BOARD OF INQUIRY appointed by THE MINISTER OF LABOUR to enquire into a COMPLAINT under the HUMAN RIGHTS CODE OF BRITISH COLUMBIA.

Vancouver, B.C.
July 16, 1984

BETWEEN:

SHERI ZARANKIN

Complainant

AND:

IAN JOHNSTONE, carrying on business as WESSEX INN

Respondent

REASONS FOR DECISION

LYNN SMITH: Chairperson and Sole Member

APPEARANCES:

DEREK FINALL, Esq. — appearing for the Complainant and for the Acting Director, Human Rights Code

DONALD JOHNSTON — speaking for Mr. Ian Johnstone

CONSTITUTION OF THE BOARD

The Minister of Labour appointed a Board of Inquiry under the Human Rights Code, R.S.B.C. 1979, c. 186 into an allegation that Sheri Zarankin, Complainant, was subjected by the Wessex Inn, Respondent, to discriminatory conditions of employment and dismissed on the basis of sex and without reasonable cause due to sexual harassment contrary to section 8 of the Human Rights Code. It was agreed by the parties at the hearing that the complaint would be amended to reflect the legal nature of the Wessex Inn as an unincorporated sole proprietorship: it is therefore against Ian Johnstone, carrying on business as the Wessex Inn. The complaint falls to be determined under the Human Rights Code, whether or not the new Human Rights Act (Bill 11,1984) has been proclaimed before the decision is handed down, by virtue of section 27 (1) of the Human Rights Act, which provides for a Board of Inquiry already appointed to have the same powers it had under the Code. This Board was appointed prior to the Code~s repeal.

The Complainant and the Acting Director of the Human Rights Code were represented by Derek Finall of the Department of the Attorney General. The Respondent chose not to be represented by counsel, but Mr. Donald Johnston, a friend of the Respondent, spoke on his behalf.

All parties agreed at the hearing that the Board was properly constituted and that it had jurisdiction over the complaints.

The evidence tOOK two days to hear, and was followed by written submissions on one issue. The final written submission, that of the Respondent, was received on March 20, 1984.

SEXUAL HARASSMENT AS A HUMAN RIGHTS ISSUE

Although complaints regarding sexual harassment have come before tribunals in several other Canadian jurisdictions and in the United States, this is the first to be heard by a Board of Inquiry in British Columbia. For that reason, I will discuss why sexual harassment is a human rights issue before discussing the facts of this particular case.

Sexual harassment in the workplace is not a new phenomenon: legal recourse for its victims is new. Sexual harassment has been defined by Catharine Mackinnon[1] as "the unwanted imposition of sexual requirements in the context of a relationship of unequal power." Another writer[2] has said that the term "sexual harassment" has come to be used lito identify those kinds of sexual coercion and exploitation that occur neither between complete strangers nor between purely social acquaintances or family members, but between men and women in a formal or structured relationship in which women have an expectation that the basis of the relationship has nothing to do with sex. The most common and important of these relationships are found in the workplace. Relations in schools, colleges and universities are another common, important example". A definition which has been frequently referred to by Canadian tribunals appears in one of the first cases, Bell and

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1. An American legal scholar whose book, Sexual Harassment of Working Women: A Case of Sex Discrimination (1979), has been influential in developing the co~ceptual basis for sexual harassment complaints.

2. Jill Laurie Goodman, "Sexual Harassment: Some Observations on the Distance Travelled and the Distance Yet to Go" 10 Cap. U.L. Rev. 445 (1981). (It should be noted that, of course, sexual narrassment can be carried on by women as well as by men, although this seems to be most unusual from the cases. One U.S. case involves this combination: Heubschen v. Department of Health and Social Services 547 F. Supp. 1168 (1982) U.S. 0; st. Ct.", W.D. wiscons;n.)

Bell and Korçlak v. Lada and th! Flamin; Steer 5teak ~ouse:3

> The evil to be remedied is the utilization of economic power or authority so as to restrict a woman!s guaranteed and equal access to the work-placet and all of its benefits, free from extraneous pressures having to do with the mere fact that she is a woman ••••
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> The forms of prohibited conduct that, in my viewt are discriminatory run the gamut from overt gender based activity, such as coerced intercourse to unsolicited physical contact to persistent propositions to more subtle conduc~ such as gender based insults and taunting, which may reasonably be perceived to create a negative psychological and emotional work environment. There is no reason why the law, which reaches into the workplace so as to protect the work environment from physical or chemical pollution or extremes of temperature, ought not to protect employees as well from negative, psychological and mental effects where adverse and gender directed conduct emanating from a management hierarchy may reasonably be construed to be a condition of employment.

It may be seen that this definition encompasses two possibilities:

1. The extraction of sexual favours as the quid pro quo for rewards or absence of punishments in the environment in which the harasser has authori ty;
2. The creation of a work environment in which the working atmosphere is affected by sex-oriented conduct to an unacceptable extent whether or not sexual favours must actually be delivered as a quid pro ~.

There was controversy in the United States about whether conduct in the second category constitutes sexual harassment under Title VII to the Civil Rights Act of 1964, because such conduct does not have direct adverse employment-related consequences. The Equal Employment Opportunity Commission, in 1980, promulgated its Final Guidelines on

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3. (1980) 1 C.H.R.R. 0-155 (Ont. Bd.)

Sexual Harassment. Those Guidelines provide a definition of sexual harassment as follows:

> (a) Harassment on the basis of sex is a violation of Section 703 of Title VII. Unwelcome sexual advances, requests for sexual favours, and other verbal or physical conduct of a sexual nature constitute sexual harassment, when
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> 1. Submission to such conduct is made either explicitly or implicitly a term or condition of an individual ',s employment,
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> 2. Submission to or rejection of such conduct by an individual is used as a basis for employment decisions affecting such individual, or
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> 3. Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance, or creating an intimidating, hostile, or offensive working environment.4

The Guidelines have been referred to with approval in appellate level decisions in the United States. There seems to be a consensus that the kind of sexual harassment which does not fall into the classic quid pro quo category of sex for advancement is still a matter which can constitute sex discrimination under Title VII of the Civil Rights Act of 1964. A leading case is Bundy v. Jackso~5. The court in that case, referring to MacK;nnon~s book, pointed out that an employer can effectively make an employee's endurance of sexual intimidation a

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4. The Guidelines, particularly their treatment of vicarious liability of employers, are discussed in an article by Robert F. Conte and David L. Gregory, "Sexual Harassment in Eticle by Robert F. Conte and David More Realistic Standards of Liabilitmployment - Some Proposals Towards It appears that the issue of vicaryll 32 Drake L. Rev. 407 (1982-83). sexual harrassment carried out by one employee on another has been a central source of controversy in the United States; that issue does not arise in this case.

5• 641 F. (2nd) 934 (D. C. Cir. 1981)•

a "condition" of employment even if he "demands no response to his verbal or physical gestures other than good natured tolerance". The employee then must decide whether to endure the harassment, attempt to oppose it while putting her job at risk or leave her job.

The court in Bundy v. Jac,kson held that the creation of a discriminatory work environment through sexually-oriented verbal conduct was just as contrary to Title VII as the creation of a discriminatory work environment through racial slurs (which had been held to constitute racial discrimination in a line of appellate decisions.) Numerous other American decisions have adopted this approach.[6]

Although no Canadian jurisdiction has promulgated guidelines similar to the E.E.O.C. ones, the consensus of tribunal decisions favours a definition of sexual harassment as comprehensive as the Guidelines definitions and inclusive of the "poisoned work environment" concept. The Bell and Korczak decision began this approach, followed in other Canadian tribunal decisions.[7]

6. Koster v. Chase Manhattan Bank 554 F. Supp. 285 (1983) U.S. Dist. Ct., S.D. New York; Henson v'. City of Dundee 682 F. 2d 897 (1982) 11th eir.; Ferguson v. £.1. DuPont de Re~ours and Co., Inc. 560 F. Supp. 1172 (1983) U.S. Dist. Ct., D. Delaware; Katz v. Dole 109 F. 2d 251 (1983) 4th Cir.; Coley v. Consolidated Rail Corp~ration 561 F. Supp. 645 (1982) U.S. Dist. Ct., E.D. Michigan, S.D.

7. Robichaud v. Brennan and the Treasury Board (1983) C.H.R.R. 0-1272 (Can". Rev';ew Trib.); Howard and Broda v. Lemo;gnan and Econo-Car Canada Ltd. (1982) 3 C.H.R.R. 0-1150 (Alta. Bd.); Cox and Cowell v. Jay0..:i.ttencl et ale (198)1, 3 C.HeR.R 0-609 (Ont. 3d..; Ar:,agonav. Elegant Lamp Co. Ltd. and Fillipitto (1982) 3 C.H.R.R. 0-1109 (nt. Bd•); Diesting v. Dollar Pizza (1978) Ltd. et al. (1982) 3 C.H.R.R. 0-898 Util» Bd),; Ruinave' l v* Asama tnterprj ses Ltd. (1982) 3 C.H.R.R. 0-922 (Man. Bd.; Giouvanoudis v. Golden Fleece Restaurant and Carras (1984) 5 C.H.R.R. 0-1967"" (Ont. Bd. J; Kotyk and A"l~ry V; Canadian Emp10yment and Immigration Commission and Chuba (1983) 4 C.H.R.R. 0-1416 (Can. Bd, upheld on reVlew, December 29,,1983). There is also support for this approach in a recent arbitration award under the Labour Code of British Columbia (Government of the Province of Bri,~;sh Columbia v. British Columbia Government Em'Eloyees IJ'nion (Swanson), Rory'MacDonald, Oc'tober 28,1983).

I conclude that the E.E.O.C. Guidelines provide a good working definition of sexual harassment, and that this definition is consistent with that used by Canadian human rights tribunals.

Using this definition, it must be decided on the facts of each case whether an allegation of sexual harassment has been proved. When creation of an offensive work environment is at issue, two things must be borne in mind. First, Human Rights legislation is not designed to prevent employees and employers from consensual sexual relationships, nor from indulging in ordinary banter. Second, in Catherine MacKinnon~s words, "Sexual initiatives [may be] damaging to women that men may perceive as ~normal and expectable~ sex-role behaviour, just as men may see as intercourse the same encounters women experience as rape, or as erotic the same depiction women find violating.[8] In short, the harasser',s view of what is ordinary banter is not necessary the "objective" one.

JURISDICTION UNDER BRITISH COLUMBIA LEGISLATION

The next issue is whether British Columbia legislation prohibits sexual harassment in the workplace. Section 8 of the Human Rights Code reads as follows:

> (1) Every person has the right of equality of opportunity based on 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,
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> (a) no employer shall refuse to employ, or to continue to employ, or to advance or promote that

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8. "Introduction", Symposium on Sexual Harassment, 10 Cap U.L. Rev. (1981).

> person, or discriminate against that person in respect of employment;
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> ..unless reasonable cause exists for the refusal or discrimination.
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> (2) (c) The sex of a person shall not constitute reasonable cause unless it relates to the maintenance of public decency.

There are two possibilities under the Human Rights Code: first, that sexual harassment constitutes discrimination based on sex; second, that it constitutes discrimination without reasonable cause although not based on sex. Both of these possibilities are included in the wording of the complaint and were argued to arise from section 8.

I will deal with these two possibilities in order. First, does sexual harassment constitute discrimination based on sex? American courts and Canadian tribunals have found that it does, based upon the kind of reasoning which follows, in the context of legislation which prohibits discrimination IIbecause of" or IIbased on" sex. Some jurisdictions have now enacted legislation dealing specifically with sexual harassment.[9] 1 am not referring to cases decided under specific legislation, but rather to cases decided under legislation similar to section 8 of the British Columbia Human Rights Code and section 8 of the new Human Rights Act.

Sexual harassment is not sex discrimination simply because both terms involve the same three-letter word, "sex". The issue is whether, assuming harassment, there is discrimination. For there to be discrimination, there must be some kind of differentiation, and for the

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9. See Canadian Human Rights Act, S.C. 1976-77, c. 33, s. 13.1; Ontario Human Rights Code, S.O. 1981, c. 53, s. 6; Quebec Charter of Human Rights and Freedoms, R.S.Q. 1977, c. C-12, s. 10(1).

Human Rights Code to apply, the differentiation must be on a basis which the Legislature has defined to be unacceptable through including it in the list of terms in section 8(2) (race, religion, colour, age, marital status, ancestry, place of origin or political belief, sex unless related to the maintenance of public decency, conviction for criminal charges unless related to the occupation or employment) or on a basis which a Board of Inquiry has found to be similar to those in the list in section 8(2) through including it in the "without reasonable cause" concept discussed below.

In almost all cases, sexual harassment involves differentiation based on gender -- that is, employees are subjected to sexual harassment who would not be subjected to it if they were of the opposite gender. The only exception would be a bisexual employer who evenhandedly harassed employees of both sexes: then the element of differentiation (and therefore, of discrimination) would be lacking.

Does this analysis mean that an employer with only one employee, or with a group of employees all of whom are of the same gender, cannot be found to have been discriminatory because there is no basis for comparing the treatment of employees of both genders? In my view, it does not. So long as an employer does not prove, as a fact, that the gender of the persons sexually harassed was irrelevant and that employees of both genders would equally be liable to experience the same degree of harassment, the bisexual harasser should remain in the realm of the hypothetical.[10]

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10. Whether this means that a Board is taking judicial notice of the fact that by far the majority of persons in this society are not bisexual, or only that a Complainant raises a Erima facie case by showing that members of one gender were harassed, is immaterial. There should not be a presumption of bisexuality, which is what would flow from the conclusion that a Complainant would have to prove actual differentiation between genders in all cases. A Complainant should only have to prove such actual differentiation if the Respondent has led some evidence of bisexual harassment.

Although it might be thought that sexual harassment would not amount to sex discrimination unless all employees of the same gender were equally recipients of it, that is fallacious. So long as gender provides a basis for differentiation, it matters not that further differentiation on another basis is made. An analogy would be a complaint of sex discrimination against an employer who decided to dismiss all of his married female employees but none of his male employees and none of his unmarried female employees. The decision would affect one group adversely -- female employees -- even though it would not affect every member of that group. Similarly, an employer who selects only some of his female employees for sexual harassment and leaves other female employees alone is discriminating by reason of sex because the harassment affects only one group adversely.

As mentioned above, some jurisdictions have enacted specific provisions in their human rights statutes to deal with sexual harassment, and many employers and institutions have promulgated policies for dealing with it. As well, sexual harassment is now addressed in some collective agreements.[10a] The advantage of specific legislation or agreements is that it they can provide definitions and avoid the need for the relatively complex analysis sketched out above.

10a. See, for example, the arbitration involving the B.C.G.E.U. referred to in footnote 7, supra.

Nevertheless, sexual harassment is sex discrimination[11] apart from such special provisions, and numerous Canadian human rights tribunals[12] have so found. No tribunal or court, to ~ knowledge, has found to the contrary.

I think a fair summary of the reasoning in the Canadian tribunal decisions is that sexual harassment is discrimination based on sex when it puts up an obstacle to aChievement in a job because of gender. An employee should not have to bear the extra burden of gratifying or tolerating her (or his) employer~s need for sexual titillation as a term or condition of employment. I conclude that sexual harassment ;s discrimination because of sex whenever it comes within the definition I have adopted and is not imposed upon both genders equally.

Some writers have argued that sexual harassment is not the disease, as it were, but only a symptom, reflecting the sex-role stereotypes often imposed upon women in the workplace. Sexual harassment, on this view, might be seen as the acting-out of the unstated premise in some workplaces that women are there as women (to perform services for the men and to provide sexual stimulation for the men) rather than as empl~yees (to perform a job related to the business needs of the employer). There;s some force to that view, and to the concern that

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11. For a lengthy discussion of the meaning of usex discrimination", see S:ouvanoudi s. v. Colden Fleece Restaurant andaca . s supra, note 7. *llor* F a review! o. almost all Canadian decis ions to date, see KC~~ and Allerx v. Canadi an Empl ~yment and Immigration Co~i ssi"o~"and u a supra, note 7.

curtailing sexual harassment may not do much to end sex discrimination in broader terms. However, if sexual harassment is seen as an overt symptom of sex discrimination and as one which can have traumatic consequences for the women involved, then it makes sense to bring Human Rights enforcement to bear upon it.

Having concluded that sexual harassment is discrimination because of sex, I will go on to consider whether it is also discrimination without reasonable cause within the meaning of that term in the Human Rights Code. Discrimination without reasonable cause has been found to have occurred when an employer (or purveyor of services customarily available to the public under section 3 of the Code) has made a decision unfavorable to a person and the decision is based on a factor having insufficient rational connection with the object of the decision-making process, The inability to speak English fluently, pregnancy, physical size, and physical disability have all been held to be such factors.[13]

The provisions of section 8 regarding reasonable cause are not designed to provide a remedy whenever an employee feels he or she ;s treated unfairly or harshly, even though a Board or a Court might agree that that ;s the case. Rather, they are designed to protect employees from discrimination in terms or conditions of employment where the

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13. See Holloway v. MacDonald and Clairco Foods Ltd. (1983) 4 C.H.R.R. D-1454 (B.C. Bd.); Dhaliwal v. B.C. Timber Ltd. (1983) 4 C.H.R.R. 0-1520 (B.C. Bd. appeal to B.C.S.C. heard, decision reserved); Grafe v. Sechelt Building Supelies, unreported, May 17, 1979 (B.C. Bd.'); Cook v. Noble, Prysianzluk, Ministry of Human Resources and Tranquille Hospital (1983) 4 C.H.R.R. D-1510 (B.C. Bd.).

discrimination arises from irrational categorization.14

Does sexual harassment fall within the scope of section 8 as thus defined? I conclude that it does, although the question ;s not an easy one. If sexual harassment in the workplace is proved to have occurred, and the harassed employee ;s thus subject to a condition of employment not imposed upon other employees, there is discrimination based on the irrational categorization between employees who are sexually attractive to the harasser and those who are not.15 Even more clearly, if an employee has actually suffered adverse employment-related consequences as a result of a refusal to grant sexual favours, there has erima facie been discrimination based on an irrational categorization and thus discrimination without reasonable cause. Then the Respondent must lead evidence to show a reason constituting reasonable cause for the behaviour in question. If the Respondent fails to do so, the Complainant succeeds.

Therefore, it is my conclusion that someone who can prove that he or she or he was the victim of sexual harassment may obtain a remedy under the existing Human Rights legislation because of the prohibition against sex discrimination and, alternatively, because of the prohibition against discrimination without reasonable cause.

The same result with respect to sex discrimination would follow under the new legislation (Human Rights Act, Bill 11, 1984, Section 8) since discrimination ubecause of sex" is still prohibited under the new

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14. See, for a more complete discussion, Holl"oway v. MacDonald and Clairco Foods Ltd. (1983) 4 C.H.R.R. 0-1454 {B.C. Bd.) and the cases Ci ted there.

15. This "reasonable cause" provision could cover situations not included in sex discrimination because of proven equal treatment of both genders.

Act. Further, in my view it could never be a bona fide occupational requirement that an employee submit to sexual harassment and therefore section 8(4) could not apply.

FACTS OF THIS CASE

Sheri Zarankin (the Complainant) worked on weekends at the Wessex Inn in Cowichan Bay, British Columbia, from August 29, 1981 to March 14, 1982, as a receptionist/chambermaid. She was still attending high school, being seventeen years old at all relevant times. Ms. Zarankin's duties were to check in customers, answer inquiries, take in cash and, in the latter period of her employment at least, to clean the rooms during eight hour shifts on Saturdays and Sundays between 10:00 a.m. and 6:00 p.m.

The Wessex Inn, it can be assumed from some of the evidence, is a relatively small operation which was not doing particularly well during the period in question. It is a sole proprietorship carried on by Mr. Ian Johnstone (the Respondent), a man in his later middle years judging from his appearance. Mr. Johnstone did not give evidence at the hearing before the Board of Inquiry.

Sheri Zarankin's evidence was that, during the weekends while she was working, Ian Johnstone would walk in to the motel four or five times to see how things were going and at the end of the day to take the cash. She was asked how Mr. Johnstone behaved toward her during

her employment, and her answer was that, "He di dn ı t have much respect for me. He was always rude and had a vulgar tongue." She said he frequently hit her on the IIbum" or tapped her on the head. In her words, "If I was sitting down at the desk doing something he!d come in and tap me on the head." IIHe'd just corne up behind me and hit me on the bum and laugh and walk. away. " When she was ask.ed whether there was any other kind of physical contact, she replied, "If I was just standing there, he put his hand around my shoulder ..... She said that this kind of patting and touching occurred once or twice a week, a number of times during a shift.

Ms. Zarankin also gave evidence of certain verbal comments or statements made by Mr. Johnstone. One example was that, when she was closing, he came in and said something lik.e, IILet'·sgo into the back room and I'll show you what it!s all about." She added, "1 didn!t say nothing, I just laughed. "

Ms. Zarankin~s evidence was that she did not say anything to Mr. Johnstone about his conduct because she was afraid of losing her job, When ask.ed how she felt about his conduct, she replied, "I felt like dirt. 1 was scared of the man all the time. It always frightened me. I always liked to avoid him when he was coming in. I just didn't say nothing." She said she liked working at the Wessex Inn because it was good experience for the line of work she had chosen -- restaurant and hotel management. She said that sometimes she would try to let Mr. Johnstone know in a non-verbal way that she did not like what he was doing, by moving quickly or just trying to avoid him. She also said

that she had asked Donna Young, the "head girl" who had initially hired her, about this aspect of the job and that Donna had told her "that he does hit and either you have to put up with it or tell him to get lost."

Ms. Zarankin said that this sort of conduct took place in the presence of other persons on two occasions. On one of these occasions, she thought that Donna Young was present when Mr. Johnstone came in and gave her a big bear hug. She also said that she saw him hit Donna Young lion the bum". Donna Young was not called as a witness. On another occasion, Ms. Zarankin said, a friend of hers (who was not called as a witness but whose absence was explained) was present when Mr. Johnstone Uhitme on the bumn.

In cross-examination, Ms. Zarankin added to her description of Ian Johnstone!s conduct. She said that another example of his suggestive and offensive remarks was, "He~d tell me when I was leaving that a couple of hookers were up in the back room. He wanted to make sure that I k.new that."

The circumstances leading to Ms. Zarankin~s dismissal were described by her. She said that she was cleaning a room on the day in question (March 14, 1982) when Mr. Johnstone and two of his friends came in and someone said, uDo you come with the room?" whereupon they all "laughed and laughed". She was ask.ed whether she had said anything to that and answered that she could not remember, although she might have said something. When ask.ed what she did, she said she just turned the other way. Then she said that she went back to the office and was folding sheets in the other room beside the office when Mr. Johnstone

and his two friends walked in. Mr. Johnstone asked her to come. She said "Just a minute" or something like that. She finished folding the sheets and then walked out. Mr. Johnstone said something to her and then left. Half an hour before she was closing that day Mr. Johnstone walked in and told her that his friends said she did not have the right business attitude. Thus, she was let go. Her evidence was that there had been no previous complaint with respect to her work from either Ian Johnstone or Donna Young.

Although Ian Johnstone did not testify, his friend Kurt Adelborg did. He said that he, Ian Johnstone, and his brother Jurgen Adelborg had been for coffee on March 14, 1982, in Cowichan Bay and on the way back they stopped in at the Wessex Inn. They walked in to the office. Mr. Adelborg took a look around, and saw that the place was smelly and dirty and that there were papers allover the desk. He said, IIIan, why don~t you get somebody to clean this place up a little? It's kind of messy." Then, Mr. Adelborg said, Mr. Johnstone looked at the paper work and yelled for the girl 1n the back, "Why don~t you come and clean this up?U Mr. Adelborg said that a voice came from the back which said in a "snotty type of voice", ·'I!ll sort of do it when I get around to it." Mr. Adelborg said he looked at Ian and said, "Look, Ian, whots the boss here? You or the girl in the back?" Then he said Mr. Johnston got a little bit embarrassed and Mr. Adelborg said, IIIf I should own this place I,d fi re the gi rl on the spot."

Mr. Adelborg was not asked in direct or cross examination about the comment related by Ms. Zarankin to the effect of "Do you come with the

room?"

Mr. Adelborg also testified that Mr. Johnstone was in the habit of putting his arm around his friends, including Mr. Adelborg, frequently patting them on the head, making jokes, and calling them "baby". However, he said that Mr. Johnstone had never patted him on the bottom.

Mr. Bruce Greenwood, a Human Rights Investigating Officer, gave evidence that he met with Ian Johnstone and discussed Sheri Zarankin~s complaint with him on June 15, 1982. On that occasion the Respondent said that Sheri Zarankin had not been terminated because of shortage of work, although that is what her Record of Employment form said. In fact, the Respondent said, she was terminated because of her poor attitude in terms of working with the public. Mr. Greenwood said that by the end of the interview, it was established that basically Ms. Zarankin was terminated because she had embarrassed Mr. Johnstone in front of his friends in an incident that took place on the same day as her termination. He said that he could not get any more specific description of that incident from Mr. Johnstone.

Mr. Greenwood also said that Mr. Johnstone, when asked what his relationship was like generally with his employees, answered that it was good. Mr. Greenwood said of Mr. Johnstone, "He further pointed out that he may pinch them on the bottom or pat them on the head at times but that it was all in fun.1I When asked whether he had ever touched Sheri Zarankin on the bottOM, Mr. Johnstone replied that he couldn~t remember. Mr. Johnstone also told the Human Rights Officer that he had not made comments about Ms. Zarankin "coming with the room". He

admitted that he may have referred to Sheri Zarankin as either 'babe', or !-baby'. Mr. Greenwood said he concluded the interview by asking about Ita rumour that apparently was floating around the community of Cowichan Bay in terms of it being a condition of employment for any employee of Ian Johnstone's, which were all female by the way, if it was necessary for those employees to sleep or have sexual relations with Ian Johnstone." The Respondent's answer was, "I've kidded to friends about that, yes."

Mr. Greenwood also gave evidence about what the Complainant had told him in his interview with her, in which some further particulars about the Respondent's conduct were given, but I am disregarding this evidence and am relying only on what the Complainant said under oath and under cross-examination at the hearing.

Two other witnesses were called. Both gave similar fact evidence about the conduct of Mr. Ian Johnstone toward them in their capacity as employees at the Wessex Inn (the admissibility and weight of such evidence will be discussed below).

The first, Shiela Burden, had worked at the Wessex Inn from June to August of 1981. She was eighteen years old at the time. She was asked how Mr. Johnstone behaved toward her and said that "He would grab a lot •.• he!,d grab up top and bottom and he~d make rude comments quite a bit." She specified that she meant that he would "grab my chest, you k.now, or ass." She also said that a couple of times he would push employees on the waterbed which was in the back room where he lived.

Ms. Burden said this happened to her personally on two occasions. She also said he would "make lewd comments". She said the touching and

patting would occur a couple of times a day usually, and that she reacted to the physical touching by telling him to "get lost" or to "f••• off". This would make Mr. Johnstone stop for a while but then he would just come back later in the day. When she left in August of 1981 she said she was laid off but that she probably would have ended up quitting before that "over his attitude". This witness also testified that she saw Mr. Johnstone conduct himself in the same way with other employees while she was there -- "patting and grabbing and stuff like that."I She said she was not acquainted with Sheri Zarankin.

On cross-examination, it was put to Ms. Burden that she had on a previous occasion said that Mr. Johnstone had made no verbal suggestions to her. The witness explained that inconsistency by saying that she had been responding to a telephone inquiry from some lady she d;dn~t Know when she didn~t know what it was all about. In any event, the alleged previous inconsistent statement was not proved. Another attacK on her credibility was made on the basis that she had mis-stated the amount of time she had worked at the Wessex Inn. I found that while she may have been mistaken in that regard her testimony about the Respondent's conduct was believable and I accept it as truthful. It was not contradicted by any other evidence.

The second witness called to give similar fact evidence was Shelley Parker, who had been employed at the Wessex Inn from approximately February to April of 19B1. She had been hired to be a receptionist. She described the behaviour of Mr. Johnstone toward her during her employment as, "Just, I guess walk around patting or whatever ••• patting me on the backside." She could not remember it happening very

much but said that it was more than once. She said that she just moved his hand and walked away. She could not recall any verbal exchanges between herself and Mr. Johnstone. Nor did she recall any comments nor any physical conduct between Mr. Johnstone and other employees.

Another witness had been summoned but did not attend. Counsel for the Complainant and the Acting Director, unable to reach the witness, requested an adjournment in order to see whether she could be located. Because her evidence was said to consist of further similar Tact evidence and because the hearing had been pending for considerable time, I refused the adjournment.

The Respondent also put in evidence a letter dated February 14, 1984 from Donna Young, "manageress and bookkeeper" of the Wessex Inn Motel, stating, liAs far as I can recall none of the girls who have worked at the Wessex Inn have complained to me about anything concerning Ian Johnstone. " Donna Young was not called at the hearing, although time to do so was offered and the potential effect of her absence was explained. (The admissibility and weight of this evidence will be discussed below.) Assuming (although not finding) that this letter accurately states Ms. Young~s recollection, it relates to one aspect of what the Complainant said -- that she uasked Donna what Ian was like and she told me that he does hit and either you have to put up with it or tell him to get lostll. It does not necessarily contradict that testimony because what Ms. Zarankin said may not have been construed as a complaint.

EVIDENTIARY ISSUES

A. Hearsat

Under the Human Rights Code, section 16(5), a Board of Inquiry has discretion to admit any form of evidence which it considers necessary and appropriate, whether or not it would be admissible in a court of law. There were two pieces of evidence which were tendered, one by the Complainant and Acting Director, the other by the Respondent, which would likely not have been admissible in Court because they were hearsay. I was asked to admit them, pursuant to the discretion conferred by section 16(5).

In my view, section 16(5) does not mean that a Board should simply disregard the rules of evidence as developed by the common law over the centuries. The common law rules may have common sense behind them. For example, the hearsay rule is often thought to be inordinately technical and difficult, and to result in courts' and tribunals' having the duty to disregard perfectly useful evidence for no rational reason. This criticism is sometimes accurate, and sweeping reforms in the rules regarding hearsay have been the result.[16] However, when one looks at the reasons for the hearsay rule, it is difficult to argue that it should be totally abolished. Hearsay evidence is dangerous because it is not given under oath, and it is second-hand (and thus there is the risk that it is not accurately repeated). Most importantly, hearsay evidence consists of the repetition in court of out-of-court statements which were not subject to cross-examination; the right to cross examine is a crucial part of our adversary system.

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16. Such as the documentary evidence provisions in both the B.C. and the Canada Evidence Acts, and the provisions in the B.C. Evidence Act permitting experts~ reports to be put in as evidence without calling the experts in person.

The first hearsay issue was the repetition by.Mr. Greenwood of the Complainant~s statements to him during his investigation. As stated above, I decided to disregard that evidence and to rely wholly upon the Complainant!s testimony at the hearing. Her earlier statements to the Human Rights officer had not been under oath, and were not subject to cross-examination. There was no necessity to rely on the hearsay, because the Complainant was there in person.

The second issue about hearsay evidence concerns the letter from Ms. Parker. At first I was inclined not to admit the letter, because there seemed no necessity to rely upon this form of hearsay when the witness was seemingly available and it was within the power of the Respondent, as her employer, to grant her time off to come to the hearing without a summons. However, because the Respondent was not represented by counsel, and because I was not sure whether the person speaking for the Respondent really understood the law in this regard such that he could have made an informed decision about whether to call Ms. Parker, I made it clear to him that Ms. Parker~s evidence would carry more weight if she were there in person but admitted the letter for what it was worth. In fact, the letter is not of much assistance even if taken at face value because of its wording and its qualification regarding its writer~s recollection. Even if its contents were of more potential probative value, I would have to give the letter little weight because of the circumstances in which it was written -- by an employee of the Respondent, who may be reluctant to say anything which will injure her employer, and who was not under oath or subject to cross-examination.

B. Similar Fact Evidence

The threshold question with any kind of evidence is whether it is relevant to a material issue. Here, the evidence of Ms. Burden and Ms. Parker could be relevant in two ways: firstt to corroborate the Complainant~s testimony and support her credibility (in the face of a denial by the Respondent that he touched the Complainant, and an assertion that she was concocting her storYt their evidence would tend to decrease the likelihood of concoction and rebut the Respondent~s denial); second, to show what the general atmosphere and working conditions were for young female employees at the Wessex Inn. This would be part of the Complainant~s assertion that there was discrimination with respect to conditions of employment.

Because the Complainant's case can be established on the strength of her own and Mr. Greenwood's evidence and because there was no denial that the conduct occurred, and no real attempt to say the Complainant was concocting her story, I do not need to rely on the similar fact evidence and refrain from doing so.

However, 1 find that the evidence was admissible as corroborating the Complainant~s story and as showing what the working conditions at the Wessex Inn were. I reach this conclusion on the basis of the general principle that similar fact evidence will be admitted where its probative value outweighs the possibility that it will create undue prejudice.[17]

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17. I think that general principle can be derived from the following judicial decisions: scholarly writings and tribunal decisipns: Boardman v. D.P.P. [1974] 3 All E.R. 887, [1975] A.C. 421, [1974] 3 Wac .k.73;6, GUay v R Cl9791 1 S.C.R. 18, 2J N.R. -,51 .2 C.C.C. (2d) 36; McDonald et ale V. Canadae K 1E Co. LU-. et ~l. 39 D.L.R. (3d) 617, [1973] 5 W.W.R. 689 (B.c.c.A.l; Mood MUSIC Publlshing Co. Ltd. v. DeWolfe Ltd. [1976] 1 All E.R. 763 (C.~.);Piragoff, Similar Fact Evidence (T]81)ta0 rte et al. v. Commodore Businessac M ines Ltd. et ale (1983) 4 C.H.R."R. 0-1399; Graessner v. Ports (1983) 4 C.R.R.R~"D-" T5b9; Bell and Korczak v. lada and the Flam; n9 'S'teer Steak House (1980) 1 C.H•R.R. 0-T55~

Bearing in mind that this is not a criminal but a civil matter, where less stringent precautions regarding similar fact evidence are necessary, I think the probative value of the similar fact evidence justifies its admission because of the closeness in time and the similarity in circumstances between what happened to Ms. Burden, Ms. Parker and Ms. Zarankin.

C. Onus of Proof

The Complainant must prove, on a balance of probabilities, that there was a contravention of section 8 of the Human Rights Code. This involves two parts: (1) proof that the alleged conduct by the Respondent occurred; (2) proof that it constituted sexual harassment in the circumstances (for example, that it took place without the complainant!s willing consent). If the Complainant leads evidence which could satisfy these requirements, then the Respondent has an evidentiary burden to respond with some evidence that the acts did not occur or that they did not constitute sexual harassment. I agree with the comments about onus of proof in Dhaliwal v. B.C. Timber Ltd.[18] and that the Complainant, at the end, must have proved the allegations on a balance of probabilities.

D. Credibility: and Conclusions of "Fact

Because the Respondent did not give evidence, there is no necessity to resolve disputed issues of fact on the basis of conflicting

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18. (1983) 4 C.H.R.R. d-1520, (B.C. Bd.).

accounts. Ian Johnstone did not deny he conducted himself in the manner described by Sheri Zarankin. There was nothing inherently implausible about what Ms. Zarankin said and she was not shaken to any extent in cross-examination. The same may be said about Mr. Greenwood's and Mr. Adelborg's evidence.

Accepting all witnesses~ evidence as truthful, there is no doubt that the Respondent persistently and frequently touched the Complainant in the manner she described and made the sorts of comments which led her to say he had a "vulgar tongue". Indeed, he did not seem to treat her with much respect, and there is no doubt that she did feel "like dirt" and was frightened of him. Further, I find that Ms. Zarankin did what she could to avoid Mr. Johnstone~s physical and verbal advances, without ever making a direct statement to him. Despite the absence of a direct statement, there was no reasonable basis upon which he could have concluded that she enjoyed or invited his conduct, or that she tolerated it for any reason besides the fact she was his employee. While his statement to Mr. Greenwood was that "It was all in fun", I find that he knew or should have known that the fun was one-sided, and was at the expense of his employee's feelings of dignity and self-respect.

The evidence surrounding Ms. Zarankin's dismissal was more obscure. Taking into account the evidence of Ms. Zarankin, Mr. Adelborg and Mr. Greenwood, I conclude that Sheri Zarankin was dismissed because of something that happened on March 14, 1982 between her and Ian Johnstone and not because of lack of work. The submission of the Complainant and Director was that I should go on to find that the

dismissal was caused by her reasonable response to sexual harassment by the Respondent, which would therefore constitute a violation of section 8 of the Code. I agree that it would constitute a violation, but there was not sufficient evidence to conclude that the dismissal was caused by the Complainant',s response to the comment about her "coming with the room[u]" or to any other kind of sexual harassment.

The Complainant's evidence was that she could not recall whether she had said anything at the time of the comment. Mr. Adelborg~s evidence was that she had answered her employer sharply when told to clean up the office. Ms. Zarankin recalled saying something like "Just a m;nute". While there may be suspicion that ;t was some response by Ms. Zarankin to the COOl11entabout Ucoming with the room" which led Mr. Johnstone to dismiss her, suspicion is not proof.

Therefore, although there was a prima facie case that the dismissal was without reasonable cause on the basis of the Complainant's evidence, the evidence of Mr. Adelborg leaves me unable to conclude, on a balance of probabilities, that the dismissal was not caused by some perception of Mr. Johnstone~s about the Complainant~s business attitude or by his annoyance at her manner of speaking to him, rather than by retaliatory motives arising from her reaction to sexual harassment. Her evidence did not permit this conclusion because it did not reveal any response by her to the comment about "coming with the room" besides turning away during the laughter.

CONCLUSION

I have concluded that the Complainant has not proved her dismissal was due to sexual harassment, but she has proved that she was subjected to discriminatory conditions of employment through sexual harassment.

I find that the Respondent persistently and frequently touched and patted the Complainant in a familiar and relatively intimate manner, and spoke to her in a coarse and suggestive way. The fact that she did not expressly warn the Respondent that she did not appreciate this conduct does not imply consent. Nor does it imply that the Respondent was unaware of the effect of his conduct on the Complainant. As stated above, the circumstances were such that he knew or ought to have known the effect of his conduct on the Complainant, and an express warning by her would likely have been ineffective. 1 accept her evidence that she believed that saying anything would affect her continued employment, and I find that her belief was reasonable in the circumstances.

It was suggested in argument on behalf of the Respondent that the problem in this case was a "generation gap" and that the Complainant was guilty of age discrimination herself because she admitted that she would not have found some of the Respondent!s remarKS offensive if they had come from a person of her own age group. I do not find that argument to be persuasive. What a person finds offensive depends on the situation. In her situation, the Complainant found the Respondent~s conduct not only offensive but frightening because he was her employer and because he was much older than she (probably closer to her grandfather~s generation than her father~s). The fact that she may

have felt differently if he had been a young man and not her employer is completely irrelevant.

I find that submission to the Respondent's conduct was made implicitly a term or condition of the Complainant's employment. I also find that the Respondent's conduct had the purpose or effect of unreasonably interfering with the Complainant~s work performance, and creating an intimidating, hostile and offensive working environment. The conduct amounted to sexual harassment and was based upon Ms. Zarankin's gender. Therefore it constituted sex discrimination contrary to section 8 of the Code. Alternatively, I hold it was without reasonable cause and contravened section 8 of the Code in that respect.

As to the remedy, following the decision in ~o.1.~way v. ~acDonald and Clairco Foods Ltd.[19] regarding the interpretation of section 16 of the Code, I have determined that the injury to the Complainant's feelings of self-respect and the Respondent~s disregard for the prohibition against sex discrimination in the Code warrant an order that the Respondent pay $1500.00 to the Complainant. The persistence of the Respondent and the youth of the Complainant are influential factors; on the other side, there is the fact that the Complainant testified that she might still be at the job despite the Respondent~s conduct if she had not been dismissed. The situation was difficult, but not completely intolerable for her.

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19. (1983) 4 C.H.R.R. 0-1454 (B.C. Bd.)

Therefore, this Board of Inquiry orders that:

(1) The Respondent cease contravening the Human Rights Code through sexual harassment of his employees;

(2) The Respondent pay the Complainant $1500.00 as compensation for the humiliation and injury to feelings of self-respect which he caused;

(3) The Respondent pay the costs of this hearing, in an amount to be agreed between the parties or, failing agreement, in an amount to be determined by this Board, using costs on a party and party basis under the Supreme Court Rules as an appropriate measure.

Lynn Smith

Chairperson