OCT. 197

HUMAN RIGHTS BOARDS OF INQUIRY

HUMAN RIGHTS CODE: BOARD OF INQUIRY DECISION

Billie Lee Linton (Complainant)	v.	Nabob Foods Ltd., (Respondent)

Board: Marguerite Jackson, Edwin W. Willes, Mohan Jawl (Chair)

For Complainant and the Human Rights Branch: Stephen Kelleher

For Respondent: Terence Wolfe

A board of inquiry heard a complaint filed by Billie Lee Linton alleging that she was discriminated against, on the basis of sex, by her employer Nabob Foods Ltd., contrary to section 8 of the Human Rights Code of BC. In a 2 to 1 decision, the board ruled that Ms. Linton was not discriminated against when she was demoted from the position of order-selector in the Nabob warehouse.

Ms. Linton worked as a packer at Nabob Foods Ltd. from April 1973 to March 1976; all packers at Nabob Foods Ltd. are women.

In March 1976, Ms. Linton bid on a job as order-selector and was awarded the position on the basis of seniority. Only one other woman had ever worked as an order-selector in the plant. That particular woman had returned to her job as packer after only four days. During Ms. Linton's probationary period, she was demoted from order-selector. Ms. Linton alleged that her demotion was the result of sex discrimination.

The board determined that a *prima facie* case was established against the respondent; the positions of packer and order-selector were virtually sex-segregated. There was undisputed evidence that Mr. Sanderson, the warehouse supervisor, had stated to the investigating Human Rights officer and to a union representative, on separate occasions, that "The warehouse was no place for a woman as it was too cold and too dusty" and that "a boxcar was no place for a woman."

In addition, three weeks after the complainant became an order-selector, the company, the union and the Workers Compensation Board entered an agreement which identified certain general warehousemen's duties as being too physically strenuous to be performed safely by women. The agreement was subsequently annulled due to the suggestion that it might offend the Human Rights Code, given that previous Human Rights Board of Inquiry decisions have required that employee's abilities be assessed individually, not on the basis of a group factor.

One of an order-selector's duties considered too strenuous for women was loading and unloading boxcars. Ms. Linton was never assigned to work in the boxcars and as a result was never assessed on her ability to do so. Her supervisor said that in his opinion, she could not do the work without exposing herself to injury.

The respondent's position was that the primary justification for Ms. Linton's demotion was her lower than average productivity. The board found that the measures of productivity were not entirely reliable and that Ms. Linton was being compared to workers more experienced than herself.

The majority opinion of the board stated, "The Human Rights Code guarantees equality of opportunity and in this context that means an unbiased test for candidates for the order-selector position . . . we are not convinced that Billie Linton's opportunities during her probationary period were in any way compromised by the fact that she was a woman."

The dissenting opinion by Marguerite Jackson quoted a previous board of inquiry decision: "A contravention will occur if the prohibited consideration is only one of the motivating factors." She further stated:

> In my opinion, when the factor of sex is present to any degree in an employment decision, the burden is extremely heavy to overcome the presumption that sex played a part in the decision.
>
> In my opinion, that burden has not been discharged. I find that one of the reasons for the decision to demote Billie Lee Linton was

the fact that she was a women.

For these reasons, I would have allowed the complaint made by Billie Linton.

The board also confirmed that complainants have the right to choose whether to make a complaint under the Human Rights Code or under procedures provided in a collective agreement, where they are covered by such an agreement.

Finally, counsel for the respondent asserted a claim for costs against the Human Rights Branch. The board determined that the claim was without merit and stated that the decision to dismiss the complaint was one which occasioned a great deal of difficulty for the board.

OCT. 1978

HUMAN RIGHTS CODE: BOARD OF INQUIRY DECISION

Alex and Nella Nelson (Complainants)	v.	Mr. and Mrs. Gubbins and Byron Price Associates Ltd. (Respondents)

Board: Leon Getz

For Complainants and the Human Rights Branch: S. Gudmundseth

For Respondents: R.A. Price

A board of inquiry upheld a complaint by Alex Nelson and Nella Nelson alleging that they were denied tenancy, contrary to section 5 of the Human Rights Code, because they are native Indians.

Mr. and Mrs. Nelson had inquired about an advertised vacancy in a townhouse complex owned by Belvedere Estates Ltd. Byron Price and Associates Ltd., acting as rental agent, provided instructions to the resident managers.

On two separate occasions, Mr. and Mrs. Nelson were told in person by Mrs. Gubbins, the wife of the resident manager, that there was no vacancy in the complex, although on the day of the first inquiry an advertisement of vacancies had appeared in the Victoria Colonist. On each occasion there had been a "vacancy" sign on the lawn of the complex, in front of the Manager's apartment. Moreover, Mr. Stern, a relative of the complainants and an RCMP officer, had been advised, when he telephoned after each of the Nelson's unsuccessful inquiries of Mrs. Gubbins, that vacancies existed. In addition to this, after making a further inquiry by telephone, subsequent to the first failed attempt to rent the townhouse, Mrs. Nelson had been told by an employee of Byron Price and Associates Ltd. that there was in fact a vacancy, and she had been referred to the resident manager of the complex.

On the occasion of the second personal inquiry by the Nelsons, Mrs. Gubbins had stated that there already was an application pending on the available townhouse, and that therefore there was no longer a vacancy. On the basis of this information, and on the basis of Mrs. Gubbins' testimony at the board of inquiry that there were tenants of a variety of racial origins in the complex, counsel for the respondent sought dismissal of the complaint.

In his decision upholding the complaint, the chairman of the board of inquiry confirmed that the Human Rights Code does not require that there be space available for occupancy by a tenant, but simply that it be advertised or represented as available, for a complaint of discriminatory treatment to be successful. The newspaper advertisements, telephone information provided to Mr. Stern, and the "vacancy" sign outside the complex were found to be sufficient to meet this requirement. Mrs. Gubbins' position, that there was no vacancy since another application was pending, was considered to be insufficient, given the wording of the Code, to dismiss the complaint. In addition, Mrs. Gubbins had testified that there was a fairly high rate of rejection of applications

The board of inquiry found that Mrs. Gubbins had in fact denied the Nelsons the right to occupy space represented as being available for occupancy, because of their race. This decision was not modified in testimony that other tenants in the complex were of a variety of racial origins. Professor Getz stated: "It cannot, in my opinion, be deduced from the fact that one is tolerant of, and not disposed to discriminate against some racial groups, that one is similarly disposed in respect of all racial groups."

With respect to liability for damages, the board ruled that Byron Price and Associates Ltd., although not responsible for the payment of