

Date Issued: June 9, 2006
File: 2437

Indexed as: Koblensky v. Westwood and Schwab (No. 2), 2006 BCHRT 281

IN THE MATTER OF THE *HUMAN RIGHTS CODE*
R.S.B.C. 1996, c. 210 (as amended)

AND IN THE MATTER of a complaint before
the British Columbia Human Rights Tribunal

B E T W E E N:

Crystal Koblensky

COMPLAINANT

A N D:

Westwood Inds. Inc. and Peter Schwab

RESPONDENTS

REASONS FOR DECISION

Tribunal Member:

Marlene Tyshynski

On her own behalf:

Crystal Koblensky

No-one appearing on behalf of the Respondents

Hearing date:

May 29, 2006

Introduction

[1] Crystal Koblensky filed a complaint against Westwood Inds. Inc. (“Westwood”) and Peter Schwab (the “Respondents”) alleging that they discriminated against her regarding employment on the basis of sexual harassment, contrary to s. 13 of the *Human Rights Code*.

[2] The hearing was scheduled for May 29 and 30, 2006 at 9:30 a.m. at the B.C. Human Rights Tribunal, 1170-605 Robson St., Vancouver. The file includes a letter sent by fax from the Tribunal to the parties dated May 30, 2005, that refers to the hearing dates and indicates that a Notice of Hearing was enclosed. There is a fax transmission confirmation that the letter and Notice of Hearing was received by the parties. Further, on December 12, 2005, the case manager conducted a pre-hearing conference (“PHC”) at which Ms. Koblensky and Mr. Schwab attended. Mr. Schwab indicated that he appeared on behalf of himself and Westwood. In the confirming PHC memorandum, the case manager indicated that the parties advised him they were in receipt of the Notice of Hearing. The Tribunal records show that the case manager left three telephone messages for Mr. Schwab, reminding him of the hearing, in the week preceding the hearing. None of the messages were returned.

[3] Ms. Koblensky attended the hearing on her own behalf. No-one appeared on behalf of the Respondents. I waited until 9:50 a.m. at which time I commenced the hearing being satisfied that the Respondents had notice of the time and place of the hearing.

The Evidence

[4] Ms. Koblensky was hired by Westwood, a furniture manufacturer on September 1, 2004. She described Westwood as a relatively small shop, which employed about a dozen men and women. Women represented about one third of the employees.

[5] Ms. Koblensky’s job included sanding and staining furniture. She had five years of related experience in the construction industry, including sanding, painting, doing renovations and building. This was her first job working on furniture and her first job

after being away from the workforce for about three years due to the birth of her son and pursuing educational upgrading.

[6] The essence of Ms. Koblensky's complaint is that she was subjected to ongoing sexually explicit language and behaviour by a co-worker named Scott. No surname was provided. She complained four times to Mr. Schwab, her boss and the owner of Westwood. Mr. Schwab repeatedly said that he would talk to Scott, however there was no change in Scott's behaviour, in fact, it escalated. Ms. Koblensky's employment was terminated on October 29, 2004, a day after her fourth complaint respecting Scott, on the basis that Mr. Schwab had over-hired.

[7] Ms. Koblensky testified as to the following chronology of events. She stated that initially Scott spoke incessantly about the details of his sexual exploits with his girlfriend and would call out to her "Hey, lick my balls".

[8] She stated that others said that the "sex talk" was "just Scott". She got the impression that others somewhat begrudgingly, put up with Scott's behaviour. Ms. Koblensky's shift was from 8 a.m. to 5 p.m., which unlike the other women who started work at 6 a.m., resulted in her being the only woman whose breaks coincided with Scott's. She felt Scott could tell that his comments made her uncomfortable and that this had the effect of provoking him to make more comments of the same nature.

[9] On October 21, 2004, Ms. Koblensky told Mr. Schwab that Scott's sexual comments were upsetting her and, in her view, were inappropriate in the workplace. Mr. Schwab said he would talk to Scott. Scott failed to attend at work the following day. Ms. Koblensky thought that this was due to Mr. Schwab speaking to him, although she did not know this for sure. Upon his return, Ms. Koblensky testified that Scott's behaviour "got worse". He made more and louder comments about his "dick".

[10] Ms. Koblensky complained to Mr. Schwab again on October 25, 2004. It was her understanding that Mr. Schwab warned Scott not to continue talking "in that manner" on October 26, 2004. She testified that later that day, Scott persisted in making similar comments in her presence. She asked him why he was acting like such a jerk to which he responded by asking her why she was such a "bitch". She walked away feeling very upset

and confided in Jackie, an older female employee, respecting the interchange. Jackie, whose teen-aged daughter also worked at Westwood, stormed into the room and told Scott “to stop the sex-talk or he was going to have to deal with her”.

[11] Ms. Koblensky spoke to Mr. Schwab again on October 26. She testified that he asked her if she had any suggestions. Her suggestion was that Mr. Schwab do something more than talk to Scott. It was her view that he needed to establish an ultimatum, a consequence, such as suspension from work, if Scott continued. Ms. Koblensky stated that Mr. Schwab told her to take her breaks alone instead of with the others. She told Mr. Schwab that this recommendation upset her as she felt as though she was being punished. He responded by saying that he would ask Scott to take his breaks alone. Ms. Koblensky stated that this rule was not enforced and that Scott continued to go into the lunchroom when she was there. On one occasion, he specifically brought a cup into the room, put it down, looked at her and said “suck my dick”.

[12] On October 27, Scott jumped up on a table in the workroom and acted out masturbation in front of their supervisor. Ms. Koblensky again complained to Mr. Schwab. He responded by asking if a supervisor was present.

[13] On October 29, Ms. Koblensky was called into Mr. Schwab’s office and was told that her employment had been terminated as Westwood had over-hired. Ms. Koblensky testified that she said she did not understand why she was the one being fired. Mr. Schwab had no response beyond his one reason, that they had too many employees for the work available.

[14] Ms. Koblensky testified that she was shocked and upset, and stated that she would never have started to work for Westwood if she had known she would be terminated in such circumstances. She believes she was terminated because she complained about feeling uncomfortable due to Scott’s inappropriate sexual comments and behaviour. Ms. Koblensky stated that five employees were hired after her, three of whom had no prior experience. Their employment was not terminated.

[15] Ms. Koblensky immediately sought another job. With the assistance of a co-worker, from Westwood, she found employment by the following week, and thereby suffered a wage loss of only two days at \$9.00 an hour for 8 hours a day.

[16] Ms. Koblensky stated that it is her understanding that Westwood has subsequently closed. She referred to documents disclosed by Mr. Schwab to her former counsel, which had been passed on to her, which disclosed Mr. Schwab's spending habits. In response to my question respecting whether she wished to file any of the documents she had brought to the hearing she said no.

Analysis and Decision

[17] Ms. Koblensky alleges that the Respondents discriminated against her by subjecting her to sexual harassment and terminating her employment when she persisted in complaining about it, contrary to s. 13 of the *Code*. Section 13(1) provides:

A person must not

(a) refuse to employ or refuse to continue to employ a person, or

(b) discriminate against a person regarding employment or any term or condition of employment because of ... the sex... of that person...

[18] At the hearing of every complaint, whether or not the respondent attends, the complainant is required to establish a *prima facie* case of discrimination. A *prima facie* case of discrimination is one which covers the allegations made and which, if the allegations are believed, is sufficient to justify a finding in the complainant's favour, absent an answer or justification from the respondent: *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Limited*, [1985] 2 S.C.R. 536 at para. 28.

[19] Sex discrimination includes sexual harassment. In *Janzen v. Platy Enterprises Ltd.* (1989), 10 C.H.R.R. D/6205 (S.C.C.), the Supreme Court of Canada addressed the human rights perspective on sexual harassment in the workplace. It stated:

...sexual harassment in the workplace may be broadly defined as unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment....

When sexual harassment occurs in the workplace, it is an abuse of both economic and sexual power. Sexual harassment is a demeaning practice, one that constitutes a profound affront to the dignity of the employees forced to endure it. By requiring an employee to contend with unwelcome sexual actions or explicit sexual demands, sexual harassment in the workplace attacks the dignity and self-respect of the victim both as an employee and as a human being. (para. 44451)

[20] In order to succeed in proving discrimination in this case, Ms. Koblensky must establish, on a balance of probabilities, that she was the victim of sexual harassment at her workplace and that it is reasonable to infer from the evidence that her complaints about that harassment were a factor in the termination of her employment.

[21] Ms. Koblensky was not subject to cross-examination, therefore I am required to make a determination on the basis of my assessment of her testimony alone. I found that Ms. Koblensky was somewhat nervous and at times had to reflect or look at her complaint in order to advise me of the exact date of an incident. In response to my question respecting whether Mr. Schwab knew that Scott was going to the lunchroom after he had been instructed to eat his lunch alone, she stated that she believed so, knowing Mr. Schwab's daily routine, however she said did not know for sure. On the whole I found Ms. Koblensky a credible witness. She was willing to make a comment contrary to her interest and she did her best to speak from her memory. I note that she did not mention some of the allegations set out in her complaint form, which as a result are not evidence before me. In any event, the Respondents have called no evidence to contradict Ms. Koblensky's evidence.

[22] Sexual harassment can encompass a range of behaviours including, sexual comments and suggestive behaviour. Ms. Koblensky has testified that her co-worker persisted in speaking about his sexual exploits, making ongoing sexual remarks about his penis, taunting Ms. Koblensky with comments like "suck my balls, dick..." comments and acted out self masturbation in a sensationalized manner standing on a table in the workplace in her presence. Ms. Koblensky was very clear that the behaviour and comments were not welcomed by her, and whether or not others put up with them, she found them offensive and wanted her employer to have them stopped. On the evidence before me, I find that Ms. Koblensky was subject to sexual harassment while working for

Westwood. I also find that the efforts of Mr. Schwab appear to have done little, if anything, to stop the sexual harassment. Employers have an obligation to ensure that their workplaces are free of sexual harassment. In this case Westwood and Ms. Koblensky's boss, Mr. Schwab failed to take any or sufficient steps to protect Ms. Koblensky from the harassment she was experiencing. Both Westwood and Mr. Schwab, are liable for acts of discrimination of their employees: *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84, at para. 17.

[23] Ms. Koblensky stated that it is her view that her employment was terminated because she insisted that Mr. Schwab address the offending sexual comments and conduct of Scott. She testified that there were five people employed after her and that three of these employees had no prior experience, whereas she had five years of related experience. With no evidence to the contrary, I find that it is reasonable to infer that Ms. Koblensky's insistence that Mr. Schwab stop the sexual harassment occurring in the workplace, was a factor in the termination of her employment.

[24] Therefore, I find that Ms. Koblensky has succeeded in establishing a *prima facie* case of discrimination based on sexual harassment respecting the terms and conditions of her employment and as a factor in the termination of her employment contrary to s. 13 of the *Code*. In the absence of an answer from the Respondents I conclude that her complaint is justified.

Remedy

[25] Section 37 of the *Code*, addresses the issue of remedy. It provides, in part:

...

- (2) If the member or panel determines that the complaint is justified, the member or panel
 - (a) must order the person that contravened this Code to cease the contravention and to refrain from committing the same or a similar contravention,
 - (b) may make a declaratory order that the conduct complained of, or similar conduct, is discrimination contrary to the Code,

- ...
- (d) if the person discriminated against is a party to the complaint, ... may order the person that contravened this Code to do one or more of the following:

- ...
- (ii) compensate the person discriminated against for all, or a part the member or panel determines, of any wages or salary lost, or expenses incurred, by the contravention;
- (iii) pay to the person discriminated against an amount that the member or panel considers appropriate to compensate that person for injury to dignity, feelings and self respect or to any of them.

[26] Pursuant to s. 37(2)(a) of the *Code*, I order Westwood and Mr. Schwab to cease their contravention of s. 13 of the *Code* and to refrain from committing the same or a similar contravention.

[27] I accept Ms. Koblensky's testimony respecting her wage rate at Westwood, and that she suffered a loss of two days of work, due to her termination. Pursuant to s. 37(2)(d)(ii), I order Westwood and Mr. Schwab to pay Ms. Koblensky two days wages in the amount of \$144.00.

[28] Ms. Koblensky was subjected to sexual harassment for about two months. She asked Mr. Schwab to address the issue to no avail and finally, at least in part, had her employment terminated due to her requests that the employer provide her with a sexual harassment free workplace. Pursuant to s. 37(2)(d)(iii), I order Westwood and Mr. Schwab to pay Ms. Koblensky \$4,000 for the injury she suffered to her dignity and self-respect.

[29] I order post-judgment interest. Interest is to be calculated at the rate of 3% which is the bankers' prime rate as published by the British Columbia Supreme Court Registry, in accordance with the *Court Order Interest Act*, R.S.B.C. 1996, c. 79. Liability for all amounts ordered is joint and several.

Marlene Tyshynski, Tribunal Member