

Before the Yukon Human Rights Board Of Adjudication

In the matter of the Yukon *Human Rights Act*

and the matter of

Peter Budge (“Complainant”) & Yukon Human Rights
Commission (“Commission”)

v.

Talbot Arm Motel Ltd. & Charles Eikland (“Respondents”)

BOARD DECISION

Appearances

Peter Budge	Complainant
Brandon Macleod and Jennie Cunningham for	Commission
Suzanne Tremblay for	Respondent Talbot Arm Motel Ltd.
Charles Eikland	Respondent

Board of Adjudication Members

Penelope Gawn	Chair
Karen Keenan	Adjudicator
B. Bruce Warnsby	Adjudicator

Heard: Whitehorse, Yukon, May 7 to 11, 2018

Closing Submissions: May 14, 18 and 22, 2018

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I. Introduction

The individual Respondent (“Eikland”) is a co-owner of the Respondent Talbot Arm Motel Ltd. (“the Motel”) along with Suzanne Tremblay (“Tremblay”).

On October 20, 2016, the Commission referred two complaints against the Respondents to the Yukon Human Rights Panel of Adjudicators, alleging that the Complainant was sexually harassed by Eikland in the course of his employment at the Motel. The text of the first complaint specifically alleges that the individual Respondent “repeatedly pulled, or tried to pull down his pants from May until September 2014”. The text of the complaint against the corporate Respondent also alleges that “the corporate employer Talbot Arm Motel Ltd is liable for the discrimination by consenting to the conduct and not preventing the conduct or rectifying the situation”. Tremblay is also alleged to have done “little to stop Mr. Eikland’s harassing behaviour”.

For the reasons that follow, the Board has concluded that the complaints have been proven in part, on the balance of probabilities, as required by section 24 of the *Human Rights Act* (the “Act”).

II. Procedural Background

The Complainant filed his complaints to the Commission on July 24, 2015, but it was not until October 19, 2016, that the complaints were referred to the Yukon Human Rights Panel of Adjudicators.

Notice of the complaints was sent out by the Registrar and Form 2 responses were received from all parties in November 2016. Case management conferences were subsequently held on December 13, 2016, February 7, October 13, November 6, 2017, and on February 26, 2018. The two complaints were case-managed and heard together throughout the proceedings. Hearing dates of November 6th to 10th, 2017, were scheduled but an adjournment application brought by the Respondents was granted on conditions, with reasons for that Interim Decision being released November 10th, 2017. New dates for the hearing to commence February 21st were then set but those dates were also adjourned, this time on the application of the Commission and the Complainant. Hearing

dates of April 16th to 19th, 2018, were then proposed by the Commission and Complainant but the Respondents indicated they were not available for those dates and proposed instead that the hearing be rescheduled for May 7th to 10th, 2018.

A notice of hearing confirming the hearing would go ahead from May 7th to 11th, 2018 was sent out by the Registrar on March 14, 2018. On May 4th, 2018, on the Friday before the Monday that the hearing was to commence, an adjournment request was received from the Respondents. Pursuant to 19.2.5 of the *Rules of Procedure*, that application was addressed at the commencement of the hearing on May 7th, 2018. After hearing from the Commission, the Complainant and the Respondents, the adjournment request was denied. The Respondents' reasons for seeking an adjournment included concerns about their readiness for the hearing, the scheduling of witnesses, and their late receipt of the case law binder of the Commission. The adjournment was opposed by both the Commission and the Complainant, and there had already been an inordinate amount of delay in bringing this matter on for hearing before the Board. The Board was of the view that it was in the best interests of all parties that the hearing should continue as scheduled. The Respondents had set aside the week of May 7th for the hearing to take place and had travelled into Whitehorse to attend the hearing, as had the Complainant. The Respondents' concerns about witness scheduling and disclosure of case law were matters that could be addressed in the course of the hearing. The hearing therefore proceeded with the evidence being heard over five days and with time for written submissions then being provided to the parties following the oral hearing.

The Complainant and the Respondents were not represented by counsel but the Complainant was assisted by the Commission which carried the complaint for the Complainant. The Complainant also had the opportunity to add to the Commission's case by asking questions of his own or calling witnesses and making separate submissions. The Commission was represented by the legal team of articling student Brandon Macleod and legal counsel Jennie Cunningham (referred to herein as "Commission counsel"). The Respondents did not have counsel present during the course of the hearing but had previously had counsel attend three of the pre-hearing case management conferences,

on their behalf. At the hearing the Respondents were self-represented, with Tremblay speaking for the corporate respondent and Eikland speaking on his own behalf.

III. The Legislation

The following sections of the *Act* are relevant:

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

(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.

Section 35 Employers are 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.

IV. Summary of the Evidence

Over the course of the hearing, the Board heard from 19 witnesses, some attending in person and others by telephone. For ease of reference, witnesses are referred to by their last names and the corporate Respondent is referred to as “the Motel”.

Commission witnesses:

Peter Budge

The Complainant is 54 years old and is originally from Maniwaki, Quebec, but has lived in the Yukon since 2005. He is a cook by occupation and in the Yukon has worked at Alaska Highway restaurants in Jake’s Corner, Burwash Landing and Destruction Bay.

In early September 2013, he started working as a cook at the Motel in Destruction Bay on a 7:00 a.m. to 3:00 p.m. day shift schedule. His direct supervisor was Tremblay, who was a co-owner of the Motel along with Eikland.

At first, the relationship he had with Tremblay and Eikland was “just awesome, just great”. Then on October 30th, 2013, he had a serious car accident when he lost control of his vehicle while reaching for a dropped cigarette lighter and the car rolled down the hill and overturned. He was medivaced firstly to Whitehorse and then on to Vancouver and was in hospital receiving treatment for his injuries until mid-December 2013. The Vancouver General Hospital medical record entered as an exhibit shows he had multiple fractures including of his ribs and clavicle.

After he was discharged from the hospital, he returned to the Motel where he was provided with free board and lodging while he continued to recuperate from his injuries. The Complainant said the “trauma doctors” had told him to take a year off and that he still only had 30 percent mobility on his left side when Tremblay told him it was time to go back to work. Tremblay treated him with “care and compassion” and he understood that he could not take a year off and “just live there for free”.

It was the day after the Complainant returned to the Motel in December of 2013 that the first incident happened. He was at the Front Desk when Eikland came up and tried to pull

his pants down. The Complainant yelled and screamed to “not effing touch me”. Tremblay was in the office at the time and told him to watch his language. Eikland’s response was “What are you going to do about it, you’re crippled?” The Complainant and Eikland were “still friends” and would talk.

From then on, just about every day Eikland would come up and sneak behind him and pull down his pants. These incidents happened every day while he was off work and it was always a joke, just a game to Eikland. The Complainant explained to Eikland many times that he was abused as a child in the hands of priests, and that it went on for years. Twice the Complainant sat down at the staff table with Eikland and Tremblay and explained to them that he was abused as a child and did not like being touched. The Complainant did not remember the dates of these conversations, or the times or the month.

When the Complainant returned to work as a line cook in May 2014, Eikland came in and pulled down his pants again, there were many instances in the kitchen every day. Keeping his pants up would be hurting his left side. Many times Eikland failed to pull his pants down because he caught him, but lots of times they came all the way down. The Complainant never went into the office and discussed these incidents with Tremblay because he said she broke it up so often, countless times, like every day.

On September 7th, 2014, they were dealing with the last tour buses of tourists and were scrambling to do dishes and catch up. The Complainant was helping a waitress named Sarah Shepherd when Eikland came up and pulled his pants down. The Complainant threw “a couple of fist jabs” at him and said he had enough of this then Tremblay came in and broke them up. This incident was easily visible to tourists getting their meals in the restaurant. The Complainant did not remember what he was wearing or how far his pants went down on that occasion. The Complainant said he felt disgusting, shame, uncomfortable and humiliated. He said he found it very humiliating because of his childhood when he was abused by a priest and by family members. That was the last time Eikland did that and the atmosphere afterwards was “bitter and sour”, you could “almost cut the tension with a knife”.

The Complainant tried to avoid Eikland and worked until December, then gave his notice. He said he stayed although he did not like being there anymore because it was close to the end of the season and lots of places were laying people off and closing down. In December of 2014, the Complainant gave Tremblay five months' notice that he would be leaving in May. Tremblay responded by grabbing a couple of coffees and then blowing up on him, telling him to leave in two weeks. By the end of that day he had received two weeks' written notice to leave. His last day at work was December 28 or 29 and the following day he moved out and took his stuff to the Destruction Bay Lodge.

The first pants-pulling incident happened at the Motel's Front Desk when the Complainant went in to buy cigarettes. He was still feeling sore from his accident and was taking three different kinds of morphine and oxycontin for the pain. When he returned to work in 2014 the Complainant was still very sore and having a hard time with his left side.

The last such incident on September 7th, 2014, took place in the kitchen of the restaurant by which time the Complainant's body and movements were better and the pain was tolerable.

On cross-examination by Tremblay, the Complainant agreed that his employers at the Motel were flexible and willing to accommodate him.

He denied that he was buying beer on a daily basis and said he just bought a pack of smokes. He does not like being touched but did admit to engaging in physical horseplay with Tyson Wirth which did not make him feel uncomfortable because he has known Wirth for a few years and he is like a brother. The Complainant did not remember Dennis Guthrie saying that the teasing between him and Eikland was going too far and did not remember telling Guthrie that it was "all in fun". He did remember working in the kitchen with Karim Keloua and having a fight with him when he yelled at Keloua because he was busy.

Regarding the day he gave five months' notice, the Complainant said he was sick of the place and did not want to be there anymore.

With respect to the issue of having to make sandwiches for a small work crew that was staying there, the Complainant did not remember his reaction.

The Complainant denied that he was drinking as well as taking prescription drugs after he got out of the hospital, but although he did not believe he was drinking he might have had a beer or two at the Christmas party, “so what, it’s Christmas”.

He agreed that Tremblay came to visit him while he was in the hospital but denied that she brought him clothes while he was there. He also did not remember Tremblay helping him to get disability payments. He agreed that Charlie built him a “lean-to” so he could sleep more comfortably. He also agreed that he was charged nothing for his room or food but asked Tremblay “what’s your point?”

He acknowledged that Tremblay drove him into Whitehorse once and believed that he could have been hallucinating on the ride but did not remember. He also did not remember arguing with Tremblay over her firing a waitress who came to work drunk, but he did remember that waitress crying outside his room.

The Complainant reiterated that the first pants-pulling incident took place in December of 2013, the day after he got out of hospital, and said that either Jeff or Shane and Sarah were there at the time. After the last pants incident, he told Tremblay that if it did not stop he was calling the RCMP.

The Complainant said his last two weeks of work went kind of smooth actually, as now they were really not talking to each other. He did not feel wrongfully dismissed and did not go to the Labour Board but went instead to the Human Rights Commission.

He did not remember saying that Tremblay and Eikland saved his life but did tell people he was grateful for the help they gave him when he got out of the hospital.

On cross-examination by Eikland, the Complainant agreed that Tremblay dealt with issues that came up in the workplace when they came up. He reiterated that he did not remember the month or the time that he told Eikland that he had been sexually abused as a child. When asked why he stayed so long if incidents kept happening every day, the

Complainant said he felt trapped because Tremblay had a tendency to pull a “guilt trip” on him about living there for free and the things she did for him. He said that when he left, he did not feel guilty to leave. He never saw Tremblay put a guilt trip on any other staff.

When asked if he remembered Eikland checking on him in the night out of concern for his welfare, the Complainant said he actually thought it was rude to be checked on at 3:00 a.m. He did agree that the prescriptions he was taking were prescribed to be taken without alcohol.

The Complainant has never sought help for the sexual abuse he suffered when young and said he did not think it would help him to do so. Asked if he had picked up steel bar and threatened Eikland while he was working in the garage, the Complainant said it was not like that, “You were the one holding the bar”. When asked if he remembered mimicking kicking and punching motions, the Complainant said that he did not and was not able to do so.

The Complainant said that before he got injured his relationship with Eikland was good and that he thought Tremblay was fair as an employer at first but not later because she was not doing anything about Eikland pulling down his pants. When asked why he did not go elsewhere for help, he said he was going to go to the RCMP and that was when it stopped.

Questioned on the discrepancy between the complaint alleging incidents occurred from May to September 2014, and his evidence that December 2013 was the first time, he said he had tried to make that correction and had told Commission counsel it was an error, it should be December 2013 to September 2014.

On redirect by Commission Counsel, the Complainant said he never mixed medication and alcohol and was no longer on medication when he went back to work.

Russell Carl Nelson

Nelson lives in Destruction Bay and is 58 years old. He has been in Destruction Bay for five or six years. He moved there from Alberta when he bought a mine in the area. Nelson

knows the Complainant from the Burwash Landing Resort as well from the Talbot Arm Motel. He said however that they are not so close that they text each other or phone or anything like that.

Nelson was working at the Motel cutting firewood and things but he does not know the dates. His recollection is that the Complainant spent most of his time in his room and that he assumes it would have been in 2014. Nelson would have been cutting firewood and doing odd jobs but not anywhere near the kitchen or anything like that. He was working for Tremblay but not on a paid basis. It was basically for his room and that was the agreement. He gave them the use of his skid steer and worked at the Motel.

Nelson said he did not know how the banter between the Complainant and Eikland started but it was something that was going on verbally between those two. Nelson said it was a weird situation where the Complainant would be pacing around and stuff but he cannot remember the commentary it was such a long time ago.

Nelson said he saw Eikland pulling the Complainant's pants down twice and that they were sweatpants. Nelson said those incidents happened in the kitchen of the Motel restaurant and he was sure there were other people there but he has no idea who. Nelson said the Complainant was definitely really upset. Nelson said the Complainant was trying to do his work and Eikland was running around like a nine-year-old kid pulling somebody's pants down. Nelson could tell by the Complainant's demeanour that he was upset.

Nelson thought the Complainant was voicing his concerns to Nelson and had told him about what he had undergone in his childhood and what happened to him then. Nelson would hear these concerns from the Complainant quite often if he was out back having a smoke when he would be stewing about it.

On cross-examination by Tremblay, Nelson did not remember which waitress was working that day but did remember being very friendly with the waitresses. He also remembered Dennis Guthrie being there daily and said that Tremblay was mostly in the office.

Asked about an incident when he was getting a key for the showers, Nelson acknowledged having said he was going to exfoliate and “scrub vigorously”. He denied that the comments he made to or about Jeff Flumerfelt were sexual comments. He said he did absolutely remember that Tremblay pulled him aside in the office and told him that if he continued with that kind of language he would not be welcome from that moment on at the Motel. Nelson said he never did discuss anything like that again.

Asked if he held a grudge against Eikland, Nelson said he thought Eikland did some inappropriate things to him and did some things that were way out of line as he thought Tremblay knew. He did remember Eikland trying to train him on the jobs he was doing. He did remember that Tremblay was always around the Motel although usually in the office.

On cross-examination by Eikland, Nelson agreed that he stayed in Eikland and Tremblay’s house for about two years and did not pay rent and that he agreed to exchange work for the arrangement including providing the use of his skid steer for snow removal and firewood and so on. Asked if he recalled taking offence to being instructed by Eikland on how to do the work in a safer and more efficient manner, Nelson replied “probably, sure”. When asked if he recalled heated discussions about the Bobcat, Nelson replied yes, you definitely wanted your logs done in a specific way so as not to tear the ground up.

Nelson recalled the staff table where Eikland and he usually sat and said he usually sat at the other end from Eikland with his back to the window. Nelson said he could see the coffee machine and some parts of the interior of the restaurant from where he was sitting.

Asked about how his relationship with Eikland was after he moved, Nelson said he was still helping out. Nelson said that when he moved out he cleaned the carpet and left it clean.

Tyson Wirth

Wirth is 43 years old and lives in Haines Junction, Yukon. He has lived there since 1982 when his family moved up except for probably about six years when he was down south.

Wirth has known the Complainant for six years and worked with him for a number of years. He said they were pretty tight and that the Complainant spends Christmas with them sometimes. Wirth said he grew up with Eikland and was also pretty tight with him.

Wirth worked at the Motel at about the same time as the Complainant doing renovations and so on for Eikland: helping with levelling the building, doing renovations, odd jobs, and a job at the dump as well.

Wirth said he would see the Complainant when he came in for lunch and that Eikland would joke around with his employees including with Wirth and with the Complainant too in the same kind of way. Wirth said that one time Eikland snuck up behind the Complainant and gave him a tug on his pants. On that occasion Wirth was sitting with Eikland for lunch at a table and the Complainant may have brought out the lunch. Wirth was facing the kitchen, the Complainant came out wearing jogging pants and either a smock or a shirt. Wirth did not recall how far his pants came down. The Complainant said “fuck off” or something and walked back to the kitchen holding his pants.

Wirth was told by the Complainant that it brought back memories for him of being abused as a child. Wirth said the Complainant talked to him a few times about it and was upset. Wirth said that the Complainant is pretty intense and wears his feelings on his sleeve.

Wirth recalled one time on the job when the Complainant said to Eikland that, if you do that again, I will club you out. Wirth did not recall seeing how that incident started but said that the Complainant threw the wood down and left.

On cross-examination by Eikland, Wirth was asked if it was in fact a steel bar that the Complainant was holding Wirth said he thought it was a piece of wood but it was a long time ago so he could be wrong.

Asked about the day in the restaurant when he saw the pants-pulling incident involving Eikland and the Complainant, whether he recalled giving the Complainant a “titty twister” or pinching his nipples from behind, Wirth responded that he did not recall but said that he might have and has done that before. Wirth said when he does that the Complainant either slaps his hand or tells him to “fuck off” and pushes his hand away. Wirth said he

was just playing around and would not do that to be serious. Wirth said that the Complainant joked about it and once in a while might get him back.

Asked if he recalled the Complainant taking swings at Eikland in a Kung Fu style, Wirth said he did not really remember but acknowledged that once in a while the Complainant will do that one-half karate chop.

Asked about the pants incident he witnessed, Wirth said it was a downward pull on his pants and he did not recall it going all the way down, it was just a one-handed pull.

Karim Keloua

Keloua is 46 years old and lives in Champagne, Yukon. He has lived in the Yukon on and off with the longest period being for eight months at a time. He was a co-worker with the Complainant in May of 2014 when they worked together at the Motel. Tremblay was the supervisor as was Eikland.

Keloua was hired as a cook but ended up being a helper working in the kitchen: baking, making sandwiches and doing a variety of shifts. He mostly did closing shift from 3:00 to 10:30 p.m. He could not remember how often he worked with the Complainant but said he worked with him enough and that he also crossed paths with the Complainant. He said the Complainant was a good worker and was not there to joke around or whatever. He said the Motel was a busy place.

Keloua said Eikland lived there too and was always around, having lunch and dinner there, and was very friendly with staff. Keloua saw the Complainant and Eikland joking around. He said Eikland used to pull the Complainant's pants down for a joke. Keloua said he thought it was a joke and he saw this quite a few times: four or five times. Eikland would come behind the Complainant in the kitchen and pull his pants down and he saw it until he did not want to see it anymore really.

Keloua said that in his background he was used to joking like that. Keloua was not sure what the Complainant was wearing during these incidents but guessed it was probably his chef jacket and chef pants and also said there were other people around such as

waitresses who would have seen the incidents. Also friends of Eikland might have been present.

Keloua said that at first he thought it was a joke but then he remembers one time he saw that the Complainant's eyes were popping and he was holding a knife and almost ran after Eikland with the knife. It was clear to Keloua then that the Complainant did not like that, and then he would be cursing about it. Keloua said that the Complainant built up an attitude and ended up throwing it at Keloua. Keloua said that when the Complainant reacted, Eikland would run away outside laughing.

Keloua said he was fired from the Motel and was really surprised by being fired as he thought he had been promised a bonus at the end of the season but instead was fired.

Keloua said that he later met Tremblay in Superstore and asked her if she was using her money or the money she stole from him.

On cross-examination by Tremblay, Keloua agreed he was hired as a cook and had told Tremblay he was an excellent cook. Keloua said he is still an excellent cook. Keloua agreed that he became an all-around helper because in Tremblay's head she thought he could not cook.

Keloua agreed that the orders did get backed up and recalled there being six or seven or eight orders there and that Shane Ellis used to help because the orders were getting behind.

Keloua said that Tremblay had told him that he could not get a raise but would be given a bonus at the end of the season. He said he was very happy and excited and killed himself working for her.

When asked if he was disgruntled when he left the Motel, Keloua said he was "in shock" when he was told by Tremblay that he was fired.

When asked about his disagreement with the Complainant, Keloua agreed that the Complainant was very upset but did not recall him with a knife. He said the Complainant was upset because Keloua was using all his ovens and all his cooking spots and was in

his way when he had to roast his beef for a long time. Keloua repeated that he recalled the Complainant having a knife when Charlie pulled his pants down and he was running after him. Keloua said he wished he had never seen this but he was there. He said he is not a liar, just a baker and a cook.

After he was fired from the Motel, Keloua went to work in Otter Falls for a couple of days as a cook. However he found it too far to go there from Champagne every day so he quit.

Respondents' witnesses:

Suzanne Tremblay

Tremblay and Eikland took over the Motel in 2012, it was a pretty chaotic place then and they did not want to let anyone go and did not want to be like bullies. She said they have their whole lives invested in this business and that she has related experience of 30 years in the business including training in conflict resolution and management. They went in there in good faith and she tried to run the place as best she could but it was difficult: it was a big party place and some people came to work drunk. Little by little as people left, she was able to be firm and clear on her expectations of staff.

When the Complainant came to her, Burwash Lodge was shutting down and he was going to be out of a job and a place to live so she offered him work. The Complainant began working at the Motel part-time in 2013 and then later full time. That day he went to Burwash and rolled his car he never returned. Tremblay went into Whitehorse to visit him in hospital and found that he was in and out of consciousness. She brought him some clothes and then he was medivaced to Vancouver. When he came back to Whitehorse he had nowhere to live when he was released from hospital. Eikland and Tremblay talked about it and did what they thought was the best thing to do which was help someone in need. So the Complainant came back to live at the lodge and he was heavily medicated plus he was drinking a lot of alcohol on top of all those prescription drugs.

At Christmas of 2013, they had the whole Eikland clan for Christmas dinner and invited the Complainant to join them. Russell Nelson was also there and everyone seemed fine until just after Christmas.

They then had to take the Complainant into the hospital in Whitehorse twice. One time the neighbour phoned Tremblay and told her the Complainant was in bad shape so she came down and took care of him. The Complainant asked her to drive him and she did so and took him into Whitehorse and charged him no money. On the way in he was hallucinating. He was kept in the hospital in Whitehorse until he was better and then sent back.

Eikland built a lean-to for the Complainant to help him sleep and would also check on him at night as a caring gesture.

The Complainant would come in and buy beer every day. He was loaned money by Tremblay and owed her about \$3,000 until he started receiving disability payments from then on. After he came back to work on light duty he was able to repay Tremblay the \$3,000 he owed her. Tremblay many times heard the Complainant telling people how they had saved his life.

From what she remembers the bantering between Eikland and the Complainant began after he came back to work.

It was mid-May or June 2014 that the Complainant was back to work full-time.

Keloua started working as a cook and guaranteed Tremblay he would be great. However it was a disaster. He could not handle more than one order at a time as a line cook. One afternoon Tremblay came in and saw 15 orders backed up and he was only working on one order. The Complainant came to buy some beer and Tremblay was cooking so the Complainant was also persuaded to help. He helped out for a couple of hours while Keloua was running around all over the place. Keloua was getting paid the same wage as a cook. He had previously wanted a three-dollar raise and Tremblay had told him she could not give him more money than everyone else but said that if he stayed until the end of season he might get a raise. Tremblay demoted Keloua to prep cook but at the same pay, however he insisted he wanted to bake. The priority was still not baking but the prep list as he was told.

The Complainant complained to Tremblay that Keloua was not even doing the prep. Keloua liked to go party in Burwash and Tremblay decided to let him go.

Tremblay said that the bantering between Eikland and the Complainant did not happen as was testified to by the Complainant but probably started around April. It consisted of name-calling that she found very annoying. Tremblay said that Guthrie was also annoyed by the bantering and told her so. She agreed and firmly told Eikland that it had to stop right now and it did. Eikland did stop but the Complainant kept going. Tremblay kept telling the Complainant to stop but he kept at it. Tremblay said the Complainant has a problem with being told what to do.

She does not push people around but the Complainant's attitude became a problem. For example he liked to park in front of the handicap ramp even though he was told not to and was assigned a spot with a plug-in.

Tremblay was adamant that she never witnessed pants-tugging and said she doubted Nelson did so either. She said Nelson could not have seen Eikland pull the Complainant's pants down from the chairs in the restaurant. She introduced photos of the interior of the restaurant as an exhibit.

Tremblay said she is always around and her office is very small so when Guthrie was working doing the accounts, she was out of the office. She is there 16 hours a day, seven days a week.

Tremblay said that for her to have never seen anything of all these pants-pulling incidents was impossible. She also felt it was impossible for Nelson to have seen the pants-pulling in the kitchen. In addition, if she had heard of any type of screaming she would have been on it immediately. So she doubts Keloua's evidence in that regard.

Keloua told Tremblay that he could not work with the Complainant because he was crazy so she spoke to the Complainant about his outbursts of rage and told him that he had to calm down and work with people. Tremblay also switched shifts for Keloua to the closing shift because Keloua and the Complainant were fighting and hated each other.

In mid-November to mid-December 2014, there was an engineer and crew staying with them who wanted to have sandwiches made but the Complainant insisted they had to be pre-ordered the night before.

Even though in winter sometimes there were no orders, Tremblay does not lay anyone off if she can help it. The staff has lots of down time but she expects the kitchen to be cleaned and the Complainant does not like to clean so he did not clean.

The morning that the Complainant gave his notice Tremblay walked in about 6:30 or 7:00 a.m. and the Complainant came out of the cooler, obviously hungover. He stank of booze and cigarettes. He told Tremblay she was fucking lucky he did not give notice sooner and gave her notice for May. Tremblay then hand-delivered him a letter saying he was fired and giving him two weeks' notice but telling him he could reapply in May. The next day she said he showed up to work clean and sober and all bubbly but after two weeks were up she told him he had to leave and he had had fair notice.

Tremblay said she does not believe in guilt and never rubbed in the Complainant's face that they helped him. She also said she had never heard about his having been sexually abused as a child but she was sorry for him and his issues which felt to her like he was angry.

Tremblay said she has a great team working there now. Everyone is serious workers. In the past it would have been impossible for her to leave the Motel to come into Whitehorse for a week.

Tremblay described how Nelson took offence when Eikland and Guthrie were trying to explain to him that he was cutting wood wrong, and it was not safe if the wood was too long, and not efficient if it was too short. She said Nelson thought he was being undermined. Tremblay allowed Nelson to stay there for free but told him they did not want to keep the house heated in the winter by oil, so they just asked him to keep the house warm with wood. However his bill for oil was \$750 for the last month and so she charged him for that. Then his attitude totally changed.

Tremblay said Nelson left the house covered in dog poop and it smelled awful and they had to rip the carpet out and renovate the downstairs after he moved out. However she said he kept coming to the Motel and there was an incident involving Jeffery Flumerfelt. Tremblay spoke to Flumerfelt the next day about it and about what had been said by Nelson to him and he laughed it off but did say it was a little weird. Tremblay then spoke to Nelson about his making Flumerfelt uncomfortable and said to Nelson that he should not bother coming around if he was going to talk like that to her staff.

Tremblay described generally how it was a huge battle for her dealing with staff over the past few years and took years out of her and said all of the staff problems she encountered were related to alcohol.

The previous owner of the Motel would only go there one or two days a week and there was a lot of mismanagement and things going missing and drinking, etcetera, and that's what Tremblay said she inherited when they took over the Motel.

Tremblay also described the problem they had with the Complainant filling the campground garbage containers with beer bottles and cans because it was easier for him than to put them in the recycling bins, although he was asked more than once not to do so.

Tremblay did not remember how many days the Complainant and Keloua worked together.

On cross-examination by Commission counsel, Tremblay described how she did the purchasing, the shopping, helped the housekeepers cleaning the rooms, doing the laundry, emptying ashtrays, helping the servers, helping in the bar, helping in the kitchen, hiring, answering phones, doing bills and banking, communications, emails and phone calls. She said she does everything and gets there anytime between 6:30 and 7:30 a.m. She said she now has 18 people working there full-time so it is a very complex business with Guthrie being mostly in the office but right now when he is on holidays she is mostly in the office. Tremblay said she spends a lot of time running around helping people. She said the Complainant's attitude when he started was fine and there were no problems but

that things started to change when some of the old staff started to become disgruntled. It was like other people's words were coming out of his mouth. Tremblay said that Eikland likes to joke around with staff but she does not know if he pulls pranks on them and has never witnessed anything by way of reaction other than that Eikland is a great guy. She said she has never seen anything physical and that she told Eikland to stop the verbal bantering that was going on with the Complainant. She felt they were both taking pleasure in it but that they were going too far so she did stop Eikland and she tried to stop the Complainant.

She said Guthrie came to her about both of their behaviours and others including Tyson Wirth but she never saw any attempts by Eikland to try to pull down the Complainant's pants or to tug on his pants. She did not know about it until after it happened, like two years later. Tremblay said she has seen the Complainant doing Kung Fu moves and things like that. She reiterated that she never saw Eikland try to pull down the Complainant's pants or tug on his pants and said that she only found out about these allegations after the complaint was received.

Tremblay said that generally the Complainant does not take direction whatsoever and is insubordinate.

John Kooy

Kooy is a survey and project manager and was working in Burwash Landing and staying at the Motel from November to Christmas of 2014 with his crew. He said there was another crew staying there as well at that time but otherwise the lodge was quiet, just his crew of two people, and the other crew of three and that was about it. He would come into the dining room twice a day, in the morning and at night.

He would order box lunches for the day but there was an issue that arose about ordering them the night before. It seemed like they had to order the night before which was a hassle and so the other crew would order off the menu to avoid that. At one point Kooy bought supplies himself so as to make his own sandwiches for his crew in his room. His reaction was to wonder who was telling the owners what to do there.

While a customer at the Motel he never saw Eikland pull down the cook's pants, or accost any staff.

Rodney Snow

Snow testified by telephone from the Motel where he still works. He started working at the Motel in 2013 as a seasonal worker and maintenance man and worked the day shift, Monday to Friday, 8:00 a.m. to 4:00 p.m.

He would come into the Motel quite often, about 10 or 12 times a day. He would be in the lodge also on his days off as he lived on the property. He would come in for breakfast and lunch and sometimes dinner but he never saw Eikland ever harass anyone. Snow said the Motel is the best place he has ever worked and that Tremblay is a good manager and that Eikland is a good person to work with.

Beverly St. Marie

St. Marie used to work at the Otter Falls Cutoff restaurant but resigned last October of 2017. While there she had hired Keloua when he asked to be tried out for his baking but Otter Falls does not carry a lot of baking. She said his baking skills were really good but not his other cooking, he was not very versatile. She said Keloua told her he was a good cook but a fantastic baker. Keloua was only there for three or four days. She said it was so long ago she's not sure if she let him go but it was mutually agreed on and he was not let go on bad terms or anything. She said he was living in Champagne and it might have been that he did not have rides to get to work. She would not have hired him as a cook.

Shane Ellis

Ellis worked at the Motel but is no longer there and has not been there for three years. While he was there the Complainant was there too and Ellis worked as a bartender and on Front Desk purchases and helping out in the bar and restaurant, from 3:00 to 11:00 p.m., five nights a week.

Ellis had interaction with the Complainant during the evening shift when the Complainant would purchase off-sales alcohol and cigarettes. Generally he would buy a six or 15 pack of beer. Ellis was not aware of what medications he might have been on.

Ellis said the working conditions were positive for the most part and he had no problems with the workforce. Ellis said that the Complainant made the best pancakes he has ever had and that the relations among the workers were friendly and also with Eikland and that he was not aware of any conflicts between Eikland and the Complainant. He never witnessed Eikland pulling down or attempting to pull down the Complainant's pants. Ellis did remember a conversation with the Complainant about his gratitude for being housed and fed by Eikland and Tremblay.

Eikland, Eikland's father, the Complainant, Nelson, and Ellis would have a social morning gathering, they were all friends and Ellis knew there was teasing going on but it was good-hearted with lots of laughs back and forth. The Complainant would poke fun at them too.

Ellis remembers Keloua being hired to be a line cook and being moved to being a kitchen helper because he could not keep up and the Complainant helped him out. He remembers also Keloua working as a prep cook and saying he was a baker. Ellis saw Keloua and Nelson after he left the Motel but they never said anything about harassment. Nelson and Eikland were pretty cordial and he never ever saw a problem with them although he saw them daily.

Ellis would consider going back to work at the Motel if the opportunity arose.

Ellis agreed that alcohol consumption was an issue that was pretty typical of remote places he has worked and not unique to the Motel and said there was a lot of discussion about limiting the amount of alcohol consumed.

On cross-examination by Commission Counsel, Ellis said he worked from 3:00 to 11:00 p.m. and was in the Motel restaurant for maybe 45 to 60 minutes for breakfast. He said the teasing during breakfast meetings was pretty verbal and they were all victims of Eikland's humour from time to time.

On cross-examination by the Complainant, he was asked if he remembered one night Eikland came behind the Complainant and pulled on his pants. Ellis said he did not remember that happening but also said that the Complainant is hypersensitive because of things that have happened in his life. He volunteered his opinion that in a group of adults we should all get along. He said Eikland is a joker and a fun guy to be around but maybe sometimes we do not take into account the hypersensitivity of our friends.

Charles Eikland

Eikland said he was the Chief of the White River First Nation up until May 2014 so he was not around the Motel very much. He said the Complainant has adjusted the dates of his complaint to December 2013 but that he was still Chief before May of 2014 and so was in Beaver Creek for the most part.

Eikland was born in Whitehorse, grew up in Destruction Bay, and went to high school in Haines Junction. He worked for Highways from when he was 16 and did carpentry school "outside" when he was 21 and 22 years old. He worked as a contractor for much of his life as a self-employed person and usually had employees. His employees included students, men, women and challenged people. He never had any problems or issues arising from those relationships. He joined the Rangers in 1998 and is a Sergeant for the Beaver Creek Patrol of the Rangers in which capacity he is often responsible for vulnerable persons and as many as 15 Rangers. He has a Vulnerable Persons Clearance Certificate which is more than a regular criminal records check and also has military security clearance.

Eikland said he has worked for himself for most of his life and when the opportunity to take over the Motel came up it was special as his father still lived in the area and he had grown up there. He and Tremblay decided to buy the Motel after talking to the previous owner about it. Eikland had worked at the Motel as a teenager for the previous owner. Tremblay had plenty of related experience and he had building and maintenance experience. His duties were mostly outside and often after the restaurant's closing time so he is a bit of a late starter.

He said it is usually 10:00 a.m. by the time he has breakfast and then he is out doing his thing around the building with different people working for them. Eikland described the opportunities he had as Chief to help people and the challenge he took on spending almost \$25,000 to take a case to Federal Court over the issue of membership in the First Nation and changing the constitution. He said he did that to help people and did not get reimbursed. His desire to help people when he was Chief rolled over into his job at the Motel where people were not necessarily as well-positioned in life, and had challenges. Eikland said they extended help to many people and one of them was the Complainant.

He said he has never had a problem over the years with any of the people he has worked with.

Eikland said however that Nelson was one of the worst guys he ever had to work with and pretty much all the issues he had with him were trying to teach him how to work safer but he took it as being belittled. Eikland described the disagreement he had with Nelson over how he was piling wood and how it should be safely done and how that led to the degradation of their relationship to the point that they were not even on speaking terms. He described his disagreements with Nelson over how he cut trees unsafely and over paying for the oil he had used instead of wood. Eikland said that even to this day Nelson does not speak to them and that he left the house finally in a terrible mess which meant that the carpets had to be cleaned.

Eikland said that he grew up around Tyson Wirth although he is quite a few years younger and that he is much closer to Tyson's older brother Adrian. He said they all grew up in the area together.

Eikland said as someone who grew up with a good childhood, he feels sorry for the Complainant and that he cannot imagine what it would be like going through what the Complainant did. Eikland said however that the Complainant never told him anything about it at the time that he was working there.

Eikland said that they helped the Complainant at a time that he was down but that does not seem to matter and that now they are down and getting kicked on top of the betrayal.

Eikland talked about having lost his brother a year and a half ago and trying to help deal with that while instead getting dragged through the mud by the Commission. He has been seeing a doctor and a counsellor and he is on the waiting list to get some higher-level help to deal with the loss of his brother.

Eikland enjoys working around the Motel and does a variety of jobs there and it is almost like their home.

He described the day he was in the garage by himself and the Complainant kept parking where he was not supposed to again, kind of like a joke. Eikland told the Complainant to move his car or he would move it with a Bobcat. The Complainant swore at him and picked up a tire iron and said "don't you effing dare", three or four steps from him. It was then that Tyson Wirth came walking up from outside and just happened to see the tire iron. He said then the Complainant put the bar down, left and nothing more was said.

About the incident in the restaurant seen by Wirth, Eikland said that Wirth had grabbed the Complainant's nipples and pinched them, and then the Complainant turned around and Eikland jerked on his waistband as he turned around. The Complainant said "fuck you ha ha!".

He said they had tried hard to help the Complainant and that he thought the Complainant should get some help to get him past those things he is dealing with as issues. He said he never realized how much mental health can affect someone until now.

Eikland said he is not a bad person and not a mean person and doesn't purposely hurt anyone and in fact does the opposite, he tries to help people. He gave examples of people that they are trying to help, such as an employee who has to serve time in jail on the weekends or people who have alcohol problems.

Eikland referred to the photos entered as an exhibit and said they showed there was no way you could see into the kitchen from where he and Nelson were sitting. Eikland said that he had never pulled the Complainant's pants down other than that one tug.

On cross-examination by Commission Counsel, he elaborated on how the campground garbage was being continuously refilled with Budweiser 15 packages so there was no room for campers to put their garbage. Eikland said they ended up having to move the garbage bin so the Complainant would put his empties in the proper place.

He agreed that once in a while they joke around with employees but said it was not quite a bit and often the employee is joking too.

Eikland described bantering as including the use of nicknames that are not abusive and not ridiculing and said that it is a form of play to some degree but that maybe it should not happen. Again however, he said that when you are living and working together in a place, it is almost like its own family. You think you know people quite well, you see them daily inside and outside.

Eikland acknowledged that possibly the bantering should not happen but said that he did not pick on anyone and was just a happy guy and if he is teased he will tease back.

Asked if it was inappropriate for him to tug on the Complainant's pants, he said at the moment he did not think it was inappropriate at that time or place. He also said that he did not think that the Complainant was playing up his injury and knew that he was seriously hurt and that he was going through pretty serious stuff. He said however that he was not acting hurt when Eikland tugged on his pants. He said that if someone can come up and fake punches he is not hurt enough to be immobile.

Eikland elaborated that he did not think that the Complainant was lying about his injuries but that he also may not have been totally forthcoming in his complaint about his degree of recovery at the time of the incident when his pants were tugged on by Eikland. He agreed that tugging and pulling have similar meanings.

Eikland said he did not think that Tremblay even knew about it until the complaint came up and that she had mainly talked to him about that wordplay with the Complainant.

Eikland said that the Complainant has an intense personality but was laughing after his pants were tugged upon.

Eikland recalled Guthrie having said that there was too much joking around by you guys and did not remember what he said in response but did remember that he changed his behaviour when Tremblay told him “enough is enough you guys” and that is when it stopped on his part.

Generally Tremblay was the one who dealt with the staff.

On cross-examination by the Complainant, Eikland was reminded that the Complainant’s blue Toyota 4 Runner had a licence plate taken from it which related to his parking concerns.

In redirect, Eikland clarified that although he and Tremblay are co-owners of the Motel, Tremblay was the direct supervisor of the employees including the Complainant. He also clarified that if he had thought the Complainant did not take the bantering in fun, it would have stopped.

Dennis Guthrie

Guthrie is the assistant manager at the Motel and does financial records and things like time sheets. He is there from 7:00 a.m. to 3:00 p.m. except he leaves at 1:30 p.m. on Wednesdays and Fridays.

He said the teasing going back and forth included Eikland and that he mentioned a few times that he thought it was going overboard. For sure he talked to the Complainant about it. He thought it was a bit much for being done in public. The Complainant told him it was all in fun and not to worry about it. The Complainant never mentioned anything other than teasing and he never saw Eikland pull down the Complainant’s pants.

He has worked at the Motel for about 31 years.

On cross-examination by Commission Counsel, Guthrie elaborated on his duties which are mostly financial and also office duties. He said he goes back and forth between the Front Desk and the office and sometimes does some maintenance jobs too.

He said he spoke to Tremblay for sure about the joking going on and that he regarded Tremblay and Eikland as his bosses. He felt the name-calling was inappropriate for a business situation and that it was back and forth and Nelson was also involved. He told Tremblay the joking was getting out of hand and should be controlled.

Kimberly Lowes

Lowes had worked at the lodge in Burwash Landing with the Complainant and worked at the Motel in Destruction Bay from Thanksgiving 2014 to February 28, 2015, as a waitress working probably three days and two nights on a combination of shifts. She remembers that it was very quiet that December and that there was a surveying crew staying there and coming in for breakfast every day who requested lunches.

The Complainant was asked to prepare the sandwiches but he got very upset as he thought they should have ordered them the night before but he said he would make them that day. The men were told and they said to forget it.

The Complainant said he was going to tell Tremblay he was leaving in the middle of May. She saw the Complainant very upset talking to Tremblay and walked out as she did not want to hear what was going on between Tremblay and the Complainant.

In the time she was working at the Motel it was very cordial and everyone seemed to get along very well. She said "of course" she never saw Eikland pull down the Complainant's pants.

She was told by the Complainant that Tremblay had saved his life, she said that the Complainant told her "that you guys took him in after he had an accident and could not work" and gave him a place to live while he was recovering from his injuries and that you took him into the hospital.

During the five months she and her husband worked at the Motel they found it a good and respectful place to work.

Victor Sembsmoen

Sembsmoen retired March 29 after 34 years working for Highways. He was the supervisor of the Highways camp at Destruction Bay and lived there. He has known Eikland for 34 years and worked with him off and on over the past 20 years. He also worked for Eikland part-time doing carpentry, welding, and equipment work.

He has never witnessed any harassment by Eikland.

At the Motel he helped do renovations, firewood, and maintenance and would come into the Motel restaurant for lunch. Also, when he was in Highways he would come in two or three times a week for lunches. He never saw Eikland harass staff or pull down the Complainant's pants.

On cross-examination by Commission Counsel, he elaborated that it was from November 2013 to last March 29th that he would come in two or three times a week or quite often and would have lunch as well as other meals. He would take lunch over half an hour or an hour and then go back to the Highways yard.

Gail Mercer

Mercer has been working at the Motel since 2013 and testified by telephone from the Motel.

She is the housekeeper and works five days a week from 8:00 a.m. to 4:00 p.m., Monday through Friday, which has been her schedule for five years unless it is really busy when she will do other work as well. She orders her own breakfast and lunch in the kitchen and comes in on her days off for breakfast and sometimes for lunch and coffee. She comes in through the kitchen as that is the shorter way to come to the restaurant. She knew the Complainant when he was there working.

She remembers the Complainant coming out very upset because he was making blueberry pancakes and poached eggs and not wanting to make those "effing things". She was surprised at this reaction and she sometimes saw him quite angry.

Mercer said the Motel is a good place to work and a respectful environment.

She has witnessed the Complainant holding his ribs laughing in his interactions with Eikland but never saw Eikland try to pull down the Complainant's pants. She says the Complainant was treated good and looked after, after his accident when Eikland and Tremblay took really good care of him. She also never heard of Eikland pulling down the Complainant's pants.

On cross-examination by Commission counsel, Mercer elaborated on her duties of cleaning staff and public washrooms and rooms, doing laundry and so on. She does not remember the exact date of the incident with the pancakes but it would have been in the summer because she is only there seasonally, from February or March to September every year.

Mercer was recalled later by the Respondents to say that when Nelson moved out everything was disgusting, it took a full day to clean the house.

Charles Eikland Sr.

Eikland Sr. is the father of the personal Respondent and has lived in Destruction Bay for more than 45 years. He goes down to the Motel every day at least twice and has coffee there or helps with fixing things. He has never seen Eikland harass or pull down the Complainant's pants.

David Dubois

Dubois lives in Burwash Landing and has worked for the bank and post office there for 11 years. He has lived in the area for 28 years. He has known the Complainant since he has moved to the Yukon.

He goes to the Motel two or three times a week for an hour or so to visit with Tremblay and Eikland. He has always liked the Complainant. They are from the same area of the country and they would talk in general.

After the Complainant left the Motel, he had conversations with him. They would sit and talk and the Complainant told him how angry he was with the situation and how he was determined that they were going to pay. The Complainant would be drinking the whole

time he was there for hours. One time the Complainant said that if he did not get his \$30,000 he would blow up everyone at the Motel. Dubois thought it was the ravings of a drunk and let it go, but later told Tremblay and went to the police and told them what was said.

Dubois is a reformed alcoholic who has been straight for 38 years after going to AA and to an alcohol therapy centre. He knows what addictions are about and said that the Complainant never does not drink.

He never saw Eikland taking down the Complainant's pants and only heard about it from the Complainant when he was working next door to the Motel, at the Destruction Bay lodge.

Right after his accident the Complainant was in really bad shape and was still drinking alcohol although all crippled up. Dubois thought Tremblay did way too much for the Complainant after the accident, helping him with the insurance, taking him to see the nurse, and so on.

Wendy Martin

Martin testified by telephone from the Kluane Museum in Burwash Landing where she lives.

She worked with the Complainant a few times at the Burwash Lodge. There was no safe in the office, just a closet with a lockbox with a padlock and key. The key was hanging in the office somewhere and you could get access to it. She does not recall giving the Complainant money from it but would only have done so with Helen and Ulrich Wirths' approval.

Jeff Flumerfelt

Flumerfelt testified by phone from North Bay, Ontario. He worked at the Motel from April 24, 2014 when he was 21 years old until he left in September of 2016. He worked as a cashier, on the Front Desk, getting gas, selling off-sales, and as a bartender. He knew the Complainant and worked with him there for about two years. He usually worked 3:00

to 11:00 p.m. but did some day shifts, sometimes as a server in the restaurant when the Complainant was cooking. While he was working on off-sales, the Complainant would purchase two to three six-packs of beer a day.

Flumerfelt never saw Eikland pull the Complainant's pants down.

He recalled an incident when Russell Nelson said he would try not to think of me while rubbing himself vigorously in the shower. At first Flumerfelt did not think anything of it but then the next day when Tremblay asked him how he felt about it he thought he was uncomfortable and that Nelson had crossed the line. It never happened again after they spoke about it.

Reply Witnesses:

Russell Nelson (recalled in reply by the Commission)

Nelson was shown the photographs that had been entered of the restaurant interior. He confirmed that from where he was sitting he could see into the kitchen and that the exhibit showed where he was sitting for the second incident, when he saw the Complainant taking a pot of something over to the sink when Eikland came up behind him.

Peter Budge (recalled in reply by the Commission)

The Complainant put in a Patient Medical History Report dated December 1st, 2013 to May 31st, 2014 with his prescriptions and identified the painkillers he was taking at that time. The Complainant said he did not drink while on prescriptions and may have had a beer at Christmas but does not remember having more than one or two beers at Christmas.

He had contact with the police after he worked at the Motel but no charges were laid. He denied saying he would commit violence as described by Dubois.

Ulrich Wirth (called in reply by the Complainant)

Ulrich Wirth was the owner of the Burwash Landing Lodge and he testified by telephone from Burwash Landing. He recalled leaving Wendy Martin in charge of the office while he

was away from the Lodge and telling her that if the Complainant needed money, she could give him money. The Complainant had no access to the locked cabinet where the money was kept. The key was in Wendy Martin's possession. He was not aware of any money going missing. He sold the Lodge in 2013.

V. Findings of Fact

In determining the facts, the Board has to consider the widely differing versions of events it has heard from some witnesses and to address the issue of credibility. Factors to be taken into account for assessment of credibility of witnesses include demeanour, power of observation, probability, memory and consistency. The task involved was well described by the B.C. Court of Appeal in *Faryna v Chorny* [1952] 2DLR354 (quoted and relied on by the Ontario Human Rights Tribunal in *Smith v Menzies Chrysler*, 2009 HRTO 1936 at para 14):

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carries conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. *In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.* [Emphasis added.]

Findings regarding the Complainant:

After careful consideration of all the evidence, the Board finds much, but not all, of the Complainant's testimony to be credible. Although the Complainant testified with sincerity and conviction and appeared to honestly present his recollections of key events, his memory was poor and consistency was often lacking with respect to those events. In addition, the Complainant appeared to have a tendency to exaggerate his allegations to an extent that made them improbable and difficult to believe.

The Board agrees with the Respondents' submission that the number and frequency of pants-pulling incidents testified to by the Complainant strains credibility. The Complainant testified at the hearing that Eikland pulled down or attempted to pull down his pants just about every day from mid-December 2013 to September 7, 2014. This allegation is not

consistent with the evidence of other witnesses and is also inconsistent with his original complaint to the Commission in which he alleges an incident in January of 2013 and then others “repeatedly” from May to September of 2014. This timeline is also inconsistent with the complaint referred to the Panel of Adjudicators which states that Eikland “repeatedly pulled, or tried to pull down his pants from May until September 2014”.

Furthermore, the daily incidents testified to by the Complainant at the hearing are at odds with the testimony of other witnesses who never saw any such incident while working at or frequenting the Motel, and are not corroborated by the Commission’s witnesses who saw only two, or four or five, such incidents.

It is noteworthy that there was no mention of a 2013 incident either in the Complainant’s July 2015 complaint or in the Commission’s October 2016 referral of the complaint to the Panel. The Board therefore finds the evidence of the Complainant on this point is inconsistent and not credible. Accordingly, the Complainant’s testimony regarding daily incidents commencing in mid-December of 2013 is not accepted by the Board as proven on a balance of probabilities. However, the Board does accept that there were multiple (at least four or five) pants-pulling incidents commencing in May of 2014, despite the denial of Eikland that there was ever more than one.

The Complainant’s evidence that he suffered sexual abuse as a child was unchallenged and is accepted as true by the Board. His evidence that he told Eikland and Tremblay about his history of sexual abuse is however vague and unclear. He said that twice he sat at the staff table with Eikland and Tremblay and explained to them that he was abused as a child and did not like being touched. He also said that he explained to Eikland many times that he was abused as a child. He could not however remember the date or the month or the time of these conversations and the Board does not accept his evidence in this regard as proven on a balance of probability, given that it is uncorroborated and is strongly denied by both Eikland and Tremblay.

Findings regarding the Commission’s witnesses:

In addition to the Complainant, the Commission called Russell Nelson, Tyson Wirth and Karim Keloua. The Board finds the evidence of these witnesses to be generally credible,

and corroborative of the Complainant's evidence on the key issue of whether pants-pulling incidents did occur in the workplace. Despite the Respondents' attempts to challenge the credibility of Nelson and Keloua as being disgruntled ex-employees with an axe to grind, the Board found their testimony candid and not self-serving as well as being consistent with the nature of the incidents described by the Complainant. Nelson testified to having witnessed Eikland's pants-pulling conduct on two occasions, Keloua on four or five occasions, and Wirth on one occasion. The Board therefore finds that there is credible evidence of multiple incidents of Eikland's having pulled down or attempted to pull down the Complainant's pants in the workplace.

Findings regarding Respondents' witnesses:

Suzanne Tremblay

The Board finds Tremblay's evidence to be largely credible and uncontradicted. As the direct supervisor of the Motel's employees, the Board accepts she did her utmost to deal with employees fairly and as a responsible employer while running a busy highway lodge and working long hours on the premises daily.

The Board also accepts her evidence that she and Eikland went above and beyond in their care and compassion for the Complainant's welfare. The Board accepts her evidence that when she became aware of inappropriate banter going on involving Eikland, Nelson and the Complainant, she put a stop to it.

The Board accepts her evidence that she was unaware of and did not witness pants-pulling incidents described by the Complainant and other witnesses and that, if she had been aware, she would have put a stop to that too.

Charles Eikland

The Board accepts his evidence of his long history of dealing with people of various workplaces without ever having been accused of harassment. The Board also accepts his testimony that he finds the allegations distressing and unfair. Nevertheless, the Board finds that his evidence that there was only one pants-pulling incident and that it was of a minimal nature, is not credible, given the preponderance of evidence to the contrary.

Other witnesses for the Respondents:

The Board accepts that the preponderance of their evidence overall establishes that

- a) the Motel is generally a good and respectful place to work; and
- b) none of the witnesses ever saw or heard of pants-pulling incidents despite their frequency of working hours in, or visits to, the Motel; and
- c) Eikland is known for joking around with staff.

VI. Analysis and Decision

The task of the Board in deciding this case is not only to assess and reconcile the conflicting evidence but also to consider and apply the law governing this type of complaint. That law is as set out in the *Act* provisions previously quoted and also as has been developed by the courts in relevant case law.

The *Act* provides that no person shall harass any individual by reference to a prohibited ground of discrimination and defines “harass” as including engaging in a “course of vexatious conduct” that one “knows or ought reasonably to know is unwelcome”. It is discrimination to treat any individual unfavourably on a prohibited ground which includes “sex”.

The *Act* also provides that no person shall discriminate “in connection with any aspect of employment”.

The following four elements are therefore required in order for the Board to find the complaint in this case has been proven:

1. *a course of vexatious conduct;*
2. *a connection with employment;*
3. *conduct that one knows or ought reasonably to know is unwelcome; and*
4. *conduct that treats an individual unfavourably on the prohibited ground of sex.*

The onus is on the Complainant to establish each of these elements on a balance of probabilities in order for the Board to find that the individual Respondent has harassed the Complainant.

1. a course of vexatious conduct

The Federal Court in *Canada (Human Rights Commission) v Canada (Armed Forces)*, 1999 CanLII 18902, sets out relevant considerations for assessing sexually harassing conduct, stating as follows:

On the one hand, some forms of sexual harassment, such as physical assault, may be severe enough to constitute, in themselves, sexual harassment. Such incidents would, because of their gravity, immediately create a poisoned work environment. On the other hand, a crude sexual joke, although perhaps in poor taste, will not generally be enough to constitute sexual harassment and would rarely create a negative work environment.

I agree with the proportionality test proposed by M. Drapeau in *Le harcèlement sexuel au travail*:

[translation] The equation as to the harassing nature of the conduct is calculated according to the “inversely proportional” rule: the more serious the conduct and its consequences are, the less repetition is necessary; conversely, the less severe the conduct, the more persistence will have to be demonstrated.

The multiple instances established by the evidence, of the individual Respondent pulling down an employee’s pants in the workplace, is clearly a vexatious course of conduct within the meaning of the *Act* and case law.

See also *Aramark Canada Ltd v United Food and Commercial Workers Canada*, 2013 CanLii 90007 (ON LA) in which pants-pulling was found to be sexual harassment. In *Smith v. Menzies Chrysler*, 2009 HRTO 1936 at para 15, the Ontario Human Rights Tribunal stated that:

There is no basis in law for excluding sexually vexatious behaviour from *Code* protection simply because it occurs in a same-sex work setting or because some of the participants accept and/or even appear to enjoy it.

2. *a connection with employment*

The Complainant began work at the Motel in September 2013 and continued to be an employee of the Motel until December 2014. The conduct complained of took place in the workplace and the Board therefore finds it to be conduct occurring in connection with his employment.

3. *conduct that one knows or ought reasonably to know is unwelcome*

The *Aramark* case cited above is an Ontario grievance arbitration and not a human rights case. Nevertheless, it has factual similarities with the case before the Board. In that case, the workplace was a restaurant in which the grievor was a server and incidents of horseplay, pranks, name-calling and teasing were common in the workplace among the staff and used to relieve the “stress of working in a fast-paced restaurant/bar environment”.

The grievor was disciplined as a result of her conduct in pulling down the pants of a co-worker while in the restaurant and bar. The arbitrator found that by pulling down her co-worker’s pants in a public place, the grievor crossed the line from “horseplay” to “harassment”.

The grievor’s actions can only be construed as an attempt to belittle, demean and embarrass RW. Demeaning conduct which humiliates, embarrasses and which is an affront to the dignity of an employee is normally characterized as harassment, not horseplay. [at page 19]

In *Smith v Menzies Chrysler*, cited above, the Tribunal was dealing with a sexual harassment complaint that arose in what was apparently a workplace in which pranks and jokes of a locker-room type were frequent. The Tribunal stated:

Throughout their testimony, all of the respondents repeatedly stated that the impugned comments and conduct were a joke and that there was no intention to offend. I do not agree and if I did, I would not find this to be a defence...Even if I were to accept the respondents’ testimony that there was no intent to offend, this does not assist, because intention is not a prerequisite for determining whether or not behaviours amount to sexual harassment. [at par157]

In this case, there was evidence of bantering and horseplay taking place in the workplace including such conduct as “nipple-twisting” between the Complainant and Tyson Wirth.

Given these circumstances, it is quite possible that the Respondent Eikland did not know or did not fully appreciate that his conduct was unwelcome. However, he was not merely a co-worker but was an employer as one of the two owner/managers of the Motel. The Board finds on a balance of probabilities that Eikland certainly **ought to have known** that his pulling down or attempting to pull down an employee's pants was unwelcome. The Board agrees with the Commission's submission that a reasonable person in Eikland's place would know that his conduct in this regard was unwelcome.

4. conduct on the prohibited ground of sex

The Respondents submit that the conduct in question was not sexual in nature and the Board accepts that this is not a case in which there is an allegation or evidence of any sexual intentions in regard to the impugned conduct. However, that is not the test under the *Act* or the case law. In *Smith v Menzies Chrysler*, the Tribunal addresses the concept of sexual harassment and its interpretation by the Supreme Court of Canada, with respect to the "growing awareness that men can also be subjected to sexual harassment" [at paragraphs 147 and 148]:

As stated by the Supreme Court of Canada in its seminal decision of *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252, 1989 CanLII 97 ("*Janzen*"), at para. 57: "[p]erpetrators of sexual harassment and victims of the conduct may be either male or female".

In *Janzen*, the Supreme Court of Canada articulated an expansive interpretation of the concept of sexual harassment. The Supreme Court explained that sexual harassment encompasses "conduct which creates a 'hostile environment' by requiring employees to endure sexual gestures and posturing in the workplace" (para. 54). The Court noted that this "hostile environment" form of sexual harassment manifests "...as unwelcome conduct of a sexual nature that detrimentally affects the work environment..." (para. 56). The Court recognized that sexual harassment can entail "any sexually-oriented practice" that adversely impacts an employee's work performance, work conditions or personal well-being. The Supreme Court's interpretation of sexual harassment clearly contemplates a broad range of behaviours with respect to matters of sex, including, but not limited to, sexual gestures, sexual posturing and sexually-oriented practices, which negatively impact the work environment. As such, sexual harassment law provides protection from the imposition of sexually inappropriate overtones and undercurrents in the workplace.

The Board finds that the act of pulling down an employee's pants is a sexually-oriented practice which negatively impacts the work environment. It therefore comes within the meaning of the *Act* as being conduct that treats the Complainant unfavourably on the prohibited ground of sex.

The Board therefore concludes that each of the four elements required has been established on a balance of probabilities and that the individual Respondent has been proven to have harassed the Complainant by reference to a prohibited ground of discrimination, contrary to section 14 of the *Act*.

Responsibility of employers

Under section 35 of the *Act*, quoted above, employers are held responsible for the discriminatory conduct of their employees unless they did not consent to the conduct, took care to prevent the conduct, or tried to rectify the situation after learning of the conduct.

In this case, the Respondent Eikland is an owner/manager of the corporate Respondent and was the Complainant's employer at the time of the discriminatory conduct. Tremblay's evidence that she did not know about this conduct has been accepted by the Board.

Although Tremblay is a co-owner and manager of the corporate Respondent, it is not necessary for her to have been proven to be aware of the conduct and to have condoned it in order for the employer Talbot Arm Motel Ltd to be liable.

Accordingly, both Respondents are found jointly and severally liable for the harassment caused to the Complainant.

VII. Remedy

The Commission submits that an award of damages in the amount of \$20,000 is appropriate. The Respondents' submission is that if an award is to be granted, a reasonable remedy for the Complainant would be \$1,500.

The remedial powers of the Board are set out in section 24 of the *Act*, as quoted above. Pursuant to section 24(1)(c), the Board of Adjudication may order the Respondents to pay damages for injury to dignity, feelings, or self-respect.

The Board has considered case law including the relevant factors set out in *Torres v Royalty Kitchenware Ltd.* (1982), 3 C.H.R.R. D/858, which are as follows:

- a) The nature of the harassment, whether it was physical as well as verbal;
- b) The degree of aggressiveness and physical contact;
- c) The ongoing nature and time period;
- d) The frequency of the harassment;
- e) The age of the victim;
- f) The vulnerability of the victim; and
- g) The psychological impact of the harassment on the victim.

Torres is a sexual harassment case in which the complainant was a young woman sexually accosted and verbally abused by her older male employer at work. The individual and corporate respondents were found jointly and severally liable and ordered to pay \$1000 as general damages for her injured feelings and the pain and suffering she endured.

The Board has also considered the guidance provided by the Yukon Supreme Court in *Hureau v. Yukon Human Rights Board of Adjudication*, 2014 YKSC 21, at paragraphs 69 and 70 as follows:

There is a danger in trivializing the awards for injury to dignity, feelings and self-respect for sexual harassment. Psychological injuries are just as serious as physical injuries and are often more difficult to remedy and make the subject whole again.

The court must consider the objective facts of the nature and duration of the harassment and also address the subjective impact of the conduct on the particular victim.

In the *Hureau* case, the Yukon Supreme Court assessed and awarded general damages for sexual harassment involving a young woman in the workplace, in the amount of \$5,000.

The Board has also considered a number of other Yukon Human Rights Tribunal harassment cases in which the general damages awards were as follows:

- *Baczowski v. Suffesick et al*, 2000 YHRT, \$2,000;
- *Dyck and Lacosse v. Childhood Discoveries Preschool*, 2013 YHRT, \$5,000;
- *B.S. and M.A. v. Quenneville*, 2013 YHRT, \$5,000;
- *Simon and Simon v. Sallows*, 2017 YHRT, \$2,500

In considering the “objective facts of the nature and duration of the harassment” of the Complainant, the Board takes into account that the number and duration of the incidents found to have occurred are less than were alleged and that the Complainant carried on working for months, despite the harassment, and when he decided to quit three months after the last incident, gave a further five months’ notice of his intention to do so.

The *B.S and M.A.* case cited above involved complaints of sexual harassment against a motor inn/restaurant in a small Yukon community. The complainants worked there as servers and were 17 and 15 at the relevant time. All of the servers were female and were supervised by Quenneville who was considerably older and was the manager and one of the male cooks. The Board found the complainants were harassed by Quenneville’s conduct of a sexual nature consisting of leering, unwelcome touching and sexual comments, including having their buttocks grabbed or kicked. The Board found the complainants were adversely affected as they were unable to find other work after they left their jobs due to this conduct, and were “less comfortable or trustful of older men or male colleagues because of their experience with Quenneville which has also affected their ongoing search for work” [at page 18].

The Commission argues that the awards of \$5,000 granted in other Yukon cases including *B.S and M.A* were for “primarily verbal workplace sexual harassment over variable periods and with variable frequencies.” However, the Board in *B.S. and M.A.* found the “nature of the harassment was mainly physical” [at page 18]. The Board does not accept the Commission’s argument that a higher award is warranted in this case

because the “physically violative nature of the harassment differentiates this case from others brought before this Board.”

The Complainant is not, like the complainants in many of the cases cited above, a young woman subjected to sexual harassment by a considerably older man. He is 54 years old now and would have been 50 at the time he was being harassed. The Board appreciates however that the subjective impact of the conduct on the Complainant must have been considerably heightened by his personal experience of sexual abuse as a child and affected by the physical injuries he was still recovering from.

In all the circumstances of this case including the nature of the harassment and its subjective impact, the Board concludes that an award of \$5,000 in damages payable to the Complainant is appropriate.

Punitive damages

The Complainant in his written submission seeks an award of punitive damages in the amount of \$50,000 and a written apology.

The remedial powers given to the Board under section 24(1) do not include the power to order a written apology and the only power to award punitive damages would come under 24(1)(e) which provides that the Board may order the party who discriminated to pay exemplary damages if the contravention was done maliciously.

The Complainant refers in his submission to his concern that “memories end up fading and facts end up getting scrambled because it took too long to get to the hearing”. The Board does agree that facts ended up getting scrambled which made this a difficult case to decide. The Board however can only deal with the evidence that was presented before it, and does not find there to be any basis in that evidence for awarding punitive damages.

The harassment complaint against the personal Respondent has been proven with respect to multiple incidents of pants-pulling occurring in the May to September 2014 period. This conduct has not however been proven to have been a deliberate or intentional attempt to hurt the Complainant. The Board does not find that the contravention was done maliciously and therefore the order sought is denied.

Costs

The Commission did not seek an order for costs under subsection 24(1)(e) of the *Act*. The Respondents request that costs be awarded against the Commission and the Complainant, pursuant to sections 25 and 26 of the *Act*. However, in this case there is no finding by the Board that the Complaint was either frivolous or vexatious or based on information that the Complainant knew to be false, and there is therefore no basis for the Board to order the Commission or the Complainant to pay costs to the Respondents.

VIII. Conclusion

The Board concludes that the complaints of harassment have been established on a balance of probabilities and awards damages in the amount of \$5,000 to the Complainant, with both Respondents being jointly and severally liable for that award.

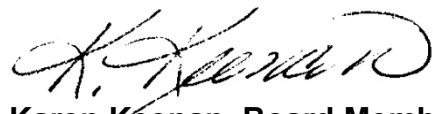
Any kind of harassment in the workplace is a serious matter, and the Board agrees with the following comments made in the *B.S. and M.A.* case cited above (at page 20):

Sexual harassment in the workplace needs to be taken seriously, given its significant and sometimes long-term impact on those who are harassed. In addition, it is against the law, and those who engage in such conduct or allow others for whom they are responsible to engage in such conduct need to be accountable for the damage that is done. Financial compensation doesn't remove or make up for the experiences of victims of sexual harassment, but it does send a message that conduct that constitutes sexual harassment will not be tolerated.

Dated June 20th, 2018, at Whitehorse, Yukon



Penelope Gawn, Board Chair



Karen Keenan, Board Member



B. Bruce Warnsby, Board Member