

Before the Yukon Human Rights Board of Adjudication

Between:

Yukon Human Rights Commission

And:

Willow Lacosse

Complainant

And:

Jessica Dyck

Complainant

And:

Childhood Discoveries Preschool (Christina Hassard)

Respondent

REASONS FOR DECISION

BACKGROUND

Willow Lacosse (“Lacosse”) and Jessica Dyck (“Dyck”) are both young women who individually brought complaints of sexual harassment against Christina Hassard (“Hassard”) and Childhood Discoveries Preschool (the “Daycare”). Lacosse and Dyck were both employed by Hassard at the Daycare in the fall and winter of 2011-12. At that time, Lacosse was 24 years old and Dyck was 22 years old. Mike Gustus (“Gustus”) was also an employee of the Daycare who sometimes supervised Lacosse and Dyck. Their complaints were joined for the purposes of the hearing because they involve the same Respondents. The Complainants settled their case against Gustus. The complaint against the Respondents was heard by the Board of Adjudication (the “Board”) on March 5 to 8, 2013 and on May 17, 2013 (final submissions).

Both of the Complainants gave evidence. The Commission also called a former Daycare employee and Lacosse's mother as witnesses. The Respondent, Hassard, also gave evidence. In addition, Hassard called one other witness, who was an employee at the Daycare when the Complainants worked there.

On May 18, 2013, the Board issued a disposition of this Complaint, finding that:

1. The Respondents discriminated against the Complainants on the basis of sex, in that the Complainants were subjected to sexual harassment during their employment at the Daycare; and
2. The Respondent, Hassard, failed to establish that she did not consent to the sexual harassment, or that she took steps to prevent the sexual harassment or rectify the situation after learning of the conduct alleged to be sexual harassment.

The Board advised that reasons for this decision would be issued within thirty days, which is the timeframe allowed by section 14 of the Yukon *Human Rights Act* Regulations.

The night before the Board was to reconvene for final submissions, the Registrar for the Panel of Adjudicators received an e-mail from a person alleging to have information about the allegations in this case. The Board was advised of this the morning before final submissions. The Board did not review the e-mail. However, given the potential relevance of this information, the hearing was adjourned. A letter was then received by the Registrar, again from a person alleging to have information about the allegations. The Board did not see this letter. The Board sought input from the parties as to whether they wished to call either of the authors as witnesses and, through the Registrar, provided copies of the e-mail and letter to the parties. The parties met with the Board's legal counsel and advised they did not wish to pursue the authors as witnesses. The Board then set a date to reconvene and confirmed with the parties, on the record, that they did not wish to call the authors as witnesses. The hearing then proceeded to final submissions.

THE LAW

Yukon Human Rights Act

The allegations against the Respondents are that they breached the Complainants' human rights, pursuant to the Yukon *Human Rights Act* (the "Act"). Section 7 of the Act says that it is discrimination to treat any individual or group unfavourably on a number of prohibited grounds, one of which is sex.

Section 9 (b) of the Act prohibits discrimination in connection with any aspect of employment or application for employment.

Section 14(1) of the Act prohibits harassment of any individual or group by reference to a prohibited ground of discrimination, or retaliation or threats to retaliate against an individual who objects to being harassed. Harassment is defined in section 14(2) as meaning “to engage in a course of vexatious conduct or to make a demand or a sexual solicitation or advance that one knows or ought reasonably to know is unwelcome”.

In addition, section 35 of the Act makes employers responsible for the discriminatory conduct of their employees unless it is established that the employer did not consent to the conduct and took care to prevent the conduct or, after learning of the conduct, tried to rectify the situation.

Case Law

The leading Supreme Court of Canada case on sexual harassment is *Janzen v. Platy Enterprises Ltd* [1989] 1 S.C.R. 1252 (“*Janzen*”). In *Janzen*, the Court concluded that sexual harassment is a form of sex discrimination, which is defined as, “practices or attitudes which have the effect of limiting the conditions of employment of, or the employment opportunities available to, employees on the basis of a characteristic related to gender.”

The Court, in *Janzen*, defined sexual harassment in the workplace as “unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment.” The Court described sexual harassment as “a demeaning practice, one that constitutes a profound affront to the dignity of the employees forced to endure it” and that “attacks the dignity and self-respect of the victim both as an employee and as a human being.”

The Supreme Court, in *Janzen*, referred to the book written by Professors Constance Backhouse and Leah Cohen titled, *The Secret Oppression: Sexual Harassment of Working Women* (1978), who write:

Sexual harassment can manifest itself both physically and psychologically. In its milder forms it can involve verbal innuendo and inappropriate affectionate gestures. Physically, the recipient may be the victim of pinching, grabbing, hugging, patting, leering, brushing against, and touching. Psychological harassment can involve a relentless proposal of

physical intimacy, beginning with subtle hints which may lead to overt requests for dates and sexual favours.

The Court concludes that the main point in allegations of sexual harassment is that unwelcome sexual conduct has invaded the workplace, irrespective of whether the consequences of the harassment include a denial of concrete employment rewards for refusing to participate in sexual activity.

Elements of Sexual Harassment

In a human rights case, the onus is on the complainant to establish, on a balance of probabilities, that his or her human rights have been breached. In cases involving allegations of sexual harassment, there are four elements the complainant must prove. These elements are:

- That the conduct complained of was of a sexual nature;
- That the conduct complained of was unwelcome;
- That the person alleged to have sexually harassed the complainant knew, or ought to have known, that the conduct was unwelcome; and
- That the conduct detrimentally affected the workplace or led to adverse job-related consequences.

The Sexual Nature of the Conduct

In the *Janzen* case, the Supreme Court of Canada refers to Aggarwal and Gupta's text, *Sexual Harassment in the Workplace* (3rd Ed.) to help it determine what kinds of conduct can constitute sexual harassment. Aggarwal and Gupta say that, because human behaviour is complex, "it is difficult to pinpoint what exact behaviour will be perceived as harassment by any particular individual." They provide a list of verbal behaviours that may constitute sexual harassment and note that the behaviours do not have to be specifically addressed at the victim to constitute sexual harassment. These behaviours include, but are not limited to:

- continuous idle chatter of a sexual nature and graphic sexual descriptions;
- offensive and persistent risqué jokes or jesting, and kidding about sex or gender-specific traits;
- suggestive or insulting sounds such as whistling, wolf-calls, or kissing sounds;
- comments of a sexual nature about weight, body shape, size, or figure;
- pseudo-medical advice such as "You might be feeling bad because you didn't get enough" or "A little tender loving care (TLC) will cure your ailments";
- staged whispers or mimicking of a sexual nature about the way a person walks, talks, sits, etc.;

- derogatory or patronizing name calling;
- innuendoes or taunting;
- unwelcome remarks;
- rough and vulgar humour or language;
- jokes that cause awkwardness or embarrassment;
- comments about a person's looks, dress, appearance, or sexual habits;
- inquiries or comments about an individual's sex life and/or relationship with a sexual partner;
- remarks about a woman's breasts, buttocks, vagina, and her overall figure;
- speculation about a woman's virginity, her choice of sexual partner or practices;
- verbal threats or abuse; and
- telephone calls with sexual overtones.

Aggarwal and Gupta go on to say that:

Sexual harassment in this context is employment discrimination by means of sexual blackmail, being a comprehensive pattern of hostile behaviour meant to underscore women's difference from and, by implication, inferiority with respect to the dominant male group. It is closely analogous in form and in effect to race discrimination. It is a systemic, arbitrary abuse of male power and authority used to extract sexual favours, remind women of their inferior ascribed status, and deprive women of employment opportunities and equality.

Sexual harassment in this context is an infringement of an employee's right to work in an environment free from sexual pressure of any kind. While sexual harassment need not necessarily involve a male supervisor and a female subordinate, this has been the most common situation in which the problem arises.

In determining from whose perspective the impugned behaviour should be assessed, the Federal Court, in the case of *Canada (Human Rights Commission) v. Canada (Armed Forces)* (T.D.), [1999] 3 F.C. 653 (the "*Armed Forces Case*") suggests a middle ground between the "reasonable woman/victim" and the "reasonable man" standard:

In my opinion, the appropriate standard of review is that of the reasonable person in the circumstances. However, this objective standard should not be applied in a vacuum. Bearing in mind the above debate, the trier of fact should be sensitive to stereotyped norms of what constitutes acceptable social conduct and consider the context in which the impugned conduct took place, when determining how the reasonable person would react in similar circumstances.

Unwelcome Conduct

The second element a complainant must establish is that the conduct was unwelcome. The Commission argued that a contextual analysis is required to determine whether sexualized words or actions constitute sexual harassment, taking into account the power imbalance that is often present in employment-related sexual harassment cases.

To determine if the conduct complained of was welcome or unwelcome, the *Armed Forces Case* says that the tribunal must consider the complainant's reaction at the time the incident occurred and assess whether she expressly, or by her behaviour, demonstrated that the conduct was unwelcome:

More subtle solicitations or "verbal" innuendos may be ignored and as such simply endured by the complainant. Thus, the proper inquiry will not require a verbal "no" in all cases. Nevertheless, the complainant must establish, for instance by her body language or by her repetitive failure to respond to suggestive comments, that she had in some way signalled to the harasser that his conduct was unwelcome. I leave the door open to certain limited circumstances which may force an employee to endure objectionable conduct, such as the fear of losing a job. In these cases, the appropriate standard against which to assess the conduct will be that of the reasonable person in the circumstances.

The Act, at section 14, says that it is enough to show on a balance of probabilities that the respondent ought to have known that the conduct was unwelcome.

Aggarwal and Gupta clarify that "When the victim is put into a vulnerable position, whether that be physically, economically or psychologically, the onus lies with the person in authority to ensure that the relationship is really consensual", and say that "lack of protest alone should not be taken as a signal by managers and supervisors that their sexual advances are acceptable. The burden rests with them to ensure that the subordinate is a willing participant, and that the sexual conduct continues to be welcome."

"Unwelcome" has been defined to mean that the employee did not solicit or incite it, and in the sense that the employee regarded the conduct as undesirable [Aggarwal and Gupta, citing the American decision, *Henson v. Dundee*, 682 F.2d 897, 903, 29 E.P.D. para.32, 993 (11th Cir.1982), that has been adopted by Canadian courts]. Aggarwal and Gupta further argue that it is sufficient for the complainant to establish that she let the harasser know, in a non-verbal way, such as by moving away quickly or just trying to avoid him, that she did not like what he was doing.

Signalling that conduct is unwelcome may be done in a variety of ways, including stony silence or evasion [*Miller v. Sam's Pizza House* (1995), 23 C.H.R.R. D/433], simply walking away from the respondent [*Garrow v. Vanton* (1992), 18 C.H.R.R. D/148], by not responding to comments or invitations [*Bouvier v. Metro Express* (1992), 17 C.H.R.R. D/313], or even by laughing at what is being suggested [*Zarankin v. Johnstone c.o.b. as Wessex Inn* (1984), 5 C.H.R.R. D/2274].

The Ontario Board of Inquiry in *Cuff v. Gypsy Restaurant* (1987), 8 C.H.R.R. D/3972, in discussing the subjective aspect of harassment, looked at how to determine if a comment or conduct was vexatious and set out the following considerations:

In considering this condition, account should be taken of the personality and character of the complainant; a shy reserved person, or in some cases a younger, less experienced or more vulnerable person, is less likely to manifest her annoyance, irritation or agitation with the respondent's behaviour than a self-confident, extroverted individual.

The Board, in *Cuff*, also said that it is not necessary for the complainant to have objected in order to establish that a harassing respondent's behaviour was unwelcome, and held that:

In general, the legislative enunciation of the right to be free from sexual harassment and advances indicates a public awareness of the unacceptable nature of this behaviour and carries with it an expectation that this understanding is shared by the members of the community.

Knowledge that the Conduct was Unwelcome

In *Zarankin v. Johnstone c.o.b. as Wessex Inn* (1984), 5 C.H.R.R. D/2274, the complainant testified that the harasser frequently hit her on the "bum", and put his hand around her shoulders. One day he invited her to go into a back room where he could show her "what it's all about." The complainant's evidence was that she didn't say anything, she just laughed, because she was afraid of losing her job. The BC Board of Inquiry, in a decision upheld by the B.C. Supreme Court, stated that:

The fact that she [the complainant] did not expressly warn the Respondent that she did not appreciate the conduct does not imply consent. Nor does it imply that the Respondent was unaware of the effect of his conduct on the Complainant. As stated above, the circumstances were such that he knew or ought to have known the effect of his conduct on the Complainant, and an express warning by her would likely have been ineffective.

In another Ontario case, *Harriott v. National Money Mart Company*, 2010 HRTO 353, the respondent argued that because the complainant made little or no objection to the harassing comments and conduct, no finding of sexual harassment should be made. The Board of Inquiry rejected this argument, both on the basis of the evidence in that case and on the basis that the general law is that even if employees tolerate certain conduct, employers are obligated to ensure a harassment-free workplace.

The BC Human Rights Tribunal in *Mahmoodi v. Dutton (No.4)* (1999) 36 C.H.R.R. D/8 said that “Behaviour may be tolerated and yet unwelcome at the same time. The reasons for submitting to conduct may be closely related to the power differential between the parties and the implied understanding that lack of co-operation could result in some form of disadvantage.”

In assessing whether sexual advances were welcome, several factors are relevant to evaluating the limits of “reasonable” social interaction, including the nature of the conduct at issue, the workplace environment or culture, and the pattern or type of prior personal interaction between the parties.

In the case of *Swan v. Canada (Armed Forces)* (1995), 99 F.T.R. 250, (a case involving racial harassment) the Canadian Human Rights Tribunal found that the complainant’s participation in the “unwelcome” conduct did not necessarily negate the complaint. The complainant in that case was a First Nation military police officer who did not object to, and in fact participated in, the use of racial slurs. The Tribunal observed that, “The *Canadian Human Rights Act* does not take into consideration the conduct of the Complainant and even though Complainants may participate in or instigate objectionable conduct they may still file a complaint and succeed in their claim”. In that case, the Tribunal accepted expert evidence that individuals may acquiesce and participate in activities that they find objectionable and demeaning because they feel powerless to stop it and as an ego defence mechanism. Like that finding, the Yukon *Human Rights Act* does not take into consideration the conduct of the complainant in setting out the criteria needed to establish sexual harassment.

In *Re Canada Post Corp. and Canadian Union of Postal Workers* (Gibson) (1987), 27 L.A.C. (3d) 27, the arbitrator, while holding that the conduct of the alleged harasser was unwelcome, said the following:

...merely because an employee is prepared to engage in banter, flirtation, or even sexual activity with one or more fellow employees does not mean that employee is required to accept the same conduct from everyone. As this area of law develops, it must recognize that some comments or activity may be welcome from one person, while entirely

unwelcome from another, and will recognize an employee's right to choose those with whom he or she is prepared to let down some of the defences to which he or she is entitled.

Adverse Job-related Consequences

In the *Harriot* case, the Board commented that different people respond differently to sexual harassment in the workplace:

... some are prepared to take a definite stand and tell the harasser to stop immediately, whereas others are more muted in their response and for a variety of reasons either say nothing or say very little. ... It must be borne in mind that sexual harassment is usually more about abuse of power and control than actual sexuality, and I find that the applicant was very vulnerable to Mr. Wade's authority and his ability to influence her job with the company.

In this case, the Commission argued that a person in a supervisory position, in particular, bears the onus of ensuring that his or her comments, conduct and advances of a sexual nature are truly consensual and welcomed in light of the unequal power dynamic that exists between the parties.

Employer's Liability for Employee's Conduct

Section 35 of the Act makes employers responsible for the discriminatory conduct of their employees unless it is established that the employer did not consent to the conduct and took care to prevent the conduct or, after learning of the conduct, tried to rectify the situation.

The Supreme Court of Canada, in the case of *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84 ("*Robichaud*"), found that an employer is liable for the conduct of an employee who has been found to have sexually harassed another employee. The Supreme Court stated that this employer liability places responsibility on those who control an organization and are in a position to take effective remedial action to remove undesirable conditions.

In another leading Supreme Court of Canada case, *Ontario Human Rights Commission and O'Malley v. Simpsons Sears Ltd.*, [1985] 2 S.C.R. 536 the Court made it clear that "an intention to discriminate is not a necessary element of the discrimination generally forbidden in Canadian human rights legislation". Further, the Court, in *Robichaud*, concluded that human rights legislation is concerned with the effects of discrimination rather than its causes or motivations

and said that only an employer can remedy undesirable effects and provide a healthy work environment:

[An] employer who responds quickly and effectively to a complaint by instituting a scheme to remedy and prevent recurrence will not be liable to the same extent, if at all, as an employer who fails to adopt such steps. These matters, however, go to remedial consequences, not liability.

WILLOW LACOSSE'S EVIDENCE

Willow Lacosse is a single mother who was a student at Yukon College at the time of the hearing. Her previous work history includes working at several daycares before she got a job at the Daycare, where she was employed from October 20, 2011 to January 6, 2012. Her Record of Employment says that her reasons for leaving were a "shortage of work" and "other".

Lacosse applied to work at the Daycare and was interviewed by the Respondent, owner/director Christina Hassard, and by co-director Mike Gustus. She was hired as a pre-school teacher at a rate of \$16.50 per hour. Her work schedule was Monday to Friday from 8:15 to 4:45. She has her Level 1 Child Care Worker certification. Lacosse said she was initially happy working at the Daycare as everyone seemed to get along. As a result, she encouraged her friend, Jessica Dyck, to apply to work there too.

Lacosse initially believed that Gustus and Hassard were romantic partners. She said the relationship was unclear, and appeared to her to be more than a working relationship due to the flirting and physical contact that went on between them (e.g. hugging, Gustus touching Hassard's back, eye contact and complimenting each other). She only realized they were not a couple after Gustus talked about needing a girlfriend.

Lacosse initially liked working for Hassard but eventually realized that Hassard didn't like confrontation and that this affected her ability to run the Daycare. She said that Hassard's way to communicate with staff was writing notes in a notebook that would be initialed by staff members when read. She said Hassard would agree with something but later disagree "behind their back". She heard Hassard talking to another employee about her once and did not appreciate Hassard's failure to be direct with her, or Hassard's style of managing the Daycare.

Lacosse testified that Gustus is in his forties and that his duties at the Daycare included being the cook, janitor, co-director, and a Supported Child Care Worker. She said it was made clear at a staff meeting that when Hassard wasn't there, Gustus was in charge. Lacosse felt that Gustus had too many duties and was unable to do any properly. Eventually, Lacosse and Dyck spoke to

Hassard about Gustus having too many duties and not being able to fulfill all of them. They also talked to Hassard about the inappropriate language staff members were using at the Daycare.

According to Lacosse, as her employment continued, she began to feel increasingly uncomfortable with comments and jokes Gustus was telling at the Daycare. Initially, she went along with them but later she started telling him they were "gross". At first, she was afraid not to fit in, but after a while she started speaking out more. At the hearing, she said, "If I ever participated in sexual comments, it was to fit in, but I never encouraged it." She said she laughed, not because she thought it was funny, but because she just didn't want to be the "outcast". She said she badly needed the job and, as a result, she went along with things she did not believe in.

After a while, Lacosse said that she became cold towards Gustus and tried to distance herself from his invasive eye contact and disgusting jokes. She said she never specifically spoke to Gustus about his behaviour as she didn't feel it was her place to talk to him, but said she did speak up to him in response to specific comments.

Lacosse gave evidence about a note being posted at the Daycare to be read and initialed by all staff. The note referred to "attitude problems" at the Daycare. The note said, "Someone has an attitude problem. Attitude must be adjusted or someone will get fired." Lacosse asked Hassard if the note was directed at her but said that Hassard told her it wasn't. Lacosse said that later, when her employment at the Daycare ended, Hassard brought up her "bad attitude". Lacosse's view was that after she stopped putting up with Gustus' advances, she was labelled as a "bad-attitude girl", which eventually led to her losing her job.

Lacosse said she spoke to friends and to her mother about what was happening at the Daycare but did not feel comfortable talking to Hassard about Gustus' behaviour. When she described to her mother what was going on, her mother told her it was sexual harassment. When she talked to Shona Sicotte, an older, more experienced staff member at the Daycare, Sicotte dismissed her concerns, telling her, "It's okay; it's just the way Mike is." Lacosse said that she and Dyck shared the same experiences and felt the same way about Gustus' behaviour.

According to Lacosse, Gustus made the following comments during her employment at the Daycare:

- During Lacosse's first day on the job, Gustus commented that Hassard didn't wear underwear and that he was going to buy her some;
- Gustus told Lacosse she was beautiful;

- Gustus asked her "when are we going to go on a date?";
- Gustus stared her up and down;
- Gustus commented about a Facebook picture of Lacosse and told her she looked hot as a blonde;
- When Lacosse referred to a good friend as her "soul mate" Gustus asked if this meant they were lesbians. She told him he was too old to be asking and believed he found the idea attractive;
- Gustus commented how a former employee was ugly and that he would not have sex with her;
- Gustus told Sicotte, while she was pregnant, that she "should take it up the ass more";
- Gustus asked Jessica Dyck, "Why are you so happy ... you got laid last night?";
- Gustus talked about another employee, saying how fat she was, how manly she looked and that she stank;
- Gustus commented about a disabled child's mother, saying she was disgusting and how he couldn't believe she even got pregnant;
- Gustus used words such as "fat", "cunt", "slut", "bitch" to describe the Child Care Services Inspector. Lacosse said "he often used this type of language to describe women";
- Gustus compared his penis to a cucumber and said "it wouldn't fit in a woman's vagina and suggested to Lacosse that he could show her his "lineage", and gestured to pull his pants down;
- Lacosse described an incident where Gustus wiggled his buttocks at her and Dyck and asked if his new winter pants made his "bum" looked good. Lacosse said she reacted by telling him he was "gross". He then asked Dyck, in a sexually suggestive manner, if she wanted to wrestle in the snow. According to Dyck, Lacosse's response was "Eww"; and
- Lacosse said there was no dress codes at the Daycare and that she dressed appropriately for the job. She said a typical outfit for her would be sweat pants, tank top and shirt over the tank top. She said on that on one occasion Hassard commented on her appearance in front of Gustus and told her that her breasts were "out there" and Gustus agreed.

Lacosse also described a situation in the kitchen of the Daycare where Gustus looked at her and told her she had beautiful eyes, then said, "Come here, you beautiful woman", indicating she should come and he would give her a hug. She said she didn't want to hug him but didn't feel she could resist. As he hugged her, Lacosse says she patted his shoulder.

Lacosse said that the layout of the Daycare was such that Hassard had to have heard some of what Gustus said from her office. She said that Hassard was present when some of these comments were made, and that she found them funny.

Eventually Lacosse's employment at the Daycare ended. Following Christmas break, Lacosse missed several days of work due to a death in the family. Hassard contacted her and they agreed to meet. Prior to the meeting, however, Dyck told her she was going to be fired. Lacosse said she wanted Hassard to say it to her face. When Lacosse met with Hassard and Gustus, she says they brought up a number of incidents in relation to her job performance and bad attitude. Lacosse said she looked at Gustus and told him that ever since she stopped accepting his sexual comments, she was accused of having "a bad attitude".

Lacosse said that the harassment by Gustus, combined with losing her job, had the following impact: "I was depressed, anxious. I experienced panic attacks and the doctor put me on anti-depressants. I felt I was worthless. I didn't have any interests with my kid to go to events. I felt fingers pointing at me. When I applied for Employment Insurance my claim was denied because my T4 showed I had quit. I felt the agent was against me because he already knew about the case. I appealed that decision. I showed I put in a complaint at YHRC and eventually was granted EI."

Lacosse further stated: "I suffered financially and missed out on going back to school. It affected me in so many ways. Here I am during my reading week, spending my time still dealing with this a year later. I felt judged".

JESSICA DYCK'S EVIDENCE

Jessica Dyck was employed at the Daycare from November 16, 2011 to January 27, 2012. Her Record of Employment says she quit. Dyck had five years of experience as a daycare worker and was 22 years old when she filed her human rights complaint. At the time of the hearing, she was working part time at the Canada Games Center and attending Yukon College.

Dyck was interviewed by Hassard for a job at the Daycare and Gustus was also present. She was told during the interview that Gustus was the co-director of the Daycare. Her hourly wage was \$17 per hour and she worked regular full-time hours.

Dyck agreed that the Daycare was a good place to work but not a “professional” workplace, as sexual jokes were commonplace, especially between Gustus and Hassard. She felt that the atmosphere at the Daycare was more about adults, not about the children and that Hassard’s management style was “ineffective”. According to Dyck, Hassard was at the Daycare every day.

Dyck’s evidence was that she had the following interactions with Gustus that constitute sexual harassment:

- While sweeping the floor, Gustus remarked, “too bad you moved away because I was hoping to sweep you off your feet.” Dyck said she ignored this comment;
- One day when Gustus asked for assistance and Dyck offered to help, Gustus said “Oh, good, I get the attractive one!”;
- When Gustus talked to Dyck about a previous daycare director (in another location), Gustus described how the director’s vagina smelled, that the director was “gross”, and that she had “saggy” breasts. Dyck said that Hassard was there for this comment and laughed with Gustus about it;
- On another occasion when Dyck was having a really good day, Gustus asked her three times during the day if she got laid the night before, as an explanation for her good mood. Dyck said she ignored him at first. The third time he asked, she said, “No.”;
- During a winter walk with the children, Gustus lifted the back of his jacket and stated, “Look at my bum. Don’t I look hot in my snow pants?” Then, he asked if Lacosse or Dyck would like to “wrestle in the snow”. Dyck said she replied, “No, I wouldn’t want to hurt you because you’re so old,” and Lacosse said “Eww!”;
- Gustus asked some of the staff one day if he could make a sexually suggestive comment. Dyck said she walked away but could still hear Gustus saying that he’d hung his coat on top of Hassard’s, and then said to Hassard, “Look Christine, I’m on top of you!”;
- On another occasion Gustus complained that he hadn’t been able to sleep because he kept imagining he was lying in bed next to Hassard. Dyck said Hassard was not present for this comment; and
- One day when Gustus was cooking, he asked Dyck for a hug as he’d made her favourite meal. Dyck says she said no to the hug. Her evidence was that she didn’t ever want to give Gustus a hug.

Dyck said she thought Hassard was either present for or heard of these incidents, but did nothing to correct them. Dyck also said that Hassard and Gustus made a lot of inappropriate jokes between the two of them but that she was uncomfortable going to Hassard about these

issues because of the relationship between Hassard and Gustus. She said that she sometimes participated in Gustus' jokes but often didn't find the same things funny as other staff did. She said she felt pressured — most of the jokes were made by Gustus and she felt like she might lose her job or not be liked if she didn't laugh at his jokes.

After Lacosse left the Daycare, Dyck was called into the office where Gustus and Hassard were talking. Hassard left and Gustus asked if Dyck had any complaints about his joking around. She felt "put on the spot" and that his question was "inappropriate" so did not answer.

Prior to Dyck leaving the Daycare, Child Care Services Unit did an investigation of the Daycare. However, Dyck's evidence was that she did not mention sexual harassment to the investigators.

Later, when Hassard asked Dyck about Lacosse's human rights complaint and whether she was part of it, Dyck said that she was sick and tired of what was going on and that she "quit", to which Hassard allegedly said to her, "Good, I was going to fire you any way!"

Dyck said that after she left the Daycare and was working with children at the Canada Games Centre, she felt uncomfortable and worried about parents who might know about the allegations.

SHONA SICOTTE'S EVIDENCE

Shona Sicotte was called as a witness for the Human Rights Commission and provided her evidence by telephone. She is a resident of Mayo, Yukon, who lived in Whitehorse and worked at the Daycare when Lacosse and Dyck worked there, starting in October 2011. She is 27 years old, has a Level 2 Child Care Worker Certification, and has worked in a number of daycare facilities. Sicotte confirmed that she has known Hassard and Gustus for a number of years and met Lacosse at Bubbles Daycare, and Dyck at the Daycare.

Sicotte's evidence was that Hassard was the director of the Daycare and Gustus was the assistant director who also assumed the role of supervisor in Hassard's absence. Sicotte described the environment at the Daycare as an energetic workplace where people got along, and there was a sense of humour. From her perspective, it was the best daycare she had ever worked at. She liked everyone, and the staff all worked together well. She said that Hassard was a good boss, she was flexible, and had confidence in what staff were doing. According to Sicotte, "She was more hands off" than some other directors she had worked for.

Sicotte did not work directly with Gustus because she worked on the toddler side of the work space and he worked on the pre-school side, where Lacosse and Dyck were the pre-school teachers. She said she and Gustus were friends and at work he would say hi and ask if he could

tell her a joke. She said they would see each other a couple of times a day, usually over the lunch hour.

Sicotte said Gustus was loud, obnoxious and silly, liked being the centre of attention, and often made derogatory or dirty comments. She remembered incidents where reference was made to a cucumber looking like a penis and where the words of a Christmas carol were changed to words of a sexual nature.

Sicotte confirmed that Gustus did these things in front of other staff — basically to whomever would listen, including in front of Hassard. She said that Hassard would suggest that he quiet down, and that what he had said was inappropriate, but that they shared an open sense of humour and often joked with one another. Sicotte testified that Hassard was present for the workplace joking, that she was aware of it, and that the staff found it to be a comfortable work environment where they could be themselves.

Sicotte confirmed that Hassard and Gustus had a close relationship and ran the Daycare as a partnership. Sicotte said she never heard Hassard making inappropriate jokes or remarks. She could not recall hearing negative comments being made about the Child Care Services Inspector or about parents, but did recall a comment about a staff member looking like a big brown bear.

Sicotte testified that she heard jokes and comments between Gustus and Lacosse and observed that they shared some personality traits and bantered on an even playing field.

Sicotte described Lacosse as being “kind of like Gustus, in your face” and said she admired her for the fact that she would stand up to Hassard. She did not recall Lacosse talking to her about Gustus, or saying that he was “creeping” her out. In response to questions about the working relationship between Gustus and Lacosse, Sicotte said Lacosse might have called him “greasy” but then Lacosse called her “greasy” too. Sicotte said that is just her sense of humour and that Lacosse would have responded to Gustus with quips that included sexual innuendo. She said she never saw Gustus gesture toward his penis or comment about his lineage. Sicotte could recall two occasions when she heard Hassard tell Gustus that his comments were inappropriate.

Sicotte said Lacosse’s work attire included hoodies, sweat pants and tank tops and felt that she dressed appropriately.

When asked whether Gustus made comments to her, Sicotte said that once he told her that she could wear a better bra to enhance her breasts and that this bothered her. She said he also called her “Shamu” – the whale – as a joke when she was pregnant, but that she wasn’t bothered by this comment.

Sicotte also recalled a comment about “taking it up the ass” to avoid getting pregnant and thought that Gustus, Lacosse and another staff member were present but could not recall who made the comment. Her recollection was that it was “hilarious”. Sicotte did not recall Gustus ever asking her for a hug, but did recall a time when Gustus offered Hassard a hug. Her view was that everyone, except Dyck, made inappropriate jokes, or were open to them.

Sicotte felt that the Daycare was a comfortable work environment, quite unlike any other daycare she had worked at where there were often older women who were more politically correct. At the Daycare, according to Sicotte, there was more laughing and joking. When asked if she recalled an incident where Gustus used the words “bitch” or “slut”, she said she did not remember the incident but said she could see Gustus using these words. She said that Hassard did not talk like that, but that Gustus’ opening line was often, “Can I tell you a dirty joke?”

When asked about Lacosse’s employment status, Sicotte said she understood that Lacosse was going to be let go because she was “not a team player” and was often late for work. Sicotte did not recall specifics. She said she “may have heard it; everyone kind of talked.”

Sicotte said that Lacosse was confrontational and was angry when she came into the Daycare on her last day of work. According to Sicotte, Lacosse’s voice was raised enough that Sicotte looked up and wondered what was going on in the office. She said she could hear Lacosse but didn’t recall hearing her say she quit. She said she later found herself defending both Dyck and Lacosse. Sicotte testified that Dyck was very professional, and that she stayed focussed on her work.

Sicotte did recall Gustus asking if she was uncomfortable with his remarks, and another staff member telling her he asked her the same question. Sicotte did not recall being asked if she felt sexually harassed. She did recall Lacosse’s human rights complaint being in the workplace and other staff saying there were falsehoods in it. She recalls Gustus being very quiet.

It was Sicotte’s view that nobody at the Daycare thought Lacosse had been sexually harassed and that after Lacosse and Dyck left the Daycare there was a lot of negativity and that staff thought things had been blown out of proportion.

EVAN LACOSSE'S EVIDENCE

Evan Lacosse ("Evan") is Willow Lacosse's mother and a social worker for the Kwanlin Dun First Nation. She has worked with the Family Violence Prevention Unit with people charged or convicted of sexual assault. She and Willow live together with Willow's son.

Evan's evidence is that Lacosse was living with her when she started work at the Daycare and that she was excited about the job — the new location, her new responsibilities and the possibility for creativity. She said that Lacosse talked about her co-workers, including being uncomfortable with Gustus' sexual comments about her body and the way she dressed as well as some of the things he said about other staff. Evan said that she met Dyck when Dyck and Lacosse were working at the Daycare as Dyck often came to their house, and sometimes also talked about being uncomfortable with Gustus' comments. Evan said that Lacosse dressed the same way she had dressed for the other daycares she had worked at.

Evan said that, given her background, which involved advocating for women who are being harassed or abused, it is likely she said something to Lacosse and Dyck about Gustus' behaviour and that it might constitute sexual harassment. She said she told them that they didn't have to put up with it, and that they had the right to speak up. She said she also likely told them that their boss should be doing something about it.

According to Evan, after Lacosse lost her job, Lacosse was in shock, but by that point in January it was too late for her to go to the College. She said Lacosse did her best to get Employment Insurance but there was an issue with her Record of Employment not being accurate. She said that Lacosse didn't want to go back to working in a daycare because of her experience at the Daycare and ended up looking for other kinds of work, eventually getting a really great job.

Evan said that at times it seemed hard for Lacosse to get motivated for work at the Daycare as she was not sure what would be said or done each day. Her evidence was that Dyck said that same thing. Over the Christmas holiday, Evan said that Lacosse was really concerned that she might not have a job to go back to because she had told Hassard how uncomfortable she was with comments being made at the Daycare.

Evan said that after Lacosse's employment at the Daycare ended, she was reluctant to go out in public for fear of running into parents from the Daycare. Evan said Lacosse was aware that people were taking sides and described her as being upset and depressed, wondering how things were going to work out, even though she was also relieved to be out of the Daycare.

CARRIE WILKINSON'S EVIDENCE

Carrie Wilkinson ("Wilkinson") was employed at the Daycare from November 2011 to March 2012. She holds a Level 2 Child Care Worker certification and has 12 years of daycare experience. Wilkinson said she has known Gustus for 18 years. She thought the work atmosphere at the Daycare was great, fun with a playful atmosphere, where conflicts were always dealt with.

Wilkinson described Hassard as a professional who was on the ball and who held regular staff meetings where staff concerns were addressed, including staff attitudes. She found Hassard to be fair and flexible, and said she didn't avoid confrontation, she just didn't like it. Wilkinson confirmed that if Hassard wasn't there, Gustus was the supervisor and staff could bring their concerns to him, although Hassard made the final call. Wilkinson said she was comfortable taking her concerns to Hassard.

Wilkinson acknowledged the close friendship between Hassard and Gustus but said she never saw Gustus give Hassard a massage or touch the small of her back. She did see him give her a hug and tell her things would be okay.

Wilkinson said Gustus would ask for permission to tell a dirty joke and that all staff made comments of a sexual nature. She said they were labelled as "jokes" and never said in front of the children but could have been overheard by other staff. Wilkinson denied hearing Gustus make comments about his penis but did hear him tell Dyck he wanted to sweep her off of her feet. She also heard Gustus' comments about the Child Care Services Inspector being fat, ugly and manly. She said she also heard Lacosse say the inspector had a manly voice. Wilkinson said that Lacosse called Gustus a "fat, dirty old man".

Wilkinson was at work on Lacosse's last day at the Daycare and said she could hear Lacosse shouting. She couldn't hear anyone else but did hear Lacosse say, "I'm tired of your sexual harassment and I quit". She said Gustus then asked her if he had crossed the line in terms of sexual harassment, to which she said, "No". She also recalls seeing Dyck being taken into the office that day with Gustus.

Wilkinson said she was shocked when she was interviewed by the Human Rights Commission and said that the allegations weren't true and that what was going on was vengeful.

Wilkinson was also at work on Dyck's last day at the Daycare. She said she saw Dyck and Hassard talking outside but couldn't hear what was being said. She could see that Dyck was

yelling and that Hassard was standing with her arms crossed. Then Dyck stormed in to the Daycare, grabbed her stuff, said “I quit”, and left.

Wilkinson was asked about a reference she made in her interview with the Human Rights Commission to a joke about “seamen” that Gustus told. Wilkinson explained that Gustus told the joke after Dyck walked away and that it was a play on the words “seamen” and “semen”. She said jokes were told away from the kids and parents.

CHRISTINA HASSARD’S EVIDENCE

Hassard said that she originally opened a pre-school program in October 2010 in a different location and that they were able to expand and hire a preschool teacher after only a few months. As some of the children in the program needed one-on-one care, in April 2011 she hired Gustus, a long-time acquaintance she knew from the Early Childhood Development program.

With increasing demand for daycare, Hassard says she talked with her partner and with Gustus about moving to a bigger space. They secured a space in Riverdale and were able to re-open with an infant/toddler program in October 2011. This was Hassard’s first time being an employer. Hassard said that she has a lot of anxiety, can be self-conscious, and doesn’t like to feel wrong or have people mad at her, which she acknowledged were not great qualities for a boss.

When Hassard began to hire staff, she needed particular levels of child care training and experience. When Lacosses’s resume arrived, Hassard thought it looked good, especially the fact that Lacosse had her Level 1 Child Care Worker certification. Hassard knew who Lacosse was and said her classmates said good things about her, including that she was creative and liked children. Hassard contacted Lacosse and interviewed her, with Gustus present, and then offered her a position as lead preschool teacher.

Hassard agreed that Gustus had a lot of roles at the Daycare, including being her assistant, cooking, meal planning, and after-hours janitorial, as well as being a Supported Child Care Worker. She said he was also co-director of the Daycare, in charge when she wasn’t there, and that he supervised Dyck and Lacosse when she was away from the Daycare.

Hassard said that she convened a staff meeting just before the Daycare opened and talked about employees’ roles and responsibilities, reviewed the staff handbook, talked about how the program was run, and set out her expectations for the program. Hassard also told the staff at this meeting that she doesn’t like confrontation and suggested they work together and solve their problems between themselves, that she didn’t want to hear their petty grievances on a

daily basis, and to come to her only if they couldn't work it out. She said she made it clear that staff could come to her if necessary. She said that Lacosse did come to her with issues about another staff member, and that Lacosse and Dyck came to her about Gustus having too many responsibilities.

Hassard said that Lacosse and Dyck also brought up the issue of Gustus' loud voice and swearing, and about another staff member making inappropriate comments and using bad language in front of the children. Hassard said she talked to that staff member, telling her to leave her attitude at the door and to be conscious of what she said in front of the children.

Another issue Hassard recalled bringing up at a staff meeting was the use of cell phones during work time. She said that everyone used their phones from time to time but she recalled an occasion when Lacosse was not where she was supposed to be with the children but was on her phone in the washroom.

Hassard said that staff also went to Gustus to deal with their concerns and she would sometimes not hear about them until later. She said he was good at dealing with workplace conflict and that she was not aware that staff members were uncomfortable coming to her with their concerns.

In describing her relationship with Gustus, Hassard said that she hadn't liked him at first, but once she got to know him, they became friends. She said her children call him "Uncle Mike" and that they hang out quite a bit. She said he is fun and likes children. She said he was working for another daycare when he asked her for a job. Hassard said that when she and her partner were having problems she confided in Gustus and if she had a rough day he would sometimes give her a hug, although he always asked first.

Hassard described Gustus as the "co-director" of the Daycare and said that she didn't think their friendship affected her ability to direct him. However, she acknowledged that other staff came to her about Gustus not doing his jobs as well as he might, but she said she dealt with the concerns. At one point, she said she built in extra help for him.

One of the concerns that Lacosse and Dyck brought to Hassard about Gustus was that he often didn't take the children with whom he worked outdoors. Hassard said she told Gustus he needed to bring his winter gear and take the children outdoors regularly.

Hassard could not recall hearing Gustus swear in front of the children. She said that Gustus had a pretty good sense of humour but didn't tell jokes in front of the children; rather, such jokes might have been made quietly in the kitchen, as she encouraged staff to be professional at work. According to Hassard, if a dirty joke was told, it would have been outside on a smoke

break or during lunch break. Her evidence was that she couldn't remember hearing anything in the open or in front of the children or directed at any particular staff member, except the "Shamu" comment Gustus made to Sicotte. Hassard said that neither Lacosse nor Dyck ever expressed concerns about Gustus making comments, innuendos or jokes directed at them.

On Lacosse's last day of employment, after she left the Daycare, Hassard confirmed that Gustus asked each staff member if they felt sexually harassed by him. Later that day, Hassard said she called a staff meeting and asked if anyone felt they had been harassed. Her evidence was that no one said yes, so she didn't take any action to address the issue because she and Gustus thought no one other than Lacosse felt that way.

Hassard said that on the day they received Lacosse's human rights complaint she was upset and stewed about it all day. Then she asked Dyck if she could speak to her and asked her if she felt the same way. Hassard told Dyck that she knew she and Lacosse were friends, and she would have done something about it if she had known. Hassard described her confrontation with Dyck. She said they were standing outside, Hassard had her arms crossed, and may have raised her voice. She said that Dyck's arms were flailing, trying to prove her point.

According to Hassard, Dyck said she didn't know Lacosse was going to file a human rights complaint. Hassard then said to Dyck that she noticed her bad attitude toward Gustus, after which Dyck responded by becoming defensive. Hassard asked her if she was feeling the same way as Lacosse. By this time they were both raising their voices and Dyck finally said she couldn't take it anymore and quit. She grabbed her stuff from the Daycare and left in a foul mood. Hassard said she never told Dyck that she was going to fire her as she had no issues with her except her attitude toward Gustus.

Hassard described an earlier occasion when she asked Dyck about her attitude toward Gustus. She said Dyck didn't raise any concerns about him at that time. She said Dyck never told her why she was rude to Gustus nor that she was feeling harassed by him. Dyck did say to Hassard that some staff comments were inappropriate and needed to be addressed. Hassard said she was surprised when she got Dyck's complaint because Dyck told her she wasn't feeling that way.

At the hearing, Hassard went through the allegations in Lacosse and Dyck's complaints and denied being aware of the following comments or conduct allegedly said or done by Gustus:

- His comment about Lacosse's friend and them being lesbians;
- Gustus looking at Hassard sexually;
- Gustus making rude comments about a former staff member and saying he would not have sex with her;

- Gustus saying that Lacosse had a lot of sexy pictures on Facebook;
- Gustus making comments about the size of his penis;
- Gustus asking Lacosse for a hug;
- Gustus' comment about a Child Care Services Inspector;
- Gustus asking Dyck, when she was in a good mood, if she got laid;
- Gustus wiggling his buttocks at Dyck and Lacosse, asking them if it looked hot, and whether they wanted to wrestle in the snow with him; and
- Gustus telling her that Lacosse had lots of hot photos on Facebook and that she looked hot as a blonde.

With respect to Lacosse telling Hassard that Gustus' comments were getting out of hand, Hassard agreed that Lacosse said this but that Lacosse was referring to another staff member, not Gustus.

With respect to Gustus' comment that Sicotte should "take it in the ass more", Hassard said that she had heard the comment but that Lacosse was not present as it was early in the morning.

Regarding the allegation that Gustus offered to confirm his lineage by pulling his pants down, Hassard said she was in shock when she heard this, didn't think it was like him, and couldn't see how pulling down his pants would prove his lineage.

Hassard said she didn't hear Gustus' comments about sweeping Dyck off of her feet or about her being "the attractive one". She agreed that if this comment was made, it was inappropriate. Hassard said she was not there the day that Gustus allegedly asked Dyck if she got laid.

With respect to Dyck's allegation that Gustus lifted up his jacket on the way to the park and asked her if his "bum looked hot", and then asked her if she wanted to wrestle in the snow, Hassard says she wasn't there so couldn't verify whether or not this happened.

When asked if she recalled Gustus asking if he could make a sexual joke, and then talking about "being on top" of her, Hassard said she didn't recall this joke. With respect to Gustus talking about not being able to sleep because he was dreaming about her, her evidence was that she couldn't verify whether or not this happened.

With respect to Lacosse's allegation that Gustus hugged her, Hassard said she wasn't there, and could not verify whether or not it happened. She said she could see Gustus asking for a hug but didn't think he would push it on anyone.

Hassard said she never asked Lacosse to add her as a Facebook friend and doesn't know why Lacosse added Gustus as a friend or why she felt pressured to do so. She said she was not aware of Gustus pressuring anyone else to be a Facebook friend. With respect to Gustus making a comment about Lacosse's breasts, Hassard recalled frequent occasions when Lacosse wore a tank top with cleavage visible. She said Gustus commented on it and that he asked her to talk to Lacosse about it.

Hassard testified that she is familiar with Gustus' personality, that he likes to joke around, and she can see that his jokes could be construed as sexual in nature. She said, however, that Gustus would not make dirty jokes in front of the children, but would make them during breaks or out of earshot of the children.

Hassard said that to understand Gustus' jokes, people had to have the same sense of humour and that she could see the sexual innuendo in them. She testified that everyone in the workplace had a pretty good sense of humour and that they told dirty jokes quietly in passing in the kitchen, not in front of the children.

Hassard said Gustus' comment about sweeping Dyck off of her feet was harmless and did not constitute sexual harassment. With respect to Gustus' comment that Dyck was the "attractive one", she testified that Gustus said a similar thing to her and she was comfortable with it. Hassard agreed that Gustus commented on her personal appearance at work and that some of the banter between her and Gustus could be construed as sexual in nature. When asked during cross-examination if she could understand how Gustus' comments and behaviour might make others feel uncomfortable, Hassard agreed and said that she felt uncomfortable around him when they first met.

Hassard said that she had been struggling with the idea of terminating her employment for a while. She avoided dealing with the situation because she doesn't like confrontation. When Lacosse started working at the Daycare, Hassard said she was really good, very creative, the children liked the arts and crafts she did, her programming was good and she wanted to learn more. She said problems arose when Hassard raised the issue of her cell phone use. In addition, Hassard said that Lacosse started to arrive 10 to 15 minutes late for work and did not complete her time sheet accurately. Hassard said she brought up Lacosse's lateness at a staff meeting and told staff they needed to be there on time. She said other staff improved, but Lacosse did not.

Hassard said that during the first week after the Christmas break, Lacosse didn't show up for work and didn't let anyone know about her absence. Hassard said there were other factors that made her consider terminating Lacosse's employment: enrollment was down and she couldn't

afford extra staff. She said she had a hard time deciding, and felt awful about it but that Lacosse was the only person with whom she was having issues, including her being late, not taking direction, and being confrontational. She also said that there were times when Lacosse brought her son to the Daycare, for which she didn't always have approval.

Hassard also said Lacosse napped at work. She agreed that she had said to some staff that if they needed to nap it was okay as long as it was on their lunch break, but she said that Lacosse never asked if she could nap. Other staff would come to her and point it out, including times when Lacosse was not on her lunch break. Hassard eventually deducted napping time from Lacosse's paycheque. She said that when she told Lacosse she was doing this, Lacosse shrugged her shoulders and brushed it off.

Hassard decided to talk to Gustus about letting someone go and they thought that if they talked to Lacosse about it, maybe Lacosse could improve her work performance. However, Hassard's evidence is that Lacosse became aggressive and confrontational when they tried to talk to her.

After the fact, Hassard learned that prior to what turned out to be Lacosse's last day, Gustus told Dyck that Lacosse was going to be fired. Gustus told Hassard he said he did it because Dyck was Lacosse's friend and he thought she could be supportive. Hassard said she never told Gustus she planned to fire Lacosse.

Hassard was afraid that Lacosse would be defensive and didn't want to talk to her at work as she was afraid of a scene. As a result, she contacted her over the weekend and told her she wanted to talk to her before work on Monday. She said she phoned, texted, and messaged her on Facebook, telling Lacosse she was trying to get contact her. According to Hassard, Lacosse replied to her text saying she knew what it was about and would come and talk to her on Monday.

According to Hassard, when Lacosse came in on Monday, she was in an awful mood and stormed into the office where Hassard and Gustus were. Hassard said that Lacosse raised her voice, saying she was mad because Dyck knew she was being fired before she did, and demanded to know why she was being fired. Hassard said she had wanted to talk to her first. Lacosse turned to Gustus and told him she was tired of his sexually harassing comments, that she had had enough and was quitting. Hassard said this was the first she had heard that Lacosse felt this way about Gustus and she was shocked. After this, Lacosse left quickly and they never really talked.

After Lacosse left, Hassard and Gustus looked at each other in shock. She said that everyone heard the confrontation so Gustus went to all of the staff members and asked if his comments were offensive, or if anyone else felt harassed. Hassard was not present for those conversations but Gustus reported to her that other staff didn't feel this way. Hassard was present when Gustus spoke to Dyck in the office. Her recollection is that Dyck said that some of his comments were inappropriate but she never felt sexually harassed in the workplace. Hassard said she was okay with Gustus talking to the staff about whether they felt sexually harassed by him, or if his comments were inappropriate.

Hassard called a staff meeting following these individual meetings and asked if staff members felt this way. Gustus was present at this meeting. She said that no one said that Gustus' behaviour was offensive and they didn't discuss it again. Hassard admitted she did not have any policies about sexual harassment. She said she didn't know daycares needed them and had never seen one in a staff handbook.

After Lacosse raised concerns about sexual harassment, Hassard felt she had dealt with the situation by talking to staff members but said they all denied any issues so she didn't think she needed to do anything further. She was concerned that there might be repercussions so she checked the *Employment Standards Act*. A week later, when Child Care Services staff came to inspect the Daycare, Hassard said the regulations were all met and no questions were asked about sexual harassment, although there were some issues about Gustus doing other jobs while billing as a Supported Child Care Worker.

Hassard said that Lacosse's allegations, the Child Care Services investigation, and the human rights complaint by Lacosse resulted in quite a few children leaving the Daycare. Hassard said it was a stressful time and once word got out, parents didn't feel their children were safe there. It seemed that Gustus was presumed guilty before he could prove himself. She said she lost money and eventually decided to close the Daycare because it was too much for her. She wasn't making enough money to operate and pay her staff.

As the employer, Hassard said she was not aware of sexual harassment at work, that she had asked Dyck on numerous occasions, but was never told specifically that she was feeling sexually harassed by Gustus, and when she asked Dyck directly, Dyck said no. Hassard said that the first she had heard about sexual harassment was on the day Lacosse quit.

Hassard also said that before she and Gustus moved the preschool to its new location, in October 2011, Gustus told her that if parents ever mentioned issues about him working with kids, he would leave the position for the integrity of her business. She said that if she had known, she would have talked to Gustus. She said it sickens her as she tried to avoid this very

thing. Hassard said she didn't show Lacosse's human rights complaint to anyone at the Daycare, but that Gustus received the same complaint and they talked about it.

Gustus told Hassard he was concerned about what might happen and was worried that it would affect his family and other work he did. She said they didn't discuss whether similar allegations had been made about him before.

Hassard said she had known Gustus since 2004 and was pretty familiar with what kind of a guy he was. She said he likes to joke around and she could see that some of his jokes might be construed as sexual, although she hadn't heard that kind of remark at work. She agreed she would describe him as having a "sick sense of humour" but that he wasn't like that at work except on breaks or standing outside. She said he might have told a joke off to the side but not where children could hear. She agreed that Gustus' humour could be misconstrued unless a person had the same sense of humour.

Hassard said that she would have considered Gustus' comment about sweeping Dyck off of her feet a harmless comment and would not have thought it was sexual harassment. She said that she was not uncomfortable with the comment Gustus made when Dyck helped him move a table, that he got "the attractive one", although she was not present for this. She said that Gustus commented on her appearance and called her beautiful. Hassard agreed that it was not professional for Gustus to tell co-workers they were attractive and said that when Gustus made general rude comments, she would tell him it was not appropriate.

When asked about Dyck's complaint that Gustus asked if he could make a sexually suggestive joke regarding his coat being "on top" of Hassard's, Hassard said this was definitely a comment he could have made. Hassard denied that Gustus compared his penis to a cucumber. With respect to Gustus commenting about Sicotte "taking it in the ass", Hassard said she heard about this comment from another staff member who thought it was funny and laughed about it. She said this comment was a "long running comment" that staff brought up on occasion and talked about at times other than when it happened.

Hassard said she never asked Lacosse if she was feeling sexually harassed. She asked Dyck twice, and Gustus asked her once. Hassard also asked her if her poor attitude was because of Gustus sexually harassing her but says that Dyck didn't speak up when she asked the staff as a whole. Hassard agreed that it might be difficult for an employee to tell a boss they were feeling sexually harassed and that the staff might not have felt comfortable telling her when she asked after Lacosse left.

Hassard said she didn't have a harassment policy before this happened as she didn't think she needed one, but after Dyck filed her complaint, she created a general harassment policy and added it to the staff handbook, at the suggestion of the Human Rights Commission.

When questioned during cross-examination about how appropriate it was for Gustus to be present when she was asking staff if they were feeling sexually harassed, Hassard said that he was there for the impromptu meeting in the boot room, and although it might have been better discussed one on one, no one indicated that they were feeling uncomfortable or that they had any issue coming to her about their concerns.

THE COMMISSION'S ARGUMENT

The Commission argued that the onus is on the Complainants to establish, on a balance of probabilities, that they experienced sexual harassment as defined by the Act, and that if the Board concludes that Lacosse and Dyck were sexually harassed, the onus is on Hassard to establish that she did not consent to the conduct and that she took care to prevent the conduct or rectify the situation once she was aware of it. The Commission argued that a reasonable person in Dyck and Lacosse's circumstances would find Gustus' conduct toward them sexual in nature and that he ought reasonably to have known that such conduct would be unwelcome, coming from a male supervisor many years their senior in a workplace devoted to the care of young children.

The Commission argued that the evidence before the Board supports a conclusion that Lacosse and Dyck were sexually harassed by Gustus while working at the Daycare and that Hassard consented to the sexually harassing conduct and failed to take steps to prevent his conduct or to rectify the situation once she was aware of it.

The Commission suggested that the Board must determine the existence of sexual harassment in light of the evidence as a whole and the totality of the circumstances, and that the test was not whether Lacosse or Dyck voluntarily participated with Gustus in inappropriate conversations or jokes of a sexual nature, but whether his conduct toward them was unwelcome. The Commission argued that Dyck and Lacosse communicated to Gustus, through their behaviour and words, that his conduct was unwelcome and that Gustus ought reasonably to have known this in any event.

The Commission argued that Hassard consented to Gustus' sexually harassing conduct and failed to prevent his conduct by permitting a work environment where inappropriate language and behaviour were not only tolerated but encouraged. The Commission also argued that once Hassard learned that Lacosse objected to Gustus' behaviour, on the day that Lacosse's

employment ended, she failed to rectify the situation by implementing and enforcing a sexual harassment policy or even by speaking to Gustus about his behaviour in the workplace.

Finally, the Commission argued that the Daycare had no harassment policy, written or otherwise, and that it is up to the employer to create a healthy work environment and to provide employees with the protections afforded by human rights legislation.

THE RESPONDENT'S ARGUMENT

Hassard argued that the allegations of sexual harassment by Lacosse and Dyck are fictitious and vexatious. She said she doesn't believe that the things they allege actually happened, and further, if they did happen, she was not aware of them. She said that if Gustus was harassing them as much as they claim, then other staff should have been able to notice his behaviour, overhear some of his comments or see some of his actions. She argued that neither Sicotte nor Wilkinson heard any comments or saw any gestures made to either Lacosse or Dyck and that some comments were taken out of context and re-worded, or said to someone else. She also argued that it is hard for her to disprove many of the comments alleged because they were made only within earshot of Dyck or Lacosse. She also argued that because of her friendship with Gustus, she didn't believe he would say or do the things alleged.

Hassard also argued that because she was not aware of Lacosse and Dyck's feelings toward Gustus, she could not have rectified the situation, but that once she became aware, she directed Gustus to ask staff members, including Dyck, if his comments or jokes crossed any lines, or if they felt sexually harassed in any way. She argued that no staff member said that they felt harassed by Gustus. She also called a quick staff meeting to ask the staff herself if they felt uncomfortable or harassed and she said no staff member said they felt this way, including Dyck. As a result, she didn't feel that any intervention was necessary, and thought that Lacosse was blowing things out of proportion and was angry at the thought of being let go from her job.

After Dyck quit, and at the request of the Human Rights Commission, Hassard says she drew up a general conflict resolution policy that encompassed all forms of harassment and staff disputes.

Hassard argued that Lacosse had a history of getting back at her employers in similar ways, which showed that her allegations were vexatious. She also argued that Sicotte and Wilkinson's evidence shows that Lacosse was not a reliable employee and could have been let go from her job for many reasons, and, in fact, was going to be let go if she did not improve her behaviour.

FINDINGS OF FACT

The Board finds that Lacosse and Dyck were both employed at the Daycare in the fall of 2011 and into the early winter of 2012 and that both needed their jobs at the Daycare. During their employment at the Daycare, Hassard was the director of the Daycare and Gustus was co-director as well as cook, janitor and Supported Child Care Worker. When Hassard was not present at the Daycare, Gustus supervised Lacosse and Dyck.

The evidence is clear that a considerable amount of joking and banter was allowed at the Daycare, some of it including inappropriate sexual content, and that Gustus played a large part in this. This banter went on in the kitchen and on the floor of the Daycare, including in front of children. Not everyone was uncomfortable with the joking and banter — in fact, some staff enjoyed it and were not offended by it. When Lacosse first started working at the Daycare, she went along with the joking and banter in an attempt to get along and fit in. As time went on, she began to find some of Gustus' comments offensive and inappropriate, she became uncomfortable with Gustus looking at her in a sexual way, and she felt pressured by things he said to her, including comments about her appearance and his genitals. She also disliked Gustus' suggestions about sexual relations with other staff, including himself and Hassard. Lacosse was offended by Gustus' use of words such as "cunt" and "bitch", and she felt pressured to let him hug her and to go on a date with him. Lacosse voiced her discomfort with Gustus' behaviour by telling him that she found his words and gestures inappropriate and disgusting.

Dyck conducted herself at the Daycare in a quiet and professional way. She did not engage in the joking and banter at the Daycare in the way Lacosse initially did. When Gustus made comments to Dyck, she basically ignored him, although on occasion, she let him know that his suggestions, such as that they wrestle in the snow, were inappropriate.

The Board is satisfied that Lacosse and Dyck were telling the truth and that the things they described happened to them. The Board is also satisfied that Gustus' looks, comments and hugs constitute conduct of a sexual nature and that it was not welcomed by Lacosse or Dyck. Although Lacosse may initially have given the impression that she was okay with engaging in the sort of joking and banter that went on daily at the Daycare, she became increasingly uncomfortable with the sexual content, and let her feelings be known.

The Board is also convinced that Gustus knew, or should have known, that his conduct was unwelcome and inappropriate. As co-director of the Daycare, Gustus should have known what was and was not appropriate behaviour in a Daycare and that his comments and conduct, which were sexually suggestive, were not appropriate. In addition to Gustus' responsibility to be aware of how inappropriate his behaviour was, both Dyck and Lacosse let him know they

didn't like it. Further, there was a power imbalance between the Dyck and Lacosse and Gustus. He was their supervisor, he was older, male, and in a position to influence their jobs. They both needed their jobs so speaking up about Gustus' behaviour was both awkward and risky, especially given the close relationship between Gustus and Hassard.

The Board is also convinced that Hassard was aware of Gustus' behaviour — that she was either present for many of his comments or heard about them from other people. In addition, she knew Gustus well and it was her responsibility to let him know that the sexual content of his joking and banter had no place in the Daycare or in his relationships with the young women he was responsible for supervising. By not addressing Gustus' inappropriate comments and behaviour at the Daycare, Hassard, in essence, consented to his conduct and failed to take steps to prevent discriminatory conduct at the Daycare.

Finally, the Board finds that Gustus' conduct had adverse job-related consequences for the two Complainants and that continuing to be employed at the Daycare, in these circumstances, was untenable. Dyck found work fairly quickly after quitting; Lacosse took a little longer.

The Board finds that the Complainants have proven that they were sexually harassed by Gustus, contrary to sections 7, 9 and 14(1) of the Yukon *Human Rights Act*, and that Hassard knew about the conduct that constitutes sexual harassment but did nothing to stop it as required by section 35 of the Act.

With respect to concerns about Lacosse's job performance, under human rights law, a finding that a person has been discriminated against can be made even when there are additional factors that may have contributed to the adverse job-related consequences.

REMEDY

Human Rights Act

The objects of the Act are set out in section 1 of the Act and include:

- (a) furthering the public policy that every individual is free and equal in dignity and rights;
- (b) discouraging and eliminating discrimination;
- (c) promoting recognition of the inherent dignity and worth and of the equal and inalienable rights of all members of the human family, these being principles underlying the *Canadian Charter of Rights and Freedoms* and the *Universal Declaration of Human Rights* and other solemn undertakings, international and national, which Canada honours.

Section 24(1) of the *Act* states that, if the complaint is proven, on a balance of probabilities, the Board may order the party who discriminated to:

- (a) stop the discrimination;
- (b) rectify any condition that caused or is causing the discrimination;
- (c) pay damages for any financial loss suffered as a result of the discrimination;
- (d) pay damages for injury to dignity, feelings, or self-respect.

DAMAGES

Human Rights Case Law

Human rights law is aimed at eradicating discrimination and ensuring equal opportunity. The aim is to remedy situations where this is not happening, and to provide relief for victims of discrimination, not to punish those who discriminate (*Robichaud, O'Malley*). It is not necessary for a person to intend to discriminate for them to be held responsible for discrimination (*O'Malley*).

The purpose of damages under human rights law is to restore a complainant as far as is reasonably possible to the position that the complainant would have been in had the discriminatory act not occurred [*Piazza v. Airport Taxi (Malton) Assn.*, Ont. C. A. 1989, 10 C.H.R.R. D/6347].

Two kinds of remedial damages are often awarded in human rights cases: “special damages”, which include monetary compensation for specific losses, such as lost earnings; and “general damages”, which are monetary compensation for the less readily quantifiable loss of the right to be free from discrimination. The amount of damages depends on the nature and circumstances of the sexual harassment in each particular case. However, in awarding damages for injury to dignity, feelings and self-respect, the following factors are generally considered [*Torres v. Royalty Kitchenware Ltd.* (Ont.1982) 3 C.H.R.R. D/858]:

1. the nature of the harassment, whether it was verbal or physical;
2. the degree of aggressiveness and physical contact in the harassment;
3. the duration and frequency of the harassment;
4. the age and vulnerability of the victim; and
5. the psychological impact of the harassment upon the victim.

It is up to each Board, in each case, to determine the appropriate amount of damages, taking into account what appears to be fair in the circumstances. As the Board has found, in this case, that both Lacosse and Dyck were subjected to sexual harassment by Gustus and that Hassard knew about it and didn't stop it, the next step is to assess their entitlement to compensation for injury to their dignity, feelings, and self-respect and for any financial loss suffered as a result of the discrimination. Financial loss could include lost wages.

a) Special Damages — Injury to Dignity, Feelings or Self-Respect

Lost wages are often easily quantifiable. Awarding damages for injury to the complainant's dignity, feelings, and self-respect, however, is more difficult to quantify. The Human Rights Tribunal of Ontario in *Arunachalam v. Best Buy Canada*, 2010 HRTO 1880 (harassment based on pregnancy case) stated that such compensation:

... recognizes that the injury to a person who experiences discrimination is more than just quantifiable financial losses, such as lost wages. The harm, for example, of being discriminatorily denied a service, an employment opportunity, or housing is not just the lost service, job or home but the harm of being treated with less dignity, as less worthy of concern and respect because of personal characteristics, and the consequent psychological effects.

The Tribunal in *Arunachalam* also cautions against awarding damages that are so low that the social importance of human rights legislation is minimized by creating "a license fee to discriminate", and notes the following two criteria:

[53] The first criterion recognizes that injury to dignity, feelings and self-respect is generally more serious depending, objectively, upon what occurred. For example, dismissal from employment for discriminatory reasons usually affects dignity more than a comment made on one occasion. Losing long-term employment because of discrimination is typically more harmful than losing a new job. The more prolonged, hurtful, and serious harassing comments are, the greater the injury to dignity, feelings and self-respect.

[54] The second criterion recognizes the applicant's particular experience in response to the discrimination. Damages will be generally at the high end of the relevant range when the applicant has experienced particular emotional difficulties as a result of the event, and when his or her particular circumstances make the effects particularly serious.

Lacosse was uncomfortable with Gustus' comments and with his actions toward her, including his comments about her appearance, his insistence on a hug, his invitation to go on a date, his leering and his regular comments of a sexual nature, including references to his own genitals and sexually suggestive remarks. Most of the offensive behaviour was verbal but there was one occasion when Lacosse felt that a hug was forced on her. Over the two and a half months that Lacosse worked at the Daycare, she became increasingly uncomfortable with his comments to the point that, on the day that turned out to be her last day of work, she accused him of sexually harassing her.

After leaving the Daycare, Lacosse became anxious and depressed to the point of seeking medical help and it took her several months to find work. Although she was able to live with her mother during this time, she has a young son to support. Her situation was made more difficult because she could not bring herself to apply at any daycares after her experience at the Daycare. She left the Daycare in January and applied for a number of jobs, finally securing new employment in May 2012 at a rate of \$18.50 per hour. During her time without a job, she was able to collect Employment Insurance benefits but there was a delay in getting these benefits because her Record of Employment said that she quit.

Dyck's experience with Gustus was similar to that of Lacosse's although she was less confrontational and spoke up less about Gustus. All of the offensive behaviour about which Dyck complained was verbal as she refused Gustus' offer of a hug. After Lacosse left the Daycare, she was subjected to Gustus asking if his behaviour was offensive to her. Dyck found part-time work fairly quickly after leaving the Daycare but said she was always vigilant, afraid of running into parents from the Daycare. She said that by the end of February she was working about 15 hours a week at the Canada Games Centre at an hourly wage of \$21.35, and that she had other work by the summer.

The Commission argued that the Board of Adjudication should consider the seven factors set out in *Torres v. Royalty Kitchenware* case, and apply the test from the *Arunachalam* case to determine the appropriate damages for injury to dignity, feelings and self-respect in this case. The *Arunachalam* case says that the Board should look at the following: (1) the objective seriousness of the conduct; and (2) the effect on the particular applicant who experienced discrimination. The Commission also argued that it is important that the award of compensation does not trivialize the effect of the sexual harassment by Gustus on these young women and asked the Board to award \$5,000 to each of the Complainants, taking into account the impact of their job loss as a result of the sexual harassment by a much older man who had a supervisory role in the workplace.

The Board has found that Gustus' behaviour constituted sexual harassment and that the offensive conduct was frequent and ongoing throughout the Complainant's employment, which was approximately three months for each of them. Lacosse and Dyck were young compared to Gustus and were vulnerable as he was their supervisor and perceived to be closely connected to Hassard, who had the power to fire them. The sexual harassment experienced by the Complainants was also psychologically and emotionally damaging to them.

Not only were the Complainants being sexually harassed by Gustus, the Board has found that Hassard failed to fulfil her duty to ensure that her employees were free from sexual discrimination in the workplace and that she failed to take adequate steps to stop the sexual harassment once she became aware of it.

Awards for injury to dignity, feelings, and self-respect are difficult to quantify and require a largely subjective analysis of a number of factors. In this case, taking into account Lacosse's age, the fact that the sexual harassment was mostly verbal, and the fact that harassment went on for the duration of her employment at the Daycare, the Board orders the Respondent to pay Lacosse \$5,000 for injury to her dignity, feelings and self-respect as a consequence of Hassard doing nothing to stop the harassment, which she knew about, contrary to section 35 of the Act.

In awarding damages for injury to Dyck's dignity, feelings and self-respect, the Board has also taken into account her age and vulnerability, the fact that all of the sexual harassment she was subjected to was verbal, and the fact that the harassment went on for the duration of her employment at the Daycare. The Board orders the Respondent to pay Dyck \$5,000 for injury to her dignity, feelings and self-respect as a consequence of Hassard doing nothing to stop the harassment, which she knew about, contrary to section 35 of the Act.

b) General Damages — Loss of Earnings

The purpose of an award for loss of earnings is to put the Complainants in the position they would have been in had the discriminatory conduct not occurred (*McIntosh v. Metro Aluminum Products, BCHRT*). Aggarwal and Gupta suggest that generally, the victim is entitled to lost wages for the period of time between leaving the respondent's employment and acquiring the next job.

Complainants have a duty to mitigate any losses flowing from the discrimination by making reasonable efforts to seek other employment. However, the Commission argued that the onus of proof that the Complainants failed to mitigate their losses lies with the Respondent. In other

words, it was up to the Respondent to call evidence to show that the Complainants did not obtain work as quickly as they could have. The Commission also argued that the Board should take into account that the physical, emotional, and psychological distress resulting from the experience of being sexually harassed may impact the victim's ability to work or find work.

Lacosse worked full-time hours (40 hours per week) at the Daycare at a wage of \$16.50 per hour. After leaving the Daycare, she was unemployed for about four months before securing other employment. The Commission argues that an order that the Respondent pay Lacosse lost wages for a period of three months is reasonable.

Dyck worked full-time hours at the Daycare at a wage of \$17.00 per hour. After leaving the Daycare, she was without any work for two to three weeks before getting part-time work (about 15 hours per week) at the Canada Games Centre at a rate of \$21.35 per hour. The Commission argues for an order that the Respondent pay Dyck lost wages for a period of two weeks, as well as the difference between her full-time wage at the Daycare and her casual employment at the Canada Games Centre for a period of two weeks.

The Board has determined that both Complainants are entitled to damages for lost wages calculated as follows:

Lacosse: 40 hours per week at a rate of \$16.50 per hour for 12 weeks = **\$7,920.00**. The Board leaves it to the Commission to deduct any Employment Insurance benefits Lacosse received from the amount awarded.

Dyck: based on Dyck having worked 15 hours a week during the third and fourth weeks after leaving the Daycare, the Board awards lost wages calculated as follows: 40 hours per week at a rate of \$17 per hour for four weeks = \$2,720.00, less 15 hours per week at a rate of \$21.35 per hour for two weeks = \$640.50, which totals **\$2,079.50** (\$2,720.00 - \$640.50).

The Board notes that it has used the terms Hassard, the Daycare, Respondent and Respondents throughout this Decision. As Ms. Hassard was the sole proprietor of Childhood Discoveries Daycare, the Board's findings and awards of damages are made against her personally.

CONCLUSION

Sexual harassment is a serious issue. Not only is it against the law, those who choose to engage in such conduct impact the lives of those they harass in serious, sometimes far-reaching ways. Financial compensation doesn't remove those experiences from the lives of the victims of sexual harassment but it does signal that this sort of conduct will not be tolerated.

It is the Board's view that sexual harassment cases such as this one could be effectively prevented if the Human Rights Commission pursued its educational mandate set out in section 16(1)(c) of the Act with more vigour. Throughout this case, it was clear that the Respondent, as a first-time business owner, had little understanding of her responsibilities as an employer under the Act. An ongoing educational campaign targeted at alerting Yukon businesses and employers of their significant responsibilities under the Act could go a long way toward reducing or eliminating discrimination. Further, it could alert the public, more generally, to the kinds of behaviour that are and are not acceptable.

SIGNED at Whitehorse, Yukon on June 18, 2013



**E. Joie Quarton, Chief Adjudicator
For the Human Rights Board of Adjudication**