantages through classification processes that have denied them employment, either entirely, or at specific times of their pregnancy. Some women become incapable of work virtually from the outset of the pregnancy. In some jobs, pregnancy in the later months can be cause for ineffectiveness, because the work station itself is too small or unsafe for a gradually enlarging abdomen. In other situations, however, women have demonstrated that they can remain at their employment almost up to the moment of childbirth.

For these reasons the Board concluded that pregnancy is one of the categories protected by Section 8 of the Code, and that the complainant in this case should have had the benefit of individualized treatment from her employer rather than being summarily dismissed because she was pregnant. It views the Code as requiring a higher and more expansive standard of conduct from employers, and therefore decided that Kroff should have attempted to work out a compromise that would reconcile his busy fall season with the uncertainties created by H.W.'s pregnancy. The Board therefore ruled that pregnancy is a status protected by the Human Rights Code, so dismissal for pregnancy in the present case did not fall within the meaning of "reasonable cause" permitted by the statute.

On the issue of relief, the Board agreed that the complainant was not seeking reimbursement, but only money damages for wages lost through dismissal. The Human Rights Code does not purport to dislodge the doctrine of common law, which states that a person who has been wrongfully discharged is under an obligation to mitigate his or her damages. To her credit, the complainant did that immediately. Her misfortune lay on the fact that employment came to an end six weeks after it began.

In the Board's opinion, therefore, if an employee demonstrates that he or she can obtain no employment at all subsequent to wrongful dismissal, the employer is liable only for a reasonable period of search. In the present case, that liability would have been in the range of two weeks to one month and, accordingly, would have expired during H.W.'s period of subsequent employement. Her position required no specialized prior training, and equivalent employment requiring basic office skills was readily available. The Board therefore decided that its damages award should be limited to the sum of $40, which was the amount of wages lost by the complainant in attending the hearing on July 19, 1976.

When the hearing began, the complainant asked that she be identified only by her initials, H.W., notwithstanding that the complaint and other stages had proceeded under her full name. There is a precedent for protecting the identity of the litigant in civil cases, and the Human Rights Code implicitly recognizes that some persons will be reluctant to bring forward a case, although there may be good reason for such cases to be heard.

This Board concluded that the application was appropriate in this case, and it ordered that the style of cause of the decision, the decision itself, and the order incorporate only the initials of the complainant. The Board further ordered that all persons attending the hearing, or having knowledge of the order, refer to the complainant only by her initials.

The respondents consented to this order and asked that there be no reporting of the case until a decision had been issued by the Board. This request violated the principle that human rights hearings should be publicly conducted. Secret hearings are anomalies in the Canadian judicial system. Besides, there is a public policy reason for public decisions in human rights

cases--namely, that under our governmental system, in which some minor part is played by precedent, a decision in an individual case instructs the public generally as to appropriateness of conduct, and is a method of advancing the legislative purpose to protect the human rights of society generally.

Another reason for a public hearing is that, throughout Canada's history, experience has proved that freedom of the press and freedom of speech are often the strongest and the most useful means of advancing civil liberties and civil rights. Hence the Board was reluctant to grant what one press representative described as a "gag order". Nevertheless the Board did grant the order, on the grounds that the interests of the individual overrode the availability of information. It seemed fair to the Board that if the complainant was to be granted permanent anonymity, the respondents should be permitted anonymity for a few days.

**Sholto Hebenton, Chairman**

**Penny Bain**

**John Gebbie**