T.D. 13/83
HUMAN RIGHTS REVIEW TRIBUNAL
IN THE MATTER OF THE CANADIAN HUMAN RIGHTS ACT,
S.C. 1976-1977, C. 33, as amended;

AND IN THE MATTER OF the appeal filed under subsection 42.1(2) of the Canadian Human Rights Act by Jack Chuba dated May 20, 1983 from the Decision of a Human Rights Tribunal dated April 25, 1983.

BETWEEN:
JANE KOTYK and BARBARA ALLARY,
Respondents:
(Complainants)

- and -
CANADA EMPLOYMENT AND
IMMIGRATION COMMISSION
(Respondent)

- and -
JACK CHUBA
Appellant:
(Interested
Party)

REVIEW TRIBUNAL:
SIDNEY N. LEDERMAN, Q.C.,Chairman
DONNA WELKE, Member
L. DAVID WILKINS, Member

DECISION OF THE REVIEW TRIBUNAL
APPEARANCES:
K. WASYLYSHEN Counsel for the Respondent
(Appellant), Jack Chuba
L.P. MacLEAN Counsel for the Canadian Employment
and Immigration Commission.

R.G. JURIANSZ Counsel for the Canadian Human
Rights Commission and the
Complainants (Respondents)

Decision rendered on December 29, 1983

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This is an appeal by Jack Chuba under Section 42.1 of the Canadian Human Rights Act (hereinafter referred to as "the Act") from the Decision dated April 25, 1983 of Susan M. Ashley, sitting as a Human Rights Tribunal. She found that Mr. Chuba’s conduct constituted sexual harassment of both complainants, Jane Kotyk and Barbara Allary, and as such was adverse differentiation on the grounds of sex as prohibited by Section 7 of the Act. As a consequence thereof, the Tribunal ordered that Mr. Chuba pay damages of $2,500.00 to Jane Kotyk and damages of $100.00 to

Barbara Allary. The Tribunal also found the Canadian Employment and Immigration Commission (hereinafter referred to as "CEIC") liable in two respects: first, it bore direct liability by virtue of responsibility for the discriminatory conduct of a member of its management staff; and secondly, it bore indirect liability because of its failure to provide a work place free from harassment or the fear of harassment. Damages in the amount of $2,500.00 in favour of Jane Kotyk were awarded against the CEIC. It was also ordered to reimburse Barbara Allary $60.00 for travelling expenses. The Tribunal further ordered the CEIC to undertake to establish such policies and practices to ensure that their employees are made aware of the law regarding sexual harassment.

The CEIC did not appeal the orders made against it. Nevertheless, its counsel, Mr. MacLean, appeared before this Review Tribunal and sought to make submissions on various issues. More will be said about this later.

Mr. Wasylyshen, on behalf of the Appellant, Jack Chuba, submitted that the decision of the Tribunal should be reversed for a number of reasons. We now turn to a review of those matters in the order in which they were raised.

1. ALLEGED FAILURE TO COMPLY WITH S. 36(4)(a) AND FAILURE TO NAME THE APPELLANT IN THE COMPLAINTS

The Appellant argued that there was a complete failure by the Canadian Human Rights Commission (hereinafter referred to as "the Commission") to comply with Section 36(4)(a) of the Act in that it did not give Mr. Chuba notice of its action that it was appointing a Tribunal to inquire into the complaints. This subsection must be seen in its context and accordingly Section 36 is reproduced in full immediately below:

"36. (1) An investigator shall, as soon as possible after the conclusion of an
investigation, submit to the Commission a report of the findings of the investigation.

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(2) If, on receipt of a report mentioned in subsection (1), the Commission is satisfied

(a) that the complainant ought to exhaust
grievance or review procedures otherwise reasonably available, or

(b) that the complaint could more appropriately be dealt with, initially or completely, by a procedure provided for under an Act of Parliament other than this Act,

it shall refer the complainant to the appropriate authority.

(3) On receipt of a report mentioned in subsection (1), the Commission

(a) may adopt the report if it is satisfied that the complaint to which the report relates has been substantiated and should not be referred pursuant to subsection (2) or dismissed on any ground mentioned in subparagraphs 33(b)(ii) to (iv); or

(b) shall dismiss the complaint to which the report relates if it is satisfied that the complaint has not been substantiated or should be dismissed on any ground mentioned in subparagraphs 33(b)(ii) to (iv).

(4) After receipt of a report mentioned in subsection (1), the Commission

(a) shall notify in writing the complainant and the person against whom the complaint was made of its action under subsection (2) or (3); and
(b) may, in such manner as it sees fit, notify any other person whom it considers necessary to notify of its action under subsection (2) or (3)."

The complaint forms of Jane Kotyk and Barbara Allary (Exhibits C-2 and C-11) which initiated these proceedings are virtually identical and

"... allege that the Canada Employment and Immigration Commission ... is engaging or has engaged in a discriminatory practice on, or about July, 1980 (ongoing) because of marital status and sex. The particulars are as follows: During the course of employment with Canada Employment and Immigration Commission I have been subjected to differential treatment by the CEC Manager Jack Chuba. I believe I have been discriminated against on the above stated grounds."

Although Mr. Chuba was named in the particulars of the discriminatory practice in the complaint form he was not specifically named as the party who was alleged to have been engaged in a discriminatory practice. Only the CEIC was so named. Mr. Wasylyshen said that given the nature of the allegations, it was mandatory for Mr. Chuba to be named as primary respondent as well and that it was a fatal defect that he was not so named.

Mr. Wasylyshen argued that Mr. Chuba, although not expressly named as such in the complaint, was in fact "the person against whom the complaint was made" and accordingly he should have received notice in writing of the decision taken by the Commission upon receipt of the Investigator’s Report. For one reason or

another, Mr. Chuba was not given written notice that the Commission had decided to appoint a Tribunal. Failure to give this notice, counsel for the Appellant contended, was a breach of a mandatory statutory provision and was fatal to the ultimate decision of the Tribunal. The thrust of Mr. Wasylyshen's argument was that Mr. Chuba should have been named as a primary respondent in the Complaint and should have received notice under Section 36(4)(a). As a result of these defects the Tribunal below proceeded without statutory jurisdiction and the decision that it rendered must be a nullity, according to Mr. Wasylyshen.

This argument was advanced before the Tribunal below upon a motion to dismiss the proceedings at the outset of the hearing. Although the Tribunal did not deal with the alleged defect in the complaint, it rejected the argument with respect to Section 36(4)(a) upon the simple basis that the section had in fact been complied with. The Tribunal reasoned as follows:

"The Act required that the Commission advise the complainant and "the person against whom the complaint was made" of the action to be taken on the investigator's report. This was done. The parties at the time - Ms. Kotyk, Ms. Allary and the CEIC - were informed that a Tribunal would be appointed. The Commission has a discretion under s. 36(4)(b) to notify "any other person whom it considers necessary to notify...". There is no requirement to notify anyone other than the parties mentioned in paragraph (a), and although Mr. Chuba could have been notified under paragraph (b), I cannot find that the failure to do so was fatal, because of the use of the discretionary word "may". The fact that the investigator advised Mr. Wasylyshen that he would be notified of the

Commission's decision and he was not so advised indicates a

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lack of courtesy but nothing more."

We do not agree with Mr. Wasylyshen that it was essential for the complainants or the Commission to have made a direct complaint against Mr. Chuba in addition to the CEIC. In most cases of sexual harassment that have come before provincial Boards of Inquiry, the employer respondent has tended to be either a sole proprietor or a company whose sole directing mind was the individual against whom the allegations of discrimination were made. It was appropriate in those circumstances for the provincial Human Rights Commission to lay a complaint against the individual employer. Employers within the federal jurisdiction, however, tend to be large in scale, and have numerous employees spread across the country. We believe that it is open to the Canadian Human Rights Commission to proceed only as against the corporate employer in such situations for creating or condoning a substantially discriminatory work environment, thereby making the employer responsible in its own right and not by reason of a theory of vicarious liability. It is not incumbant upon a complainant or the Commission to seek relief against an individual manager. The Commission may, if it so chooses, seek to eliminate the greater evil rather than pursuing a damages remedy

against the
individual wrongdoer. It may proceed only as against the large corporate entity for the purpose of ensuring that a particular discriminatory practice in its overall business cease and that its global work environment be cleansed of an atmosphere conducive to sexually stereotyped insults and demeaning propositions. Accordingly, the fact that Mr. Chuba was not specifically named in the complaint forms as a party who was alleged to have been engaged in a discriminatory practice did not render the complaints defective.

When a decision was taken to appoint a Tribunal, Mr. Chuba was not the party against whom a complaint had been made and therefore it was not mandatory for the Commission to give him notice of the appointment of the Tribunal. We agree with the original Tribunal's finding in this respect. Although, for reasons stated hereafter, Mr. Chuba did subsequently become at the hearing a party against whom the complaints were made, he did not possess that status at the time the Commission made its decision to appoint a Tribunal and it was therefore not mandatory for the Commission to provide him with such notice under Section 36(4)(a).

At the hearing before the Tribunal, Mr. Chuba was added as an "intereted party" under Section 40(1) of the Act. Mr. Wasylyshen submitted that the Tribunal was in error because it improperly characterized Mr. Chuba as only "an interested
party" and not as a party against whom the complaint was made. He added that although Mr. Chuba was indeed added as an interested party at his own request upon learning by chance that a

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Tribunal had been appointed to investigate the complaint against the CEIC, the whole foundation of CEIC's responsibility rested upon the allegations against Mr. Chuba himself and thus he should be the party against whom the complaint was being made. The mere fact that he was not named expressly in the complaint as the person against whom the complaint was being made and the mere fact that he was added as an interested party does not, according to Mr. Wasylyshen, take away from the real basis of the claim which placed Mr. Chuba in the position of being the primary party against whom the complaint was made. Consequently, he argued, any subsequent decision by the Tribunal against Mr. Chuba, even in his character as an interested party, was a nullity.

At first blush, there appears to be little in the distinction between being an interested party and a party against whom the complaint was made since both, in the circumstances of this case, were given ample opportunity to prepare for and indeed participated fully at the hearing. The distinction, however, may have some significance nonetheless.
For example, under Section 42.1(1) of the Act, it
seems that a mere interested party has no right of appeal to a Review Tribunal. That provision permits an appeal only by the Commission, the complainant or the person against whom the complaint was made. Accordingly, if Mr. Chuba, as the Tribunal below found, was merely an interested party, then Mr. Chuba would

have no standing to launch the appeal before us; and since Mr. Chuba was the only Appellant, (the CEIC did not appeal) there would not be any appeal under the Act and we would be without jurisdiction.

If Mr. Chuba was not named as a primary respondent in the complaint, then no specific relief could have been sought against him. There is no doubt, however, that findings as to his behaviour still might have had an indirect bearing on his continued employment as a public servant and might have adversely affected his reputation. These potential consequences might have increased his right to be added as an interested party at the hearing but they did not require either the complainant or the Commission to name Mr. Chuba as a party respondent in the initial complaint.

The complaint itself is not as formal as the information which commences criminal proceedings under the Criminal Code. Under the Act, the complaint is not a sworn document and indeed it may be in any form acceptable to the Commission (see Section 32). Informal though it is, the complaint does have considerable significance, for it is the Tribunal's obligation under Section 40(1) to inquire into the complaint and its obligation under Section 41 to find whether the complaint is or is not substantiated.

We think there is something to the distinction between a person who is made an interested party at a hearing and a person

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against whom a complaint is made. As mentioned, the former has no right of appeal but the latter does. This suggests that an interested party is not a person directly affected by the proceedings before the Tribunal of first instance but has only an indirect interest and on his own volition wishes to participate in the hearing. The Commission has a discretion to provide such an interested party with notice of its decision following receipt of the Investigator's Report under Section 36(4)(b), and the Tribunal has a discretion under Section 40(1) to provide the interested party with notice of hearing. It is up to the interested party to decide whether he will or will not participate at the hearing. If he chooses not to, then no relief can be ordered against him since he was not named as a party against whom a complaint was being made. There would not have been proper indication to him that he was subject to liability. If the Commission, however, is seeking affirmative relief from a party, then it should be made clear to that party that his status is not simply that of an interested party but that of a primary respondent. Natural justice requires no less. Although a Tribunal is capable of making an Order under Section 41(2) against "the person found to be engaging or to have engaged in the discriminatory practice" fairness requires that the person be so named in the complaint so that he fully realizes his exposure of risk should the allegations be established.

A procedural error was made in this case in that Mr. Chuba was added only as an interested party. If the nature of the

proceedings had changed at the hearing stage such that the Commission was seeking to obtain relief against him personally as well as the CEIC, it should have sought an amendment to the complaint to make this clear. As it turned out, at the time of the hearing, he was not in fact just an interested party. He had become, along with the CEIC, a party
against whom direct allegations were being made and from whom redress was being sought.

However, when Mr. Chuba requested and indeed was added as an interested party he was notified that the risk of so doing was that he would be treated together with the CEIC as a party against whom the complaint was being made. Counsel for the Commission stated to the Tribunal his position as follows:

"My next submission is that if Mr. Wasylyshen joins this proceeding and Mr. Chuba becomes an interested party to this proceeding, then Mr. Chuba becomes liable to an Order under Section 41 sub 2.

Under Section 41 sub 3(a) and (b), the Tribunal may order compensation in respect of feelings or self-respect, not exceeding $5,000.00.

In my submission that order may be made against an interested party as well as against a person against whom the complaint was made.

I am giving notice that if Mr. Chuba does join this proceeding, we would be seeking compensation under that section from him as well as against from the Employment and Immigration Commission."

(Vol. 1, pp 17-18, Transcript of Evidence)
Mr. Chuba was aware of this and did not take issue with this proposition. He was not lulled into any false sense of security by his capacity as an "interested party" and suffered no prejudice as a result thereof. We agree with the Tribunal that after Mr. Chuba was added as a party the nature of the case changed in that the complainants' allegations against himself became as much of an issue as the allegations the against CEIC. Accordingly, although he was added as "an interested party" it was the equivalent of the complaints being amended so that he became, in addition, a party against whom the complaints were made. Mr. Chuba and his counsel treated his involvement in the proceedings as more than an interested party. He knew that he had become a primary respondent in the proceedings and that specific relief would be sought against him should the allegations be substantiated.

In summary, we find that it was not fatal to the proceedings that Mr. Chuba was not named in the original complaint as a person against whom the complaint was made. We do find that although informed that he was being added as "an interested party" to the hearing he was treated in all respects as a party against whom a

complaint was made and he prepared for and participated at the hearing on this basis.

There was thus no denial of natural justice in the findings that the Tribunal ultimately made against him.

2. ADMISSIBILITY OF THE CEIC ADMINISTRATIVE REVIEW COMMITTEE REPORT

Counsel for Mr. Chuba submitted that the Tribunal erred in admitting the report of the findings and recommendations of a three person CEIC administrative investigation committee. The committee was an internal group appointed by the CEIC to look into the grievances filed by Jane Kotyk and Barbara Allary relating to sexual harassment as well as their grievances relating to fraud and mismanagement at the Yorkton office. The mandate of the committee was to inquire not only into the allegations pertaining to sexual harassment but also into those of fraud and mismanagement and the general nature of the office dynamics. The report found that the

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allegations of sexual harassment by Barbara Allary were unfounded. It concluded that although sexual advances were made by Mr. Chuba towards Ms. Allary, the evidence did not support the sexual harassment charge in that on the balance of probability, the committee could not conclude that Mr. Chuba knew that his behaviour was objectionable to another employee. The Report did, however, find that Ms. Kotyk's allegations of sexual harassment had been proven. The committee then made certain recommendations relating to sexual harassment including the immediate transfer of Mr. Chuba, the development of a regional policy on the issue of sexual harassment and that professional couselling be retained for the complaintants, if so required, and for Mr. Chuba with the intent of ensuring that he be made aware and sensitive to the needs, aspirations and feeling of women and that he be able to cope with the consequences. The committee did not find any basis for the allegations of fraud.

This report was admitted into evidence before the Tribunal as Exhibit C-18. Both Counsel for Mr. Chuba and the CEIC objected to the admissibility of this report when it was first discussed because there were findings by this committee on the very issues to be decided by the Tribunal. They both recognized that Section 40(3)(c) of the Act gave the Tribunal considerable latitude over the admissibility of evidence and that it was not bound by the strict rules of evidence. They contended that the Tribunal nevertheless had an obligation to exercise its discretion fairly and was obliged to reject as evidence an opinion on the ultimate issue that it must itself decide. The admission of this report, counsel for Mr. Chuba argued, amounted to a "loading of the dice" against his client
before adjudication began. The report disclosed that upon investigation of sources which remained absolutely confidential and unknown to Mr. Chuba, Ms. Kotyk's grievance of sexual harassment was substantiated. The committee recommended that, "in the best

interests of Mr. Chuba the grievors and employees of the Yorkton CEIC", there should be an immediate transfer arranged for Mr. Chuba. On the basis of these findings, Mr. Chuba was suspended for a two week period. It was argued that the admissibility into evidence of such a report presented a formidable obstacle to Mr. Chuba to defend himself on these issues.

Moreover, because the report was based upon information received from confidential sources, it was founded on nothing more than hearsay and accordingly Mr. Chuba was denied the fundamental right to cross-examine and test the credibility of those individuals whose information formed the basis of the report. The conclusions in the Report could be only as trustworthy as the information that was relied upon by the committee.

There is no question that as against Mr. Chuba this evidence

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bears the frailty and weakness ascribed to it by Mr. Wasylyshen. However, there is no indication that this evidence formed any part of the findings as against Mr. Chuba or was relied on at all by the Tribunal for that purpose. It should be noted that when Mr. MacLean, Counsel for CEIC, questioned the admissibility of this report as being nothing more than opinion evidence as against Mr. Chuba, the Chairman replied, "Yes, but we are also concerned with what steps the CEIC had taken to deal with the internal complaint." (Volume II, page 156, Transcript of Evidence). In fact, the report is alluded to in the Reasons of the Tribunal only in connection with the allegation against the CEIC in respect of its alleged failure to provide a work environment free of harassment. The report was relevant to the steps that were taken by the CEIC when it learned of the allegations in question. The nature of the objections raised was that such evidence would be prejudicial against Mr. Chuba but not necessarily against the CEIC. We find that the Tribunal below did not place any weight on this report in respect of the allegations against Mr. Chuba and restricted the purpose of the evidence to the question of the procedures followed by the CEIC in the face of the allegations. The evidence for this limited purpose was perfectly proper and relevant in the circumstances. Accordingly, we must conclude that no error was committed by the Tribunal in receiving this evidence as against the CEIC.

3.
FINDINGS OF FACT AND CREDIBILITY BY THE TRIBUNAL

Mr. Wasylyshen pointed out that pursuant to Section 42.1(5) of the Act, the Review Tribunal had jurisdiction to consider errors of fact made by the Tribunal of first instance. He submitted that the Tribunal had erred in concluding that the complainants' evidence was more credible than that of Mr. Chuba. He articulated a number of factors and inferences which cumulatively, in his view, provided support and corroboration for the version of events given by Mr. Chuba and displayed glaring contradictions in the complainants' evidence which should have been apparent to the Tribunal below. He argued that the onus was on the complainants and on the Commission to show that on the balance of probabilities, sexual harassment had

taken place. He reviewed the totality of the evidence in his argument before us relating to credibility to demonstrate that the onus had not been satisfied.

Mr. Wasylyshen relied upon the case of Robichaud v. Brennan and Treasury Board [1982] 3 C.H.R.R. D/977, reversed [1983] 4 C.H.R.R. D/1272, wherein a Review Tribunal overturned the original Tribunal ruling that the complainant was not sexually harassed. Mr. Wasylyshen put that decision

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forth as an illustration of a Review Tribunal overturning questions of fact including issues of credibility pursuant to Section 42.1(5) of the Act. We disagree with his interpretation of the nature of the decision made by the Review Tribunal. In that case the Review Tribunal did not take issue with the finding of credibility made by the original Tribunal but rather disagreed with the proposition or principle expressed by the original Tribunal that only certain sexual acts could be voluntary and not coerced. In rejecting the presumption made by the original Tribunal the Review Tribunal considered the only testimony that was given at the hearing and concluded as follows:

"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 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."

In addition, the Review Tribunal found that there was an error of mixed fact and law by the original Tribunal in that, in their view, the facts established that there was a poisoned work environment created. That formed another basis for the Review Tribunal overturning the original Tribunal's decision in the circumstances of that case.

Although this Review Tribunal does have power to review factual findings, such findings in cases of discrimination usually turn upon credibility, which is often difficult to assess. The events "depend upon detailed nuances for their proper interpretation. There is seldom a single factor which will establish the truth of one version of the facts". (See Aragona v. Elegant Lamp Company and Fillipitto [1982] 3 C.H.R.R. D/1109 at 1112 (Ontario Board of Inquiry, per E. Ratushny).

In making a finding of credibility, the demeanour of the witnesses, their manner of expression and other personality-related aspects of their testimony, although not necessarily determinative, are relevant.

The words of Viscount Simon in Watt or Thomas v. Thomas [1947] A.C. 484 at p. 486 (H.L.) are just as apposite for a Review Tribunal as they are for an appellate court in assessing findings of fact made by a trier of fact who had the benefit of observing witnesses:

"I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a

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different view on facts from that of a trial judge.... Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law ... an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law), the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."

It is obvious that the benefit to be derived by seeing and hearing witnesses will vary according to the subject matter of the case. Allegations of discrimination and in particular sexual harassment form a class of case in which it is of considerable importance to see and hear the witnesses and particularly the parties themselves. The incidents in question usually take place between the parties in a private setting. Generally, it will only be the parties themselves that will give direct evidence on the matter as they in all likelihood would be the sole witnesses.

There is no principle or rule that a Review Tribunal can apply by which to measure the personalities of the protagonists by an examination of the written record. Without the advantage of seeing and hearing the witnesses first
hand, we are not in a position to come to any conclusion that the Tribunal was plainly wrong. Indeed, our review of the transcripts indicates that there was ample evidence upon which the Tribunal could have made the findings of fact and credibility that it did. The evidence giving rise to those findings are set out at length by Ms. Ashley in her Reasons and it is therefore unnecessary

for us to repeat it here. Nor do we find it necessary to review in our Reasons the various contrary inferences of the evidence urged upon us by Mr. Wasylyshen. Suffice it to say that the findings of

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fact and inferences of fact made by the Tribunal were reasonable and well founded in the circumstances and we do not accept the contrary inferences suggested by Mr. Wasylyshen. This is not a case where the findings of the Tribunal were groundless or perverse and warranted interference by a Review Tribunal. Accordingly, we hold that the findings made by the Tribunal as to credibility and facts were in accord with the evidence and the weight of the evidence.

4. SUBMISSIONS BY THE CEIC, A NON-APPELLANT

Although the CEIC did not appeal the decision of the Tribunal, its counsel, Mr. MacLean, appeared at the hearing before the Review Tribunal and made submissions as an interested party under Section 42.1(5) of the Act. The CEIC was a primary respondent against whom findings were made by the Tribunal below. It chose not to appeal. We do not think that the statutory provision permitting a Review Tribunal to entertain the submissions of interested parties allows the CEIC to appear before it with this status and to challenge the findings of fact and law made against it. If it wished to take issue with those findings, it should have appealed. It cannot collaterally attack those findings by having its counsel take on the guise of "an interested party". It had rights of appeal and for reasons of its own decided not to exercise them. Therefore, we do not find it necessary to deal with the submissions made by Mr. MacLean as they related to the CEIC.

5. IS SEXUAL HARASSMENT PROSCRIBED DISCRIMINATION?

Mr. MacLean did raise one argument that was expressly adopted by Mr. Wasylyshen and we therefore feel compelled to consider it and that has to do with the fundamental question as to whether sexual harassment is a prohibited ground of discrimination within the meaning of the word "sex" in section 3(1) of the Act. The events in question took place before the recent amendment to the Act (1980-81-82-83, C. 143, S.7) which now expressly provides in Section 13.1 that harassment of an individual in matters related to employment is a prohibited ground of discrimination and more specifically that sexual harassment is deemed to come within that prohibition. The amendment, therefore, was not applicable to the instant case. The Tribunal below held that even prior to this amendment the prohibition against sex discrimination was sufficiently wide in its scope to include sexual harassment and the amendment merely served to codify that interpretation. Mr. MacLean submitted that the Tribunal was wrong in that regard.

The numerous decisions of provincial and federal Human Rights

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Tribunals and American courts as collected in the Reasons of the Tribunal below and more recently in Olarte et al v. Commodore

Business Machines Limited and DeFilippis (October 11, 1983, Ontario Board of Inquiry, Peter A. Cumming) provide a convincing tide of opinion that sexual harassment does constitute proscribed sexual discrimination. Nevertheless, Mr. MacLean argued that this Review Tribunal should consider the matter afresh and of course argued that these decisions were wrong. He reasoned that sexual harassment is gender-related only in the sense that different people have different sexual preferences, generally heterosexual. He submitted, however, that one cannot say in any given case that a woman is more likely to be
sexually harassed than a man; and in the case where the offender is bisexual, men have an equal chance of being harassed. The offender who uses sexual threats to harass a person of his sexual preference may in respect of another employee use other demeaning threats, for example, exacting personal services. Mr. MacLean therefore argued that harassment in the work place per se was not proscribed conduct under the Act prior to the amendment. He submitted that harassment which is sexual in nature does not make the conduct any more prohibited because sexual harassment as a concept obviously cannot be said to apply to one gender as opposed to the other and therefore cannot be said to be discrimination by reason of sex.

He also relied upon the case of Re Board of Governors, of the University of Saskatchewan et al and Saskatchewan Human Rights Commission (1976) 66 D.L.R. (3rd) 561, in which Mr. Justice Johnson of the Saskatchewan Queen’s Bench held that a provision in the Saskatchewan Fair Employment Practices Act which prohibited discrimination in employment on the basis of sex did not apply where an employer refused to employ a person because of that person’s homosexuality. He held that the word "sex" in its normal meaning refers to the gender of a person, not to his sexual activities, propensities or orientation. Mr. MacLean argued that the reasoning of Mr. Justice Johnson was applicable to the interpretation of the word "sex" in the Canadian Human Rights Act in the context of sexual harassment. He submitted that sexual discrimination under the Act is only applicable where the employer or a person acting as his servant or agent differentiates adversely in relation to an employee because in the general sense that person is a male or female as the case may be and not because of sexual preferences.

Without considering the correctness of The Board of Governors of the University of Saskatchewan decision, it is sufficient to point out that that case dealt solely with the sexual preferences and orientation of the complainant and is clearly distinguishable from the facts in our case. In any event, we do not think that it is a condition precedent to sex discrimination that the victim of

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the improper conduct must always be a member of one gender. There is a number of theoretical permutations and combinations that could give rise to sexual harassment. For example, a male manager may commit heterosexual sexual harassment upon a female employee or homosexual sexual harassment upon a male employee. Similar combinations can be imagined if the roles were reversed and the

manager were female and the employee male. Indeed, the harassment may be both gender-related and based upon sexual propensity as where a homosexual employer exploits a homosexual employee.

The central problem in all of these situations is that a specific employee (whether male or female and whether heterosexual or homosexual) is the subject of harassment and therefore has had imposed on him or her, conditions of employment which were not inflicted upon employees of the opposite gender. The target of the harassment suffers disparate treatment based on sex. As was noted in Bundy v. Jackson (1981) 641 F. 2d 934 at 942 (U.S. Court of Appeals):

"... In each instance the question is one of but-for causation: would the complaining employee have suffered the harassment had he or she been of a different gender? ... Only by reductio ad absurdum could we imagine a case of harassment that is not sex discrimination - where a bisexual supervisor harasses men and women alike."

Nor is it an answer by an employer to argue that a manager is discriminating against a woman not because of her sex but because he finds her sexually attractive and consequently, is not harassing all women in his employment but merely this particular woman. In Bundy v. Jackson, supra, at p. 942, the Court indicated that

"sex discrimination ... is not limited to disparate treatment founded solely or categorically on gender. Rather discrimination is sex discrimination whenever sex is for no legitimate reason a substantial factor in the discrimination."

Accordingly, the crux of the matter is whether the basis for the specific discrimination was sex related. If so, there is discrimination by reason of sex even though other employees of the same gender are not subjected to such conduct. One commentator put the principle aptly as follows:

"Whether or not the attention is directed solely at one individual, so long as it is sex based, it is discriminatory. Womanhood is the sine qua non of the sexual harassment. But for her femaleness, the victim of sexual harassment would not have been propositioned; she would not have been requested to

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participate in sexual activity if she were a man." (Constance Backhouse, Case Comment, (1981) 19 University of Western Ontario Law Review, 141 at 143). Applying these principles to the circumstances of the case before us, there is no question that the discriminatory conduct was based upon sex and accordingly fell within the proscribed conduct under the Canadian Human Rights Act.

For the reasons given above, we have concluded that this appeal fails on all grounds and must therefore be dismissed.

DATED at Toronto, this 13th day of December 1983.

SIDNEY N. LEDERMAN, Q.C.,
Chairman

DONNA WELKE,
Member

DAVID WILKINS
Member