

## Age Discrimination in Employment: What will Make the Grade?

By Linda McKay-Panos

### Cases Considered:

*Brawn v. Profile Seismic Ltd.*, ([June 16, 2009, Diane Colley-Urquhart Panel Chair](#))

Diane Colley-Urquhart, sitting as a Panel for the Human Rights and Citizenship Commission (“Commission”), recently dealt with a complaint involving age discrimination in employment. This case illustrates how it can be quite difficult to prove discrimination when you have conflicting witness testimony, and how human rights law does not address unpleasant workplace cultures, when it is not clear that the offensive behaviour is based on a ground covered under human rights legislation.

Ms. Brawn was employed full time with Profile Seismic Ltd. for nine years. She was terminated at age 68. The then owner of the small company was Oscar Reinhardt. Ms. Brawn did senior accounting work, reported to another accountant, Mr. Makarra, and the operations manager, Mr. Johnson. Mr. Johnson retired in 2004 and Mr. Marks assumed the operations manager position. When Mr. Makarra retired, Mr. Reinhardt offered that position to Ms. Brawn and she turned it down, as she did not have sufficient skills. Several months later, Ms. Brawn was terminated.

Ms. Brawn alleged that Mr. Marks treated her negatively and disrespectfully in relation to her gender and her age. She cited the following examples (para. 10):

- 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.

The document said (para. 17):

*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.*

[reproduced as the original document read]

There was conflicting testimony about how the document came to be in the possession of Ms. Brawn and then later distributed to other employees. Mr. Marks alleged that Ms. Brawn had taken it from his garbage can and had reproduced it and distributed it to others. Ms. Brawn said that it had been delivered to her by Mr. Marks and denied distributing it.

Ms. Brawn raised a number of issues regarding Mr. Marks’ treatment of her, including name calling and advocating for her dismissal. The respondent argued that the offensive references to Ms. Brawn were made during private conversations that did not include her. In addition, the respondent provided the following reasons for terminating her [para. 15]:

- 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.

Ms. Brawn answered these allegations by denying some of them and by stating that she had never been offered computer training.

The Director of the Human Rights and Citizenship Commission (“Director”) argued that age was a factor in Ms. Brawn’s adverse treatment based on the following (para. 66):

- 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.

Further, the Director argued gender was a factor in her adverse treatment because she was referred to by Mr. Marks as a “fb” or a stupid old “fb” or a “b”.

Finally, the Director argued that age was a factor in Ms. Brawn's termination. These were the factors that support that argument (para. 74):

- 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.

This case involved a great deal of conflicting evidence from several witnesses who were or had been employees of Profile Seismic. While Ms. Brawn provided evidence indicating that she had been discriminated against, the respondents' witnesses basically supported the argument that she had been terminated for cause.

The Panel dismissed the complaint, finding that the complainant had not made out a *prima facie* case of discrimination on the basis of age or gender. In setting out the reasons for the dismissal, the Panel noted that while Mr. Marks had been hired to oversee the day-to-day operations of the head office, Mr. Reinhardt sent mixed messages in the office and undermined Mr. Marks' efforts to do his job. Ms. Brawn used Mr. Reinhardt's contradictory actions to her advantage. This culminated in three employees undermining Mr. Marks, with Mr. Reinhardt knowingly or unknowingly acquiescing.

Further, the Panel concluded that Ms. Brawn was uncooperative in the workplace under Mr. Marks— she refused computer training and refused to report to Mr. Marks. In addition, she tried to have Mr. Marks fired. On more than one occasion, Mr. Marks terminated Ms. Brawn, but she refused to leave, saying she didn't work for him. Both Ms. Brawn and Mr. Makarra tried very hard to make the transition to a computerized office difficult.

The fact that Mr. Marks had written the *Profile Seismic's Senior Citizen's Day Care* document was seen by the Panel as unfortunate, and the Panel noted that while it may have been written in a moment of private frustration, there was a risk that it could have become public, which it did. The Panel took this event as evidence of the degeneration of the workplace environment and decided that Ms. Brawn had made copies of the document to further her discrimination case.

This case illustrates that it can often be quite difficult to establish or prove discrimination. Since people can interpret events differently, in the face of conflicting evidence, the Panel is tasked with determining which evidence is more credible. While there was clearly a personality conflict between Mr. Marks and Ms. Brawn, it was less clear to the Panel that there was discrimination against her based on age or gender.

The case also indirectly highlights some of the potential drawbacks to human rights legislation in dealing with a workplace which may be unpleasant or even harassing, yet the harassment is not based on one of the grounds under human rights law. What does one do if the boss is a bully or a grouch but does not pick on you on the basis of one of the covered grounds? This is a growing concern. While human rights legislation does not address this situation, some provinces have amended labour laws to prohibit bullying and harassment in the workplace. See for example: Quebec's *Act Respecting Labour Standards*, R.S.Q. 2004, c. N-1.1 and Saskatchewan's *Occupational Health and Safety (Harassment Prevention) Amendment Act*, S.S. 2007, c. 34.