

IN THE MATTER OF THE HUMAN RIGHTS CODE
OF BRITISH COLUMBIA

AND IN THE MATTER OF A COMPLAINT BY
WAYNE KESTERTON AGAINST THE SPINNING WHEEL
RESTAURANT AND JAMES K. CLARK AND CLARK
REEFER LINES LTD.

REASONS FOR DECISION AND ORDER

DATES OF HEARING: AUGUST 19 and SEPTEMBER 23, 1975

PLACE OF HEARING: 4211 KINGSWAY, BURNABY, B.C.

MEMBERS OF BOARD
OF INQUIRY: PENNY BAIN
BILL GIESBRECHT
ROD GERMAINE (Chairperson)

EFFECTIVE DATE OF DECISION: OCTOBER 22, 1975

Reasons of Board Members - Penny Bain and Bill Giesbrecht.

The Complainant, Wayne Kesterton, alleges that one or more of the Respondents contravened Section 8(1) of the Human Rights Code of British Columbia in late January, 1975. The Complainant alleges that he was terminated from his employment at The Spinning Wheel Restaurant because of his sex. The Spinning Wheel Restaurant is owned by the Respondent, Clark Reefer Lines Ltd., and managed by the Respondent, James Clark. Mr. Clark is also the President and principal shareholder of Clark Reefer Lines Ltd.

The hearing in respect of this complaint was originally scheduled to take place on July 22, 1975. That hearing was adjourned when, shortly before July 22, 1975, the Respondent, James Clark, informed the office of the Director of the Human Rights Code that he had not received notice of the hearing. At the hearing on August 19, 1975, counsel for

the Respondents, Mr. Irvine E. Epstein, expressly waived the requirement of fifteen days notice under Section 4 of the Human Rights Code of British Columbia Regulations on behalf of all of the Respondents.

The Board heard a considerable amount of testimony from several witnesses in the course of the two days which were required to complete the hearing. While there was conflict in the testimony, we have made the following findings of fact as to the events which gave rise to Mr. Kesterton's complaint.

On January 18, 1975 Mr. Kesterton responded to an advertisement in the Vancouver Sun Newspaper for waiters and waitresses required by a new restaurant in Gastown. Mr. Kesterton was interviewed on the premises of this new restaurant, The Spinning Wheel, at 212 Carrall Street, Vancouver, by the Respondent, James Clark. Mr. Kesterton was hired as a waiter in the dining room and told by Mr. Clark that he would be given a chance to prove himself satisfactory. Mr. Kesterton commenced work on Wednesday, January 22, 1975. His hours were from approximately 5:00 P.M. to closing time which was around midnight to 1:00 A.M. Mr. Kesterton worked the evenings of Wednesday to Saturday, had Sunday and Monday evenings off and was to return to work on Tuesday evening.

On Tuesday afternoon, Mr. Kesterton received a call from Mr. Clark and was told he would not be needed any longer. Mr. Clark told Mr. Kesterton that the reason was that Mr. Clark and his partners had decided to use only female employees in the dining room. No other reason was given to the Complainant. Mr. Kesterton was disappointed and upset and he called the Human Rights Branch. He was advised that if his allegation

that he had been fired because of his sex were true then he had grounds for a complaint.

On the evening of January 30th the Complainant went to The Spinning Wheel to pick up his pay cheque. At that time he met with the Respondent, James Clark, and asked for a written recommendation. Mr. Clark agreed and Mr. Kesterton asked him to state the reason for his termination in the recommendation. Mr. Clark immediately wrote out the following letter on a page from a note book:

Jan. 30-75

To Whom It May Concern

Mr. Wayne Kesterton worked in our new restaurant for one week on trial, I found him to be very efficient and a good waiter however, because of the style of our restaurant, I decided to employ female waitresses only. I recommend Mr. Kesterton for any position in a Bar or Restaurant.

Sincerely,

Jim Clark
The Spinning Wheel

Mr. Clark also informed Mr. Kesterton that he would assist him to obtain a job at a new restaurant that his brother was opening shortly.

Before Mr. Kesterton left the restaurant that evening he informed at least one employee that he intended to use the recommendation to substantiate a complaint he intended to make under the Human Rights Code. Mr. Clark was told of Mr. Kesterton's intention to make a complaint shortly after Mr. Kesterton left the premises.

Mr. Kesterton requested the Human Rights Officer, Hanne Jensen, not to proceed with the complaint until he knew whether or not the job promised by Mr. Clark would be available. On February 13, 1975 Ms. Jensen received a formal appointment as Investigating Officer from the office of the Director of the Human Rights Code and, after ascertaining that Mr. Kesterton wished to proceed because the other job had not materialized, commenced her investigations.

Ms. Jensen went to The Spinning Wheel in the early evening of February 14, 1975 to talk to Mr. Clark. During the following interview, Mr. Clark by his own admission was unco-operative and hostile. He informed Ms. Jensen that in fact the reason for the termination in the written recommendation was not the real reason. Mr. Clark stated that Mr. Kesterton was terminated because he was not friendly with the customers and because he was too cocky. Mr. Clark also requested another employee, Ralph Kerman, to discuss Mr. Kesterton with Ms. Jensen. Mr. Kerman said Kesterton was unfriendly and he related an incident in which Kesterton had complained about the size of a tip he had received. Clark told Ms. Jensen to contact his solicitors. Ms. Jensen subsequently contacted Mr. Epstein who was described by Clark as his lawyer and Mr. Epstein explained he had not yet received instructions. Settlement was not achieved in subsequent contacts between Ms. Jensen and Mr. Epstein.

Section 8 of the Human Rights Code of British Columbia reads:

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 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.

(2) For the purposes of subsection (1),

- a) the race, religion, colour, age, marital status, ancestry, place of origin, or political belief of any person or class of persons shall not constitute reasonable cause;
 - a) a provision respecting Canadian citizenship in any act constitutes reasonable cause;
 - b) the sex of any person shall not constitute reasonable causes unless it relates to the maintenance of public decency;
 - c) a conviction for a criminal or summary conviction charge shall not constitute reasonable cause unless such charge relates to the occupation or employment, or to the intended occupation, employment, advancement, or promotion, of a person.

(3) No provision of this section relating to age shall prohibit the operation of any term of bona fide retirement, superannuation, or pension plan, or the terms or conditions of any bona fide group or employee insurance plan, or of any bona fide scheme based upon seniority.

We conclude that at least one of the Respondents is an employer and that the employer refused to continue to employ Mr. Kesterton. We are therefore required to determine whether reasonable cause existed for that refusal. More specifically, in view of the allegation before the Board, we must determine whether the termination was due to Mr. Kesterton's sex. If the termination was due to Mr. Kesterton's sex, there would be no reasonable cause and therefore a contravention of Section 8.

Three aspects of the evidence before us support Mr. Kesterton's contention that he was fired because of his sex. First, Mr. Kesterton was told by the Respondent James Clark, both during the conversation in which he was first advised he was dismissed and subsequently when he attended at The Spinning Wheel to pick up his pay cheque, that the reason he was being dismissed was simply that The Spinning Wheel was going to change to an "all-female" look. Second, the Complainant received a letter of recommendation which expressly states as the reason for the dismissal the decision of the Respondent James Clark "to employ female waitresses only". However, before stating our conclusions as to these first two aspects of the evidence, we will assess the weight to be ascribed to a third aspect of the evidence which could support the complaint.

It was argued by counsel for the Complainant that the Respondents did, indeed, institute an "all-female" look in the restaurant part of its operations. However, we have concluded that the evidence respecting the policy of the Respondents in the staffing of their restaurant after Kesterton was terminated is inconclusive.

First, a witness for the Complainant, Kim Peters, who was employed at the restaurant from late January to the end of March, and again during the month of June, 1975, testified that after Mr. Kesterton was terminated, food was served in the restaurant by females only. She said that on very rare occasions when the restaurant was busy a male employee from the bar area might assist in the serving of food in the restaurant. A male bus boy, Robin Brook, was also employed at this time.

Three male employees of the restaurant gave evidence for the Respondents respecting the issue of whether an "all-female" look was instituted. Mr. Ralph Kerman, a bartender, testified that none of the employees had exclusive responsibilities in

either the restaurant or the bar area of the restaurant but rather that all employees were required to be flexible and to move from one area to another according to the needs of the traffic in the restaurant. As a result he had waited on tables in the restaurant frequently. Robin Brook testified that his duties consisted of waiting on customers in the dining room area, as well as the duties of a bus boy. Finally, Mr. Peter Croke testified that although his primary responsibility was in the bar he was often required to serve food in the dining room.

In addition the Respondent James Clark testified that his employees were required to assist in all areas of the operation of the restaurant. He also said that he has employed men to wait in the dining room and that he himself on occasion serves food in the dining room.

The evidence as to whether an "all-female" look was ever introduced at The Spinning Wheel is therefore inconclusive. While in Kim Peters' view the male "waiters" were either bus boys or bartenders but not dining room waiters, the view of the Respondent and the male employees is that the work of serving food in the dining room was not exclusively a female

function. Further, the Board is not prepared to give much weight to the Respondent's conduct in relation to an "all-female" look after Mr. Clark was informed of the possibility of a Human Rights complaint as he then had an opportunity to modify his conduct in anticipation of this hearing.

It therefore becomes necessary to turn to the first two aspects of the evidence which are based on the oral and written statements by the Respondent and consider carefully whether that evidence is sufficient to show that Mr. Kesterton was terminated because of his sex. The Respondent James Clark testified at the hearing that his statements at the time of the termination of the Complainant were untrue. He testified that the events which lead up to the termination and the real reason for the termination are as follows.

Mr. Clark stated that a few days after Mr. Kesterton had started work Mr. Clark received a telephone call from an acquaintance who is the proprietor of another restaurant in Gastown, Mr. Raymond P. Carton. Mr. Carton complained to Clark that Kesterton had made an insulting remark as to the amount of tip Mr. Carton left following a dinner party in the restaurant. In response to this complaint from Mr. Carton, Mr. Clark says that he canvassed all of his employees about Wyane Kesterton. Although we are not convinced that Mr. Clark talked to all of his employees, particularly as we accept the evidence of Kim Peters that she was not contacted, we believe he did discuss Mr. Kesterton with some of his employees, including Francine Klotz, who was the head waitress in the dining room, and Ralph Kerman. Mr. Clark says that the reports from employees were unanimously negative in respect of Kesterton, and he felt that as Kesterton was not able to get along with his employees, Kesterton would have to go. Clark says that he came to that conclusion despite his personal observations that Kesterton was an efficient and keen employee who was always prepared to make suggestions for improvements and who regularly sought the approval of Clark as to his performance.

Mr. Clark testified that these favourable impressions of Kesterton together with the following factors led him to write the recommendation containing the untrue statement of the cause of the termination. Mr. Clark believed Kesterton was excitable and that if he were told the real reason for his termination it would result in confrontations between Kesterton and himself, and Kesterton and his employees, which Clark wanted to avoid. In addition to that, Clark testified he was very busy when Kesterton requested the recommendation and he did not wish to take the time to engage in the kind of discussion which would have been necessary in order to describe for Kesterton the real reasons for his termination. Finally, Clark testified that he did not want to hurt Kesterton and this was especially so in view of Kesterton's keenness and Clark's personal conviction that he was efficient, and under proper supervision, would perform well as a waiter in a high class dining room.

In assessing this testimony of the Respondent James Clark and the evidence supporting an explanation for the stated reason for Kesterton's termination, we are first of all impressed by the evidence of Mr. Raymond Carton. Mr. Carton testified that Kesterton had clearly uttered the words "cheap bastards" as Carton's party was leaving the restaurant. Mr. Carton expressed the view that such conduct reflected upon Gastown as a whole and that he personally would have terminated an employee for similar conduct. Mr. Carton gave no hint of any reason why his evidence should not be accepted entirely and we accept his evidence.

We are of the opinion that the conduct of Kesterton giving rise to Mr. Carton's complaint is very serious conduct and conduct which probably would, in the minds of many proprietors of quality dining room facilities, constitute sufficient grounds for dismissal. Moreover, on the evidence of witnesses for both parties, we believe that Clark would have received a negative assessment of Kesterton from his

employees Francine Klotz and Ralph Kerman. There existed, therefore, grounds apart from Kesterton's sex, upon which Clark could have been moved to terminate Kesterton.

Finally, we accept Clark's explanation for his giving the written recommendation. Clark says he was able to tell other employees the reason for their termination because the reason was simply lack of experience. However, in the case of Kesterton, who had training, qualifications and experience, Clark wished to avoid confrontations and the energy and time necessary to deal with those confrontations.

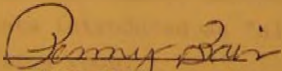
In our opinion, therefore, all three elements of the evidence in support of the Complainant's contention that he was fired because of his sex, prove, upon close examination, to be inconclusive. Not only is the evidence concerning whether the Respondents ever introduced an "all-female" look inconclusive, there did exist grounds other than Kesterton's sex upon which Kesterton might have been dismissed and we accept the Respondent James Clark's explanation for not stating orally and in writing to Kesterton his true reason for the termination.

It is the opinion of this Board that the burden of proof resting upon the Complainant is not the criminal burden of proof beyond a reasonable doubt but rather the civil burden of proof on the balance of probabilities in all of the circumstances. We rely upon several decisions to this effect by Boards of Inquiry in Ontario, and particularly the decision of Professor Harry W. Arthurs in Black and Henry v. Rajewski dated March 25, 1969, and we rely upon the more recent decision of the Saskatchewan Human Rights Commission in Bird v. Gabel and Gabel dated September 16, 1974. However, for the reasons already expressed, in our opinion the Complainant in these proceedings has not satisfied us that,

on the balance of probabilities in all of the circumstances, he was dismissed because of his sex. In view of our conclusion, we are of the opinion that the complaint must be dismissed.

Having concluded that the allegation must be dismissed, we wish to place on record our conclusion respecting two related matters. First, we consider it regrettable that the Respondent James Clark found himself unable to discuss with the Complainant Kesterton the complaints made against Kesterton by Mr. Carton and the other employees of The Spinning Wheel. In terminating Kesterton, we believe that Clark acted precipitously and without due consideration and respect for his employee, Wayne Kesterton. We conclude that because of Clark's refusal to discuss with Kesterton the problems which had arisen and because of Clark's refusal to be truthful with Kesterton, Wayne Kesterton never had reason to suspect or believe that he was fired for any cause other than the one expressed to him orally and in writing. Mr. Kesterton was therefore completely justified in prosecuting the complaint he made under the Human Rights Code and the dismissal of his allegation is in no way a reflection upon the reasonableness of his conduct.

Finally, we consider it important that we express some opinion as to the conduct of the Respondent James Clark in response to the allegation made against him by Kesterton. The admitted hostility of Clark toward the Investigating Officer and his failure to co-operate is extremely regrettable. We conclude that the Officer made every possible effort to settle the complaint and that the Director had every reason, based on the evidence before her, to proceed with the complaint. If Mr. Clark had co-operated with the Officer and communicated his true reasons for the termination to Mr. Kesterton, this complaint may not have proceeded to the stage of a Board of Inquiry hearing.


PENNY BAIN


BILL GIESBRECHT

Reasons Of Board Member Rod Germaine

I have had an opportunity to read the Reasons for Decision of my colleagues and I must respectfully dissent from those reasons. I have no dispute with the conclusions of fact made by my colleagues but I am forced to state that I draw different inferences from those facts.

In my respectful opinion, the Board of Inquiry must proceed very carefully in assessing the evidence of the Respondent James Clark. Mr. Clark told the Board he was not truthful with Mr. Kesterton at the time he terminated Kesterton. I believe the evidence of any witness who asserts positively that he did not tell the truth must be the subject of extra scrutiny on the part of any tribunal required to assess credibility.

I would agree with my colleagues on the Board that the evidence as to whether an "all-female" look was ever introduced at The Spinning Wheel restaurant is not particularly conclusive. However, I am not impressed by the testimony of the three witnesses for the Respondents on this issue. Mr. Kerman said that Robin Brook was hired as a kitchen helper and bus boy and that almost immediately he took up the duties of a waiter and bus boy combination in the restaurant. Mr. Brook himself, however, testified that he was hired as a waiter. This inconsistency causes me to be more impressed by the evidence of the witness Kim Peters who testified that after Kesterton's termination only waitresses were employed in the restaurant. Moreover, I do not believe that the evidence to the effect that in busy moments, male employees would assist in the serving of food really contradicts the proposition that the Respondents introduced an "all-female" look in The Spinning Wheel dining room.

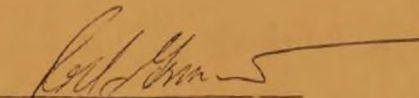
The second aspect of Clark's testimony which I consider significant is his admitted willingness to recommend Kesterton for a job as a waiter in a restaurant that his brother was attempting to purchase. Clark explained to the Board that he was willing to make this recommendation because of his conclusion that with proper supervision Kesterton would perform the duties of a waiter sufficiently and satisfactorily. In my opinion, if Clark really did fire Kesterton because of the complaint from Carton and his subsequent discussions with other employees each of which resulted, Clark testified, in a negative assessment of Kesterton, then I am simply unable to accept as credible Clark's evidence that he nevertheless would recommend Kesterton for a job in his brother's restaurant. In my opinion, the willingness of Clark to recommend Kesterton for a job in his brother's restaurant is consistent with only one conclusion. That conclusion is that Kesterton was fired for reasons quite unconnected with the performance by Kesterton of his duties in The Spinning Wheel. The obvious reason Kesterton was fired is the one stated by Clark in the written recommendation. If that reason is correct, then Kesterton was fired because of his sex and the Respondent Clark and the Respondent Clark Reefer Lines Ltd. have contravened Section 8 of the Human Rights Code.

For these reasons, I would have allowed the complaint made by Wayne Kesterton. However, Section 18(2) of the Human Rights Code of British Columbia Regulations provides that the decision of the majority of the members of a Board is the decision of the Board and therefore the Complaint is dismissed.

There are also two aspects of the Respondent Clark's testimony which, taken together, cause me to conclude that his evidence to the effect that Kesterton was not fired because of his sex is evidence which is simply not credible. First, it is to be emphasized that Clark testified that he consulted his employees and came to his conclusions about Kesterton only after and only because he received a complaint from Mr. Raymond Carton. I concur with my colleagues that Carton's evidence is credible. However, if that complaint were as significant in Clark's decision to terminate Kesterton as he would have us believe, then I am convinced he would have informed Human Rights Officer Jensen of Carton's complaint when they met on February 13. Clark admitted that he was hostile toward the investigating officer but he also testified that he did inform her that the real reason Kesterton was fired was because of his unfriendliness and his cocky attitude. Clark denied that he told Ms. Jensen that he had received no complaints from customers concerning Kesterton. He said, however, that he was so angry when he talked to Ms. Jensen that he had difficulty in recalling the content of his conversation with her. I choose to accept the evidence of the Human Rights Officer Jensen that Clark told her he had received no complaints from any customer about Kesterton. I find this evidence extremely important since Clark testified at the hearing before the Board of Inquiry that it was the complaint from Carton which led him to consult his employees and decide that Kesterton had to go. The inconsistency of Clark in stating his reasons for termination is substantial. First, he told Kesterton it was because he had decided to go to an "all-female" look, second he told Human Rights Officer Ms. Jensen it was because Kesterton was unfriendly and cocky, and, finally, he told the Board of Inquiry that, because of a complaint, he consulted his staff and determined Kesterton could not fit in. That inconsistency causes me to conclude that Clark's testimony at the Hearing was not credible.

O R D E R

Upon hearing the evidence adduced on behalf of the parties on August 19th and September 23rd, 1975, and upon hearing counsel for the parties on the foregoing dates; this Board of Inquiry concludes that the allegation is without merit and the allegation is hereby dismissed.



Rod Germaine
Chairperson