

HUMAN RIGHTS PANELS OF ALBERTA

BETWEEN:

Elizabeth (Betty) Brawn

Complainant

-and-

Profile Seismic Ltd.

Respondent

DECISION

Panel Chair: Diane Colley-Urquhart

Date: June 16, 2009

File Number: S2006/05/0029

Human Rights and Citizenship Commission
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APPEARANCES

Elizabeth (Betty) Brawn)
Complainant) Milton Woodard, Q.C.,
) Legal Counsel

Director of the Human Rights)
and Citizenship Commission) Janice R. Ashcroft, Legal Counsel

Profile Seismic Ltd.)
Respondent) Randy Marks, Representative

Background

[1] Ms. Elizabeth (Betty) Brawn (the complainant) was employed full time with Profile Seismic Ltd. (the respondent) from November 1996 through to her termination on November 14, 2005. She was 68 years old at the time of her termination.

[2] Profile Seismic Ltd. is a duly registered active Alberta corporation (# 204201347) conducting business in Calgary, Alberta. It is a small oil field company with most of the employees working in the field. The office staff consists of the owner, an operations manager, a bookkeeper, and a secretary/receptionist.

[3] Mr. Oscar Reinhardt was the majority owner of the company until approximately 2007, at which time Mr. Randy Marks became the majority owner. As of March 3, 2009, Mr. Marks is the sole director and voting shareholder of Profile Seismic Ltd.

[4] The complainant filed a human rights complaint with the Alberta Human Rights and Citizenship Commission (the Commission) on March 20, 2006 in the area of employment practices on the grounds of age and gender. The director has carriage of this complaint before the Panel.

Preliminary Matters

[5] No substantive preliminary matters were raised.

[6] Mr. Mickey Woodard, legal counsel for the complainant, clarified his status at the Panel hearing. Ms. Brawn wanted to be independently represented by legal counsel because a number of allegations have been raised against her in relation to her conduct as an employee. She requested her legal counsel be present throughout the entire proceedings to focus mainly on this aspect. The submission of legal counsel for the director is on behalf of both the director and legal counsel for the complainant.

[7] During the testimony of Mr. Brien Gerlitz, crew manager for the respondent, the director's legal counsel, Ms. Janice Ashcroft, notified the Panel that rebuttal witnesses may be called in relation to testimony given by the witness since no notice was given. This was acknowledged by the Panel chair. The Panel asked Ms. Ashcroft at the end of the Panel hearing if rebuttal witnesses would be called and the decision was made not to call such witnesses.

Authority

[8] The director of the Commission referred this complaint to the chief commissioner as the parties were unable to reach a settlement. Under section 27(1)(b) of the *Human Rights, Citizenship and Multiculturalism Act*, (the Act) a human rights Panel was appointed by the chief commissioner on September 12, 2008 to hear this complaint.

Issues

1. Did the respondent contravene s. 7 (1)(a) of the Act in that Ms. Braun was fired due either in whole or in part to her age?
2. Did the respondent contravene s. 7 (1)(a) of the Act in that Mr. Marks harassed Ms. Brawn through specific gender and age based insults, constituting discrimination with regard to her employment or a term or condition of her employment?

Evidence from the Director's Exhibits

[9] During Ms. Brawn's tenure with the respondent, she worked under the direction of Mr. Reinhardt. Her responsibilities included senior accounting work and she worked closely with Mr. Bernie Makarra, accountant, and Mr. Bob Johnson, operations manager. They comprised the head office staff and worked well together for over seven years.

[10] In late 2003 to early 2004, Mr. Johnson prepared to retire and Mr. Marks, former field crew manager, started to transition into Mr. Johnson's position in head office. Once the transition was complete, the complainant experienced a very negative and disrespectful attitude from Mr. Marks in relation to her age and gender. Examples of this included:

- In a document entitled, *Profile Seismic's Senior Citizen's Day Care* (the document) he ridiculed the three older staff in the office.
- He attempted to reassign the complainant's parking spot without any authority or notice.
- He used gender and aged based insults: f.....g b.... (fb) and old b... (ob) when referring to the complainant.

[11] On or about March to May 2005, Mr. Makarra was retiring and Mr. Reinhardt offered his position to Ms. Brawn. She was also granted signing authority in August 2005 by Mr. Reinhardt which continued until she was dismissed.

[12] In October 2005, the complainant overheard a conversation where her firing was discussed. Mr. Reinhardt said to Mr. Chris Perry, accountant, "you would have me fire a 9 year employee who has not done anything wrong" to which Mr. Perry stated that "she should not be working anyways as she was over 70..."

[13] On November 14, 2005, Mr. Reinhardt asked the complainant to lunch. He told her about a job involving data entry for Mr. Perry. The complainant believed she was being offered the job until he told her that she didn't have to come back after lunch and gave her a cheque.

[14] The human rights complaint form submitted by Ms. Brawn on March 20, 2006, included the following relevant information:

- On May 17, 2005, when Mr. Perry started, Mr. Marks gave him the complainant's parking stall. When she raised this with Mr. Marks, he was very irate and stormed out of the office and moved his vehicle to the street so Mr. Perry could have his stall.
- From June 1, 2005 onwards, Mr. Marks was telling Mr. Reinhardt that the "fb" had to go. Mr. Reinhardt did nothing to stop the constant abuse.

- On July 7, 2005, Mr. Marks accused Ms. Brawn of withholding incoming and outgoing mail. She showed the Visa statements with late fee charges to Mr. Reinhardt. When he inquired about it to Mr. Perry, he said it was the complainant's fault for withholding mail. Mr. Reinhardt then told Mr. Perry that Ms. Brawn was to see every invoice before it was sent to the client.
- Mr. Marks and Mr. Perry listened in on her phone calls. They were on a constant campaign to make her job as unpleasant as possible. Mr. Reinhardt was aware and didn't stop it.
- On November 14, 2005, Mr. Reinhardt took Ms. Brawn out for lunch. She was told that Mr. Perry wanted only to work about three days a week and wanted somebody to perform data entry. The complainant asked when this would start and he said "you don't even have to come back to the office after lunch if you don't want."
- Ms. Mary Slipets worked part time for three to four months in the winter and always covered for the complainant when she was away. Ms. Slipets never mentioned anything to the complainant about name calling.

[15] The human rights respondent's response form submitted by Mr. Marks on June 9, 2006, included the following relevant information:

- The respondent believes the complaint is unjustified because the complainant is referring to private conversations that did not include her. Everything in the complaint is either incomplete or incorrect as no human rights were violated. She was treated more than fairly while employed, as well as when she was dismissed.
- Ms. Brawn was dismissed for the following reasons:
 - She was always paid until 4:30 p.m. but would leave whenever she pleased. When asked about leaving early she would say, "I am leaving," and walk out.
 - She would call in a replacement when she didn't feel like being at work and wouldn't let anyone know.
 - The company switched over to a computerized system and she refused to learn any of it.
 - She tampered with the incoming and outgoing mail by opening outgoing mail and withholding incoming mail.
 - She constantly told the operations manager and accountant that she didn't work for them.
 - If there was an incoming call, she would say that the employee wasn't there because she didn't feel like checking.
 - She felt entitled to swear and cuss profusely at the operations manager.

[16] In a letter dated December 5, 2005 (corrected at the hearing to November 5, 2005) to Mr. Marks from himself in relation to the dismissal of Ms. Brawn, it states:

Before the dismissal of Betty Brawn, I Randy Marks have agreed to pay for any monies outstanding regarding a pending law suit against Profile Seismic Ltd.

[17] In an undated document entitled *Profile Seismic's Senior Citizen's Day Care* (the document), and written by Mr. Marks, the following statements were made:

Profile seismic is a great place for elderly people to come to when they are no longer any use to society, there is great conversation about the farce holocaust, and whatever the f...k it is Bernie is always trying to say. (no one understands him at all) Once that gets boring (after 5-10 minutes), you can talk about how young people today don't know anything, or you can engage in a conversation about how profile is losing money (pure bullshit).

If you kiss Bernie's ass constantly, he will even give you a pay check for doing nothing at all (not to mention a gas card). Or if trucks is more your thing, there is always a conversation about parts going on (even though no one is listening). The best part about being a profile senior citizen, is even if you get up at an ungodly hour, there is always another useless old f....r here to tell lies with.

Here at Profile, we have a saying "the equipment is old, and so are the people" so grab your canes and wheelchairs and come on down and have a gay old time at PROFILE SEISMIC SENIOR CITIZEN'S DAY CARE.

WARNING: *If you are easily offended by people telling lies, or by people interrupting you to say you are full of shit, then Profile is not for you.*

Testimony of Ms. Elizabeth (Betty) Brawn

[18] The complainant started work for the respondent in November 1996 as a secretary. She typed bid letters, prepared invoices and job reports, and handled the morning mail. She completed manual entries into the ledger, manually prepared cheques, and cross-referenced paid invoices. Most of her work was for Mr. Makarra.

[19] In 1997, Mr. Johnson took over as operations manager. In April 2004, when Mr. Johnson retired and Mr. Marks took over, no one told the complainant that she was to report to Mr. Marks.

[20] In October 2004, Mr. Marks came into the complainant's office and handed her the *Profile Seismic's Senior Citizen's Day Care* document. He later came back and asked if she saw any humour in it. She found it very degrading even though he told her that he wasn't referencing her. She made a copy then threw it in her garbage but later retrieved it. When Mr. Marks left in the afternoon, Ms. Brawn went into his office to see if his copy was on his desk because the one she had made was crumpled. She saw his copy lying on his garbage can. The complainant denied ever going into Mr. Marks's office and taking anything else out of his garbage can.

[21] She then gave the document to Mr. Makarra who gave it to Mr. Reinhardt. She wanted them to know what Mr. Marks thought of the people he worked for. She did not distribute other copies. Her copy later disappeared out of a personal file in her desk. She told Mr. Reinhardt about it and asked him if she could put locks on her desk because things were disappearing. He approved the request.

[22] In late May 2005, Mr. Makarra was retiring and Mr. Reinhardt offered the complainant the job. She declined the offer because she wasn't an accountant and didn't feel qualified. Mr. Perry was hired that same month.

[23] There were three designated parking stalls assigned to the company and Ms. Brawn had parked in the same stall for seven years. Mr. Perry parked in the complainant's parking stall for the first few days when he started. She spoke to Mr. Reinhardt about it, but no changes were made.

[24] One week later when she came to work, she parked in her stall because Mr. Perry wasn't there. Mr. Marks told Mr. Perry that he could park there. She went directly to Mr. Marks' office and Mr. Reinhardt and Mr. Makarra also arrived and asked him why he had given her parking stall away. He told her that it didn't make any difference to him and that Mr. Perry could park there if he wanted to. Ms. Brawn told Mr. Marks that he had "no business because that was my spot and Oscar agreed, and that has been my parking spot from day one." Mr. Marks went out and moved his truck out to the street.

[25] One morning in June 2005, she overheard a private conversation between Mr. Marks and Mr. Reinhardt in the coffee room adjoining to her office. She heard Mr. Marks say "that fb has got to go." They stopped their conversation when they realized she was in her office.

[26] In early July 2005, when she was checking four or five Visa statements, there were over \$100 in late fee charges. The complainant brought this to Mr. Reinhardt's attention, who in turn spoke with Mr. Perry.

[27] Only Mr. Makarra and Mr. Reinhardt had signing authority. When Mr. Makarra left, Mr. Reinhardt was the only one remaining with signing authority. In August 2005, prior to Mr. Reinhardt going on vacation, he asked Ms. Brawn if she would accept signing authority because he "sure in the hell wasn't going to give it to either Mr. Perry or Mr. Marks." She had this authority until the day she was let go.

[28] One day in October 2005, while walking down the hall, Ms. Brawn overheard a conversation that Mr. Reinhardt was having in Mr. Perry's office. He said to Mr. Perry "so you would have me fire an employee of nine years who has not done anything wrong?" She stopped to listen further. Mr. Perry responded by saying "well, she shouldn't be working anyway, she's 70 you know."

[29] On the morning of November 14, 2005, Mr. Reinhardt asked her to go for lunch. As they were about to return, Mr. Reinhardt told the complainant that Mr. Perry only wanted to work two or three days a week, and wanted somebody to perform data entry. Ms. Brawn thought she was being offered this work and asked when it started. Mr. Reinhardt told her she didn't need to come back to the office.

[30] Mr. Perry and Mr. Marks never offered the complainant computer training. The topic of computers were never brought up with her and never discussed by anyone in the office.

[31] Ms. Brawn prepared daily production reports that included statistics on all jobs being done in the field. She had been doing that job since her first day. She had access to bid letters on all the jobs because she had to know what extra charges, if any, were included in the bid. Sealed invoices were brought out to her desk to be sent to the respective companies. She knew there should be extra charges on those invoices so she opened them to check. The extra charges weren't included so she

showed them to Mr. Reinhardt. He then went and told Mr. Perry that Ms. Brawn was to see every invoice before it left the office. Mr. Perry didn't comply.

[32] Mr. Marks and Mr. Perry listened in on the complainant's phone calls. On the day that she phoned the locksmith, Mr. Marks came around the door and said "I do not want that desk locked." She told him that Mr. Reinhardt had given her permission.

[33] Under examination by Mr. Woodard, the complainant gave the following relevant testimony:

- Computers were never mentioned, she wasn't requested to use one and no offer was made to train her. Mr. Reinhardt and Mr. Makarra both opted against computerizing the company because it was a small company and too expensive to change everything over and train people.
- In 2003, when Mr. Reinhardt became the sole owner of the company, he had the final say on any decisions in the company.
- The complainant denied having any conversations with Mr. Makarra to discredit Mr. Marks, like the fact that he made bad decisions and was running the company into the ground and didn't know what he was doing.
- The complainant only spoke with Mr. Kelly Borstmayer, the main drill push for the respondent, about Mr. Marks' arrogant attitude and how high he rated himself.
- Ms. Brawn never spoke to Mr. Reinhardt about getting Mr. Marks fired or complaining about him.
- Ms. Brawn stated that she seldom left the office early, and when she did, it was for appointments late in the day and she always told Mr. Reinhardt. He always knew. Mr. Marks was not her supervisor and had nothing to do with her work. He was a field operations manager who looked after operations in the field. She took her direction from Mr. Makarra. She also had to be out of the office on company business to go to the bus depot, bank, and pick up office supplies. She seldom went out for lunch and was always at the office to at least answer phones. She denied not answering the phones or only doing statistical reports.
- When Mr. Perry started, he was provided with a computer and he converted manual tasks to the computer. The complainant told Ms. Slipets that he didn't know what he was doing. He had high stacks of mail and papers all over his desk. Once in awhile she would see him heading to the garbage dump and then his desk would be cleared of papers. He seemed to be unaware of what an accountant was supposed to do, such as paying bills on time and incurring late payment charges.
- She denied withholding mail and screaming profanities at Mr. Marks during the altercation about the parking stall. Ms. Brawn denied removing any invoices from Mr. Marks' desk. She also denied withholding accounting information for Mr. Perry to computerize, and denied failing to produce a trial balance for him. This wasn't her job.
- Ms. Brawn installed locks on her desk because things were disappearing and she knew that somebody was rummaging through it. Her copy of the document disappeared. Nothing else disappeared. Every time she had a copy of it, it always disappeared. She made several copies of this document which continued to disappear out of her desk, at least 10 times.
- Ms. Brawn denied having documents in her locked desk that Mr. Marks needed to access. He had access to the same daily reports on his computer. She denied being requested to move such files to another accessible site.

- Ms. Brawn denied eavesdropping on a conversation between Mr. Reinhardt and Mr. Marks. They were in the lunchroom adjoining her office with the door open.
- She denied withholding the mailbox key which was kept in the top drawer of her desk.
- In a matter of months, Mr. Marks elevated himself to the point of thinking that he ran the whole company instead of just the field. Mr. Makarra reported to Mr. Reinhardt, and Mr. Perry reported to Mr. Marks.
- Her only human rights complaint based on gender was being called a “fb” as usually women are called “b.....s.”

[34] Under cross-examination by Mr. Marks, the complainant gave the following relevant testimony:

- Ms. Brawn corrected the director’s submission to clarify that she was not a field clerk for the company. She also concurred that she didn’t perform senior accounting work as stated in the submission, but assisted Mr. Makarra. She balanced the ledger, reconciled bank accounts and reviewed bank statements.
- In the complainant’s testimony, she stated that she worked under the direction of Mr. Makarra. In the director’s submissions, her evidence was that she worked under the direction of Mr. Reinhardt. Ms. Brawn clarified that she worked under Mr. Makarra for as long as he was with the company, and when he retired, Mr. Reinhardt became her boss. “I worked for him. I worked for the company.”
- After Mr. Makarra quit, there was no one there to give her direction in her work but after nine years she knew what her job entailed.
- She denied ever having to complete time sheets and have Mr. Reinhardt sign them because her hours of work were being questioned.
- She told Mr. Marks that he was the manager of the field, not the manager of the company. In her view, Mr. Marks was the field manager and Mr. Makarra was the office manager as well as the accountant. When Mr. Makarra left, there was no office manager.
- Ms. Brawn admitted that she hadn’t really prepared the invoices for seven years, but only compiled the statistics and typed up the invoices for Mr. Makarra.
- Ms. Brawn admitted to opening Mr. Marks’ sealed outgoing invoices because Mr. Reinhardt wanted her to see every outgoing invoice. She denied withholding company mail, and denied telling Mr. Reinhardt that she only took home important mail.
- Ms. Brawn concurred that Mr. Perry only parked in “her spot” from May 17 to May 24 when she, Mr. Marks, Mr. Reinhardt and Mr. Makarra discussed the issue. She agreed that at the conclusion of the discussion, Mr. Marks moved his vehicle and parked it on the street so Mr. Perry could have a spot. She further admitted the parking arrangements continued after that day, were that she could keep her parking stall and that Mr. Marks parked on the street. Mr. Marks took over Mr. Makarra’s stall when he left. Ms. Brawn felt that Mr. Reinhardt was the only one who should have had the authority to change parking arrangements since he was the boss.
- The complainant saw no reason for Mr. Marks to have access to the job files in her desk. She admitted that her previous testimony wasn’t completely accurate about what files were in her desk that Mr. Marks would need to access. She previously stated that all that was in the job files were the daily reports. She admitted that there were copies of chaining notes. When asked if Mr. Marks would have had copies of the chaining notes (except for in the job file), she said didn’t know. Further, under cross-examination when asked if drill logs were kept in her desk, she admitted that they were.

- Mr. Marks asked the complainant how she could say that he had no reason to go into her desk where all this information was kept to respond to clients' calls when the desk was locked. The complainant stated that Mr. Marks could have asked her for the files or for whatever he needed. He could have had access from 8:00 a.m. to 4:30 p.m. when she was there.

Testimony of Mr. Bernie Makarra

[35] Mr. Makarra was co-owner with five other shareholders and directors when the company was formed in 1990. He sold his shares in April 2000 when he turned 65 years old. He held senior accounting positions with a number of companies before joining the company as their accountant. The head office was made up of Mr. Reinhardt, Mr. Johnson (later Mr. Marks) and Ms. Brawn.

[36] Mr. Makarra was responsible for:

- Coordinating and performing accounting duties and payroll preparation
- Authorizing the approval to pay vendor invoices
- Controlling the accounts receivable and performed billings with the approval of the operations manager
- Assisting in the bid process for existing and new clients
- Posting the general ledger from the sub ledgers and providing management reports
- Preparing necessary components for the corporation tax return, including preparation at the end of the fiscal year for the external auditor.

[37] Ms. Brawn was responsible for general secretarial duties which included:

- Picking up and delivering mail, checking incoming client invoices
- Preparing bank reconciliations, posting invoices in the register for setting up controls for accounts payable
- Preparing and processing cheque runs
- Filing and setting up client job files.

[38] Ms. Brawn reported to Mr. Makarra 95 per cent of the time. She reported to Mr. Reinhardt, Mr. Johnson and his successor, Mr. Marks, the other five per cent of the time.

[39] Mr. Makarra described Ms. Brawn's work as follows:

- She was punctual and her sick days were negligible over the course of her employment
- She was courteous to the staff, clients and visitors
- She fit in very well with the company with her prior knowledge
- There were never any complainants from clients in the nine years that she worked for the company.

[40] Mr. Makarra felt that when Mr. Marks started as operations manager, there would be "a little streamlining done in the accounts receivable area."

[41] Mr. Makarra was involved in replacing Mr. Johnson. There were two candidates: Mr. Marks and Mr. Borstmayer. Mr. Borstmayer was unsuccessful. Two or three months later, Mr. Makarra

received complaints from Mr. Borstmayer that there were some problems with Mr. Marks. Mr. Makarra advised him to talk directly to Mr. Reinhardt.

[42] Ms. Brawn gave Mr. Makarra a copy of the document. Initially he was shocked and surprised that something like that would be generated, and gave a copy to Mr. Reinhardt. He never discussed it with Mr. Marks.

[43] Mr. Makarra's intention was to retire in April 2005. He chose Ms. Brawn to replace him and offered her the job. He informed Mr. Reinhardt, who supported the decision. She was offered the job because she knew the manual accounting system. He never approached Ms. Brawn about learning to use computers. Computers were not an issue when he was at the company. She did not accept the position, as she felt she didn't have enough experience to fully handle the job.

[44] Mr. Makarra then made Mr. Reinhardt and Mr. Marks aware that they should look for a suitable replacement by mid March 2005. He advised them that they should be able to hire a qualified person with a solid background in computers and software. He played a role in hiring Mr. Perry.

[45] Ms. Brawn had a designated parking stall at the company since 1998.

[46] In the fall of 2005, Mr. Makarra told Mr. Johnson that he would like to buy him lunch to discuss the firing of Mr. Marks, who was on vacation. Ms. Braun and Mr. Reinhardt joined them. He found out during the lunch that Mr. Johnson and Mr. Reinhardt had met with Canadian Natural Resources Limited (CNRL), the company's main client, about firing Mr. Marks.

[47] Mr. Makarra said initially that there could have been several times that Mr. Marks referred to Ms. Brawn with derogatory names. With prompting from the director's legal counsel, he clarified his statement saying, "Yes, I believe a few times." Mr. Marks referred to her as "that b." He told Mr. Marks that they all had to get along because it was a small office. He admitted cursing a few times himself.

[48] Mr. Reinhardt gave the final approval on employee bonuses. The amount of the bonuses depended on year end profits. They were determined after the external auditor completed the audit, and prior to making the final entry.

[49] Under examination by Mr. Woodard, Mr. Makarra gave the following relevant testimony:

- When Mr. Johnson left and Mr. Marks took his place, the discussion between Mr. Makarra and Mr. Reinhardt was that Mr. Marks' duties would be the same as Mr. Johnson's. Mr. Makarra stated, "There would probably be a lesser amount regarding office administration as Mr. Johnson had demonstrated to Mr. Reinhardt and myself that he should be part of it." They felt that Mr. Marks was in his learning period and would possibly make some changes in the field to make it more efficient.
- Mr. Makarra felt that his replacement (once Ms. Brawn turned down the offer) would need to be well-versed in computers because in three to five years, their competitors would be solely dependent on the computerized operation of their accounting and payroll systems. He felt it would be a good thing for the company to move in this direction when he left.

- Mr. Marks offered a computer training program to Mr. Makarra and Ms. Brawn. He never heard Ms. Brawn's response to this offer. He said that Ms. Brawn probably indicated to him that she was not interested in computer training. Mr. Woodard repeated the same question, and Mr. Makarra changed his answer.
- When asked if it was true that he and Ms. Brawn took exception to computer training, and made it clear on a regular basis that they would not have anything to do with computers, and refused any efforts to be taught, Mr. Makarra said "yes." When Mr. Woodward repeated the question again, Mr. Makarra changed his answer to "no." Both he and Ms. Brawn "were not interested in further training on computers."
- He denied starting any kind of campaign against Mr. Marks, or that Mr. Marks didn't know what he was doing. He never complained to Mr. Reinhardt about Mr. Marks.

[50] Under cross-examination by Mr. Marks, Mr. Makarra gave the following relevant testimony:

- He agreed that there were probably disagreements between them over the years, such as how much Mr. Marks should get paid and when, and taking deductions off client invoice payments (for skull beams and headlamps) when he shouldn't have.
- He agreed that the first thing that Mr. Marks was given to do when he started as operations manager was to take over the client invoicing. This was because they wanted Mr. Marks to be aware of the principles involved to maintain what they had always done in the past.
- He agreed that Mr. Marks negotiated all the client contracts, and hired and negotiated rates with subcontractors.
- He stated that Mr. Johnson and consequently Mr. Marks hired and set wages for the employees, including new hire and rehires.
- He acknowledged the time that Mr. Marks talked to him about Ms. Brawn leaving early. Ms. Brawn was not allowed to leave early if her work was done.
- Mr. Marks was not involved in the disbursement of the bonus money and determining amounts. Mr. Makarra drafted the amounts and gave it to Mr. Reinhardt for approval.

Testimony of Mr. Robert (Bob) Johnson

[51] Mr. Johnson gave his affirmed testimony by teleconference call. Mr. Johnson is a retired operations manager with Profile Seismic Ltd.

[52] Mr. Johnson started with the company in 1996 as a field manager for a year, and then moved into the head office in Calgary as operations manager. This position entailed meeting with potential clients in Calgary, completing administrative work, and arranging field crews. He was also responsible for some hiring and firing in the field.

[53] He worked with Ms. Brawn when he transferred into the head office. She was an above average worker, working on tasks until they were completed. In general, she got along well with people.

[55] In late June to early July 2004, he came back into the office to cover for Mr. Marks who was on vacation. Everything was normal in the office. He covered for Mr. Marks' vacation again in late July to early August 2005. During this time, Mr. Reinhardt approached him about staying on if he got rid of Mr. Marks. When Mr. Marks returned, he met with CNRL who consequently talked Mr. Reinhardt out of firing Mr. Marks.

[56] In early December 2006, Mr. Reinhardt called Mr. Johnson a few times to see if he would come back for the winter, as Mr. Marks had said that he was quitting or leaving at the time. Mr. Johnson said he would only come back for a few weeks to train someone. CNRL talked Mr. Reinhardt out of firing Mr. Marks, so Mr. Johnson left the next day.

[57] Mr. Johnson didn't recall approaching the complainant about computer courses while he worked at the company. He wasn't that big on computers himself and didn't think it was worth the change.

[58] Under examination by Mr. Woodard, Mr. Johnson said he never heard Ms. Brawn talk about computers. If he had any concerns about computers he would have first discussed it with Mr. Makarra. Mr. Makarra would have had to agree with the change to computers.

[59] Under cross-examination by Mr. Marks, Mr. Johnson gave the following relevant testimony:

- Mr. Johnson concurred that CNRL was happy with the job that Mr. Marks was doing and that if he was fired, the company would lose the contract.
- When Mr. Johnson started as operations manager, accounting was the only aspect of running the company that he did not handle. When he started, Mr. Makarra was doing the majority of hiring and firing, but then it became shared to the point where Mr. Johnson did more than Mr. Makarra.

Testimony of Ms. Mary Slipets

[60] Ms. Slipets worked as a relief receptionist and secretary for the respondent in the winter months. She was hired by Mr. Makarra in January 2002, and last worked in the office in the summer of 2005.

[61] Ms. Slipets' responsibilities included payroll, accounts payable and relieving Ms. Brawn when she went on holidays.

[62] She overheard Mr. Marks call the complainant a "stupid old fb."

[63] The working environment in the office was very pleasant both before Mr. Marks arrived and after. Upon further questioning from the director's legal counsel, Ms. Slipets stated that some days were good and some days weren't too bad.

Key Arguments of the Director

Age Discrimination

[64] Ms. Brawn was an older employee who suffered adverse treatment in her employment and was fired. There were numerous reasons to infer from the evidence that age and gender were factors in the adverse treatment.

[65] Mr. Marks caused the termination of Ms. Brawn and age was a factor. The essence of harassment classified as discrimination in the workplace involves doing and saying things about

employees. It does not involve personal conflicts or criticizing workplace performance, but they take on a particular tact of ridicule in this case with respect to age.

[66] The following points establish a prima facie case based on age discrimination:

- The conversation between Mr. Perry and Mr. Reinhardt that was overheard by Ms. Brawn.
- The marginalization and taking away of her job duties.
- The testimony of Mr. Reinhardt where he stated that Mr. Marks wanted the older people in the office gone and to bring in younger people.
- Mr. Marks giving Ms. Brawn's parking spot to Mr. Perry. Mr. Marks said under oath that he took it away from her just to upset the complainant.

Gender Discrimination

[67] Many witnesses heard Mr. Marks refer to the complainant as a "fb" or a stupid old "fb" or a "b." All that is needed for a prima facie case of gender discrimination is the testimony of these five witnesses who indicated that she was being referred to in this derogatory manner.

[68] The relevant provisions of the Act are as follows:

- s. 7(1) No employer shall*
- (a) refuse to employ or refuse to continue to employ any person, or*
 - (b) discriminate against any person with regard to employment or any term or condition of employment,*

because of the race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income or family status of that person or of any other person.

[69] The burden of proof rests with the complainant to establish a prima facie case of discrimination. Once the prima facie case has been shown, the onus shifts to the respondent to provide a justification that is credible on all the evidence for the impugned action. The "persuasive burden throughout the case is the balance of probabilities."^{1 2}

[70] Ms. Braun was dismissed either in whole or part because of her age. She was subject to gender and age based insults, constituting discrimination on the ground of gender.

[71] In understanding the evidentiary burden involved in proving discrimination, the following principles must be followed:

- It is not necessary that discriminatory considerations be the sole reason for the impugned actions in order for there to be a contravention of the Act.^{3 4}

¹ *O'Malley v Simpson-Sears* (1986), 7 C.H.R.R. D/3102 (S.C.C.) at p. D/3108

² *Basi v. Canadian National Railway Co.* (1988), 9 C.H.R.R. D/5029 (C.H.R.T.) at p. D/5039

³ *Gadowsky v. Two Hills (County) School Committee No. 21*, (1980), 1 C.H.R.R. D/184 (Alta. Q.B.)

⁴ *Basi*, supra at D/5040

- There does not need to be direct evidence of discrimination; discrimination will more often be proven by circumstantial evidence and inference.⁵
- Discrimination is not a practice which one would expect to see displayed overtly. Rarely are there cases where one can show by direct evidence that discrimination is purposely practiced.⁶
- The appropriate test for circumstantial evidence is whether an inference of discrimination may be drawn where the evidence in support of it renders such an inference more probably than the other possible inferences.⁷
- The respondent cannot refute the inference of discrimination by suggesting any rational alternative. “It must offer an explanation which is credible on all the evidence.”^{8 9}

Age Discrimination

[72] Ms. Braun was fired either in whole or part because of her age. She was employed by the respondent for nearly nine years and was terminated on November 14, 2005. During the last year and a half of her employment with the company, Mr. Marks and Mr. Perry engaged in a process to force the complainant’s termination from the company either in whole or part because of her gender and age.

[73] While the overall burden rests with the complainant, once a prima facie case is established, the evidentiary burden shifts to the respondent to present credible evidence that its actions were not, even in part, discriminatory.¹⁰

[74] The facts that establish a prima facie case are as follows:

- Ms. Brawn was a long-term older female employee who was well respected and rewarded for her work.
- She was terminated and replaced by a much younger person.
- Mr. Marks, who initiated her termination, had shown a negative attitude toward her in relation to her age and gender by making derogatory comments in conversations with others and in the document.

[75] The respondent alleges performance concerns. Any and all performance concerns are denied by the director and the complainant. The complainant denies any allegations of poor work performance and these allegations are inconsistent with Ms. Brawn’s: 1) employment as a long-term employee; 2) retaining signing authority until the day she was dismissed; 3) being offered other jobs and promotions in the company; and 4) receiving yearly bonuses, including one for the year leading up to her dismissal.

⁵ *Radek v. Henderson Development (Canada) Ltd.* [2005] B.C.H.R.T.D. No. 302

⁶ *Basi*, supra at D/5040 para 38481

⁷ *Ibid* at D/5040 para 38481

⁸ *Ibid* at D/5040 para 3849

⁹ *Fuller v. Candur Plastics Ltd.* 2 C.G.R.R. D/419

¹⁰ *Flores v. Duso Enterprises Ltd. (No. 2)*, (2008), C.H.R.R. D 08 – 642 , B.C.H.R.T. 368 paras. 79 – 88.

[76] It is not sufficient simply to put forward “performance concerns” as a possible explanation for the respondent’s actions. There must be credible evidence that performance concerns were the employer’s reason, and not even in part discriminatory.

[77] In the *Larente* case,¹¹ the complainant, a human resources advisor, was laid off. The respondent submitted that the complainant was not able to fulfill the duties of her new position as a human resources advisor. The tribunal considered all the evidence and stated:

[266] The tribunal considers it more probable that the employer based its decision to terminate the complainant’s employment on her age rather than on her inability to fill the position of Human Resources Advisor.

[78] In the *McKee* case,¹² the tribunal specifically rejected the respondent’s argument that Mr. McKee was selected for termination because of inadequate job performance.

[79] In the *Kearns* case,¹³ the tribunal rejected the respondent’s position that Mr. Kearns was fired because of lack of potential in the area serviced by him.

[80] While the respondent may point to the fact that there was conflict between Ms. Brawn and Mr. Marks at the time of the firing, this conflict arose specifically because of the unacceptable disrespectful and humiliating treatment of Ms. Brawn in relation to her age and gender.

Gender Discrimination

[81] In the *Bell* case¹⁴, the Chair addressed gender discrimination:

[1389] The forms of prohibited conduct that, in my view, are discriminatory run the gamut from overt gender based activity, such as coerced intercourse to unsolicited physical contact to persistent propositions to more subtle conduct such as gender based insults and taunting, which may reasonably be perceived to create a negative psychological and emotional work environment. There is no reason why the law, which reaches into the workplace so as to protect the work environment from physical or chemical pollution or extremes of temperature, ought not to protect employees as well from negative, psychological and mental effects where adverse and gender directed conduct emanating from a management hierarchy may reasonably be construed to be a condition of employment.

[82] It is submitted the complainant was subjected to gender based insults. The respondent referenced the complainant several times as a “fb.” The older women in the office were referred to as “ob.”

¹¹ *Larente v. Canadian Broadcasting Corp. (No. 2)* (2002), 42 C.H.R.R. D/405 (C.H.R.T.)

¹² *McKee v. Hayes-Dana Inc.* (1992) 17 C.H.R.R. D/5700 (Ont. Bd. Inq.)

¹³ *Kearns v. P. Dickson Trucking Ltd.* (1988), 10 C.H.R.R. D/5700 (Ont. Bd. Inq.)

¹⁴ *Bell et al v. Ladas and The Flaming Steer Steak House* (1980), 1C.H.R.R. D/155 (Ont. Bd. Inq.) at paragraph 1389

[83] In the *Fornwald* case,¹⁵ the Council said that the complainant need not expressly object to the unwelcome conduct. The Council found that the respondent's conduct was of such an obviously degrading nature that a "reasonable person" ought to have known that it was unwelcome. The term "fb" is so inherently offensive that it must be reasonably assumed that the person against whom it is being used, would know it was unwelcome.

[84] Profile Seismic Ltd. and Mr. Marks are liable for gender based discrimination and harassment. Profile Seismic Ltd. is responsible for Mr. Mark's comments even at such time as he was not the directing mind of the company. As stated in the *Robichaud* case:¹⁶

An employer is responsible for the discriminatory acts of its employees in the course of their employment.

[85] The *Torres* case¹⁷ sets out the factors that should be considered in awarding damages for sexual harassment:

- *The nature of the harassment, that is, was it simply verbal or was it physical as well?*
- *The degree of aggressiveness and physical contact in the harassment.*
- *The ongoing nature, that is, the time period of the harassment.*
- *The frequency of the harassment.*
- *The age of the victim.*
- *The vulnerability of the victim.*
- *The psychological impact of the harassment upon the victim.*

[86] The director submits that a similar analysis should be employed for gender based harassment, such as gender based insults and taunts. While the harassment perpetrated on the complainant was not physical, it was frequent and ongoing over a period of months. It is patently obvious that being referred to as a "fb" was degrading, humiliating and upsetting for Ms. Brawn.

Remedy Sought by the Director

[87] Pursuant to Section 32(1) of the Act, the Panel has broad powers to take any action to place the person dealt with contrary to the Act in the position the person would have been in but for the contravention of the Act. The director and the complainant seek the following remedies from the respondent:

¹⁵ *Fornwald v. Astrographic Industries Ltd.* (1996), 27 C.H.R.R. D/317 (B.C.C.H.R.)

¹⁶ *Robichaud v. Canada (Treasury Board)* (1987), 8 C.H.R.R. D/4326 (S.C.C.)

¹⁷ *Torres v. Royalty Kitchenware Limited* (1982), 3 C.H.R.R. D/858 (Ont. Bd. Inq.) at D/873 paragraph 775

1. Pay to the complainant lost wages for a total of \$50,798.46 (subject to statutory deductions and payback to Employment Insurance) for the period of time from November 14, 2005 to May 12, 2007.

Calculated at \$4,000.00 per month (as earned on her T4 Employment Income in 2004 and 2005) x 18 months, minus severance (\$5,330.076), minus mitigation earnings in 2006 (\$4,831.83), and minus mitigation earnings in 2007 (\$11,038.95).

While the complainant clearly mitigated her damages by finding work, this work did not pay as much as her work with Profile Seismic Ltd. Consequently, the lost wages portion of the remedy includes top up wages which is authorized under the Act. See the *Alberta Human Rights and Citizenship Commission* decision.¹⁸

Ms. Brawn received a \$5,000.00 bonus upon being fired from the company, however, this money was not wages. Consequently, it should not be deducted from any lost wage claim.

2. Pay the complainant \$10,000 for injury to dignity and self respect for her discriminatory firing due to age. See the *Berry* decision,¹⁹ where the wrongful firing of a three-month employee attracted \$10,000 in damages.
3. Pay the complainant an additional \$5,000.00 for injury to dignity and self respect for the gender based discrimination which as inflicted on her.
4. Pay the complainant interest on all of the above non-pecuniary amounts at a rate of 4% pursuant to Section 4(1) of the Judgment Interest Act R.S.A. 2000 C. J-1.
5. Direct the respondent along with their management and staff, within two months of the date of this decision, to participate in an education seminar conducted by the Commission.

Evidence from Respondent's Exhibits

[88] The complainant's duties included answering the telephones and compiling statistical reports from the field crews.

[89] In 2003, the previous operations manager, Mr. Johnson, retired and Mr. Marks was promoted from field manager to operations manager. When Mr. Marks started in the Calgary office, he became aware of how ineffective and unprofessional the business was operating.

[90] Mr. Marks started recommending changes including computer training courses for staff and offered to teach staff himself if it would make it easier on the employees. Both the complainant and the bookkeeper, Mr. Makarra, took exception to this idea and both made it clear on a regular basis that they would not have anything to do with computers and refused all efforts to be taught.

¹⁸ *Alberta Human Rights and Citizenship Commission v. Federated Cooperatives Ltd.*, 2005, 53 C.H.R.R. D/496, 2005 ABQB 587

¹⁹ *Berry v. Farm Meats Canada Ltd.*, 2000 ABQB 682

[91] By early 2004, the complainant and Mr. Makarra had decided that the only way to keep computers out of the office, and to keep the company operating the same way that they were accustomed to, was to conspire against Mr. Marks to get rid of him. They started a campaign to discredit him and to make him look bad to the owner, the clients, the subcontractors and other employees. This included telling people that Mr. Marks was making bad decisions and was running the company into the ground, and that he didn't know what he was doing.

[92] They both found reasons to complain and disagree with every move or decision that Mr. Marks made from what equipment was needed, to what he was doing while he was on his lunch break. They would try to convince others to argue with Mr. Marks and to complain to the owner.

[93] Mr. Borstmayer was convinced to join them in their efforts after being given false information. This resulted in Mr. Borstmayer disagreeing and arguing with Mr. Marks and complaining to Mr. Reinhardt on a regular basis as well.

[94] By the summer of 2004, the complainant, Mr. Makarra and Mr. Borstmayer had convinced Mr. Reinhardt that Mr. Marks should be fired. The plan was to fire Mr. Marks when he returned from holidays and have Mr. Johnston return to act as the interim manager.

[95] When Mr. Reinhardt advised his clients that he was proposing to release Mr. Marks, the clients informed him that they felt that Mr. Marks was a good operations manager with whom they had built a good rapport. They told Mr. Reinhardt that if Mr. Marks was to be fired, their business would go with Mr. Marks.

[96] On October 4, 2004, the complainant went into Mr. Marks' office, rummaged through his garbage looking for something that she thought could be used against him. Ms. Brawn removed a piece of paper that was a personal and confidential document of Mr. Marks. This was written with some unpleasant things said about some people at the company and was not intended for anyone to see. It was written to alleviate the stress that Mr. Marks was feeling due to the working conditions in the office.

[97] After the complainant stole the piece of paper entitled, "*Profile Seismic's Senior Citizen's Day Care*," her attitude around the office changed drastically. She became more outspoken in her dislike for Mr. Marks and voiced this to Mr. Reinhardt at every opportunity. The complainant started leaving earlier and earlier until soon she would be gone by 1:30 pm. When confronted about her behavior and activities, her response was, "I don't work for you, I work for Mr. Makarra."

[98] Mr. Marks advised Mr. Reinhardt of the complainant's insubordination and counter-productive attitude, and that he was going to replace her. Mr. Reinhardt explained that Ms. Brawn had let him know that if she was relieved of her duties she would go the labour board and file a civil suit for wrongful dismissal. Since Mr. Reinhardt didn't want a lawsuit filed and felt that he was being blackmailed, he insisted on keeping her employed.

[99] Mr. Marks explained to Mr. Reinhardt that there was ample just cause for her dismissal and that since the piece of paper was stolen from his garbage can, that this would not be grounds for the complainant to sue the company. Mr. Reinhardt, however, was totally convinced that if he terminated the complainant's employment that she would sue.

[100] As time progressed, the complainant's attitude toward her job got even worse. Ms. Brawn stopped answering the telephone unless it rang more than five to six times. She refused to do anything except the daily statistical reports and pick up the mail. The rest of the morning she would spend at Mr. Reinhardt's desk bad mouthing Mr. Marks, and then leave after lunch.

[101] Mr. Makarra, who was also involved in spearheading activities against Mr. Marks, increased the complainant's salary so that she would get more compensation if she sued the company.

[102] When Mr. Makarra retired in April 2005, he insisted that the company hire someone who used the old ledger system instead of a computerized system. Mr. Makarra convinced Mr. Reinhardt to offer the complainant the accounting job, even though he knew that she didn't possess the skills and experience to look after the accounting department. Mr. Marks and Mr. Reinhardt discussed this and decided that Ms. Brawn did not possess the skills and experience to look after the accounting department, and that they would hire someone who did.

[103] Mr. Perry was hired on May 17, 2005 and parked in a company parking stall. The complainant became irate when Mr. Perry parked in her stall and complained to Mr. Reinhardt. Mr. Reinhardt explained to Ms. Brawn that specific parking spots were never assigned to her.

[104] On May 18, 2005 Mr. Perry parked in the same spot as the previous day. Mr. Reinhardt went into his office and told him that the complainant was very upset. Mr. Perry asked Mr. Reinhardt if the parking staff was specifically assigned to her and he said no. Mr. Perry offered to park somewhere else but Mr. Reinhardt said, "I don't care." He continued to park there and the complainant continued to complain about it.

[105] Mr. Marks also overheard Mr. Makarra encouraging the complainant to confront Mr. Marks about the parking stall. The complainant then stormed into Mr. Marks' office and screamed, "what gives you the right to give my parking spot away?" Mr. Marks responded by telling her that he had already discussed the matter with her and that both he and Mr. Reinhardt told her it wasn't her spot. In order to keep the peace in the office, Mr. Marks told the complainant that he would move his truck out onto the street and that she could have his spot. The complainant screamed profanities towards him but Mr. Marks ignored her tirade and proceeded to move his truck out onto the street where he continued to park every day.

[106] Mr. Perry began the task of computerizing the company's manual accounting system. There was a one month overlap with Mr. Makarra during this conversion period. The complainant discredited him on numerous occasions stating that he didn't know what he was doing and that everything was going to fail because the company was bringing in a new computerized system to handle the accounting systems. On several occasions, Ms. Brawn was overheard saying to Mr. Reinhardt that "you type one wrong thing into a computer and you can never go back and fix it."

[107] Over the next two to three weeks, Ms. Brawn and Mr. Makarra did everything they could to make the computer transition difficult for Mr. Perry. This included withholding information and failing to produce a draft balance. Mr. Perry was unable to reconcile accounting procedures and decipher handwriting.

[108] On May 24, 2005, Mr. Marks was having a conversation in his office with another employee when the complainant walked in and handed the employee an envelope. Inside the envelope was a

photocopy of the stolen piece of paper she had retrieved from his garbage can on October 4, 2004, entitled *Profile Seismic's Senior Citizen's Day Care*.

[109] When Mr. Marks went into the lunch room that day, there were dozens of photocopies of this document on the table, and other employees were opening envelopes with the document inside. For half an hour, the complainant and Mr. Makarra stood outside Mr. Mark's office whispering.

[110] In spring 2005, Mr. Marks informed Ms. Brawn that she was relieved of her duties, but again she refused to listen and leave, telling him that her boss was Mr. Reinhardt.

[111] During the summer of 2005, Mr. Marks and Mr. Perry noticed that incoming mail, invoices, and faxes were either late or never showed up. The complainant denied any wrongdoing and blamed the computer system. When Mr. Marks asked the complainant if she had seen had seen particular invoices that were on his desk, she said that she had not removed them. Mr. Marks then asked Mr. Perry if he had seen the invoices. Mr. Perry told Mr. Marks that while he was at lunch, the complainant had given the invoices to him and told him that he had to pay them immediately.

[112] After this incident, Mr. Marks put locks on his office door. Ms. Brawn then installed locks on her desk where job files were kept, which prevented other staff from accessing files. Mr. Marks acknowledged her right to privacy for personal things, but requested that Ms. Brawn move the job files to another filing cabinet where they could be daily accessed by authorized staff. The complainant refused to comply with the request and became irate, acted inappropriately and used derogatory language toward Mr. Marks. She never did comply.

[113] The only reason that the complainant continued to be employed by the company was because of her threat to Mr. Reinhardt to sue the company if her employment was terminated.

[114] On October 27, 2005, Mr. Marks sent a memo to Mr. Reinhardt with the following relevant information:

- *I have been telling you for well over a year now, that if you don't want to listen to me, or trust me, or cooperate with me, that you should replace me, because without any cooperation from you I don't feel I can do the job asked of me.*
- *You have proved to me that you will not cooperate with me, in anyway. I cannot get a straight answer out of you most times, and the few times I think I do get a straight answer you do not stick to your word (that often puts me in a tight spot)*
- *Since you do not want to willingly provide the equipment and personnel required for me to do this job safely and efficiently, and the fact that I am sick and tired of the same arguments over and over (that get no where). I feel I cannot continue as Operations Manager for Profile Seismic after this winter. Since managing a seismic company takes a lot of experience...I would strongly suggest you find my replacement A.S.A.P.*

[115] After Mr. Marks handed Mr. Reinhardt his resignation, Mr. Reinhardt realized that if Mr. Marks left the company, he would also lose his biggest asset to the company. He would not only lose trucks, ATVs and geo phones which would cause a huge setback for the company, but also lose their only client. Consequently, Mr. Reinhardt refused to accept Mr. Marks's resignation.

[116] Mr. Reinhardt continued to allow Ms. Brawn to blackmail him and continued to be disruptive to both Mr. Marks and Mr. Perry. They both gave their resignations to Mr. Reinhardt. Mr. Marks and Mr. Reinhardt had several discussions about this situation after hours, and these are the conversations the complainant eavesdropped in on.

[117] When it became apparent to Mr. Reinhardt that the complainant was no longer an asset but a liability to the company due to her counter-productive attitude, as well as her unethical and unprofessional ways of handling office matters, Mr. Reinhardt made the decision to terminate her employment.

[118] On November 5, 2005, Mr. Marks wrote a letter to the attention of Randy Marks at Profile Seismic Ltd. stating, *Before the dismissal of Betty Brawn, I Randy Marks, have agreed to pay for any monies outstanding regarding a pending lawsuit against Profile Seismic Ltd.*

[119] On November 14, 2005, Mr. Reinhardt took Ms. Brawn for lunch and gave her a cheque for \$19,287.81 (\$12,287.81 net) which included the following:

- \$1,776.92 – pay from November 3 – 16, 2005 (days worked)
- \$1,776.92 – pay from November 17 – 30, 2005 (let go on November 14, 2005)
- \$5,330.76 – eight weeks' severance pay in lieu of notice
- \$5,403.21 – six weeks' vacation pay (even though she had used all her vacation pay)
- \$5,000.00 Christmas bonus

[120] According to Alberta Employment Standards, termination of an employee without notice, for eight years of employment but less than 10 years, is six weeks' severance pay. Mr. Reinhardt and Mr. Marks believed that Ms. Brawn was dismissed for just cause and that Ms. Brawn was treated fairly upon her termination.

[121] Mr. Reinhardt told her that she didn't need to come back to the office but she did anyway. Mr. Reinhardt then requested Mr. Perry write up a letter of termination which stated the following:

- *Please find enclosed your final pay cheque from Profile Seismic Ltd. Effective today November 14, 2005, your employment has been terminated by Profile Seismic Ltd.*
- *Employment Standards Act requires that we have an option of providing you with 6 weeks pay in lieu of six weeks notice.*
- *The owner of Profile Seismic Ltd. has been nice enough to pay you 8 weeks notice, plus provided you with full vacation pay, not deducting any vacation pay you have taken this year, plus...a \$5,000.00 extra bonus.*

Testimony of Mr. Randy Marks

[122] Mr. Marks began working full-time with Profile Seismic Ltd. in 1997. He started out as an operator or in an observer position. In 1999, he was promoted into a middle management position as party manager. On July 1, 2003 when Mr. Johnson retired, he assumed his position as general manager.

[123] When he first started in the head office, the complainant told him that it was his job to be her sounding board and listen to all her non work related problems. After a few months, Mr. Marks told Ms. Brawn that he made it clear that he had no interest in “being her shrink.” After that, he noticed her attitude change toward him.

[124] By spring 2004, he started preparing invoices and working on the computer. Both the complainant and Mr. Makarra constantly ridiculed him for using the computer saying anything that came off the computer was no good. He felt growing animosity because of this.

[125] While he was on holidays in July to August 2004, Mr. Reinhardt was convinced to fire Mr. Marks. He changed his mind when CNRL would not support the idea. After this, the harassment from Mr. Makarra and the complainant stepped up and they became more vocal about their dislike for him and computers. They complained about everything he did to other employees both in person and on the phone.

[126] In the winter of 2004 to 2005, Ms. Braun started leaving work earlier and earlier. She would go back to the shop and let Mr. Reinhardt know that she was leaving. He spoke to Mr. Marks several times about this, asking him why she would go shopping at 2:00 p.m.

[127] Whenever Mr. Marks would try to discuss any issues with the complainant, she would tell him, “I don’t work for you,” and walk away.

[128] Mr. Marks brought the matter up with Mr. Makarra and suggested that maybe she should be replaced due to her poor work ethic and her argumentative attitude. Mr. Makarra said he would talk to her about it and take care of it. After this, things deteriorated further. She became more uncooperative and disruptive in the office.

[129] This resulted in the complainant starting an “all out attack.” She started going through Mr. Marks’ outgoing mail. Mail went missing, including Visa statements, and Husky and Shell statements from gas cards. Mr. Perry then had to phone these companies to find out how much the company had to pay. This went on in the summer of 2005. When Mr. Marks confronted the complainant, Ms. Brawn said that the reason the bills didn’t show up was because these companies used computers.

[130] In the summer of 2005, Mr. Reinhardt came to Mr. Marks with an invoice that had been given to him by the complainant saying that Ms. Brawn was complaining that the clients were not being billed for drilling mud. He explained to Mr. Reinhardt that the clients did not want to be billed for all these incidentals. After Mr. Makarra had left, Mr. Marks worked with the clients to rework the contracts for everything to be included. Mr. Reinhardt was satisfied with the explanation and it was Mr. Marks’ first verification that the complainant was opening his mail.

[131] When Mr. Marks returned from holidays in summer 2005, there was no one in the office that morning which was unusual. One of the drillers phoned the office to see who the new operations manager was and was surprised to hear Mr. Marks answer. Mr. Reinhardt arrived around noon and went on as if everything was ordinary.

[132] By this time his patience was wearing thin with the continuous attempts to get him fired and to bad mouth him to anybody and ridicule his use of the computer. He gave Mr. Reinhardt notice that he was leaving because it was a small office that had to work together. To continue to work

around Ms. Brawn was not something he was willing to tolerate since he was in charge of human resources, the safety program and client negotiations.

[133] He and Mr. Reinhardt would have many private conversations about this early in the morning before work in the lunchroom, in the back shop or in his office. He wasn't aware of Ms. Brawn overhearing any of these conversations.

[134] Mr. Reinhardt agreed to dismiss Ms. Brawn and was aware that Mr. Perry and Mr. Marks had found a replacement for her. He continued to delay taking her to lunch which led to several more arguments between Mr. Marks and Mr. Reinhardt which could have been overheard by Ms. Brawn.

[135] Mr. Reinhardt took Ms. Brawn for lunch on November, 14, 2005, and terminated her employment. After lunch they both came back to the office. Every 20 to 30 minutes, Mr. Reinhardt would come to her office and ask her why she was still there and she would say she was just making a few calls. He then asked Mr. Perry to write the termination letter.

[136] When Mr. Perry started working for the respondent, he was told that there were three parking spots that were reserved for the company on a first come first serve basis. The first day Mr. Perry started, Ms. Brawn complained to Mr. Marks about him parking in her spot. Mr. Marks explained that it was not her assigned spot, but rather it was Profile's spot. Ms. Brawn complained to Mr. Reinhardt, who told her the same thing. With Mr. Reinhardt and Mr. Makarra present, the complainant came into Mr. Marks office and screamed "what gives you the right to give away my parking spot?" Mr. Marks was tired of dealing with the issue so he moved his truck to the street and continued parking there to accommodate the complainant.

[137] On May 24, 2005, Mr. Marks was in his office talking to Mr. Gerlitz, when the complainant came in and handed him an envelope with the document inside. That is when Mr. Marks first realized that the complainant had stolen the document out of his garbage can in October 2004. It surfaced in many places including the lunchroom and with other employees both in the office and in the field.

[138] Under cross-examination by Mr. Woodard, Mr. Marks gave the following relevant testimony:

- Mr. Marks and Mr. Perry convinced Mr. Reinhardt to fire Ms. Brawn.
- Mr. Reinhardt had very little to do with events going on in the office and ignored what was going on. He spoke with whomever he wanted to in the company because he was the owner.
- Mr. Reinhardt's memory seemed to be failing him.
- Mr. Marks first offered computer training to both Mr. Makarra and Ms. Brawn in 2003. Ms. Brawn made it very clear over the years that she wasn't interested in computers. The one time that she did agree to him teaching her, she quit right away and said that she never wanted anything to do with it again.
- Mr. Marks denied that Mr. Reinhardt wanted to fire him because he was difficult to get along with. Mr. Reinhardt didn't have a difficult time working with him.
- He never told Mr. Perry to park in the parking stall Ms. Brawn parked in. Parking stalls were not assigned to individuals.
- Ms. Brawn regularly rummaged through his garbage looking for anything to complain about.

- When he wrote the document, he was playing with the Microsoft Excel, playing with fonts and colours, and was extremely frustrated that morning with his coworkers. He was venting to himself as well as playing with the program and learning more about it. He was referencing Mr. Makarra and Ms. Slipets, not Ms. Brawn. He never expected anybody would see what he wrote.

Testimony of Mr. Brien Gerlitz

[139] Mr. Gerlitz worked as a crew manager for Profile Seismic Ltd. for six years, leaving the company in 2006.

[140] His duties included running the whole operations of the field crew and keeping in touch with the office through e-mails and phone calls. Ms. Brawn usually answered the phones and he usually asked for Mr. Marks when he called. There were a few times when he called that Ms. Brawn would say, “Are you calling to talk to the ass?” Mr. Gerlitz never heard Mr. Marks refer to Ms. Brawn in a derogatory manner.

[141] Mr. Gerlitz said that Ms. Brawn gave him a copy of the document. She handed him an envelope with the document inside when he was in office to see Mr. Marks.

[142] There was a lot going on between people in the office and field to make Mr. Marks job as manager more difficult. Mr. Marks’ job as manager was to run the whole operations from Calgary, and to give orders or suggestions on how the jobs should be done and what should be getting done.

[143] Mr. Gerlitz was told in phone conversations with Mr. Johnson, Ms. Brawn and Mr. Makarra about their plan to bring Mr. Johnson back into the office and fire Mr. Marks. This plan was ongoing and staff were undermining each other. Mr. Gerlitz also discussed Mr. Marks’ performance with office staff.

[144] Under cross-examination by Ms. Ashcroft, Mr. Gerlitz gave the following relevant testimony:

- Mr. Marks in particular didn’t have a rough or vulgar manner around the field in dealing with employees. In their industry, everybody has a rough manner.
- Prior to Mr. Marks moving into the head office, there was tension between Ms. Brawn and Mr. Makarra.

[145] Under cross-examination by Mr. Woodward, Mr. Gerlitz said he was told by Mr. Johnson that he and Mr. Reinhardt had met with CNRL about replacing Mr. Marks, and that they had another meeting scheduled. Mr. Borstmayer also knew about the meeting.

Testimony of Mr. Kelly Borstmayer

[146] Mr. Borstmayer has worked for Profile Seismic Ltd. for 11 years.

[147] Mr. Marks was the party manager when he started with the company, and then was the office supervisor, and then the general manager.

[148] He was told about the document from the complainant, but had never seen it.

[149] Mr. Marks had an excellent relationship and working rapport with the clients. Mr. Marks knows his business and he knows what he is doing. Mr. Johnson managed the CNRL account. When he left, Mr. Marks took over and CNRL was happy with Mr. Marks.

[150] Under cross-examination by Ms. Ashcroft, Mr. Borstmayer gave the following relevant testimony:

- He complained to Mr. Makarra about problems in the field with Mr. Marks. However, Mr. Johnson would remind him that Mr. Marks was the boss.
- Ms. Brawn would phone him and others in the field and tell them what was going on in the office. He felt he had to then report things to Mr. Makarra because he felt Mr. Makarra was still in charge.
- Mr. Borstmayer denied questioning that suggested Mr. Marks wanted to get younger people in the office. He said Mr. Marks wanted to get people in there who knew how to run a computer. Under a repeat of the same question Mr. Borstmayer again stated that Mr. Marks never used the word “younger.”
- Mr. Borstmayer never heard Mr. Marks refer to Ms. Brawn as a “b” or a “fb” at any time.
- Mr. Borstmayer was not aware of arguments or altercations between Mr. Reinhardt and Mr. Marks. Most of the information he ever heard about the office was from Ms. Brawn.

[151] Under cross-examination by Mr. Woodard, Mr. Borstmayer gave the following relevant testimony:

- He had different ideas about the way the company should be operated compared to Mr. Marks. Ms. Brawn didn’t always tell him to discuss problems and issues with Mr. Reinhardt, because there wasn’t much they could do about things, they had to just live with it. Ms. Brawn would go to Mr. Reinhardt herself. He was fine with this because he didn’t always have time to phone Mr. Reinhardt himself.

Testimony of Mr. Oscar Reinhardt

[152] Mr. Reinhardt was originally a surveyor with Shell Oil and then started his own business. Since there was no actual work for surveyors he ended up being a mechanic in the shop mainly working on trucks. Profile Seismic Ltd. got the contract with CNRL in 2005.

[153] Up until ten years ago, Mr. Makarra owned 16% of the company. Mr. Reinhardt bought him out and owned the whole company. He was the only one with signing authority in the company.

[154] Mr. Reinhardt did not involve himself in the day to day running of the office. It was a five person job running the company. Although he had a desk in the lunch room, he primarily worked in the back shop as a mechanic.

[155] One morning when he came into the office, the document was laying on his desk. Mr. Makarra told Mr. Reinhardt that there could be a time when the document could be used against him by the Human Rights Commission.

[156] Mr. Reinhardt and Mr. Johnson met with CNRL when Mr. Marks was on holidays. The purpose of the meeting was to discuss with CNRL his intention of finding a new operations

manager. They advised him that if they replaced Mr. Marks, CNRL would end their contract. 98% of the company's work came from CNRL.

[157] His decision to terminate the complainant evolved over a couple of months. He finally decided the day after he got Mr. Marks to sign a letter stating that if there was a come back from Ms. Brawn, Mr. Marks would pick up the tab. Mr. Reinhardt made up the letter and Mr. Marks signed it. The signing of this letter eliminated the possibility of being sued. He was told that even though he had sold the company, he could still be liable. The cloud has been hanging over him for four years.

[158] Mr. Marks and Mr. Perry were doing most of the work, which left the complainant just sitting at her desk and she was paid a fair amount of money for just answering the phone. She was a good employee doing her job the old way without computers.

[159] When Mr. Johnson was there, the complainant would go to him. Ms. Brawn did not come to Mr. Reinhardt on a day to day basis to talk about things. There was nothing to talk about. He was the owner of the company and was the top of the pecking order in the shop. Mr. Marks was in charge of the office.

[160] When Mr. Marks became operations manager, he never told the complainant that she wouldn't be reporting to him anymore because she wasn't reporting to Mr. Reinhardt to start with. Everyone in the company knew Mr. Marks, so it wasn't necessary to tell people about his new job.

[161] He fired the complainant because she was not computer literate. Her job as she knew it had disappeared because the company became computerized. He didn't fire her for all the other reasons outlined in the respondent's reply. She was a good long term employee but that was before computers came along.

[162] Due to the way the office was setup, it was easy to eavesdrop on conversations.

[163] Part of the complainant's job prior to Mr. Marks becoming operations manager was to add the extra items to the invoice that had been required with the CNRL contract. She wasn't required to do that once Mr. Marks had negotiated an all inclusive annual contract with them.

[164] Mr. Reinhardt found it hard to believe that he made the statement to Mr. Perry that "you would have me fire an employee of nine years who hasn't done anything wrong." He wasn't aware of the statement until he read it a week before the Panel hearing. He didn't really know how old she was. He thought Ms. Brawn was 58 years old at the time. He said it was impossible to know how old any of his employees were.

[165] Mr. Reinhardt discussed the pros and cons of firing the complainant with Mr. Perry. The company was paying her \$65,000 plus benefits for a person sitting in the front, answering the phone. In addition, quite often she wasn't there in the middle of the afternoon. She hadn't done anything wrong, and she hadn't done anything right. The only reservation he had about firing Ms. Brawn was that she may get back on him, and she did by filing a human rights complaint.

[166] Under cross-examination by Ms. Ashcroft, Mr. Reinhardt gave the following relevant testimony:

- He gave signing authority to Ms. Brawn in 2005 because the accountant is never given signing authority.
- He is the President of the company, and he parked at the back or on the street.
- He and Mr. Marks had a few disagreements. Mr. Reinhardt couldn't say that Mr. Marks was rude and disrespectful to some employees.
- When questioned about the document he said, "What do you call your father? The old man, right? Anybody 20 years older than you are is an old fogey and a bygone isn't he?" He agreed that the document was directed at older people in the office.
- He never heard Mr. Marks refer to the complainant as a "b" or a "fb." He can't remember specifics from four years ago.
- He and Mr. Marks had many discussions about terminating Ms. Brawn. Both Mr. Makarra and Ms. Brawn performed accounting by longhand in pencil and paper. He didn't ask Ms. Brawn to take computer courses but he thought Mr. Marks did.
- With prompting, he recalled a conversation with Ms. Brawn about a missing document from her desk and her asking him if she could put a lock on her desk. He gave her permission but he thought her desk was always locked anyway.
- The complainant brought him some invoices with items that weren't billed and some with extra drilling charges. The problem was that CNRL increased the contract rate in order to get rid of the small incidentals. He couldn't remember if he told Mr. Perry that the complainant had to see all the invoices before they went out.
- He was always in the field from 1990 to 2004. He was never in the office and was never concerned with the accounting department whatsoever.
- He tried to fire Mr. Marks because he liked Mr. Johnson better. He couldn't think of any complaints from the field off hand about Mr. Marks. He couldn't remember Mr. Borstmayer phoning him about concerns with Mr. Marks, but agreed it was possible.
- Mr. Marks had to take directions from Mr. Reinhardt because he was the owner of the company. An operations manager in the front end wants to run the show the way they see fit. He did not disagree with the way Mr. Marks was running the company.

[167] Under cross-examination by Mr. Woodard, Mr. Reinhardt gave the following relevant testimony:

- It is not true that the reason he terminated the complainant was because Mr. Marks wanted her terminated. Mr. Marks did not pressure him to fire the complainant. He fired the complainant partially because she was not computer literate. She was fine when Mr. Makarra was in charge, but not after he left.
- He disagreed that he needed Mr. Marks. He stated that there was no such thing as a person who can't be replaced.
- The complainant told him that she didn't want the job working with computers. Mr. Marks told him he offered her training. He was the operations manager and the person responsible for telling him the company needed to be computerized. It wasn't hard for Mr. Marks to convince him.

Key Arguments of the Respondent

[168] Profile Seismic Ltd. does not feel that it violated the Act since Ms. Brawn's employment was terminated for just cause and not due to her age. There was just cause to terminate her employment.

[169] The complainant did not work for Mr. Reinhardt. She worked under the direction of Mr. Marks.

Parking Stall

[170] There were three unassigned stalls used by company staff. They were occupied on a first come first served basis. Mr. Perry was told this upon his hiring.

Derogatory Remarks and Private Conversations

[171] Mr. Marks and Mr. Reinhardt had a closed door conversation in Mr. Marks' office about the complainant's termination. Mr. Reinhardt told Mr. Marks that the complainant had threatened him with lawsuits and that she was going to go to the Commission and the Labor Board if she was relieved of her duties. Mr. Marks may have used profane language in this private conversation. The private conversation the complainant eavesdropped on between Mr. Perry, Mr. Reinhardt and Mr. Marks was about the workplace situation and not about her age.

Mail Handling

[172] The company had incurred late fee charges on Visa, power and gas bills because they were not given to Mr. Perry when they were received. The complainant would give them to Mr. Perry the day after they were due for payment. Ms. Braun used these late fee charges to show Mr. Reinhardt that computers were unreliable.

[173] Mr. Perry then requested to Mr. Reinhardt that he would like to assume responsibility for looking after incoming mail and would like to have the mailbox key to avoid these recurring problems. Mr. Reinhardt asked the complainant for the key on numerous occasions and each time she refused to give it to him.

[174] Outgoing mail was addressed and sealed when given to Ms. Brawn and invoices were to be sent by courier. Once Mr. Marks became operations manager, he was responsible for generating computerized invoices instead of manual invoices that Mr. Makarra gave the complainant to type. These invoices were based on confidential contractual agreements which were solely negotiated and managed by Mr. Marks and his clients. Ms. Brawn was no longer required to type the invoices and didn't have any authority to open the sealed addressed envelopes and change the amount the clients were being billed. When it was discovered that the complainant was opening outgoing mail and changing rates, Mr. Perry discussed this with Mr. Marks and they agreed that Mr. Perry would assume responsibility for all the outgoing mail.

Complainant's Personal Calls and Space

[175] Ms. Brawn's desk was located in an open space beside the lunch room. Employees used this room and did not purposely listen in on her phone calls. Mr. Marks did not violate Ms. Brawn's privacy rights by retrieving files that were needed in the running of the day to day operations of the company.

Findings and Analysis

The Panel makes the following findings:

Workplace Environment

[176] Through the complainant's own testimony, she worked for both Mr. Makarra and Mr. Johnson, and as such reported to them since it was a small head office with informal reporting relationships. It was reasonable to assume that when Mr. Marks became operations manager that the same working relationship would have continued. The complainant did not work under the direction of Mr. Reinhardt. He was not involved in the day to day running of the head office. Ms. Brawn reported to him when it was convenient to do so.

[177] Even though Mr. Marks replaced Mr. Johnson as operations manager, the complainant believed that he was just a field operations manager only responsible for looking after matters in the field. Ms. Brawn never respected the fact he was her supervisor or that she had to report to him. She stated that she reported to Mr. Reinhardt because he was the owner, and took her direction from Mr. Makarra. Mr. Marks had the authority to redefine the complainant's job duties and was responsible for the day to day operations of the head office. That is what he was hired to do.

[178] Mr. Reinhardt couldn't always recall certain incidents and would answer a question with a question. He didn't have great insight into office politics, and the complainant and other employees manipulated him to maintain the status quo. He sent mixed messages in the office as the owner of the company. In doing so, he undermined the efforts of Mr. Marks to effectively do his job as operations manager. Mr. Reinhardt had little insight into the skills and expertise needed to do Mr. Makarra's job. It is difficult for the Panel to reconcile why on the one hand Mr. Reinhardt would understand the shortcomings of the complainant in her role under new management, and with Mr. Marks wanting to terminate her, but on the other hand offer her the accountant's position for which she had no skills at all. It took the complainant to say that she was unqualified and decline the position. Further, at the same time that he terminated her, he offered her a part time job helping Mr. Perry. Mr. Marks was the operations manager and responsible for these matters.

[179] Ms. Brawn was granted signing authority instead of Mr. Marks. Mr. Reinhardt further undermined Mr. Marks and Mr. Perry by not granting either of them signing authority but instead authorizing Ms. Brawn for the first time ever to assume this responsibility. Mr. Reinhardt knew there were already tensions in the workplace between these parties.

[180] Ms. Brawn used these contradictory actions and used this to her advantage. The Panel also believes that both Mr. Makarra and Ms. Brawn used Mr. Reinhardt to advance their own personal agendas, even though they realized he wasn't responsible for the day to day operations of the head office. This culminated in all three of these employees undermining Mr. Marks, with Mr. Reinhardt

knowingly or unknowingly going along. The complainant used Mr. Reinhardt as a go between which circumvented Mr. Marks and further undermined his management responsibilities.

[181] The Panel does not concur that Mr. Marks reassigned the complainant's parking stall. These stalls were assigned to the company and accessed on a first come first served basis. Mr. Marks accommodated the complainant when she became upset with Mr. Perry parking in "her" stall, by parking his own vehicle out on the street. It wasn't Mr. Marks who became irate, it was the complainant.

[182] While it is unfortunate that private conversations were conducted in a manner that were overheard by the complainant, Mr. Marks and Mr. Reinhardt were legitimately having an early morning private conversation as they believed they were the only ones in the office. They stopped this private conversation when they realized the complainant was in her office. There is conflicting testimony about what was said. The complainant was upset that Mr. Marks was listening in on her conversations, but evidence indicated that she too was listening in on a private conversation of others in the office. It was a small and open office, and it wasn't unusual for private conversations to be overheard.

[183] There was conflicting testimony as to whether it was Mr. Reinhardt or Mr. Makarra who offered the accountant's position to the complainant. It is perplexing as to why, under the new management approach that either of these individuals would make this offer to Ms. Brawn. It is also unclear as to why Mr. Marks was excluded from this decision. This further undermined Mr. Marks' position.

[184] When Ms. Brawn declined the offer, Mr. Makarra then felt the company needed a qualified person with a solid background in computers. He realized that when they had to go outside the company to hire for the position, that they needed someone with computer expertise.

[185] When Mr. Perry started, the complainant also felt that he was incompetent and not doing what an accountant should be doing. This should have been none of Ms. Brawn's concern, but she made it so. She undermined Mr. Perry by going to Mr. Reinhardt saying that Mr. Perry wasn't doing his job properly. She stated that "Mr. Reinhardt had every right to know what was going on," and the complainant saw that as her responsibility. The Panel disagrees.

[186] It is unusual that Mr. Makarra would not have directed Mr. Borstmayer to talk directly to Mr. Marks about any problems. If there were problems in the field they should have been directed to Mr. Marks. The nature of these problems was ambiguous. The Panel also finds it unusual that Mr. Makarra didn't discuss the document with Mr. Marks.

[187] Mr. Reinhardt, Mr. Johnson, Mr. Makarra, Mr. Gerlitz and Ms. Brawn were all involved in strategizing to fire Mr. Marks, and to take it further by discussing this with their main client, CNRL.

Complainant's Performance

[188] The Panel has concluded that Ms. Brawn was uncooperative in the workplace under new management, and did not accept the fact that Mr. Marks was her new boss and that she took direction from him. She undermined his authority by speaking negatively and gossiping about him in the workplace with other employees. The evidence shows that she never accepted the new

management approach which was moving toward computerizing the company. Offers were made to provide training but she wasn't interested.

[189] Her behavior also resulted in her wanting to continue doing her job the old way and not accept the fact that Mr. Marks and Mr. Perry were doing most of the work she used to do using technology. Mr. Marks had the right as operations manager to negotiate contracts and monitor invoicing. The Panel does not believe this constitutes gradually taking away her responsibilities as a form of discrimination based on her age. The position and skills she possessed were no longer a fit for the company. The Panel does not find clear evidence that Mr. Marks or Mr. Perry were on a constant campaign to make her job as unpleasant as possible. On the contrary, the Panel finds the opposite.

[190] The Panel finds that Ms. Slipets gave conflicting testimony. There is no reference in the original human rights complaint about name calling, but in her testimony she did recall name calling. The Panel placed minimal weight on her testimony.

[191] There is conflicting written and verbal testimony from Ms. Brawn that questions her credibility:

- Ms. Brawn admitted that she didn't perform senior accounting work, or invoicing for the company, and that she wasn't a field clerk.
- In Ms. Brawn's testimony she did not say that Mr. Marks became irate about being challenged on Mr. Perry parking in her stall, however she did in her written complaint form.
- In the complaint, she said that Ms. Slipets never mentioned any name calling. Ms. Slipets did recall name calling when she testified.
- Ms. Brawn stated she only gave the document to Mr. Makarra. Mr. Reinhardt stated that Ms. Brawn gave it to him, as did Mr. Gerlitz. Ms. Brawn also said that she didn't make copies of this document or distribute it. There was considerable evidence to indicate otherwise. This calls into question her motivation and credibility.
- The complainant was offered computer training and disagrees that she was offered this training. This again calls into question her credibility when she stated that computers were never brought up or discussed by anyone in the office. The Panel disagrees.
- Ms. Brawn did speak negatively about Mr. Marks to other employees in the company. There also was credible evidence that Ms. Braun did leave work early. She took her direction from whomever it was convenient for her, whether that be Mr. Makarra or Mr. Reinhardt.
- It was Ms. Brawn's view that Mr. Marks only ran the field, which was not the case. This set in motion her actions and behavior in the head office as she was not supportive of the new management approach. This calls into question her credibility on other matters before the Panel.

- Ms. Brawn stated that she reported to Mr. Reinhardt because he was the owner of the company. It would have been logical to assume that with Mr. Makrarra's departure from the company, she would have reported to Mr. Perry. Mr. Makarra stated that 95% of the time she reported to him.
- Ms. Brawn did complain to Mr. Reinhardt about Mr. Marks and about getting him fired.
- While she denied having documents in her desk that Mr. Marks needed, under cross-examination, she admitted otherwise.

Age Discrimination

[192] The Panel finds it very unfortunate that Mr. Marks would as operations manager write the *Profile Seismic's Senior Citizen's Day Care* document. Even if it were written in frustration, the obvious risk existed that it would become public, which it did. Whether he gave the document to Ms. Brawn or whether she retrieved it from him garbage can indicates to the Panel how the workplace environment had degenerated. The Panel believes it was not Mr. Marks intention for this document to become public. Ms. Brawn did make copies of this document to further her case of being abused and discriminated against in the workplace, and reason enough to have Mr. Marks fired.

[193] Ms. Brawn stated in her human rights complainant that the basis of discrimination based on age was that the company didn't have a retirement policy.

Gender Discrimination

[194] Ms. Brawn stated in her human rights complainant that the basis of discrimination based on gender was being called a "fb" as usually women are called "bitches." The Panel believes that the director has not proven a case of prima facie discrimination and that overhearing a private conversation that couldn't be substantiated such as calling the complainant a "b" or a fb" is not reason enough on its own to determine if discrimination occurred under the Act.

[195] Ms. Slipets never mentioned anything to the complainant about name calling prior to her testimony.

[196] While the profane language used by Mr. Marks is questionable and unfortunate, it is difficult for the Panel to ascertain definitively which parts of these conversations applied to the complainant. It was difficult also for the Panel to corroborate evidence and testimony about private conversations relating to the age of the complainant that Mr. Perry had with Mr. Reinhardt. Mr. Perry did not appear before the Panel, and minimal weight is placed on the testimony of Mr. Reinhardt because through his own admission, he couldn't always recall events and conversations.

Decision

1. Did the respondent contravene s 7 (1)(a) of the Act in that Ms. Braun was fired due either in whole or in part to her age?

No.

2. Did the respondent contravene s. 7 (1)(a) of the Act in that Randy Marks harassed Ms. Brawn through specific gender and age based insults, constituting discrimination with regard to her employment or a term or condition of her employment?

No.

[197] The burden of proof rests with the director and complainant to establish a prima facie case of discrimination. They have not done so. Ms. Braun was not dismissed either in whole or in part because of her age or gender.

[198] Evidence showed Ms. Brawn was uncooperative in the work place under the new management. She refused computer training and refused to report to Mr. Marks, the new manager. In addition, she tried to discredit him and have him fired. On more than one occasion, Mr. Marks terminated the complainant, but she refused to leave saying she didn't work for him. Ms. Brawn and Mr. Makarra did everything possible to make the computer transition difficult.

[199] Mr. Reinhardt's decision to terminate the complainant evolved over a number of months. He eventually terminated Ms. Brawn when he realized she was becoming a liability to the company and was acting in an unethical and unprofessional manner. Mr. Reinhardt was very fair in providing for Ms. Brawn with respect to her termination. Ms. Brawn was given eight weeks' severance pay instead of the six weeks required by Employment Standards. She was given a \$5,000 Christmas bonus and she was given six weeks' vacation pay even though she had used up her vacation time. The Panel believes that the complainant was dismissed for reasonable and legitimate reasons and not because she was discriminated against based on age or gender.

[200] On more than one occasion, Mr. Marks terminated the complainant, but she refused to leave saying she didn't work for him. Mr. Reinhardt's decision to terminate the complainant evolved over a number of months. The Panel believes that the complainant was dismissed for reasonable and legitimate reasons and not because she was discriminated against based on age or gender.

[201] The complaint is dismissed.

June 16, 2009

Diane Colley-Urquhart
Panel Chair