Document Body

T.D.-4/83
DECISION RENDERED ON FEBRUARY 21, 1983

CANADIAN HUMAN RIGHTS ACT
HUMAN RIGHTS REVIEW TRIBUNAL

RE: IN THE MATTER of the appeal filed by Bonnie Robichaud against the Human Rights Tribunal decision pronounced on June 30, 1982.

BETWEEN: BONNIE ROBICHAUD
APPELLANT
AND:
DENNIS BRENNAN, and HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY THE TREASURY BOARD,

RESPONDENTS

DECISION OF REVIEW TRIBUNAL
Before: M. Lois Dyer, Chairman
Paul L. Mullins
M. Wendy Robson

Counsel: For the Appellant: Scott McLean and Penny Bonner
For the Respondent, Brennan: William Sangster
For the Respondent, Treasury Board: Leslie Holland

In addition argument was heard by Counsel for the Canadian Human Rights Comission: Russell Juriansz.

>-
DECISION
The Canadian Human Rights Commission has appointed this Human Rights Review Tribunal pursuant to Section 42.1(2) of the Canadian Human Rights Act to enquire into the appeal of Bonnie Robichaud from the decision of R.D. Abbott rendered on June 30, 1982 in the matter of the complaint of Bonnie Robichaud against Dennis Brennan and the Treasury Board.

Professor Abbott in his decision set out the relationship of Mrs. Robichaud, the lead-hand, and Mr. Brennan, the foreman, as follows:

"There are several lead hands in the Cleaning Department. They are supervised by two Area Foremen who, in turn, are supervised by the Base Assistant Administrative Officer and, ultimately, the Base Commanding Officer. Assignment of Mrs.

Robichaud's geographic workplace, duties, workload, and cleaners to supervise was done mainly by the Area Foreman, subject to the supervision and, at times, the intervention of Mr. Brennan."(Pg. 7)

"Mrs. Robichaud testified that from mid-March, to late May, 1979, a number of encounters between her and Mr. Brennan occurred. These encounters included conversations of a sexual nature, a proposition of sexual intercourse by Mr. Brennan, masturbation of Mrs. Robichaud by Mr. Brennan, fellatio, "fondling" of Mr. Brennan's penis by Mrs. Robichaud, and the initiation by Mr. Brennan of sexual intercourse with Mrs. Robichaud when he was unable to achieve an erection. In her demeanour, Mrs. Robichaud gave the impression of being a truthful person. Her testimony regarding these encounters was of such an intimate and embarassing nature, accompanied by a feeling of humiliation that must have been created by giving the testimony, that it could reasonably be expected only to be the truth. Her propensity to tell the truth was confirmed by other evidence. Mr. Brennan denied the occurrence of any of these sexual encounters. His demeanour was that of a person who was not telling the truth. In other aspects, his testimony was inconsistent or was contradicted. On the whole I find that Mrs. Robichaud's testimony that these

>-

sexual encounters occurred is to be preferred to Mr. Brennan's denial. I find also that Mrs. Robichaud's testimony is sufficiently credible to satisfy the onus resting on the complainants to establish that the sexual encounters occurred." (Pg. 13-14)

It is important to add to this summary, the further fact that all but the last major incident, which involved attempted intercourse, took place while Mrs. Robichaud was on probation as a lead hand, a position never previously occupied by a woman.

These findings of fact have clearly satisfied the obligation on the complainant to establish a prima facie case of sexual harrassment. Having done so, the onus shifts to the defendants to show that for some reason these acts did not constitute sexual harassment. Counsel for all the parties agreed that the test to be applied must be an objective one.

The respondent, Mr. Brennan, called no evidence to satisfy this onus but maintained throughout that none of these events took place. Even during the cross-examination of Mrs. Robichaud, no questions were directed toward attempting to show

that if in fact these events did take place, they were with her consent. On the contrary, the only evidence before the Tribunal was the evidence of the complainant herself in which she stated quite clearly that she was fearful, that she was intimidated, that she was continually telling Mr. Brennan that his advances were not welcome, that she wanted him to stop. We respectfully disagree with the proposition that the

>-

- 3 nature
of the acts of fellatio, masturbation, and fondling are of such a highly consensual nature that she could not have engaged in them unless she was fully consenting thereto.

There is nothing in the nature of these acts that is in itself contrary to her evidence that she submitted to these encounters as a result of the intimidation and fear that she had for Mr. Brennan. Mr. Brennan was in a position of authority over her, made comments to her such as "If you don't have my support, you will fall flat on your face", and "I am your boss and I will charge you with disobedience". We also have other evidence that he used his authority in a capricious manner to reward and to punish; for example, the reward he gave the foreman who gave favourable evidence on his behalf before the Human Rights Tribunal by permitting him to take the night off without loss of pay and the punishment he gave out to Rose Grammond who gave unfavourable evidence against him before the same Tribunal.

We find very persuasive the reasoning set out in Bell and Korczak v. Ladas and The Flaming Steer Steak House Tavern Inc. [1980, Ontario Board of Inquiry, O.B. Shime, Q.C.] at pages 4 to 6:

"The prohibition of such conduct is not without its dangers. One must be cautious that the law not inhibit normal social conduct between management and employees or normal discussion between management and employees. It is not abnormal, nor should it be prohibited activity for a supervisor to become socially involved with an employee. An invitation

>-
- 4 -
to dinner is not an invitation to a complaint. The danger or the evil that is to be avoided is coerced or compelled social contact where the employee's refusal to participate may result in a loss of employment benefits. Such coercion or compulsion may be overt or subtle but if any feature of employment becomes reasonably dependent on reciprocating a social relationship proffered by a member of management, then the overture becomes a condition of employment and may be considered to be discriminatory."

There is a second ground of alleged discrimination which relates to sexual harassment based upon a poisoned work

environment. This Tribunal reviewed the law relating to workplace environment both in the United States and Canada.

In Bell, supra, at page 156, Mr. Shime clearly states that gender based insults and taunting may reasonably be perceived to create a negative, psychological and emotional work environment.

"There is no reason why the law, which reaches into the work-place 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."
In addition, the case of Sucha Singh Dhillon v. F.W. Woolworth Ltd., (1982) 3 C.H.R.R. D-743, (Peter A. Cumming) at page D-763 points out that employees have the right to a workplace free from harassment and that the atmosphere of the workplace is a term or condition of employment.

"As I have said, verbal racial harassment, through name calling, in itself, is in my view prohibited conduct under the Code. The atmosphere of the workplace is a 'term or condition of employment' just as much as more visible terms or conditions such as

>-

hours of work or rate of pay. The words 'term or condition of employment' are broad enough to include the emotional and psychological circumstances in the workplace... Rather it need only be shown that the working environment has been poisoned by unwelcome sexual harassment."

The Tribunal was directed to the case of Grace Aragona v. Elegant Lamp Co. Ltd. and Fillipitto, (Ontario Board of Inquiry, 1982), (Professor E.J. Ratushny) which considered the matter of the poisoned environment and what constitutes sexual harassment. Mr. Ratushny points out at page 4 of his Decision:

"The line of sexual harassment is crossed only where the conduct may be reasonably construed to create, as a condition of employment, a work environment which demands an unwarranted intrusion upon the employee's sexual dignity as a man or woman."

In the circumstances of that case, Mr. Ratushny did not find sexual harassment but the principles of both the reasonable objective test and the work environment are reaffirmed.

In Hufnagel vs Zeid's Payfair Store, (Manitoba Board of Inquiry, 1982, Paul S. Teskey) Mr. Teskey, at page 12, noted:

"The complainant must have an honest and reasonable apprehension that a refusal to participate, acquiesce or endure such conduct may affect the existence of the employment relationship itself or any benefits or conditions arising from the relationship."

The leading case in the United States is Bundy vs Jackson, 641F. 2b 934 (1981, U.S. Court of Appeals) and it has been relied upon by many Canadian tribunals. At page 943:

>-

"Though no Court has yet so held, we believe that an affirmative answer follows ineluctably from numerous cases finding Title VII violations where an employee created or

---

condoned a substantially discriminatory work environment, regardless of whether the complaining employees lost any tangible benefits as a result of the discrimination. Bundy's claim on this score is essentially that 'conditions of employment' include the psychological and emotional work environment that the sexual stereotyped insults and demeaning propositions to which she was indisputably subjected and which caused her anxiety and debilitation, illegally poisoned that environment."

And further at page 946:
"The employer can thus implicitly and effectively make the employee's endurance of sexual intimidation a 'condition' of her employment. The woman then faces a 'cruel trilemma'. She can endure the harassment. She can attempt to oppose it with little hope of success, either legal or practical, but with every prospect of making the job even less tolerable for her. Or she can leave her job, with little hope of legal relief and the likely prospect of another job where she will face harassment anew."

The Tribunal is persuaded by the facts as found and the law as stated above. The Tribunal cannot overlook that the facts clearly showed a pattern of sexual inquiry and inuendo on the part of Mr. Brennan, and his awareness of Mrs. Robichaud's vulnerability as a probationer. The cumulative effect was to create a poisoned work environment for Mrs. Robichaud. In addition, the facts showed that this pattern of harassment and abuse of authority extended not only to Mrs. Robichaud but to at least one other female on the cleaning staff.

Accordingly, we have no hesitation in finding that Mr. Brennan was guilty of sexual harassment on two grounds:

>-
 1)
By reason of his failure to rebut the prima facie case established by Mrs. Robichaud;

2) By reason of his creation of a poisoned work environment; both contrary to the Canadian Human Rights Act, Section 7(b). We must now determine the question of the liability of the employer, the Department of National Defence (The Treasury Board) for the actions of its employee, Mr. Brennan. In this regard, we note that Mr. Brennan was the senior civilian managerial employee on the base. The authorities provided to this Tribunal make it quite clear that the liability of the employer for its supervisory personnel is a strict liability.

The Tribunal was referred to the Bundy case, supra, at page 943 where it was held that:

"an employer is liable for discriminatory acts committed by supervisory personnel ... and there is obviously no dispute that the men who harassed Bundy were her (superiors)"

This case, however, goes further to point out at page 947, that:

"an employer may negate liability by taking immediate and appropriate corrective action when it learns of any illegal harassment..."

In the Bell case, supra, at page 156, the Tribunal was referred to this statement:

"The next issue to be decided is the extent of liability under the Code. If a foreman or supervisor

>-

discriminates because of sex, will the company be liable? The law is quite clear that companies are liable where members of management, no matter what their rank, engage in other forms of discriminatory activity."

Mr. Shime goes on to say that:
"Thus I would have no hesitation in finding the corporate Respondent liable for a violation of the Code if one of his officers engaged in a prohibited conduct..."

The Review Tribunal considered the case of Oram and McLaren v. Pho (B.C. Board of Inquiry, 1975). The case involving a complaint against a restaurant owner on refusal of service because of the length of the Complainant's hair. It was contended that nothing happened to the Complainant on the evening in question which was attributable to Mr. Pho, the owner. At page 24, the following statement occurs:

"Dealing with this submission it can be seen immediately that if given effect it would provide a convenient loophole through which the owners and managers of public houses and other

establishments which offier services or facilities customarily available to the public could escape responsibility for violations of the Code by having an agent or servant effect the denial and enforcing the discriminatory policy without doing so personally. Fortunately the common law of this country is not so shortsighted. The law provides that a master is responsible for the wrongful act done by his servants in the course of his employment."

In this case, there was no clearly defined policy against sexual harassment which had been communicated to the employees. Secondly, when the complaints were brought to the attention of Mr. Brennan's superiors, no investigation was conducted by the employer to determine the truth or otherwise

>-
- 9 of
the allegations and in particular no investigation was requested

---

or made pursuant to the Financial Administration Act, Section 10. On the contrary, steps were taken to remove Mrs. Robichaud from the normal routine of a lead hand. She was ultimately transferred to the so called "punishment block" on the barracks where her duties were severely curtailed. This treatment of Mrs. Robichaud would give the impression to the other employees on the base that she had fallen out of favour with the people in charge of personnel. There was certainly no indication that Mr. Brennan was disfavoured. There was the orchestrated attempt to discredit Mrs. Robichaud after she had filed her complaint by the flood of letters and petitions against her, a circumstance which should have prompted great suspicion and therefore closer inquiry. Finally, we find it particularly irresponsible on the part of the employer that the activities of Mr. Brennan in relation to the personnel who were called to testify before the Tribunal were not monitored so as to prevent any coercion or intimidation of them by Mr. Brennan.

We are therefore allowing the appeal of Mrs. Robichaud against both respondents, Dennis Brennan and Her Majesty the Queen in Right of Canada as represented by The Treasury Board.

Having found liability on the part of both Mr. Brennan and his employer, we must still determine the damages

>-
- 10 to
which Mrs. Robichaud is entitled and determine what other award, if any, should be made as a consequence of our finding. Since these issues have never been dealt with by a Canadian Human Rights Tribunal before and no argument was made on them either here or below, this portion of our decision will be reserved for argument.

Ottawa, Ontario, February 14, 1983.

M. LOIS DYER, Chairman
PAUL L. MULLINS
M. WENDY ROBSON

Page Navigation Panel

1 2 3 4 5 6 7