Canadian Human Rights Tribunal		Tribunal canadien des droits de la personne

BETWEEN:

HELEN OSTER

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION (MARINE SECTION), LOCAL 400

Respondent

REASONS FOR DECISION

T.D. 4/00
2000/08/09

PANEL:

Claude Pensa, Q.C., Chairperson

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I. INTRODUCTION

[1] The Complainant, Helen Oster, claims to have reasonable grounds for believing that Local 400 of the International Longshoremen's & Warehousemen's Union (Marine Section) (now "The Longshoremen") has discriminated against her on the ground of sex contrary to Section 9 of the *Canadian Human Rights Act*. In its particulars, the complaint states that in January of 1992, Ms. Oster began registering for employment with Local 400 of the union hall as a cook/deckhand position. The complaint goes on to allege as follows:

> "On March 8, 1994, the union President, David Crain, telephoned Norsk Pacific to refer me for a position as a cook/deckhand. He was advised that I would not be acceptable as a referral because the vessel in question did not have separate sleeping accommodations for women. The work required working alternating six-hour shifts and, therefore, crew members would not be in the cabin at the same time and there would not have been a problem for men and women to be assigned to the same sleeping quarters."

[2] While there is considerable background to Ms. Oster's relationship with the Longshoremen, what is before the Tribunal is a specific incident on a specific date captured in the particulars of the complaint.

II. BACKGROUND

[3] In her evidence, the Complainant said that she first attempted to obtain a position as a cook/deckhand in January of 1992 through the Respondent's union hall. She had experience on commercial fishing vessels as a deckhand for which she qualified through a training course at the Pacific Marine Training Institute. She also had a certificate as a professional cook in culinary arts from Vancouver Community College. Her experience on fishing vessels began in 1988 and continued for three years. This included working with fishing gear, cleaning and storing fish and wheelhouse duties.

[4] Over a period of some two-and-a-half years of her association with the Respondent, she received approximately seventy-five days' work, some as a cook and others as a deckhand or an able bodied seaman. During this period, she was not a union member for which one can only qualify, according to the terms of the collective agreement, after having completed sixty consecutive days of work on one payroll. As a non-union member, the Complainant had to attend the hall to qualify for a dispatch recognizing that there are priorities in favour of union members, those with the most experience, and those who have been sitting in the hall the longest over accumulated days. There is a separate list called the "night list" reserved for non-union members on which list, the Complainant

rose to second from the top in 1994. When a job is phoned in to the union hall, it is written on a chalkboard with a description of the position and at what time it is to be called. In order to get the job you have to be in the hall when it is called. Those seeking the position raise their hands and a person is chosen in accordance with established rules.

III. EVIDENCE

A. The Incident

(i) The Complainant

[5] The Complainant states that she was in the hiring hall on March 8, 1994, when someone asked her to go to David Crain's office. Mr. Crain was President of the Union. When she entered the office, she noticed that Peter Lahay, another union employee, was there. David Crain was on the telephone, apparently in conversation, and responding affirmatively to what was being put to him. After he hung up he told the Complainant that he had been talking to an employer, Norsk Pacific Marine Services ("Norsk"), about a job for a cook/deckhand on a vessel called The Texada Crown, but which did not have separate accommodations for women. Peter Lahay, who apparently had some knowledge of the vessel in question, concurred in what Mr. Crain had said. Lahay did offer the comment however that on the vessel in question, the Complainant would not be in the bunk in the forecastle at the same time as another crew member because of the six-hour opposite shifts. Crain then said that he and Norsk had agreed that the boat was not suitable for women. The job in question was on a tug which would be on a continuous twenty-four-hour, fourteen-day run. The Complainant did not recall who was in the hiring hall at the time.

[6] She did not understand why the sleeping accommodations were unsuitable, having in mind that she had worked on fishing vessels that had no separate accommodations for women which was not a problem from her point of view. She had worked on fishing vessels which had two bunks in the forecastle that male deckhands used. In the meeting with David Crain there was no discussion of the Complainant's qualifications or experience concerning the job. She had worked on a tug as a cook on a long trip, but not as a cook/deckhand.

[7] The Complainant states that having been rejected for the cook/deckhand job on the Texada Crown, she returned the next day on March 9th and was dispatched to another employer, Tymac Launch Services, for a job that day, but was rejected by the employer because they were looking for someone with scow experience.

[8] It should be noted at that point that the "rejection", as the Complainant characterizes it, which occurred on March 8th, did not apparently occur in the ordinary course as provided for in the rules governing the hiring hall. The Complainant did not return to the hiring hall to either witness or participate in the dispatching of the position on the Texada

Crown because, it is argued, she regarded the events in Mr. Crain's office as foreclosing the opportunity to be dispatched.

(ii) Peter Ray Robertson

[9] At the pertinent time, Peter Robertson was employed by Norsk, from 1992 to 1999. In March of 1994, he was General Manager and a director of Canada Steamship Lines of which Norsk was a subsidiary. His duties at the pertinent time were general supervision of the tugboat operation. Routinely, he would communicate with the dispatcher of the Union concerning personnel. It was he who called the Union for a cook/deckhand to replace an injured employee, after which he received a call from David Crain asking which vessel the request involved. He told him it was the Texada Crown and described the accommodations on the vessel. While his memory was somewhat challenged because of the lapse of time, he recalls that David Crain said,

> "...that vessel wouldn't be suitable for a women, would it, or words to that effect, and I said no, I didn't feel it would be appropriate for a woman."

[10] Mr. Robertson said his conclusion was based on the absence of proper sleeping accommodations. It had a small shower stall, and W.C. In his opinion, it was just "a little too close quartered". Concerning possible adjustment to the accommodations, Mr. Robertson stated,

> "Well, it was suggested that a bulkhead could be put in between the bunks, but a permanent bulkhead would have taken up the escape hatch and the coastguard would have got involved...".

[11] He went on to say that financially it was a burden on the company to go that far with a cost of perhaps $10,000.00. He supposed that a curtain could have been put up between the bunks for "not very much". A question of this kind had never arisen before while he was with Norsk. On the Texada Crown, there would have been two cook/deckhands functioning on separate six-hour shifts so, they would never sleep at the same time. Norsk is part of the Council of Marine Carriers with whom the collective agreement was entered into.

(iii) The Investigation Report

[12] In coming to a conclusion concerning what occurred in Mr. Crain's office on March 8th in the presence of the Complainant, it is useful to compare the evidence of the Complainant and Mr. Robertson to the particulars contained in the complaint, as well as what is said in the Commission investigation report dated June 20, 1997. It will be noted that the complaint signed by Helen Oster on June 20, 1997, states in its particulars that on March 8th, the Union President, David Crain, "telephoned Norsk Pacific to refer me for a position as a cook/deckhand". This does not accord with her evidence at this hearing in

that she does not maintain that Crain stated an intention to refer her for a position as a cook/deckhand. Turning to the investigation report, it is stated in paragraph two,

> "The Respondent denies discriminating against the Complainant since it referred her for the job of cook/deckhand. It notes, however, that although it refers potential employees to requesting companies, it cannot make the company accept the one dispatched. Therefore, since the Respondent fulfilled its obligation by referring the Complainant for the position, there can be no basis for the complaint."

[13] In paragraph four of the report, it is stated,

> "Following the request for a replacement cook/deckhand, the Respondent's President telephoned the company to refer the Complainant for the position; however, before he could do so, both mutually agreed that the job would not be suitable for a woman because the vessel did not have separate sleeping accommodations. The Complainant was present during the conversation and states that the President made no mention of either her name or qualifications/experience, nor did he tell the company he had planned to refer a female for the job; shortly after the conversation, a male was dispatched for the position. This was confirmed by the company's representative, who also said he had no discussion with the Respondent on how the vessel could be modified to accommodate female cook/deckhand. The Respondent's President did not document this conversation and had a stroke and died before he could be interviewed."

[14] As will be seen in these reasons, I have not found the inconsistencies posed by the complaint and the Investigation Report problematic in relation to a finding of fact concerning the March 8th incident.

IV. THE QUALIFICATION ISSUE

[15] Questions are raised concerning the Complainant's qualifications for the position dispatched on March 8th for a cook/deckhand. Respondent contends that, inevitably, the Complainant would not have been dispatched to the position by virtue of her lack of experience and physical capability. Counsel for the Commission concedes that to be the case in relation to experience at least, but I do not accept that concession necessarily as

reflecting the position of the Complainant in view of her submissions to the Tribunal. In any event, this issue also touches on the question of accommodation.

A. Mr. Robertson

[16] Mr. Robertson stated that personnel who are dispatched from the Union are evaluated by the Masters and the Mates on the vessel on which they are to serve. By the collective agreement, there is a ninety-day period to evaluate the person and if they were not up to the employer's standards, they were let go or a replacement is asked for. In this routine, Mr. Robertson usually spoke to Mr. Crain who, he said, always fought for his people if he thought that they were being dealt with unfairly. The Texada Crown's run involved tugging barges which, typically, would involve a trip between Campbell River and Seattle. The cook/deckhand duties included outside work, hooking up barges, unhooking, general deckhand duties, keeping the vessel clean and cooking for a five-man crew. On a fourteen-day run, they handled anywhere from fourteen to eighteen barges, sometimes as many as twenty-four. Picking up and emptying in the river is hard work. The shorelines have to be put ashore with the tug holding the barge into the dock while the deckhand takes off the lines and puts them into shore. The deckhand then, with a pike pole, pulls up the bridles to connect them with the bollards. The bridles are sixty-five feet long with a three-foot eye consisting of an inch-and-a-quarter steel line. Handling requires a fair amount of strength. The duties are exacerbated depending on the weather which in March can be rough. Norsk required a Food Safety Certificate if a person is to be hired permanently. They also ask for experienced barge handling personnel because the job can be dangerous.

[17] The person has to be physically fit and have physical strength. It is a high-risk industry which involves accidents such as being crushed between barges, slip and fall, and falling in when the barge is under way. Norsk did not like to get inexperienced personnel because they are unfamiliar with the dangers involved in hooking up and unhooking from a barge. On March 8th, Norsk was looking for an experienced barge person. A person with experience on a Tymac water taxi would not qualify. Mr. Robertson told the dispatcher on March 8th that he wanted an experienced barge person. The person dispatched was Bruce Herd, about which Norsk had no complaints in that he had a history of working in the industry. Robertson had phoned the Union somewhere between 8:00 a.m. and 9:00 a.m. and asked for an experienced cook/deckhand. The vessel was near Campbell River and needed a replacement that day.

[18] On the Texada Crown, the bunks are in the forecastle where it narrows down to the bow. The bunks are almost touching. Through the collective agreement, the Unions have negotiated cabin size, mess room size, bunk size, particularly on new vessels and the company has to comply with those requirements. Mr. Robertson was unaware of any employer in the industry requiring an employee to share sleeping accommodations with a member of the opposite sex. He had not heard of women deckhands.

B. Allan Leonard Engler

[19] The President of the Union Local 400, Allan Leonard Engler, has held that position since 1996. He has long experience in the shipping industry having started work as a deckhand which he rejected because it was too dangerous for him because of a visual handicap. The work requires considerable upper body strength, with strong hands and arms. Most of the employment in the industry is steady with people who have many years of experience working for one company so most of them are qualified as members of the Union. The purpose of hiring hall is to provide employment for members who, for one reason or another, leave or lose their employment. Permanent full-time employees do not go to the hiring hall, rather those who go are members who, because of a lack of seniority cannot hold a job and so have been laid-off and are looking for alternative employment. As well, there are non-members who are trying to break into the industry. Non-members go from that position to becoming a member, first by being dispatched to jobs, usually in the beginning to Tymac because they are one-shift jobs from four to twelve hours. The Union hears back from employers about how they do, if there are any problems and so, it acts as a training position. The duties are quite limited involving much smaller tugs and barges from which, the Union gets an idea whether people can do the work. The procedure for dispatching positions involves employers phoning the Union requesting a particular crew member which is posted on a chalkboard and recorded on a telephone tape. A person interested in the job would come down to the hall and at the appointed time. The person highest on the board, if it is a union member, would get the job. If no member is available, a non-member with experience who is highest on the night list, would get the job. It is not strictly speaking a seniority system, rather it is based on the length of time you have been registered for work, rather than the length of time you have been in the industry. You cannot register for work unless you are available.

[20] The Complainant was second on the night list. The dispatch system is very open and transparent and is deliberately done in front of members and non-members. Experienced people, at all times, go ahead of inexperienced people. Once a person has indicated an interest in the job, the person's card will be taken off the board by the dispatcher, a dispatch slip is written and then the employer will be contacted by telephone. In the case of a non-member, the person would be asked to go to the dispatcher's office where a dispatch slip is written out and the employer phoned. In the event of a refusal, a dispute may arise between the employer and the Union. This happens on occasion. It would be a breach of the dispatch system to call the employer before hand, that is, before the dispatch procedure had been completed. There are two reasons for emphasizing experience, the first being that it is the contractual obligation to the employer to send people who can do the job. Second, it is a moral or common sense obligation to the members and the industry which involves very tight crewing. There are no spare people aboard a vessel. If a person cannot do the work, they are putting themselves and the other crew members in danger. This is particularly so in a two-watch system. The vessel is extremely noisy with heavy vibrations and a lot of crashing and banging. It is a hard fourteen days. To dispatch inexperienced people is contrary to obligations set out in the collective agreement.

[21] Mr. Engler described the prevalence of injuries reflected in Workman's Compensation records. There are back injuries, broken arms, broken legs, falls from

ladders and slipping on the surface of a barge. The steel bridles weigh seventy to ninety pounds. Experience may be gained outside the Union and in other industries, such as logging camps, sawmills and construction jobs. Experience and training is required also in the use of lifesaving and fire extinguishing equipment. Bruce Herd was dispatched instead of Helen Oster because he had three years' experience on tugboats as a cook/deckhand and as a deckhand.

[22] Mr. Engler stated that David Crain was an exceptionally good union advocate. As President, it was not his job to dispatch people, rather it is the job of the Secretary/Treasurer who keeps the records of the Union, including dispatch records. Depending how busy it was, a good deal of his time was spent on dispatch issues which includes not only dispatching people, but keeping the records. The Complainant's records do not indicate she ever was a cook/deckhand on any towboat. She had no record of a successful dispatch as a cook/deckhand or a deckhand on a towboat. Tymac sent her back from a dispatch on March 9th because of previous negative experience with her. The work is much lighter on that kind of a vessel. Another employer, Seaspan, refused her dispatch in May of 1994 because of inexperience. Mr. Engler suggested that if she had a complaint about not being dispatched on March 8th, the Union could have phoned Norsk and advised them of the possible implications if they refused this job to a woman. The Union has never faced a situation where a woman has put in for a job that required her to share sleeping accommodations with a man.

C. Ronald William Hilder

[23] Mr. Hilder stated that he has been involved in the marine industry since he was twelve years of age. He owned a commercial trawler while attending university after which, he joined Tymac Launch Services, first as a launch master and water taxi operator and a tug master. He has been in a dispatch position from 1982 to the present. His duties involve responsibility for human resources, labour relations, customer relations and overall operations of the company. He too described in some detail the deckhand duties and the risks associated with that role. Under the collective agreement between Local 400 and Tymac, the former is under an obligation to supply Tymac with qualified personnel.

[24] The only way to evaluate a person's qualifications is by actually observing the performance of the duties. During the period up to about March 8, 1994, he was getting people that he was satisfied with. The Master would report any instances of dissatisfaction. Qualified employees are important in relation to safety and also the economics of the operation.

[25] The Complainant worked periodically for Tymac in 1992, 1993 and 1994. She worked primarily on water taxis, but some work on tugs as well. He had complaints from three tug masters that she was not qualified to do the job and was not aware of her duties. She was unfamiliar with the terminology, she did not know how to handle lines or tie up barges. She also did not know how to tie basic seamen's knots. These complaints arose in the first period when she was employed with Tymac. He made some observations of his own in 1993 regarding the manner in which she was holding a line. He said to her that

she should learn how to tie knots in which event, he would continue to employ her on water taxis and launches rather than the tugs. On March 9, 1994, he put in a call for a deckhand with scow experience at about 12:30 a.m. The Complainant came into the dispatch office which resulted in him telling her that he was not satisfied with her experience on tugs. He spoke to David Crain and a replacement was sent out. Cook/deckhand duties on the Texada Crown would be heavier. In his opinion, in March of 1994, the Complainant was not capable of doing work of a cook/deckhand on a tugboat.

D. The Collective Agreement

[26] The terms of a collective agreement bear on issues concerning the relationship between the Respondent and employers, the issue of qualifications and issues having to do with the duty to accommodate.

[27] The collective agreement between the Council of Marine Carriers (of which Norsk was a part) and the Canadian Brotherhood of Railway Transport & General Workers Local 400 (the Longshoremen) for the period 1991 to 1994 recognizes the Union as the certified bargaining agent of all Unlicensed Personnel in the various described positions which, it is common ground, included the position sought by the Complainant. Article 1.02 deals with "supplying of personnel" and provides in part that the company agrees that Unlicensed Personnel to be hired shall be requested through the dispatch office of the Union; in cases where the company rejects individuals that it does not consider satisfactory it shall notify the Union of the rejection with written reason for such rejection; rejection shall not be arbitrary or without valid reason; should the Union be unable to furnish employees that are capable, competent and satisfactory, the company to avoid a delay in sailing may secure replacements from other sources on a temporary basis.

[28] Article 1.07 titled "Discrimination" provides,

> "The Company agrees not to discriminate against any person for legitimate Union activity, sex, race, creed, appearance, age or ethnic origin." [sic]

[29] Article 1.22 which deals with manning, in part provides as follows:

> "(b) In the manning of new ships, vessels and equipment, the parties agree that the governing factor shall be to provide crew complements of a size and quality sufficient to meet the requirements of the operations efficiently, safely, and within the terms of this Agreement.
>
> (c) The following rules shall be applied to determine the crew of a tug from the point of view of maintaining a safe and efficient operation at all times;

> (i) The crew of any commercially operated tug shall be a minimum of two (2) men;
>
> (ii) The manning of a tug shall allow for two (2) men being available to the wheelhouse at all times the vessel is underway..." (Emphasis added)

[30] Article 2.10, provides that on vessels carrying cook/deckhands, their duties shall be arranged by the Master.

[31] Article 4.02 deals with education and training and establishes an Education and Training Committee, "...to foster education and training of Unlicensed crew members". The section goes on to set out a scheme for education and training with specific responsibility placed on the employer to bear the costs of tuition, including wages, upgrading courses. Specifically, in relation to cook/deckhands, it provides that in order to improve the cooking skills of cook/deckhands, the company is obligated to arrange from time to time to send employees on courses sponsored by Canada Manpower, the cost of which is to be borne by the employer. The employer further is obligated to provide wage assistance to eligible employees who take courses leading to certificates.

[32] It strikes me that these provisions constitute, in the hands of the Union, an effective vehicle through which its members' education and training can be advanced. In this regard, the Respondent tendered certain letters as evidence of its efforts to obtain education and training on behalf of the claimant, presumably pursuant to the said Section 4.02 of the collective agreement. The first is dated April 7, 1994, and addressed to the Director of Human Resources at Seaspan International Limited and reads as follows:

> "Further to our telephone conversation of April 5, 1994 regarding training as a supernumerary for a female, I enclose her resume.
>
> In keeping with the spirit of employment equity, I believe we should review this matter, which could result in securing employment in the industry, for the applicant as she does require 'Hands-on' training."

[33] It is signed by David Crain as President. It will be noted that the name of the person who is the subject of the letter is not included, but it is said that the letter was written on the Complainant's behalf.

[34] There is no record of any response to the letter. A second letter dated May 5, 1994, directed to the Operating Manager of Tymac Launch Services reads as follows:

> "I have discussed the issue of some hands-on training regarding scow work for Helen Oster, in the past. You

> indicated that people were opposed to the proposition, without any reason stated.
>
> Is it not possible, when Helen is working at Tymac to allow her the opportunity to upgrade her skills?"

[35] The Complainant, in her evidence, expressed mistrust of the sincerity of the Respondent's efforts and questions whether it had any real intention to have her participate in upgrading her skills. Arguably, one might observe at this point, first that the two letters tendered follow the incident of March 8, 1994, which leaves no record of efforts made by the Respondent for the period beginning in January of 1992 when the Complainant first attempted to obtain a position as a cook/deckhand, and ending with March 8, 1994. Second, when one compares the force of the contractual obligation set out in Section 4.02 with the effort demonstrated in the form of the two above-mentioned letters, it is difficult to escape the conclusion that the effort seems somewhat half-hearted.

(V) ISSUES

[36] (a) What is the appropriate characterization of the incident which occurred in Mr. Crain's office on March 8, 1994?

(b) Has the Complainant met the onus of showing that the "standard" to be derived from the incident should be classified as *prima facie* evidence of discrimination?

(c) Assuming that a *prima facie* case of discrimination has been made out, has the Respondent proved that the discrimination standard is a BFOR or that there is a *bona fide* and reasonable justification?

(d) Was the Complainant qualified for the position?

(e) Assuming a case made out, what is the appropriate remedy?

(VI) ANALYSIS

A. The Incident

[37] Characterization of what occurred in Mr. Crain's office on March 8th precedes the applicability of any principles of law. It is common ground that the Respondent is an "employee organization" within the meaning of Section 9 of the *C.H.R.A.* and so was bound by subsection (c) of the *Act* not

> "to limit, segregate, classify or otherwise act in relation to an individual in a way that would deprive the individual of employment opportunities, or limit employment opportunities or otherwise adversely affect the status of the individual, where the individual is the member of the organization and where any of the obligations of the organization pursuant to a collective agreement relate to the individual."

[38] I am disposed to find what, in essence, was said in Mr. Crain's office on March 8th based on the evidence of the Complainant, which I accept, and that of Mr. Robertson who was frank in his evidence as to what he recalled. I can make such a finding notwithstanding certain ambiguities arising from the wording in the complaint and the Commission's report on that complaint. I do not believe that the Complainant was expressly told that Mr. Crain had telephoned Norsk to refer the Complainant for a position as a cook/deckhand, although she might well have surmised that that was the reason she has been summoned to his office. I see no essential conflict between the evidence of the Complainant and Mr. Robertson which together lead me to the conclusion that what was said in Mr. Crain's office had to do with a conclusion reached jointly by Mr. Crain and Mr. Robertson that a dispatch of the Complainant to the Texada Crown on the day in question as a cook/deckhand should not occur because the vessel did not have separate sleeping accommodations for women.

[39] It is on this rather narrow factual platform that the Complainant's case rests which raises the question; did what took place on March 8th establish a *prima facie* case and thus potentially have the effect of engaging the provisions of Section 9 of the *C.H.R.A.*? Here, in my opinion, an examination of the context in which the March 8th meeting took place must be examined. Counsel for the Commission submits that what occurred in Mr. Crain's office was clothed with the authority of the President of the Respondent. He summoned the Complainant to his office and in effect, told her that she was not acceptable for dispatch because there was no sleeping accommodations for women and thus foreclosed or made futile any opportunity to then go to the hiring hall to raise her hand signifying her intention to apply for the position. Moreover, it is argued that even if she had chosen to apply, the fact that she may not have obtained the position in the hiring hall process because someone with more experience would have succeeded or alternatively, she would not have succeeded because she lacked experience, is irrelevant because a discriminatory act had already occurred. Counsel for the Commission concedes that the Complainant lacked experience, however, in the course of the meeting in Mr. Crain's office, that issue was never raised. So, what occurred in Mr. Crain's office was, it is argued, an act by the Respondent which, by any measure, constituted a "chill".

[40] Counsel for the Respondent urged that an examination of the context of the incident on March 8th leads one to conclude that no *prima facie* case is shown and so, the provisions of Section 9 are not attracted. The Complainant did not put in for a dispatch on the Texada Crown and what occurred in Mr. Crain's office had nothing to do with the established dispatch procedures with which the parties were obliged to comply. Further,

the dispatch was not the President's to give and to attempt to do so, would have constituted an interference with the ordered and mandated procedures in the hiring hall. Counsel for the Respondent buttresses her argument concerning context by referring to the apparently passive attitude of the Complainant in the course of the meeting with Mr. Crain in that she did not say in her evidence that she intended to apply for this particular dispatch nor did she object to what had occurred in Mr. Crain's office. The Complainant's evidence was referred to in respect to a response to a question about what her expectations were from the Respondent with respect to the issue of this dispatch. She replied that she was not sure whether the Union could do anything for a non-member, but it seemed to her that it should have tried to get her work considering that she was interested and she had been sitting there in the hall for over two years at the time. If the Complainant was serious about the matter, the Respondent contends, she could have returned to the hiring hall following the meeting in Mr. Crain's office and put up her hand when the position was called. Again, it is argued that had she done that, she would not have been dispatched in any event by virtue of her inexperience and most certainly, because Bruce Herd who was dispatched, possessed the necessary experience qualifications.

[41] So it seems the Respondent's arguments rest on the notion that what occurred in Mr. Crain's office, when examined in context, was of little or no significance. Mr. Crain was merely making inquiries and conveying information completely outside the Union's dispatch procedure.

(i) *Prima Facie* Case

[42] While it will never fully be known why the Complainant was called to Mr. Crain's office, what occurred in that office can, as I have said, be gleaned from the evidence. Mr. Crain was President of the Respondent and while it was not his responsibility to manage the day-to-day affairs of the hiring hall, the job of the dispatcher, he undoubtedly had a general supervisory authority and responsibility. In my opinion the conversation he carried on with Mr. Robertson at Norsk had clearly to do with the posted dispatch of the cook/deckhand position on the Texada Crown. By the end of that conversation, one could not have reasonably come to any other conclusion but that the Complainant would be discouraged from applying because the sleeping accommodations were not suitable for her as a woman. That was the reason and the only reason given at that point. To the extent that a standard or goal can be discerned from what occurred during the March 8th incident, one must proceed from there to determine whether that standard or goal is discriminatory.

[43] I see no evidence of a fundamental standard of a far reaching goal rather, it can be better described as a practice that women are discouraged from positions on tugs where accommodations are "a little too close quartered", as Mr. Robertson put it. The Respondent's evidence was that there had never been a request for shared sleeping accommodations. This "standard" existed in the particulars of this case though men and women would not be occupying the same sleeping quarters at the same time because of the alternate six-hour shifts.

[44] What occurred in Mr. Crain's office, in my opinion, constitutes *prima facie* evidence of a discriminatory practice based on sex contrary to Section 9(1)(c) of the *Act*. The Respondent acted in a way that deprived the Complainant of an employment opportunity based on a prohibited ground of discrimination. It is no answer, in my view, that the full process of the dispatch procedure was not exhausted to a formal conclusion. What occurred constituted a discouragement to the Complainant about participating any further in the process in relation to this particular dispatch. I am satisfied that the Complainant has discharged the onus on her. (*Ontario Human Rights Commission v. Etobicoke*, [1982] 1 S.C.R. 202)

[45] The onus shifts to the Respondent to prove on a balance of probabilities that the standard is a BFOR and has a *bona fide* justification. Is the standard justifiable in terms of safety, efficiency or some other legitimate reason?

(ii) Experience Standard

[46] The Respondent argues that the standard of experience is a neutral one which has nothing to do with gender. Relying upon the evidence of Mr. Robertson, Mr. Engler and Mr. Hilder, the inescapable conclusion, it is argued, is that experience in the skills required on a vessel are fundamental to its safe operation. These standards are reflected in the collective agreement which imposes on the Union an obligation to dispatch qualified personnel. Mr. Engler, in his evidence, emphasized the contractual obligation on the part of the Respondent to the employer to send people with experience which has an impact on the entire relationship between the Respondent and the various employers. He referred to the moral and common sense obligation to the members of the Union and the industry which operates under very tight crewing. The occupation is hazardous and prone to injury. The safety of all crew members is connected to the experience and skill of each.

[47] I am satisfied on the whole of the evidence that the Complainant did not have sufficient experience to qualify for dispatch on the Texada Crown, and that ultimately she would not have been selected for that reason.

[48] Assuming such a conclusion, the Respondent says that that disposes of the complaint based on an absence of a *prima facie* case.

[49] I agree that does dispose of the Complainant's case with respect to assigning a *prima facie* discriminatory effect to the experience standard. But that does not dispose of the complaint, not quite, because there is authority that it is sufficient that discrimination be a basis for the conduct of the Respondent.

[50] In the Law of Human Rights in Canada; *Zinn and Brethour*, it is stated at page 10-4,

> "Discrimination in employment on the basis of sex is prohibited in all of the Canadian jurisdictions. Basically, discrimination on the grounds of sex will be prohibited whenever a male or female is treated differently in relation

> to hiring, firing, lay-offs, benefits, wages, promotions and training. However, as noted in previous chapters, human rights legislation also provides that it is permissible to discriminate in employment on the basis of sex, where it can be demonstrated that the differential treatment is a *bona fide* occupational qualification. Tribunals and Courts have been very hard pressed to accept sex as a *bona fide* occupational qualification."

And at page 10-7,

> "It should be noted, however, that there are cases where an employer has been found guilty of sex discrimination even though the individual complainant did not possess the appropriate qualifications, or was not the best candidate. In *Clayton v. Wheels for the Handicapped Society* (1989) 10 C.H.R.R. D/5864 (B.C.C.H.R.), a woman applied for a full-time position as a bus driver but was told that the position was being given to a man because he had a family to support. At the hearing, the Council accepted the evidence that the real reason why the respondent had given the position to the male candidate was because he possessed more experience than the complainant. It was held that the complainant had nevertheless been discriminated against by the respondent by giving her a discriminatory reason for their decision."

[51] *Holden v. Canadian National Railway* (1990), 14 C.H.R.R. D/12, a decision of the Federal Court of Appeal, involved an age discrimination complaint in which the Court found that the review Tribunal had erred in establishing the standard for a *prima facie* case and is relied upon by the Complainant for the proposition that discrimination need only be one of the reasons for the refusal. MacGuigan J.A. stated at paragraph 8,

> "As the case law establishes, it is sufficient that the discrimination be a basis for the employer's decision: *Sheehan v. Upper Lakes Shipping Ltd.*, [1978] 1 F.C. 836 at 844 (F.C.A.), reversed on other grounds by S.C.C. at [1979] 1 S.C.R. 902."

[52] Accordingly, in my view, the Complainant's case remains alive which requires analysis of the evidence concerning the onus on the Respondent to provide a reasonable justification for the standard.

(VII) THE LAW

[53] The beginning point is *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U.)* [1999] 35 S.C.R. 3 (*Meiorin*), in which the Supreme Court of Canada redefined the law concerning *bona fide* occupational requirement and enunciated a three-step test for determining whether an employment standard is a *bona fide* occupational requirement. 1) it must be for a purpose rationally connected to job performance; 2) it must have been adopted by the employer in good faith with an honest belief that it was necessary for the fulfilment of the work related purpose; and 3) the employer must show that the standard is reasonably necessary to accomplish the work related purpose. The issue in that case had to do with whether the B.C. Government had improperly dismissed Ms. Meiorin from her job as a forest firefighter.

[54] In *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] S.C.J. No. 73 (*Grismer*), the court revisited its decision in *Meiorin*, in a case involving the application of the *Meiorin* test to a public service provider.

[55] Before applying the principles in these cases, it would be useful to review the authorities referable to Section 9 of the *C.H.R.A.*

[56] In *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970 (*Renaud*), the Appellant was a Seventh Day Adventist holding a position as a unionized custodian. The work schedule formed part of a collective agreement which included a shift on Friday evening which clashed with the Appellant's religion. Unsuccessful attempts to accommodate led to termination. The Appellant filed a complaint under the British Columbia legislation against the employer and the Union. At issue was whether an employer is relieved of his duty to accommodate the religious beliefs of an employee when this would require an alteration of the collective agreement which is opposed by union employees. At issue is whether a union, in these circumstances, is in breach of its duty to accommodate.

[57] It was held that an employer must take reasonable measures short of undue hardship to accommodate an employee's religious beliefs and practices and so, private arrangements by contract or a collective agreement must give way to the requirements of the *Act*. The effect of the collective agreement is relevant in assessing the degree of hardship caused by interference with its terms. Considerations as to the effect on employee morale while a factor to be considered in deciding whether accommodating measures would constitute undue hardship must be applied with caution.

Sopinka J., page 984,

> "The concern for the impact on other employees which prompted the Court in *Hardison* to adopt the *de minimis* test is a factor to be considered in determining whether the interference with the operation of the employer's business would be undue. However, more than minor inconvenience

> must be shown before the complainant's right to accommodation can be defeated. The employer must establish that actual interference with the rights of other employees, which is not trivial but substantial, will result from the adoption of the accommodating measures. Minor interference or inconvenience is the price to be paid for religious freedom in a multicultural society."

And at page 989 concerning the Union's duty to accommodate,

> "Moreover, any person who discriminates is subject to the sanction which the Act provides. By definition (S. 1), a union is a person. Accordingly, a union which causes or contributes to the discriminatory effect incurs liability. In order to avoid imposing absolute liability, a union must have the same right as an employer to justify the discrimination. In order to do so it must discharge its duty to accommodate."

[58] And so, the duty to accommodate arises if the union is a party to discrimination which may occur in two ways - Sopinka J., page 990,

> "First, it may cause or contribute to the discrimination in the first instance by participating in the formulation of the work rule that has the discriminatory effect on the complainant. This will generally be the case if the rule is a provision in the collective agreement...second, a union may be liable for failure to accommodate the religious beliefs of an employee notwithstanding that it did not participate in the formulation or application of a discriminatory rule or practice. This may occur if the union impedes the reasonable efforts of an employer to accommodate...If reasonable accommodation is only possible with the union's co-operation and the union blocks the employer's efforts to remove or alleviate the discriminatory effect, it becomes a party to the discrimination."

And at page 992,

> "A union which is liable as a co-discriminator with the employer shares a joint responsibility to seek to accommodate the employee. If nothing is done both are equally liable."

[59] In *Starzynski v. Canada Safeway Ltd.* (1999), 35 C.H.R.R. D/478 (Alta. H.R.P.), a tribunal found the employer and Union jointly liable for discrimination, the complainants

being on disability leave and were denied access to a buyout package. The panel referred to and adopted reasoning in *O.P.E.I.U. Local 267 v. Domtar Inc.* (1992), 16 C.H.R.R. D/479 (Ont. Div.Ct.) at page D/483, paragraph 23,

> "Discrimination in the workplace is everybody's business. There can be no hierarchy of responsibility. There are no primary and secondary obligations to avoid discrimination and adverse effect discrimination; companies, union, and persons are all in a primary and equal position in a single line of defence against all types of discrimination. To conclude otherwise would fail to afford to the *Human Rights Code* the broad purposive intent that is mandated. Any interpretation short of this would, in my view, be inconsistent with the philosophy and policy enunciated by the Supreme Court of Canada in *O'Malley v. Simpsons-Sears*."

[60] These decisions dealt with the joint responsibility and liability of the employer and union which raises the question whether the union alone can be found liable in a proceeding in which the employer is not a party. By way of background, the Complainant, on November 11, 1994, filed a complaint against Norsk with respect to the same incident that occurred on March 8, 1994, stating that she had reasonable grounds for believing that Norsk discriminated against her on the grounds of sex by refusing to employ her contrary to Section 7 of the *C.H.R.A.* In the particulars she quotes David Crain as having telephoned Norsk Pacific to refer her to a position for a cook/deckhand and that he was advised that she would not be acceptable as a referral as the vessel in question did not have separate sleeping accommodations for women. The Commission elected not to proceed with that complaint.

[61] In *Goyette and Tourville v. Voyageur Colonial Ltd*, [1997] 30 C.H.R.R. D/175, the Tribunal dealt with a complaint against the union concerning a seniority system alleged to discriminate against female telephone operators. The Tribunal found that by accepting and executing the collective agreement, the union committed an act of systemic discrimination towards a class of employees, namely, the telephone operators (the majority women) and thereby deprived them of opportunities for employment or promotion within the company.

At page D/180, paragraph 22,

> "Jurisprudence also clearly establishes that the Union must at all times find a reasonable solution to accommodate its members. The principle was clearly developed by Judge Sopinka in the Supreme Court case *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. page 970."

[62] On appeal to the Federal Court ([1999] F.C.J. No. 1678), Pinard J. stated at page 5, paragraph 7,

> "As for the law, in my opinion there is no basis for the applicant's argument that a trade union can neither be held exclusively liable, without the employer, for systemic discrimination toward a class of employees, nor alone be under a duty to accommodate. I see no support for this proposition in the Supreme Court of Canada decision in *Central Okanagan School District No. 23 v. Renaud*...".

[63] Accordingly, there does not seem to be any impediment procedurally to a complaint only against a union. It is suggested, relying on a statement by Pinard J., that a process against a union should only occur in circumstances that are extraordinary. In my view, the fact that the employer is not a party in this case should not operate to deprive the Complainant of a hearing and whatever remedy might potentially follow.

A. The Issue of Justification

[64] Under the unified approach, one begins with the identification of the standard which I have referred to earlier in these Reasons. Complainant argues that the discriminatory conduct which occurred on March 8th reflects a standard that women are not dispatched on vessels where sleeping accommodations are shared with men. That, in my view, is, as much as is possible, a fair representation of what was intended as a standard of practice. The onus is on the Respondent to provide a reasonable justification for the standard. As stated by McLaughlin J. in *Grismer*, page 8, para 21,

> "This test permits the employer or service provider to choose its purpose or goal, as long as the choice is made in good faith, or 'legitimately'. Having chosen and defined the purpose or goal - be it safety, efficiency, or any other valid object - the focus shifts to the means by which the employer or service provider seeks to achieve the purpose or goal. The means must be tailored to the ends."

This statement seems to embrace the first two steps in the three-step process.

[65] Respondent argues that to characterize the standard as proposed followed by findings as to its unacceptability has serious implications because in essence, such a finding would constitute a ruling that it is acceptable for an employer to require the sharing of sleeping accommodations with a member of the opposite sex as a condition of employment and would constitute a departure from accepted social norms. Counsel for the Respondent asserts that there is no law in Canada which would impose that kind of a burden on an employer or derivatively on a union.

[66] There are some authorities that touch on this area.

[67] In *Gauthier v. Canada (Canadian Armed Forces)*, [1989] C.H.R.D. No. 3, the complaints were by individuals who were refused entry to combat or combat support employment in the Canadian Armed Forces because they were women. The respondent admitted that the practices and policies were discriminatory, but were based on a BFOR, that is, "operational effectiveness" required under the legislation. As the decision states, the material entered as exhibits was "rich in detail and eclectic in scope". For our purposes here, I focus on those portions of the decision bearing on the role of women at sea in various vessels, particularly in relation to the issue of privacy. The decision more broadly addresses mixed-gender employment in the regular Forces and the adequacy of a *bona fide* occupational requirement which would justify the exclusion of women from combat related occupations and units as members of the Forces. Underlying this analysis was the principle of operational effectiveness in time of war or national emergency.

[68] In discussing environmental conditions in various models, the Tribunal concluded that there was one exception to its finding that environment was not a factor in the assessment of risk, that exception being the submarine service. There was considerable evidence about the unique and special environment in such a vessel, therefore the Tribunal supported the Force's contention that privacy constituted a significant factor in operational effectiveness and that the exclusion of women from occupations which serve in submarines exclusively was a *bona fide* occupational requirement.

[69] The Tribunal referred to *McKale v. Lamont Auxiliary Hospital and Nursing Home District No. 23* (1986), 8 C.H.R.R. D/3659 and *Stanley v. Royal Canadian Mounted Police* (1987), 8 C.H.R.R. D/3799 and stated at page 22,

> "However, the Tribunal distinguishes the present issue from those cases on the ground that the privacy element on a submarine affects all crew members at all times, whether working or not. It is not an issue related to an 8-hour work shift, for example, where a person of one gender has the job of supervising the intimate private behaviour of persons of the opposite sex. In a submarine, there is privacy of a sort, but in the usual sense of the word there is no privacy for anyone, whatever the gender or rank."

[70] In the case before me, while the issue of privacy was alluded to in argument as a possible component of the standard, I do not find the evidence advanced by the Respondent persuasive that privacy constitutes a significant factor in the operational effectiveness in the case of the Texada Crown. Indeed, the evidence weighs in the other direction, having in mind the shift arrangements and the ease of accommodation.

[71] In *Stanley v. Royal Canadian Mounted Police*, the issue related to the requirement that prison guards be of the same sex as the prisoners being guarded. The Tribunal held that it was a BFOR because the viewing of inmates in states of undress and while using toilet facilities could not be avoided and even if viewing was infrequent, it violated the prisoners' rights of privacy.

[72] In *Re Lornex Mining Corporation Limited*, [1976] 5 W.W.R. 545, the British Columbia Supreme Court dealt with a procedural issue concerning the right of a human rights commission to hear new evidence after a decision was made. The facts were that a research chemist employed by Lornex had complained to the Commission alleging a breach by her employer of the *Act*, the substance of her complaint being that male co-employees enjoyed accommodation and board in a camp at a mine site while such accommodation and board were not available to her as a female. The Commission had found that in its opinion, the complaint was without merit and had therefore been dismissed. The Complainant appealed on the basis that she wished to adduce further evidence which the Commission responded to by scheduling a further hearing following which, the Commission ordered Lornex to make accommodation available to female employees on the same terms and conditions as male employees.

[73] One can read into this briefly reasoned decision that it was incumbent on the employer to provide appropriate washroom and sleeping facilities for a female, that is, an issue of accommodation.

[74] In *Sharon Curtis v. Coastal Shipping Limited*, [1984] 5 C.H.R.R. D/1998, a Commission of Enquiry under the Newfoundland Human Rights Code dealt with the complainant's assertion that she was refused a position on a ship because of her sex. Her qualifications were not in dispute, but the respondent argued that there was no suitable accommodation on the ship for women which was a *bona fide* occupational qualification which provided a defence for the refusal. The Commission rejected that argument finding that a suitable accommodation could have been provided. The Commission was of the opinion that the discriminatory act was motivated more by fear of adverse crew reaction than concern about or inability to provide accommodations.

[75] Of interest are three decisions in the United States.

[76] *Miller* v. *Drennon*, [1992] CA4-QL 1967, a decision of the United States Court of Appeals for the Fourth Circuit.

[77] This case involved a male paramedic who brought a claim that his employer had violated his right to observe his religious beliefs. His claim was based on the fact that the County had arranged a scheduling system whereby a male employee could be forced to work a twenty-four-hour shift in a single bedroom substation with a female employee. It was contrary to the plaintiff's religious belief to share a bedroom with a woman who was not his wife while unsupervised.

[78] The plaintiff asserted two claims: 1) religious discrimination under the civil rights act; 2) violation of the free exercise clause of the first amendment.

[79] Both claims were dismissed. There was no religious discrimination as reasonable accommodation had been provided by the county. The County allowed a shift-swap scheduling system and allowed the plaintiff to take personal leave to accommodate religious beliefs. As well, the County spent $5,000.00 installing folding walls to provide

privacy. The first amendment was found not to have been violated based on a Supreme Court decision which held that the first amendment is not violated by a neutral, generally applicable and otherwise valid provision which does not have as its object the prohibition of the exercise of religion.

[80] *Canedy* v. *Officer Peggy Boardman*, [1994] CA7-QL 160.

[81] In this decision, an inmate of the Columbia Correctional Institution in Portage, Wisconsin appealed a decision from the district court which dismissed the action. The plaintiff complained that female officers could regularly observe male inmates in a variety of settings typically considered private. As the right to privacy was a major issue, the court considered the general idea that it was generally a greater invasion of privacy when a member of the opposite sex is involved.

[82] The court reviewed a number of decisions which held that the state must balance the need to provide equal employment opportunity to female guards with the inmate's right to privacy. Inadvertent sightings of inmates in their cells or in open showers is not a violation of their right to privacy. More regular occurrences or more invasive intrusions are a violation of privacy.

[83] The dismissal was reversed and the matter was remanded for further proceedings. The judge provided an opinion endnote. The opinion stated that the plaintiff should make a religion based complaint under the free exercise clause of the first amendment. The plaintiff was Muslim and had a strong taboo against nudity. The judge also stated that the new Religious Freedom Restoration Act could be of assistance. The legislation stated that a rule of general applicability should not burden a person's exercise of religion unless it is in furtherance of a compelling governmental interest.

[84] *McAlindin* v. *County of San Diego*, [1999] CA9-QL 766.

[85] This case involved an individual who suffered from a series of psychological and anxiety disorders. The plaintiff had filed a claim under the Americans with Disabilities Act. The court sought to determine whether or not Mr. McAlindin was disabled. In order to be disabled, he had to have a "physical or mental impairment that substantially limits one or more of the major life activities". One of the issues before the court was whether or not sleep was a major life activity. The court cited three other decisions in holding that sleep is a major life activity.

B. The Union's Liability

[86] Nothing in these reasons should lead to the interpretation posed by counsel for the Respondent. This case is not about imposing a standard that persons, male or female, enjoying the protection of a union can be forced to accept sleeping accommodations with members of the opposite sex as a condition of employment. This case rather is about whether in the given circumstances, a discriminatory standard can be justified. At issue too is the conduct of the Union in the face of its obligation to stand up for the

Complainant. In my view, the Respondent has not advanced persuasive evidence that the so-called standard was adopted for a purpose or goal rationally connected to the function being performed nor was the standard adopted in good faith in the belief that it was necessary for the fulfilment of the purpose or goal. Moreover, there is no evidence that supports the conclusion that it was impossible to accommodate the Complainant without imposing undue hardship. There is no evidence that allowing a woman to participate in the six-hour opposite shift would interfere with the rights of other employees in adopting accommodating measures. Not even a negligible effort was made by the Respondent to challenge the proposition put to Mr. Crain by Mr. Robertson concerning the unsuitability of the Complainant in relation to the posted position.

[87] The Respondent argues in an effort to absolve itself of responsibility for what occurred on March 8th in Mr. Crain's office, that there was no obligation to respond to the position taken by Mr. Robertson on behalf of Norsk because there was not a woman who would have been referred that day. The Complainant did not seek the position nor did she possess the experience to qualify. The Respondent, it is said, deals with problems of this nature as they arise and are dealt with in the course of bargaining leading to a collective agreement. So, failure to dispatch in these circumstances was not discrimination and did not taint the dispatch. There was no obligation to respond to what Mr. Robertson said and, as put by counsel for the Respondent, it is not the Respondent's responsibility to be the employer's human rights watchdog.

[88] I disagree. The Respondent had an obligation both at law and under the collective agreement not to be a party to a discriminatory act. It had a duty to respond in a way that was consistent with its obligations to accommodate the Complainant. Arguably, this could have been accomplished in a number of ways. First, by not participating in the tenor of the discussion between Mr. Crain and Mr. Robertson in a way that it appears to have given sanction to what was said. Mr. Crain could have objected or challenged the proposition put to him and signalled his intent that the Complainant should proceed to apply through the hiring hall process. That would have left open the possibility that the procedures called for in the collective agreement, in particular Article 1.02, would have been exercised, even though Ms. Oster was not destined ultimately to be selected. This was not done.

[89] I refer again to the evidence of the President of the Union, Mr. Engler, who stated that in the event of a complaint by Ms. Oster, the Union could have phoned Norsk and advised them of the possible implications if they refused this woman a job. Instead of doing that, the Union acquiesced in the inadmissible reason for the denial of the dispatch. I am also influenced in coming to this conclusion by the Union's apparent disregard of article 1.07 of the collective agreement which prohibits discrimination against any person (as I read it) on the basis of sex. Article 1.07 , somewhat ironically, is juxtaposed with Article 1.22 which states that the manning of a tug shall allow for "two (2) men".

[90] In *Renaud*, Sopinka J. said that minor interference or inconvenience is the price to be paid "for religious freedom in a multi cultural society". This sentiment might be paraphrased in the context of this case to say that such interference and inconvenience is

the price to be paid for according equality rights to women. This is so especially where the accommodation was available to the Respondent in a relatively simple and straightforward way.

[91] The Respondent has failed to satisfy the onus to provide reasonable justification for the standard.

(VIII) LIMITATION ISSUE

[92] In Reasons delivered February 10, 2000, I reserved Respondent's motion to dismiss the complaint on the four grounds recited in those reasons. The Respondent's chief submission concerning the timeliness of the complaint was that its ability to respond to the allegations had been compromised by the delay in the filing of the complainant.

[93] I will not repeat my review of the evidence contained in the interim Reasons. The Respondent's argument is underpinned by the delay of thirty-nine months between the act complained of and the time of filing with the Commission. Reliance is placed on Section 41(e) of the *C.H.R.A.* which provides as follows:

> 41. Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that,
>
> > (e) the complaint is based on acts or omissions the last of which occurred more than one year, or such longer period of time that the Commission considers appropriate in the circumstances, before receipt of the complaint.

[94] It seems clear that a Human Rights Tribunal lacks jurisdiction to judicially review a decision of the Commission to exercise its discretion under Section 41(e) of the *Act* (*Canadian Human Rights Commission v. Canadian Broadcasting Corp. et al.* (1996), 120 F.T.R. 81 (*Vermette*)). That being said, the neat question is whether Section 41(e) properly understood confers on a respondent the benefit of the limitation period spelled out in Section 41(e) of the *Act*. In *Vermette*, Muldoon J. was of the opinion, affirming the decision of the Canadian Human Rights Tribunal, that a respondent does enjoy the benefit of Section 41(e) in its defence to a complaint. The distinction was made between the powers accorded to the Commission under Section 41(e) which are procedural and preliminary authority to override the basic limitation period of one year, and to extend it to what "the Commission considers appropriate in the circumstances", and the statutory powers of the Tribunal to conduct a full hearing accorded in Section 50(2)(a). In that regard, Muldoon J. makes the following comment:

> "Why should that be the Courts interpretation of s.41(e)? It is because Parliament enacted the one year datum as a substantive right of, or benefit to, those against whom complaints are made, but the Commission does not deal with complaints by dealing with anyone's substantive rights. Tribunals, however, do determine substantive rights in according full hearings pursuant to powers provided in s.50, and in concluding whether the complaints be substantiated against respondents, or not pursuant to s.53.
>
> Full, fair hearings are those in which the persons against whom complaints are made, are accorded each the opportunity to make a full answer and defence to the complainant's case. Clearly, being prevented from benefiting from the one-year limitation can be raised in a full answer and defence." (paragraph 28, 29 - page 97)

[95] *Canada Post Corp. v. Barrette* (1998), 43 C.H.R.R. D/353 (F.C.T.D.), seems to take a different approach to Section 41(e). This involved an application for judicial review of a decision of the Canadian Human Rights Commission to investigate complaints of discrimination brought against Barrette. Issues of the timeliness of the complaint and estoppel because of prior unsuccessful grievances were raised by the Respondent. In response to the Respondent's argument that the listed exceptions to the Commission's duty to deal with a complaint under Section 41 should be regarded as enacted for the benefit of the employers and others against whom complaints are made and that the Court should be vigilant to ensure that the Commission does not erode those statutory rights, Evans J. stated that he could not accept this as an appropriate approach to Section 41. At page D/360, paragraph 30, he stated,

> "For one thing, as I have noted, the section is drafted in the way that leaves many issues to the discretion or judgment of the Commission: this is incompatible with the notion that it should be interpreted as if it created a legal right not to be investigated in specific circumstances. The Commission still has the discretion to deal with the complaint if it so chooses...
>
> Moreover, since the purpose of the statutory scheme is to reduce inequality, and accordingly, has been said to possess a *quasi*-constitutional status, a court should be reluctant to conclude that the Commission has erred by taking too narrow a view of the exceptions to its statutory duty to deal with complaints of discrimination. On the other hand, it is arguable that closer judicial scrutiny is justified when the Commission decides <u>not</u> to deal with a complaint, which

> will normally be the final disposition of the matter." (paragraph 31)

[96] The Federal Court of Appeal on April 20, 2000, allowed an appeal in *Barrette* and set aside the decision of the Trial Judge. There is no specific reference to the issue of timeliness of the complaint and estoppel as discussed by Evans J. The general approach of the Court of Appeal, however, is more in line with Muldoon J.'s thinking.

[97] The reconciliation of these two points of view can perhaps be achieved on the basis of the reasoning in *Vermette*. There, the Tribunal was seized of the complaint and came to a conclusion after a full hearing, included in which was an adjudication on the issue of timeliness, whereas in *Barrette*, it was an application by way of judicial review dealing pointedly with the jurisdiction of the Commission described in Section 41.

[98] I am guided here in this deliberation therefore by the principle expressed in *Vermette* both at the Tribunal level and in the Federal Court that a Tribunal may determine, based on the evidence before it, whether a Respondent has been deprived of the benefit which Parliament provided in relation to the limitation period provided in Section 41 of the *Act*. Such evidence may be beyond the considerations of the Commission when it made its decision to proceed with the complaint.

[99] Returning to the chronology, the Complainant waited thirty-nine months to file her complaint on June 20, 1997. The Commission was reasonably prompt in notifying the Longshoremen of the complaint on June 31, 1997. It took the Commission until October 9, 1998, to complete its investigation. It was not until September 1, 1999, that the Commission decided to request that a Canadian Human Rights Tribunal hold an inquiry into the complaint. While the primary responsibility for the delay and so potentially running afoul of Section 41(e) lies with the Complainant, the Commission, having custody of the matter and faced with the already existing delay, took almost twenty-seven months to investigate and ultimately refer the matter to the Tribunal.

[100] Among the factors that should be considered are:

(a) The time period that elapsed between the act or omission that is the subject of the complaint and the time when the complaint was filed with or received by the Commission;

(b) The period of time that elapsed between the act or omission that is the subject of the complaint and the time when the Respondent received the notice of complaint;

(c) The reasons for the delay in filing the complaint or notifying the Respondent of the complaint;

(d) The reasons of the Commission for deciding, pursuant to Section 41 of the *Act*, to proceed with the complaint, notwithstanding that the complaint is based on acts or

omissions the last of which occurred more than one year before the receipt of the complaint; and

(e) The prejudice caused to the Respondent by delay.

A. Prejudice

[101] In my view, concerns about prejudice by virtue of the death of Mr. Crain have been allayed having heard the full evidence at the hearing. I was able to make findings concerning the incident of March 8th based on the evidence of the Complainant and Mr. Robertson.

[102] In *Belloni v. Canadian Airlines International Ltd.*, [1996] 192 N.R. 74, a decision of the Federal Court of Appeal, there had been an order prohibiting the C.H.R.C. from proceeding with a complaint on the grounds that a fifty month delay between filing the complaint and the appointment of a Tribunal was unreasonable and caused prejudice to the Respondent. The Court of Appeal disagreed and stated by Decary J.A., page 642,

> "The alleged prejudice falls way short, in our view, of the high threshold that has to be crossed by Canadian.
>
> The fading of the recollection of witnesses is a prejudice inherent in our system and is not even recognized as relevant in most criminal cases where, for example, a new trial is ordered by a court of appeal or by the Supreme Court of Canada. We are talking here of a period of some fifty months, regrettably long but by no means exceptional. Furthermore, as the issue before the Tribunal will revolve around the question of *bona fide* occupational requirement (BFOR), Canadian will most likely have recourse to expert evidence and the particular circumstances of the complaint will be relegated to a position of secondary importance."

[103] I am not persuaded that the Respondent's motion should be granted on the ground that prejudice has been caused by delay.

[104] The Respondent raised the defence of *res judicata* based on the decision of the Commission not to proceed against the employer which, in my view, was not a final adjudication. In any event, there are two elements missing, namely, that the Commission is not an adjudicative body and there is no identity of action or issue.

[105] Accordingly, the Respondent's motion is dismissed.

(IX) REMEDY

[106] I have found on the evidence that the Complainant would not have succeeded in being dispatched to the Texada Crown had the hiring hall processes been pursued. She lacked the experience and a qualified person succeeded to the position. The Complainant said that she felt humiliated by the process, but I accept counsel for the Respondent's argument that these feelings of humiliation described by the Complainant focussed more on the entire history of her association with the Union rather than on the incident of March 8th. Indeed, it did not occur to Ms. Oster to file a complaint against the Union until some thirty-nine months after the incident and she only decided to proceed when advised to do so by the Commission. I do not doubt that she has felt humiliated by her overall experience with the Union, but I must focus primarily on the four corners of the complaint in deliberating the issue of remedy.

[107] This is not a case in which an award for lost wages should be made because on the evidence, none has been shown. However, pursuant to Section 53(3) it is appropriate to award special compensation which, considering the applicable provision as of March 8, 1994, is limited to a sum not exceeding $5,000.00. In the circumstances, I order that the award be in the sum of $3,000.00 plus simple interest from March 8, 1994, calculated at the rate of 5% per annum provided that in no event the sum so calculated exceed $5,000.00.

[108] It is also suggested that a letter of apology be directed by the Respondent to the Complainant. In my view, a directed apology has little weight in the circumstances of this case and so I decline to order one.

_____

Claude Pensa, Chairperson

OTTAWA, Ontario

August 9, 2000

CANADIAN HUMAN RIGHTS TRIBUNAL

COUNSEL OF RECORD

TRIBUNAL FILE NO.: T529/2499

STYLE OF CAUSE: Helen Oster v. International Longshoremen's and Warehousemen's Union (Marine Section), Local 400

PLACE OF HEARING: Vancouver, B.C.
(January 27, 2000 to April 17, 2000)

DECISION OF THE TRIBUNAL DATED: August 2, 2000

APPEARANCES:

Helen Oster On her own behalf

Odette Lalumière For the Canadian Human Rights Commission

Sam Black For the International Longshoremen's and Warehousemen's Union (Marine Section), Local 400