Board File No.: 2012-05
Decision: June 25, 2013

Before the Yukon Human Rights Board of Adjudication

Between:

Yukon Human Rights Commission

And:

B.S.

Complainant

And:

M.A.

Complainant

And:

Sid Quenneville

Respondent

DECISION

The hearing of this complaint took place on May 21 and 24, 2013 before the Yukon Human Rights Board of Adjudication (the "Board"). The Board was comprised of the following Panel members: E. Joie Quarton (Chief Adjudicator), Elaine Cairns and Max Rispin.

BACKGROUND

B.S. and M.A. are both young women who individually brought complaints of sexual harassment against a motor inn/restaurant in a small Yukon community (the "Motor Inn") and against Sid Quenneville ("Quenneville"), the manager/cook at the Motor Inn during the spring of 2011. At the relevant time, B.S. was 17 years old and M.A. was 15 years old. Both young women were hired to work in the restaurant of the Motor Inn and were supervised by Quenneville. Their complaints were joined for the purposes of the hearing because they involve the same

Respondent and employer, the Motor Inn. The Complainants settled their case with the employer, the Motor Inn. The complaint against Quenneville was heard by the Board on May 21 and May 24, 2013 (final submissions).

The Registrar for the Board communicated with the Respondent by e-mail and the Board is satisfied, by his e-mail responses, that Quenneville was aware of the time and place of the hearing. The Respondent did not attend the hearing; therefore, the hearing proceeded in his absence. Both of the Complainants gave evidence. There were no other witnesses. The Commission had planned to call another employee of the Motor Inn as a witness but were unable to contact him on the day of the hearing. As he resides outside of the territory, they were not able to subpoena him. The Commission proposed that the investigator provide evidence of his interview with this witness but the Board decided that it was not necessary to hear this evidence, given its questionable weight, and given that both Complainants were credible witnesses. Both Complainants gave their evidence in a straightforward manner despite both being soft-spoken and clearly uncomfortable talking about their experiences while working with Quenneville.

THE LAW

Yukon *Human Rights Act*

The allegations against the Respondent are that he breached the Complainants' human rights, pursuant to the Yukon *Human Rights Act* (the "Act"). Section 7 of the Act says that it is discrimination to treat any individual or group unfavourably on a number of prohibited grounds, one of which is sex. Section 9(b) prohibits discrimination in connection with any aspect of employment or application for employment.

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

Case Law

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

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

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

> Sexual harassment can manifest itself both physically and psychologically. In its milder forms it can involve verbal innuendo and inappropriate affectionate gestures. Physically, the recipient may be the victim of pinching, grabbing, hugging, patting, leering, brushing against, and touching. Psychological harassment can involve a relentless proposal of physical intimacy, beginning with subtle hints which may lead to overt requests for dates and sexual favours.

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

Elements of Sexual Harassment

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

- That the conduct complained of was of a sexual nature,
- That the conduct complained of was unwelcome,

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

Sexual Nature of Conduct

The Supreme Court of Canada refers to Professor Aggarwal's text, *Sexual Harassment in the Workplace,* in the *Janzen* case to help it determine what kinds of conduct can constitute sexual harassment. Aggarwal and Gupta say that, because human behaviour is complex, "it is difficult to pinpoint what exact behaviour will be perceived as harassment by any particular individual." Aggarwal and Gupta provide a list of verbal behaviours that may constitute sexual harassment, and note that the behaviours do not have to be specifically addressed at the victim to constitute sexual harassment. Among other things, these behaviours include:

- innuendoes or taunting
- unwelcome remarks
- rough and vulgar humour or language
- jokes that cause awkwardness or embarrassment
- comments about a person's looks, dress, appearance, or sexual habits
- inquiries or comments about an individual's sex life and/or relationship with sexual partners, and
- speculation about a woman's virginity, her choice of sexual partner or practices.

They go on to state:

> Sexual harassment in this context is employment discrimination by means of sexual blackmail, being a comprehensive pattern of hostile behaviour meant to underscore women's difference from and, by implication, inferiority with respect to the dominant male group. It is closely analogous in form and in effect to race discrimination. It is a systemic, arbitrary abuse of male power and authority used to extract sexual favours, remind women of their inferior ascribed status, and deprive women of employment opportunities and equality.
>
> Sexual harassment in this context is an infringement of an employee's right to work in an environment free from sexual pressure of any kind. While sexual harassment need not necessarily involve a male supervisor and a female subordinate, this has been the most common situation in which the problem arises.

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

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

Unwelcome Conduct

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

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

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

Section 14 of the Act says that it is enough to show, on a balance of probabilities that the Respondent ought to have known that his conduct was unwelcome.

Professors Aggarwal and Gupta, in their text, *Sexual Harassment in the Workplace* (3d ed.), clarify that "When the victim is put into a vulnerable position, whether that be physically, economically or psychologically, the onus lies with the person in authority to ensure that the relationship is really consensual", and say that "lack of protest alone should not be taken as a signal by managers and supervisors that their sexual advances are acceptable. The burden rests with them to ensure that the subordinate is a willing participant, and that the sexual conduct continues to be welcome."

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

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

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

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

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

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

Knowledge that the Conduct was Unwelcome

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

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

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

Adverse Job-related Consequences

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

> … some are prepared to take a definite stand and tell the harasser to stop immediately, whereas others are more muted in their response and for a variety of reasons either say nothing or say very little. … It must be borne in mind that sexual harassment is usually more about abuse of power and control than actual sexuality, and I find that the

applicant was very vulnerable to Mr. Wade's authority and his ability to influence her job with the company.

THE EVIDENCE

B.S.'s Evidence

B.S. is of First Nation ancestry and was 17 years old when she started working at the Motor Inn in April 2011. The Motor Inn has a motel, restaurant and bar, and she worked as a cashier and server in the restaurant. It was her first job. She heard about the job from her cousin who also worked there, and when she took her resume in to apply for a job, it was Quenneville, the restaurant manager, she dealt with. She started work the next day. She said she needed a job and there were not many options in the community where she lived.

B.S. said she didn't know Quenneville before she began working at the Motor Inn. She described him as being "older", likely in his 50s. B.S. worked mostly nights, from 1:00 p.m. to closing at 9:00 p.m. but said it was usually 10:00 or 11:00 p.m. before the work was done and she could leave. She was paid $10 to $11 per hour plus tips, and worked full time (40 hours per week) for about a month until she quit.

According to B.S., all of the servers in the restaurant were female although several men worked at the restaurant as cooks. According to B.S., the Motor Inn was busy during the evenings when she worked, and there was usually the cook, a dishwasher, and one other server on shift with her. The cook and the dishwasher worked in the kitchen and she worked in the restaurant. She said the workplace atmosphere was fun when Quenneville wasn't there but that she didn't feel comfortable when he was working. When Quenneville was there, he was the supervisor. When he wasn't there, the cook was the supervisor. She said that Quenneville was not there every day that she worked, but when he was, he did things in the kitchen, helped the cook, and worked on his laptop.

B.S. said that she found Quenneville annoying and that she was uncomfortable around him. She said that sometimes, when her back was turned, she could feel his eyes on her, and when she turned around, she saw him looking at her and "checking her out". She said she never talked to him about this as she was too uncomfortable to do so. She said this happened throughout the time she worked at the Motor Inn.

Although B.S. never told Quenneville how old she was, she said that every time one particular cook worked, Quenneville would comment loudly to the cook that she was only 16. She said he

made allegations that she was having sex with one of the cooks and commented to another staff person that he could smell them “fucking”. When B.S. was told about this comment, she was angry. B.S. said she was friends with the cook but not in a relationship with him. At the hearing, B.S. had a difficult time talking about this comment.

According to B.S., Quenneville would also put his hand on her back or her shoulder or her arm whenever he passed by her. She also saw him doing this to other employees.

On May 28, 2011, B.S. was in the kitchen straightening out an order when Quenneville came over to her and poked her in the ribs. She turned around and told him it startled her. There was another cook present who said, “At least you’re not like the other manager who grabbed a handful of ass.” According to B.S., Quenneville said, “You mean like this?” and grabbed her buttocks. He commented that her “bum” was wet because his hands were wet. B.S. said she felt degraded and mad after this incident and left the kitchen.

Later, B.S. returned to talk to the cook about what happened and told him she felt violated. The cook said that if they were anywhere else he would punch Quenneville out. The cook also asked B.S. if it was okay if he talked to the owner about what Quenneville had done. B.S. didn’t know if the cook talked to the owner or not.

B.S. said she didn’t go to the owner but she told her cousin who also worked at the Motor Inn what happened to her. B.S. said that she was scared she would lose her job if she talked to either the owner or Quenneville about Quenneville’s behaviour. She also said that it was her first job, she needed it, and although she wanted to quit, she didn’t really know how.

After the May 28 incident, the thought of returning to work made B.S. feel quite uncomfortable. The next time she saw Quenneville was two days later on the morning shift. Although there were normally only two people working in the morning, Quennville was not usually one of them. However, on that day, she and Quenneville were alone. The reason, Quenneville explained to her, was that he had fired the other morning staff person the night before so he had to work the shift. B.S. thought it was really odd that Quenneville was on the shift with her after he had grabbed her the last time she worked.

According to B.S., the shift was going fine until Quenneville began explaining the new schedule to her and describing how he fired the other morning person. As he was talking to her, Quenneville was standing too close to her and she felt very uncomfortable. As soon as she could, she went to the washroom, upset and crying, and then called her mom to come and get her. This was just before 8:00 a.m., less than an hour after she started work that day.

After B.S. was picked up, her mother suggested they go to the police station to file a complaint. B.S. and her mother talked to the police, who said they would talk to Quenneville and get back to her. She said they never heard back from the police and she didn't return to work. According to B.S., her mom talked to Quenneville but she doesn't know what she said to him. It is her understanding that Quenneville continued working at the Motor Inn for several weeks after she left.

B.S. said it was between a few days and a week after she started working at the Motor Inn that she began to feel uncomfortable around Quenneville. She says she didn't invite his conduct toward her.

B.S. worked at the Motor Inn for about a month in all, and started looking for other work as soon as she quit. She said that the incidents with Quenneville have made her feel socially awkward and uncomfortable even though she knows that not everyone is like him. After she quit her job at the Motor Inn, B.S. wasn't able to find another full-time summer job. She worked for several days filling in for a receptionist but, aside from that, she was not able to get another job despite applying. She said there weren't a lot of options in her community.

M.A.'s Evidence

M.A. is the second Complainant. B.S. and M.A. did not talk about Quenneville's behaviour until after they had both quit their jobs. Neither one of them was aware of his behaviour toward the other one or knew why the other had quit. Both Complainants said they had never discussed their complaints with each other.

M.A., also of First Nation ancestry, was 15 years old and a grade 11 student when she worked for the Motor Inn in May of 2011. She had worked as a dishwasher the previous summer, and on and off during the winter of 2010-11, so decided to see if there were any job openings for the summer of 2011.

Like B.S., M.A. talked with Quenneville about getting a job and when she told him she had worked there before, he hired her on the spot. She started working that day as a dishwasher.

In 2011, Quenneville was her supervisor. He was the manager and one of the cooks. M.A. said she didn't know him before he hired her and that she usually worked the evening shift, starting after school. M.A. described Quenneville as being white and in his 30s or 40s. She says he was at the Motor Inn the whole time she worked there in May 2011.

M.A. said she worked several days a week, and was sometimes called in if things got busy. She was paid between $10 and $11 per hour plus occasional tips. M.A. also quit work at the Motor Inn at the end of May, after only working there for about a month. With the exception of babysitting for her mom, she was unable to find other work and hasn't worked since then.

M.A. said she previously liked working at the Motor Inn but in May 2011 she sometimes got "weird vibes" when Quenneville was there. She said it started after she had been working for about two weeks. She said it seemed like something was off about him — she felt like "he wanted to do something". She based this on the way he looked at her. She described feeling him staring at her and getting a "weird feeling". When she would turn around, she would see him staring at her. She said this happened about five times. She didn't say anything to Quenneville about this.

Several weeks after she began working at the Motor Inn, Quenneville kicked M.A. in the buttocks twice. She was doing dishes at the time and the kicks made her feel weird and felt that what he had done was wrong. She didn't know how to react. The other cook was there when Quenneville kicked her, and after Quenneville left the kitchen, she talked to the cook about what happened, and then to the owner. She said the owner suggested that Quenneville was doing this to make her work harder. M.A. didn't talk to Quenneville about his conduct directly as she was afraid of losing her job, especially after the owner dismissed her concerns.

When asked whether Quenneville touched her on any other occasions, M.A. said that after he kicked her buttocks, he poked her with his finger in her lower back when she was doing dishes. She said there was no one else there when this happened, and that Quenneville looked at her and smiled. She told him not to do that again. She said she didn't talk to the owner after Quenneville poked her as she thought he would likely minimize her concerns as he had done previously. She said that Quenneville poked her four more times, and that it made her feel "really, really bad", and felt that it was wrong.

M.A. stopped working at the Motor Inn at the end of May. She said she just stopped going to work as she didn't like how she felt when she left work. She had previously enjoyed her job but because Quenneville was still working there and the owner wouldn't do anything about his behaviour toward her, she was unable to keep working there.

M.A. said that she quit about a week after the last time Quenneville touched her. She didn't tell anyone she was quitting as she initially felt like it was her fault, and was afraid of getting into trouble. She said she had wanted to prove to her grandmother that she could work and felt like

she would let her down. When she told her grandmother, her grandmother reported Quenneville's behaviour to the police.

M.A. says she never saw Quenneville after she quit her job. She said she didn't invite or encourage Quenneville to touch her, and although other staff had talked about getting weird feelings from him, she never saw him touch anyone else.

After quitting the Motor Inn, M.A. tried to find another job but no one called her back. She said that the impact of the experience has been that she stopped going places, eventually gave up on finding a job, and feels afraid that something like this might happen again in another job. She said that it is hard to talk about her feelings and she keeps to herself.

FINDINGS OF FACT

Based on the evidence of both M.A. and B.S., the Board finds that Quenneville treated the female employees at the restaurant differently than the male employees. Neither of the Complainants saw him touch the male employees the way he touched them, on their backs or arms, when he passed them. The Board finds that Quenneville leered at B.S., made a rude sexual comment about her, touched her back, shoulder and arm, poked her in the ribs, grabbed her buttocks, and stood close to her while describing how he fired another employee. The Board also finds that Quenneville leered at M.A., kicked her buttocks twice and poked her lower back about five times.

Neither M.A. nor B.S. consented to or invited Quenneville's staring, touching or comments and both let him know his conduct was not welcome. Although M.A. talked to the owner about Quenneville kicking her, the owner's failure to take her concerns seriously made it seem to her that there was no point in talking to the owner about the other unwelcome behaviour, such as the staring and poking. She did, however, tell Quenneville not to touch her again after the first time he poked her. When Quenneville poked B.S. she told him it startled her and when he grabbed her buttocks, she was angry and left the kitchen. B.S. did not speak to him or the owner about his unwelcome conduct toward her because she was afraid of losing her job.

Both Complainants needed their jobs and there were few other employment opportunities for them in the small community where they lived, so working at the Motor Inn was one of the few jobs available to them. In addition, they had limited job experience, and both were young First Nation girls working for an older non-First Nation man.

Both Complainants were soft-spoken and shy when giving their evidence. B.S., in particular, did not even want to repeat Quenneville's comment to the cook about her having sex with another male employee. Although the events described by the Complainants occurred two years ago, both were uncomfortable talking about their experiences.

The Board finds that the Complainants quit their jobs at the Motor Inn because of Quenneville's leering, comments, and physical contact with them while working at the restaurant, and further finds that they had difficulty finding other work after they left the Motor Inn.

ANALYSIS AND CONCLUSION

Given that the Respondent did not participate in the proceedings, the Complainants' evidence was not tested by cross-examination. As a result, the Board paid particular attention to the issue of credibility and is satisfied that the Complainants were telling the truth and that the things they described happened to them.

The Board is also satisfied that Quenneville's conduct toward the two Complainants involved conduct of a sexual nature (leering, unwelcome touching and sexual comments), and that it was not welcomed by the Complainants. The Board also finds that Quenneville knew, or should have known, that his conduct was unwelcome and inappropriate.

The Commission argued that a person in a supervisory position, in particular, bears the onus of ensuring that his or her comments, conduct and advances of a sexual nature are truly consensual and welcomed in light of the unequal power dynamic that exists between the parties and the potential for adverse job-related consequence for the person who complains. This is clearly a situation where there was a power imbalance between the Complainants and the Respondent — he was their supervisor, he was older, male, and in a position to hire and fire them. In fact, when Quenneville stood close to B.S. on the workday following the day when he grabbed her buttocks, he was clearly intimidating her by standing close to her while describing how he fired another employee. Further, after M.A. took her complaints to the employer, Quenneville continued to sexually harass her.

In the context of the Yukon's history, including the legacy of residential schools, the fact that the Complainants were of First Nation ancestry, and Quenneville was of non-First Nation ancestry adds another layer to the power imbalance between B.S., M.A., and Quenneville.

Finally, the Board is satisfied that the sexual harassment by Quenneville had adverse job-related consequences for the two young Complainants. Both quit their jobs at the Motor Inn because of his conduct toward them and both described having difficulty finding other work, and being emotionally affected by the experience.

The Complainants have established a prima facie case of sexual harassment, which is discrimination on the basis of sex, and their case was not refuted by the Respondent, who chose not to participate in the proceedings. The Board finds that the Complainants have proven that they were sexually harassed by Quenneville, thereby establishing that they were discriminated against on the basis of sex, contrary to sections 7(f), 9(b) and 14 of the Yukon Act.

REMEDY

As the Board has found that B.S. and M.A. were subjected to sexual harassment by Quenneville, the next step is to assess their entitlement to compensation for injury to their dignity, feelings, and self-respect and for any financial loss suffered as a result of the discrimination. Financial loss can include lost wages.

Yukon *Human Rights Act*

The objects of the Yukon *Human Rights Act* are set out in section 1 of the Act and include:

> (a) to further in the Yukon the public policy that every individual is free and equal in dignity and rights;
> (b) to discourage and eliminate discrimination;
> (c) to promote recognition of the inherent dignity and worth and of the equal and inalienable rights of all members of the human family, these being principles underlying the Canadian Charter of Rights and Freedoms and the Universal Declaration of Human Rights and other solemn undertakings, international and national, which Canada honours.

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

> (a) stop the discrimination;
> (b) rectify any condition that caused or is causing the discrimination;

(c) pay damages for any financial loss suffered as a result of the discrimination;
(d) pay damages for injury to dignity, feelings, or self-respect.

Case Law

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

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

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

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

It is up to each Board, in each case, to determine the appropriate amount of damages, taking into account what appears to be fair in the circumstances.

General Damages - Injury to Dignity, Feelings, or Self-Respect

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

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

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

> [53] The first criterion recognizes that injury to dignity, feelings and self-respect is generally more serious depending, objectively, upon what occurred. For example, dismissal from employment for discriminatory reasons usually affects dignity more than a comment made on one occasion. Losing long-term employment because of discrimination is typically more harmful than losing a new job. The more prolonged, hurtful, and serious harassing comments are, the greater the injury to dignity, feelings and self-respect.
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> [54] The second criterion recognizes the applicant's particular experience in response to the discrimination. Damages will be generally at the high end of the relevant range when the applicant has experienced particular emotional difficulties as a result of the event, and when his or her particular circumstances make the effects particularly serious.

The Commission provided the Board with a number of cases in relation to the appropriate remedy. In some of these, the facts were much more serious than the facts in this case. Some of these cases were quite dated, and many were of little assistance in determining a fair and appropriate remedy. In terms of the facts, the B.C. case of *Young and Young* was the

closest. However, even that case involved much more frequent and ongoing physical contact over a slightly longer period of time.

In *Young and Young on behalf of Young v. Petres*, 2011 BCHRT 38, the BC Human Rights Tribunal awarded $4,000 (for Algebra Young) and $6,000 (for Aja Young) for injury to the dignity to two sisters who had worked at the respondent's food cart business. Algebra was 19 years old when she worked for the respondent for about period of about six weeks. Aja was 13 years old and worked for the respondent for more than three months. It was her first job. The harassment, in that case, was physical, consisting of frequent lengthy unwelcome hugs from the respondent owner, who was a much older man. With one of the complainants, the hugs were almost daily. The harassment occurred throughout the complainants' employment and it adversely affected their enjoyment of their jobs.

B.S. was very uncomfortable with Quenneville's comments and actions toward her. On the last day she worked with him, when he was standing close to her describing how he fired the other cook, she went to the washroom and began to cry before calling her mother to pick her up. Although she has been able to secure employment since leaving the Motor Inn, she does not feel comfortable around male co-workers because of what happened with Quenneville, and feels socially awkward in new work situations because of what she experienced.

M.A. said she became so uncomfortable around Quenneville that she simply stopped going to work. She described feeling shame, as though she was the one who had done something wrong, rather than Quenneville, and was scared to tell her grandmother that she had quit her job. M.A. said that she doesn't trust older men and is scared that what happened to her will happen again.

M.A. applied for other jobs after she left the Motor Inn but there is not much employment available in her community, with the exception of some babysitting, so she has not worked. More recently, she has applied for work in Whitehorse, where she is now living to attend school, but has not yet heard back from any of the employers she contacted.

There was no harassment prevention policy at the Motor Inn to provide guidance to either Complainant or to the Respondent and neither of the Complainants had ever experienced sexual harassment in the workplace before.

The Commission argued that the Board of Adjudication should consider the seven factors set out in *Torres v. Royalty Kitchenware*, and apply the test from the *Arunachalam* case to determine the appropriate damages for injury to dignity, feelings and self-respect in this case. The *Arunachalam* case says that the Board should look at: 1) the objective seriousness of the conduct and, 2) the effect on the particular applicant who experienced discrimination.

In this case, both B.S. and M.A. were young, new to the workforce, and needed the money from their jobs. Both are soft-spoken and non-confrontational, and gave clear evidence of the impact this situation had on them.

Quenneville is considerably older than both young women and was in a supervisory position at the Motor Inn. Although both of the Complainants worked at the Motor Inn for a very short period of time (approximately one month), they were exposed to Quenneville's harassing conduct for the duration of their employment. Not only was their employment adversely affected by the discriminatory and harassing conduct, it was also the reason they both left their jobs.

Applying the factors in *Torres v. Royalty Kitchenware Ltd.*, the nature of the harassment was mainly physical, consisting of Quenneville poking them in the ribs and lower back, touching arms, shoulder and lower back, and kicking and grabbing the buttocks, as well as staring at their bodies in a way that made them feel uncomfortable. B.S. was also subjected to verbal harassment when Quenneville made comments about her and one of the cooks.

Quenneville grabbed B.S.'s buttocks once and kicked M.A.'s buttocks twice. These were both aggressive physical acts that shocked the Complainants. He stared at the Complainants throughout their employment, and touched B.S.'s arm, shoulder and lower back throughout the month that she worked at the Motor Inn. Quenneville poked M.A. in her lower back on more than one occasion.

Both Complainants were uncomfortable in the workplace because of Quenneville's conduct. After their employment ended they both felt stressed because they were unable to find other work, 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, and in B.S.'s case, her current employment.

The Board heard undisputed credible evidence during the course of the hearing that the Complainants experienced injury to their dignity, feelings and self-respect as a result of the sexual harassment by Quenneville and the resulting loss of their employment. The Commission argued for an award of $6,000 to each of the Complainants, taking into account the loss of their jobs as a result of sexual harassment by a much older man who had a supervisory role in the workplace.

Taking into account B.S.'s young age and vulnerability, the fact that some of the harassment was physical, and the fact that false allegations were made in front of another employee about her sexual activity with a co-worker, the Board orders the Respondent to pay her $5,000 for injury to her dignity, feelings and self-respect.

In awarding damages for injury to M.A.'s dignity, feelings and self-respect, the Board has taken into account her young age and vulnerability, the fact that some of the harassment was physical and the fact that the harassment continued after she complained to the employer. The Board orders the Respondent to pay M.A. $5,000 for injury to her dignity, feelings and self-respect.

Special Damages — Loss of Earnings

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

Complainants have a duty to mitigate any losses flowing from the discrimination by making reasonable efforts to seek other employment. However, the Commission argued that the onus of proof that the Complainants failed to mitigate their losses lies with the Respondent. In other words, it is up to the Respondent to call evidence to show that the Complainants did not obtain work as quickly as they could have. The Commission also argued that the Board should take into account that the physical, emotional, and psychological distress resulting from the experience of being sexually harassed may impact the victim's ability to work or find work.

The remedies under section 24 of the Act are not limited to employers and awards can be made against the perpetrator of the harassment. The evidence was not consistent with respect to how long the restaurant stayed open after the Complainants quit, but it appears that it was not

open past the summer of 2011. Counsel for the Commission advised, during final submissions that the restaurant at the Motor Inn closed in the fall. In any event, the job opportunities available in their community to young women such as B.S. and M.A. were very limited.

B.S. worked full-time hours (40 hours per week) plus overtime at a wage of $10.50 per hour, plus tips. After leaving the Motor Inn, she applied for whatever limited jobs were available in the community, but all she could find for the rest of the summer was an on-call receptionist job that resulted in about three shifts over the whole summer. The result was that she made much less money than she would have if she had not had to leave her job at the Motor Inn. The Board finds that **if** B.S. hadn't needed to quit, it is likely that she would have worked there until the business closed later that summer. The Commission argued for an order that the Respondent pay B.S. lost wages for a period of one month, plus tips.

M.A. worked part time at the Motor Inn, after school and on weekends, as she was still attending high school at the time. She was paid between $10 and $11 per hour, with occasional tips, and earned approximately $600 per month during the time she worked at the Motor Inn. With the exception of some babysitting, she was unable to find other employment, and, in fact, although she has expanded her job search, she has yet to find a job. If M.A. hadn't been sexually harassed by Quenneville, she would have reasonably expected to work at the Motor Inn until it closed later that summer. The Commission argued for an order that the Respondent pay M.A. lost wages for a period of one month.

Based on B.S.'s evidence that she worked full time (40 hours per week) at a rate of $10.50 per hour, the Board awards $1,680 to B.S. for lost wages.

Based on M.A.'s evidence that she worked part time, after school and on weekends, at a rate of $10.50 per hour, the Board awards lost wages based on 20 hours per week for four weeks, which results in an award of $840.

The Commission argued that B.S. should be compensated for tips but as no evidence was presented to the Board as to the amount of tips, no award is made for tips.

CONCLUSION

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.

In situations such as this case, sexual harassment could have been prevented if the employer had taken their responsibilities under the Act seriously, especially when concerns were brought to light. Section 16(1) of the Act imposes an educational mandate on the Human Rights Commission to ensure that Yukon businesses and employers are aware of their significant responsibilities under the Act, and the Board finds that such education could go a long way toward reducing or eliminating discrimination. Further, it could alert the public, more generally, to the kinds of behaviour that are and are not acceptable.

SIGNED at Whitehorse, Yukon on June 25th, 2013

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