T. D. 8/ 88

Decision rendered on May 17, 1988

IN THE MATTER OF THE CANADIAN HUMAN RIGHTS ACT S. C. 1976 - 77, C. 33 as amended

AND IN THE MATTER OF A hearing before a Human Rights Review Tribunal appointed under Section 42.1(2) of the Canadian Human Rights Act

BETWEEN:

SHERYL GERVAIS Appellant

and

AGRICULTURE CANADA Respondent

TRIBUNAL: CARL E. FLECK, Q. C. Chairman
KATHLEEN JORDAN
PETER BORTOLUSSI

DECISION OF REVIEW TRIBUNAL

APPEARANCES: ROBERT P. HYNES, ESQ.
RUSSELL JURIANSZ

A. PRELIMINARY OBSERVATIONS OF HEARING

This Tribunal was established under Section 42.1 (2) of The Canadian Human Rights Act to hear an appeal from the decision heard on September 3rd, 1986 in which the complaint of Sheryl Gervais was dismissed.

In a Notice of Appeal and in both written and oral arguments the Appellant appealed upon the following grounds:

1. The Tribunal erred in finding that the respondent did not authorize, knowingly overlook, condone or ratify the conduct of one Ian Fetterly;

2. The Tribunal erred in finding that the employer was not strictly liable for the conduct of Ian Fetterly.

It was the latter ground, namely the issue as to whether employers are liable for the discriminatory acts of their employees that counsel for the Appellant advanced before this Tribunal.

At the opening of the appeal the members of this Tribunal were made aware that the Federal Court of Appeal decision in Robichaud and The Queen was to be argued in the near future. This Tribunal adjourned following argument and reconvened on November 13th, 1987 to hear further submissions as a result of the landmark decision of the Supreme Court of Canada in this Robichaud case.

This Tribunal having thoroughly examined the transcripts of testimony and exhibit books as presented before the initial tribunal, after hearing full argument and submissions presented to this Tribunal and particularly having considered the Reasons of the Supreme Court of Canada in Robichaud, and for reasons stated hereafter, allows the Appeal of the Appellant Sheryl Gervais and sets aside the Tribunal decision dated September 3rd, 1986.

B. THE FACTS

The Tribunal adequately reviewed and summarized the relevant facts in this dispute and for these reasons we shall write a brief account only of the facts and circumstances which led the Appellant to file a complaint to the Human Rights Commission.

The Appellant filed a complaint under Sections 7, 10 and 12 of The Canadian Human Rights Act, S. C. 1976- 77, Chapter 33, November 16th, 1982 against the Respondent, The Department of Agriculture. She alleged that the Respondent engaged in discriminatory practice on the grounds of sex some time in 1980 and thereafter until May 13th, 1983 when she submitted her resignation to the Respondent.

The essence of the allegation of discriminatory practice arose out of the conduct of one Ian Fetterly, an employee of the Respondent. The complainant was hired by the Respondent as a casual employee in a position classified as G. L. T.- 3 (General Labour Trade) and in December 1980 was promoted to a permanent position classified as G. L. T.- 5. Mr. Fetterly was at all material times classified as a G. L. T.- 6a- 1 of the A1 level according to the classification standards of the Treasury Board and conferred upon the holder of the position a supervisory function over certain employees. Fetterly's job description used words such as "explains work procedures and sets work speed, ensures that project procedures are known and followed, instructs employees....".

The Appellant was a member of a ten person work team which included Fetterly as one of four lead hands. The Appellant alleged that some time in or about February 1981 Fetterly began annoying her with comments of a sexual nature. She gave evidence that she spoke to her union representative concerning the sexual harassment of Fetterly and as well there was evidence that three other woman employed by the Respondent had been approached sexually by Fetterly.

The Appellant testified that the verbal and physical advances of Fetterly culminated in a serious incident on October 10th, 1981. This incident, which is most appropriately described as a "sexual

assault", took place during her hours of employment at the work place and by reason of the physical actions of Fetterly. We are satisfied that the sexual advances of Fetterly resulting in sexual relations were without her consent and were advances specifically objected to by the Appellant.

The chronology of events following the incident of October 10th, 1981 as it relates to the ultimate findings of this Tribunal and indeed the question of penalty are as follows:

a) The Appellant attended at the Rape Crisis Centre and was medically examined and interviewed by Police Officers. The medical examination confirmed the allegation of sexual activity. On October 12th, 1981 the complaint of sexual harassment against Fetterly was brought to the attention of the Respondent which instigated an investigation.

b) At the commencement of the investigation, Fetterly, at the suggestion of the Respondent went to a hospital for psychological evaluation and was released on or about the 6th day of November, 1981. He was then instructed by the Respondent to stay at home and received during that time full salary.

c) It is to be noted, that following an investigation a report dated September 15th, 1981 was prepared by one, S. C. Thompson for the attention of Dr. J. J. Cartier, Director General, Ontario Region of the Respondent. On page 2 of this report there is recited the report of section supervisor R. Doak as follows:

"He was very distressed and crying. He admitted being with Miss Gervais and that some sort of sexual contact had taken place. Mr. Fetterly was very confused about what had happened and said "You don't think I raped her do you? You don't think I done that". I informed him I only wanted to hear what happened. He said again he was with her and remembered her saying no Ian, no, but the events were very cloudy. At this point he was very distressed and crying loudly saying "I guess I've lost my job and my wife will probably leave"."

d) The confidential report of September 15th, 1981 goes on to conclude as follows on page 4:

"Miss Gervais was at best imprudent to have carried on discussions of a sexually explicit nature with Mr. Fetterly, however from the statements of both employees at the time, when it came to the question of a physical sexual relationship, there was no consent given. Based on the information at hand I must conclude that Mr. Fetterly forced himself upon Miss Gervais with an intention to have sexual contact with her.

This being the case, I wish to recommend termination of his employment as the only action acceptable in the circumstances. I regret this because Mr. Fetterly has been a fully satisfactory employee for 9 1/ 2 years. However, the gravity of the office leaves me no alternative."

e) The reply to Dr. S. C. Thompson's letter of December 15th, 1981 is contained in a letter by Director General Cartier under date of January 29th, 1982 which is set out herein in it's full context:

"This is in reply to your letter of December 15, 1981 in which you recommended dismissal of the above named employee.

My reaction to the case was such that I felt that the opinion of our Legal Services was required. The attached photocopy of the December 29 letter from Mrs. Nicholson is quite explicit in stating that there are not sufficient facts to justify dismissal. Further discussions involving John Nolan, myself and/ or yourself and the Legal Services lawyers have resulted in revealing more circumstances that diminish and/ or contradict the statement of Miss S. Gervais.

In consequence, I want this investigation to be terminated. You are to withdraw from the files of the two employees all material and references to this incident and send this material to my office where it will be kept for a minimum of a year. You are to inform verbally the employees that the investigation is closed at your level and that they should resume their work and behave normally in the working place. Any such misconduct reported in the future will be dealt with severity. If either one of the two employees is dissatisfied with this procedure, the matter may be raised again in a letter addressed to me. In such an eventuality, I will make sure that they be councelled by lawyers in order to protect their rights and assure proper handling of the legal procedures. In the meantime, if outside agencies and/ or persons inquire on the case, I want you to refer such requests to my office without comments."

f) In or about February 8th, 1982 Fetterly returned to the same work environment with the appellant but in a neighbouring section. In February 1982 the Appellant complained to the Anti-discrimination Branch of the Public Service Commission and on February 25th, 1982 submitted the request for a transfer.

g) In or about August 1982 the Appellant filed a grievance relating to a request for transfer which had not been granted to that date and on September 21st, 1982 the Appellant was advised that her grievance at the first level was dismissed. Subsequently the Appellant was on sick leave from November 5th, 1982 until January 14th, 1983 and submitted an application for six months paid sick leave and filed a medical certificate in support of such application. In November 1982 she was advised that her application for sick leave had not been approved and on January 13th, 1983 the Appellant advised by letter that it was necessary for her to return to work due to monetary circumstances.

h) In or about February 21st, 1983 the Anti- discrimination Branch found that Fetterly had sexually harassed the appellant and recommended that the Appellant be transferred. On March 9th, 1983 the Appellant received a response from the grievance at the third level stating that it was finally agreed that she should be transferred. The Appellant submitted on April 19th, 1983 a medical certificate confirming that she was able to return to work as long as she was not in the same section.

i) On or about the 13th day of May, 1983 the Appellant submitted her resignation to the respondent and in June 1983 the Anti- discrimination Branch of the Public Service Commission closed its files. In addition to the allegations of sexual harassment by Fetterly the complaint of the Appellant further alleged that the work environment undermined the dignity of women. Evidence at the hearing was heard of magazines being kept in desk drawers which were marked

personal and were found to be crude and in bad taste. Further there was evidence of two posters being displayed in the work place which posters have since been removed. It is also noted that the work environment appeared to be somewhat informal with a great deal of free discussion and teasing amongst employees, some of which occurred with sexual overtones.

With respect to the Appellant's complaint regarding the work environment undermining the dignity of women, we cannot leave this point without reviewing certain aspects of the Appellant's behaviour as produced in the evidence at the hearing. The following matters have given us concern as to the strength of the aforesaid complaint:

a) The appellant displayed in the work place to co- workers a publication containing photographs of male posteriors;

b) She participated with another male employee in sexual acts in the work place;

c) It appears on all the evidence that the day prior to the serious incident of October 10th, 1981 she recounted to Fetterly an erotic dream in which he was the main figure.

Despite our concern of the somewhat ambivalent evidence of the appellant regarding the allegation of "a poisoned work environment" we are all satisfied that the serious incident of October 10th, 1981 constituted a discriminatory practice contrary to Section 7 of the Act. Despite certain discrepancies in the evidence of Miss Gervais we are unanimously persuaded that on the balance of the evidence her version of this incident is to be believed and that the evidence of Fetterly as it relates to same is evasive, replete with inaccuracies and unacceptable by any standard of credible evidence. Further we are satisfied that throughout he was the aggressor in this incident that occurred on October 10th, 1981 and his reaction and statements following the incident clearly confirm that he was aware of the serious nature of his acts and the possible consequences of same as it relates to his continued employment.

C. THE LAW - LIABILITY OF THE EMPLOYER

This brings us to the main ground of appeal which was advanced by counsel for the Appellant, namely whether the respondent, Department of Agriculture can be held liable for the harassment. We have now had the benefit of reviewing the Supreme Court of Canada decision in the case of Regina vs. Robichaud which has significantly simplified the complex issue of employer responsibility in the context of the Human Rights Act. At page 5 and 6 of the Robichaud decision LaForest, J. ennunciates the general purpose of the Act as follows:

"Since the Act is essentially concerned with the removal of discrimination, as opposed to punishing Anti- social behaviour, it follows that the motives or intentions of those who discriminate are not central to its concerns. Rather the Act is directed to addressing socially undesirable conditions quite apart from the reasons of their existence."

With respect to the entire question of employer liability he lays to rest the question of tort concepts of vicarious liability and at page 7 states as follows:

"It is clear, however, that limitation as developed under the doctrine of vicarious liability and tort cannot meaningfully be applied to the present statutory scheme. For in torts what is aimed at are activities somehow done within the confines of the job the person is engaged to do not something like sexual harassment that is not really referable to what he or she was employed to do. The purpose of the legislation is to remove certain undesirable conditions, in this context in the work place, and it would seem odd if under Section 7(a) an employer would be liable for sexual harassment engaged in by an employee in the course of hiring a person but not liable when that employee does so in the course of supervising another employee particularly an employee on probation. It would appear more sensible and more constant with the purpose of the Act to interpret the phrase "in the course of employment" as meaning work or job related especially when the phrase is prefaced by the words "directly or indirectly".

With respect to the question of remedies available under the Act, LaForest, J. states at page 10:

"Indeed if the Act is concerned with the effects of discrimination rather than its causes (or motivations), it must be admitted that only an employer can remedy undesirable effects; only an employer can provide the most important remedy - a healthy work environment. The legislative emphasis on prevention and elimination of undesirable conditions, rather than on fault, moral responsibility and punishment, argues for making the Act's carefully crafted remedies effective. It indicates that the intention of the employer is irrelevant, at least for purposes of s. 41(2). Indeed, it is significant that s. 41(3) provides for additional remedies in circumstances where the discrimination was reckless or wilful (i. e. intentional). In short, I have no doubt that if the Act is to achieve its purpose, the Commission must be empowered to strike at the heart of the problem, to prevent its recurrence and to require that steps be taken to enhance the work environment."

The Robichaud decision concludes on page 11 that the concept of liability is irrelevant and clearly resolves this issue as follows:

"Hence, I would conclude that the statute contemplates the imposition of liability on employers for all acts of their employees "in the course of employment", interpreted in the purposive fashion outlined earlier as being in some way related or associated with the employment. It is unnecessary to attach any label to this type of liability; it is purely statutory. However, it serves a purpose somewhat similar to that of vicarious liability in tort, by placing responsibility for an organization on those who control it and are in a position to take effective remedial action to remove undesirable conditions."

With respect to when conduct of an employer may be relevant LaForest, J. concludes on page 12 that such relevancy may be based in the context of assessing penalty. He makes the following observation:

"I should perhaps add that while the conduct of an employer is theoretically irrelevant to the imposition of liability in a case like this, it may nonetheless have important practical implications for the employer. Its conduct may preclude or render redundant many of the contemplated remedies. For example, an employer who responds quickly and effectively to a complaint by instituting, a scheme to remedy and prevent recurrence will not be liable to the same extent, if at

all, as an employer who fails to adopt such steps. These matters, however, go to remedial consequences, not liability."

We are all of the opinion that had the Tribunal been afforded the clear and incisive language of the Supreme Court of Canada decision in the Robichaud case it would have reached a different conclusion. Both this Review Tribunal and the Tribunal in the first instance have concluded that the acts of Fetterly amounted to a discriminatory practice contrary to Section 7 of the Act. On the authority of the Robichaud decision we quite clearly find that the decision of the Tribunal cannot stand as it relates to the liability of the Respondent for the acts of Fetterly. We accordingly set aside the conclusion of the Tribunal dismissing the complaint of the Appellant and allow the appeal holding the Respondent, Agriculture Canada liable for the conduct of Fetterly which constituted a sexual harassment of the Appellant and therefore a discriminatory practice contrary to Section 7 of the Act .

D. DAMAGES

Turning to the question of damages we are mindful of the conclusion of LaForest, J. in the Robichaud case wherein he stated that although conduct of an employer is irrelevant to the imposition of liability it may have important practical implications as it relates to the mitigation of damages.

Towards this end we make the following observations of the Respondent's conduct:

a) Despite a thorough and exhaustive investigation of this incident, by union representatives, police authorities and investigators under the direction of J. J. Cartier, the ultimate decision was to take no action at all. The basis of this decision was that the evidence as to the October 10th, 1981 incident was conflicting and that discipline action would constitute a difficult procedure as against Fetterly. He was therefore allowed to take an absence from employment with full pay and ultimately returned to the same work environment albeit an area where contact with the Appellant would not occur as easily.

b) The grievances of the Appellant required a long and labourious review process during a period of time when she was undergoing severe physical and emotional stress and receiving medical treatment for same. The request for transfer was the ultimate in ineffective bureaucracy. We agree with the Tribunal below that it is difficult to believe that the Department was taking every reasonable step to facilitate the transfer.

We are unanimously of the conclusion that the actions of the Respondent following the incident of October 10th, 1981 where ineffective and indecisive. In short the approach appears to be that the overall plan of action should be to take no action at all. We can only conclude that the letter of January 29th, 1982 endorsed by Mr. J. J. Cartier, reflected in general the attitude of the Respondent towards this problem, despite the very clear recommendation of Dr. S. C. Thompson under date of December 15th, 1981.

With respect to the quantum and scope of damages that can be awarded under the Human Rights Act, the relevant sections are as follows:

41(2) If, at the conclusion of its inquiry, a Tribunal finds that the complaint to which the inquiry relates is substantiated, subject to subsection (4) and Section 42, it may make an order against the person found to be engaging or to have engaged in the discriminatory practice and include In such order any of the following terms that it considers appropriate:

(a) that such person cease such discriminatory practice and, in order to prevent the same or a similar practice from occurring in the future, take measures including (i) adoption of a special program, plan or arrangement referred to in subsection 15(1), or (ii) the making of an application for approval and the implementing of a plan pursuant to section 15.1, in consultation with the Commission on the general purposes of those measures;

(b) that such person make available to the victim of the discriminatory practice on the first reasonable occasion such rights, opportunities or privileges as, in the opinion of the Tribunal , are being or were denied the victim as a result of the practice;

(c) that such person compensate the victim, as the Tribunal may consider proper, for any or all of the wages that the victim was deprived of and any expenses incurred by the victim as a result of the discriminatory practice; and (d) that such person compensate the victim, as the Tribunal may consider proper, for any or all additional cost of obtaining alternative goods, services, facilities or accommodation and any expenses incurred by the victim as a result of the discriminatory practice.

(3) in addition to any order that the Tribunal may make pursuant to subsection (2), if the Tribunal finds that

(a) a person is engaging or has engaged in a discriminatory practice wilfully or recklessly, or

(b) the victim of a discriminatory practice has suffered in respect of feelings or self- respect as a result of the practice,

the Tribunal may order the person to pay such compensation to the victim, not exceeding five thousand dollars, as the Tribunal may determine.

The question of damages was fully argued before the Tribunal by counsel at the hearing and these submissions are contained in Volume 8 of the Transcripts of Evidence provided to this Review Tribunal. It would appear to be beyond dispute that an employment wage loss occurred between the period of November 1982 and May 1983 when the appellant was absent from employment by reason of her physician's recommendation that she take time off of work. At the time of this recommendation the appellant had no sick leave credits and accordingly took her leave without pay until May 1983 when she resigned.

The calculations of wage loss during the aforesaid period amount to $8,567.28.

At the opening of this appeal we requested and were provided a letter by Ms. Small to the effect that her client Sheryl Gervais was relying upon counsel for the Human Rights Commission to advance her arguments and she had instructions and had an agreement with the Human Rights

Commission to be bound by the ultimate outcome of these proceedings both with respect to the question of liability and the question of damages. We reconvened this appeal following the decision of the Supreme Court of Canada in Robichaud and received further submissions not only on the question of liability but further on the question of damages. We are satisfied that the wage loss figure would be an appropriate award herein under Section 41(2)(c).

We are also of the opinion that the Appellant was a victim of the discriminatory practice we have so found and did in fact suffer in respect of feelings or self- respect as a result of the said practice. We find accordingly that under this head of damages an appropriate amount would be $2,500.00.

In conclusion there will therefore be an Order as follows:

a) That an appeal be allowed and the decision of the Tribunal dated September 3rd, 1986 be set aside and in its place a finding that the Respondent is liable for the discriminatory acts of Fetterly pursuant to Section 7 of the Act.

b) The appellant shall receive for loss of wages the sum of $8,567.28; c) The appellant shall receive the sum of $2,500.00 as suffered in respect to feelings or self- respect by reason of the discriminatory practice.

DATED at Sarnia, Ontario this 19th day of April, 1988.

Carl E. Fleck, Q. C.

Kathleen Jordan

Peter Bortolussi