

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

HUMAN RIGHTS TRIBUNAL

BETWEEN:

HEATHER PATTERSON FEATHERSTONE

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

CANADA EMPLOYMENT AND IMMIGRATION COMMISSION

Respondent

- and -

LORNE LONEY

Respondent

DECISION

TRIBUNAL: Keith C. Norton, Chairman
Kathleen Jordan, Member
Hugh Fraser, Member

APPEARANCES: Odette Lalumière, Counsel for
Canadian Human Rights Commission

Robert Venier, Counsel for
Canada Employment and Immigration Commission

DATES AND PLACE March 1 and 2, 1993
OF THE HEARING: Belleville, Ontario

The Complaints

Two identical complaints dated November 2, 1988 were made by the Complainant, Heather Patterson (now Heather Patterson Featherstone) with the Canadian Human Rights Commission.

The Respondents named in the Complaints are the Canada Employment and Immigration Commission and Lorne Loney.

The complaints were filed before the Tribunal as part of Exhibit HRC-1, Tab 1 and 2. They make the following allegation:

The Respondents ... "discriminated against me in employment by treating me differently, harassing me and forcing me to resign on the basis of my sex (female) in contravention of sections 7 and 13.1 of the Canadian Human Rights Act."

The complaint was supported by some eighteen statements, including fifteen specific incidents between mid-October, 1986 and May 6, 1988 allegedly constituting sexual harassment.

The Evidence

The Complainant, prior to June, 1986, was employed by the Department of National Defence at CFB Trenton. She had received her lay-off notice and was placed in surplus with priority status.

On June 10, 1986, she was contacted by the Respondent Lorne Loney, Supervisor, Property and Security in the Regional Sub-Headquarters of Canada Employment and Immigration Commission (C.E.I.C.) in Belleville, to arrange an interview regarding employment in his office. Following the interview in mid-June, she commenced working as a Property and Security Administration Support Clerk (CR-3) on June 23, 1986 reporting to the Respondent Loney.

There was one other person working in the same office area, a Mr. Bill Cretney, who also reported to Mr. Loney.

Although the formal complaint refers to incidents from mid-October, 1986 onward, the Complainant stated in her oral testimony that

the first incident occurred on her first day at work when Loney shouted at her for eating her lunch at her desk.

Subsequently, she stated, there were many incidents when Loney would compare her unfavourably with Ken Quinn, the person she had replaced and on at least one occasion said he resented her in the position.

All witnesses agreed that Lorne Loney spoke loudly and the Complainant stated that he often shouted and used inappropriate and foul language calling her "useless bitch", "stupid bastard", and "stupid bitch", when relatively minor mistakes or misunderstandings occurred in the office.

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The incidents, as they occurred, were recorded in notes made by Ms. Featherstone both on sheets of paper and in a diary. She used these notes, she stated, to subsequently compile a detailed 15 page letter to the Canadian Human Rights Commission on December 8, 1987, Statement of Particulars for the Public Service Commission Investigation Directorate, April 6, 1988, and the formal complaint on November 2, 1988. The notes and diary she then destroyed. The significance of this will become more apparent later in this decision.

The Complainant testified that on February 9, 1987, she met with the person to whom Loney reported, William Girdlestone, Manager, Administrative and Financial Services to complain about Loney. There is some confusion about the date and what was actually said at this meeting.

Clearly a meeting did take place. However, in the complaint and in oral testimony the Complainant stated it was on February 9, 1987. In the letter to the CHRC dated December 8, 1987 in paragraph 4 on page 2, (Exhibit CEIC-1, Tab 7) it appears that the meeting took place upon her return from vacation on January 5, 1987. Mr. Girdlestone's recollection was that it occurred in January but he was uncertain of the specific date.

Girdlestone testified that his recollection was that Ms. Featherstone had complained of Loney's management style and the fact that he didn't ask her to do things but told her to. Girdlestone said this was consistent with Loney's military style and experience.

In any event, Girdlestone met with Loney privately the next day and then two days later met with Loney and Ms. Featherstone together to air the differences and urge Loney to alter his management style. He believed the matter was resolved and heard nothing more about it for 10 months.

After this meeting, according to the evidence of the Complainant, Loney's style improved "on and off". However, she continued to document incidents of shouting and use of offensive language.

In the formal complaint document, the Complainant makes three particularly significant allegations suggestive of a tone, manner and context characteristic of sexual harassment. These are recorded as points 11, 12 and 16 on page 3 of the document. She also mentioned these incidents in oral testimony while referring to the documents.

The document states that Loney made the following statements on these dates:

On October 27, 1987, he allegedly said to Ms. Featherstone "Don't walk away from me you two bit whore".

On November 23, 1987, he allegedly commented that Ms. Featherstone had nice breasts, that his wife was flat chested and that a man likes a handful.

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On May 4, 1988, she quotes him as saying "You've caused me a lot of trouble whore".

Ms. Featherstone testified that from the time of the meeting on January 5, 1987, or February 9, 1987 and the follow-up of that meeting she did not complain or raise the matter with management because she "had no faith in management".

However, on November 24, 1987 she requested an Internal Lateral Transfer "due to consistent, degrading harassment..."(Exhibit CEIC-1, Tab 1).

The evidence is that Mr. Girdlestone immediately offered her temporary employment in the Retrieval Unit as an OE MEO 3 and this was accepted. He also offered her the position on a permanent basis which was declined because of a salary differential of \$131.00 per year.

A further permanent job offer was declined because it required shift work.

On December 1, 1987, Mr. Girdlestone wrote to Ms. Featherstone, bringing to her attention the CEIC policy on complaints of work-related personal harassment and the internal redress system (Exhibit CEIC-1, Tab

3). Subsequently, on December 3, 1987, he met with Ms. Featherstone to discuss the allegations. The meeting degenerated into a confrontation and was terminated as recorded in a memorandum of that date by Mr. Girdlestone (Exhibit CEIC-1, Tab 4.). In that meeting, Ms. Featherstone refused to answer any questions or give any information about the alleged incidents unless the request was in writing.

Further on December 3, 1987, Mr. Girdlestone requested in writing that Ms. Featherstone provide more specific information so that he could conduct an internal investigation (Exhibit CEIC-1, Tab 5).

Ms. Featherstone responded by memorandum dated December 8, 1987 that she would not be providing any further information and that she was pursuing an alternative course. (Exhibit CEIC-1, Tab 6.)

The Complainant, in her oral testimony, stated that she had a weak left side and that in her temporary position in the Retrieval Unit there was a large heavy wheel containing tapes which she was required to use and which was at her left side. Consequently, her back and hip were sore and she left work on December 7, 1987 and did not return until April 20, 1988.

On December 8, 1987, she wrote the detailed, 15 page letter to the CHRC outlining her allegations (Exhibit CEIC-1, Tab 7).

On February 15, 1988, Ms. Featherstone filed a formal Request for Investigation with the Public Service Commission Investigations Directorate, Ontario Region (Exhibit CEIC-1, Tab 8) and subsequently, on April 6, 1988 she provided a Statement of Particulars (Exhibit CEIC-1, Tab 10).

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During her absence from work, the Complainant was advised by Mr. Girdlestone that her temporary position was being filled and that she would be expected to go back to her permanent position (Exhibit CEIC-1, Tab 9). She expressed that she could not go back to work with Mr. Loney.

Consequently, upon her return to work on April 20, 1988, she was offered a choice of two other positions and chose a position in the Material Management Section where her supervisor was Mr. Ike MacDonald.

She testified that some further incidents involving Loney occurred after that date mainly involving his standing and watching or following her.

Mr. Girdlestone received a letter dated April 15, 1988 (Exhibit CEIC-1, Tab 11) from Appeals and Investigations Branch advising him that Ms. Featherstone made a complaint alleging personal harassment by her supervisor and requesting that he respond to the Statement of Particulars (Exhibit CEIC-1, Tab 10) and include any relevant supportive documentation on disputed points.

He requested a response from Loney and received a signed memorandum dated May 9, 1988 (Exhibit CEIC-1, Tab 15) responding to each allegation. Loney denied each allegation in turn.

It is worthy of note that in this Statement of Particulars there is no reference to the incident in which Loney allegedly commented on her breasts nor is the word "whore" mentioned nor any overt reference to sexual harassment. There are, however, several references to the use of offensive language.

On May 6, 1988, the Complainant left work during the day. She testified that she left on her doctor's advice although she did not mention it to her supervisor.

Earlier in her testimony she stated she was upset that she did not have a permanent position and did not have a desk so had to work at a table.

When her supervisor contacted her by telephone the next day, she advised him she was resigning and by letter dated May 6, 1988 she stated she was resigning but gave no reason at that time. (Exhibit CEIC-1, Tab 16.)

A medical certificate dated May 13, 1988 was entered as an exhibit, indicating a diagnosis of acute reactive depression related to her working conditions. (Exhibit CEIC-1, Tab 16.)

After the exhaustion of Unemployment Insurance Benefits, Ms. Featherstone appealed by way of letter dated July 28, 1988, to have her resignation rescinded (Exhibit CEIC-1, Tab 17). This request was denied by letter from the Director of Personnel, Ontario dated November 7, 1988 (Exhibit CEIC-1, Tab 19).

As noted earlier, the Complainant had made a formal complaint with CHRC on November 2, 1988.

The Respondent Loney did not appear in person nor was he represented by Counsel nor did he respond to a subpoena served upon him by CEIC to appear as a witness. After receiving in evidence as exhibits T-1 to T-10 proof of service of all appropriate documents including notice of the hearing and following a fifteen minute recess to allow for late arrival, the Tribunal concluded that he chose not to appear and, thus, the inquiry proceeded.

Two female employees of CEIC who worked in the Belleville office but on a different floor from Loney and Ms. Featherstone were called as witnesses. They were Judith Carmichael and Julia Mundle.

They testified that they knew the parties. In particular, Ms. Carmichael stated that she had not heard Loney use such language, that he had never intimidated her and that she believed he treated everyone the same.

Julia Mundle testified that Lorne Loney didn't make those kind of comments. Ms. Mundle was specifically mentioned on page 13 of Ms. Featherstone's letter of December 8, 1987 to CHRC as one who had spoken "of Lorne's behaviour and uncalled for verbal attacks".

Ms. Mundle's sworn testimony would appear to contradict Ms. Featherstone's recollection.

DECISION:

FINDING OF FACT:

The Complaint Forms (Exhibits HRC-1, Tabs 1 and 2 set out the particulars of the complaint as follows:

Canada Employment and Immigration Commission/Lorne Loney (have) discriminated against me in employment by treating me differently, harassing me and forcing me to resign on the basis of my sex (female) in contravention of sections 7 and 13.1 of the Canadian Human Rights Act.

It was clear at the inquiry that in fact it ought to have cited s. 14 of the act instead of s. 13.1 and the hearing proceeded on that basis.

The Tribunal shall examine these allegations in reverse order.

Was the Complainant forced to resign as a result of differential treatment or harassment based on sex?

When the Complainant requested an internal Lateral Transfer on November 24, 1987, the evidence indicates that she was transferred almost immediately on a temporary basis to the Retrieval Unit under a different manager .

The same day, she was offered that position or one other on a permanent basis and refused one because of an annual salary differential of \$131.00 and the other because it involved shift work.

Following her departure from work on December 7, 1987, her temporary position was filled.

Upon her return to work on April 20, 1988, when she said she could not go back to her permanent position with Mr. Loney, she was again offered a choice of two positions and accepted one until her resignation on May 6, 1988.

Based upon the evidence presented, the Tribunal finds that rather than forcing the Complainant to resign, the employer made every reasonable effort to provide alternative employment when she requested it.

Was the Complainant treated differently or harassed and thus discriminated against on the basis of sex?

Of all the specific allegations of harassment and abuse, three stand out as more flagrant than the others and clearly have sexual overtones. These three are points 11, 12 and 16 on page three of the Complaint Forms (Exhibit HRC-1, Tabs 1 and 2).

They state the following:

11. On October 27, 1987, I was leaving a room and Lorne Loney was entering. He was looking for me and he was in an angry mood. As I was leaving he said "don't walk away from me you two bit whore".

12. On November 23, 1987, Lorne Loney commented that I had nice breasts. He also commented his wife was flat chested and a man likes a handful. I told Lorne Loney that he was out of line and that he should never mention my anatomy again.

16. On May 4, 1988, as Lorne Loney walked past me he said "You've caused me a lot of trouble whore".

On November 24, 1987, Ms. Featherstone requested a transfer and neither in speaking to Mr. Girdlestone nor in the written request where she alleges harassment does she mention either of the incidents alleged to have preceded that date.

On December 3, 1987, in a confrontational meeting with Mr. Girdlestone, these incidents are again apparently not mentioned.

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On December 8, 1987, in the 15 page detailed letter to the CHRC, which she testified was composed from the notes and diary she had kept, the same notes and diary relied upon for composing the Complaint almost a year later in November of 1988, she describes events on October 27, 1987 and on November 23, 1987. In neither case, is there any mention of the incidents ultimately set-out in points 11 and 12 of the Complaint Forms as occurring on those dates.

In the Statement of Particulars signed by the Complainant on April 8, 1988 and submitted to the Public Service Commission Investigations Directorate (Exhibit CEIC-1, Tab 10) there is no reference to either of the above allegations.

It is troubling for the Tribunal that with the opportunities the Complainant had to report these serious allegations, orally or in writing, when in fact she was making other allegations both orally and in writing soon after and even reporting things to have occurred on the same dates, relying on her notes and diary, she should not make mention of these serious incidents until they appear a year later in the Complaint Form.

It is also problematic that the notes and diary were destroyed by her after the complaint was formally made, thus destroying potentially valuable evidence.

The Tribunal finds that the fact that there is no corroboration of these allegations in points 11, 12 and 16 and no evidence of their having been mentioned orally or in writing at or near the time, seriously, perhaps fatally weakens their evidentiary value.

Is there sufficient evidence to establish on the balance of probabilities, that the other incidents which were alleged to have occurred did in fact occur and did they constitute sexual harassment?

As with the allegations in points 11, 12 and 16 above, the remaining specific allegations stand alone with no corroborating evidence.

The evidence indicates that one other male employee, Bill Cretney, worked in the same immediate area but was away from his desk for protracted periods. Ms. Featherstone also testified that Cretney had a strained relationship with Loney and they seldom spoke.

Furthermore, the evidence is the office was an open-concept design with portable separations.

In oral testimony, the Complainant stated that an unnamed woman nearby heard Loney's abusive language on one occasion when speaking to Ms. Featherstone and asked her how she could tolerate it. Otherwise she did not know whether anyone overheard on other occasions.

In the December 8, 1987 letter to CHRC (Exhibit CEIC-1, Tab 7) at page 2, Ms. Featherstone reports:

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Laurie McMillan-Burt would say she often could overhear Lorne speaking to me in a mean fashion, or hollering at me for whatever reason, and she asked me how I could stand it ... I recall her saying that she would have told him to go to hell a long time ago. That no way would he ever speak to her like that.

On page 3 of the same letter, she reports another incident of swearing by Loney overheard by the same person and an incident of his shouting at another female employee, Cec Bolyea.

In the balance of the letter she mentions by name at least twelve employees who either observed incidents or made statements to her critical of Lorne Loney's behavior.

It is troubling that the only persons mentioned in the letter who were called as witnesses, were called by the Respondent CEIC. They were Mr. Girdlestone and Ms. Julie Mundle.

In each case, these witnesses gave testimony under oath that was contradictory to the viewpoint attributed to them in the letter by Ms. Featherstone.

With respect to Ms. Mundle the letter states on p. 13:

Julie Mundle and Brenda Reed (warrant dispatch unit) have also spoken different times of Lorne's behavior and uncalled for verbal attacks.

In sworn testimony, Julie Mundle stated when some of the alleged abusive language was read to her:

"No that would not be Lorne".

She further stated she had never noticed Loney treat women differently from men and that she had never been in contact with Ms. Featherstone and Mr. Loney at the same time.

She also said she could not recall even commenting to Ms. Featherstone about Loney's behavior or having heard other employees comment about his behavior in the workplace. (See Transcript pp. 167, 168, 169.)

Further under cross-examination by Ms Featherstone regarding the allegation that Loney commented on her breasts, Ms. Mundle replies on p. 169 of the Transcript:

Well I just, in knowing Mr. Loney, to me it would be out of character, he was not that type of man, he was to me a gentleman.

Ms. Featherstone, in the December 8, 1987 letter at page 13 states:

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Even Bill Girdlestone, Loney's boss, has twice mentioned to me that he would puke if he had to look at and put up with Lorne Loney every day.

In sworn testimony, Mr. Girdlestone stated at page 110 of the transcript:

Mr. Loney was an excellent individual, he always worked at a very high level for me, he had a very difficult job in terms of the technical responses and that kind of thing, but he just managed to get the job done. ... he was an excellent employee. I had no problems with Lorne at all.

Perhaps the most negative remarks Mr. Girdlestone had about Lorne Loney were that he spoke loudly and was "crusty".

These contradictions between what Ms. Featherstone attributed to these witnesses in her letter of complaint and what they said under oath raise some real questions of credibility.

Given that none of the other people mentioned by Ms. Featherstone, some nine or ten in all, who might have supported her statements about Lorne Loney, were called as witnesses and that the only two of those she mentioned who were called contradicted her or disagreed with her recollection of what they said, it is very difficult to find the bare allegations themselves sufficient to substantiate the complaint.

When one combines that with the failure to mention for almost a year, orally or in writing, the two most serious allegations even when there was ample opportunity to do so, the Tribunal has very little to go on.

Given the evidence, the Tribunal is satisfied that the work environment was very stressful for Ms. Featherstone and might well have contributed to her depression as diagnosed by her doctor. Furthermore, the evidence suggests that Lorne Loney was loud, authoritarian and demanding and his strong will when confronting Ms. Featherstone's strong will quite likely contributed to the stress.

Even though these circumstances might have resulted in a very unpleasant working environment, they fall short of establishing that sexual harassment was at the root of the problem.

Based upon the strength of the evidence presented, this Tribunal finds that the complaints against the Canada Employment and Immigration Commission and Lorne Loney have not been substantiated and they are therefore dismissed.

DATED this 24th day of March, 1993.

Keith C. Norton, Chairman

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Kathleen Jordan, Member

Hugh Fraser, Member