

Decision Summary: Pardy v. Earle and others (No. 4), 2011 BCHRT 101

BC Human Rights Tribunal

The Tribunal held that Guy Earle, Zesty Food Services Inc. and its owner Salam Ismail, discriminated against Lorna Pardy because of her sex and sexual orientation in providing services customarily available to the public, contrary to s. 8 of the *Human Rights Code*. The Tribunal found that when Ms. Pardy and her same sex partner went to Zesty's Restaurant in May 2007, Mr. Earle repeatedly and publicly subjected her to extreme homophobic and sexist comments, and physical aggression, when he was acting as the host of an open microphone comedy show.

The Tribunal made its decision after a four-day hearing. It considered testimony from 11 witnesses, including Ms. Pardy, a friend who was with her, Mr. Ismail, two employees of Zesty's, and several comedians present that night. Mr. Earle did not testify. It also considered legal submissions from all of the parties.

Ms. Pardy, her partner and a friend did not intend to watch a comedy show, but they were moved by staff to a table near the stage when Zesty's patio closed and were asked if they wished to order drinks. They did not heckle or otherwise disrupt the performance, but when Mr. Earle saw Ms. Pardy's partner give her a kiss, he twice directed virulent insults exclusively at her and others at her table based on her personal characteristics as a woman and a lesbian.

Mr. Earle also angrily left the stage twice to confront Ms. Pardy's group. Each time she threw a glass of water in his face and told him not to approach their table. When Ms. Pardy later went to the washroom to compose herself, Mr. Earle cornered her on her return, continuing to physically intimidate and verbally abuse her. He grabbed and broke her sunglasses, and dropped them to the floor at her feet.

Zesty's and Mr. Ismail submitted that their actions were justified because Ms. Pardy provoked or was an equal participant in Mr. Earle's conduct. The Tribunal found that she did not provoke Mr. Earle and was far from an equal participant thereafter.

Mr. Earle submitted that it was his job to engage disruptive patrons to quiet them. However, the Tribunal found no evidence of any rational connection between this and attacking a patron's sex or sexual orientation on or off the stage. There was no evidence that Mr. Earle adopted an "insult to maintain order" standard in good faith, and no evidence that abstaining from sexist and homophobic insults would have caused undue hardship. There were measures available to accomplish the purpose of ending any disruption of the show well short of attacking Ms. Pardy's sex and sexual orientation.

Mr. Earle also argued that the protection against discrimination on the grounds of sex and sexual orientation in s. 8 of the *Code* was an unconstitutional infringement of his right to free speech under s. 2(b) of the *Charter of Rights and Freedoms*. The Tribunal could not consider this because s. 45 of the *Administrative Tribunals Act* deprives it of jurisdiction over constitutional issues related to the *Charter*.

However, the Tribunal considered whether exercising freedom of expression could justify what would otherwise be discrimination under the *Code*. Based on Supreme Court of Canada authority, the Tribunal concluded that the *Code's* provisions are not ambiguous and do not need *Charter* values to interpret them.

The Tribunal said that, in the alternative, if the law does permit freedom of expression to be a defence to discrimination under the *Code*, none of the witnesses testified that Mr. Earle was telling “jokes” and there was no evidence that he was using comedy to expose the stereotypes of others. Nothing about Mr. Earle’s asserted purposes in verbally and physically attacking Ms. Pardy on the basis of her sex and sexual orientation justified elevating his right to free expression over her right under the *Code* to be protected against his discriminatory conduct.

The Tribunal also held that Zesty’s and Mr. Ismail were employers of Mr. Earle, and were liable for his conduct under s. 44(2) of the *Code*, because the restaurant utilized and controlled his services, and remunerated him with free beer. They had the opportunity and ability to set and enforce behavioural standards for performers, and to remedy discrimination. The Tribunal also found that Zesty’s and Mr. Ismail did not take effective steps to prevent, respond to or remedy Mr. Earle’s actions, even though Mr. Ismail did not intend to discriminate.

The discrimination had a significant physical and psychological effect on Ms. Pardy, which was supported by unchallenged medical evidence. This was aggravated and prolonged by public statements made by Mr. Earle about her, which falsely portrayed her as a drunken heckler and instigator.

The Tribunal ordered the respondents to cease the contravention and refrain from committing the same or similar contravention in the future. It declared that the conduct engaged in by Mr. Earle, on and off the stage, was discriminatory. To compensate Ms. Pardy for injury to her dignity, feelings and self respect, Mr. Earle was ordered to pay \$15,000, and Zesty’s and Mr. Ismail were ordered to pay \$7,500. Ms. Pardy was also awarded lost wages for time taken off of work to attend the hearing.