FAIR PRACTICE

SC CIV 76 001

DISCRIMINATION

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

GIANT YELLOWKNIFE MINES LIMITED,

Appellant

and

MARILYN SIMONSON, and
COMMISSIONER OF THE
NORTHWEST TERRITORIES,

Respondents

REASONS FOR JUDGMENT OF THE
HONOURABLE MR. JUSTICE W. G. MORROW

This is an appeal brought on before me pursuant to Section 8 of the *Fair Practices Ordinance*, R.O.N.W.T. 1974, C. F-2. The appeal seeks to set aside an Order made by the Commissioner of the Northwest Territories on November 10, 1975 which order directed that the appellant pay to the respondent an amount based on cost of living allowance and value of fuel oil which she would have received during the period April 1 to September 27, 1974 had these allowances been accorded to her. In the proceedings before me the appeal was by way of a trial *de novo* as required by Section 8(4) *supra*. The respondent Mrs. Simonson was represented by counsel, as was the appellant, but the Commissioner was not represented nor did he take any part. In addition to an agreed statement of facts filed, several witnesses were called to testify.

It is admitted that Mrs. Simonson is married, has two children and at all times material was living with her husband in

Yellowknife. Her husband is a carpenter employed by Poole Construction Limited and earns approximately $15,140.80 gross annually. He receives no subsidies of any kind from his employer. Mrs. Simonson was employed as a personnel secretary by the Appellant and at the date of termination was earning $685.00 monthly. She was classified as "staff" not "hourly rated" and hence was not a member of the local mine union. While there had been an earlier period of employment, the present appeal is only concerned with the period from April 1st, 1974 up to September 27, 1974.

Persons placed in the category of staff employees were entitled to Cost of Living and Oil Allowances as set forth in Memoranda posted by the Company from time to time. It should be observed that in Yellowknife, where the cost of living is reported by government surveys to be some thirty percent higher than in the City of Edmonton, larger employers, both Government and private enterprise, have found it expedient to pay special allowances in order to attract employees to the area. The Memorandum in effect during the period of the present appeal was to the following effect:

> "1. All staff maintaining residences for themselves and immediate dependents in Yellowknife, except those in Company subsidized apartments, will qualify for 90 gallons of fuel oil per month for each of the months of October to April inclusive.
>
> 2. For those maintaining residences for themselves and immediate dependents, but not in company housing or apartments, the cost-of-living bonus will be increased from 80 cents per shift worked to $2.50 per shift worked."

A second Memorandum aimed at avoiding duplication of benefits was also in effect:

> "When one of our employees lives with his (or her) spouse in a government dwelling supplied to that spouse because of his (or her) employment by the government, our employee does not qualify for cost of living bonus or oil subsidy because he (or she) is not maintaining a residence. The same would apply when the employee's spouse is supplied with any subsidized accommodation due to his (or her) employment."

While the rates are higher now, the qualifying tests as published remain the same as set forth above.

The witnesses who testified outlined the procedures actually followed when a person was employed.

An employment record card is signed by the new employee. It is prepared by the personnel secretary who was at the time Mrs. Simonson herself. This card, in addition to showing place of birth, social security number, and other data has a section which purports to show marital status. There are three categories here: Single with or without dependents; married with or without dependents; and married with or without children. In the Simonson case she listed herself as married with two children. She apparently did not claim children as dependents to ensure single status for income tax purposes. Her evidence was that she followed the practice in filling out this form as she had been shown by her predecessor at work. According to Mrs. Simonson it was not unusual

for applicants, male or female, to not show dependents and for the same reason as she gives. If an employee claims dependents by the above form or takes the position he or she is entitled to the special allowances, a form is then filled out claiming same. This form is submitted to the personnel officer who must approve it before the allowances become payable. It is at this juncture that the practice varies as between male and female applicants or employees.

Mr. Bruce Nikiforow, paymaster for four years at Giant, described the procedure, in the absence of the personnel officer B. Rivet, who is now retired and has moved away from Yellowknife. The application for benefits would go to the personnel officer. If the card shows a man to be married he will receive the benefits. As this witness quite frankly said, the personnel officer would take the fact of the marriage at face value, and approve the allowance without further inquiry. If the applicant was shown as a married woman the personnel officer would inquire if the applicant was living with her husband and if her husband was employed. If the two were living together and the husband was employed her application would be turned down. As the witness said "Rivet and he would automatically feel the man had the burden of keeping the house up." He went on to say that if the female applicant could satisfy them that she was carrying the prime burden then they would look on it in a different light. It would then be a question

of whether the husband or wife earned a larger salary or the husband had subsidized housing. If he was or had then the application would be turned down. In this man's memory, the Simonson case was unique. Mr. Nikiforow stated that as of April 1974 of a total of 89 staff employees, 75 were male and 14 female. Thirty-four of the males received the subsidies and the balance were in staff houses or other similar accommodation. Of the 14 females, two received the subsidies. Eight or 9 were wives of Giant employees already receiving the subsidies. Those female employees who were given the subsidy were either widows or separated from their husbands and with dependents or in one instance a woman who had remarried, who had children from the previous marriage, and whose new husband earned less than herself.

There was one example shown by the oral testimony where a male employee was given a letter which apparently permitted him to get a Government subsidy through his wife working there, while he himself received the Giant subsidy as a married man. Nothing too much turns on these examples other than they further serve to show that in practice, at least, the female employee at Giant has a heavier burden when she seeks the special allowances than a male employee has in similar circumstances.

In the particular case here, Mrs. Simonson completed the form request for the allowances, was turned down by the personnel officer, and then discussed the matter with the Mine Manager, now Vice-President of Operations, but without success. There is

nothing in the evidence as to which of the Simonsons does in fact pay the rent or maintain the Simonson residence or whether they may even own their residence. Mr. Nikiforow quite honestly stated she would be turned down once it was ascertained that her husband earned a higher income. It seems clear to me from all the evidence that in the present case, where the employee was a female, she had to go further than a male employee, she had to show in fact that she did maintain the dwelling or family unit, that there was an automatic turn down if the husband received more income, and this even if the husband did not receive any subsidy from his employment, although the whole purpose of the review by the company was to avoid duplication of subsidy payments.

The Ordinance must now be examined to see if there is a breach or infringement of the legislation which would entitle Mrs. Simonson to payment of the special allowances as had been found and directed by the Commissioner acting as he was on the recommendation of the Officer appointed by him to inquire into her complaint: (Sec. 7).

Section 3(1) of the Ordinance is the governing section in the present appeal. To quote:

> "No employer shall refuse to employ, or to continue to employ, a person or adversely discriminate in any term or condition of employment of any person because of the race, creed, colour, sex, marital status, nationality, ancestry or place of origin of that person."

While this section must be taken as paramount in the present appeal, the long title and preamble of the Ordinance should be read as declarative of the common purpose of the legislation: viz.

> "
>
> Title
>
> An Ordinance to prevent discrimination in regard to accommodation and employment and in regard to membership in Trade Unions by reason of race, creed, colour, sex, marital status, nationality, ancestry or place of origin."
>
> Preamble
>
> "Whereas recognition of the inherent dignity and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world and is in accord with the Universal Declaration of Human Rights as proclaimed by the United Nations;
>
> And whereas it is public policy in the Northwest Territories that every man and woman is free and equal in dignity and rights without regard to race, creed, colour, sex, marital status, nationality, ancestry or place of origin;" (Then comes the enactment clause).

While the arguments before me covered various points, in essence the issues come down to the following:

For the Appellant:

(1) There has been no difference in standards laid down, the declared policy as set forth in the Memoranda quoted above being careful to treat each spouse the same;

(2) Mrs. Simonson doesn't qualify, there being no benefit to which she was in fact entitled as she did not in fact maintain a residence, in other words she was not "adversely" discriminated against and "adversely" is the key word.

For the Respondent:

(1) In applying its declared policy the appellant in fact applied different tests and when there was different treatment this in itself is to be considered as discrimination.

(2) When the man is assumed to be head of the household then such assumption is indefensible, it is in itself discrimination.

The remarkable thing is that neither counsel have been able to come up with any decided case discussing discrimination in the human rights field. I have been referred to several Board hearings and decisions in the Courts of the United States however.

In *Frontiero et vir v. Richardson* (1972) 5E.P.D. 7790, federal legislation permitting servicemen to automatically receive extra benefits by declaring their wives as dependents while servicewomen to obtain the same benefits had to prove their husbands were dependent on them, constituted different treatment according to sex and accordingly was in violation of the Due Process Clause, Fifth Amendment, U.S. Constitution.

Much the same result is to be found in *Mary Bowen et al v. Mary C. Hackett et al* (1973) 361 F. Supp. 854 where state unemployment compensation was held to be unconstitutional because women, unlike men, were required to prove dependency of children on them.

Counsel for the appellant produced an Arbitration Award (unreported) between *United Brotherhood of Carpenters and Joiners of America for Lumber and Sawmill Worker's Union Local No. 2754 vs. Canada Veneers Limited* (14 March 1975, Toronto.) In this case the issue involved was as to the Ontario Health Insurance Plan premiums. Article 17.01 of the collective agreement added a sentence which provided that bread winners in a family would be covered by the premium for family rate. The griever, a married woman with children, whose husband worked for another employer, where no group health plan was available and who earned more than his wife, was conceded to contribute towards the support of the family. She was refused family coverage although she has paid the premium to maintain family coverage. The issue as to whether she was being discriminated against by reason of her sex was resolved against her by a two to one board decision. The majority decision was to the effect that the wording of the provision contained nothing which excluded women per se from participating, it being clear that to participate the party claiming had to satisfy a condition precedent namely that he or she was the bread winner, the agreement being clear that the parties intended that each family unit have only one member who could qualify as bread winner. The majority award in reaching this conclusion states: "We find that the establishment of the bread winner in the family is a matter of evidence rather than a question of sex."

Almost directly opposite decisions were submitted by counsel for the respondent. Reference need only be made to one,

a decision of the Equal Employment Opportunity Commission, referred to as Case No. CL 7-6-64, May 19, 1969. This decision was discussing employee insurance contributions, the allegation being that the employer was discriminating because of sex contrary to Title VII - Civil Rights Act of 1964. In this case "head of household" was made the criteria of eligibility by the employer. A new policy plan was made effective which made eligible any employee who provided the principal support of his or her spouse or minor children. Under the original plan married males were assumed to be the "head of household" while married females were assumed to occupy some other ineligible status. In respect to the original plan the Commission in finding that the assumption that a working female is dependent upon her husband was indefensible stated:

> "Respondent's definition of 'head of household' in its original plan was based on a general (and demonstrably incorrect) assumption regarding females as a group. It follows that the actions of Respondent in establishing and maintaining classifications or categories based on the sex in the coverage of its original health benefit plan constituted discrimination based on sex."

It is quite true that none of these decisions or awards are in any way binding on this Court in the present appeal nor is the legislation discussed in them on all fours with the Territorial Ordinance. They do however, in the absence of other more cogent authority, at least show how other courts or boards have met similar problems as the present one and to this extent offer some guidance.

Looking firstly at the two memoranda in the present appeal which enunciate the entitlement to staff cost-of-living and oil allowances, the paramount phrase, the test laid down, is "maintaining residences for themselves and immediate dependents". The disentitlement is expressed "because he (or she) is not maintaining a residence." In respect to the first memorandum it is "all staff" or "those" with no reference to male or female whatsoever. It is only in the second memorandum, the disentitlement one, where sex is mentioned and then it is "his (or her) spouse" and "his (or her) employment" and finally "he (or she) is not maintaining a residence." To me, there is only one way in which these memoranda read, and that is with equal emphasis on either sex. I am unable to see anything in the policy of the appellant company as expressed and set forth in these memoranda that can be termed discriminatory by reason of the employee's sex, nothing that infringes Section 3(1) of the Ordinance.

However the matter does not stop here. There still remains the fact that in practice, that in the actual application of policy, the appellant company has permitted those of its officers who are charged with applying declared policy, to follow a procedure that admittedly treats its employees differently, namely the male who shows as married is given the allowances automatically while the female gets no such equal treatment. Rather she is placed under the burden of proving her case, proving either a dependency

or that she "maintains" the residence (and this to the satisfaction of the personnel officer).

Is the above application of policy a mere "matter of evidence" as referred to in the *United Brotherhood of Carpenters* case? Is there no discrimination because the appellant by virtue of her husband's greater income wouldn't have qualified anyway? Counsel for the appellant argues strenuously here that the manner of application of an otherwise non-discrimination policy cannot be brought within the Ordinance because the key word is "adversely", because, also, the complaining person must go further than merely show different treatment if the final result may end up the same anyway.

In the present case, the respondent Mrs. Simonson, did not get to the point where the question of whether she maintained the residence or not could be resolved. Rather, because she was a woman whose husband had a higher income her request was rejected. I cannot look at this as other than discrimination because of her sex. She did not receive what she might have been entitled to because the assumptions made as a result of her sex prevented the full investigation as to whether she "maintains" a residence or not to be made. As a consequence she was in my opinion discriminated against and in an adverse manner.

I must observe that I am not impressed by the suggestion that so long as the "published" policy is non-discriminatory a person can apply unequal tests to determine the right to such

benefits as are declared to be open to all. To permit such practices would make it all too easy for employers wishing to get around this type of legislation. The Court must be vigilant to avoid such circumvention of the declared policy of the Territorial Government.

In the present case the discrimination which I have found to have taken place with respect of Mrs. Simonson may have been more from a careless procedure which was allowed to develop rather than a deliberate attempt to get around the law.

The appeal with respect to the Order appealed from is dismissed with costs. The Order of the Commissioner dated November 10, 1975 directing the appellant to pay cost of living allowances and the value of fuel oil for the period of April 1, 1974 to September 27, 1974 is hereby confirmed and ordered to be paid.

W. G. Morrow

Yellowknife, N.W.T.
February 23, 1976.

Counsel:

D. Searle, Esq., Q.C.
for Appellant

D. Geldreich, Esq.,
for Respondent.

NO. 3232

IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES

BETWEEN:

GIANT YELLOWKNIFE MINES LIMITED

Appellant

and

MARILYN SIMONSON, and
COMMISSIONER OF THE NORTHWEST
TERRITORIES

REASONS FOR JUDGMENT OF THE
HONOURABLE MR. JUSTICE W. G. MORROW
