BOARD OF INQUIRY

IN THE MATTER OF HUMAN RIGHTS CODE OF B. C.

AND

IN THE MATTER OF SUSAN JORGENSEN, COMPLAINANT

AND

IN THE MATTER OF B.C. ICE & COLD STORAGE LTD.,
RESPONDENT

AND

IN THE MATTER OF THE UNITED FISHERMEN &
ALLIED WORKERS UNION, RESPONDENT

BOARD OF INQUIRY:

JOHN A. BOURNE, Q.C.	-	CHAIRMAN
C. LYNN SMITH	-	MEMBER
C. J. ALCOTT	-	MEMBER

T. A. ROPER, ESQ.	-	appearing for B.C. Ice & Cold Storage Ltd.
J. J. CAMP, ESQ.	-	appearing for The Director of Human Rights and for Susan Jorgensen
J. NICHOL, ESQ.	-	appearing for United Fishermen & Allied Workers Union

MAJORITY OPINION OF JOHN A. BOURNE, Q.C., CHAIRMAN
AND C. J. ALCOTT, MEMBER

Unfortunately the Board has not been able to reach a unanimous decision and report with respect to this complaint. However, we do agree to a great extent upon our assessment of the evidence. The majority of the Board has carefully examined and assessed the analysis of the facts, the motives of the parties, and the opinions which Lynn Smith expresses in her dissenting opinion. The majority respects the very learned and studied opinion which she has expressed, but we do not feel we can agree with her rationale or her ultimate conclusions. The majority has refrained from writing a treatise on the Human Rights Code and from any detailed critique of Lynn Smith's opinions. The majority confines its remarks to what it considers the essential elements of the matter which has been put before us, considering case law and the large body of the evidence which was presented to the Board.

In the result the Board does agree that Susan Jorgensen was discriminated against and agrees, except with respect to the question of pay rates, upon our proposed remedy. Where the Members of the Board mainly differ is whether the sex of Susan Jorgensen was the motive or ingredient in the Employer's decision to deny her the further opportunity to perform Group 1 work, which work will be more extensively referred to later in these Reasons.

Pursuant to Section 13 (1) of the Human Rights Code this Board of Inquiry was appointed by the Minister of Labour on January 31, 1979.

The hearings commenced on April 24, 1979 and continued on April 25 and June 1. During the hearing on the latter day Jack Nichol on behalf of the United Fishermen & Allied Workers' Union objected to the composition of the Board upon the grounds which were stated at some length. Submissions with respect to the matter were heard on June 1 and June 4 and on July 3. On August 16, 1979, the Board in a written decision stated that in its opinion and in the circumstances and in law, the Board could not properly disqualify itself or any of its Members. The Board declined to do so and stated that it intended to proceed with the hearing of the complaint. This decision is appended as a Schedule to these Reasons.

Hearings resumed on January 7, 1980 and continued on January 8, January 9, January 10, January 11, February 18, February 19, March 24 and March 25.

Argument was heard on March 26, 1980, April 7, April 9, May 21 and May 22.

The Board reserved its disposition of the matter of the complaint. Due to personal problems and commitments of Members of the Board this decision has been delayed.

The Respondent B.C. Ice & Cold Storage Ltd. is engaged in the business of processing fish products for its own account and for customers. It has freezing and storage facilities. While the Board of Inquiry has had a view of the premises and is generally familiar with its operation, the understanding

of the case is not furthered by going into great detail of these operations.

The Respondent Union and the Employer have been parties to collective agreements over a considerable period of time.

The Collective Agreement with which we are concerned contains reference to Group 1 and Group 2 classifications. The work in Group 1 classifications is, generally speaking, more arduous than the work in Group 2 classifications. Prior to 1973 the reference was to male and female classifications, the former generally corresponding to what is now Group 1 and the latter to what is now Group 2. The change in reference to the classifications occurred in the Collective Agreement negotiated in or about 1973. The evidence is that over the years male applicants for employment have always applied for and have been assigned to Group 1 work and female employees have always applied for and have been assigned to Group 2 work. The evidence is that in recent years, at least, the difference in the work has been explained to applicants. The Group 1 starting rate was in 1978 and prior years lower than the Group 2 starting rate but the structure of rates enabled the employee in Group 1 ultimately to exceed the rate for the employee in Group 2. The evidence is that persons in Group 1 are expected ultimately to be able to perform all the job classifications

in Group 1, and although many have done so, some have not been called upon to nor have in fact performed them all. In this pattern no male has, at the time of hiring, applied for and been designated for the Group 2 classification, nor has any female, at the time of hiring, applied for and been designated for Group 1 classifications.

The issues before this Board contained in the Report to the Minister and, as we understand it, agreed to by the parties are as follows:

(1) Has Ms. Jorgensen been denied and is she being denied equal opportunity to perform Group 1 work?

(2) Was Ms. Jorgensen discriminated against in not being paid a Group 1 rate, or being classified as a Group 1 worker, when she performed Group 1 work?

(3) Does the Collective Agreement discriminate against women employees of B.C. Ice & Cold Storage Ltd. by not providing a one thousand hour rate in the Group 2 classification?

(4) Did Clause 602 of the 1976 Collective Agreement have a discriminatory impact in the employment of women at B.C. Ice & Cold Storage Ltd.?

ISSUE (1)

This will be dealt with in detail below.

ISSUE (2)

Susan Jorgensen performed work that comes within the description of Group 1 on occasions in January and in March, 1977. At that time she was being paid the top Group 2 rate which was approximately 21¢ per hour above the four hundred hour rate for Group 1 work but less than the one thousand hour rate of Group 1. Her complaint is that she should have been paid the one thousand hour rate, i.e. given credit for the hours she had performed in Group 2 towards a one thousand hour rate for Group 1. The Employer's position is that she does not get credit for the hours performed in Group 2 towards the one thousand hour rate for Group 1. Either at that time, but certainly later, the Employer rationalized this by stating that they were prepared to allow a credit for Group 2 persons performing Group 1 work up to six hundred hours. The Employer says that this is covered by the transfer provision in the Collective Agreement (8.01.2) which reads as follows:

> "8.01.2 An employee transferred from one department to another shall be credited with all hours worked (up to a maximum of 400) in establishing a rate in such department."

and that a Group 2 employee performing Group 1 work would only get the one thousand hour rate for Group 1 when that employee had performed six hundred additional hours of Group 1 work. However, the Employer was willing to concede a six hundred hour, rather than a four hundred hour, credit.

If there had been a male employee in Group 2 under similar circumstances, presumably he would have been in the same position. If either Susan Jorgensen or the male employee did not agree with the Employer's interpretation of the Collective Agreement, that employee could file a grievance but it does not seem to us to be discrimination against a female employee. It is a question of a grievance rather than a violation of the Human Rights Code.

ISSUE (3)

It should be noted that in 1979 and subsequent thereto, a one thousand hour rate did apply to Group 2. The Collective Agreement that was in effect in 1976 had one reference, and one reference only, to female and that is in Section 6.02 which is referred to in our analysis of Issue (4) below. The parties did address themselves to the matter of potential sex discrimination in their negotiations in or about 1973 and in subsequent negotiations. There is no other reference in the 1976 Collective Agreement or any reference in subsequent collective agreements that identify discriminatory practices in respect to sex, either in terms or rates of pay or of opportunities to perform certain work. There is no doubt in our view that historically there was that clear distinction drawn between female and male employees but the parties addressed

themselves to the question and removed that distinction. It would appear that in earlier collective agreements there was a male classification and a female classification, and the male classification covered jobs which are presently covered, more or less, in Group 1, and the female classification covered, more or less, jobs which are presently covered in Group 2. It therefore appears to us that, on the face of it, there is no discrimination in the Collective Agreement itself against women. We have addressed ourselves to the fact that in the interpretation and the administration of a collective agreement there may arise a conscious or subconscious discrimination against women. Such discrimination might arise in the application of the collective agreement or practices arising out of its administration without the Employer or those in authority specifically or consciously interpreting the collective agreement in a manner which would be discriminatory. Virtually every collective agreement has the capability of being interpreted in a discriminatory way by some party whether intentionally or unintentionally. The question of interpretation of the language of a collective agreement would better be dealt with in the grievance and arbitration procedure rather than as a complaint under the Human Rights Code. The issue as set forth deals only with the absence at the time of the laying of the complaint of a one thousand hour rate in Group 2 classifications as discriminatory against women. This difference in the hourly structure

was removed in 1979. We, however, have addressed ourselves to that matter and any other apparent discrimination in the Collective Agreement and have found that the Collective Agreement itself does not discriminate against women.

ISSUE (4)

Clause 6.02 in the 1976 Collective Agreement is contained as part of the attachment to Exhibit 7 and reads:

> "It is clearly understood that female employees shall not be required to work in low temperature rooms in cold storage."
>
> (Emphasis added)

Such a provision is not contained in the 1977 or subsequent collective agreements. If Clause 6.02 of the 1976 Agreement is discriminatory, it is discriminatory against males rather than females in that it permits females to refuse such work but does not, on its face, permit males to refuse such work. This complaint was withdrawn by the Branch.

This, then, in our view, leaves Issue (1) and the ancillary matters relating to it as the only Issue to be determined by this Board.

Section 8 of the Human Rights Code reads, in part, 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 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) ... 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; "

(Emphasis added)

It will be noted that the prohibition against discrimination includes, but is not limited to, discrimination by reason of sex.

The reason given by S. W. Reeder, President, to this Board and to Ms. Embree of the Human Rights Branch as to why the Employer subsequent to March, 1977, refused or declined to permit Susan Jorgensen to be engaged in Group 1 work was that because of alleged wrist and back problems she would be more likely to be susceptible to injury than if she were engaged in Group 2 work. This conclusion was arrived at by knowledge and observation that Susan Jorgensen wore wrist bands and taped her wrists and on one occasion requested Mr. Geoff Leyland, Plant Manager of the Employer, to tape them for her, and the observation of Mr. Leyland of Susan Jorgensen away from her

work station holding her back and indicating a back fatigue or back complaint. There was no other incident of back complaint or back ache nor was there anything other than the taping of wrists or wearing wrist bands which led management to conclude that she had back or wrist impairment. Mention was made of two occasions in 1978 when Susan Jorgensen was working washing fish in cold water and because of the discomfort to her wrists she asked for other work, which her seniority permitted her to do. Mr. Reeder also stated that he did not think he found her to have a disability but rather to exhibit back complaints and wrist complaints which indicated either weakness or impairments.

Mr. Reeder testified that based upon Dr. William Buckler's medical report and difficulties which very well may not have shown up in Dr. Buckler's office, he would not now offer Susan Jorgensen any opportunity to do Group 1 work. He says, "What we saw, we still cannot ignore."

Dr. Buckler conducted an examination of Susan Jorgensen on April 5, 1979, approximately two years after the complaint herein was filed, and she then had no physical complaints and appeared to be an average healthy young woman of average weight and build and strength and there were no objective findings of physical damage or injury. His opinion, based upon given assumptions and general evidence as to the strength and physical capabilities of males, females and human beings generally, will be dealt with at a later stage.

The Employer's position is that one of the factors which the Employer took into account in declining or refusing to allot Group 1 work to or permit Susan Jorgensen to perform Group 1 work was the condition of her wrists.

It is therefore necessary to arrive at a conclusion upon the evidence as to the actual condition of Susan Jorgensen's wrists and as to whether that condition would constitute a valid factor in refusing or declining to allow her to perform Group 1 work.

It should be noted that in the various questions to Susan Jorgensen and to the other witnesses various terms were used with respect to the condition of her wrists, such as "complained", "experienced" and other terms of communication with respect to the condition of her wrists.

Susan Jorgensen admitted that her wrists were, on occasions, tired and she seems, on occasion in her evidence, to have acquiesced in the term "sore" but usually under questioning returned to the term "tired". She stated that at no time did she receive any treatment with respect to her wrists nor did she consult any doctor. She never filed an accident report with respect to her wrists. She never refused work because of the condition of her wrists and, in spite of soreness, she worked in any event. She never made any complaints as to being unable to perform her work because of the condition

of her wrists. She denies the suggestion that on one occasion when racking fish that the water was too cold for her wrists and that she wanted to go off the washing line and onto the afternoon shift. She contended that she preferred more comfortable work and that because of her seniority she was entitled to ask for this type of work.

Susan Jorgensen admitted that she did tape her wrists periodically and that she wore wrist bands, some of which were supplied through First Aid and some of which were her own. She admitted that on one occasion she asked Geoff Leyland to tape her wrists for her. She stated that the reason for her taping her wrists and asking them to be taped for her was for protection and that she had her wrists taped irrespective of the job she was to perform. It would appear that Susan Jorgensen consistently taped her wrists, and that Faye Newman also did so to some considerable extent, and some employees did so occasionally.

The witness L. Jackson testified that Susan Jorgensen did mention the soreness of wrists and that she taped her wrists and that Jackson had taped them for her. This was done for support and it was not uncommon for employees to tape their wrists.

L. Mulroney testified that Susan Jorgensen did tape her wrists. This was not uncommon but she did complain about tired and sore wrists, as did others.

The witness Faye Newman testified that Susan Jorgensen had complained to her about sore wrists but no more so than had some other employees. This would appear to be in 1976, and after the summer of 1977 when she had ceased to perform Group 1 work. She stated that not only did Susan Jorgensen wear wrist bands but she, herself, and other employees, wore wrist bands for support of their wrists.

The witness Mick Louis testified that Susan Jorgensen never complained to him about sore wrists but that she did tape her wrists.

The witness Vince Casano said that he had heard that Susan Jorgensen had sore wrists and knew that she wore wrist bands or taped her wrists.

Gordon Jorgensen, brother of Susan Jorgensen, stated that he knew his sister had tired wrists and that she taped her wrists with elastic. He stated that she had never discussed this at home.

Mrs. G. M. McKenzie stated that she was aware that Susan Jorgensen taped her wrists or used wrist bands but she assumed that this was merely because her wrists were sore or weak.

Mrs. M. Hull stated that Susan Jorgensen never complained to her about sore wrists but she knew that she wore wrist bands but did not know why.

Mrs. L. Mackay gave similar evidence.

Peter Storness-Kress testified that Susan Jorgensen never made any complaint to him about sore wrists.

W. P. Hunter said that Susan Jorgensen had sore wrists on occasion but he cannot recall that it was a problem and he thinks she said that she was tired.

Karnal Manhas testified that Susan Jorgensen wore wrist bands, he assumed for strength in her arms but it never appeared to affect her ability to do work at the plant.

E. Gagnevin said that she knew Susan Jorgensen wore wrist bands but it was just to protect her wrists and that Susan Jorgensen had told her so.

Dr. Buckler, in addition to the evidence already referred to, stated that the absence of physical findings in his examination was not inconsistent with any strain on the back or sore wrists which had occurred in the past, nor did this exclude the possibility of strain in the future. He said that she did not have teno-synovitis but she had a risk of getting it.

Geoff Leyland referred to the occasion when he was asked by Susan Jorgensen to adjust the tightness on the bandage around her wrist with an elastic band that belonged to her. He thought this was an unusual request to a representative of management. However, on another occasion Faye Newman had

asked him to tape her wrists. Leyland said that Susan Jorgensen had stated that she taped her wrists for protection and that this was the first occasion upon which he was aware that Susan Jorgensen had her wrists taped.

J. Wolkosky recalled the occasion in 1978, which is after the complaint was filed, when Susan Jorgensen had been washing fish and had asked to be transferred from the day shift to the afternoon shift, giving the reason that her wrists were too sore for the job of washing fish. A similar request was made several days later but on that occasion she did not mention about sore wrists. He agreed that on the first occasion Susan Jorgensen mentioned sore wrists as the reason for the transfer and on the second occasion it was because the water was too cold for her. Susan Jorgensen, as previously stated, denied the words attributed to her.

With respect to the condition of Susan Jorgensen's back, the evidence is as follows.

Susan Jorgensen said that she had never felt any problem with her back, she had never felt fatigued or tired in her back or experienced any soreness in her back concerned with her work. She then was asked if she had ever experienced any soreness at any other time concerned with anything other than work and after remarking that it was embarrassing, she went on to relate that at one point in her life she had had

an intra-uterine device installed and her body rejected it and that she had had really bad back aches and cramps from it. This would be in 1976 or 1977. She recalled the incident when Geoff Leyland saw her when she was feeling tired and he asked her what the trouble was and she said that her back hurt. These symptoms lasted about a week and she ended up in hospital. Since that time she has had no trouble with her back and never made any complaints with respect to her back other than on that occasion. She has had no further physical problems and considers herself to be healthy.

Mr. Mulroney stated that Susan Jorgensen had never complained to him about a sore back.

Faye Newman gave similar testimony as did Mick Louis, Gordon Jorgensen, G. M. McKenzie, M. Hull, L. Mackay and Storness-Kress.

Dr. Buckler confirmed that in his examination Susan Jorgensen had told him about the back ache that had been associated with the intra-uterine device for preventing pregnancy. He stated that it is not infrequent for back pains to be associated with an intra-uterine device and that back pain was relieved by the removal of the device.

In his report (Exhibit 27) Dr. Buckler states that he was told certain things about the work to be done in the plant and of Susan Jorgensen's complaints with respect to her

back and wrists. In spite of his own negative objective findings, he proceeded in his report and in his evidence to give opinions concerning her ability to do certain work and the likelihood of her injuring herself. He then dealt with general statistics with respect to certain anatomical and physiological factors of males and females and he quoted statistics. Additional and differing statistics, and differences between males, and between persons of different racial origins, were put to him. In view of the evidence heard by the Board on these subjects, we discount the rather speculative opinion evidence of Dr. Buckler insofar as it relates to the condition of Susan Jorgensen's back and wrists, and the likelihood of her injuring herself.

In summary, with respect to Susan Jorgensen's wrists and back, the Board's view, upon the evidence, is that she had no significant problems nor had she experienced any unique physical conditions which would of themselves unduly affect her ability to perform Group 1 or Group 2 work, or which would of themselves likely expose her to job related injury.

Disregarding for the moment what is <u>not</u> "reasonable cause", pursuant to Section 8 (2) of the Code, it is our understanding of Mr. Roper's argument with respect to that subject that if the Employer held an "honest belief" that if Susan Jorgensen continued to perform Group 1 work after March,

1977, she might be exposed to job related injury because of the condition of her wrists and back, the holding of such honest belief would be reasonable cause even if the Board would not have come to the same conclusion.

He referred to the following cases as authorities.

The Vancouver Sun vs Gay Alliance Towards Equality (1977) 5 W.W.R. 198 (a decision of the Court of Appeal of British Columbia).

It was submitted that the decision of the Court that

> "the fact that such policy was motivated by bias on the part of certain individuals in the Appellant's management could not be said to have no reasonable foundation as long as the bias was honestly, not maliciously, held"

supported the Employer's position if it honestly held the belief referred to with respect to Susan Jorgensen's condition.

Branca, J.A. at page 209 said:

> "The question still remains: Was the policy of the newspaper based on reasonable cause? The Board did not attribute bad faith to the bias of the individual. It did not consider the second question at all, that is, whether or not the policy, despite bias, constituted reasonable cause."

Robertson, J.A., while observing that the correct test is the objective rather than the subjective test when on to say at page 210:

> "Conversely, if reasonable cause does not in fact exist, the other person cannot justify his act of discrimination by a genuine belief that a reasonable cause did exist."

The case went to the Supreme Court of Canada where the appeal was dismissed.

It seems to us that applying the above statements of the Court of Appeal that even if the Employer held an honest belief with respect to the above mentioned matters, such honest belief would not constitute reasonable cause if the alleged facts upon which such honest belief were based did not, in fact, exist or were not as the Employer believed. In other words, if Susan Jorgensen's condition with respect to her wrists and back would not, in fact, unduly affect her ability to perform Group 1 work or which would, of themselves, likely expose her to job related injury if performing such work, the fact that the Employer held an honest belief in that respect would not constitute reasonable cause within the meaning of the Code.

The second case relied on in that respect by Counsel for the Employer is

> British Columvia Forest Products Limited and Janice Lynn Foster vs The Director (1980) 2 W.W.R. 289.
>
> Chief Justice McEachern stated:
>
> "It seems clear from the authorities that to determine whether reasonable cause exists, it is necessary to apply an objective test, and the Appellant would have reasonable cause to refuse to employ the Respondent if facts existed which would constitute reasonable cause even if such facts were not known at the time of the application for employment."
>
> (Emphasis added)

Dealing with the particular facts as they related to the medical condition in that case, the Chief Justice stated:

> "For there to be reasonable cause it would be necessary for the Appellant to establish that the Respondent, in answering the said question as she did, misstated facts relevant to the question of employment. In my view the Appellant has not established a sufficient factual basis for such a conclusion. A misaligned vertebra does not necessarily indicate back weakness, and the word 'strain' usually connotes a soft tissue injury. I have no way of knowing if a hip condition such as described in the Stated Case constitutes a back weakness or strain, but I would surmise, which is the best I can do, that it would not."

The Chief Justice then went on to say:

> "In closing, even though it is not necessary to this decision I do wish to say that I agree entirely with Mr. Horne's very frank submission that there would be no discrimination which offends against the Code if the Appellant had declined to employ the Respondent because of an honest belief that her size or weight made it, in the Appellant's judgment, unlikely or impossible that she could do the job."

It should be noted that this statement is obiter. The honest belief was with respect to a judgment based on known facts of size and weight, not upon assumed physical conditions. It would appear to follow from the Chief Justice's earlier remarks in the case and upon the latter statement by way of obiter, that if the facts did not exist, such honest belief that they did so exist would not amount to reasonable cause within the meaning of the Sections in the Code.

Apart from the question of rates paid to Susan Jorgensen while she was performing work in Group 1, which matter