

Date: August 9, 2004  
File: 98

Indexed as: Mottu v. MacLeod and others, 2004 BCHRT 76

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

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

B E T W E E N:

Andrea Mottu

**COMPLAINANT**

A N D:

Cass MacLeod and Cass MacLeod and Michael Jahnke dba Barfly Night Club

**RESPONDENTS**

---

**REASONS FOR DECISION**

---

Tribunal Member:	Barbara J. Junker
Counsel for the Complainant:	Paul Hildebrand
On behalf of the Respondents:	Cass MacLeod
Dates of Hearing:	June 1, 2, and 3, 2004

## **I INTRODUCTION**

[1] Andrea Mottu alleges that Cass MacLeod and Cass MacLeod and Michael Jahnke doing business as the Barfly Night Club (the “nightclub”) discriminated against her in the terms and conditions of her employment because of her sex including sexual harassment, contrary to s. 13(1)(b) of the *Human Rights Code*.

[2] The witnesses for the complainant were: Sarina Perneel, Mark Lavallee, Rod Hickman and Ms. Mottu. The witnesses for the respondents were: Carey-Ann Pershick, Jason MacLeod and Cass MacLeod. Cass MacLeod is part owner of the nightclub.

## **II FINDINGS OF FACT**

[3] In making my findings of fact, I was not called upon to address the credibility of the witnesses because there was no significant variation in the evidence and as a result the facts on which I base my decision.

### *Ms. Mottu’s Regular Job*

[4] Ms. Mottu commenced part-time employment at the nightclub in March 2000 when she was 21 years of age. The work at the nightclub provided her main source of income, but she also had a part-time job at a tanning salon. Ms. Mottu’s regular shifts were four hours on Friday night and five hours on Saturday night. The nightclub posts the staff shifts on a weekly schedule.

[5] Ms. Mottu’s hourly wage rate was \$11.87 per hour, but the main source of her earnings at the nightclub was her tips which amounted to \$50.00 to \$100.00 on Friday and \$100.00 to \$150.00 on Saturday.

[6] Ms. Mottu’s job at the nightclub entailed selling drinks from the “beer barrel” near the front door. The beer barrel is about four to five feet in diameter and is filled with ice and different kinds of beer, usually Kokanee, Corona, Budweiser, and Smirnoff Ice. The beer barrel is located about ten feet from the front door where customers enter and can see Ms. Mottu.

[7] The standard work attire at the nightclub was a black top and skirt or pants. Ms. Mottu enjoyed her job and had received no complaints about her performance. Ms. Pershick, head server, said she was “an awesome employee” and probably the best beer barrel server.

#### *The BCIT Fundraiser*

[8] On Thursday, April 12, 2001, BCIT held its annual fundraiser at the nightclub. The fundraiser had a beach theme. Since the event was sold out, it was going to be a busy night and therefore the nightclub scheduled extra staff. On Saturday, April 7, 2001, Ms. Mottu noted that she was scheduled to work on the fundraiser doing her usual job at the beer barrel. On that same day, she spoke with Ms. Pershick who said it was a Hawaiian event and Ms. Mottu understood she could wear a Hawaiian dress. The previous year she wore a tank top and capri pants.

[9] Mr. MacLeod asked each group of staff members, subject to approval, to come up with a consistent “costume” or apparel for the evening. Ms. Pershick and the regular Thursday night servers met on Saturday, April 7<sup>th</sup> and decided that they would wear bikini tops and sarongs or surfer shorts. The bartenders chose to wear Hawaiian shirts and shorts; the door staff chose Hawaiian shirts and khaki pants. The coat check staff chose to wear tank tops and skirts.

[10] Ms. Mottu was not aware of the meeting with the Thursday staff servers or what the staff had decided to wear. On Wednesday, April 11, 2001, Mr. MacLeod telephoned Ms. Perneel, another server, and Ms. Mottu to advise them of the dress code for the BCIT event. He told them that they could choose to work the shift and wear the attire, which included a bikini top, or not work the shift, and not be paid. Ms. Perneel declined to work the shift and was not paid.

[11] Mr. MacLeod reached Ms. Mottu by paging her and she returned his call. He said that the servers were to wear bikini tops. Ms. Mottu said she had no problem with that as long as she could wear a summer dress over top. Mr. MacLeod advised her that he wanted all the servers dressed the same way, wearing bikini tops, and if she had a

problem with that, he would find someone else to work the shift. Ms. Mottu told Mr. MacLeod that she would phone him back. Ms. Mottu phoned Mr. MacLeod back and told him she would work the shift. She made that decision because she did not want to lose the shift where she knew she would earn a lot of tips, as she had the year before.

[12] Ms. Mottu then phoned her union to find out whether she could be compelled to wear the prescribed dress code for the BCIT event. Her union representative, Kevin Smyth, advised her that she did not have to and that he would phone Mr. MacLeod. Mr. Smyth phoned Mr. MacLeod and left a message saying that he was calling about the dress code. Ms. Mottu also phoned the Human Rights Commission which advised her to start documenting events.

[13] On April 12<sup>th</sup>, Ms. Mottu dressed in layers, with a bikini top underneath, a tank top, and then a sweater over that. She also wore a skort. Ms. Mottu planned to leave her sweater on unless she got too hot. Her purpose was to make a point with Mr. MacLeod that the bikini top was not appropriate. Ms. Pershick was dressed in a bikini top and surfer shorts, and over that for the beginning of her shift, a white zip up sweater because she was cold. Other servers had tank tops over their bikini tops at the start of their shift.

[14] Ms. Mottu arrived at work her usual 15 to 20 minutes before her shift. Instead of the usual friendly greeting from Mr. MacLeod, he did not acknowledge her. In preparing the beer barrel for her shift, Josh Johnson, the porter, brought over the drinks she was to sell that night. He brought her a supply of Corona beer and Smirnoff Ice. Ms. Mottu had expected to be provided a supply of Canadian beer as that was the drink special that night and she often sold the drink special from the beer barrel. Ms. Mottu was concerned about the drink supplies she had received as they were more expensive than the drink special and she did not think she would sell as much and hence, would have fewer tips. Ms. Mottu asked Mr. MacLeod why she was not supplied with the drink special and he advised her that he was “trying something different”. Ms. Mottu felt Mr. MacLeod was annoyed with her as he snapped his answer at her.

[15] In addition, Ms. Mottu alleges that all other staff had name tags and one was not made up for her. As it turns out, the regular Thursday staff had name tags associated with

a promotional event every Thursday and the extra staff called in to work the BCIT event did not have name tags. Nevertheless, at the time, Ms. Mottu thought she had been singled out.

[16] Ms. Mottu became upset at how she was being treated and went to the coat check room where she started to cry. She decided she could not work as she was too upset so told the head doorman, Trevor Johnson, that she was leaving and asked him to tell Mr. MacLeod.

[17] A replacement, “Kim”, who does not normally work at the nightclub, was called in to work the beer barrel and she was allowed to sell the drink special.

#### *Events After April 12, 2001*

[18] Ms. Mottu was scheduled to work her regular shifts on Friday and Saturday that week. About two hours before her scheduled shift on Friday, on the advice of her boyfriend, Mr. Hickman, she went to the nightclub to talk to Mr. MacLeod to apologize for leaving on Thursday and to explain that she felt she was being treated unfairly. Mr. MacLeod asked her why she called the union before speaking to him and said that he did not like working with someone who went to the union first before talking to him. Ms. Mottu took it from those comments that she had been fired. As a result, she did not report to work that evening. On Saturday, Mr. MacLeod called Ms. Mottu at approximately 8:45 p.m., 15 minutes before the start of her shift. He asked her if she was coming to work. Ms. Mottu replied she was not because she thought she had been fired. Mr. MacLeod advised Ms. Mottu that she was not fired and Ms. Mottu replied that she would be in to work. Ms. Mottu was late for work because she had to drive from her home in Richmond to the nightclub which is located in New Westminster. She arrived at about 9:15 or 9:20 p.m.

[19] As soon as Ms. Mottu arrived, Mr. MacLeod asked to see her in his office where he handed her two letters of warning. One was a reprimand for not arriving for her scheduled shift on Friday, April 13<sup>th</sup>, and the other was a reprimand for not arriving on time for her shift that night.

[20] Another employee was working the beer barrel, so Ms. Mottu was given a bucket of ice and a supply of an unpopular, discontinued drink called Boomerang. The bucket was approximately two feet in height. Instead of being placed near the front door, Ms. Mottu was put in a dark corner at the rear of the nightclub with the ice bucket placed on a table.

[21] Ms. Mottu filed her complaint with the Human Rights Commission on April 16, 2001, citing the events of April 12<sup>th</sup>, 13<sup>th</sup>, and 14<sup>th</sup>. Ms. Mottu also went to the media and her story appeared in the Vancouver Sun and the Richmond Review. There was also television coverage. Mr. MacLeod testified that the media attention negatively affected the nightclub's business as there was a downturn in customers.

[22] Ms. Mottu continued to be relegated to the Boomerang bucket in the dark corner. She sold no drinks on April 20<sup>th</sup>, her next shift, and maybe four but definitely under ten on April 21<sup>st</sup>. In the meantime, Ms. Pershick's sister operated the beer barrel. On April 21<sup>st</sup>, Mr. MacLeod told Ms. Mottu that she could not sit down and wanted her standing for her five hour shift. That same night Jason MacLeod, a bartender at the nightclub and Mr. MacLeod's brother, approached Ms. Mottu and told her she was a "loser", that things would be better if she left, and that everyone on staff agreed with him. Ms. Mottu was very uncomfortable and intimidated by Jason MacLeod because he is large and over six feet tall.

[23] There was meeting scheduled with the union and the nightclub on Thursday, April 26, 2001, which Ms. Mottu expected Mr. MacLeod to attend. He did not attend, but instead, Andy Agnesini, a former manager at the nightclub, attended, arriving ½ hour late. The grievance was never resolved as the union advised Ms. Mottu to proceed with the human rights complaint first.

[24] The next shift schedule that was posted showed that Ms. Mottu's Friday shift was eliminated and her Saturday shift had been cut to four hours. Ms. Mottu therefore did not work the following Friday, but did work Saturday, April 28<sup>th</sup>. She sold some drinks to her boyfriend, his friends and some of the staff members, but again, less than ten. She received no significant tips.

[25] On May 5, 2001, Ms. Mottu again worked selling Boomerang. Mr. MacLeod approached her and told her that she could lose her job for going to the media. That night, Michael Jahnke, part owner in the nightclub, came to the nightclub, which he rarely does. He also approached Ms. Mottu and said that her union was not going to help her and that she had blown everything out of proportion. He also told her that the bikini top had just been a suggestion, to which Ms. Mottu replied it was not just a suggestion, but a requirement, and that he would not likely have been comfortable wearing a speedo. Mr. Jahnke also suggested that they try and reach a mutual settlement; that Ms. Mottu resign and they would give her a good reference. Ms. Mottu rejected the suggestion and responded by telling Mr. Jahnke she wanted her old position back. He said she would never get her old position back.

[26] Ms. Mottu worked again on May 12<sup>th</sup>, still selling Boomerang. Due to illness she was not able to work on Saturday, May 19, 2001. She phoned and left a message on the nightclub's answering machine which Mr. McLeod testified he never received. Ms. Mottu provided a medical certificate to the nightclub via facsimile on May 22, 2001, which advised she was not able to work due to medical reasons, and confirmed that she was unable to work on May 19<sup>th</sup> due to illness. Ms. Mottu's doctor recommended she not continue working at the nightclub because she was upset, anxious and stressed out.

[27] Ms. Mottu did not return to work at the nightclub after that. She never received any formal documentation about her employment being terminated and she did not receive a record of employment. No-one replaced Ms. Mottu on the Boomerang bucket after she stopped working.

[28] Between filing her complaint and leaving the nightclub in May, Ms. Mottu parked some distance from the nightclub because she thought someone might do something to her car. During the events, she was an emotional mess; she thought she would lose her friends at work. After the events of April 12<sup>th</sup>, 13<sup>th</sup> and 14<sup>th</sup>, staff at work shied away from her because they did not want to be around someone who was not popular with the owners. There was general tension as well in the workplace after Ms. Mottu reported the events to the media.

[29] Ms. Mottu started looking for work in July and concentrated on looking for full-time work as a receptionist. Ms. Mottu continued her work at the tanning salon until she found a receptionist position in a law firm in September 2001. Ms. Mottu learned other duties in order to be a legal secretary, such as conveyancing and accounting. At the time of the hearing Ms. Mottu had changed law firms and was working as a legal secretary.

### **III ARGUMENT**

[30] Ms. Mottu argues that it was clear that if she wanted to work the April 12<sup>th</sup> shift she had to wear a bikini top. When she resisted and phoned the union, Mr. MacLeod was angry. When Ms. Mottu attempted to resolve the issues with Mr. MacLeod on April 13<sup>th</sup>; she was bluntly rebuffed. Following that, when she returned to work, the nightclub retaliated against her. In the end, she was forced to leave her employment. In support of her argument that this constitutes discrimination on the basis of sex, including sexual harassment, and that she is entitled to damages, Ms. Mottu relies on the following cases: *Worrall (Madsen) v. Boca Homes Ltd. dba Monogram Building and Design and Michael Brealey* (B.C.H.R.T.) (July 3, 1998); *Fernandes v. Multisn Movies Ltd. and Suresh Jogia* (B.C.H.R.T.) (September 2, 1998); *Lanteigne v. Sam's Sports Bar Limited dba G. G. Sports Bar* (B.C.H.R.T.) (July 23, 1998); *Haynes v. Coltart* (B.C.H.R.T.) (October 19, 1998); and, *Gyger v. A. A. Ecologica Ltd.* (B.C.H.R.T.) (September 2, 1998).

[31] The respondents say that Ms. Mottu was never discriminated against on the basis of her sex. Rather, she provoked the conflict with them. She has never been terminated from the nightclub and a job was available to her. They say the reason she was moved away from the front of the nightclub is that they did not want a disgruntled employee that had been in the media, greeting customers. The respondents argue that this is not a “bikini top” issue; rather, this is a case of a staff member trying to cause a fight with management.

### **IV ANALYSIS AND DECISION**

[32] Discrimination in employment on the basis of sex is prohibited under s. 13 of the *Code*. Pursuant to s. 13(1)(b), a person must not discriminate against a person regarding

employment or any term or condition of employment because of their sex. Once a complainant provides evidence of a *prima facie* case, then the burden shifts to the respondent to prove that the prohibited ground was not a factor in its actions or that its conduct was justified under the *Code*. The overall burden is on a complainant to show discrimination on the balance of probabilities. In this particular case, the respondents did not mount a defence to the *prima facie* case.

[33] It is uncontested that the female servers were to wear bikini tops at the BCIT event on April 12<sup>th</sup>. Some of the servers had other tops on over their bikini tops when their shift first started because it was cold.

[34] While there were slightly different versions of the words used in the conversation between Ms. Mottu and Mr. MacLeod on April 11<sup>th</sup>, there was no question that Ms. Mottu was given a choice, either to wear the bikini top and work her shift, or she would be replaced. In other words, if she did not conform to the chosen dress for the evening, she would lose her scheduled shift and the associated pay and tips.

[35] Ms. Mottu chose to challenge the requirement to wear the bikini top, and contacted her union, who in turn contacted the nightclub. I find that was what caused Mr. MacLeod to act as he did.

[36] Mr. MacLeod argued that he had a marketing reason for not having the drink special at the beer barrel. That was, he wanted the more expensive drinks to be more accessible than the special, which he was going to sell only from the main bar. However, that does not explain why, after Ms. Mottu left, Kim was allowed to sell the drink special. Mr. MacLeod tried to suggest that he allowed Kim to sell the drink special because she was inexperienced with working a beer barrel and that selling the drink special at the beer barrel would attract people. Yet, that does not explain why selling three products instead of two, and the high volume of the drink special, would make it an easier job for an inexperienced server on the beer barrel.

[37] There were also slightly different versions of the actual words used in the meeting between Ms. Mottu and Mr. MacLeod on April 13<sup>th</sup>. What was clear, however, was that

Mr. MacLeod expressed his annoyance that Ms. Mottu had gone to the union and not talked to him first. From the expressions used by Mr. MacLeod in the meeting, Ms. Mottu, already upset about the events of April 12<sup>th</sup>, took it to mean she was fired. Although that was not the case, as clarified on April 14<sup>th</sup>, Mr. MacLeod nevertheless retaliated against her in the following days of her employment.

[38] First, when she arrived on April 14<sup>th</sup>, she received two disciplinary letters, one for being late that day and one for her absence on April 13<sup>th</sup>. Then, Ms. Mottu was taken off the beer barrel, where she had a good performance and earned lucrative tips. She was relegated to an out of the way location in the nightclub, selling an unpopular drink. That continued until she finally stopped working on May 19, 2001. In the meantime, the nightclub reduced her hours of work, starting April 27<sup>th</sup>. In addition, comments were made by Jason MacLeod and Mr. Jahnke.

[39] Taking all of those circumstances into account, I find that the nightclub was trying to force Ms. Mottu to quit. Likely, it realized it could not fire her without causing further media coverage, and its reputation and its business might be affected.

[40] Mr. MacLeod said that the decision to wear bikini tops was a decision of the female servers, but Ms. Mottu was not involved in that decision. However, what the nightclub staff wore on April 12<sup>th</sup> had to be approved by Mr. MacLeod. He condoned the servers wearing the bikini tops. When Ms. Mottu asked on the phone if she could wear a dress over top, the answer was no, she had to wear the bikini top. If she felt uncomfortable she was told someone else could work her shift. When she agreed to work the shift and then appeared at work in an outfit that did not conform to the required dress for the evening, she was immediately retaliated against by not being allowed to sell the drink special. She was latterly given two unwarranted disciplinary letters, and relegated to a degrading and inferior job.

[41] Dress code requirements based on sex have been found to constitute discrimination on the basis of sex. (see: *Doherty and Meehan v. Lodger's International Ltd.* (N.B. 1981), 3 C.H.R.R. D/628; *Giouvanoudis v. Golden Fleece Resaurant & Tavern Ltd.* (Ont. 1984), 5 C.H.R.R. D/2978; and, *Ballentyne v. Molly 'N' Me Tavern*

(Ont. 1982), 4 C.H.R.R. D/1191). Ms. Mottu chose not to wear an outfit that was gender specific and that she believed was sexual in nature. I compare this to the fact the male bartenders and door staff were not required to wear something that was gender-specific or carried sexual connotations. I find this constitutes discriminatory conduct and that the actions of the respondents on and after the incident of April 12<sup>th</sup> constitute discrimination against Ms. Mottu in the terms of her employment based on her sex.

[42] Mr. MacLeod's explanation of his reason for moving Ms. Mottu and reducing her shifts was that he was unhappy that she had gone to the union and perhaps the press about the bikini issue. I find, however, that her doing so was so inextricably linked with her discomfort around the dress code requirement that it was a factor in the respondents' decisions regarding her employment.

## V REMEDY

[43] Section 37(2) of the *Code* provides me with the authority to award remedies where I find the complaint is justified. The remedies sought by Ms. Mottu are covered by the following provisions:

- (2) If the member or panel determines that the complaint is justified, the member or panel
  - (a) must order the person that contravened this Code to cease the contravention and to refrain from committing the same or a similar contravention,
    - ...
  - (d) if the person discriminated against is a party to the complaint, or is an identifiable member of a group or class on behalf of which a complaint is filed, may order the person that contravened this Code to do one or more of the following:
    - ...
    - (ii) compensate the person discriminated against for all, or a part the member or panel determines, of any wages or salary lost, or expenses incurred, by the contravention;
    - (iii) pay to the person discriminated against an amount that the member or panel considers appropriate to compensate that person for injury to dignity, feelings and self respect or to any of them

*Order Under s. 37(2)(a)*

[44] An award under s .37(2)(a) is mandatory when discrimination is found and I so order the respondent to cease the contravention and refrain from committing the same or similar contravention.

*Order Under s. 37(2)(d)(ii)*

[45] Ms. Mottu seeks lost wages from April 12<sup>th</sup> to the end of May, and for the months of June, July and August. The lost wages between April 12<sup>th</sup> and May 26<sup>th</sup> total \$367.97. Ms. Mottu is also seeking lost tips for that same period in the amount of \$1,350.00. The amount being sought for the summer months for wages and lost tips is \$3,600.00. The total claim for lost wages and tips is \$5,317.97.

[46] Ms. Mottu had a duty to mitigate her loss during the period of time she was only working at the tanning salon. I had no evidence what job searches she made during the summer months. I did have evidence from Ms. Mottu's doctor that he advised she stop working at the nightclub "for the time being". He does not put a time period around the medical leave. In any event, the medical leave would not have been necessary if the nightclub had not acted in the manner it had. I am therefore prepared to award some of the wage loss being sought for the summer months, but not all three months.

[47] In addition, I only have Ms. Mottu's oral evidence about what tips she actually earned. I have no written record or any income tax information. On the other hand, if the amounts she said she earned seemed unrealistic to the respondents, Ms. Pershick could have provided some evidence to refute Ms. Mottu's evidence. Ms. Mottu is asking for \$75.00 for each Friday shift lost, \$125.00 for each Saturday shift lost and \$150.00 for April 12<sup>th</sup>.

[48] Pursuant to s. 37(2)(d)(ii), I find it is appropriate to compensate Ms. Mottu for the lost wages and tips from April 12<sup>th</sup> to May 26<sup>th</sup>, and one additional month of lost wages and tips, for a total of \$2,917.97. Further, I award interest, at banker's prime rate, on the amount awarded for lost wages and tips calculated in accordance with the *Court Order Interest Act*, RSBC 1996, c.79, as amended.

*Order Under s. 37(2)(d)(iii)*

[49] With respect to injury to dignity, feelings and self respect, I have reviewed the cases provided by Ms. Mottu. I have found that the respondents' requirement that Ms. Mottu wear the bikini top was an improper condition regarding her employment. In addition, the nightclub's conduct afterward was deliberate and intended to humiliate her and had a psychological impact. In the circumstances, I find that compensation for injury to dignity, feelings and self respect in the amount of \$3,000.00 is appropriate.

## **VI CONCLUSION**

[50] I find that the respondents discriminated against Ms. Mottu in her employment on the basis of sex and retaliated against her when she failed to conform to a discriminatory condition of employment.

## **VII ORDERS**

[51] I make the following remedial orders:

1. pursuant to s. 37(2)(a) of the *Code* that the respondents cease its contravention of the *Code* and refrain from committing the same or similar contravention;
2. pursuant to s. 37(2)(d)(ii) of the *Code* the payment of wages and tips from April 12<sup>th</sup> to May 26<sup>th</sup>, 2001 and an additional one month's wages and tips, in the amount of \$2,917.97;
3. interest payable on the above amount, at banker's prime rate calculated in accordance with the *Court Order Interest Act*;
4. pursuant to s. 37(2)(d)(iii) of the *Code*, damages for injury to dignity, feelings and self respect in the amount of \$3,000.00.

---

Barbara J. Junker, Tribunal Member