IN THE MATTER OF THE HUMAN RIGHTS CODE

OF BRITISH COLUMBIA

AND

IN THE MATTER OF A COMPLAINT BY H.W.
AGAINST JACK R. KROFF AND RIVIERA
RESERVATIONS OF CANADA LTD.

REASONS FOR DECISION

DATE OF HEARING:	July 19, 1976
PLACE OF HEARING:	Vancouver, B.C.
BOARD OF INQUIRY	Penny Bain John Gebbie Sholto Hebenton (Chairman)
EFFECTIVE DATE OF DECISION:	July 22, 1976
APPEARANCES:	S.F.D.Kelleher for the Complainant and for the Director, Human Rights Code A.C.Sharp for both Respondents

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This case raises some important questions concerning the rights of pregnant women.

The claimant is described in the style of cause, this decision and our order only by her initials, H.W. The reason is explained below.

She was dismissed from her position as a reservations clerk by the respondent, Riviera Reservations of Canada Ltd. ("Riviera") on July 25, 1975. The person who dismissed her was the other respondent, Jack R. Kroff, the Manager for Riviera in Vancouver since 1969. The complainant alleges that she was dismissed because she was pregnant. Both the respondents allege that she was dismissed because of incompetence.

workload of nil

She commenced working for Riviera on March 21, 1975. Her gross salary was $600 a month. She and Mr. Kroff were the only employees of Riviera in Vancouver. At the time she commenced work, she did not know that she was pregnant. By the date of the hearing on July 19, 1976, having the advantage of hindsight, she believed that she was pregnant when she began work or else she became pregnant very shortly thereafter. The workload was rather light. Her duties included some typing and acting as a receptionist. Her main job was to take reservations for a hotel in Las Vegas called the Riviera Hotel. Even this work was not exceptionally time consuming. The evidence reveals that the average number of reservations she might take in a day would be about three or four.

The complainant stated that Mr. Kroff, after the initial period of two weeks to a month, never criticized her work. Even in that initial period she interpreted his statements more as telling her what to do than as criticism for doing work badly. She was punctual and never missed a day of work.

Mr. Kroff's testimony conflicts with hers on the issues of the quality of work and the extent to which he communicated this to her. He says that he criticized her performance many many times. The thrust of his objection was that she never learned to be more than an adequate receptionist in that she was incapable of taking an aggressive role to go beyond filling out the reservation form. He expected her to ask questions concerning the numbers and ages of children, whether they would require cots, to explain policies concerning multiple occupancy of rooms, etc. He also stated that she did poorly in explaining 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 are two separate versions of the events surrounding her departure. Mr. Kroff testified that he mentioned to the complainant that he had noticed the abdominal expansion associated with pregnancy late in July and asked her if she was pregnant a day or two prior to July 25. His evidence is that she said that she did not know whether she was pregnant and he told her that she could consult her doctor. She did consult her doctor and informed Mr. Kroff at the office on July 25 that she was pregnant. The complainant's version of the foregoing differs only in that she claims that the question was asked of her on the 25th and that she then replied that she was pregnant. She explained that she had only just found out. She says that the baby was then expected on December 21. It was actually born on December 5, 1975. By July 25, the complainant must have been approximately three months pregnant at least and the board of inquiry is somewhat puzzled as to why she was unaware of her pregnancy, though that is irrelevant to this case. She stated that, though she experienced some uneasiness in her stomach first thing in the morning, her pregnancy did not affect her ability to work.

The complainant states that when Mr. Kroff dismissed her on July 25 he said that he would not have dismissed her had she not been pregnant, since he needed someone to work in the office in December. His version of the conversation was different, that they had a long discussion in which he reviewed her deficiencies and in which she agreed that she was not really cut out to be a reservationist. Mr. Kroff testified that he did not mention his requirements of having help in December. However, he did inform Mr. 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 the months of October and November as well as December itself. It is common ground that on July 25, she

typed a letter of reference to be signed by Mr. Kroff and post-dated to August 1, which letter was submitted as Exhibit 2. He signed this letter and gave it to her, together with pay for the period ending August 1 when she returned to the office on August 1. Mr. Kroff reported the termination to the controller's office in Las Vegas where all personnel matters were attended to. That office issued a document called a separation slip, Exhibit 3. This is an Unemployment Insurance Commission form. It has a box with various items to be marked to indicate the reason for the issue of the form. The box includes various items such as "quit" and "labour dispute". Two have been marked, "pregnancy" and "other".

The board of inquiry finds it difficult to determine which version of the events is correct in the areas where they differ. The board does accept Mr. Kroff's testimony that the complainant was not a particularly good reservationist and concludes that she did not have prospects for a long career with Riviera, either because she was not showing the improvement which Mr. Kroff hoped for or because, like most of her predecessors in the job, she would become bored with the routine and lack of challenge and would leave of her own accord. This is not a finding that in all areas of disagreement the board prefers the evidence of Mr. Kroff. The fact that her description of the job differed in a number of respects from his description of the job indicates to us that in the period of her employment, she did not come to have the grasp of it which he would have expected of an employee of four months experience.

Our first difficult question is to determine the connection, if any, between the pregnancy and the termination. Mr. Kelleher referred us to a labour relations case[1] which

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1. Re Robinson, Little & Company and Retail Clerks Union, Local 1518, L.R.B. of B.C., May 22, 1975.

held that if an improper reason is one of those considered by an employer in discharging an employee that the employer ceases to be entitled to rely on a valid reason for discharge. He asked us to follow this case by analogy. Mr. Kelleher warned us that any approach other than that advocated by him would permit an employer, as a practical matter, to discharge persons for prohibited reasons of discrimination and then after the event trump up charges of incompetence, insubordination, or whatever to justify its actions. Mr. Kelleher urged us moreover to decide that the onus of proof was on the defendant employer to show that the reason for dismissal was not a prohibited one. The functional basis of this argument was that this information is more available to the employer than to the employee. In our view of the evidence it is not necessary for us to apply either of these legal propositions and we expressly refrain from doing so.

Mr. Pasacreta testified that Mr. Kroff told him that the pregnancy was the straw which broke the camel's back. Mr. Kroff denied making this statement. However, Mr. Kroff did say under cross examination that the pregnancy was a factor in his decision to discharge the complainant. The interesting question is presented as to how significant the factor must be. Deciding and quantifying the strength of a factor is a very difficult task. For example, if we found that the pregnancy could in some way be measured as contributing 10% to Mr. Kroff's decision, would that be sufficient to fasten liability upon him for reliance on improper cause? Should the number be much higher? Where should the line be drawn? This board can avoid exploring that difficult and shifting terrain since the evidence demonstrates to us that the pregnancy was the effective cause of the dismissal. This, in our view, was demonstrated by several

factors, chief of which was the timing of the dismissal and Exhibit 3 which includes pregnancy as one of the marked items. We do not place a great deal of store in Exhibit 2, the letter of recommendation. It was proffered by the complainant to disprove allegations of incompetency. Mr. Kroff testifies that he now wishes that he had not sent the letter and that it was too glowing a commendation. He said he gave it to her out of sympathy to assist her in getting a new job. We are inclined to accept Mr. Kroff's explanation of the letter and cannot resist the temptation to observe that providing inaccurate reference letters is a business practice which does no good for anyone. The evidence in the case and the defence conducted by Mr. Kroff and his counsel, Mr. Sharp, suggest to us that permitting himself to be moved to action by the pregnancy was almost an unthinking act rather than a conscious act of prejudice. They attempted to demonstrate that the nature of the training period, the availability of additional staff, and the timing of the busy season were such that it was necessary to replace the complainant immediately on the announcement of her pregnancy. The board concluded that the evidence did not support this argument. In the absence of any other explanation of the dismissal, we conclude that the expression that this is the straw which broke the camel's back is probably what Mr. Kroff was thinking even if he did not say it. In short, we believe that he let the fact of the pregnancy take him to his conclusion without stopping to analyse how this particular pregnancy of this particular woman would affect her ability to perform her duties at Riviera.

That takes us to the question of whether pregnancy is one of the areas of protection covered by the Human Rights Code. Section 8(1) provides as follows:

"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."

Subsection (2) of section 8 lists a number of factors which do not constitute reasonable cause. They include matters such as race, religion, colour, age, marital status and ancestry. In certain circumstances, sex and criminal conviction are improper factors. Our initial question is whether pregnancy is one of the categories which is protected by section 8.

Section 8 is not intended to remove from the civil courts every case of wrongful dismissal. Section 8 must be interpreted in the context of the Human Rights Code whose purpose is to eliminate discrimination. The evil at which the Code is aimed is making decisions about individuals based on classes or categories rather than upon individual performance. Our 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. That is, if physical strength is needed in a job, it is not enough to say men only 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" and not "strong man".

Pregnant women are a class of people who have been subject to very significant disadvantage by classification processes which 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 job positions, pregnancy in its 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. We conclude that pregnancy is one of the categories protected by section 8 and that the complainant in this case should have had the benefit of individualized treatment by her employer, rather than being dismissed because she was pregnant.

Mr. Kroff's reaction was in many ways human. He was not particularly pleased with the complainant as a reservationist and, apparently without much thought, he yielded to the straw added by the pregnancy to accelerate the termination of the employment relationship. We interpret the Human Rights Code as requiring a higher and more expensive standard of conduct by employers. In our view, Mr. Kroff should have made an attempt to analyze the effect which this pregnancy would have on this woman's abilities to perform this job and to work out a reasonable program to fit the situation created by his busy fall season with the uncertainties created by her pregnancy. Several avenues present themselves as possibilities: obtaining a firm commitment from her as to how long she would work, arranging for a standby to become permanent when she departed, or making an arrangement under which the complainant and some other person would work part time in a changeover period. It might have been impossible to adopt any of these solutions, but we will never know because the respondents never made any attempt to explore procedures by which their situation as a two-employee business could be

reconciled to the potential disruption created by a situation in which 50% of the work force was pregnant. In fact, Riviera was very successful in finding two subsequent successors to the complainant, both on short notice, in 1975 and was even able to bring in an experienced person to supervise the second new employee when Mr. Kroff was away for a few days in December.

Our conclusion then is that pregnancy is a status protected by the Human Rights Code and that dismissal for pregnancy in the situation here presented did not fall within the meaning of "reasonable cause" permitted by the statute.

Mr. Kelleher argued that the dismissal of a person on the ground of pregnancy also constitutes sex discrimination as prohibited by section 8. We see some difficulties with this argument and since a decision on the point is unnecessary to our decision in this case, we shall not decide that point.

We turn now to the issue of relief. The complainant is not seeking reinstatement but only money damages for wages lost as a result of the dismissal. She was dismissed on July 25, 1975. She was paid until August 1 by the respondent, Riviera. She obtained another job commencing August 2 which paid a higher salary than she had been receiving at Riviera. She was laid off that job at the end of six weeks, namely, in mid-September. She did not then look for other employment because she felt that other employment would be difficult to obtain in view of the fact that she was by then very visibly pregnant. She obtained full pregnancy benefits under the Unemployment Insurance Act regulations in force at the time, namely fifteen weeks at $90 per week, commencing on October 15. When her unemployment insurance benefits ran out (approximately the end of January, 1976) she began looking for work and obtained a new position on March 22, 1976. Mr. Kelleher urged the board to have regard to the whole period from July 25, 1975 to March 22, 1976 in calculating her damages. The Human Rights Code does not purport

to dislodge the common law doctrine that a person who has been wrongfully discharged is under an obligation to mitigate her damages. To her credit, the complainant did that immediately. Her misfortune is that that employment came to an end six weeks after it began. We do not believe that it would be appropriate to visit that misfortune on the respondents. Where the employee demonstrates that he can obtain no employment at all subsequent to wrongful dismissal, the employer is liable only for a reasonable period of search. In this situation, that liability would have been in the range of two weeks to one month and, accordingly, expired during her period of subsequent employment. This position required no specialized prior training. Equivalent employment requiring basic office skills is readily available. The board considers it inappropriate to award damages for the period suggested by Mr. Kelleher and concludes that its damage 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.

Mr. Kelleher very responsibly conceded that this was not a case for an award of damages under section 17(2)(c) of the Code where a person has acted in knowing contravention of the Code or with a wanton disregard. We agree.

At the commencement of the hearing, the complainant, for personal reasons, 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 precedent for protecting the identity of the litigant in civil cases and in a case which has been heard by another board of inquiry whose decision has not yet been released. In providing for enforcement action by the Director even in the absence of a complaint (see section 15(1)) the Code implicitly recognizes that some persons will be reluctant to bring forward a case and that there may be good reason for such cases to be heard.

This board concluded that the application was appropriate in this case and 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 refrain from referring to any feature of the case by the full name of the complainant, but that any such reference be to her initials only. The respondents were willing to consent to the aforementioned order and asked on their part that there be no reporting of the case until a decision was issued by the board. This latter request violates the principle that human rights hearings should be publicly conducted. Secret hearings are anomalies in our judicial system. 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 in our history we have found that freedom of the press and freedom of speech are often two of the most useful and strongest weapons in advancing civil liberties and civil rights. Hence the board was reluctant to grant what one press representative colourfully but accurately described as a "gag order". However, we did grant such an order. In our view this was a case where the circumstances of the parties in the individual case overrode the more general interest in current availability of knowledge. It seemed to us fair that if the complainant was to obtain permanent anonymity from us that we should grant an anonymity to the respondents for a few days.

Board of Inquiry

By: _____
Sholto Hebenton
Chairman

ORDER

IT IS HEREBY ORDERED THAT:

(a) All persons who attended the hearing of this case in Vancouver on July 19, 1976 and all persons having knowledge of this order refrain from referring to this case or any feature of this case by the name of the complainant, and instead of such name use the complainant's initials only;

(b) All persons who attended the hearing of this case in Vancouver on July 19, 1976 and all persons having knowledge of this order refrain from reporting on it in the press or referring to it publicly until the Effective Date of the Decision set out on page 1 of the Reasons for Decision;

(c) Jack R. Kroff and Riviera Reservations of Canada Ltd. cease to contravene section 8(1) of the Human Rights Code and refrain from committing the same or a similar contravention to that which has been established, namely dismissing an employee because of her pregnancy where the pregnancy is not demonstrated to affect work performance; and

(d) The respondent, Riviera Reservations of Canada Ltd. pay to the complainant the sum of $40 and, if Riviera should fail to make such payment within fifteen days of the Effective Date of this decision then such payment shall be made forthwith by the respondent, Jack R. Kroff.

There will be no order as to costs.

Board of Inquiry

By: _____
Sholto Hebenton
Chairman