T.D. 8/95
Decision rendered on March 7, 1995

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

HUMAN RIGHTS REVIEW TRIBUNAL

BETWEEN:

BOBBI STADNYK

Complainant
(Appellant)

-and-

CANADIAN HUMAN RIGHTS COMMISSION

Commission

-and-

CANADA EMPLOYMENT AND IMMIGRATION COMMISSION

Respondent

DECISION OF THE REVIEW TRIBUNAL

TRIBUNAL: S. Jane Armstrong, Chairperson
Barry M. Gelling, Member
Subhas Ramcharan, Member

APPEARANCES: Alan McIntyre, Counsel for the Complainant (Appellant)
Myra Yuzak, Counsel for the Respondent

DATES AND LOCATION
OF HEARING: January 9, 1995
Regina, Saskatchewan

A Review Tribunal was appointed pursuant to Subsection 56.(1) of the Canadian Human Rights Act to inquire into the appeal of Bobbi Stadnyk dated

August 24th, 1993, against the Decision of the Tribunal rendered on July 27th, 1993, in the matter of the complaint of Bobbi Stadnyk against the Canada Employment and Immigration Commission.

The hearing was held on January 9th, 1995, in Regina.

At the hearing the respondent, Canada Employment and Immigration Commission, appeared by counsel and the appellant, Bobbi Stadnyk, appeared by counsel. The Canadian Human Rights Commission was not represented at the hearing.

The original Notice of Appeal filed by the appellant contained fourteen grounds upon which the appellant sought review of the decision of Raymond William Kirzinger rendered July 27th, 1993.

At the hearing of the Review Tribunal the appellant advised that only one issue would be placed before the Review Tribunal for consideration and that the remaining grounds for appeal were abandoned.

No applications were heard respecting the introduction of new evidence nor was any new evidence admitted by the Review Tribunal and the matter was argued based upon the transcripts of the original hearing and the authorities filed by the parties.

ISSUE BEFORE THE REVIEW TRIBUNAL

The sole issue which this Review Tribunal was asked to consider was "whether or not Ms. Stadnyk was sexually harassed when interviewed by Susan Hogarth on January 25th, 1989."

Accordingly, we were not asked to consider whether the appellant was denied an employment opportunity by reason of a prohibitive ground of discrimination nor to consider whether the appellant was subjected to adverse differential treatment.

SCOPE OF APPELLATE REVIEW

Section 56 of the Canadian Human Rights Act provides in Subsection (3) that:

An appeal lies to a Review Tribunal against a decision or order of a Tribunal on any question of law or fact or mixed law and fact.

Both counsel for the appellant and for the respondent conceded that although the grounds or right of appeal as outlined in Section 56(3) appear quite broad in their scope in fact the jurisdiction of a Review Tribunal has been considerably narrowed by the case law and this Review Tribunal was referred in particular to the case of Cashin v. CBC [1988] 3 F.C. 494 where the Federal Court adopted the standard proposed in Brennan v. R [1984] 2

F.C. 799 relying on the test set out in Stein, et al. v. The Ship "Kathy K" ([1976] 2 S.C.R. 802):

> It is no doubt true that in a situation of this kind where no evidence in addition to that before the Human Rights Tribunal was before the Review Tribunal the latter should, in accordance with the well-known principles adopted and applied in Stein et al. v. The Ship "Kathy K" ([1976] 2 S.C.R. 802; 62 D.L.R. (3d) 1), accord due respect for the view of the facts taken by the Human Rights Tribunal and, in particular, for the advantage of assessing credibility which he had in having seen and heard the witnesses. But, that said, it was still the duty of the Review Tribunal to examine the evidence and substitute its view of the facts if persuaded that there was palpable or manifest error in the view taken by the Human Rights Tribunal. (Cashin v. CBC [1988] 3 F.C. 494 at 500)

and at page 501:

> Parliament's intention, as I read it, appears in fact to be that the hearing should be treated as de novo only if the Review Tribunal receives additional evidence or testimony. Otherwise, it should be bound by the Kathy K principle.
>
> The findings of the adjudicator must therefore stand unless she committed some palpable and overriding error.

The test in "Kathy K" is enunciated on pages 806 and 807, of that decision:

> I think that under such circumstances the accepted approach of a court of appeal is to test the findings made at trial on the basis of whether or not they were clearly wrong rather than

whether they accorded with that court's view of the balance of probability.

In reaching this view the court in "Kathy K" considered the decision of S.S. Honestroom (Owners) v. S.S. Sagaporack (Owners) [1927] A.C. 37 at pages 47-48 and in particular the following:

> We must, in order to reverse, not merely entertain doubts whether the decision below is right, but be convinced that it is wrong.
>
> The Court will not depart from the rule it has laid down that it will not overrule the decision of the Court below on a question of fact in which the judge has had the advantage of seeing the witnesses and observing their demeanour, unless they find some governing fact which in relation to others has created a wrong impression.

In acknowledging then the limited jurisdiction of the Review Tribunal both counsel confirmed that it was not the role of this Review Tribunal to question the findings of fact made by the Tribunal at first instance but instead to accept the findings of fact made by Mr. Kirzinger and to determine based on his findings whether any manifest error was made in the inferences and conclusions drawn from such findings of fact.

In drawing inferences and examining conclusions made by the Tribunal at first instance we are mindful of the decision of Anderson v. Anderson [1994] 4 W.W.R. 272 Manitoba Court of Appeal:

> It is not enough for an appeal court to say that it would prefer to draw a different inference. The Court must be able to identify some tangible error in the trial judge's approach. The less the credibility of witnesses enters into the equation, the freer the appeal court will be to intervene. But even in the most clinically clean case, all things being equal, the trial judge's conclusion is entitled to respect.

and of the decision of the Federal Court of Appeal in Canada v. Mongrain [1992] 1 F.C. 472 at 482:

> It is correct to state that the powers of a Review Tribunal established under the Canadian Human Rights Act are analogous to those of a court of appeal in the ordinary judicial hierarchy. Accordingly, the Attorney General is correct in stating that the

Review Tribunal could only intervene if there were an error of law or manifest error in assessing the facts.

CONSIDERATION OF FINDINGS OF THE TRIBUNAL

In his decision of July 27th, 1993, Mr. Kirzinger provides an exhaustive review of the complainant's background and the events leading up to the interview which took place on January 25th, 1989. For the purposes of our discussion here the following points should be highlighted. We do, however, adopt all of the findings of fact of Mr. Kirzinger in arriving at our decision, in accordance with the submissions of both the appellant and the respondent.

Ms. Stadnyk had commenced employment with the Federal Government in 1981. During the course of such employment she was subjected to harassment and subsequently wrongfully dismissed. As a result of complaints filed by her with the Canadian Human Rights Commission, Public Service Commission and Public Service Alliance of Canada she was eventually reinstated and returned to her former place of employment.

The work situation was still intolerable for her and as a result the services of the Public Service Commission were sought to assist in placing Ms. Stadnyk elsewhere in the Federal Government.

In the course of its inquiries the Public Service Commission (PSC) learned that the local Regina Canada Employment and Immigration Commission (CEIC) office was seeking staffing approval for two information officer (IS-2) positions. PSC requested that Ms. Susan Hogarth, the Regional Manager of Public Affairs of CEIC meet with Ms. Stadnyk to consider, among other things, her suitability for one of these positions.

The duties of an IS-2 officer included planning and producing information and promotional materials, advising CEIC employees of public information policies and programs and communicating with other governmental departments (at all levels of government), the media and public at large.

It must also be noted that as a result of the difficult and traumatic experience that Ms. Stadnyk had initially encountered in her employment with the Federal Government, the appellant had had extensive contact with the media and had attained some notoriety speaking out in the media and in the public eye with respect to her sexual harassment experiences during the course of her employment with the Federal Government.

It was in this context as was found by the Tribunal Chairperson that the meeting or interview of January 25th, 1989, took place.

On January 17th, 1989, approximately one week prior to the meeting of Susan Hogarth and the appellant an article appeared in the Regina Leader Post. The article which was tendered as an exhibit in the original proceeding dealt with the appellant's experiences with sexual harassment and the Federal Government. The article had been written by a reporter named Anne Kyle who was responsible for covering labour issues for the Regina Leader Post.

The Tribunal at first instance accepted the version put forth by Susan Hogarth of her meeting with Ms. Stadnyk and the order of events as described by Ms. Hogarth. We do not question the credibility assessments made by the Tribunal Chairperson nor his preference of one version of events over the other.

In that the position of an information officer with the public affairs division of the CEIC is charged with acting as a spokesperson for the Federal Government and representing the position of the Federal Government to the public and to the media it was clear that in order for Ms. Stadnyk to be further considered for the position of an information officer her intentions insofar as media contact and her continued criticism of the Government to the media must be canvassed.

As Ms. Stadnyk acknowledges, the issue of conflict of interest with respect to the position of an IS-2 were discussed during the course of her meeting with Ms. Hogarth. Ms. Stadnyk appears not to have understood the difficulties of acting as an information officer and continuing in one's private life, after hours, to maintain a role with the media in criticizing the very employer she would during working hours be charged to represent. Accordingly, we find as did the Tribunal Chairperson, that it was necessary to determine what steps Ms. Stadnyk would take in future if faced with a sexual harassment experience.

As described by the Tribunal Chairperson two scenarios were put to Ms. Stadnyk by Ms. Hogarth relating to sexual harassment. One dealt with an employee occupying an inferior position while the other concerned an employee holding a more superior position to that of the alleged victim of harassment.

We accept the findings of the initial Tribunal that such scenarios were put to Ms. Stadnyk in order to ascertain what steps she would take if faced with sexual harassment in future. The purpose being to ascertain whether Ms. Stadnyk's reaction would be to first contact the media or whether instead, Ms. Stadnyk would follow the procedures outlined in the

sexual harassment policy of her employer in order to address the sexual harassment complaints.
In our view Ms. Stadnyk misinterpreted the questions posed to her and mistakenly concluded that she was being asked to condone a sexual harassment situation in her employment instead of what steps she would take in the event that she were faced with sexual harassment in future.

We have reviewed the consideration and analysis of the relevant case law put forward by the Tribunal Chairperson and concur that clearly intention to discriminate need not be proved but by the same token it is

necessary to develop a standard by which behaviour will be judged in ascertaining whether such behaviour constitutes discrimination.

Both the respondent and the appellant referred in argument to the decision of Ellison v. Brady (1991), 924 F. 2b 872 (9th C.L.R.) and agreed that the standard as espoused in such decision to assess evidence of harassment should be the reasonable woman standard.

Such standard was adopted by the initial Tribunal (pages 32 to 33) and we do not find any error in the application of such standard by the Tribunal Chairperson to the evidence and facts as found by him.

We therefore explicitly adopt the reasoning of the Tribunal Chairperson in concluding that the posing of the scenarios describing circumstances of sexual harassment did not constitute in and of themselves sexual harassment of the appellant.

The Tribunal Chairperson adopted the standard of the reasonable woman and in fact, went so far as to say that even from the standard of a reasonable woman who was the previous victim of sexual harassment, he did not find that the conduct of the interview was offensive.

We do not find any error in the conclusions drawn by the Tribunal Chairperson and therefore find that there is no palpable or overriding error in the findings of fact made by the Tribunal Chairperson nor any error in law in applying the principals of law to the findings made by him.

Having reviewed the decision of the initial Tribunal, the evidence and findings of fact made by the Tribunal Chairperson together with his consideration of the authorities and his discussions of the law, we cannot find any palpable and overriding error in the findings of fact made by the Tribunal Chairperson nor the inferences drawn from such findings nor can we

find any error in law as it was applied by the Tribunal Chairperson to his factual findings.

In short, we do not find that the Tribunal erred in finding that Ms. Stadnyk was not sexually harassed when interviewed by Susan Hogarth on January 25th, 1989.

In arriving at this conclusion, we have given consideration to the specific issues raised by the appellant and would comment on such issues as follows:

1. The appellant questions the conclusions drawn by the Tribunal Chairperson that Ms. Stadnyk fit the definition of the rare hyper-sensitive employee (Ellison v. Brady (1991), 924 F. 2b 872 (9th C.L.R.)). The appellant argues that there is no basis in the evidence nor in the decision of the Tribunal to support such a finding. We find that the Tribunal Chairperson does set out in his decision findings of fact which would support such a conclusion. The Tribunal Chairperson finds that the complainant had well publicized critical views regarding the Federal Government and in addition that as a

result of her previous experience with the Federal Government and her unemployed status at the time of the interview she was emotionally distraught and suffering from a number of stress related ailments.

The Tribunal Chairperson finds that such condition seems to have had a significant impact on the complainant's reaction to and recollection of the interview.

The Tribunal Chairperson further finds:

> Ms. Stadnyk was going through a difficult time in her life when the interview took place. She had not been working for sometime and appeared to have been emotionally distraught. Her accounting of the interview and evidence appears to be exemplary of her condition at the time. That is, she remembered only the specific things that offended her and they were portrayed in evidence (and probably interpreted by her at the time) as outrageous acts on her dignity and person. (Tribunal Decision at pages 34 to 35)

In addition, it would appear that Ms. Stadnyk's condition at the time significantly affected her perception of the interview and her interpretation of the questions and scenarios put to her.

2. The Appellant states that even based on Ms. Hogarth's testimony and version of the events taking place during the interview that the posing of the questions and scenarios relating to sexual harassment constituted sexual harassment.

For the reasons set out above we concur with the findings of the Tribunal Chairperson that Ms. Hogarth was justified in posing the questions to Ms. Stadnyk in order to ascertain whether Ms. Stadnyk would continue her relationship with the media while employed as an information officer and spokesperson for the Federal Government.

3. The Appellant submits that the conflict of interest issue is a red herring and that there was no justification for raising the issues of sexual harassment during the course of the interview.

The Tribunal at first instance canvasses in great detail the conflict of interest guidelines of the Federal Public Service together with the codes of professional standards of the CPRS and PSRA. (Certain journalism and public relations organizations)

The Tribunal Chairperson preferred the evidence of Nicholas Russell over that of Gerald Sperling with respect to the requirements of information officers and journalists in particular that the avoidance of conflict of interest and attainment of objectivity is an important and valid consideration.

As found by the Tribunal Chairperson even the appellant's witness, Professor Sperling acknowledges that it would be difficult for a person like the appellant to represent the government's position on

sexual harassment on the one hand and criticize it on her own behalf on the other hand even if the criticism occurred on the individual's own time. We concur with the Tribunal's findings that "... it is difficult to imagine even on a common-sense basis how an outspoken critic of the Government in the public eye could also be an effective, credible and reliable Information Officer." Accordingly, we agree with the finding of the initial Tribunal that the respondent in conducting its interview was operating on a valid concern one which would not offend a reasonable female.

We see no reason to stray from the Tribunal Chairperson's finding and acceptance of the evidence of Professor Nicholas Russell that for information officers and journalists ethics are an important consideration and the avoidance of conflicts of interest and attainment of objectivity are important and valid considerations.

4. The Appellant submits that no Federal job can ask you to condone sexual harassment. Ms. Stadnyk was not asked to condone sexual harassment but simply asked what she would do if faced with sexual harassment.

Evidence of the sexual harassment policies of the Federal Government were tendered at the hearing and at no time was it suggested that Ms. Stadnyk would not have recourse to such policies and procedures in the event that future sexual harassment experiences required redress.

5. The Appellant argues that the posing of the sexual harassment hypotheticals without context constituted sexual harassment.

We adopt the findings of the Tribunal in first instance as to the context in which such scenarios were posed and find that the posing of such scenarios in such context did not constitute sexual harassment.

It would appear that the scenarios were posed almost seventy percent through the interview. It would further appear that the appellant's own witness Professor Hayford acknowledges that questions relating to sexual harassment could be relevant in certain circumstances (if it was relevant to the job).

In this instance in that Ms. Stadnyk had been vocal on such issue and her media contact was derived from such issue questions relating to sexual harassment and procedures she would take if faced with sexual harassment were relevant and necessary and did not constitute sexual harassment.

6. Finally, the appellant questioned the posing of the sexual harassment scenarios to Ms. Stadnyk in that such scenarios were not posed to the successful candidates for the IS-1 and IS-2 positions.

Ms. Hogarth had been made aware only a week before her meeting with Ms. Stadnyk of the appellant's media notoriety and we concur with the findings of the Tribunal Chairperson that the posing of the questions

by Ms. Hogarth to Ms. Stadnyk on the issues of sexual harassment were necessary in order to determine whether she intended to continue her media contact when faced with a sexual harassment experience in future or whether she would follow the policies and procedures of her department and the Federal Government. These questions were not posed to the other applicants in that they were not vocal in the media with respect to the issue of sexual harassment.

As found by the Tribunal Chairperson if her public criticism of the government had been in the area of environmental standards for example a reasonable female candidate for a public relations position with the Federal Government would expect questions about such candidate's use of the media in public discussions about the environment.

We concur with the Tribunal Chairperson that:

> The questioning and discussions about sexual harassment were necessary and incidental components to the Respondent's valid concern about the Complainant's use of the media to criticize the Government because the topic of criticism was sexual harassment.

We concur with the initial Tribunal's findings that the manner in which the interview was conducted by Ms. Hogarth would not on an objective basis have constituted a profound affront to the dignity of a reasonable female given the circumstances of this case.

DECISION OF REVIEW TRIBUNAL

We therefore find no palpable and overriding error in the findings of the Tribunal Chairperson nor any error in law in his decision and concur with the decision of the Tribunal Chairperson that the respondent did not discriminate against the Appellant and that the complaint of the Appellant was not substantiated and therefore must be dismissed.

We are indebted to counsel for their able assistance in this matter.

Dated thisday of January, 1995.

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S. Jane F. Armstrong

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Barry M. Gelling

Subhas Ramcharan