COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Friedmann v. MacGarvie,*
2012 BCCA 445

Date: 20121108
Docket: CA039348

Between:

John Friedmann

Respondent
(Petitioner)

And

Noemi MacGarvie

Appellant
(Respondent)

And

The British Columbia Human Rights Tribunal

Respondent
(Respondent)

And

West Coast Women's Legal Education and Action Fund

Intervenor

Before: The Honourable Mr. Justice Frankel
The Honourable Mr. Justice Tysoe
The Honourable Madam Justice Garson

On appeal from: Supreme Court of British Columbia, August 24, 2011
(*Friedmann v. MacGarvie*, 2011 BCSC 1147, Vancouver Docket S092567)

Counsel for the Appellant:	L. A. Waddell
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Place and Date of Hearing:	Vancouver, British Columbia October 10, 2012

Place and Date of Judgment: Vancouver, British Columbia
November 8, 2012

Written Reasons by:
The Honourable Mr. Justice Tysoe

Concurred in by:
The Honourable Mr. Justice Frankel
The Honourable Madam Justice Garson

Reasons for Judgment of the Honourable Mr. Justice Tysoe:

Introduction

[1] The principal issue on this appeal is whether sexual harassment constitutes sexual discrimination for the purposes of s. 10 of the *Human Rights Code*, R.S.B.C. 1996, c. 210 (the "*Code*").

[2] The appellant, Noemi MacGarvie, appeals from an order of a chambers judge allowing the judicial review petition of the respondent, John Friedmann, and setting aside a decision of a member of the respondent, British Columbia Human Rights Tribunal. The tribunal member had found that Mr. Friedmann had sexually harassed Ms. MacGarvie and had awarded Ms. MacGarvie $10,000 for injury to her dignity, feelings and self-respect, as well as approximately $9,500 for expenses incurred by her and for costs of the proceeding.

[3] The chambers judge held that the tribunal member had erred in concluding that Ms. MacGarvie's complaint was justified merely upon proof of sexual harassment, without finding sexual discrimination.

[4] The decisions of both the tribunal member (2009 BCHRT 47) and the chambers judge (2011 BCSC 1147) turned on their interpretation of the decision of the Supreme Court of Canada in *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252, 59 D.L.R. (4th) 352. I also believe that this matter turns on a proper understanding of *Janzen*. For the following reasons, it is my view the appeal should be allowed and the award of the tribunal member should be reinstated.

Background

[5] The facts of this matter are relatively straightforward, and Mr. Friedmann does not challenge the findings of sexual harassment made by the tribunal member.

[6] Ms. MacGarvie rented an apartment in a building owned by Mr. Friedmann from February 1, 2004 until January 31, 2005. She gave oral notice to terminate the

tenancy in late December 2004 because she felt that Mr. Friedmann's treatment of her was inappropriate.

[7] The tribunal member considered nine categories of Mr. Friedmann's conduct and found that the following three categories constituted sexual harassment:

1. Mr. Friedmann made a number of gifts and inappropriate comments to Ms. MacGarvie. The gifts included flowers, bread, chocolates, stained glass, and the installation of a mirror in her bathroom that Mr. Friedmann said was needed because Ms. MacGarvie was a beautiful woman and needed lots of mirrors. The inappropriate comments included referring to his tenants as beautiful women, repeatedly asking if her boyfriend was in the apartment when he picked up the rent cheque, and referring to himself and other members of his soccer team as "sexy, 40's, hardworking mens". The tribunal member found that Mr. Friedmann knew or ought to have known that the gifts and comments would be unwelcome and inappropriate to a young female tenant.

2. When Mr. Friedmann was showing Ms. MacGarvie a bicycle in the basement of the building, he put his hand on her buttocks while she was seated on the bike.

3. Mr. Friedmann asked unnecessary questions about Ms. MacGarvie's male friends, made derogatory comments about a male visitor, and told her "I don't care who you sleep with, if you're a lesbian, this man is a bad man and he has to leave".

Decision of the Tribunal Member

[8] The tribunal member first concluded that Ms. MacGarvie had not met the burden on her to demonstrate that she had been discriminated against on the basis of sex. She indicated there was scant evidence about Mr. Friedmann's treatment of

male tenants and stated she was unable to reach any conclusions about differential treatment of Ms. MacGarvie based on her sex.

[9] The tribunal member then went on to consider Ms. MacGarvie's sexual harassment complaint. She referred to passages from 1282 and 1284 of *Janzen* (which I will reproduce later in these reasons) and cited a decision of the tribunal (*Dietrich v. Dhaliwal*, 2003 BCHRT 6) in which it was concluded that the reasoning in *Janzen* with respect to sexual harassment in the workplace applied to cases of sexual harassment in tenancy situations. After reviewing the allegations of Ms. MacGarvie, the tribunal member concluded that the three categories of allegations that I have summarized above constituted sexual harassment by Mr. Friedmann.

[10] The tribunal member awarded Ms. MacGarvie (i) $1,922.84 for her expenses, (ii) $10,000 in respect of injury to her dignity, feelings and self-respect, (iii) $7,500 as costs, and (iv) pre-judgment and post-judgment interest.

Decision of the Chambers Judge

[11] The chambers judge stated that the principal issue was whether the tribunal member was correct that Ms. MacGarvie's complaint was justified upon proof of sexual harassment without making a corollary determination that the impugned conduct constituted discrimination based upon sex (para. 16).

[12] The judge rejected the position of Ms. MacGarvie that sexual harassment constitutes a separate and distinct form of discrimination and does not require proof of differential treatment (paras. 18 and 23). He was of the view that *Janzen* did not decide that sexual harassment, *per se*, is sexual discrimination but, rather, the circumstances of that case supported a finding of differential treatment in the workplace for the appellants on the basis of their sex (para. 21).

[13] The judge set aside the decision of the tribunal member and remitted the matter for rehearing.

Discussion

[14] The parties agreed that the issue before the court is a question of law and that the standard of review applicable to the decision of the tribunal member is one of correctness. This is the standard of review for decisions of the Human Rights Tribunal prescribed by s. 59 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45, "for all questions except those respecting the exercise of discretion, findings of fact and the application of the common law rules of natural justice and procedural fairness."

[15] Before turning to a consideration of *Janzen*, I wish to refer briefly to the governing legislation. Section 10 of the *Code* deals with discrimination in relation to tenancies. Subsection 10(1) reads as follows:

> 10 (1) A person must not
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> (a) deny to a person or class of persons the right to occupy, as a tenant, space that is represented as being available for occupancy by a tenant, or
>
> (b) discriminate against a person or class of persons regarding a term or condition of the tenancy of the space,
>
> because of the race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation, age or lawful source of income of that person or class of persons, or of any other person or class of persons.

[16] It is noteworthy that the wording of s. 10(1)(b) is similar to the applicable wording of the *Human Rights Act*, S.M. 1974, c. 65, considered in *Janzen* ("no employer ... shall ... discriminate against that person in respect of employment or any term or condition of employment ... because of the ... sex ... of that person"). As noted in *Janzen* at 1261, the Manitoba legislation was amended subsequent to the adjudication in that case to specifically prohibit sexual harassment in the workplace, and I understand other provinces (but not British Columbia) have followed suit.

[17] In *Janzen*, the appellants were waitresses in a restaurant. They were sexually harassed by a male employee who touched their bodies and made sexual advances towards them. After the physical harassment ended, the male employee and/or the

manager of the restaurant were unjustifiably critical of the appellants' work. The appellants filed a complaint with the Manitoba Human Rights Commission, and the Board of Adjudication held that the appellants had been sexually harassed and that this amounted to sex discrimination contrary to the Manitoba legislation. The holding was upheld by the Court of Queen's Bench, which ruled that sexual harassment did amount to discrimination on the basis of sex. However, the holding was overturned by the Manitoba Court of Appeal on the basis that sexual harassment could not constitute discrimination on the basis of sex because not all women at the restaurant were victims of sexual harassment.

[18] The Supreme Court of Canada rejected the reasoning of the Manitoba Court of Appeal. It reasoned that the fallacy in the position of the Court of Appeal was that sex discrimination only exists where gender is the sole ingredient in the discriminatory action. The Court held that it was not necessary for all members of the affected gender to be mistreated identically (at 1288).

[19] During the course of its reasons, the Supreme Court of Canada made two statements that were quoted by the tribunal member in this case. The first was a discussion of whether it is necessary to show economic loss to establish sexual harassment (at 1282):

> Sexual harassment is not limited to demands for sexual favours made under threats of adverse job consequences should the employee refuse to comply with the demands. Victims of harassment need not demonstrate that they were not hired, were denied a promotion or were dismissed from their employment as a result of their refusal to participate in sexual activity. This form of harassment, in which the victim suffers concrete economic loss for failing to submit to sexual demands, is simply one manifestation of sexual harassment, albeit a particularly blatant and ugly one. Sexual harassment also encompasses situations in which sexual demands are foisted upon unwilling employees or in which employees must endure sexual groping, propositions, and inappropriate comments, but where no tangible economic rewards are attached to involvement in the behaviour.

[20] The second passage quoted by the tribunal member was a description of what constitutes sexual harassment in an employment situation (at 1284):

> Without seeking to provide an exhaustive definition of the term, I am of the view that 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. It is, as Adjudicator Shime observed in *Bell v. Ladas*, [(1980), 1 C.H.R.R. D/155 (Ont. Bd.)], and as has been widely accepted by other adjudicators and academic commentators, an abuse of power. 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.

[21] On my reading of *Janzen*, the Supreme Court of Canada did hold that sexual harassment in the workplace is sexual discrimination. Chief Justice Dickson stated at 1276 that the central ground of appeal was whether "the Manitoba Court of Appeal erred in holding that sexual harassment of the type to which the appellants were subjected was not discrimination on the basis of sex". By allowing the appeal, the Supreme Court of Canada necessarily concluded that the sexual harassment did constitute sexual discrimination.

[22] Further, in the passage quoted above from *Janzen* at 1282, Dickson C.J.C. explained that sexual harassment is not limited to instances where there are tangible economic rewards or adverse consequences, and can be manifested in the sexual treatment of the female employees. He reinforced this in the quoted passage from 1284 by stating that sexual harassment is unwelcome conduct of a sexual nature that "detrimentally affects the work environment or leads to adverse job-related consequences" (emphasis added). In other words, the adverse treatment required for sexual discrimination can be the sexual harassment itself because it adversely affects the work environment. Thus, sexual harassment of the nature present in *Janzen* does constitute sexual discrimination. This is the point made in *Henson v. Dundee*, 682 F.2d 897 (11th Cir. 1982) that was quoted with approval by Dickson C.J.C. immediately prior to the passage I have quoted above from 1284:

> Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for

> the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.

This passage was also quoted with approval by the Supreme Court of the United States in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 at 67, 106 S. Ct. 2399 (1986), another decision relied upon by the Court in *Janzen*, which settled that sexual harassment in the workplace constituted sexual discrimination under the applicable American legislation.

[23] Finally, the following comments made by Dickson C.J.C. at 1278, 1290 and 1291 lead inexorably to the conclusion that the Court held that sexual harassment amounts to sexual discrimination:

> With the exception of the Manitoba Court of Appeal in the case at bar, all of the courts in Canada which have considered the issue, including two appellate courts, have also found sexual harassment to be a form of sex discrimination...
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> * * *
>
> The sexual harassment the appellants suffered fits the definition of sex discrimination offered earlier: "practices or attitudes which have the effect of limiting the conditions of employment of, or the employment opportunities available to, employees on the basis of a characteristic related to gender".
>
> * * *
>
> As noted earlier, the argument that sexual harassment is sex discrimination has been recognized by a long line of Canadian, American and English ... cases which have found sexual harassment to be sex discrimination.

[24] Mr. Friedmann says the Supreme Court of Canada did not hold that all forms of sexual harassment constitute sexual discrimination, by pointing to phrases from *Janzen* such as "sexual harassment of the type to which the appellants were subjected" (1276, IV) and "certain forms of sexual harassment constitute sexual discrimination" (1276, V). I do not consider that these phrases qualify the more general statements of Dickson C.J.C. set out above. In any event, although the sexual harassment in the present case was less aggravated than the harassment in *Janzen*, it was of the same general nature and falls within the non-exhaustive definition of the term "sexual harassment" given by Dickson C.J.C. at 1284 (quoted above). Even if one were to view the *ratio* of *Janzen* narrowly, it would still be

binding authority for the conclusion that sexual harassment of the type present in this case constitutes sexual discrimination.

[25] Although the actions of Mr. Friedmann were of a character similar to the actions of the employees in *Janzen*, this case does not involve an employment situation like *Janzen*, and there is no work environment that is detrimentally affected. As referred to earlier, the tribunal member cited *Dietrich v. Dhaliwal* for the proposition that *Janzen* applies to situations of sexual harassment in a tenancy. In *Dietrich v. Dhaliwal*, the reasoning of the tribunal member was as follows:

> [25] In my view, the reasoning of the Supreme Court of Canada in *Janzen v. Platy Enterprises Ltd.* (1989), 10 C.H.R.R. D/6205 with respect to sexual harassment in the workplace is, by analogy, applicable to the sexual harassment experienced by the Complainant. (See also *Veitenheimer v. Orange Properties Ltd.* (1992), 20 C.H.R.R. D/462 (Sask. Bd. Inq.).) I find that Mr. Dhaliwal, by sexually harassing the Complainant, discriminated against her regarding a term or condition of her tenancy because of her sex. In effect, being the recipient of Mr. Dhaliwal's unwanted advances implicitly became a condition of the Complainant's tenancy.

[26] I agree with the tribunal member in *Dietrich v. Dhaliwal* that the reasoning in *Janzen* does apply to a tenancy relationship, but my reasoning is a little different. I am not confident that it is correct to say that the sexual harassment implicitly became a condition of the tenancy. Rather, I would prefer to focus on the criteria set out in s. 10(1)(b) of the *Code*, which requires discrimination regarding a term or condition of the tenancy based on an enumerated ground. In that regard, I will refer to the legislation that governs residential tenancies.

[27] The *Residential Tenancy Act*, S.B.C. 2002, c. 78, sets out numerous terms and conditions applicable to residential tenancies in this Province. One of them, the term of quiet enjoyment, is set out in s. 28 of that Act:

> 28 A tenant is entitled to quiet enjoyment including, but not limited to, rights to the following:
>
> (a) reasonable privacy;
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> (b) freedom from unreasonable disturbance;
>
> (c) exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with section 29 *[landlord's right to enter rental unit restricted]*;

> (d) use of common areas for reasonable and lawful purposes, free from significant interference.

[28] In my view, a female tenant is entitled to quiet enjoyment of her apartment free of sexual harassment in the same way that a female employee is entitled to a work environment free of sexual harassment. By sexually harassing her in and about her apartment, Mr. Friedmann was discriminating against Ms. MacGarvie regarding the term of quiet enjoyment because of her sex, with the result that his actions violated s. 10(1)(b) of the *Code*. This was the approach taken by another tribunal member who applied *Janzen* to a tenancy situation: see *Emard v. Synala Housing Co-operative,* [1993] B.C.C.H.R.D. No. 39 at paras. 106-108. In my view, this is a preferable approach to the one taken in *Dietrich v. Dhaliwal*.

[29] As the Court in *Janzen* relied on American jurisprudence, it is of interest to note that the courts in the United States have concluded sexual harassment in the tenancy context is actionable sexual discrimination: see, for example, *United States of America v. Hurt*, 676 F.3d 649 (8th Cir. 2012).

[30] Mr. Friedmann also submits that in order to establish discrimination, Ms. MacGarvie was required to prove differential treatment by him of male tenants and that, as the tribunal member made a finding that Ms. MacGarvie did not prove differential treatment, sexual discrimination was not established.

[31] In my opinion, what a complainant in a sexual harassment case is required to show is that gender is a factor in the adverse treatment received by the complainant. This point was made by Dickson C.J.C. in *Janzen* (at 1288):

> While the concept of discrimination is rooted in the notion of treating an individual as part of a group rather than on the basis of the individual's personal characteristics, discrimination does not require uniform treatment of all members of a particular group. It is sufficient that ascribing to an individual a group characteristic is one factor in the treatment of that individual.

[32] One way to demonstrate in a discrimination case that the group characteristic of the complainant was a factor in the adverse treatment received by him or her is to introduce evidence of the treatment of persons who did not share the group

characteristic. However, that is not the only way in which it can be demonstrated. In a sexual harassment case, the very nature of the sexual harassment can be sufficient to establish that the gender of the complainant was a factor in the adverse treatment.

[33] This has also been the approach in the United States. In *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), the Supreme Court of the United States held that same-sex sexual harassment can constitute sex discrimination. Mr. Justice Scalia discussed the different modes of proof at 80:

> Courts and juries have found the inference of discrimination easy to draw in most male-female sexual harassment situations, because the challenged conduct typically involves explicit or implicit proposals of sexual activity; it is reasonable to assume those proposals would not have been made to someone of the same sex. The same chain of inference would be available to a plaintiff alleging same-sex harassment, if there were credible evidence that the harasser was homosexual. ... A same-sex harassment plaintiff may also, of course, offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace.

[34] In the present case, it was open to the tribunal member to infer that Mr. Friedmann sexually harassed Ms. MacGarvie because she was a woman, without any evidence of how Mr. Friedmann treated male tenants. It appears that the same inference was made by the Manitoba Board of Adjudication in *Janzen* itself. A review of its decision ((1985), 6 C.H.R.R. D/2735) does not disclose any reference to evidence with respect to differential treatment of male employees of the restaurant. In any event, the Supreme Court of Canada did not require any evidence of differential treatment in *Janzen*.

[35] Finally, one could view the tribunal member to have been in error when she held that Ms. MacGarvie had not met the burden of demonstrating that she was discriminated against on the basis of sex, but then went on to make an award for sexual harassment as if there were a free-standing remedy available for it in the event that sexual discrimination has not been proven. However, one must bear in mind how Ms. MacGarvie's claim was framed before the tribunal member. She was alleging both sexual discrimination and sexual harassment. Although the tribunal

member could have been clearer in explaining the bifurcated nature of the claim, it is my understanding that Ms. MacGarvie was alleging that in addition to being subject to sexual discrimination through sexual harassment, she was also discriminated against on the basis of her sex by other conduct of Mr. Friedmann that did not amount to sexual harassment (i.e., the six categories of his conduct that the tribunal member concluded did not constitute sexual harassment). The tribunal member did not err in requiring evidence of differential treatment of men with respect to the conduct of Mr. Friedmann that did not constitute sexual harassment, and her finding about the lack of proof in demonstrating discrimination on the basis of sex did not apply to the conduct that constituted sexual harassment. Viewing the complaint in its bifurcated nature, there was no error on the part of the tribunal member.

Conclusion

[36] The chambers judge erred in his interpretation of *Janzen* and in effectively concluding that sexual harassment of the nature present in this case does not necessarily constitute sexual discrimination as prohibited by s. 10(1)(b) of the *Code*.

[37] I would allow the appeal, set aside the order of the chambers judge and reinstate the award of the tribunal member.

"The Honourable Mr. Justice Tysoe"

I agree:

"The Honourable Mr. Justice Frankel"

I agree:

"The Honourable Madam Justice Garson"