

IN THE MATTER OF: Human Rights Code, C.C.S.M., Cap. H175 and Amendments thereto:

BETWEEN:

SHERRY DUBECK and
THE HUMAN RIGHTS COMMISSION,

(Complainants)

- and -

CONNIE PEARL FRIESEN, o/a VY-CON CONSTRUCTION,

(Respondent).

Adjudicator: Lori T. Spivak

Appearances:

For the Complainant: Aaron Berg and Darla Rettie

DECISION

This complaint was filed by Sherry Dubeck on December 29, 2000 and alleges that Connie Pearl Friesen operating as Vy-Con Construction discriminated against her on the basis of gender in the course of employment. Specifically she alleges that the terms and conditions of her employment, her work assignment, dress requirements and the decision to lay her off was unreasonably based on gender constituting differential treatment in employment. On May 31, 2002 the Attorney-General of Manitoba appointed me to sit as a Board of Adjudication to hear and decide the complaint.

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The hearing of this matter took place on October 15, 2002. The Respondent did not appear at the hearing nor was she represented. A number of documents were filed relating to the service of the notice of the time, date and place of the hearing on the Respondent. An Affidavit of Service of Bernadine Loran (Exhibit 3), legal assistant to Mr. Aaron Berg, counsel for the Commission indicated that on August 20, 2002 she served Connie Pearl Friesen operating as Vy-Con Construction with a copy of the Notice of Hearing by certified mail to her last known address at Box 817, Grunthal, Manitoba. Her Affidavit states that this address appears to be accurate as a search of the Court of Queen's Bench revealed that a registered letter sent to that address relating to a Small Claims action was signed by Connie Friesen on June 7, 2002. Ms. Loran's Affidavit further provides that on September 20, 2002 the letter sent by certified mail was returned as unclaimed. Mr. Berg confirmed at the hearing that a previous letter dated July 31, 2002 was sent to the Respondent advising of a tentative hearing date and requesting a response, failing which formal notices of the hearing would be served.

An Affidavit of Service of a process server, Milton B. Brown, and correspondence from him is attached to Ms. Loran's Affidavit. Mr. Brown attended at the residence of Connie Friesen at 38 Park Street in Grunthal and left a Notice of Hearing with a male at that residence who identified himself as Ms. Friesen's common-law husband. The male advised Mr. Brown that Ms. Friesen was unable to come to the door as she was ill but assured Mr. Brown that Ms. Friesen would receive the material.

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Ms. Sally Flintoff, an investigator with the Human Rights Commission testified that the complaint and investigation report was served on the Respondent but no response was received. During the course of the investigation of this complaint she left five telephone messages with the Respondent with no response.

Given the evidence, I was of the view that the requirements for notice in accordance with Section 35 of the Human Rights Code was satisfied and the hearing proceeded in the Respondent's absence.

THE EVIDENCE:

Three witnesses testified at the hearing, Ms. Flintoff, an investigator with the Human Rights Commission, Ms. Dubeck, the Complainant, and Mr. Jeremiah Lambert, a co-worker at Vy-con Construction.

Ms. Flintoff, an investigator with the Human Rights Commission for fourteen years, advised of the Commission's efforts to ensure that the Respondent was properly identified in the complaint. Her investigation confirmed that the business name Vy-Con Construction was registered by Connie Friesen with the address noted as Box 817, Grunthal, Manitoba. Ms. Flintoff also testified of the efforts to speak with Ms. Friesen which were not successful.

Ms. Dubeck, a young woman, described her current occupation as a sheet metal labourer although she does not have any formal documentation of her qualifications. She is

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currently working in Edmonton, Alberta and has worked in the construction industry for the last three to four years in both Manitoba and Alberta. Her complaint represents, to the best of her recollection, a reasonably accurate version of events.

In or around September 2000, Ms. Dubeck responded to an ad in the Steinbach paper, The Carillon, which indicated that Vy-Con Construction was looking for labourers. Ms. Dubeck phoned and spoke with Connie Friesen who advised her that the person in charge of hiring was John Bueckert and Ms. Dubeck would have to call him about a job. Mr. Bueckert is Ms. Friesen's common-law husband. Ms. Dubeck testified that in the initial conversation with Ms. Friesen she told her to tell John Bueckert "not to not hire me because I was a girl". Ms. Dubeck's evidence was that she previously encountered problems because she was female.

Mr. Bueckert returned Ms. Dubeck's call and they met on September 9, 2000, at the parking lot of the Mohawk Station in Richer, Manitoba. Mr. Bueckert asked Ms. Dubeck if she would agree to go up north with him on a job (to Gardenhill) which would take three to four days and indicated that she would make \$1,000.00. She agreed.

Ms. Dubeck started working with Vy-Con Construction on Monday, September 11, 2000. The trip up north to Gardenhill, a four day job, was planned for the week of September 18, 2000. On the day when they were scheduled to travel, she received a telephone call from Mr. Bueckert who advised her that she could not go on the trip "because she was a girl". He further told Ms. Dubeck that the wife of one of the men who would be working on the

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job did not like the idea of her working. Ms. Dubeck testified that she was angry and asked Mr. Bueckert why she was not told this sooner. His response was that he was sorry and would make it up to her but according to Ms. Dubeck that did not happen.

Ms. Dubeck asked for the name of the individual whose wife objected to her working at the Gardenhill job. Ms. Dubeck testified that her boyfriend phoned this individual who lived in Blumenort and he had no idea about this. Ms. Dubeck's evidence was that she then called the airport and asked Mr. Bueckert to call her. She testified that another male who was with Mr. Bueckert returned the call and pretended to be Mr. Bueckert whom she heard laughing in the background. Eventually Mr. Bueckert took the phone and laughed and said he was sorry but that he would make it up to her.

Ms. Dubeck testified that as a result, she worked the full week of September 11, 2000 but did not work the week after. She identified her payroll records (Exhibit 7) which showed that for the pay period September 11 to September 22 she only worked 47.5 hours.

Ms. Dubeck also described an incident that occurred on October 12, 2000 while she was working at Vy-Con Construction on Connie Friesen's mother's driveway. It was late morning and was getting hot. She, therefore, removed her sweater and T-shirt and was left wearing her sports bra and construction overalls which had a bib. A few minutes later Ms. Friesen spoke to her in the presence of others working and indicated that this was not appropriate and she should put her shirt on. Ms. Dubeck put her shirt on but was upset.

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To her knowledge the men who worked there were never told what they could wear on the job. She claims Ms. Dubeck was rude and could have pulled her aside to discuss this.

Ms. Dubeck continued to work for Vy-Con Construction for another three to four weeks. On November 10, 2000 she was advised by Mr. Bueckert that she was to be laid off because of the cold weather. A few days before this she had been told by Mr. Bueckert that they had received a big contract on houses in St. Pierre. An Affidavit of Bernadine Loran (Exhibit 8) attached an excerpt from The Carillon dated October 23, 2000 which contained an ad by Vy-Con Construction looking for concrete finishers and labourers.

Ms. Dubeck testified that when she was advised that she was going to be laid off she called Jeremiah Lambert, a co-worker who did not know anything about this. Mr. Lambert telephoned Connie Friesen and told Ms. Dubeck that Ms. Friesen advised him that only Ms. Dubeck was being laid off as she did not agree with her working for Vy-Con Construction.

On Monday, November 13, 2000 Ms. Dubeck went to work with Jeremiah Lambert. She was told by John Bueckert that she was to be laid off and he laughed. She was angry and went back to her truck. Mr. Bueckert came back to the truck with her and tried to talk to her but Ms. Dubeck just shut her door. Ms. Dubeck was very angry and upset about her layoff and testified that it was obvious to her that it was because she was female. She felt powerless to do anything about it.

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Ms. Dubeck then called another company that she had previously worked for and was able to obtain other work immediately.

Mr. Dubeck's evidence was she never received her last pay cheque or her record of employment from Vy-Con Construction. Her phone calls to Ms. Friesen were ignored. She, therefore, had to present her pay stubs with Employment Standards and obtained an Order that Vy-Con Construction pay her wages outstanding in the amount of \$1,136.26. Ms. Dubeck testified that Vy-Con Construction still owes her the amount of \$91.98 under a Payment of Wages Order.

Ms. Dubeck testified as to the expenses she incurred to attend the hearing. She lost two days of income at an hourly rate of \$14.00 per hour and she averaged more than eight hours a day. It cost her \$396.36 to pay for her airfare to travel to Winnipeg for the hearing.

Jeremiah Lambert testified that in the fall of 2000 he worked for Vy-Con Construction. His employer was Connie Friesen but John Bueckert ran the company. Mr. Lambert worked for Vy-Con Construction for approximately six to eight weeks doing general labour work similar to the work done by Ms. Dubeck.

On Friday, November 10, 2000 Ms. Dubeck spoke with Mr. Lambert and advised that she had a conversation with Mr. Bueckert who told her that there was to be a layoff. Mr. Lambert tried to contact Mr. Bueckert and could not reach him and, therefore, spoke with Ms. Friesen. Ms. Friesen advised Mr. Lambert that he had nothing to worry about. Mr.

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Lambert testified that he asked Ms. Friesen why Ms. Dubeck was being laid off and her response was that it was inappropriate for her to be working with her husband who had two kids. Mr. Lambert phoned Ms. Dubeck back and relayed the conversation to Ms. Dubeck who was distressed.

On Monday, November 13, 2000, Mr. Lambert went to work with Ms. Dubeck. He spoke with Mr. Bueckert and asked why Ms. Dubeck was being laid off as there was ample work. He testified that Mr. Bueckert was not impressed with his questions and advised him that if he wanted to leave he could do so. Mr. Lambert, therefore, quit. He testified that he had difficulty with the Respondent and did not receive his final pay cheque.

THE DECISION

The question before the Board is whether there has been a contravention of Section 14(1) of the Manitoba Human Rights Code ("the Code"). That section provides as follows:

14(1) "No person shall discriminate in respect to any aspect of an employment or occupation, unless the discrimination is based upon bona fide and reasonable requirements or qualifications for the employment or occupation."

Section 9 of the Code defines discrimination as follows:

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9(1) In this code discrimination means:

"(a) differential treatment of an individual on the basis of the individual's actual or presumed membership in or association with some class or group of persons, rather than on the basis of personal merit;

(b) differential treatment of an individual or group on the basis of any characteristic referred to in subsection 2;

(c) differential treatment of an individual or group on the basis of the individual's or group's actual presumed association with another individual or group whose identity or membership is determined by any characteristic referred to in subsection 2; or

(d) failure to make reasonable accommodation for the special needs of any individual or group, if those special needs are based upon any characteristic referred to in subsection 2."

Section 9(2)(f) of the Code provides that one of the applicable characteristics for the purposes of clause 9(1)(b) to (d) is sex.

When there is an allegation of discrimination under the Code, the onus is on the Complainant to establish a prima facie case of discriminatory action. Once a prima facie case is established the onus then shifts to the Respondent either to disprove the prima facie case of discrimination or to prove that although an act of discrimination had occurred, it was justified because of a bona fide qualification or requirement. In Martin v. 3501736 Inc. doing business as Carter Chevrolet Oldsmobile, (2001), 41 CHRR D/88, it was noted that to succeed a Complainant need only show that the ground alleged was one factor in the Respondent's conduct; it does not need to be the sole or overriding factor.

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I am satisfied here that the Commission has established such a prima facie case. The Complainant, a young woman, testified in a simple straightforward manner. Her evidence was uncontradicted and I have no reason to disbelieve it. I am, therefore, prepared to rely upon it in coming to a decision.

The evidence indicates that John Bueckert, the common-law husband of Connie Friesen, was the supervisor or directing mind of Vy-Con Construction and Connie Friesen was its registered owner. Section 10 of the Code provides that an employer is vicariously liable where there is a contravention of the code by an officer, employee, director or agent acting in the course of the employment or the scope of actual or apparent authority. The Respondent is, therefore, vicariously liable for the actions of John Bueckert.

The Complainant's evidence establishes that she was denied the opportunity to work at the Gardenhill job because she was a woman. According to her, Mr. Bueckert told her that she could not work on the job because the wife of one of the men working on the job did not like the idea of her travelling up north with him. The Respondent's actions deprived the Complainant of an economic opportunity based on a prohibited ground of discrimination, her sex. It was demeaning for the Complainant to be treated in this fashion.

I am also satisfied that the evidence establishes prima facie that the Complainant's sex was a factor in her being laid off by Vy-Con Construction. It is clear from the evidence that the Respondent had no shortage of work. The Complainant testified that just before she was told she was laid off, the company had received a big contract on houses in St. Pierre.

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Mr. Lambert was not laid off and the advertisement in the Steinbach newspaper The Carillon on October 23 (Exhibit 8) confirms that Vy-Con Construction required workers. Mr. Lambert's evidence was that Ms. Friesen advised him that he had nothing to worry about and that the Complainant was being laid off because it was inappropriate for her to be working with her husband who had two kids.

In the absence of any evidence or justification from the Respondent as to why the Complainant was denied the opportunity to work at Gardenhill and was laid off, I am bound to decide in favour of the Complainant and find that the complaint is substantiated in this regard.

In light of these findings and the fact that no independent relief was requested as a result of the incident on October 12, 2000, I am of the view that it is unnecessary to determine whether this incident was discriminatory conduct.

REMEDY

Having found that the Respondent has contravened the Code and the Complainant has been discriminated against, I must now determine the appropriate Order to be made to remedy the contravention.

The Complainant seeks an Order to compensate her for the wages lost plus interest for the week off work she missed as a result of being denied the opportunity to work at Gardenhill.

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The jurisdiction for such an Order is found in Section 43(2)(b) of the Code which provides that an adjudicator may order that the party compensate the party adversely affected by contravention for any financial loss sustained, expenses incurred or benefits lost. While she testified that John Bueckert told her that she would earn \$1,000.00, her employment records (Exhibit 7) do not indicate that she earned that amount in any week she worked for the Respondent. Given that the evidence from the Complainant's employment record was that she was paid \$10.00 an hour, I am of the view that it is unlikely that she would have earned \$1,000.00 for four days of work. However, I am prepared to accept that the intent in travelling up north to work was to work longer hours and, therefore, her earnings would have exceeded the amount that she would be paid for a standard eight hour day. Taking that into account, I am of the view that a fair estimate of her earnings for that week is \$600.00. I, therefore, order that the Respondent compensate the Complainant in the amount of \$600.00 plus interest for the financial loss she sustained by reason of the contravention. I am prepared to order interest at the rate of 6% which is roughly equivalent to the average Queen's Bench rate in effect at that time.

Counsel for the Commission requests an award for damages to the Complainant for injury to feelings. Section 43(2)(c) provides the jurisdiction to award damages as an Adjudicator considers just and appropriate for injury to dignity, feelings or self-respect. The Complainant described her difficulty in trying to find work in the field of construction, a non-traditional occupation for a woman. I am satisfied from her evidence that the Respondent's actions were hurtful and the Complainant was understandably angered. I, therefore,

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accept that she should be awarded damages for injury to dignity, feelings or self-respect. In my view, an appropriate award is \$1,500.00.

Counsel for the Commission also argued that this is an appropriate case for exemplary damages. Section 43(2)(d) provides that an Adjudicator may award a penalty or exemplary damages as punishment for any malice or recklessness involved in the contravention. Section 43(3) of the Act provides that the amount of such penalty shall not exceed the maximum fine to which the contravening party would have been liable under Section 51(1) which in this case would be \$2,000.00.

I recognize that exemplary damages are extraordinary and in the nature of punishment for malice or recklessness. In my view, however, the evidence regarding the manner in which the Complainant was denied the opportunity to work at Gardenhill and the manner in which she was laid off reflects malice or at the very least a recklessness on the part of the Respondent. The Complainant's evidence that Mr. Bueckert laughed when he told her she could not work at the Gardenhill job, and when he told her she was laid off, and the fact that he had someone impersonate him on the phone with her illustrates a wanton disregard for her dignity. It is challenging enough for a young woman to try and work in a non-traditional occupation and this attitude and deliberate behaviour on the part of the Respondent does suggest an intent to denigrate and thereby merits an exemplary damage award. This amount should, however, be modest and I would award the amount of \$750.00 as exemplary damages in this case.

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It is requested that my remedy include an Order that the Complainant be compensated for wages she had to forego to attend the hearing and for the air expenses she incurred. Counsel for the Commission submitted that the jurisdiction for such an Order is pursuant to Section 43(2)(b) of the Code as a financial loss sustained or an expense incurred as a result of the contravention. At the hearing I raised the issue of whether such an award was precluded by Section 45(1) of the Act which provides that each party to the adjudication shall pay their own costs.

I accept that if there is a finding of unreasonable discrimination, as a matter of public policy a meaningful remedy should be provided to return the victim to the position he or she would likely have been had the discriminatory actions not taken place.

The Complainant's evidence was that she lost wages for the Tuesday of the hearing and pay for the statutory holiday the day before as this was dependent on her working the Tuesday. Effectively, therefore, she suffered a wage loss of two days. She testified that she was paid \$14.00 an hour. I am prepared to order that she be compensated for lost wages for two days based on the standard eight hour work day at an hourly rate of \$14.00, as an expense incurred by the contravention. The claim for lost wages is not in the nature of costs. This type of award is consistent with the decision of *Jones v. CHE Pharmacy Inc.* (2001), 30 CHRR D/92 where the Panel awarded an amount for lost wages to attend the hearing and the remedy provision was similar to Section 43(2)(b).

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The cost of airfare in the amount of \$396.36 was an expense that had to be incurred by Ms. Dubeck if the complaint was to receive effective adjudication. I interpret Section 45(1) of the Code as referring to legal fees and, in any event, as not precluding an award of this nature under Section 43(2)(b). I am of the view that it is within the Adjudicator's discretion where just and appropriate to characterize the cost of airfare incurred as an expense incurred by reason of a contravention pursuant to Section 43(2)(b). I also note that in *Willis v. Blenco* (No. 2) (2001), 39 CHRR D/302 reimbursement of airfare was ordered where there was a similar remedial provision. I, therefore, order that the Respondent pay the Complainant the amount of \$396.36.

Counsel for the Commission has requested that my award include the amount of \$91.94 for the outstanding wages owing to the Complainant by the Respondent. I note the evidence of Jeremiah Lambert that there was an amount owing to him for outstanding wages by the Respondent. On the basis of the evidence I am not satisfied that the failure to pay this amount to the Complainant was caused by the contravention of the Code and I, therefore, decline to include this amount in my award.

I believe it is also appropriate to include an Order that the Respondent refrain from treating female employees differently in the future in terms of work opportunity unless they are able to establish that such treatment is based upon bona fide and reasonable requirements or qualifications for the employment or position.

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SUMMARY

In summary, I make the following Orders:

1. that the Respondent pay to the Complainant the amount of \$600.00 on account of wages lost as a result of being denied the opportunity to work during the week of September 18, 2000 with interest at the rate of 6% from that date until the date of this decision;
2. that the Respondent pay the Complainant \$1,500.00 to compensate her for injury to her dignity, feelings and self-respect;
3. that the Respondent pay to the Complainant \$750.00 as exemplary damages;
4. that the Respondent pay to the Complainant the amount of \$224.00 for lost wages and \$396.36 for the cost of airfare being expenses incurred as a result of the contravention.
5. that the Respondent refrain from treating female employees differently in the future in terms of work opportunity unless they are able to establish that such treatment is based on bona fide and reasonable requirements or qualifications for the employment or position.

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DATED at the City of Winnipeg, in Manitoba, this 20th day of December, 2002.



LORI T. SPIVAK
Adjudicator