T.D. 7/97
Decision rendered on August 27, 1997.

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

HUMAN RIGHTS TRIBUNAL

BETWEEN:

TAYLOR HEWSTAN

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

-and-

GILBERT AUCHINLECK

Respondent

DECISION OF TRIBUNAL

TRIBUNAL:

Peggy J. Blair, Chairperson
Magda Seydegart, Member
Nick Sibbeston, Member

APPEARANCES:

Eddie Taylor, Counsel for the Canadian Human Rights Commission
Tim Pettit, Counsel for the Respondent.

HEARING DATES:
February 11, 1997; April 7-11, April 28-30, 1997,
Vancouver, B.C.

MAJORITY DECISION OF TRIBUNAL

The complaint before this Tribunal involves an allegation by Taylor Hewstan, an employee of CHUM Ltd. (also known as CFUN Radio) at the relevant time. Ms. Hewstan alleges that a co-worker and co-host of the Morning Show, Gilbert Auchinleck, known more commonly by his radio name, "Doc Harris," sexually harassed her between April 12 and May 27, 1994 at the workplace and thereafter sabotaged her work as a result of her complaint. This harassment, it is alleged, involved inappropriate comments

and physical actions of a sexual nature which were both uncomfortable to Ms. Hewstan and unwelcome. Following her complaint to management at CFUN, Ms. Hewstan alleges that Mr. Auchinleck took steps to retaliate against her both directly and indirectly, by creating an atmosphere in which Ms. Hewstan was unable to fulfil her duties. Both Ms. Hewstan and Mr. Auchinleck were dismissed by CFUN Radio on August 30, 1994.

The Tribunal heard evidence from some 22 witnesses over eight days of hearings. Lengthy case materials have been provided both by Mr. Taylor, counsel for the Canadian Human Rights Commission and Mr. Pettit, counsel to Mr. Auchinleck. Ms. Hewstan chose to rely on the evidence and representations of the Canadian Human Rights Commission and neither called evidence nor presented argument on her own behalf.

Two of the witnesses, Jaylene Larose Hamilton, (hereafter referred to as Jaylene Larose) and Terri Theodore, former co-workers of Mr. Auchinleck, were presented as witnesses to provide similar fact evidence. Before assigning appropriate weight to the content of Ms. Theodore and Ms. Larose's evidence, it is perhaps useful to review the proper application and admissibility of similar fact evidence.

The use of similar fact evidence derives from the criminal law although the same principles apply to its use in civil cases. Past conduct similar to that at issue in proceedings may be admitted as evidence in proceedings provided its probative value exceeds its prejudicial value, R. v. Morin [1988] 2 SCR 345. Such evidence must be relevant to an issue in the case apart from its tendency to show propensity on the part of the accused, or it may not be received.

In two prior human rights hearings, Graesser v. Porto (1983) 4 CHRR D/1569 and Piazza v. Airport Taxi Cab and Mann (1986) 7 CHRR D/1396 , similar fact evidence was introduced and accepted as evidence on the basis that it

was probative of the issues before the hearings. Both hearings were presided over by the same chairperson.

In Porto, supra, Mr. Zemans indicated that the general approach to such evidence is to consider whether the similar fact evidence is relevant to the subject matter of the proceedings and if so, to what extent the evidence can be used. Mr. Zemans also noted that the benefit derived from admitting such evidence must be weighed against the prejudice to the person against whom it is admitted. Having correctly enunciated two of the principles to be considered in assessing the value of similar fact evidence, Mr. Zemans then stated his rationale for accepting similar fact evidence. At p. D/1572, he wrote:

> When dealing with matters involving sexual harassment, or I might add, other alleged violations of the Ontario Human Rights Code, one rarely encounters the situation where the offence or alleged offence takes

> place in the open and therefore can be proven through eye witness testimony. That is, rarely will one sexually harass another in public view. Rather, these events usually take place behind closed doors or with no witnesses present. Such being the case, if similar fact evidence were excluded, the trier of fact would be faced with having to decide an issue based solely on the evidence of the parties before him.
>
> ... In light of the difficulty associated with establishing sexual harassment and the relevance of her testimony, I consider the [similar fact] evidence of Sheila Lang to be admissible to rebut the defence of the respondent. In my opinion, the evidence is not prejudicial to Mr. Porto. (emphasis added)

It is our view that Mr. Zemans applied irrelevant considerations in determining the appropriate admission of similar fact evidence.

While a human rights tribunal is not strictly bound by the rules of evidence, a tribunal must ultimately determine the facts on the basis of the credibility of the parties and witnesses before it as to the allegation in front of it. It would be objectionable for a tribunal to uphold a complaint based on past conduct alone and similar fact evidence must never become a substitute for evidence supporting the allegations themselves. The fact that sexual harassment does not often take place in public, moreover, does not mean that similar fact evidence is required for a complaint to be proven on the balance of probabilities. The absence of similar fact evidence should not be fatal to a complaint, nor should the reception of

similar fact evidence, without more, be determinative of one.

Furthermore, we disagree entirely with the notion that the admission of similar fact evidence is not prejudicial to a respondent. Such evidence is necessarily prejudicial, in that it introduces into a hearing evidence of past conduct which is not a part of the allegations before the tribunal as corroborative evidence of those allegations. The issue is not the prejudicial nature of similar fact evidence -- that is a given -- but whether its probative value outweighs the prejudice which may be caused by its reception. Although the Supreme Court was addressing the issue of expert evidence in criminal proceedings, Justice Sopinka's comments in Morin, supra are entirely appropriate to consider in determining the issue of prejudice and probative value.

> The trial judge must determine whether it is relevant to issue in the case apart from its tendency to show propensity. If it is relevant to another issue ... it must then be determined whether its probative value on that other issue outweighs its prejudicial effect on the propensity question. In sum, if the evidence's sole relevance or primary relevance is to show disposition, then the evidence must be excluded.

In R. v. Pascoe, (1997) 32 OR (3d) 37, the Ontario Court of Appeal recently discussed the prejudice which may be occasioned by the use of such evidence in jury trials. Again, in comments directed to the use of such evidence in criminal trials, the court noted (at page 56) :

> The nature of the prejudice arising from the fact that the appellant would be revealed as a person of bad character was described by Sopinka, J. in R. v. D.(L.E.) [1989] 2 SCR 111 at pp 127-28, 50 CCC (3d) 142 at pp. 161-62. The first is that the jury may assume that the accused is a bad person who is likely to be guilty of the offence charged.... The second effect on the jury may be a tendency to punish the accused for past misconduct by finding the accused guilty of the offence charged. The third danger is that the jury will become confused as it concentrates on resolving whether the accused actually committed the earlier acts of misconduct. (emphasis added)

We suggest that similar considerations should apply to the weight to be placed on similar fact evidence in proceedings before us. If similar fact evidence is merely put forward to cast doubt upon the accused's character, or to imply or establish a propensity on the accused's part towards committing the acts in question, it is not admissible and should not be

relied upon, even in the more relaxed setting of a human rights tribunal. The proper test for the reception of such evidence is whether it is sufficiently similar of the facts alleged to be probative of the issues before the tribunal when balanced against the prejudice which may be caused by its admission. The factors to consider in reaching this determination are (a) whether the evidence put forward as similar fact indeed involves similar facts as those at issue in the proceedings, (b) whether the evidence addresses issues other than the Respondent's mere propensity to commit a particular act or acts and (c) whether the introduction of the evidence will serve to confuse the issues by requiring the Tribunal to resolve whether the earlier acts have in fact been committed.

Applying these principles to the matter before us, we find that the evidence presented through Terri Theodore cannot be characterized as similar fact evidence supporting Ms. Hewstan's allegations of misconduct. The facts relayed by Ms. Theodore are not similar to those alleged by Ms. Hewstan. Ms. Theodore described a relationship with Mr. Auchinleck which was consensual, and which amounted to, in her words, "almost dating." Mr. Auchinleck told her of his feelings which she did not share. When she made her feelings known to Mr. Auchinleck in no uncertain terms, he was somewhat "chilly" towards her for a week but maintained his on-air professionalism at all times. According to Ms. Theodore, Mr. Auchinleck did nothing to sabotage her work. There was therefore nothing in Ms. Theodore's evidence to suggest any sexual harassment by Mr. Auchinleck towards her. Furthermore, there is nothing inappropriate in a social relationship developing between co-workers, even where one occupies a

position akin to management. As stated in Bell v. the Flaming Steer Steak House, at p. D156:

> One must be cautious that the law not inhibit normal social contact between management and employees or normal discussion between management and employees. It is not abnormal, nor should it be prohibited activity for a supervisor to become socially involved with an employee. An invitation to dinner is not an invitation to a complaint.

Jaylene Larose's evidence appeared to be put forward to show a propensity on the part of Mr. Auchinleck to engage in the acts complained of by Ms. Hewstan. Ms. Larose suggested that Mr. Auchinleck's criticisms of her and the sabotage of her work both on-air and off arose following her rejection of her physical advances. While both B.R. Bradbury and Terri Theodore confirmed that Mr. Auchinleck was critical of Ms. Larose's work and at

times, reduced her to tears, both Ms. Theodore and Mr. Bradbury to a certain extent, could only repeat what Ms. Larose had told them. The preponderance of evidence suggests, however, that Ms. Larose had been unable to meet the exacting standards set by Mr. Auchinleck for the format of the Morning Show and that as the quality of the show began to suffer, Mr. Auchinleck became more vocally critical of his co-worker.

While Ms. Larose's allegations of inappropriate comments and behaviour on the part of Mr. Auchinleck may or may not be true, it is not the function of this Tribunal to rule on allegations which are not before us. To paraphrase Pascoe, supra, we ought not to confuse the issues by concentrating on whether Mr. Auchinleck actually committed the earlier acts of misconduct, but rather attempt to determine whether Ms. Larose's evidence is corroborative of Ms. Hewstan's complaint.

In this regard, while Ms. Hewstan had not spoken with Ms. Larose prior to launching her complaint, Ms. Hewstan had spoken with Terri Theodore, B.R. Bradbury and Murray Thompson and had questioned them to find out the details of Ms. Larose's dealings with Mr. Auchinleck. Ms. Hewstan's complaints, where similar to those of Ms. Larose, would carry much greater weight had these discussions not taken place. The possibility that Ms. Hewstan perceived events differently once she became aware of Ms. Larose's complaint is a factor we must weigh in determining the credibility of Ms. Hewstan's evidence. Similarly, we must take into account Ms. Hewstan's demeanour on the witness stand, and in particular, her evasiveness and refusal to answer questions during cross-examination. In this regard, the station's failure to properly record and investigate both Ms. Larose's and Ms. Hewstan's complaints about Mr. Auchinleck's conduct at the time made it difficult to assess the extent to which rumour and gossip at the station may also have influenced the recollection of events by witnesses testifying some three or four years later.

Details of CFUN's sexual harassment policy were not placed into evidence and it is not altogether clear that CFUN had such a policy in place at the time, although we have some evidence to suggest that no such policy was posted until after Ms. Hewstan's complaint. CFUN, in our view, should have at minimum required the complaints of both women to be reduced in writing, together with Mr. Auchinleck's response to those complaints, and further that the matter be kept confidential until an independent investigation had been completed. Because of the station's failure to do so, it is difficult, for example, to assess the specifics and timing of Ms. Larose's complaints. Furthermore, those who may have witnessed events which both Ms. Hewstan and Ms. Larose claim took place, such as Murray Thompson, B.R.

Bradbury and Gary Crane, should have been interviewed with their statements of what they had, or had not observed, reduced to writing at that time.

Because of the station's apparent indifference to the documentation of these complaints, and the rumour, gossip and innuendo which began to swirl about the station when news of Ms. Larose's impending law-suit reached the work-place in May of 1994, it is difficult to separate out what actually happened, from what people now recollect somewhat imperfectly.

There are certain facts, however, which are beyond dispute. Ms. Hewstan commenced employment at CFUN in April, 1994 as a traffic reporter. Mr. Auchinleck worked from a home studio, an arrangement he was required to maintain for tax reasons. Ms. Hewstan's eventual contract as co-host contained a term that she and Mr. Auchinleck would prepare material either at his home studio or at the radio station. Throughout April and May, 1994 Ms. Hewstan prepared comedy routines for production at Mr. Auchinleck's home studio. This arrangement appears to have been necessary in light of the parties' tacit agreement that during this period of time Ms. Larose would not be informed that her employment would soon be terminated and that the other employees at the station not be told that Ms. Hewstan would be her replacement.

During this time period, Mr. Auchinleck greeted Ms. Hewstan on her arrival with a hug and a kiss, and repeated this conduct on her departure. The perception each party held as to the nature of these hugs and kisses remains in some doubt. Ms. Hewstan testified essentially that she did not like them but admits that she did not convey her discomfort to Mr. Auchinleck, at least initially. According to Ms. Hewstan, her "template was emotionally neutral."

It was not until May 27, 1994, in fact, that Mr. Auchinleck had any way of knowing of Ms. Hewstan's discomfort with his conduct. On that day, Ms. Hewstan left a message on Doc Harris's home answering machine indicating that she did not wish to have any physical contact with him, and stating clearly her opinion that hugs and kisses were inappropriate between co-workers. Her notes state: "I called Doc after I arrived home from doing production at his house to tell him that I did not feel comfortable that he

would hug and kiss me not only in public but in private as well." According to Ms. Hewstan, Doc Harris called her several hours later on May 27th to ask her why hugs and kisses were inappropriate and she explained her position that such exchanges were inappropriate in a working relationship. The following day, at the Hyak Festival, according to her notes, Doc Harris

was friendly but reserved. Ms. Hewstan testified that he shook her hand and wished her Happy Birthday, May 28th being her birthday. It seems fairly evident, then, that upon bringing her discomfort to Mr. Auchinleck's attention, Mr. Auchinleck changed his conduct and discontinued the hugs and kisses which he now knew to be unwelcome.

Ms. Hewstan alleges that in the period prior to May 30th, however, there was more than merely hugging and kissing. Since the 28th and 29th of May were a weekend notably without incident, the events described by Ms. Hewstan had to have occurred, if at all, prior to May 27th.

Ms. Hewstan alleges that "Doc Harris" kissed her down the side of her neck on one occasion, and that on another occasion, he "jumped" on her while she was lying on a bed in the bedroom of his studio in which his computer was situated, while they were working, and kissed her five times. In weighing Ms. Hewstan's evidence, it is significant that there is no mention of these events in her notes. Ms. Hewstan's voice-mail message to Mr. Auchinleck on May 27, 1994 referred only to unwelcome hugs and kisses. On the other hand, Ms. Hewstan did record for each day in which they worked together throughout April and May 1994 the occasions on which Mr. Auchinleck had greeted her with a hug and kiss. Mr. Auchinleck admits having made a joking comment to her during this period of time while seated in the bedroom to the effect that "this was as close as he would ever get to being in bed with her." As such, while something may have happened between Mr. Auchinleck and Ms. Hewstan in the bedroom at some point during their working relationship, whatever it was, we are inclined to believe the incident was not as significant as Ms. Hewstan subsequently made it out to be.

It is apparent, however, that something must have happened to change Ms. Hewstan's view of Mr. Auchinleck's conduct since on May 30, 1994, Ms. Hewstan embarked on a series of inquiries and discussions with third parties concerning her discomfort with Mr. Auchinleck's behaviour. These complaints were repeated to a number of persons including Trish Hanna, Murray Armstrong, B.R. Bradbury, Brenda Lauck, Terri Theodore, Paul Ski and Neil Gallagher. Ms. Hewstan's notes of May 30, 1994 perhaps provide some insight into her sudden change in perspective: "I told Trisha that my suspicions had been aroused several days earlier when Doc had mentioned that Jaylene Larose his former co-host intended to file a sexual harassment suit against him." (emphasis added). Doc Harris himself questioned whether Ms. Hewstan's behaviour had changed because of something she had heard. Her notes of her discussion with him of the same date indicate:

> I repeated I was uncomfortable with any kind of physical contact and specifically mentioned his unwanted hugging and kissing. He accused me of not telling him sooner He said he thought Neil had told me something about him that had brought on this reaction. (emphasis added)."

We are inclined to think that Ms. Hewstan had not considered Doc Harris's fairly innocuous conduct towards her with much concern until she had learned of Jaylene Larose's complaints. Ms. Hewstan had apparently been the victim of a prior incident of sexual harassment in Alberta (according to the evidence of her care-giver, Dr. Posen) which had resulted in a complaint which had not been taken seriously. It would not be surprising for Ms. Hewstan, having learned of a prior allegation of sexual harassment involving her predecessor in her new job, to become apprehensive for her safety in circumstances where the majority of persons she spoke to informed her the station had done nothing to investigate Ms. Larose's complaint. She had agreed to work (as a term of contract) in the home of a man she now had reason to believe was a sexual harasser. Furthermore, as is evident from the tape of one comedy routine introduced by the Respondent as evidence, Mr. Auchinleck and Ms. Hewstan were engaged in work which involved a certain amount of sexual innuendo. That Ms. Hewstan may have revisited prior events and re-cast them as less innocent as they first seemed in light of her newly found information is perhaps not surprising, in those circumstances.

It seems clear that from the point that Ms. Hewstan learned of Jaylene Larose's experiences with Mr. Auchinleck, Ms. Hewstan considered even otherwise innocuous remarks from Mr. Auchinleck to be sexually charged, personal and inappropriate. Ms. Hewstan's heightened sensitivities are evident, for example, in her later complaints that she was uncomfortable with Mr. Auchinleck commenting on the shoes she was wearing.

Although Ms. Hewstan clearly believed that Mr. Auchinleck had set out to sabotage her work, perhaps because of the information she had received about Ms. Larose's earlier experiences, there was nothing in the evidence before us to confirm Ms. Hewstan's belief. There is no evidence of Ms. Hewstan being interfered with on-air. Murray Thompson, the sound engineer, saw and heard nothing to suggest any on-air sabotage. The evidence from virtually all the witnesses was that Doc Harris was the consummate professional on-air, even when he felt "humiliated" by Ms. Theodore's earlier rejection of his feelings. As a number of witnesses noted, an attempt to sabotage Ms. Hewstan would have harmed Mr. Auchinleck's own on-air product.

After June 14th, because of the tension between the co-hosts, the programming had taken on the form known as "back to basics." Ms. Hewstan states in her notes that Doc Harris was co-operative and courteous with her but angry and hostile in general after June 14th. It is likely that Mr. Auchinleck was upset and frustrated that his show, and his own status as Morning Show "star" had been reduced to a basics format. At this time, Mr. Auchinleck's own future tenure with the station had become uncertain because of poor ratings and the impending change to computerized equipment. There is nothing, however, even in Ms. Hewstan's evidence, to indicate

that any of this anger or hostility towards the station was directed towards her.
Ms. Hewstan has alleged that Mr. Auchinleck used crude language in her presence after May 30th. In this regard, we place considerable weight on the tape earlier referred to, which involved a spoof on phone-sex and engaged both parties in "libidinous" banter. It is apparent from the tape that a certain degree of "off-colour" content or crudeness was associated with the show Ms. Hewstan was working on. Although Ms. Hewstan had denied that this was so, once the tape was presented, Ms. Hewstan acknowledged that the particular idea for the skit had originated with her (while she was working in Mr. Auchinleck's home studio) and that she had no problem with the content of the tape, or with working on it. It is difficult for these reasons to accept that she was then offended by the off-colour language she has described, with one exception, namely comments about gay sex which Mr. Auchinleck admits making on one occasion. Neither party was able to provide any context to the remarks, which were certainly crude and offensive.

Professor Ratushny in Aragona v. Elegant Lamp Company Ltd. and Fillipitto (1982) 3 CHRR D/1109 at p. D/110 commented to the effect that:

Sexual references which are crude or in bad taste are not necessarily sufficient to constitute a contravention of section 4 of the Code on the basis of sex. The line of sexual harassment is crossed only where the conduct may be reasonably construed to create, as a condition of employment, a work environment which demands an unwarranted intrusion upon the employee's sexual dignity as a man or woman. The line will seldom be easy to draw.

In Piazza, supra, it was noted at page D/3198:

In Watt, supra, Dean McCamus held that offensive remarks made by the supervisor of a female employee of a road crew did not occur with sufficient frequency to create an abusive atmosphere contrary to the law. Dean McCamus found that "the incidents in question would have to have a degree of frequency and offensiveness which would meet the "condition of work" threshold of section 4 of the Code . [D/3198]

There is no evidence that the words in question were used on any other than the one occasion referred to. We are not satisfied that they form part of a pattern of sexual harassment as alleged by the complainant.

Having weighed the evidence carefully, we are not persuaded on the balance of probabilities that sexual harassment took place. For the reasons set out, we find that the complaint has not been established. As such, it is not necessary for us to determine whether medical expenses are recoverable as part of an award of general damages. However, we would not have awarded exemplary damages on the circumstances of this complaint even if exemplary damages were provided for by the statute, which they are not. It is apparent from an examination of the provincial statutes in which exemplary damages have been awarded that specific provision was made in each for the award of such damages. No such provision exists within the Canadian Human Rights Act.

We wish finally to note that we placed no weight on the so-called character evidence introduced by Mr. Auchinleck. The fact that Mr. Auchinleck has a number of friends who do not believe

him to be capable of sexual harassment means very little. We cannot help but think that activities of prostitution and pornography engage men whose families and friends have no idea such activities are taking place. Sexual harassment, as noted by Mr. Zemans earlier, takes place in private. Furthermore, admissible character evidence should be directed towards the general reputation of an accused or defendant within a community. Most of the evidence placed before us related to individual perceptions of Mr. Auchinleck and the personal opinions of those witnesses as to whether he was a "sexual harasser" or not. As such, and although we received the evidence, it was not particularly helpful.

The complaint against Mr. Auchinleck is dismissed.

Dated this 31st day of July, 1997.

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Peggy J. Blair, Chairperson

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Nick Sibbeston, Member