TD 4/ 86

Decision rendered September 3, 1986

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 Tribunal Appointed Under Section 39 of the Canadian Human Rights Act.

BETWEEN:

SHERYL GERVAIS, COMPLAINANT,

- and -

AGRICULTURE CANADA, RESPONDENT.

TRIBUNAL: ROBERT W. KERR

DECISION OF TRIBUNAL

APPEARANCES: RUSSELL JURIANSZ Counsel for the Canadian Human Rights Commission
ALLISON SMALL Counsel for the Complainant
R. P. HYNES and M. NICHOLSON Counsel for the Respondent

DATES OF HEARING: September 3, 4, 5, 1985 December 9, 10, 1985 May 20, 21, 1986 June 30, 1986

EXPLANATORY NOTE RESPECTING PROCEEDINGS

I was appointed as the Tribunal in this matter originally on May 8, 1985. After the initial set of hearings at which some of the most important evidence had been heard, the Federal Court of Appeal issued its decision in MacBain v. Lederman et al. (1985), 6 C. H. R. R. D/ 3064. This raised the possibility that any Tribunal appointed prior to the proclamation of amendments to the Canadian Human Rights Act on October 15, 1985 was subject to challenge for reasonable apprehension of bias. Since the application of the MacBain decision to other Tribunal proceedings had already been referred to the Federal Court of Appeal by another Tribunal, the matter was adjourned on joint application of the parties pending the decision on that reference.

The hearing was later scheduled to resume, but in the meantime further judicial proceedings involving other cases raised uncertainty respecting the apprehension of bias question. In order, therefore, to remove any cloud from the jurisdiction of the Tribunal, the following occurred with the consent of all parties. I resigned as the Tribunal, appointment of a Tribunal was requested by the Canadian Human Rights Commission, and the President of the Human Rights Tribunal Panel reappointed me as the Tribunal on May 8, 1986.

At the opening of the hearing following the latter appointment, I accepted a joint application of the parties to adopt the record of the proceedings that had taken place under my prior appointment as Tribunal into this matter. The hearing dates set out reflect those proceedings as well as the hearing after my appointment of May 8, 1986.

GENERAL REVIEW OF THE FACTS

This case involves a complaint by Sheryl Gervais against Agriculture Canada of discrimination in employment on the ground of sex. Specifically the complainant alleges sexual harassment in the form of a work environment which undermined the dignity of women, and in the form of sexual advances by a fellow employee, Ian Fetterly, which culminated in a sexual assault.

Ms. Gervais began her employment with the Department in July, 1980 as a temporary employee, but she later received a continuing appointment. She was employed as a general worker in the poultry section of the Department's Greenbank Farm in Ottawa. According to her testimony, sex magazines and posters were to be seen in the workplace and sexual bantering occurred. The workforce was predominantly male which put pressure on female employees to accept this atmosphere. Witnesses for the Department disputed this view of the working environment.

The concern of Ms. Gervais centered in particular on the conduct of one of the lead hands, Ian Fetterly. She testified that he had cornered her physically on some occasions, although it does not appear that prior to October 10, 1981 this physical contact had been carried very far in the workplace. On that date, however, an incident occurred in which Mr. Fetterly had sexual intercourse with Ms. Gervais at the workplace during working hours.

Ms. Gervais' position is that she did not consent to intercourse with Mr. Fetterly and that she was, therefore, subjected to a sexual assault. Mr. Fetterly testified that Ms. Gervais was an active consenting participant in the incident. To the extent that it is necessary, I shall deal with this conflict later.

Following the incident, Ms. Gervais remained in her job while Mr. Fetterly was put on leave with pay while the matter was investigated. After a period of sick leave and vacation, this leave took the form of administrative leave which is a form of paid leave available at the employer's discretion.

Following the investigation of the incident, it was the decision of Dr. J. J. Cartier, Director General of the Department's Ontario Region, based on the advice of legal counsel, that there was not sufficient evidence to support disciplinary action against Mr. Fetterly. He decided that both Ms. Gervais and Mr. Fetterly should receive verbal counselling, which is defined as being a non-disciplinary measure by the Department's disciplinary code. Mr. Fetterly returned to work at this stage, but was assigned to work at a different location on the Greenbank Farm and warned to avoid contact with Ms. Gervais. This took place at the end of January, 1982.

Ms. Gervais was not satisfied with this action by the employer. She initiated a human rights complaint with the Anti- Discrimination Directorate of the Public Service Commission in February, 1982. During the course of proceedings with respect to this complaint, she began to

seek a transfer which would remove her from the scene of the incident. The Directorate supported this, but did not formally make a recommendation on Ms. Gervais' complaint until February, 1983. In the meantime, Ms. Gervais also launched a grievance over the failure of the Department to provide her with a transfer. This grievance was rejected on the basis that the Department was acting in accordance with proper procedures in dealing with the transfer request.

Ms. Gervais experienced growing feelings of frustration over what appeared to her as the lack of any action by the Department to redress the incident of October, 1981 or resolve the situation. This came to a head by the end of October, 1982. At that time she decided she could no longer continue working at the Greenbank Farm and sought paid leave. She obtained a medical certificate to the effect that she was unable to work. Sick leave was denied because she had used up her sick leave entitlement. She was given leave without pay. In mid- November she also filed the present complaint with the Canadian Human Rights Commission, although the Commission postponed taking any action while the Anti- Discrimination Directorate was still dealing with the earlier complaint to it. During the ensuing period, Ms. Gervais obtained psychological counselling.

It appears that Ms. Gervais returned to work for portions of January and February, 1983 for financial reasons. The Anti- Discrimination Directorate recommended in February that Ms. Gervais be given a transfer and efforts by the Department to accomplish this appear to have been intensified somewhat as a result. However, no firm proposal for transfer to an equivalent position had been made to Ms. Gervais prior to May 13, 1983. On that date she resigned to pursue other employment. The Department appears to have been about ready to make a suitable transfer proposal at this time, although there may be some question whether this transfer was subject to competition by others, as had been the case with one earlier transfer proposal.

LEGAL ISSUES

This case raises two questions of law which have been addressed for future cases by amendments to the legislation. The first is whether sexual harassment constitutes sex discrimination under the Canadian Human Rights Act, S. C. 1976- 77, c. 33. It is now clear that sexual harassment is a discriminatory practice by virtue of section 13.1 of the Act as enacted by S. O. 1980- 81- 82- 83, c. 143, s. 7. However, that amendment does not apply to this case.

Secondly, there is a question as to whether an employer is vicariously liable for acts of sexual harassment by its employees. This is now dealt with section 48(5)-(6), as enacted by S. C. 1980- 81- 82- 83, c. 143, s. 23, which similarly does not apply to this case.

HARASSMENT ISSUE

Other tribunals under both the federal Act and similar provincial legislation have generally held that sexual harassment constitutes sex discrimination: Robichaud et al. v. Brennan et al. (1982), 3 C. H. R. R. D/ 977 (Can. H. R. Tribunal), Kotyk et al. v. Canadian Employment and Immigration Commission et al. (1983), 4 C. H. R. R. D/ 1416 (Can. H. R. Tribunal), Bell et al. v. Ladas et al. (1980), 1 C. H. R. R. D/ 155 (Ont. Bd. of Inquiry). This conclusion is accepted by all members of the Federal Court of Appeal interpreting the federal Act in R. v. Robichaud (1985), 6 C. H. R.

R. D/ 2695. Consequently, I conclude that sexual harassment constituted a form of sex discrimination and was therefore a discriminatory practice under other sections of the Act prior to the enactment of section 13.1.

This brings me to the factual issue of whether sexual harassment actually occurred in this case. On the whole of the evidence, I am not persuaded that the elements of the working environment, apart from the presence of Mr. Fetterly, constituted sexual harassment. In order for harassment to occur, there must be a victim who is troubled by the alleged harassment. Moreover, for the harassment to be related to employment, the victim must at least perceive it as involving the employment, and not as a merely personal or private matter. The evidence indicates that no one, including the complainant, seriously viewed the presence of sex magazines or posters in the workplace, to the extent any such presence existed, or the uttering of sexual banter, to the extent it may have occurred, as a troublesome matter affecting the employment until the course of the various proceedings culminating in the complaint before me was underway. No one appears to have complained of such matters previously.

It is, of course, possible that someone was offended, but was fearful of complaining. However, the only real evidence that the working environment was offensive to women was that of Ms. Gervais. Her testimony itself supports the conclusion that up until the incident of October 10, 1981 she viewed such matters as something to be dealt with on a personal and private level, rather than as an employment matter. Moreover, Ms. Gervais herself elected to participate by sexual banter of her own and by bringing to work a book featuring pictures of clothed male posteriors. While the evidence indicates this book was at most mildly suggestive, Ms. Gervais' involvement tends to refute any inference that she was really offended by posters, magazines and banter prior to the October 10 incident. I conclude that the concern Ms. Gervais expressed about the working environment as it existed prior to that incident was influenced by the trauma resulting from the incident, and is not a true reflection of how the environment impacted upon her prior to the incident.

The physical cornering by Mr. Fetterly that Ms. Gervais experienced prior to the October 10 incident comes closer to constituting sexual harassment. Moreover, there is evidence that Ms. Gervais at least raised this with her union representative, Jennifer Spratt, although it appears that she declined to have Ms. Spratt take the matter up with the employer's representatives. There is conflicting evidence as to whether Ms. Gervais herself complained of Mr. Fetterly's conduct to their mututal supervisor, Roger Doak. I think Ms. Gervais probably did raise the matter with Mr. Doak, but consistently with the manner in which she raised it with Ms. Spratt, I conclude Ms. Gervais left the impression she intended to deal with the problem herself. In other words, she was again inclined to treat this as a personal matter, rather than an employment matter, up until the incident of October 10. In the final analysis the physical cornering by Mr. Fetterly is so overshadowed by the incident itself that I think it is unnecessary to decide whether the cornering by itself amounted to harassment. In so far as the cornering was prelude to the October 10 incident, I will return to it when dealing with the question of whether the Department is liable for that incident.

The incident occurred shortly before lunchtime on October 10. This was the Saturday of the Thanksgiving Day weekend so that the farm was staffed by a skeleton crew to attend to the needs

of the livestock. Ms. Gervais and Mr. Fetterly were not assigned to work in the same buildings, although it appears that some contact between them was to be expected since Ms. Gervais was dependent on Mr. Fetterly for transportation between two buildings that were some distance apart. Mr. Fetterly seems to have visited the buildings where Ms. Gervais was working in the morning somewhat frequently, and to have brought up the topic of a possible sexual relationship. He was perhaps encouraged in this by the fact that Ms. Gervais had on the previous day told him about a dream of hers involving the two of them in such a relationship.

On his final visit before lunch to the building where Ms. Gervais was working, it seems clear that Mr. Fetterly pressed his interest in a sexual relationship rather agressively. At this point the evidence becomes not only conflicting, but also unclear on the part of both participants. Ms. Gervais' testimony was definite that everything that followed was Mr. Fetterly's doing and that she was unable to resist. However, she was not able to describe in detail what did in fact happen. Mr. Fetterly, on the other hand, testified that Ms. Gervais actively assisted, although he too could not relate in detail what happened. It does seem clear that Ms. Gervais did say "No, Ian, no" at least once, if not repeatedly. It also seems clear that the incident included a brief act of actual sexual intercourse.

Following the incident, Ms. Gervais' immediate intention was to say nothing. By mid- afternoon she decided to treat it more seriously. She informed her boy- friend who was also a co- worker. They consulted with a rape crisis center and went to a hospital where Ms. Gervais was examined and the police questioned her. The police raised the question of rape charges with her, but Ms. Gervais decided that she did not wish to lay charges.

While there are discrepancies in Ms. Gervais' accounts of the events over the course of the investigation by the Department and subsequent proceedings, I am persuaded that these discrepancies are all explicable by the ordinary defects of memory. Her basic account has remained consistent throughout. Mr. Fetterly's testimony on the other hand lacks basic credibility because his story has changed fundamentally over the same course of proceedings. I conclude that Mr. Fetterly was in fact the agressor in the incident and that Ms. Gervais did not consent. While it might be thought that Ms. Gervais should have more actively resisted Mr. Fetterly if she was not consenting, I am satisfied that it was in character for her to remain physically passive. The evidence indicates that she is quite unsure of herself in many matters of human relationship. I think she remained largely passive because she simply did not know what to do. It follows that Mr. Fetterly's action constituted sexual harassment of Ms. Gervais. This was a discriminatory practice contrary to section 7 of the Act. I would note that sexual harassment does not require anything in the nature of criminal sexual conduct so that I am making no finding with respect to the character of Mr. Fetterly's conduct for any purpose other than the Human Rights Act.

LIABILITY OF THE EMPLOYER

This brings me to the question of whether the Department can be held liable for this harassment. The present law on this issue must be determined in accordance with the decision of the Federal Court of Appeal in R. v. Robichaud (1985), 6 C. H. R. R. D/ 2695. Although, if the question were open to me to decide, I should find the dissent of Mr. Justice MacGuigan to be far more

appealing to reason, I am bound by the majority decision which, on this issue, is stated in the following passage from the decision of Chief Justice Thurlow, at D/ 2703:

In my opinion, the decision of the Review Tribunal is not sustainable and should not be allowed to stand.

First, it is based on the concept that under the Canadian Human Rights legislation applicable to this case the Crown is strictly liable for the actions of its supervisor, Brennan. In my opinion there is no basis in law for applying such a concept. The appliable law is that established by the Act 10 and there is no federal common law or federal civil law to supply such a concept in its interpretation. What the statute does is to declare certain types of discrimination to be illegal and to provide in section 4 that such discrimination may be the subject of a complaint under Part III of the Act and that "anyone found to be engaging or to have engaged in a discriminatory practice may be made subject to an order as provided in sections 41 and 42. 11

To be subject to the making of an order under this provision a person must be engaging or must have engaged in a prohibited discriminatory practice. In my opinion the section means that if a person has personally engaged in a discriminatory practice or if someone else does it for him on his instructions he may be subjected to an order. But nothing in the wording purports to impose on employers an obligation to prevent or to take effective measures to prevent employees from engaging in discriminatory practices for their own ends. And I see nothing in the section or elsewhere in the statute to say that a person is to be held vicariously or absolutely or strictly liable in accordance with common law tort or criminal law principles for discrimination engaged in by someone else, whether an employee or not. Compare Re Nelson et al. v. Byron Price & Associates Ltd. 12

It appears to me that under the applicable legislation in the case of a corporation the authorization that will attract liability must come from the director level. In the case of the Crown, I see no basis for concluding that the conduct of public servants or officials lower than that of the public official or body under whose authority and management the public operation is carried on, in this case the Minister of National Defence or The Treasury Board, would engage the liability of the Crown. Nothing in the findings of either Tribunal or in the record suggests that Brennan had authority from such sources to harass Mrs. Robichaud. Nor is there any basis for thinking that anyone in such a position or indeed in any position senior to that of Brennan authorized or even knowingly overlooked, condoned, adopted or ratified Brennan's actions in harassing Mrs. Robichaud.

[Footnotes omitted.] The difficulty I have is in interpreting the real meaning of this passage. Read literally it would imply that only the person who actually commits a discriminatory practice is liable under the Human Rights Act. Although the decision involves a case of sexual harassment, the principles. of liability which the Court is referring to would seem equally to apply to all aspects of the Act. Thus, a refusal of service by a government office to a person because of colour would no more attract liability to the Crown than would an act of sexual harassment unless the relevant principles imposing vicarious or indirect liability are found in the Act itself. Prior to the enactment of section 48(5)-(6), however, there were no such principles in the Act.

The implications of this interpretation are such that I cannot believe that this is what the Federal Court of Appeal intended. Since the Court indicates that only persons at the Ministerial level can bind the Crown, this would virtually nullify the provision of section 63(1) that the Act is binding on the Crown. Since we may anticipate that a Minister of the Crown is rarely likely to give authority for discriminatory practices, the Crown would be unlikely ever to be liable for a violation of the Act on this interpretation of the Federal Court of Appeal's decision. Of course, it may be argued that the Act is made binding on the Crown merely to preclude lesser officials from claiming the benefit of Crown immunity. However, if the acts of lesser officials are acts of the Crown for purposes of Crown immunity, one wonders why logically they would not also be acts of the Crown for the purposes of Crown liability. In any event, it seems unlikely that Parliament intended, when it made the Act binding on the Crown, to add the caveat "but only, of course, if a Minister has personally authorized the discriminatory practice".

I am convinced the Court had some narrower principle in mind than complete exclusion of indirect liability by the Crown for the discriminatory practices of its lesser officials. I think the key is found in the reference to "discriminatory practices for their own ends". The Court was recognizing that the discriminatory conduct, namely sexual harassment, involved in that case was, and would be perceived by any reasonable person to be, for the personal benefit of the individual involved and not under any colour of authority. In these circumstances, it was necessary in the Court's view to find some basis for a higher authorization to make the Crown liable. Apart from actual higher authorization, which is unlikely to arise, the Court also notes the absence of any other basis for charging higher authority with responsibility since there was no evidence that such authority had "knowingly overlooked, condoned, adopted or ratified" the sexual harassment.

In other words, where discriminatory practices are such that they would be seen to be serving the personal ends of the individual actor, rather than the ends of the party the actor represents, that party is not liable unless, through someone higher in the chain of command, it authorized, knowingly overlooked, condoned, adopted or ratified the discriminatory practice. Because of the personal nature of many incidents of sexual harassment, this principle would apply particularly to this type of discriminatory practice and would be less likely to apply in other contexts where business, rather than personal, motivation is likely to be perceived, as for example where someone is refused service because of colour.

In light of the extent to which discriminatory practices are now condemned in our society, the question does arise as to whether any such practice can reasonably be perceived as having a business purpose, rather than being merely an act of personal prejudice. It is this which makes the rationale of the Federal Court of Appeal rather unappealing. It could lead again in the direction of virtually nullifying the effect of the Human Rights Act by denying institutional responsibility for any discriminatory practices unless those practices are clearly institutional policies. It may also be noted that, although the Federal Court of Appeal rejects any reference to tort or criminal principles of vicarious or strict liability, its approach is analogous to the "frolic of one's own" limitation under vicarious liability in tort law.

Since the sexual harassment I have found to occur in this case was also for the personal gratification of the actor, that is, Mr. Fetterly, the holding of the Federal Court of Appeal is, of

course, directly relevant to this case. I must consider, therefore, whether there was any authorization, overlooking, condoning, adoption or ratification of Mr. Fetterly's conduct.

Clearly there was no authorization. In the absence of any firm complaint by Ms. Gervais that the conduct of Mr. Fetterly prior to the October 10 incident, such as the physicial cornering, was getting out of hand, the problem was not knowingly overlooked.

The question of whether the harassment was condoned, adopted or ratified is more difficult. It was argued before me on behalf of the Canadian Human Rights Commission that, by its failure to take further disciplinary action against Mr. Fetterly, the Department had condoned, adopted or ratified the sexual harassment of Ms. Gervais. While there is no doubt some difference between condoning, adopting and ratifying, I do not propose to explore that question here. There is obviously an overlap among these terms in that all involve an acceptance of whatever is being condoned, adopted or ratified. Since I find no such element of acceptance in this case, there is no need to explore the other elements involved.

At first glance, the argument that the Department did in fact accept Mr. Fetterly's conduct by returning him to work without disciplinary action has a certain attraction. Since even Mr. Fetterly admitted at the outset that he was engaged in some sort of a sexual encounter with Ms. Gervais, although he denied intercourse, the Department had clear grounds for some disciplinary action against him. However, I am satisfied by the Department's explanation as to why no action was taken.

The case indeed exemplifies the major drawback to reliance upon an employer to resolve disputes that may arise between employees in the workplace. While internal resolution of such disputes, if it is possible, can improve relations between everyone involved, an employer ultimately lacks the authority to resolve such a dispute by adjudication. The employer has a contractual relationship with each employee. Unless those contractual relationships mutually confer on the employer the authority to resolve disputes between the employees, which is rarely the case, the separate obligations of the employer to each employer can easily conflict with any action that might serve to resolve the dispute between the employees.

In this case, the Department owed both Ms. Gervais and Mr. Fetterly an obligation not to discipline them without cause. The Department was faced with conflicting stories from the two employees and it had no authority to finally decide whom to believe. If it accepted Mr. Fetterly's version, both employees should probably have been subjected to some discipline less than dismissal. If it accepted Ms. Gervais' version, on the other hand, Mr. Fetterly probably deserved dismissal and Ms. Gervais deserved no discipline at all. While discipline short of dismissal against Mr. Fetterly would at the least seem justified on either version, this would have to be based on Mr. Fetterly's version. On that basis, fairness would require similar discipline of Ms. Gervais and failure to impose such discipline would support a grievance by Mr. Fetterly. Any significant differential in treatment was justified only under Ms. Gervais' version, but under that version Ms. Gervais would deserve no discipline at all. Thus, if the Department had disciplined Mr. Fetterly alone, it ran the risk in grievance proceedings that Mr. Fetterly would be believed and discipline would be perceived as unfair since Ms. Gervais had not been disciplined. On the other hand, if it disciplined both, it ran the risk that Ms. Gervais would be believed and its

discipline of her would be perceived as grossly unfair. While it could conceivably have disciplined both to the maximum indicated and left the matter to be adjudicated by arbitrators, this would be an expensive process and not conducive to good labour relations. In other words, the Department faced a virtual no- win situation.

The decision to take no disciplinary action was entirely reasonable in the circumstances based on labour relations considerations. I am persuaded that the decision was in fact made on this basis and does not represent any acceptance of Mr. Fetterly's conduct. On the contrary, by reassigning Mr. Fetterly and warning about any similar conduct in the future, the Department made it as clear as it could that this conduct was unacceptable without risking the legal complications that disciplinary action would have involved.

I would also note that, even if the decision of the Federal Court of Appeal in R. v. Robichaud is wrong and the Department is subject to vicarious liability on a broader basis, it does not follow that liability should attach to the Department for the conduct of Mr. Fetterly. Unless the standard is one of absolute liability of an employer for discriminatory conduct of an employee, it is doubtful whether liability would attach the Department in this case. On the basis of the information available to the Department, or even to Ms. Gervais herself, prior to October 10, it is doubtful whether the incident of that date was foreseeable. Thus, it is arguable that there was no duty on the employer with respect to this incident. While Mr. Fetterly had some supervisory responsibility, his position was clearly that of a lead hand, not someone with managerial responsibility. Thus, if the correct standard is strict liability for the conduct of supervisors adopted by the Review Tribunal in Robichaud et al. v. Brennan et al. (1983), 4 C. H. R. R. D/ 1272, the Department might not be subject to liability in relation to Mr. Fetterly. This would depend on how far the strict liability standard were carried.

On the facts of this case, Ms. Gervais' testimony indicates that she did not view Mr. Fetterly as having managerial authority. She does indicate that fear for her job was involved in her initial decision not to report the incident, but this appears to derive from her general lack of self-assurance and the fact that Mr. Fetterly had far more seniority than Ms. Gervais, and not from any authority he had over her. Thus, the argument for making the Department liable on the basis of strict liability for the actions of supervisors is not a strong one.

On the other hand, under the statutory standard which now exists in section 48(5)-(6) of the Act it is likely that prima facie liability would attach to the employer. Liability under section 48(5) is based on the "course of employment". This would open the possibility of the "frolic of one's own" limitation of vicarious liability. However, it is more likely that, where the discriminatory practice occurred at the workplace during working hours, the correct approach would be to hold the employer responsible, subject to section 48(6) which involves consideration of whether the employer exercised due diligence to prevent the discriminatory practice and to mitigate the effects. Indeed, if this is not the approach, Mr. Fetterly himself would not be liable for sexual harassment in this case since section 7 of the Act refers only to discriminatory practices in the "course of employment", and it is arguable whether even section 13.1 would cover this type of conduct in future cases. In any event, section 48(5)-(6) was not in effect when the events in this case occurred.

If there was evidence of a discriminatory practice for which the Department might be responsible in this case, it was not in the circumstances leading up to and including the October 10 incident or the Department's subsequent investigation and disposition with respect to that incident. If there was such evidence, it was in the subsequent dealings with Ms. Gervais after the Department determined it was unable to discipline Mr. Fetterly. Whether or not Ms. Gervais had consented to Mr. Fetterly's advances on October 10, she made it quite clear to the Department that she did not wish to be subjected to any recurrence. While the reassignment of Mr. Fetterly avoided direct contact between them, the fact of the matter is that he was still employed in the same facility. Mr. Fetterly was absent from the scene for a year beginning in May, 1982 for language training, but he was expected to return thereafter.

It was quite understandable that this would be an uncomfortable situation for Ms. Gervais. I think there was a direct connection between this and the subsequent need which Ms. Gervais experienced to remove herself from this employment and to take psychological counselling. It was this loss of employment which constituted the direct pecuniary loss claimed by Ms. Gervais in this case.

John Nolan of the Department's Personnel Branch testified to special efforts that were made to meet Ms. Gervais' request for a transfer. The documentary record, however, suggests that the process was a highly bureaucratic one. The latter may be a better indication of how the handling of the transfer matter would have appeared to Ms. Gervais. Although Ms. Gervais was uncooperative with some of the bureaucratic steps being followed, she was fearful that the Department was looking for an excuse to get rid of her. Much was made of the fact that she refused to submit to a medical examination which was being requested because she was on leave without pay for medical reasons. However, it is hard to believe the Department was not aware the medical reasons related specifically to the trauma Ms. Gervais was experiencing in working at the Greenbank Farm location which was the very reason for seeking the transfer. There does not appear to have been any real effort to allay Ms. Gervais' concerns about the process.

I find it hard to believe that the Department was taking every reasonable step on its part to facilitate a transfer. It is arguable that the Department had some duty to accommodate Ms. Gervais in light of the. discomfort she was now known to be experiencing following the October 10 incident and that, given the options available to an employer like the Department, it was sexual harassment not to offer her a prompt transfer to another facility. However, I do not have all the relevant information to assess the reasonableness of the Department's conduct in this regard. One would want to know, for example, whether the transfer process was strictly governed by legal requirements and, if it was not so governed, whether there were convincing policy reasons for not proceeding more expeditiously. On the other hand, the fact that the worst period of Ms. Gervais' trauma appears to have occurred while Mr. Fetterly was away for language training raises some question as to the causal connection between the harassment she suffered and the request for a transfer. The fact that she was also applying for positions at the Greenbank Farm raises some questions about the importance of the transfer in relation to the trauma. One would want further explanation of these factors. One would also want to hear argument on whether indeed the Department had an oligation to accommodate Ms. Gervais by expediting a transfer in these circumstances. The Department's handling of Ms. Gervais' request

for a transfer was not referred to in the complaint of Ms. Gervais to the Canadian Human Rights Commission so that, in any event, I have no jurisdiction to rule on it in these proceedings.

Although I have found that Ms. Gervais was subjected to sexual harassment by Mr. Fetterly, the Department did not authorize, knowingly overlook, condone, adopt or ratify tht conduct. Consequently, the Department is not liable for this conduct and I am unable to award Ms. Gervais any remedy in this proceeding. Only the Department was made a party to this complaint.

At the commencement of the proceedings before me, an application was made to add Mr. Fetterly as a party. Mr. Fetterly had been served with notice of the proceedings, but did not appear. His later appearance as a witness occurred only after he was persuaded to testify by counsel for the Department. Since it was obvious from the complaint that Mr. Fetterly's reputation might be affected by these proceedings, it seemed only reasonable to interpret the lack of any appearance on his behalf after notice as indicating that he had no wish to be a party to these proceedings. I ruled that, in the absence of a willingness on the part of a person to be made a party, it was not appropriate to add a person as a party at the Tribunal stage for the purpose of making that person potentially liable to an order by the Tribunal, unless there was good reason for not taking steps to add the person at an earlier stage.

It is my view that the most appropriate stage at which to introduce a party for the purpose of making them liable to an order is at the complaint stage. This permits the Human Rights Commission which receives the complaint to consider whether it is timely to press the complaint against that party and ensures the party whatever advantage there may be in negotiating with the Commission with respect to the complaint. When the hearing commenced before me, almost four years had elapsed since the occurrence of the events giving rise to the complaint. Prima facie this was an excessive delay in initiating a complaint against an individual. Section 33(b)(iv) of the Act charges the Commission, not a Tribunal, with determining whether a complaint should be initiated more than a year after the events. While the complaint in this case had already been initiated, the effect of adding a party is the same from the perspective of that party as the initiation of a complaint.

The only reason provided for the fact that Mr. Fetterly had not been added as a party earlier was that it was the Commission policy not to proceed against individual employees. This was based in part on legal advice that proceeding against individuals raised constitutional problems and was unnecessary because of the vicarious liability of the employer. It was also based on the view that enforcing institutional, rather than individual, liability was more conducive to the objectives of the Human Rights Act. The legal basis for this policy later had proved erroneous, rendering proceedings against individual employees not only possible, but also perhaps necessary in the absence of vicarious liability. In my view this was not a sufficient reason to offset the desireability that persons be made parties at the earliest practicable stage in proceedings. Moreover, it raised the further possibility of prejudice to persons who might have relied on the Commission's policy not to proceed against individual employees. Consequently, I declined to add Mr. Fetterly as a party, and no order against him is possible in these proceedings.

CONCLUSION

Hopefully, Ms. Gervais will find some consolation in my finding which verifies her version of the incident of October 10, 1981. In so far as her case has presented a problem in attaching responsibility to the employer for the wrong she suffered, perhaps she can also take some consolation in the fact that, for persons who find themselves in similar situations in the future, section 48(5)-(6) of the Act will provide a better framework for establishing the responsibility of the employer than does the law which bound me in this case.

In summary, although the evidence before me shows that Ms. Gervais was sexually harassed by Mr. Fetterly, I am bound by the ruling of the Federal Court of Appeal in R. v. Robichaud to conclude that Agriculture Canada is not liable for this harassment. Consequently, the complaint against Agriculture Canada is not substantiated and is dismissed.

DATED the 3rd day of September, 1986.

Robert W. Kerr Tribunal