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TD 6/84
Decision rendered on May 29, 1984

CANADIAN HUMAN RIGHTS ACT
RE: IN THE MATTER OF A HEARING BEFORE A HUMAN RIGHTS TRIBUNAL
APPOINTED UNDER SECTION 39 OF THE CANADIAN HUMAN RIGHTS ACT

BETWEEN:
RODNEY ROMMAN,
Complainant,
- and -
SEA-WEST HOLDINGS LTD.
Respondent.

HEARD BEFORE: F.D. JONES, Q.C. TRIBUNAL

APPEARANCES:
R.G. Juriansz Counsel for Complainant.
>INTRODUCTION

This matter involves a complaint brought by Rodney Romman against Sea-West Holdings Ltd. under section 7(a) and 7(b) and section 10 of the Canadian Human Rights Act.

The complaint form signed by Mr. Romman (exhibit C-2) states: "I have been employed since June, 1981 as a deckhand on a tugboat owned by Sea-West Holdings Ltd., and on numerous occasions I have been sexually harassed by Doug McDonald, a mate on the same tugboat. The harassment has continued despite the fact that I have complained to different skippers, and to Mr. Donald Byers, whom I believe to be the manager or owner. On 9 September 1981, I refused to report to work when I realized that Doug McDonald would be the skipper of the tugboat, and I was subsequently fired. I believe that in permitting the sexual harassment to continue, the management provided an adverse working condition for myself as a male which culminated in the loss of my job. I allege that in so doing, Sea-West Holdings Ltd. acted in contravention of Sections 7(a) and (b) of the Canadian Human Rights Act."

At the hearing Sea-West Holdings Ltd. was not represented, although I am convinced that notice of hearing was transmitted to them and they knew the hearing would take place (see transcript p. 4, p. 5).

The essence of Mr. Romman's testimony was that he worked as a deckhand on a tug owned by Sea-West Holdings Ltd. The skipper of the tug, Mr. Doug McDonald, on which Mr. Romman was the deckhand, sexually harassed Mr. Romman by grabbing Mr. Romman's genitals and patting him in the genital area. These advances would be made at least two times per trip. Each trip was approximately 36 hours in duration with 12 of these hours as sleep time for the skipper.

Mr. Romman complained about these attacks to the owner of Sea-West Holdings Ltd., Mr. Donald Byers, on at least two

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- 2 occasions.
There was some confusion in Mr. Romman's testimony as to exact dates when these complaints were made, but I accept that the first complaint was made by telephone from Victoria to Mr. Byers' home in Vancouver in July, 1981. The second complaint was made by Mr. Romman to Mr. Byers again by telephone on September 9th, 1981. Mr. Romman, at the time of these attacks, was 17 years old and I accept that he was fearful of Mr. McDonald, both due to the fact that as skipper, Mr. McDonald could fire him, and physically he was intimidated by Mr. McDonald.

Mr. Romman complained to other skippers as well as to Mr. Byers about the conduct of Mr. McDonald.

Mr. Paul Leroux, a Human Rights investigator, testified that he interviewed Mr. Donald Byers, the owner of Sea-West Holdings Ltd., who acknowledged that he received complaints from Mr. Romman as to the conduct of Mr. McDonald. (see transcript p. 58, p. 59). Mr. Byers also admitted that he knew Mr. Romman had complained to other skippers. (see transcript p. 60)

Mr. Leroux also interviewed Mr. McDonald who admitted that he had grabbed Mr. Romman (transcript p.64), but indicated that was nothing sexual going on but this was simply part of growing up.

Mr. Leroux also interviewed another skipper who indicated to him that Mr. Romman had complained to him about Mr. McDonald's behaviour and who on the night of September 9th, was with Mr. Romman when he made his second phone call to Mr. Byers complaining about Mr. McDonald's conduct. (see transcript p. 66, p. 67)

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As a result of the September 9th phone call, both Mr. Romman and the other skipper testified that Mr. Byers indicated to Mr. Romman that he would not be sailing again and they took this to mean that Mr. Romman was fired. Employment records indicated that Mr. Romman never sailed again for Sea-West Holdings Ltd. after September 9th. (see transcript p. 69) Shortly after the September 9th telephone conversation with Mr. Byers, Mr. Romman made contact with the Western Regional office of the Canadian Human Rights Commission. (transcript p. 84, 85)

DECISION
Sexual harassment is prohibited by human rights legislation.

Robichaud et al v. Brennan et al (1982) 3 C.H.R.R. tribunal found on the facts that in that particular case there had been no sex discrimination. That conclusion was reversed by a review tribunal. The decision of the review tribunal (unreported) did not deal with the merits of the issue, merely saying that the complainant had "established a prima facie case of sexual harassment" taking it as a "given" that such behaviour was prohibited by the Act. This case adopted the statement in Bell and Korczak v. Ladas and The Flaming Steer Steak House Tavern Inc. (1980) 1 C.H.R.R. 155. The Board was interpreting section 4 of the Ontario Act which at that time stated:

"4(1) No person shall ...
(g) discriminate against any employee with regard to any term or condition of employment because of ...sex...of such...employee."

In holding that sexual harassment fell within the prohibition of
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- 4 discrimination
because of sex, the Board stated the following:
"Subject to the exception provided in Section 4(6), discrimination based on sex is prohibited by the Code. Thus, the paying of a female person less than a male person for the same job is prohibited, or dismissing an employee on the basis of sex is also prohibited. But what about sexual harassment? Clearly a person who is disadvantaged because of her sex is being discriminated against in her employment when employer conduct denies her financial rewards because of her sex, or exacts some form of sexual compliance to improve or maintain her existing benefits. 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-place, and all of its benefits, free from extraneous pressures having to do with the mere fact that she is a woman. Where a woman's equal access is denied or when terms and conditions differ when compared to male employees, the woman is being discriminated against. The forms of prohibited conduct that, in my view, are discriminatory run the gamut from overt gender based activity, such as coerced intercourse to unsolicited physical contact to persistent propositions to more subtle conduct 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 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 effect where adverse and gender directed conduct emanating from a management hierarchy may reasonably be construed to be a condition of employment.

The prohibition of such conduct is not without its dangers. One must be cautious that the law not inhibit normal social 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 to dinner is not an

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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 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 preferred by a member of management, then the overture becomes a condition of employment and may be considered to be discriminatory.

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Again, the Code ought not to be seen or perceived as inhibiting free speech. If sex cannot be discussed between supervisor and employee neither can other values such as race, colour or creed, which are contained in the Code, be discussed. Thus, differences of opinion by an employee where sexual matters are discussed may not involve a violation of the Code; it is only when the language or words may be reasonably construed to form a condition of employment the Code provides a remedy. Thus, the frequent and persistent taunting by a supervisor of an employee because of his or her colour is discriminatory activity under the Code and similarly, the frequent and persistent taunting of an employee by a supervisor, because of his or her sex is discriminatory activity under the Code."

The statements in the Bell case (supra) have been adopted by various provincial jurisdictions and, as stated previously, under federal legislation in the Robichaud case. The Robichaud case (supra) did a review of the cases and summed up the elements that were necessary to justify a complaint of sexual harassment under section 7(b) of the Act. (The review tribunal, while overturning the initial decision, did not take exception to this analysis.)

"In my opinion, formed largely by a perusal of the cases cited earlier in this Decision, the pertinent distinctive characteristics of the sexual encounters which must be considered to be prohibited by Section 7(b) of the Act are, first, that they be unsolicited by the complainant, and unwelcome to the complainant and expressly or implicitly known to be unwelcome by the respondent. (These are the factors which remove the situation from the normal social interchange, flirtation or even intimate sexual conduct which Parliament cannot have intended to have denied to supervisors and the people they supervise in the workplace.) Secondly, the conduct complained of must be persisted in in the face of protests by the subject of the sexual advances, or in the alternative, though the conduct was not persistent, the rejection of the conduct had adverse employment consequences. Thirdly, if the complainant cooperates with the alleged harassment, sexual harassment can still be found if such compliance is shown to have been secured by employment-related threats or, perhaps, promises.

In the Robichaud case, Professor Abbott found on the facts
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of the case that sexual harassment had not occurred. The Review

Tribunal did not dispute his anlysis, but reached a different conclusion on the facts. They went further, to find that the individual respondent had engaged in sexual harassment by reason of his creation of a 'poisoned' work environment."

Therefore, the cases have recognized two different kinds of harassment. The first kind is quid pro quo, in which an individual is invited or coerced into trading sexual favours for job security, benefits, promotions and things of that nature. That is clearly adverse differentiation in the course of employment or differential treatment, because other workers of the opposite sex are not given that same treatment.

The second type of harassment is what is called "poisoned environment" harassment and while submission to sexual conduct is not necessarily made or explicitly made a term of employment, nevertheless the individual is given a work environment which is intimidating, hostile and offensive. The poisoned work environment theory was first enunciated in the American case Bundy v. Jackson 641 F. (2d) 934 (U.S. Court of Appeals). There the Court extended the "discriminatory environment" race cases to sex by holding that subjecting a woman to sexual stereotyping, insults, and demeaning propositions "illegally poisoned" her working environment. This reasoning has been followed in relation to racial slur cases such as Dhillon v. F.W. Woolworth Ltd. (1982) 3 C.H.R.R. 743 and in sexual harassment cases such as Robichaud (supra) and Kotyk and Allary v. Canadian Employment and Immigration Commission. It should never be part of a person's employment environment, or part of their employment situation, to have to submit to the touching of the genitals. That must be seen as unacceptable. Nobody should have to put up with that as

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- 7 part
of having a job. It is clear from the evidence that Mr. Romman in no way welcomed these advances or promoted them. He reported them to the owner of the tug and made it clear that these advances were unwelcome and worrisome. In my opinion, there is a duty upon the owner being so informed to put an immediate stop to such practises. His failure to do so would render him liable for damages under the human rights legislation. In Bundy v. Jackson 641 F. (2b) 934 (1981, U.S. Court of Appeals) which has been relied upon by many Canadian tribunals, it was stated at page 943

"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).

Clearly, the harassment of a deckhand by the captain falls within this category.

Having thus decided that sexual harassment is contrary to federal legislation, I find that the acts of Mr. McDonald constituted sexual harassment.

As for damages, it was asked that damages be awarded for hurt feelings and suffering in respect of self-respect. In the case of Phalin v. The Solicitor General, a Canadian Human Rights Tribunal, a complainant suffered from a defect in vision and had applied for a job as a live in unit

officer in a correctional institution and had in fact moved his family to a new location when he failed a physical and was denied the employment. The tribunal found that the medical standard applied had been unreasonable and

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Mr. Phalin was qualified for the job. He hadn't been subjected to any of the touching or direct humiliation that we have here, but he had to move

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- 8 again
and he had a family with children. He was awarded $2,500. In Kotyk and Allary (supra), Jane Kotyk, who was subjected and coerced to sexual intercourse on one occasion and some months of attempt to coerce sexual activity, was awarded a total of $5,000. In McPherson, Ambro and Morton v. Mary's Doughnuts (1982) 3 C.H.R.R. 961, there is a list of considerations in relation to damages. One is the nature of the harassment, that is, was it simply verbal or was it physical; two, the degree of aggressiveness and physical contact in the harassment; three, the ongoing nature, that is, the time period of the harassment; four, the frequency of the harassment; five, the age of the victim; six, the vulnerability of the victim; and the psychological impact of the harassment.

In that case Ambro received $2,500 in relation to actions which involved some touching, grabbing and hugging. In that case she was particularly vulnerable because she was released from a detention centre and if she had lost her job she would have had to go back to jail.

Taking into consideration the above factors, I would award $2,000 for hurt feelings and suffering in respect of self-respect.

In addition, I was asked to award damages in relation to work time lost in the month of August which it is alleged was as a result of Mr. Romman's first call in July to Mr. Byers. This is based on the fact that Mr. McDonald with whom Mr. Romman had previously been paired, worked 13 days in August and Mr. Romman did not work any days in August. In my opinion, there is a causal connection between Mr. Romman's phone call and the fact that he

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- 9 did
not work in August. Mr. Byers indicated that the tug was not working due to some repairs being made on it. Mr. McDonald in fact worked 13 days in August and the likelihood is that Mr. Romman, who had previously always worked on the same shift as Mr. McDonald, would have done so. Mr. Romman's daily pay at that time was $135.40. Therefore, I would award the amount of $1,760.20, which is 13 x $135.40.

In addition, I was asked to award damages for lost wages in that Mr. Romman had an eight week waiting period before his unemployment insurance benefits began. There was some evidence that his termination papers had not been forwarded by a secretary in the office of Sea-West Holdings Ltd. However, I am not satisfied that the evidentiary basis has been established in order to award these damages.

Therefore I would award a total of $3,760.20 against Sea-West Holdings Ltd. which should be paid to Mr. Romman forthwith.

DATED this 15 day of May, 1984 at Edmonton, Alberta.

Frank D. Jones
TRIBUNAL

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