



1998 CarswellOnt 6051

Drummond v. Tempo Paint & Varnish Co.

In the Matter of the Ontario Human Rights Code, R.S.O. 1990, c.H.19, as amended

In the Matter of the complaint by Ena **Drummond** February 27, 1990, alleging discrimination in employment on the basis of sex, harassment and sexual solicitation

Ontario Human Rights Commission, Commission and Ena **Drummond**, Complainant and **Tempo Paint** and Varnish Co. (Division of Tower Chemicals Limited), Bernard Jakobson and Hugh Kerr, Respondents

Ontario Board of Inquiry

Laird Member

Judgment: June 18, 1998

Docket: 93-0052; 98-011

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Counsel: *Alan L.W. D'Silva*, for Commission

Roger Rowe, for Complainant

Israel Balter, for Respondents

Subject: Constitutional; Civil Practice and Procedure

Human rights --- What constitutes discrimination — Sex — Employment — Sexual harassment — As basis for termination.

Human rights --- Vicarious liability for discrimination — Factors in determining vicarious liability — Employer's failure to provide harassment-free workplace.

Human rights --- Practice and procedure — Commissions and boards of inquiry — Evidence — General.

Statutes considered:

Human Rights Code, R.S.O. 1990, c. H.19

s. 5(1) — considered

s. 7(2) — considered

s. 9 — referred to

s. 10(1) "harassment" — considered

s. 41(1)(a) — considered

s. 45(1) — referred to

Laird Member:

Introduction

1 The events which gave rise to the complaint took place over a nine-month period from December 1988 to the end of September 1989. The complaint alleges that, during this period, Ena Drummond suffered harassment, sexual solicitation and discrimination on the basis of sex as an employee of the corporate respondent, Tempo Paint and Varnish Co. (Division of Tower Chemicals Limited), referred to in this decision as "Tower Chemicals". By interim decision, the proceeding was discontinued against the two respondents named as personally responsible for the alleged sexual harassment: Oscar Boateng and Osei Nana Yaw. Osei Nana Yaw (relying on the spelling of this name as provided by Oscar Boateng in his evidence) had apparently left the country and had not received notice of the hearing before the Board of Inquiry. Oscar Boateng attended the first day of hearing but had not received notice of the human rights complaint, or of the hearing, until the day before the hearing commenced before the Board of Inquiry. The two remaining personal respondents are Bernard Jakobson, the president and an owner of Tower Chemicals, and Hugh Kerr, the senior manager under Mr. Jakobson.

Decision

2 The evidence establishes that the complainant, as an employee of Tower Chemicals, suffered harassment and discrimination in the workplace on the basis of sex, contrary to s.7(2) and s.5(1) of the *Human Rights Code* ("Code"). The personal respondents, Mr. Jakobson and Mr. Kerr, knew or should have known about the harassment, and are each personally liable under s.9 of the *Code*, for their own failure to take any sufficient action to prevent it. In addition, because the personal respondents constituted the senior management of Tower Chemicals, the corporate respondent is held to be liable for their inaction in respect of the harassment experienced by the complainant.

Evidence

3 The key witnesses for the Human Rights Commission (the "Commission") were the complainant and her co-worker during the relevant period, Barbara Smith. The Commission also called as witnesses three physicians who had treated Ms Drummond: Dr. Mark Goldstein, Dr. David Gordon and Dr. David Goldstein. As well, the Commission relied on the fact that the Ontario Court (Provincial Division) had convicted both Mr. Boateng and Mr. Yaw (referred to in the court transcript as "Osei Nana" and "Nana") of sexual assault in respect of conduct which is at issue in this complaint. In addition to the sexual assault conviction, Mr. Boateng was also convicted of assault on the complainant in respect of an incident which took place in the plant on July 27, 1989, referred to in this decision as the "burn incident". The Commission relied on the criminal convictions as *prima facie* proof that Mr. Boateng and Mr. Yaw committed the offence of sexual assault, and in the case of Mr. Boateng, also the

offence of assault.

4 The key witnesses for the respondents were: Bernard Jakobson (president and senior manager); Hugh Kerr (manager); Tony Martil (sub-foreman); Velnathan Viranathan (senior employee) and Oscar Boateng. Mr. Boateng was dismissed as an employee of Tower Chemicals in October 1989 for allegedly falsifying his attendance records. In addition, two plant workers and an office assistant testified as to their recollection of the events alleged by the complainant: Ranjit Singh, Ricardo Silva and Jayne Murat. Finally, the respondents called as a witness a police officer who interviewed Ms Drummond in respect of events as issue in this complaint: Police Constable ("P.C.") Reynolds.

Evidentiary Value of the Criminal Convictions

5 Counsel for the respondents argued that the presumption of proof arising from the criminal convictions should be rebutted in the present case on several grounds, including that the presiding judge erred in his assessment of credibility and exhibited racial bias against the accused. Respondent counsel also submitted that the Board of Inquiry had evidence unavailable to the Provincial Court which should lead to an adverse finding on the credibility of the complainant's evidence concerning the events at issue in both the criminal and human rights proceedings. The transcript of the criminal proceedings was produced to support the submissions with respect to the alleged errors committed by the Ontario Court justice presiding at the criminal trial.

6 Counsel for the Commission did not dispute that the presumption of proof arising from the convictions was rebuttable before me, but submitted that there were no circumstances to justify rebuttal in this case.

7 In my view, it is unnecessary for me to consider the submissions of counsel on the evidentiary value of the prior convictions. I have concluded, based on the evidence in this proceeding taken as a whole, that the complainant's testimony as to the events which gave rise to the complaint is credible. Although evidence was led which may suggest that the complainant was less than fully truthful in her testimony about certain events after her dismissal by Tower Chemicals (and this may become a factor in assessing the quantum of an award), I find that her evidence on the key incidents of harassment was corroborated to a significant degree by the testimony of Barbara Smith, Dr. David Goldstein and P. C. Reynolds.

Findings of Fact

Background

8 The background facts to this complaint are not in dispute. The corporate respondent, Tower Chemicals operates a plant in Weston, Ontario which manufactures paint and related products. In the late 1980's, approximately 20 to 25 workers were employed in this operation. The complainant commenced her employment with Tower Chemicals at the beginning of April 1988. Ms Drummond worked as a labeller and box-maker in the paint manufacturing plant until her employment was terminated on September 19, 1989. One other woman, Barbara Smith, worked with Ms Drummond during the relevant period. Ms Smith mostly made boxes and Ms Drummond mostly did the labelling. These two were the only women working on the plant floor during the events at issue, although at other times there had been one or two other female employees, always working at these two particular jobs.

9 Mr. Yaw and Mr. Boateng were hired by Tower Chemicals in December 1988, and began to work as "fillers" in an area adjoining Ms Drummond's work area. They regularly worked side-by-side with Velnathan Viranathan,

who supervised their work. There were open double doors between the fillers' work area and that of the complainant and Ms Smith. Mr. Yaw and Mr. Boateng filled cans of paint and paint remover, and packed the cans into the boxes made by Ms Smith and labelled by Ms Drummond. Mr. Yaw and Mr. Boateng, and occasionally Mr. Viranathan, would take turns coming into the women's work area several times a day to collect the boxes for packing the cans. At times, Ms Drummond and Ms Smith would be asked to assist Mr. Yaw and Mr Boateng with the packing.

10 It was Ms Drummond's evidence that Mr. Yaw and Mr. Boateng began to harass her sexually soon after they commenced employment. She testified that two incidents of sexual harassment by Mr. Yaw took place in December 1988, and that on each occasion, she told Mr. Yaw that he could not touch her. She testified that, between December 1988 and May 1989, there were no further incidents of inappropriate touching, but that a pattern of daily harassment by Mr. Yaw and Mr. Boateng occurred from May through July 1989. On July 27, 1989, the event occurred which has been referred to as the "burn incident". Following July 27, 1989, the complainant was off work for approximately two weeks. The complainant testified that she was subjected to continuing harassment from the day of her return to work to her firing. My findings of fact are set out below with reference to the key incidents.

December 1988 Incidents

11 The incidents alleged to have taken place in December 1988 involved Mr. Yaw "hugging" the complainant from behind, once when they were punching out of work, in the lunchroom, and shortly thereafter when she was leaving the plant, and again a few days later in the month when they were on the same bus going home from work. Ms. Drummond testified that she told Mr. Yaw on both occasions that he was not to "do that" again.

12 I accept Ms. Drummond's evidence with respect to these incidents. Although Mr. Boateng testified that he had not observed these interactions, and that the allegations were "ridiculous", Ms Drummond's account of the events was corroborated by Barbara Smith's evidence. Ms. Smith testified that she saw Mr. Yaw come up behind Ms Drummond in the lunchroom and hug her. She heard Ms Drummond say that she did not like him to do that, and heard Mr. Yaw laugh in response. She also observed the incident in the bus. She testified that she saw Mr. Yaw touch Ms Drummond and try to hug her as they were trying to get off the bus. She testified that Ms Drummond was upset, and that in response, Mr. Yaw laughed and ran off.

May to July 1989

13 It was the complainant's evidence that she was subjected to ongoing, daily sexual harassment by Mr. Yaw and Mr. Boateng from May 1989 to July 27, 1989. She testified that the harassment started with an incident on May 3rd, when she and Mr. Yaw were working at the same table. She testified that he told her he wanted to "fuck you and give you a boy baby", and that she ignored him. She stated that, two days later, Mr. Boateng touched her breasts while she was working and tried to push his hand between her legs. She told him to stop and he ran away and laughed. Ms Drummond testified that from this point on, there were daily instances of harassment. In her words, Mr. Yaw and Mr. Boateng would "slap my bum", put their hands "on my bottom", tell her that "You know I want to fuck you". They would pass by her when she was leaning over doing her work and touch her breasts. As well, they made a habit of throwing small objects, such as bottle caps, at her when her back was turned. She testified that on July 5, 1989, she hit Mr. Boateng when he touched her breasts, and he responded by hitting her in the face with a plastic jug, breaking her glasses.

14 This evidence of harassment was strenuously disputed by the respondents. Neither Mr. Jakobson or Mr.

Kerr could recall seeing or hearing of any inappropriate behaviour on the part of Mr. Yaw and Mr. Boateng. Mr. Jakobson testified that, after the police charged the two men with sexual assault, he went around the plant asking if anyone had seen anything, and that "No one had seen anything. No one knew." He testified that he thought at the time "How is it possible that no one saw?" He testified that he did not believe that there could have been repeated harassment of the complainant without anyone else knowing. Similarly, Mr. Kerr testified that, following the arrests, he talked with "people in the plant" about whether or not they had seen anything inappropriate going on, and was told that they had not. He acknowledged in his testimony that he believed this and did not see any need to speak to Ms Drummond herself about the events leading to the arrest.

15 Mr. Boateng was called as a witness. He acknowledged that he and Mr. Yaw were friends and lived together throughout their employment at Tower Chemicals, but denied each and every allegation against himself and Mr. Yaw. When asked if he had ever inappropriately touched her, he called the allegations "ridiculous" and "depressing". He pointed out more than once that the complainant was "much older" than him and, in his words, "not my type". He testified that the incident in which he is alleged to have broken Ms Drummond's glasses "never happened", and later testified that he could not recall any incident in which Ms Drummond's glasses were broken at the plant. In light of the testimony of other witnesses, summarized below, I did not find Mr. Boateng's denials to be credible.

16 Three employees were called as witnesses to testify that they did not observe any inappropriate behaviour by Mr. Yaw and Mr. Boateng. Tony Martil, Velnathan Viranathan and Ranjit Singh were all still employees of Tower Chemicals when they gave evidence. Mr. Martil described Mr. Jakobson as being "like a father" to him. Mr. Martil and Mr. Singh acknowledged in cross-examination that their work area was 50 to 75 feet away from Mr. Drummond's table, and that their backs would be to the complainant when sitting at their tables. Mr. Martil testified that he walked through the plant at most two or three times a day. Mr. Viranathan, on the other hand, worked at the same table as Mr. Yaw and Mr. Boateng, and could see Ms Drummond from his work area, but would not normally go with Mr. Yaw and Mr. Boateng when they went into the complainant's work area collecting boxes. None of the three men could recall observing Mr. Boateng or Mr. Yaw inappropriately touching Ms Drummond or Ms Smith.

17 I noted that, although all three employee witnesses had a detailed recollection of disruptive behaviour on the part of the complainant on the day she was fired, all denied having any recollection of the "burn incident", discussed below, or of the arrest of Mr. Yaw and Mr. Boateng at the plant on the following day. Neither Mr. Singh or Mr. Martil, the sub-foreman, could recall if they had ever heard of, or been told of, the burn or the arrests, although Mr. Martil acknowledged that both events would be unusual. Mr. Singh testified that: "As far as I remember, it [the burn] never happened". Mr. Viranathan could not at first recall the burn or the arrests at the plant, but later in his testimony recalled that Ms Smith had told him that "Ena had been hurt by [paint] remover". On being reminded of his signed statement to the investigating officer from the Commission, he recalled that Ms Smith had also told him that she and Ms Drummond had gone to the police station and to the hospital after Ms Drummond was burned in the plant.

18 I did not find any of these three employee witnesses credible in their testimony in this area. Mr. Jakobson testified that he spoke to everyone in the plant on the day following the arrests, inquiring if anyone had seen inappropriate conduct by Mr. Yaw and Mr. Boateng. It does not seem possible that all three men had forgotten, or had not known about the injury to the complainant and the arrest of their co-workers at the plant, particularly given the fact that Mr. Jakobson asked the plant workers about the sexual harassment accusations on the following day. Their testimony in this area undercut the credibility of their evidence that they had never observed or

been aware of inappropriate conduct on the part of Mr. Yaw and Mr. Boateng towards the complainant.

19 Ms Smith was located and called as a witness after most of the respondent witnesses had testified. Ms Smith left her employment with Tower Chemicals on good terms in November 1990. She did not seem to harbour any ill feelings towards her former employer and she testified that Mr. Jakobson had given her pay increases on more than one occasion. She testified in a straightforward manner and her evidence corroborated Ms Drummond's evidence on several key points. I found her to be a very credible witness. She was careful to identify areas where she had no personal knowledge. For example, she was clear that she never saw Mr. Boateng touch Ms Drummond sexually and that Ms Drummond never complained about Mr. Boateng touching her, only about Mr. Yaw touching her and about Mr. Boateng fighting with her. Also, she was careful to clarify in her evidence that she did not actually see the fight when Ms Drummond's glasses were broken. By the time she arrived, the glasses were already on the floor and Ms Drummond was crying and saying that Mr. Boateng had hit her in the face with the jug.

20 Ms Smith testified that Mr. Yaw would "hit" the complainant, sometimes as often as twice a day. She testified that Ms Drummond complained to her about it when it happened. She acknowledged that she did not see Mr. Yaw actually touching Ms Drummond, and that he would not do it when she was there. Ms Smith testified that Mr. Yaw also touched her "on my bottom" regularly, and that he would only touch her when Ms Drummond was not around. She testified that she did not expect Mr. Yaw to touch Ms Drummond when he was likely to be observed doing so by her. She stated that: "If he [Mr. Yaw] was walking behind you, he is right there close. Even after the arrest, he didn't take it serious. Even after the arrest, two weeks later, he still do it. He still hit me on my bum." She testified that she told him more than once not to touch her and that Mr. Yaw would laugh and run away. Once when she talked to him, he told her that he knew that "Jamaican girls were cheap". Ms Smith testified that both she and Ms Drummond were from Jamaica, and that she told him that not all Jamaican women are the same. She testified that she tried to make it clear that she was not joking.

21 Based on Ms Drummond's testimony, as corroborated by Ms Smith, I find that Mr. Yaw did sexually harass the complainant on a regular basis in the plant. I make no finding as to whether or not the inappropriate touching occurred consistently on a daily basis, or was less frequent. I accept Ms Smith's evidence that Mr. Yaw touched Ms Drummond often, "sometimes" as often as twice a day. Given that the events in question took place many years before the hearing, it is not surprising that recollections would be imprecise. Further, although Ms Smith testified that she did not actually see Mr. Yaw's hands on Ms Drummond's body, I find it persuasive that Ms Smith recalled that Ms Drummond complained of being touched by Mr. Yaw frequently and that Ms Smith believed her because Mr. Yaw was also touching her inappropriately on a regular basis, always when she was not with Ms Drummond.

22 With respect to the conduct of Mr. Boateng, I find that, at minimum, he participated in the sexual harassment of the complainant by Mr. Yaw. It was not disputed that he was present on most or many of the occasions when the sexual harassment by Mr. Yaw occurred. I accept the evidence of Ms Drummond that Mr. Boateng swore at her, threw things at her, laughed at her, and on the occasion when her glasses were broken, hit her in the face with a plastic jug. Further, although Ms Smith's evidence does not offer corroboration on this point, I find on the balance of probabilities, that it is more likely than not that Mr. Boateng also touched Ms Drummond inappropriately during this period. Ms Drummond's evidence on this point is supported by her statement to P.C. Reynolds on the evening of the burn incident, as discussed below. The notes and signed statement taken by P.C. Reynolds establish that Ms Drummond gave essentially the same account of the key events at issue to the police officer in July 1989 as she gave to the tribunal. She reported that both men would "hug" her as they passed her

in the plant, and grab her "breasts, bottom, front". The officer's notes of her interview record that the complainant stated that "the sexual assault and verbal abuse continued every day", and that both Mr. Boateng and Mr. Yaw participated.

The Burn Incident

23 The complainant suffered an injury in the plant on July 27, 1989, when Mr. Boateng touched her with his gloved hand which was wet with paint remover. The incident occurred after Mr. Jakobson asked Ms Drummond to work with Mr. Boateng and Mr. Yaw packing boxes. Ms Drummond testified that, after Mr. Jakobson left her with the men, Mr. Boateng told her: "No fighting today", and then proceeded to wrap a cord around her neck. She testified that Mr. Boateng and Mr. Yaw took turns touching her on her vagina and breasts, and that she hit them to defend herself.

24 Ms Smith testified that she had been packing with the men earlier in the afternoon, and that Mr. Yaw had touched her on her stomach while she worked with them. Ms Smith was no longer in the room when Ms Drummond was assigned the task of assisting the men with the packing. Ms Drummond testified that, after the touching incident, the three of them started packing cartons with cans. Apparently an argument started between Mr. Boateng and the complainant about how she was packing the boxes. Mr. Boateng testified that he didn't like the way she was doing the packing, and that she was slow. Ms Drummond apparently continued to pack as she had been doing, ignoring his complaints. She testified that Mr. Boateng responded by telling her that women were not as strong as men, and that he threatened her with paint remover. She testified that they began to hit each other but she went and sat down on some empty cans because it was break time. According to Ms Drummond's testimony, Mr. Boateng dipped his gloved hand in paint remover and came over to where she was sitting and held her arm. She testified that it hurt her very quickly and that Mr. Boateng laughed. At this point, Ms Smith entered the filling area. Ms Smith testified that she heard Ms Drummond crying and came into the area and saw the burn. Mr. Jakobson testified that he saw the injury but in his testimony questioned whether it could really be considered a burn. He testified that he told the complainant to go to the bathroom and wash her arm, and he suggested that perhaps she did not do so, aggravating her injury. Ms Smith took Ms Drummond to the washroom, but it is not clear if Ms Drummond washed the paint remover off her skin at this point. Ms Drummond did no further work that afternoon. She and Ms Smith left work together and decided to go to the police station.

25 Mr. Boateng denied that he and Mr. Boateng touched Ms Drummond inappropriately and testified that he didn't see how the burn happened. It was his evidence that the burn was an accident and that he did not even realize that he had touched her. When questioned about the evidence of Dr. David Goldstein, who treated Ms Drummond at the hospital, that the burn "looked like someone had pressed with two fingers into the forearm", Mr. Boateng stated that Ms Drummond "could do it to herself if she wants to put me in trouble".

26 P.C. Reynolds interviewed Ms Drummond at the station. She testified that Ms Drummond's arm looked very painful, and that she decided to take her to the hospital before taking a complete statement. Dr. David Goldstein was the emergency physician at York Finch General Hospital that evening. He testified that Ms Drummond had received a second degree burn, which he described as more painful than a third degree burn because the nerve damage is less extensive. He testified that the pain associated with such a burn is intense and develops very quickly.

27 P.C. Reynolds took a detailed statement from the complainant over the course of the evening. The statement includes information about most of the key incidents relied upon in the human rights complaint. Although Ms

Drummond did not tell the officer about the fight when her glasses were broken, the statements show that even as long ago as July 27, 1989, Ms Drummond was saying that she was experiencing daily sexual harassment by both Mr. Yaw and Mr. Boateng, and that the two men regularly threw things at her and swore at her. With respect to her injury, she told the officer that Mr. Boateng dipped his gloved hand in a container of "acid" and "put the acid" on her left forearm. The officer described the burn as "purple" and "bubbled".

28 Counsel for the respondents did not object to the introduction of the officer's notes and the complainant's typed statement. In fact, P. C. Reynolds was a witness for the respondents and the notes and statement were introduced in her examination-in-chief. In my view, it is appropriate that I accept the officer's evidence of the complainant's early statements as corroborative of Ms Drummond's testimony in this proceeding. In urging me to rely on the prior statements as corroborative evidence, the Commission argued that the statements were part of the *res gestae* and responsive to the allegation that the complainant fabricated her story to support her claim.

29 Finally, I have considered the testimony of Dr. David Goldstein as to what Ms Drummond told him when he treated her in the hospital emergency department. The doctor testified that Ms Drummond reported to him that she had been grabbed by someone wearing a glove with chemicals on it. In his view, this was consistent with the physical appearance of the burn.

30 I find that the evidence as a whole supports a finding that Oscar Boateng held the complainant's forearm knowing that his gloved hand was wet with paint remover and that he caused her to suffer a second degree burn.

August and September 1989

31 It is undisputed that the complainant was off work for two weeks after the burn incident. She testified that, when she returned, neither Mr. Jakobson nor Mr. Kerr spoke to her about her situation. She was still required to work near Mr. Yaw and Mr. Boateng and to deal with them when they collected boxes several times a day. This was the case despite the fact that, as Mr. Jakobson's evidence established, the police had informed him about the sexual assault charges pending against Mr. Yaw and Mr. Boateng.

32 Ms Drummond testified that there were a number of incidents of harassment after she returned, all of which were denied by Mr. Boateng. She testified that, on one occasion, Mr. Boateng put a cart in her way and bumped into her when she was holding a number of boxes. She also testified that Mr. Yaw drove a loading vehicle over her foot, and that when Mr. Jakobson heard her complain about this, he walked away. It was the complainant's evidence that the two men continued to laugh at her and use indecent language towards her during August and September, but she did not testify as to any particular incidents of inappropriate touching during this period. Ms Smith testified that she was touched improperly by Mr. Yaw about two weeks after the arrests. Based on my assessment of the credibility of Ms Drummond and Ms Smith, I accept the evidence of both women on the incidents during this period.

Dismissal of the Complainant

33 Ms Drummond's employment with Tower Chemicals was terminated on September 19, 1989. There is no dispute that the immediate incident leading to termination involved the complainant throwing the boxes she was making onto the plant floor instead of neatly stacking them. There was much testimony about whether and how often the complainant threw boxes instead of piling them up neatly, and about whether or not this was a disruptive practice. I accept Ms Smith's evidence on this, as summarized below, without reservation.

34 Ms Smith testified that she was the primary box-maker, but that Ms Drummond would sometimes assist her. She stated that it was often difficult for the box-makers to keep up with the fillers, because "there were more of them and they were faster than us". She testified that when she and Ms Drummond fell behind, they would not take the time to pile the boxes up neatly, but would just shove them on the floor. This was apparently irritating to Mr. Boateng and Mr. Yaw, who had to pick up the boxes, and also to Mr. Viranathan, who received their complaints. Mr. Martil, Mr. Kerr and Mr. Jakobson all testified that Ms Drummond had to be spoken to about this on a number of occasions, but none of them seemed to recall having any difficulties with Ms Smith in this regard. Mr. Kerr testified that he had no intention of firing Ms Drummond for throwing boxes prior to her termination, although he sometimes had complaints about her being slow with her work.

35 I found it significant that Mr. Kerr and Mr. Martil did not acknowledge in their testimony that Ms Smith was the primary box-maker. Only Mr. Viranathan testified that Ms Smith also made boxes, but he testified that Ms Smith never threw the boxes, but rather stacked them neatly. When he was recalled as a witness and Ms Smith's testimony was put to him, he testified that "maybe once a month" Ms Smith would throw the boxes instead of stacking them. He also acknowledged when recalled that Ms Smith was the person who most often made the boxes. Mr. Boateng confirmed in his testimony that Ms Smith was the primary box-maker.

36 Ms Smith was not at work on the day that Ms Drummond was fired. Ms Drummond testified that she was making boxes and tossing them onto the floor. Mr. Boateng and Mr. Yaw came into her work area and stood in the space where she was throwing the boxes. It was her evidence that she believed that they were doing this on purpose, trying to get in the way of the boxes. She testified that the two men went to Mr. Kerr and complained that she was throwing boxes, and that he came and spoke to her about it. She testified that she stopped working and told him she was going to the bathroom. He punched out her time card and fired her.

37 There were several versions of the actual events leading to the termination. Mr. Singh testified that Ms Drummond was throwing boxes and talking loudly to Mr. Martil and Mr. Viranathan, but that he could not hear what she was saying. Mr. Viranathan; on the other hand, testified that the problem was that Ms Drummond refused to make boxes. He testified that when he and Mr. Martil asked her to make boxes, she "never listened". He testified that she would make one box and throw it on the floor. He also testified that Ms Drummond yelled and that he had never seen her behave like that "to this extent" before.

38 Mr. Martil also testified that Ms Drummond was throwing boxes on the day she was terminated. He said that when he asked her to stop, she "just sat there and didn't say anything". He testified that he brought Mr. Kerr over, but that she would not respond to Mr. Kerr's instructions. In Mr. Martil's words, Ms Drummond "just sat there and won't listen".

39 Mr. Kerr's version was different. He testified that Mr. Martil told him that Ms Drummond was in "one of her rages" and that she was "throwing cartons around", "cursing and swearing" and slowing production down with her behaviour. It was his evidence that it was not particularly unusual for Ms Drummond to go into a rage, but that he had never before witnessed it, although he had been told about this by Mr. Martil. He testified that Ms Drummond often exhibited "mood turns" and that these "fits" were handled in the plant by Mr. Martil and by the "other two ladies" (referring to Ms Smith and another woman who had previously worked in the box-making area). He testified that he spoke to her on three separate occasions that afternoon, giving her time in between to calm down, and that he fired her on the third occasion when she told him "in no uncertain terms" that neither he nor Mr. Martil were her boss. Mr. Kerr stated that the sole reason for the termination was her insubordination in refusing to recognize his (and Mr. Martil's) authority and in refusing to follow their directions to continue mak-

ing and stacking boxes.

40 Mr. Kerr's evidence about Ms Drummond's general conduct in the workplace should be contrasted with the evidence of other witnesses. Mr. Martil, in his evidence, said nothing about the complainant having fits or rages in the workplace. He said nothing about her being loud or rude or out-of-control on that day or any other day. Similarly, Ms Smith, who was not at work on the day that the complainant was fired, testified repeatedly that she never heard Ms Drummond use "bad language" in the plant. She testified that if "you bug Ena, she gets upset", but that she never heard her swear or scream. Mr. Viranathan, on the other hand, testified that Ms Drummond swore in the workplace and was disruptive, but in cross-examination, stated that she had sworn at him on one occasion only, when he asked her to do something. He testified that he never again asked her to do anything, but that he heard her swear on other occasions, although not necessarily at anyone in particular. This can be contrasted with the evidence of Ricardo Silva, an employee who worked with the complainant for about one month in 1988. He testified that the complainant swore at him, pushed him against a machine, threatened him with castration, and was extremely rude, although none of this was ever reported to Mr. Kerr or Mr. Jakobson until after the hearing had begun.

41 I do not accept Mr. Kerr's evidence with respect to the conduct of Ms Drummond on the day she was fired. None of the other witnesses characterized the complainant's behaviour in a way that corroborated his evidence. I find that his account of the termination exaggerated both the unruly nature of the complainant's conduct and the patience which he demonstrated in response. I generally accept Mr. Martil's version of the events of the day. Rather than going into a rage, I find it more likely that Ms Drummond stopped working after Mr. Yaw and Mr. Boateng complained about her throwing boxes. This is more consistent with the testimony of Mr. Singh and Mr. Viranathan, neither of whom suggested that Ms. Drummond's behaviour was out-of-control to the extent reported by Mr. Kerr. Ms Drummond's version of the events acknowledges that she stopped working. It may well be that she also told Mr. Kerr that she did not consider him or Mr. Martil to be her "boss". I note that her testimony at other times indicated that she regarded Mr. Jakobson alone as her employer.

42 Mr. Jakobson was not on the plant floor when the complainant was fired, but he accepted this result when informed later. The fact that he allowed this decision to stand was out-of-keeping with his evidence about his usual policy with respect to dismissal. He testified that he rarely fired employees, and only did so if there were "profound" or "very very serious" grounds. In fact, he stated in evidence that throwing boxes, yelling or disruptive behaviour would not be enough to justify termination of employment. But he also testified that he did not believe that Ms Drummond had in fact suffered a burn from the paint remover and that he did not believe that she was sexually harassed in the plant. Mr. Jakobson found Ms Drummond to be a troublesome employee who made unfounded accusations against other employees. In this light, it is not surprising that he supported the decision of Mr. Kerr to terminate her employment.

Findings of Law

Harassment in Employment and Discrimination on the Basis of Sex

43 Based on the factual findings, I conclude that Ms Drummond was subjected to harassment because of sex as an employee of Tower Chemicals, contrary to s.7(2) of the *Code*. The harassment by Mr. Boateng and Mr. Yaw created a poisoned work environment for the complainant and infringed her right to equal treatment in employment, contrary to s. 5(1) of the *Code*. Considering the definition of harassment in s. 10(1) of the *Code*, there can be no question that the harassing employees knew that their ongoing conduct was not welcomed by the com-

plainant and was the cause of significant distress on her part.

44 The harassment by Mr. Yaw consisted primarily of repeated intimate and inappropriate touching and abusive language. It persisted over an extended period of time, and was severe. I find that the harassment by Mr. Boateng also involved inappropriate sexual touching, but that perhaps this aspect of the harassment was less frequent in the case of Mr. Boateng. Ms Drummond was targeted by Mr. Boateng in other ways, also on the basis of gender. I find that Mr. Boateng hit her or injured her on at least two occasions; and participated in incidents in which the two men threw small objects at Ms. Drummond (and also at Ms Smith) to taunt her. This apparently non-sexual conduct is appropriately characterized as gender-based harassment or harassment because of sex: *Shaw v. Levac Supply Ltd.* (1991) 91 C.L.L.C., 16,158 at 16,182. There can be no question that Ms Drummond, together with Ms Smith, was targeted for abusive behaviour because she was a woman. For example, just prior to the burn injury, Mr. Boateng argued with Ms Drummond about the pace of her work and told her that women were not as strong as men. There was no evidence that any of the male employees had bottle tops thrown at them or were injured by Mr. Boateng. Considered in the context of the ongoing behaviour of a sexual nature there is, in my view, no question that this pattern of conduct is appropriately characterized as gender-based harassment.

45 Further, to the extent that Ms Drummond received a disproportionate share of the abuse as compared to Ms Smith, I have no difficulty in concluding that this was because it would have quickly been apparent to the two men that the complainant was the more vulnerable of the two and was very disturbed by their behaviour. Ms Smith was able to talk calmly to the men about their behaviour. She testified that she never took it too seriously and for example, testified about simply stepping back when Mr. Yaw placed his hand on her stomach. Ms Drummond's evidence, on the other hand, demonstrated that she was clearly deeply humiliated and upset by their conduct. As was noted in *Shaw v. Levac Supply Ltd.*, *ibid.*, at 16,186, it is not surprising that a person who bullies and harasses would target a vulnerable victim whose susceptibility is established. Certainly, Ms Drummond was such a person.

Termination of Employment

46 The complaint did not allege that the complainant was dismissed as an act of reprisal for going to the police in respect of the allegations of sexual harassment, although this issue was raised by counsel for the complainant. In fact, the testimony of Mr. Jakobson suggested that the criminal process was not a source of ongoing concern to him, and he considered the matter to be out of his hands after the arrests at the plant.

47 The question to be decided with respect to the termination is not, of course, whether or not there was just cause for the dismissal in accordance with employment law jurisprudence. Rather, the question to be determined is whether or not discrimination and harassment on the basis of sex were among the factors which resulted in the dismissal. The Commission submitted that the ongoing harassment of the complainant led to the events which culminated in the termination of the complainant's employment. In response, the respondents relied on the testimony that suggested that Ms Drummond was a disruptive employee who was ultimately fired for being insubordinate and refusing to do her work as instructed.

48 I have already found that the explanation for the termination given by Mr. Kerr is less than credible. While the complainant may have been insubordinate in her actions or words, I do not accept that she was, on this or any other occasion, in a rage. Although much was made of the fact that the complainant was in the habit of throwing boxes, the evidence established that Ms Smith, the primary box-maker, attracted little criticism for the same practice. The respondents have not provided me with an adequate explanation for the termination, particu-

larly given Mr. Kerr's statement that he had no plans to fire her prior to actually doing so. The most likely reason for the termination is simply that Mr. Kerr became impatient and annoyed with Ms Drummond. The evidence of Mr. Kerr and Mr. Jakobson left no doubt that they both viewed her as a difficult employee, and I find it to be more than likely that her harassment allegations were part of that assessment. When, on that afternoon, Mr. Kerr heard complaints that she was throwing boxes or not making boxes, when she stopped working and told him that she was going to the bathroom, and particularly if she also disputed his authority as manager, he had enough reason, in his own mind, to end her employment. However, if we look behind Ms Drummond's disruptive behaviour, it is apparent that the ongoing harassment by Mr. Boateng and Mr. Yaw, and the inaction by management in response, were, at minimum, contributing factors.

49 Accordingly, I find on the evidence that the harassment was one of the factors which led to the dismissal. It was because of the harassment that Ms Drummond stopped working that afternoon. She testified that she had long since given up hope of getting any assistance from management in dealing with the hostile work environment. As a result, she may well have been difficult or disrespectful to Mr. Kerr when he came to speak to her, giving him the pretext for firing her. Mr. Jakobson allowed the decision to stand because he found the complainant, and her allegations, to be troublesome. He did not consider the extent to which his failure to address the allegations may have contributed to any troublesome behaviour on the part of the complainant. I find that the ongoing nature of the harassment, and the failure of management to take appropriate steps, were contributing factors which led to the dismissal, as submitted by the Commission. I conclude that the termination of the complainant's employment is properly considered a loss arising out of the infringement of her right to freedom from harassment and to equal treatment in employment and is thus compensable under s. 41(1)(a) of the *Code*.

Liability of the Respondents

50 The three remaining respondents to this complaint are: Hugh Kerr, Bernard Jakobson and Tower Chemicals. The issue of corporate liability was the subject of lengthy legal argument and is best dealt with after consideration of personal liability.

Personal Respondents

51 It is a matter of settled law in Ontario that management employees are responsible for taking appropriate steps to prevent discriminatory harassment in the workplace from the point at which they knew or should have known of the offending conduct. A failure on the part of a management employee to take appropriate action may support a finding of personal liability for infringement of the right to a discrimination and harassment-free workplace. The leading Board of Inquiry decisions establishing this principal are: *Dhillon v. F.W. Woolworth Company Ltd.* (1982), 3 C.H.R.R. D/743; *Olarte v. DeFilippis and Commodore Business Machines Ltd.* (1983), 4 C.H.R.R. D/1705; *Fu v. Ontario Government Protection Service* (1985), 6 C.H.R.R. D/2797; *Persaud v. Consumer's Distributing Ltd.* (1990), 14 C.H.R.R. D/23; *Shaw v. Levac Supply Ltd.*, *supra*.

52 In the present case, it is undisputed that both personal respondents knew of the allegations of harassment from July 28, 1989, the day after the burn incident, when the police arrested Mr. Yaw and Mr. Boateng at the plant. The only question at issue for the period from July 28th to termination of the complainant's employment on September 19, 1989, is whether or not Mr. Kerr and Mr. Jakobson took adequate steps to address the situation.

53 The evidence of Mr. Kerr and Mr. Jakobson was that each of them spoke to Mr. Yaw and Mr. Boateng upon their return to the plant on the day after being charged. They testified that they each separately told both men to

stay away from the complainant. Mr. Boateng testified that he recalled being told by Mr. Kerr that he was to stay away, but that Mr. Jakobson did not speak to him about the charges or about avoiding contact with the women. Mr. Boateng testified that he still worked in the same area, close to where the women worked and that he still had to get boxes from the women several times a day, in his words "constantly, all the time". Nothing was changed with respect to his work situation and in fact neither he or Mr. Yaw could do their jobs as expected without having contact with the complainant.

54 I also note the evidence of Mr. Martil, who testified that, although he was the foreman responsible for Mr. Yaw, Mr. Boateng, Ms Drummond and Ms Smith, he was not told by Mr. Kerr or Mr. Jakobson that the two men were to stay away from the women. Indeed, it was Mr. Martil's evidence that he was away the day of the burn incident and the day of the arrests, and that he was not told about either event. Similarly, Mr. Viranathan, who worked beside Mr. Yaw and Mr. Boateng and had a supervisory role, testified that he had no first-hand knowledge of the two events, and was not told that the two men should avoid contact with Ms Drummond and Ms Smith.

55 There is no question that Mr. Kerr and Mr. Jakobson failed to take adequate steps to prevent further harassment of the complainant. Accepting that Mr. Kerr did instruct Mr. Boateng and Mr. Yaw to avoid contact with the two women, he failed to make adjustments in the work process that would make this possible. He did not, for example, instruct Mr. Viranathan to collect the boxes, or make some other arrangement to keep the two accused employees out of the women's work area. Neither Mr. Kerr or Mr. Jakobson spoke to the two women about the charges or listened to their concerns. In fact, both Mr. Kerr and Mr. Jakobson admitted that they spoke to just about everyone in the plant but the two women. Mr. Jakobson testified that he spoke to 18 to 23 people in the plant, and concluded that the accusations were false. Neither manager took any steps to put in place a complaints process by which the women could bring forward evidence of any continuing misconduct.

56 Mr. Jakobson's evidence on his perception of his own responsibilities is particularly significant. He testified that he believed that, once the police became involved, the situation was not his business. He testified that he had a business to run, that he was "not interested", that "the police took over and that is all". If he received a similar complaint today, he testified that he would call the police and have them take care of it. Mr. Jakobson had no appreciation of his own responsibilities as the senior on-site manager and president of the company. Given Mr. Jakobson's clear disinterest in addressing the harassment allegations, and indeed his current and continuing belief that there was in fact no problem, Mr. Kerr's personal liability as the second-in-command should be limited.

57 Turning now to the period prior to the criminal charges, the complainant testified that she attempted on more than one occasion to complain to Mr. Jakobson about the conduct of Mr. Yaw and Mr. Boateng. Mr. Jakobson admitted that he recalled Ms Drummond speaking as he passed through the factory. He testified that he did not understand what she was saying or even if she was speaking to him and that consequently he paid no attention to her. He testified that he "didn't take her seriously ... just neglected her" because he could not understand her. Ms Smith testified that she saw Ms Drummond try to speak to Mr. Jakobson about the harassment on one occasion as he passed through the plant but that he did not stop.

58 I accept the complainant's evidence that she did make more than one attempt to speak to Mr. Jakobson about the harassment. It is consistent with her statement to P.C. Reynolds in which she stated that she had "kept on telling" Mr. Jakobson that "both guys abuse me sexually", even though at that time it was not particularly in her interest to complain of the inadequate response of her employer. It may be that Ms Drummond was not as clear

or as frequent in her complaints to Mr. Jakobson as she now believes. It is perhaps unfortunate that Ms Smith did not also try to speak to him about the harassment. However, the fact is that Ms Smith wanted to handle the situation on her own, but Ms Drummond wanted and was entitled to assistance, regardless of how articulate she might have been in bringing her concerns to the attention of Mr. Jakobson.

59 Relying on the decision in *Olarte v. DeFilippis and Commodore Business Machines Ltd.*, *supra* at 1747, the Commission submitted that Mr. Jakobson should be found to have, at minimum, constructive knowledge of the allegations of harassment. I agree. Although Mr. Jakobson may not have understood what the complainant was trying to tell him, he also made no effort at all to understand her. Moreover, his testimony established that, if he had known about harassment allegations, he would have simply told her to speak to the police. He would not have interviewed her and Ms Smith. He would not have investigated their allegations. He would not have modified the work situation. He would, in fact, not have considered the situation his business. Under these circumstances, Mr. Jakobson cannot hide behind his apparent inability to understand what the complainant was trying to tell him. If he had considered it his business, he might have taken the time to find out what the complainant was trying to tell him. Mr. Jakobson's failure to take steps to address the harassment allegations was at least one of the factors which resulted finally in the termination of the complainant's employment. On the basis of this failure, I find him to be personally liable for losses arising out of the harassment, including damages for the termination of Ms Drummond's employment. I find that Mr. Jakobson's personal liability arises from the point at which the complainant spoke to him in the presence of Ms Smith about the behaviour of the two men. From this point on, he could and should have known about the allegations of harassment. Although there is no clear evidence about when this encounter took place, I find it likely to have occurred at the end of May or beginning of June 1989.

60 With respect to the liability of Mr. Kerr for the period prior to the criminal charges, Ms Drummond testified that she made no attempt to speak to Mr. Kerr or any more junior supervisory employee about the harassment. Accordingly, I make no finding of liability in respect of Mr. Kerr prior to his receiving notice of the harassment allegations from the police.

Corporate Respondent

61 Although all counsel made written and oral submissions on the impact and effect of s.45(1) of the *Code*, and the considerable jurisprudence interpreting that provision, I find it unnecessary to deal with the question of vicarious corporate liability given my finding of personal liability on the part of Mr. Jakobson and Mr. Kerr. It is a matter of settled law that a corporation can be held liable for harassment where its senior management had actual knowledge of the harassment, or should reasonably have had such knowledge, and failed to take reasonable steps in response: *Persaud v. Consumers Distributing Ltd.*, *supra* at 28-29; *Shaw v. Levac Supply Ltd.*, *supra* at 16,170; *Olarte v. DeFilippis and Commodore Business Machines Ltd.*, *supra* at D/1747; *Dhillon v. F.W. Woolworth Company Ltd.*, *supra* at D/760-763; *Broadfield v. DeHavilland of Canada Ltd.* (1993), 19 C.H.R.R. D/347 at D/367; *Fu v. Ontario Government Protection Service* (1985), *supra* at D/2801; *Wall v. University of Waterloo* (1995), 27 C.H.R.R. D/44 at D/65.

62 Accordingly, I find that Tower Chemicals, through the inaction of its management, infringed the rights of the complainant, under s. 7(2) and s. 5(1) of the *Code*, to freedom from harassment and from discrimination in employment, contrary to s.9 of the *Code*. The failure of management to address the harassment allegations perpetuated a hostile work environment for the complainant, and led predictably to her dismissal. Tower Chemicals is jointly and severally liable, with Mr. Jakobson and, to a lesser extent, Mr. Kerr, for losses arising out of the

infringement of the complainant's rights, including termination of her employment, given that the failure of its senior management to deal appropriately with the discriminatory harassment was, at minimum, one of the factors which led to her dismissal.

Remedy and Damages

63 This hearing is to be reconvened by conference call on June 26, 1998 at 9:30 a.m. At that time, I will hear from counsel as to whether or not it is necessary for me to hear further evidence relevant to the assessment of damages. As well, counsel should be prepared to advise me as to whether or not submissions on remedy and damages can be provided to the tribunal in writing, or if a further hearing day is required.

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