T.D. 13/92
Decision rendered on November 12, 1992

CANADIAN HUMAN RIGHTS ACT
R.S.C., 1985, c. H-6 (as amended)

HUMAN RIGHTS TRIBUNAL

BETWEEN:

LESLEY CLUFF
Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION
Commission

- and -

DEPARTMENT OF AGRICULTURE
Respondent

- and -

MICHAEL SAGE
Respondent

DECISION

TRIBUNAL:

JACINTHE THEBERGE - Chairperson

LINDA M. DIONNE - Member

RAM S. JAKHU - Member

APPEARANCES:

GLENN HECTOR
Counsel for the Respondent, Michael Sage

ROBERT HYNES
Counsel for the Respondent, Department of Agriculture

MARGARET-ROSE JAMIESON
Counsel for the Canadian Human Rights Commission

DATES AND LOCATION OF HEARING: May 20, 21 and 22, and June 15, 16 and 17, 1992; Ottawa, Ontario

A. INTRODUCTION

Ms. Lesley Cluff filed complaints under sections 7 and 13.1 (now 14. 1) of the Canadian Human Rights Act (CHRA) dated June 3, 1987 as amended June 22, 1987 against the Department of Agriculture (Agriculture Canada) and dated June 3, 1987 against Michael Sage. In these complaints, the complainant, Ms. Lesley Cluff, alleged that the respondents engaged in discriminatory practice on the ground of sex in a matter related to employment as Mr. Michael Sage sexually harassed her on December 5, 1986 during the Annual Conference organized by her, at Ottawa, for the Eastern Canada Farm Writers Association (E.C.F.W.A.). At the time of the incident, both were employees of Agriculture Canada; Ms. Cluff was an Information Officer (IS-02 term employee) and Mr. Sage a Program Officer (IS-05 permanent employee).

This Tribunal was appointed on April 28, 1992 pursuant to sub-section 49. (I.1) of the CHRA in order to determine whether the action complained of constitutes discriminatory practice on the ground of sex (sexual harassment), in a matter related to employment under sections 7 and 13. 1 (now 14.1) of the CHRA. The hearing was held from May 20 to 22, and June 15 to 17, 1992 in Ottawa, Ontario.

At the outset, on the first day of the hearing, counsel for both respondents moved two preliminary motions. Mr. Glenn Hector (counsel for Mr. Sage), with the concurrence of Mr. Robert Hynes (counsel for Agriculture Canada), requested a stay of proceedings on the basis of the delay that has occurred since the filing of the complaints by Ms. Cluff. In addition, Mr.

Hynes raised the issue of jurisdiction in regard to whether the incident occurred in the course of employment. The Tribunal decided to proceed with a hearing of these two motions prior to the one on the merits of the case, if the latter proved necessary. It was also decided that the motion on delay would be dealt with prior to the one on jurisdiction. The

respondents' motion for stay of proceedings because of the delay was denied by this Tribunal on June 16, 1992. The issue of jurisdiction solely is the subject matter of this decision.

B. THE ISSUE OF JURISDICTION

(i) If the alleged sexual harassment did not occur "in the course of employment" and/or "in matters related to employment" as required under sections 7 and 14 of the CHRA, this Tribunal lacks jurisdiction to hear the complaints because any remedy for violation of sections 7 and 14 that is available under sections 53 and 65 of the CHRA (cited below) applies only to the employer. The first matter which we must determine relates to our authority to deal with the issue of our jurisdiction under the CHRA. Section 53 of the CHRA specifies that "at the conclusion of its inquiry", a Tribunal can decide to dismiss or allow the complaint and make an order. In other words, the Tribunal is vested with jurisdiction to determine the merits of the complaints. Does this mean that if a relevant jurisdictional question is raised before the start of the hearing on the merits of the complaints or during the course of proceedings on the merits of the complaints, the Tribunal is entitled to deal with that question?

In this regard, we are guided by the decisions in Shirley Cooligan, et al and British American Bank Note Company Limited, Canadian Human Rights Tribunal, February 26, 1980,

T.D. 1/80, (affirmed in Canadian Human Rip-hts Commission and British American Bank Note Company, Federal Court of Appeal, September 1 1, 1980; Court File No. A- 1 60-80) and Kristina Potapzkv v. Alistair MacBain, October 1984, 5 C.H.R.R. D/2285. In Kristina, at para. 19410, it was noted that:

"[i]t has been established by the Ont. Court of Appeal in the Cedarvale Tree Service Ltd. and Labourers' International Union of North America, Local 183, (1972) 22 D.L.R. (3d) 40 case that an administrative tribunal is the master of its own procedure when an objection to its jurisdiction is made to it. All questions of procedure, including the matter of adjoumment when an objection is made to its jurisdiction, are to be determined by the tribunal itself".

Therefore, we believe that this Tribunal does have the jurisdiction to consider the preliminary motion raised on the issue of jurisdiction in

regard to whether or not the incident of alleged sexual harassment occurred "in the course of employment" and/or "in matters related to employment".

Moreover, it is clear from the hearing of the facts that we have enough proof to make such a decision.

(ii) As noted earlier, these complaints by Lesley Cluff allege the violation of sections 7 and 14 of the CHRA. These sections specify:
Section 7:

It is a discriminatory practice, directly or indirectly,

(b) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination.

Section 14:

(1) It is a discriminatory practice,

(c) in matters related to employment, to harass an individual on a prohibited ground of discrimination. (2) Without limiting the generality of subsection (1), sexual harassment shall, for the purposes of that subsection, be deemed to be harassment on a prohibited ground of discrimination.

Mr. Hynes, counsel for the respondent Agriculture Canada, argued that this Tribunal does not have jurisdiction to hear the complaints because under sections 7 and 14 of the CHRA, an employer, in this case Agriculture Canada, is liable only if the act of discrimination occurs "in the course of employment" and/or "in matters related to employment". According to Mr. Hynes, the incident of alleged sexual harassment did not occur "in the course of employment" and/or "in matters related to employment" because Agriculture Canada had no authority or control over the Annual Conference of the E.C.F.W.A.. If it did not occur "in the course of employment", no finding of discrimination could be made (under the CHRA) because it was not possible to differentiate adversely in relation to an employee on a prohibited ground of discrimination. Consequently, Mr. Hynes submitted, that sections 7 and 14 of the CHRA were not violated, and this Tribunal lacks jurisdiction to hear the complaints by the complainant, Lesley Cluff.

Ms. Jamieson, representing the Canadian Human Rights Commission, did not deny that under sections 7 and 14 of the CHRA an employer is liable

only if the act of discrimination occurs "in the course of employment" and/or "in matters related to employment". However, Ms. Jamieson argued that the phrases "in the course of employment" and "in matters related to employment" must be interpreted broadly, as stated by the Supreme Court of Canada in Robichaud v. Canada (Treasury Board), 1987, 8 C.H.R.R. D/4326, to include the complainant's activities during the 1986 Annual Conference of the E.C.F.W.A..

None of the parties involved in this case disputed that the act of alleged sexual harassment occured during the night of December 5 and 6, 1986 at the hospitality suite arranged during the Annual Conference of the E.C.F.W.A.. However, the almost exclusive issue of their disagreement was whether or not the complainant's activities related to that Conference were part of Lesley Cluff's employment with the respondent, Agriculture Canada.

Therefore, in our view, the respondent's preliminary motion predominately involved the question of facts.

Generally, the burden of proof in human rights cases involving discrimination is on the complainant. (Basi v. Canadian National Railway, 1988,9 C.H.R.R. D/5029;Karaumanchiri v. Liguor Control Board of Ontario, 1987, 8 C.H.R.R. D/4076, Ot. Bd; aff., 1988, 9 C.H.R.R. D/4868, Ont.Div. Ct). In other words, in this case, Ms. Cluff and the Commission must establish before this Tribunal that (a) the complainant suffered sexual harassment and (b) the act of sexual harassment did, in fact occur "in the course of the employment" and/or was related to matters of Ms.Cluff's employment with the respondent,Agriculture Canada. We are aware that the proceedings before this Tribunal are not as formal as before a court of law. Although these hearings were on preliminary motion and were not related to the merits of the complaints, we beleive that the onus was on the complainant to prove that the alleged sexual harassment did, in fact, occur "in the course of the employment". The complainant, in our view, did not clearly satisfy the Tribunal that, on this preminilary question, the alleged sexual harassment did occur "in the course of the employment".

C. THE LEGAL ISSUE

The CHRA prohibits discriminatory practices in, among other activities, employment on a number of grounds, including sexual harassment (section 14). The question arises whether such actions can be attributed to the employer, in

this case the respondent Agriculture Canada, to which the CHRA applies by virtue of section 65 (cited below). Before the addition of section 65 to the CHRA, the Tribunal had to give considerable attention to the issue of liability of an employer for the acts of his employees, such as vicarious liability in tort and strict liability in the criminal or quasi-criminal context. In other words, the legal basis for an employer's liability under the CHRA was not very clear and certain. This situation was clarified by the Supreme Court of Canada in Robichaud, supra. Subsequently, the CHRA was amended by adding section 65 (cited below) in order to adopt the Robichaud ruling. If the incident of the alleged sexual harassment did not take place under the authority or control of the employer, in this case the respondent Agriculture Canada, the presumption of section 65 could not be applied because the employer is liable for his employees' acts committed only "in the course of employment" and/or "in matters related to employment". Section 65 states that:

(1) Subject to subsection (2), any act or omission committed by an officer, a director, an employee or an agent of any person, association or organization in the course of employment of the officer, director, employee or agent shall, for the purposes of this Act, be deemed to be an act or omission committed by that person, association or organization.

(2) An act or omission shall not, by virtue of subsection (1), be deemed to be an act or omission committed by a person, association or organization if it is established that the person, association or organization did not consent to the commission of the act or omission and exercised all due diligence to prevent the act or omission from being committed and, subsequently, to mitigate or avoid the effect thereof.

The CHRA creates what are "essentially civil remedies". The remedies provided in section 53 of the CHRA (cited below) give effect to the principles and policies aimed not at determining fault or punishing conduct but at a remedial action, i.e. to identify and eliminate discrimination. Section 53 specifies that:

(1) If, at the conclusion of its inquiry, a Tribunal finds that the complaint to which the inquiry relates is not substantiated, it shall dismiss the complaint.

(2) If, at the conclusion of its inquiry, a Tribunal finds that the complaint to which the inquiry relates is substantiated, it may, subject to subsection (4) and section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in that order any of the following terms that it considers appropriate:

(a) that the person cease the discriminatory practice and, in order to prevent the same or a similar practice from occurring in the future, take measures, including (i) adoption of a special program, plan or arrangement referred to in subsection 16(i), or (ii) the making of an application for approval and the implementing of a plan pursuant to section 17, in consultation with the Commission on the general purposes of those measures;

(b) that the person make available to the victim of the discriminatory practice, on the first reasonable occasion, such rights, opportunities or privileges as, in the opinion of the Tribunal, are being or were denied the victim as a result of the practice;

(c) that the person compensate the victim, as the Tribunal may consider proper, for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice; and.....

(3) In addition to any order that the Tribunal may make pursuant to subsection (2), if the Tribunal finds that

(a) a person is engaging or has engaged in a discriminatory practice wilfully or recklessly, or

(b) the victim of the discriminatory practice has suffered in respect of feelings or self-respect as a result of the practice, the Tribunal may order the person to pay such compensation to the victim, not exceeding five thousand dollars, as the Tribunal may determine.

The broad remedies provided by section 53, including the cessation of the discriminatory practice and the general necessity for effective follow-up, impose important responsibilities on the part of the employer. Only an employer can fulfil the obligations imposed by section 53 and

only an employer can provide a healthy work environment. That is why it is important that an act of discrimination that is complained of must have been committed "in the course of employment" and/or "in matters related to employment" and these phrases must be interpreted as meaning work or job related.

There are two legal theories that have been relied upon in human rights jurisprudence relating to proceedings involving discrimination in the course of employment. They are vicarious liability in tort and strict liability in the criminal or quasi-criminal context. These theories of employer's liability are considered no more relevant and applicable to acts committed under the CHRA because they are fault-oriented and restrictive in their application (Robichaud, supra, paragraphs 33938 and 33939). In the opinion of the Supreme Court of Canada, the CHRA "is not aimed at determining fault or punishing conduct. It is remedial. Its aim is to identify and eliminate discrimination" (Robichaud, ibid. para. 33940), and "[i]t is unnecessary to attach any label" to the liability of an employer under the CHRA, because such liability "is purely statutory" (Robichaud, ibid., para. 33944). In the application of the CHRA, courts have interpreted the phrases "in the course of employment" and "in matters related to employment" more liberally to include the responsibility of an employer to provide "a healthy work environment" and to remove any discriminatory practice committed by him or anyone of his employees during the course of employment. La Forest, J., in Robichaud, supra, concludes at para. 33939:

"it would appear more sensible and more consonant with the purpose of the Act RA to interpret the phrase "in the course of employment" as meaning work- or job-related, especially when that phrase is prefaced by the words "directly or indirectly";

and at para. 33944:

"the statute [CHRA] contemplates the imposition of liability on employers for all acts of their employees 'in the course of employment', interpreted in the purposive fashion outlined earlier as being in some way related or associated with the employment".

Therefore, an act of committing a discriminatory practice "in the course of employment" and/or "in matters related to employment" under the CHRA is largely an issue of facts and a broad approach should be adopted in the interpretation of these phrases.

There exist no objective criteria (standards or tests) to determine when a discriminatory practice, within the meaning of the CHRA, can be considered to have been carried out "in the course of employment" and/or "in matters related to employment". Relying on the law as established in Robichaud and subsequent amendments to the CHRA, this Tribunal establishes the following criteria, which we use to determine whether or not the act of alleged sexual harassment took place in the course of employment of the complainant. In our opinion:

An employee is in the course of employment when, within the period covered by the employment, he or she is carrying out:

(1) activities which he or she might normally or reasonably do or be specifically authorised to do while so employed;

(2) activities which fairly and reasonably may be said to be incidental to the employment or logically and naturally connected with it;

(3) activities in furtherance of duties he or she owes to his or her employer; or

(4) activities in furtherance of duties owed to the employer where the latter is exercising or could exercise control over what the employee does.

An employee is still in the course of employment when he or she is carrying out intentionally or unintentionally, authorised or unauthorised, with or without the approval of his or her employer, activities which are discriminatory under the CHRA and are in some way related or associated with the employment. However, an employee is considered to have deviated from the course of his or her employment when engaged in those activities which are not related to his or her employment or are personal in nature.

Therefore, in this case, the main questions we have to determine are, firstly whether or not the complainant's activities were in any way related or associated with her employment with the respondent, Agriculture Canada, and secondly whether or not the respondent had any authority or control over the planning and managing of the 1986 Annual Conference (including the

hospitality suite) of the E.C.F.W.A. during which the alleged incident of sexual harassment had occurred.

D. THE RELEVANT FACTS

Mr. Gerald Esdale (Director of Operations, Administration Division, Agriculture Canada)
testified regarding Agriculture Canada's policies regarding its employees attending conferences. Participation at any or all E.C.F.W.A. conferences were/are "encouraged" by Agriculture Canada but it is not mandatory for its employees to attend. Indeed most do not attend and only few representatives are allowed to attend on behalf of Agriculture Canada. Mr. Michael Sage did not attend on behalf of his employer (i.e. Agriculture Canada), even though his was the same employer as that of Lesley Cluff.

The 1986 Annual Conference of the E.C.F.W.A. was one of many which Agriculture Canada employees were allowed to participate in. Agriculture

Canada paid for two registrants to attend that Conference, i.e., for the complainant, Ms. Lesley Cluff, and another staff member, Ms. Debbie Gustafson. The registration fee paid was $45.00 for each participant.

These were the only costs for that particular Conference that Agriculture Canada assumed. It was considered customary for employees to attend the E.C.F.W.A. conferences to maintain public relations contacts to benefit the employees of Agriculture Canada in the execution of their official duties but it was not an essential part of their job descriptions. It was also clearly established that the hospitality suite hosted by the E.C.F.W.A. was not part of the formal programme of the Conference but was generally attended by participants in the Conference.

Mr. Pierre Courteau, who was Acting Chief of Media Relations of Agriculture Canada at the time of the alleged incident, was Lesley Cluff's immediate supervisor at the time. He reported to Mr. Peter Hall who, in turn, reported to Mr. Allan Caldwell. He admitted that Ms. Cluff attended the 1986 Conference with his approval, but he allowed her to work on the planning of the Conference during work hours, in her role as coordinator for the Conference since she was on the executive of the E.C.F.W.A. and was acting as chairman for the Conference, as long as she did not allow the planning to interfere with her daily work-load at her job of preparing radio programmes at Agriculture Canada. Mr. Courteau knew that a Friday evening event (hospitality suite) was planned and suggested to Ms. Cluff

that there should be a reduced fee for the event so that other persons that were not attending the whole Conference might enjoy the Friday evening event. Such a reduced fee of $10.00 was paid by only one participant in that Friday event, i.e., Mr. Michael Sage.

Mr. Peter Hall, who was Programme Director of the Communications Branch at the time of the alleged incident, also confirmed that Ms. Cluff was not required to participate as an employee of Agriculture Canada in the December 1986 Annual Conference of the E.C.F.W.A. but was allowed to attend because she was already a member of the executive of the E.C.F.W.A.. Ms. Lesley Cluff admitted that her participation at the 1986 Annual Conference of the E.C.F.W.A. was only encouraged by Agriculture Canada, but was not mandatory. In her written statement of February 14, 1987 to Ms. Diane Fecteau of the Canadian Human Rights Commission, she clearly indicated that "I would have left for home about midnight when the other guests left the hospitality suite that night [of December 5 and 6, 1986]. As merely a delegate, I would not have been staying in that room [hospitality suite]". (Exhibit 4 A. G. - 2, Tab 6).

As part of the Conference, a tour of a Bio-Technology Facility was arranged. Ms. Cluff was in disagreement with her supervisor, Mr. Pierre Courteau, over some aspects of the tour. It was Mr. Courteau's managerial view that such a tour should not be organized by Ms. Cluff as an E.C.F.W.A. member but that it was the responsibility of Agriculture Canada. The task of organizing the tour was then re-assigned within Agriculture Canada for someone else to organize. This makes clear the difference in roles of Agriculture Canada and the E.C.F.W.A. in planning and holding the 1986 Conference.

In the evidence, the independence of Agriculture Canada and the E. C. F.W.A. was clearly established. The control of the agenda, the entire Conference and, indeed, the hospitality suite was under the exclusive control of the E.C.F.W.A.. The E.C.F.W.A., and not Agriculture

Canada, was responsible for the hospitality suite in its entirety.

Moreover, the E.C.F.W.A. paid for the hospitality suite itself and the alcohol in the suite. No costs for the hospitality suite were assumed by Agriculture Canada. The events of the Conference, including the organization, the programme, the location, the daily and evening

activities, were all under the control of the E.C.F.W.A.. Agriculture Canada remained at arm's length from the E.C.F.W.A. and provided occasional services on a good public relations basis. Agriculture Canada had no control over, the 1986 Conference - the only "link" it had was to allow some of its employees (in this case two) to attend the Conference by paying their registration fees. The registration fee for Michael Sage was not paid for by Agriculture Canada even though he was an employee of Agriculture Canada. He attended the Conference entirely on his own volition and at his own cost. He was not sanctioned by his employer, Agriculture Canada, to be a representative or delegate of Agriculture Canada at the Conference.

Ms. Lesley Cluff wore two hats during the entire process of planning the 1986 Conference and then attending the Conference. She performed her functions while at work at Agriculture Canada for planning the Conference but not allowing it to interfere with her daily official work. Ms. Cluff's activities at the Conference were a combination of the two roles. In other words, she clearly performed two functions while at the Conference - one, as the delegate of Agriculture Canada in attending sessions and even the evening events if she so decided and two, as the chairman of the Conference in chairing the Conference and under the name of the E.C.F.W.A. in hosting the hospitality suite. These activities were not in anyway related to her job of producing radio programmes at Agriculture Canada. Ms. Cluff s activities in preparing for the Conference while at work for Agriculture Canada were allowed by her

supervisor only as long as her daily duties could be satisfactorily performed. Agriculture Canada had no specification in her job description to require Ms. Cluff to work for the E.C.F.W.A. nor did it require its employees to belong to the E.C.F.W.A.. It is the choice of the employees to choose the professional organization which they would like to belong to in order to enhance themselves personally or in theirjobs. Agriculture Canada does not keep a list of its staff who belong to the E.C.F.W.A..

More importantly, Michael Sage was not the employer of Lesley Cluff and is, therefore,
not liable under sections 7 and 14 of the CHRA which are the bases of these complaints.

E. CONCLUSION

Contrary to the views of the complainant, Lesley Cluff, we find that to organize and preside over the 1986 Annual Conference for the E.C.F.W.A. was not a requirement of her employment with Agriculture Canada. In fact, attendance at the Conference (and specifically at the hospitality suite) was not a part of, or incidental to or connected with, complainant's employment with the respondent, Agriculture Canada. The respondent had no authority or control over the E.C.F.W.A.. In our opinion, Lesley Cluff's activities in the organization of and attendance at the 1986 Annual Conference and the hospitality suite of the E.C.F.W.A. were of personal nature and were not related to the complainant's employment with the respondent, Agriculture Canada. Consequently, by engaging in these activities, the complainant had deviated from the course of her employment with the respondent. Therefore, we find that the incident of the alleged sexual harassment did not take place "in the course of employment" and/or "in

matters related to employment" of the complainant, Lesley Cluff, and consequently sections 7 and 14 of the CHRA were not violated. In view of the non-violation of the Act, this Tribunal lacks jurisdiction to hear these complaints.

F. ORDER

For the reasons mentioned above, we grant the motion of the respondents and order the adjournment of the proceedings in the present case.

Dated: October 19, 1992

Jacinthe Theberge (Chairperson)

Linda M. Dionne (Member)

Ram S. Jakhu (Member)