

Before the Yukon Human Rights Board of Adjudication
In the matter of the Yukon *Human Rights Act*
and in the matter of
Bobbi-Jean Simon, Suzannah Simon (“Complainants”) & Yukon Human Rights
Commission (“Commission”)

v.

Rhonda Sallows, Owner, White Tornado Cleaning Services (“Respondent”)

BOARD DECISION

Appearances

Bobbi-Jean Simon	Complainant
Suzannah Simon	Complainant
Colleen Harrington	Counsel for the Yukon Human Rights Commission
Michael Harrison	Law student at Yukon Human Rights Commission

Witnesses

Bobbi-Jean Simon
Suzannah Simon

Board of Adjudication Members

Penelope Gawn	Chair
Michael Riseborough	Adjudicator
Jean-Sébastien Blais	Adjudicator

Heard: Whitehorse, Yukon January 27, 2017

Submissions: February 7, 2017

I. Introduction

The hearing of these complaints took place in Whitehorse on January 27, 2017 before a Board of Adjudication consisting of Penelope Gawn (Chief Adjudicator), Michael Riseborough, and Jean-Sébastien Blais. The Commission's Closing Submissions were filed February 7, 2017.

II. Background

The two Complainants are sisters who filed human rights complaints with the Commission on August 7, 2015, claiming that the Respondent harassed them in connection with their employment on the prohibited grounds of ancestry and sex by referring to them in derogatory terms, contrary to *Human Rights Act* (the "Act") sections 7(a), 7(f), 9(b) and 14. The complaints were subsequently referred by the Commission to the Yukon Human Rights Panel of Adjudicators in August of 2016.

The Respondent did not attend the hearing. She participated in some pre-hearing procedures, including submitting the forms required by the Panel's Rules of Procedure and attending a pre-hearing conference on November 9, 2016, at which hearing dates were set. However, she failed to attend a second scheduled case management conference on January 17, 2017, and could not be reached by telephone. Subsequently, the Respondent emailed the Registrar that she would not attend the hearing. In light of these facts, the Board was satisfied that the Respondent had adequate notice of the hearing and that it was appropriate to proceed in her absence.

III. Evidence

The only witnesses called were the two Complainants. For ease of reference we will refer to them by their first names.

1. Evidence of Suzannah Simon

Suzannah testified that she was 36 when the complaint was filed, that she lives in Whitehorse, has three children, is Gwich'in, and a member of the Inuvik Native Band. She started working for the Respondent ("Rhonda") on July 9, 2015 after being interviewed by

Rhonda at the worksite which was the construction of the new F.H. Collins High School in Whitehorse. Suzannah's sister, Bobbi-Jean, had started working there the day before and Rhonda told Suzannah she did not want to hire sisters but would try her out. The job was as a cleaner dealing with post-construction clean up on the new classrooms and school. Rhonda explained the safety rules to her and the safety equipment she would be required to wear.

Rhonda told Suzannah that, because the job was only to last until July 30, they would not have to deal with CRA (Canada Revenue), and that she would be paid \$15 an hour.

Suzannah started work on July 9. There were about nine cleaners, mostly women, working there. Everyone had the same job and they were divided into groups of three or four to go into different classrooms to clean. Rhonda would tell them where to start, ensure they had supplies, and come back later and check on them. There was also an on-site supervisor while they were there. Everyone was generally okay to work with but when Rhonda showed up there would be a lot of swearing and yelling. Rhonda said things to her like that she was "little" or that Rhonda did not think she could handle this job.

Suzannah worked on July 9, 10, 11 and 13 and then all of the cleaners were off until July 22nd and 23rd. Suzannah did not have her own phone so Rhonda contacted her through Bobbi-Jean's cellphone. After being yelled at by Rhonda, on July 23rd Suzannah and her sister both decided to quit and they told the on-site supervisor they were leaving.

The two Complainants were paid twice by the Respondent: firstly when they met her outside the "202" in Whitehorse, which Suzannah was pretty sure was on the 14th of July at 3:00 pm and, secondly, at the jobsite on the 28th of July.

Both Complainants were on their way to meet Rhonda on July 14, with Bobbi-Jean driving, when the cellphone rang and Suzannah overheard what was apparently a "pocket dial" call made by Rhonda inadvertently. Suzannah was holding the phone, the Respondent's name came up, they heard Rhonda talking to someone saying she was waiting for two "stupid-ass bitches" to come and pick up their cheques. The Complainants were shocked. They proceeded to meet Rhonda and sign for their money, then walked away without

saying anything. The money was in cash in envelopes marked with their names and the date. The amount received reflected the hours they had worked, at \$15 an hour.

Suzannah testified that she felt betrayed by what she had overheard but that they still went back to work the next week. The Respondent had used the word "bitch" before at work. She swore a lot and referred to another worker as a "slow bitch".

Suzannah said she decided to leave the job mostly because she did not like getting yelled at at work and about her work, like when she had done a room and had to go back and do it all again. She said she had never been treated like that in other jobs, it felt like her boss was "shitting" on her, putting her down, belittling her. Suzannah and Bobbi-Jean told the on-site supervisor that they were quitting at lunch break time on the 23rd of July, and the supervisor called Rhonda. As they were driving away, Rhonda pulled up beside them at the lights and asked what happened. Bobbi-Jean said "we are done, that's it", the lights turned, and they had to go. After that, all their communication with the Respondent was through Bobbi-Jean's phone, mostly about pay.

They were not paid as expected on Friday the 24th of July so they went to the Employment Standards office to ask what they could do about that as well as about Rhonda's having told Bobbi-Jean that she was she was going to change their pay rate to minimum wage.

On July 27th at 1:40 pm, Bobbi-Jean sent a text from the Employment Standards office to Rhonda. All of the texts then exchanged on July 27th and 28th between Bobbi-Jean and Rhonda were printed off the cell phone by the Commission investigator and were put into evidence, as follows:

Mon, 07/27/2015

[Bobbi-Jean] Hi Rhonda, under the employment standard act, you are obligated to pay my sister and I within seven calendar days after our last working day. And because we were getting paid \$15/hr on our first pay period under the employment standard act you cannot change our pay without two weeks notice. If on the 29th we do not receive our pay I will be coming back to the employment standards and file a complaint. We are here now at the employment standards building speaking with an officer. From Bobbi-Jean and Suzannah Simon.

1:40 PM

[Rhonda] Ya maybe you forgot, our discussion re 10.80 an hr.
2:29 PM

[Bobbi-Jean] You only told me this last night.

[Rhonda] I have no problem paying you never did have a problem, so what your on about who knows. I have even paid the out for the restoration, you people cause problems and as I hear! It's not the first time. It's why I don't hire sisters too. You worked I pay. I say what I mean, and mean what I say. Don't fucking threaten me. I mean it!

5:47 PM

[Rhonda] I have your pay with me right now
5:47 PM

[Rhonda] And what I said, I just needed to see what type of people you truly are. You ever leave me a message like that again????

5:48 PM

[Rhonda] On your friends number! You will ask for what comes back to you

[Rhonda] Hot it????

5:49 PM

[Rhonda] Got it

5:49 PM

[Rhonda] You threaten all you want! I will not put up with your accusations!!!! I will not !!! 5:49 PM

[Rhonda] Got it????

5:49 PM

[Rhonda] Got it

5:49 PM

[Rhonda] You FAS kuds

5:50 PM

[Rhonda] And pill poppers

5:50 PM

[Rhonda] Leave me the fuck alone drama kids and your problems

Tue, 07/28/2015

[Rhonda] I have envelopes for you two squaws!

12:29 PM

[Rhonda] Where do you want to sign for them?

12:29

[Rhonda] Trouble makers
12:30 PM

[Rhonda] The faster I can get rid of you two the better off we all are
12:30 PM

[Rhonda] If you don't claim it today, I will be leaving the yukon for s bit. You will have to catch me when I get back.
12:31 PM

[Rhonda] Let me know
12:32 PM

[Bobbi-Jean] I'll be downtown at 3:00 where do you want to meet?
1:14 PM

[Bobbi-Jean] I'm on my way downtown, where are you?

Suzannah said she did not know what the Respondent was referring to by "the out for the restoration" or by "on your friends number" or by "pill poppers". She thought the Respondent calling them "you two FAS kuds" was a "messed up" thing to say to someone and the "meanest" thing you would tell someone, "really sad". Although the texts were on Bobbi-Jean's phone, Suzannah said she read all of them.

On the 28th of July, the two sisters went to the jobsite to get paid, they signed for, got their money, and left, after Rhonda got someone at the site to witness the payment. They received \$20 an hour for three hours on the 22nd and \$15 an hour for four hours on the 23rd, for a total of \$120 each.

A voicemail message was left on Bobbi-Jean's phone by the Respondent earlier that afternoon, before they met her around 3 pm. It was later transcribed by the Commission and reads as follows:

I got your envelopes you two squaws. Get a hold of me because I'm leaving Whitehorse and I'm not doing your gong show. Your. All your bullshit. You guys are trouble. You'll get your pay cheques.

Suzannah said "squaw" was the word that bothered her the most, that it was not right for anybody to be called that, it was racist and that she and her sister are not squaws. Suzannah said that Rhonda never apologized to her for the language she used but did on two occasions when she encountered Suzannah call out to her: the first time saying

that she had better watch her back, and the second that she should “watch out”. These incidents happened weeks after they filed their complaints with the Commission.

Suzannah said she was afraid of Rhonda and has not worked since then. She said she has never been called those names by anyone else and that it bothers her that someone can be that mean and have someone work for them. She wanted to make sure that no one would treat her kids like that.

2. Evidence of Bobbi-Jean Simon

Bobbi-Jean testified that she was 27 when she filed her complaint and that she is now a student at Yukon College. She lives in Whitehorse and is a member of the Tetlit Gwich'in First Nation.

She saw the Respondent's job posted online. She met with Rhonda, received a booklet on workplace safety and was provided with a safety vest and eyeglasses. She got her own hard hat and started work July 8, 2015. Her sister Suzannah started the next day.

Rhonda was the boss. Bobbi-Jean worked a total of seven days between the 8th and the 23rd, cleaning up after the construction at the F.H. Collins High School. Bobbi-Jean confirmed the accuracy of the timesheets kept by the Respondent showing she worked a total of twenty-eight hours from July 8 to 13, and seven hours on July 22nd and 23rd.

The workplace atmosphere was very tense when Rhonda was there and smooth when she was not. Rhonda had been nice at the beginning and Bobbi-Jean was happy there for the first two days, then as Rhonda got to know her she seemed to become more comfortable yelling at her in front of her co-workers. The way Rhonda spoke to them was very loud, you did not want to set her off, had to watch what you were doing. Once, she angrily took a mop and showed Bobbi-Jean how it should be done.

Bobbi-Jean confirmed that Suzannah had heard Rhonda referring to them as “bitches” when Rhonda had pocket-dialled them while they were driving to pick up their pay.

Bobbi-Jean said she and her sister walked off the job on July 23rd because they did not like the way they were treated by Rhonda. Bobbi-Jean identified the texts printed out as

those she sent to Rhonda with the responses received from Rhonda, starting with one sent from the Employment Standards office, which staff had assisted her to write.

Bobbi-Jean said Rhonda told her a day or two before July 27th that she was going to pay them minimum wage for their last pay because they had walked off the job.

Bobbi-Jean said she did not know what Rhonda meant by “restoration” and thought Rhonda probably meant to say “FAS kids” when she called them “FAS kuds”. Bobbi-Jean said she had no idea why Rhonda would say that.

Bobbi-Jean said it was hard to talk about how the comments made her feel, as her younger brother suffers from FASD. She said the texts were a big reason why she filed a human rights complaint. She said she had never been called a squaw before, she did not know what to think about it, but it made her not want to see Rhonda again, even to get her cheque.

Bobbi-Jean said that “no one should go through what we went through”. She also said there was another woman in the workplace who got yelled at, and that to be treated in this way was wrong. Bobbi-Jean said she would like to see Rhonda ordered to take counselling or something, that it is wrong to treat people this way, and that she should be disciplined for what she did.

3. Other documents filed

A Registration Report from the Yukon Government’s Corporate Affairs Branch shows White Tornado Cleaning Services as a registered business name used by Rhonda Sallows, under the *Partnership and Business Names Act*.

Timesheets for each of the Complainants, apparently filled in by the Complainants and kept by the Respondent, then signed by the Complainants when they were paid, were acknowledged by the Complainants as accurate records of their hours worked and pay received.

IV. Commission submissions:

In its written submissions, the Commission sets out what must be found by the Board in order to conclude that the Respondent harassed the Complainants, as follows:

- 1) the Respondent engaged in a course of vexatious conduct;
- 2) the conduct occurred in connection to the Complainants' employment;
- 3) the Respondent knew, or ought to have known the impugned conduct was unwelcome; and
- 4) the harassment was in relation to a prohibited ground.

The Commission submits that the Respondent engaged in a course of vexatious conduct, that the use of the word "bitch" is a gendered pejorative, that the term "squaw" is a gendered racist pejorative targeting Indigenous women, and that the term "FAS kuds" (which presumably was meant to be "FAS kids") was rooted in the racist stereotype that First Nations people are alcohol-abusers.

The Commission submits that the plurality of the insults "stupid-ass bitches", "FAS kuds", and "squaws" constituted a course of vexatious conduct against both Complainants. Although the conduct of the Respondent on July 27th and 28th occurred after the Complainants had walked off the job, it was in the context of their attempts to obtain their final paycheques and therefore the Commission submits took place in connection with their employment, pursuant to section 9(b) of the *Act*.

The Commission submits that the evidence before the Board supports the conclusion that the Complainants were harassed by the Respondent on the prohibited grounds of sex and ancestry, and that Rhonda Sallows and White Tornado Cleaning Services should be held jointly and severally liable.

The Commission says that the Respondent's response to the complaint (Form 2) should be given no weight as evidence because the Respondent did not participate in the hearing and was not cross-examined.

The Commission submits that a damages award is fair and just in this case and seeks an award for injury to dignity, feelings and self-respect for each Complainant in the amount of \$7,500.

V. The Law

The following sections of the Yukon *Human Rights Act* (the *Act*) are relevant:

Section 7 It is discrimination to treat any individual or group unfavourably on any of the following grounds

- (a) ancestry, including colour and race;
- (f) sex, including pregnancy, and pregnancy related conditions.

Section 9 No person shall discriminate

- (b) in connection with any aspect of employment or application for employment.

Section 14(1) No person shall

- (a) harass any individual or group by reference to a prohibited ground of discrimination;
- (b) retaliate or threaten to retaliate against an individual who objects to the harassment.

(2) In subsection (1), "harass" means 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.

Section 24(1) If the complaint is proven on the balance of probabilities the board of adjudication may order the party who discriminated to

- (a) stop the discrimination;
- (b) rectify any condition that causes 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;
- (e) pay exemplary damages if the contravention was done maliciously;
- (f) pay costs.

VI. Analysis and decision

Although the Respondent did not participate in the hearing, the Board cannot find the complaints justified without reviewing all of the evidence and being satisfied that the complaints have been proven. In cases where the respondent does not participate, it is especially important that the Board carefully consider the credibility of the complainant witnesses. See *Quenneville* 2013 Carswell Yukon 152 (YHRT).

The two Complainants testified separately, neither of them being present for the evidence of the other. They each gave their evidence in a manner that was straightforward and reasonable. Their accounts were internally consistent and generally consistent with each other. Accordingly, the Board accepts that the events happened as they described.

The Board finds that the Respondent's Form 2 response to the complaint, which was entered as part of the record of proceedings, is simply evidence that the Respondent filed a response. It has no weight as evidence of the truth of its contents.

In order to uphold the complaints of harassment by the Respondent, the Board must find that, on a balance of probabilities, the requirements set out in the Act have been made out:

- (1) that the Respondent engaged in a course of vexatious conduct;
- (2) that the Respondent knew or ought reasonably to have known that conduct was unwelcome;
- (3) that the harassment was by reference to the prohibited grounds of discrimination of ancestry and/or sex;
- (4) that the conduct took place in connection with any aspect of employment or application for employment.

1. *Course of vexatious conduct*

Vexatious conduct has been described as behaviour that "must have involved a degree of repetition" and "in fact have been annoying, distressing, troubling or agitating" to the Complainants (*Ghosh v Domglas Inc.*, 1992 Carswell Ont 6682, at para 32).

Based on the evidence, the Board has concluded that the Respondent did on July 27th and 28th, 2015, engage in a course of vexatious conduct. The name-calling by the Respondent was abusive in tone and content and was repeated. The context in which offensive terms were used such as “FAS kuds” and “squaws” also included other inappropriate language by the Respondent such as “You people cause problems”, “Don’t fucking threaten me”, “I just needed to see what type of people you truly are”, “Leave me the fuck alone”, “all your bullshit” and “you guys are trouble”. The Respondent had previously referred to the Complainants as “stupid-ass bitches” in the overheard phone call, had yelled at the Complainants and others in the workplace, and had told them they would only get paid minimum wage after they quit their jobs. The distress caused to the Complainants by this vexatious conduct was evident from their actions and their testimony.

2. Knew or ought to have known conduct was unwelcome

The question of whether a respondent knew or ought to have known that the conduct was unwelcome requires the Board to consider whether a reasonable person in the circumstances would have known that the conduct was unwelcome. Here, it is obvious that a reasonable person would know that calling the Complainants “squaws”, “FAS kids”, and “pill poppers”, among other things, with a degree of hostility that was apparent even in text form, is unwelcome conduct.

3. By reference to a prohibited ground of discrimination

The *Act* not only requires that a vexatious course of conduct be unwelcome, it must also be found to refer to one or more prohibited grounds of discrimination. The Complainants allege that the Respondent’s conduct refers to their sex and ancestry as First Nations women.

Although the Board accepts the Commission’s submission that the term “bitch” is or can be a gendered pejorative, the evidence here was that the term was not used by the Respondent in a communication directed at the Complainants but was rather overheard by them in a “pocket dial” phone call. Accordingly, while the use of the word was quite inappropriate and is relevant background to the later course of conduct by the

Respondent, the Board is not satisfied that the use of the word itself constituted discrimination. In *Andersen v Angell*, 2006 BCHRT 25, where the use of the word “bitch” in an employment context was found not to be discrimination based on sex, its use was nevertheless found to be “inappropriate and in bad taste”.

The word “squaw” can be, as submitted by the Commission, a gendered, racist pejorative targeting Indigenous women. Here, the evidence is that the Respondent twice referred to the Complainants as “you two squaws” and did so in the context of other insults and in response to their request to be fully paid for their work. In context, the use of this word by the Respondent was both harassing and discriminatory.

Calling the Complainants “FAS kuds” was also racist, in the context and manner done here. FAS stands for Fetal Alcohol Syndrome and, as submitted by the Commission, was used here as a reference “rooted in the racist stereotype that First Nations people are alcohol-abusers”. This is similar to *Hopkins v Turingia* 2008 BCHRT 81 where the use of the word “firewater” was described as “a pejorative term generally understood to relate to the use of alcohol by Aboriginal people” and was found to be discrimination based on race.

The comments by the Respondent calling them “squaws” and “FAS kuds” were unquestionably derogatory and reference the prohibited grounds of sex and ancestry.

4. In connection with any aspect of employment

The Complainants were employed by the Respondent until they quit their jobs on July 23 and thereafter their dealings with the Respondent were in connection with their employment, as they were trying to collect their final pay from her, including seeking assistance from Employment Standards in order to be paid properly. Collecting their final pay from their employer was clearly an aspect of their employment.

The Board therefore concludes that the complaints of harassment have, on a balance of probabilities, been proven and that the Respondent did contravene section 14 of the *Act* on July 27th and 28th, 2015, in harassing the Complainants by reference to both race and sex.

VII. Remedy

The Commission seeks an award of \$7,500 for injury to the dignity, feelings and self-respect of each Complainant under s. 24(1)(d). In determining an appropriate amount for an award under s. 24(1)(d), the Board must bear in mind that the purpose of remedies under human rights laws is to compensate the complainants for the harm of the discrimination, not to punish the respondent. In *Hureau v. Yukon Human Rights Board of Adjudication*, 2014 YKSC 21, the Yukon Supreme Court recently reiterated the basic principles governing human rights remedies, quoting a passage from the 2008 case of *McTavish v. Prince Edward Island (MacTavish v. Prince Edward Island (2009))*, 288 Nfld & P.E.I.R. 108 (P.E.I.S.C.), at para. 49), as follows:

... General damages in human rights cases are not intended to punish the wrongdoer. They reflect a recognition by society that one has been harmed by the actions of another. The harm we speak of with respect to general damages in these cases is not monetary harm. It is harm to the dignity and self-respect of the victim. We must attempt to restore, but not reward. We must be realistic and consider whether any award bears a reasonable relationship to other awards for similar discrimination.

Both Complainants testified about the distress the Respondent's conduct caused them. Bobbi-Jean experienced the reference to FAS kids as especially harmful because of her younger brother's diagnosis. The comments were offensive; however, the duration of the harassment was short.

A case that bears a close factual similarity to the case before the Board is the decision cited above in *Hopkins v Turingia*. There the complainant was an Aboriginal woman and her workplace supervisor was found to have made several comments that were discriminatory on the basis of her race, colour and ancestry. One of the comments that deeply disturbed the complainant was that "we should have wiped you off the face of the earth when we had the chance". The complainant felt that the respondent was implying that all aboriginals should have been killed and testified as to the anxiety, stress and sleeplessness she suffered as a result. The BC tribunal concluded:

[59] We are satisfied that Ms. Hopkins suffered considerable injury to her dignity, feelings and self-respect. Taking into account all of the factors of the case,

including the relatively short duration of Ms. Hopkins's employment, the fact that the conduct consisted of verbal comments, the number of comments we have found to constitute discrimination, the egregious nature of at least one of those comments (the "wipe you off the face of the earth" comment), and their impact on Ms. Hopkins, we order the respondents to pay Ms. Hopkins the sum of \$2,500 to compensate for the injury to her dignity, feelings and self-respect.

Here too, the course of vexatious conduct found to be harassing, and the employment itself, were of "relatively short duration".

After considering all the circumstances of this case including: the nature of the harassment, its duration, the age of the Complainants, and the impact upon them of the harassing conduct, the Board has decided to award to each of the Complainants damages in the amount of \$2,500 for the injury to their dignity, feelings and self-respect, to be paid by the Respondent.

The Board rejects the Commission's request that the "Respondents" should be found jointly and severally liable. There is only one Respondent here and that is Rhonda Sallows, carrying on business as White Tornado Cleaning Services.

In conclusion, the Board finds that both Complaints are justified. Under s. 24(1)(d), the Board orders the Respondent to pay to each Complainant \$2,500 in compensation for the injury to dignity, feelings and self-respect caused by the discrimination.

SIGNED at Whitehorse, Yukon on March 16th, 2017

A handwritten signature in blue ink, appearing to read 'Penelope Gawn', is written over a solid horizontal line.

Penelope Gawn, Chief Adjudicator

For the Yukon Human Rights Board of Adjudication