WOMEN/PAY EQUITY EMPLOYMENT LAW
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ALLEGED ADVERSE TREATMENT BY UNION STEMMED FROM DISAGREEMENT OVER COLLECTIVE AGREEMENT RIGHTS, NOT DISCRIMINATORY CONDUCT, TRIBUNAL FINDS

When she was not hired back after nine years with the employer working as a casual painter, the complainant claimed that the union had discriminated against her with respect to employment and as a member of the union on the basis of sex, contrary to sections 13 and 14 of the British Columbia Human Rights Code. She alleged that the union dismissed her concerns, failed to represent her appropriately with the employer and made recommendations with respect to her dealings with the employer with which she disagreed. On an application by the union to dismiss the complaints without a hearing, the Tribunal did so, holding that there was no connection between the adverse treatment alleged by the complainant and her sex, and that her difficulties stemmed from a fundamental difference of views about the collective agreement rights of casual painters.

The Facts:

The complainant worked from April to October each year as a casual painter with the Coquitlam School District in British Columbia. She had been doing so since 1996 and was represented in her employment by the Canadian Union of Public Employees, Local 561.

In the fall of 2004, the complainant reported to her supervisor that a co-worker, her shop steward, had been harassing her since 2002. She detailed incidents including minor roughhousing, being called a "bitch," having sexual comments directed at her and other painters, being told that she was not in charge and that nobody had to listen to her. The complainant felt that the shop steward was deliberately undermining her authority as the "senior casual," which – as the casual painter with the highest number of consecutive years with the school district – meant, according to the complainant, that she occupied a supervisory role over the other casuals.

In the course of the 2005 school year, the complainant became increasingly frustrated after the casuals were told by the shop steward and the union president that casuals did not accumulate seniority year over year, that no one was "in charge" and that as long as they got the job done they could do whatever they wanted. Upset with the resulting atmosphere on the job which she described as "extremely bad," the complainant submitted a letter of resignation, but had second thoughts two days later. The employer agreed to rescind the resignation on the condition that she sign a letter of expectation acknowledging that she would not assume a supervisory role over other workers unless specifically authorized. Although she strongly disagreed with it, the complainant signed the letter and returned to work for the remainder of the 2005 season.

In October, the complainant initiated a series of discussions with the union to address various concerns, including the seniority/supervisor issue, job security and harassment by the shop steward. She wrote several lengthy letters and e-mails to the local union president, and also engaged the national union which confirmed the local union's understanding that there was no seniority entitlement for casuals under the collective agreement. The complainant continued to dispute the supervisor issue, stating that the rules had recently changed only because "insecure males feel threatened by a woman looking after jobs." During this time the employer created a rotating list of casuals to fill in for temporary long-term vacancies. As the complainant had not been put on the list, another casual with fewer years with the school district was hired.

The complainant expressed concern to the local union president that a painter with less seniority had been recalled before her. Dissatisfied with his response, she again contacted the national union which told her there was nothing it could do and advised her to apply for temporary postings in the usual manner and, if she was not hired, to then contact the local union for representation. The national also told her that casuals had no seniority rights for the purposes of recall.

In the spring of 2006, when she had not been contacted with respect to a casual painter position, the complainant raised with the national union concerns that she would not be rehired for the 2006 year, her allegations of harassment by the shop steward and the seniority issue. Ultimately, and despite considerable friction resulting from the complainant having involved the national union, the local filed a grievance on her behalf, alleging that the failure to hire her despite her having the most "casual seniority" was based on discriminatory reasons. The grievance was ultimately resolved, in the union's view, when the employer agreed to hire the complainant on the understanding that the position was seasonal with no right of recall and that she would not assume a supervisory role. Despite the union's advice, the complainant refused to sign a letter acknowledging these understandings and never worked for the school district again.

Thereafter, the complainant pursued the harassment issue with the national union, which conducted an investigation and determined that the incidents of a sexual nature were uncorroborated and that the other conduct was directed at a number of people and not just the complainant. While recommending against filing a grievance, the union advised that the decision was the complainant's to make. The complainant "got the hint" and did not grieve the alleged harassment. However, she filed a complaint with the British Columbia Human Rights Tribunal shortly thereafter. She alleged that the local union discriminated against her with respect to her employment on the ground of sex contrary to s.13 of the *Human Rights Code*. [*Editors' Note:* This was also alleged as against the school district, but that aspect of the complaint was not dealt with in this decision.] She further alleged that the union violated s.14 of the *Code*, which prohibits trade unions from discriminating against a member.

The Arguments:

The complainant argued that the union did not respond appropriately to her concern that she was being sexually harassed by her shop steward: the matter was not taken seriously and the investigation, which did not take place until April 2006, was not thorough. The second aspect of the complaint related to the union's interpretation of the collective agreement, which according to the complainant resulted in the terms of her employment being changed in 2004 when the union took the position that she was not "in charge" of jobs and that casuals did not accumulate seniority. In the result, the complainant alleged, the union did not represent her appropriately with respect to the 2005 letter of expectation or the grievance relating to her not being hired back for the 2006 season.

The union brought a motion for dismissal of the complaints with respect to both s.13 and s.14, asserting that even if it could be said that the complainant suffered adverse treatment, there was no evidence to establish the necessary nexus between that treatment and her gender.

The Decision:

The British Columbia Human Rights Tribunal dismissed the complaints.

Tribunal member Tonie Beharrell held that the first two branches of the *prima facie* discrimination test – as set out in *Ontario (Human Rights Commission) v. Simpsons Sears Ltd.*, [1985] 2 S.C.R. 536 – had been met: the complainant was a woman working in a male-dominated trade and there was a reasonable basis in the evidence to establish that she suffered adverse treatment in her employment and with respect to her membership in the union. The case turned on the third branch of the test, the Tribunal declared, i.e. whether there was any connection between the treatment complained of and the prohibited ground, in this case sex. On a "no evidence" motion, the Tribunal continued, the evidence need only show that the connection *could* – not would or ought to – be established. Citing from *Gerin v. I.M.P. Group Ltd.*, [1994], N.S.H.R.B.I.D. No. 4 (QL), the Tribunal explained that while "the <u>any</u> evidence standard is probably too low, there must be some <u>reasonable basis</u> on which a conclusion in the complainant's favour could be reached." [emphasis in original].

Explaining that s.13 of the *Code* addresses situations in which the union discriminates against a member as an employee in its relationship with the employer, while s.14 deals with discrimination against the member with respect to its internal operation as a union, the Tribunal concluded that in either case there was no reasonable basis on which to establish a nexus between the alleged adverse treatment and the complainant's sex.

First, with respect to the harassment issue, Beharrell pointed out that prior to the spring of 2006, the complainant had raised the issue only on a discreet basis with the union president and in fact became upset when she learned that he had been making inquiries of other painters with respect to the allegations. However, the Tribunal continued, when the complainant later made it clear that she wanted to pursue the matter, the union responded, conducted an investigation and "appropriately advised [the complainant] of the collective agreement provisions around filing a harassment grievance, and all the potential consequences of doing so."

With respect to the second aspect of the complaint, the Tribunal found that the complainant's dissatisfaction with the union's dealings with her and representing her with the school district all stemmed from the fact that she and the union had "very different views about what the collective agreement rights of casual painters were." However, and "[d]espite this fundamental difference," the Tribunal found that the union had not ignored the complainant, but rather "consistently attempted to communicate its view on the collective agreement issues to [the complainant]" The union was also held to have been "diligent in its representation of [the complainant], ... [having] met with [the complainant] on numerous occasions, attempted to address her concerns, and attempted to explain to her the reasons for its position on those issues where their views differed."

Lastly, Beharrell observed that the union's presentation of the grievance and recommendation that the complainant sign the letter of expectation and return to work in the spring of 2006 were consistent with the union's understanding of the collective agreement. She concluded: "The fact that the union's view differed from [the complainant's] understanding of the situation does not lead to a finding that the union discriminated against her on the basis of sex.