

**Before the Yukon Human Rights Board of Adjudication
in the matter of the Yukon *Human Rights Act*
and
Devon Hanson & Yukon Human Rights Commission
v.
Mark Hureau & 17385 Yukon Inc. doing business as Intersport**

**BOARD DECISION ON
REMEDY AND DAMAGES AND COSTS**

Parties

Devon Hanson	Complainant
Rick Buchan	Counsel for the Complainant
Colleen Harrington	Counsel for the Yukon Human Rights
Commission	
Mark Hureau	Respondent
17385 Yukon Inc. (“Intersport”)	Respondent represented by owner, Mark Hureau
James Tucker	Counsel for the Respondents

Board of Adjudication Members

Michael Dougherty	Chair
Barbara Evans	Adjudicator
Maxwell Rispin	Adjudicator

OVERVIEW

On August 21, 2012 the Human Rights Board of Adjudication (the “Board”) released its Decision (the “Decision”) in regard to the human rights complaint filed by Devon Hanson about allegations of sexual harassment by her former employer, Mark Hureau and his corporation, Intersport. In the Decision the Board found that the Complaint was proven, albeit at the “*most mild end of the spectrum*” of sexual harassment.

Two issues remain before the Board. One is the issue of Remedy, Damages and Costs pursuant to Section 24, and the other is the issue of Costs and Damages pursuant to Sections 25 and 26 of the Yukon *Human Rights Act* (“Act”).

FILED DOCUMENTS

Pursuant to Sections 24, 25 and 26 of the Act, the parties made applications and reply submissions on the issues of Remedy, Costs and Damages, all of which were considered by the Board. These documents were:

1. Sept. 20, 2012 Respondent application for costs and damages from the Commission and Complainant
2. Sept. 20, 2012 Commission submission on remedy pursuant to Section 24 of the Act
3. Sept. 21, 2012 Letter from Respondent lawyer on costs
4. Oct. 16, 2012 Letter of clarification in response from Board
5. Oct. 25, 2012 Commission reply to Respondent application for costs
6. Oct. 26, 2012 Complainant reply to Respondent application on costs (Buchan)
7. Oct. 26, 2012 Complainant submission on damages (Buchan)
8. Nov. 13, 2012 Board directive regarding jurisdiction to accept the cost application from the Respondent and ruling on affidavit submissions
9. Undated
(Received Nov. 19, 2012) Remedy submissions of Respondent
10. Nov. 20, 2012 Respondent reply on damages and cost application (Tucker)
11. Nov. 26, 2012 Commission reply to Respondent remedy submissions
12. Nov 27, 2012 Complainant reply to Respondent submission on costs and damages (Buchan)
13. Nov. 27, 2012 Commission submissions to Respondent cost submissions
14. Nov. 27, 2012 Affidavit of Heather MacFadgen, Director of Commission

SECTION 24: Remedy, Damages and Costs to the Complainant

JURISDICTION

Section 24 of the Act states: 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

OVERVIEW

In the Decision the Board found there was sufficient evidence of unwelcome, sexual and persistent conduct in Mr. Hureau's interactions with Ms. Hanson during the period from March 15 to March 28, 2010 to warrant a finding that sexual harassment as defined in the Act had occurred. This finding recognized factors including the power imbalance, age difference and generational communication issues between the Complainant and the Respondent Hureau.

Although it was suggested that the Board pre-judged the issue of remedy by stating that the formal finding of discrimination was a "sufficient act to serve not only as a punitive consequence to Mr. Hureau, but also as a censure and cautionary example to other Yukon community organizations and businesses," the Board continues to have jurisdiction over remedy, damages and costs in human rights cases, and as such, invited the parties to make submissions on these issues.

It is the Board's responsibility, once a complaint is proven, to ensure that the discrimination stops and that any condition that causes the discrimination is rectified.

ANALYSIS AND FINDINGS

Stop the Discrimination and Rectify any Causal Condition

The Commission requested, in the public interest, that the Board order the Respondent to prepare and implement a sexual harassment policy for its workplace within two months. The policy would be subject to approval by the Commission.

The Complainant asked that the Respondent Hureau undergo such training as the Board considered appropriate to increase his understanding of sexual harassment and his obligations as an employer.

Mr. Hureau, a well-established business person, stated in his testimony that he allowed a casual environment in the workplace with employees. He admitted there were few policies established in the workplace. Evidence from all parties clearly indicated that the overall workplace atmosphere at Intersport was informal and sociable between the employer and workers.

The Board orders Mr. Hureau to prepare and implement a sexual harassment policy for Intersport. In doing the necessary research to develop a policy, Mr. Hureau will gain insight and understanding into what is appropriate management conduct in relation to employees.

The Board orders Mr. Hureau to prepare and implement a sexual harassment policy for the Intersport workplace within two months of this decision. This policy is subject to approval by the Yukon Human Rights Commission.

Remedy and Damages

The Commission requested that the Board order the Respondent Hureau to pay:

- \$15,000 in damages in respect of injury to the Complainant's self-esteem, dignity and feelings as a result of the sexual harassment she experienced from Mr. Hureau; and
- One month's wages for financial loss.

The Complainant requested that the Board order the Respondent Hureau to pay:

- \$15,000.00 in damages in respect of injury to her self-esteem, dignity and feelings as a result of the sexual harassment she experienced by Mr. Hureau;
- \$15,000 in financial damages resulting from impacts that led to poor educational outcomes in 2011-12 at university; and
- One month's wages for financial loss.

Additionally, the Commission and Complainant asked the Board to consider the ongoing retaliation the Complainant was subjected to subsequent to filing the human rights complaint by non-party persons and how the communications over the Internet and other publications affected her.

While recognizing the potential for broader impacts of making a human rights complaint, the Board has no jurisdiction over people who are not parties to the complaint.

The Commission referred to the Torres Test [*Torres v. Royalty Kitchenware Ltd. (1982)*, 3 CHRR D/858 (Ontario Board of Inquiry)] and the number of factors it cites in determining appropriate remedy. This included assessing the physicality, frequency and aggressiveness of the sexual harassment and the age, vulnerability and experience of the Complainant. Applying those factors here, there was no finding by the Board that the harassment was sexually physical, aggressive or of a frequent, ongoing nature. The Complainant was young, vulnerable and in her first employment situation, and there was some indication that she suffered psychological impacts for which she met with a counsellor for a brief period of time in 2010. The Board also recognizes that it is more likely than not that Ms. Hanson's employment ended because of the harassment. Because of these factors, the Board confirms its finding that the sexual harassment experienced by the Complainant was at the most mild end of the spectrum of sexual harassment.

The Commission referred to the *Aggarwal and Gupta* reference text which states that “Compensation should normally be awarded in the absence of special circumstances”, saying that since no “special circumstances exist” in this matter, an award to the Complainant should be made because the Board made a finding of sexual harassment. The Board does not agree.

The Board heard from all of the parties, including the Commission, that this complaint falls at the low end of cases involving sexual harassment. The Board agrees that this is the case and notes in its Decision that there were a series of incidents that were not salient to its finding of sexual harassment occurring between March 15 and March 28, 2010. These other events occurred outside the March 15 to 28, 2010 timeframe, and included a discussion about the choice of Halloween costume and prom dress and the possible viewing of salacious videos.

Further, there were significant gaps in the text/e-mail evidence that made it difficult for the Board to establish an accurate picture of the relationship between the parties. Although the correspondence between the Complainant and the Respondent was extensive, the Complainant retained relatively few of the text messages, which supports the Board’s finding that the remedy, in this case, must also reflect the less serious nature of the sexual harassment that was found.

While the details of the relationship between Mr. Hureau and Ms. Hanson are somewhat unclear, the relationship was ongoing for a period of four years, starting with the relationship between coach and basketball player, which eventually led to Ms. Hanson being hired to work at Mr. Hureau’s business. During the Arctic Winter Games and the weeks following, however, the relationship between Ms. Hanson and Mr. Hureau changed — a factor leading to the events found to be sexual harassment. Ms. Hanson testified that for a substantial period of time, she considered Mr. Hureau her coach, friend and mentor. Their ongoing relationship was, from the evidence, evolving to a more personal nature. At some point in March 2010, after the Arctic Winter Games, some unknown factor resulted in the Complainant no longer feeling she wished to continue the relationship – either personal or employment. Mr. Hureau did not accept this unexpected shift, as evidenced by his actions of pursuit in the e-mails of March 2010. Because the Board only has jurisdiction over sexual harassment in the workplace, the extent of the relationship between the Complainant and Respondent, both within and outside the context of employer/employee relationship, adds a dimension to the consideration of “special circumstances”.

Although sexual harassment of any kind is serious, in this case, the mild nature of the harassment, combined with the very limited timeframe during which the harassing behavior occurred constitutes the “special circumstances” that lead the Board to order no award for injury to the Complainant’s dignity, feelings or self-respect.

These circumstances, combined with the limited evidence that the Complainant attempted to mitigate the psychological impact of the harassment save for one round of counselling in August 2010, and the Complainant’s failure to satisfy the Board that there was a link between her academic performance and the harassment, support the Board’s decision that there should be no award of damages for injury to her dignity, feelings or self-respect.

Although the Board recognizes that not awarding damages for injury to the Complainant's self-esteem, feelings and dignity may be a disincentive to people having the courage to make a human rights complaint, in this case, the special circumstances described above support such a conclusion.

The Board makes no award of damages to the Complainant.

Lost Earnings

Ms. Hanson was employed by Intersport on a part-time basis for more than one year. She left her employment unexpectedly in the latter part of March 2010. She further testified that she found employment some three months later.

While the Board did not find a causal link between the sexual harassment and the Complainant terminating her employment, the Board finds that it was impossible for Ms. Hanson to return to her employment at Intersport because of the sexual harassment by Mr. Hureau subsequent to her departure from Intersport,

The Board orders Mr. Hureau to pay to Ms. Hanson an amount which reflects three months' wages, based on her average monthly earnings for the preceding six-month period of her employment.

Costs

The Complainant requested costs pursuant to Section 24(1)(f). While the Commission is charged with carriage of a complaint to adjudication, the Complainant is recognized as a separate party who is entitled to separate counsel. In this particular case, the Complainant was unrepresented at the hearing, relying on the Commission to carry the Complaint.

Once a complaint has been established, however, the interests of the Commission and the Complainant can diverge somewhat. The Commission is necessarily focused on public interest, education and cessation of the discrimination, while the Complainant is generally more focused on personal impact and compensation.

The Complainant retained counsel for the purpose of making submissions and replies on the issues of remedy, damages and costs due to her.

The Board recognizes that every person has the right to counsel. In this case, the Board further recognizes that trained legal counsel represented the Commission and Respondent in making submissions for remedy and costs on the cost application. The Complainant chose to seek professional advice to ensure her rights were properly represented.

The Board accepts the Application for costs claimed by the Complainant and orders the Respondent to pay to the Complainant costs pursuant to Section 15 of the Human Rights Regulations.

BOARD ORDER:

The Board orders Mr. Hureau to prepare and implement a sexual harassment policy for his workplace within two months. This policy is subject to approval by the Yukon Human Rights Commission.

The Board orders Mr. Hureau to pay to Ms. Hanson an amount equal to three months' wages, based on her average monthly earnings for the preceding six month period of her employment.

The Board orders that the Respondent pay to the Complainant costs pursuant to Section 15 of the Yukon Human Rights Regulations.

SECTION 25: Application for Costs and Damages from the Yukon Human Rights Commission to the Respondents

JURISDICTION

Section 25 of the Act states that if the Board concludes that the complaint was frivolous or vexatious or that the proceedings have been frivolously or vexatiously prolonged, the Board may order the Commission to pay to the Respondent

- (a) part or all of the Respondent's costs of defending against the complaint; and
- (b) damages for injury to the Respondent's reputation.

In response to the Respondent's application for costs and damages against the Commission and the Complainant, the Commission argued that the Board does not have authority under Section 25 of the Act to order the Commission to pay costs or damages to the Respondents as the Board did not conclude that the complaint was frivolous or vexatious or that the proceedings were frivolously or vexatiously prolonged. The Commission asked the Board to dismiss the Respondent's application for costs and damages.

The Commission also argued that the Board does not have authority to consider how a complaint has been conducted until after it has been referred to the Board by the Commission.

First, to clarify, the Board wishes to correct its phraseology when it said, "...nothing in the Act or Regulations that requires that a submission for costs be made either before or after the complaint has been filed or heard." It would, in fact, be illogical to suggest that an application can be brought to the Board prior to being referred by the Commission. The Board was stating that a costs application can be "filed" either before or after hearing, but most certainly after the matter had been referred for adjudication by the Commission. Up to that point, as noted, the Board has no jurisdiction over a matter.

The second issue raised by the Commission and the Complainant was whether a person who “loses” can be awarded costs.

From the perspective of judicial process, the typical costs pattern is that the successful party becomes entitled to costs. The Act provides, under Section 24(1)(f), that “if a complaint is established, a complainant may be awarded costs”. However, Section 25 does not specify that a complaint must fail in order for a Respondent to claim costs and damages.

As section 25 does not require that a complaint fail before the Respondent can claim costs and damages, the Board must decide if a Respondent who is found to have breached the Act may, under certain conditions, be entitled to costs.

An award of costs to the Respondent pursuant to Section 25 could be made where the conditions for the claim (a finding that the complaint was frivolous or vexatious or that the proceedings have been frivolously or vexatiously prolonged) have been met and is not dependent on the outcome of the complaint.

ANALYSIS

The Respondents believe they are entitled to costs, both personally and corporately, because:

- The “Standing Order” by the Commissioners to the Human Rights Director should not be found legal;
- The conduct of the Director of Human Rights was inappropriate; and
- The conduct of the counsel for the Commission was inappropriate.

The Respondent argues that the word “proceedings” in section 25 includes the date when the complaint is filed with the Commission up to the date when the hearing is concluded. The Board agrees.

The Respondent submitted the definition of “vexatious” as a “proceeding instituted maliciously and without good grounds meant to create trouble and expense for the party being sued” and “without reasonable or probable cause or excuse; harassing; annoying”.

Legality of a Standing Order by the Commission to the Director

Section 20(1)(e) of the Human Rights Regulations stipulates that “where the Commission asks the Director to try and settle the complaint on terms agreed to by the parties, the Director’s role is to mediate the dispute ...”

At the hearing, the Board heard evidence that the Human Rights Commissioners issued a “standing order” that allowed the Director to move directly to try to settle any complaint prior to the Commissioners reviewing any complaint. The Respondent argued that the Commissioners are required to review a complaint, and subsequently may order the Director to mediate the dispute, but that because of the “standing order”, the Director attempts in every case to settle the dispute prior to a review of a complaint by the Commissioners.

The Respondent argued that a “standing order” by the Commissioners to the Director of Human Rights is improper and contrary to the law because it fails to allow for the consideration of individual complaints by the Commission.

The Board does not have jurisdiction over the processes used by the Commission. The Respondent’s application for costs on this basis is dismissed.

Conduct of the Director of Human Rights

The Respondent’s allegations are that the Director of Human Rights acted inappropriately in a number of ways, including saying that Mr. Hureau should pay the Complainant an amount of money to resolve the matter, and that it would be cheaper for him to pay than to retain legal counsel to defend him and his business. The Respondent further argues that because the Complainant was not present at the meeting, the role of the Director could not be construed as “mediator” and that the Director was not acting in a mediation role, but rather as an advocate for the Complainant.

The Board cannot find that the conduct of the Director was vexatious because the Board found that the Respondent sexually harassed the Complainant. Consequently, the complaint was not frivolous or vexatious. The Respondent’s application for costs on this basis is dismissed.

Conduct of the counsel for the Commission

The Respondent argues that the conduct of the Commission’s lawyer was improper on the grounds that:

- (a) The Commission’s lawyer conducted settlement discussions “mere days before the hearing”;
- (b) During the discussions, counsel urged settlement to prevent intimate personal details about the Respondent being “aired in the public forum”; and
- (c) The Commission’s lawyer failed to disclose that she knew some of the Complainant’s allegations were false and that there were allegations made in the complaint subject matter that the Commission did not intend to use.

The Respondent argues that the settlement process is a “sizing up of the strengths and weaknesses of each party’s case. A full and frank discussion of this nature did not occur ...” The Respondent’s position is that the purpose of settlement discussions is to provide clarity to each party as to the strengths and weaknesses of each party’s case through full and frank discussion.

The Board finds that the purpose of settlement discussions prior to hearing is to try to settle a matter in a manner that is acceptable to all parties, and not simply a time to evaluate the strengths and weaknesses of party positions. When a complaint is not settled by the parties, the complaint proceeds to a de novo hearing during which the adjudicative process naturally sees some allegations proven and other allegations not proven.

It is the Board's role to hear testimony under oath, to review documentary evidence provided by the parties, and to hear the parties' arguments prior to evaluating the evidence and coming to a decision. The purpose of the hearing is to determine whether the complaint has been proven, and what the appropriate remedy is.

In every case before the Board, there is a significant amount of information that is brought forth. The Board must sift through what is presented to determine what is relevant, what can be relied upon and, where the evidence is contradictory, what evidence is more likely to be true. In essence, the purpose of the hearing is to test the evidence and make a finding of fact. The Board heard and considered the evidence provided by the parties and by all of the witnesses and found that the Respondent sexually harassed the Complainant, in spite of the frailty of some of the elements.

The Respondents' argument for costs, in this case, appears to be based largely on the actions of the Commission's lawyer, which seems to be more in the nature of one lawyer complaining about the conduct of another lawyer during settlement discussions, rather than a compelling argument for costs. There is no evidence that the proceedings were frivolously or vexatiously prolonged as a result of the Commission's lawyer's conduct.

Finally, the Board considered the Respondents' application for costs on the grounds that the proceedings were vexatiously prolonged by the Commission. The relevant dates are:

- The Complaint was signed on June 11, 2010.
- The Commission forwarded the complaint to Mr. Hureau on June 16, 2010.
- The Director of Human Rights met with Ms. Hanson on June 17, 2010.
- The Director of Human Rights met with Mr. Hureau on June 18, 2010.
- The Respondent advised the Director that he had retained counsel on July 21, 2010.
- Through his counsel, the Respondent forwarded correspondence on August 24 and August 27, 2010 to the Yukon Human Rights Commission indicating he denied the allegations and requested the complaint be dismissed, further noting there was no interest in settlement.
- The Commission prepared a "direct Referral Report" to the Commissioners who considered the Complaint on July 26, 2011.
- The Complaint was forwarded to the Board on August 4, 2011.

There appears to be a gap between the letters of August 27, 2010 and July 26, 2011; however, the Board recognizes that during that time the Commission and Respondents would more than likely have been engaged in preparing their investigative report and submissions to the Commissioners, and as such, the timelines are not unreasonable. As the Board did not hear any evidence that would constitute the Commission vexatiously prolonging the proceedings, the Respondents' application for costs on this basis is dismissed.

BOARD ORDER:

The Board dismisses the Respondents' application for costs pursuant to Section 25 of the Act.

Standing Order by the Commission to the Director

The Board has no jurisdiction over the processes implemented by the Commission. The Respondents' application for costs on this basis is dismissed.

Conduct of the Director of Human Rights

There was no evidence that the conduct of the Director was inappropriate. As such, the Respondents' application for costs on this ground is dismissed.

Conduct of Counsel for the Commission

As the Board did not find that that the Commission's lawyer made statements or failed to disclose information or that this vexatiously prolonged the proceedings, the Respondents' application for costs on this ground is dismissed.

Vexatiously prolonged proceedings by the Commission

The Board finds that the timelines were not unreasonable and, as such, the Respondents' application for costs on this ground is dismissed.

APPLICATION FOR COSTS PURSUANT TO SECTION 26

JURISDICTION

Section 26 of the Act states: If the board of adjudication concludes that the complaint was based on information that the complainant knew to be false the board may order the complaint to pay to the respondent

- (a) part or all of the respondent's costs of defending against the complaint; and
- (b) damages for injury to the respondent's reputation.

The Complainant challenged the Board's jurisdiction to consider the Respondents' application for costs pursuant to Section 26 of the Act. She argued that because the Board found that her complaint of sexual discrimination was established, it had no jurisdiction to proceed. The Complainant requested that the Board dismiss the application as being beyond its jurisdiction.

Neither Section 25 nor Section 26 of the Act specify that the complaint must be dismissed as a pre-condition for ordering costs to a Respondent, unlike Section 24 that clearly requires that the complaint be proven before a claim for costs can be made by the Complainant. In fact, this section provides the Respondent with recourse if a Complainant brings a complaint based on false information.

ANALYSIS

The Respondents' application for costs pursuant to Section 26 is based on the allegation that the complaint was based on "information the complainant knew to be false". The Respondent relied on the "Subject Matter of the Complaint" at Section III and specifically:

- the Complainant's detailed allegations of sexual harassment on March 20, 2010 during a birthday party for the Respondent by the Complainant and one other co-worker;
- the details of a "birthday hug";

- the allegations related to the Respondent's harassment about trying on one of the bikinis for sale in the store, and;
- the Complainant's statement that the staff had the Respondent put on the top of a bikini over his clothing.

It is the Board's experience that in every case, a significant amount of information is heard, with each party believing the information necessary and true in proving their case. It is the Board's role to sift through what is presented and determine relevance and reliability in order to make a finding of fact. Evidence provided by all witnesses was considered by the Board and the complaint was found to be proven, in spite of the frailty of some of the elements.

The Board heard inconclusive and contradictory evidence about the birthday hug, with the result that the Board made no finding that the Respondent subjected the Complainant to any blatant or unwelcome physical sexual harassment. In the Decision, the Board noted: "The episodes of physical contact between the Parties are inconclusive and contradictory, however. As such, the Board makes no finding of blatant or unwelcome physical sexual harassment in this complaint".

The Respondent argued that there should be an order for costs because the Complainant's allegations, as noted above, were false. In the Decision, the Board related the testimony about the birthday party, noting the inconsistencies in the witness testimony and the Complainant's allegations. As a result, the Board gave little weight to these allegations. The Decision was not based on information the Complainant allegedly knew to be false.

DECISION

As the Board did not conclude that the complaint was based on information the Complainant knew to be false, the Respondents' application for costs on this ground is dismissed.

BOARD ORDER:

The Board dismisses the Respondents' application for costs pursuant to Section 26 of the Act.

Clarification on Affidavit Evidence on Claims for Costs and Damages

During the process of submissions and replies on the issues of Remedy, Costs and Damages:

- the Complainant submitted her own affidavit in support of her claim for costs and damages and remedy from the Respondent,
- the Respondents submitted affidavits on behalf of Mr. Hureau and Intersport in support of their applications for costs; and
- the Commission submitted an affidavit from the Director of Human Rights in reply to the Respondents' application for costs.

The Board was challenged in its acceptance of certain affidavits while refusing others.

The Board wishes to clarify its reasoning for accepting the Respondents' affidavits on their cost application and the affidavit of Ms. MacFadgen in the Commission's reply to the Respondents' cost application but not accepting the affidavit of Ms. Hanson in support of her claim for costs/remedy from the Respondents.

There is a difference between affidavits in support of a claim for remedy or damages by the Complainant and Commission arising out of the findings and decision on a complaint, and a cost application that may be filed by the Respondent.

The two affidavits by Mr. Hureau and Ms. MacFadgen were in support of their respective arguments for costs, which must flow from a formal finding by the Board of a breach of Section 25 and/or Section 26. Therefore, there was no inconsistency of the Board in accepting affidavits related to the cost application and affidavits related to damages and remedy.

Dated this 21st day of January 2013 at the City of Whitehorse, Yukon.



Michael Dougherty, Chair
Yukon Human Rights Board of Adjudication