Board No.: 2011-01
Decision: August 21, 2012

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

BOARD DECISION

Appearances

Devon Hanson	Complainant
Colleen Harrington	Counsel for the Yukon Human Rights Commission
Mark Hureau	Respondent
James Tucker	Counsel for the Respondents
Kelly McGill	Counsel for the Respondents

Witnesses

Michael Hanson
Charles Hine
Rob LaRose
Krista Mooney
Stephen Mooney
Cheryl Keleher
Candace Gottschall

Board of Adjudication Members

Michael Dougherty	Chair
Barbara Evans	Adjudicator
Maxwell Rispin	Adjudicator

Heard: Whitehorse, Yukon June 4-8 and June 11-12, 2012
Submissions: June 14, 2012; Replies: June 16, 2012

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I. What is the complaint about?

This human rights complaint was laid with the Yukon Human Rights Commission (Commission) by Devon Hanson on June 11, 2010. Ms. Hanson alleged that Mark Hureau and 17385 Yukon dba Intersport discriminated against her on the prohibited ground of sex and sexual harassment in connection with employment.

This complaint alleged a contravention of the Yukon *Human Rights Act* (RSY 2002, c116) sections 7(f) *"sex",* 9(b) *"in connection with any aspect of employment or application for employment,"* 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 know is unwelcome,"* and 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."*

II. Who are the Parties?

The Complainant is Devon Hanson, who was unrepresented by Counsel.

The Commission was represented by Colleen Harrington. The Commission carried the complaint which was referred to the Yukon Human Rights Panel of Adjudicators on August 4, 2011.

The Respondent is Mark Hureau, who is also the majority owner of 17385 Yukon Inc. dba Intersport. He was represented by James Tucker who was assisted by Kelly McGill.

III. What are the circumstances giving rise to the complaint?

Note: Within Section III, statements are, except where noted, uncontested facts in evidence.

A) Background circumstances

i) Ms. Hanson was a student at Porter Creek Secondary School and a basketball player at the relevant time.

ii) Mr. Hureau is the owner/operator of Intersport Yukon, a sporting goods and clothing store operating in Whitehorse.

iii) The secondary Respondent is 17385 Yukon Inc. which does business in Whitehorse as Intersport.

iv) Mr. Hureau is a basketball coach, predominantly of female basketball teams.

v) Mr. Hureau was the coach of Ms. Hanson's basketball team at Porter Creek between 2007 and 2009 but had been an assistant coach of a Yukon prep team in summer of 2008 before coaching the Yukon Arctic Winter Games girls' basketball team for 2010.

vi) In September 2008, Mr. Hureau received an e-mail from Ms. Hanson indicating she wanted to work at Intersport. Mr. Hureau responded, asking if she thought she could handle the added employer relationship; Ms. Hanson replied she could. The employment relationship was not established at that time.

vii) In February 2009, members of the grades 10 to 12 girls basketball teams, including Ms. Hanson, assisted with doing inventory at Intersport.

viii) Subsequently, in March 2009, Ms. Hanson was hired to work at Intersport by the floor manager, Rob LaRose, to work part time as a sales representative.

ix) Other salespersons in the store included Candace Gottschall and Krista Mooney, a teammate and schoolmate.

x) Sometime in March 2009, Ms. Hanson also became involved with Charles Hine, a boyfriend and also a basketball player.

B) The Work Environment at Intersport

i) Mr. LaRose is the storefront operations manager, while Mr. Hureau's responsibilities are more focused on office management, inventory and bookkeeping tasks.

ii) Sales representatives were responsible for customer service, store organization and stocking shelves with inventory from the storage rooms, annual inventory and tasks as assigned by managers Mr. LaRose and Mr. Hureau.

iii) The work environment at Intersport was very relaxed, friendly and casual. There were no regular, formal schedules, no formal dress code or employee policies, including no harassment policy.

iv) Employees were allowed to pursue their personal business when there were no customers in the store, including homework, texting and phone calls to friends, and general conversations among the staff.

v) Ms. Hanson's typical work outfit was yoga pants or jeans, tank top, and hoodie. Testimony related to Ms. Hanson's dress included:
- Mr. Hureau sent a text to Ms. Hanson to "zip up hoodie or I'll tell your dad."
- Mr. Hureau sent a text to Ms. Hanson about her wearing specific colours of underwear.

vi) Mr. Hureau helped Ms. Hanson with her homework in the store, especially math.

vii) Mr. Hureau provided employees with "life advice"; Ms. Hanson testified he provided her with advice, help with schoolwork and homework, noting "he was my mentor".

viii) Ms. Hanson testified that the workplace had a relaxed, comfortable atmosphere. She noted that the employees texted a lot, as well as had casual discussions and joked around. She also noted that the employees discussed the texts, joking and sometimes making fun of the boys who sent texts to her.

ix) In October 2009, Ms. Hanson received an e-mail from Mr. Hureau with attached pictures of what Mr. Hureau thought she should wear for Hallowe'en, even though he knew she would be away from Whitehorse on Hallowe'en. While it is not completely clear, it appeared from the testimony that more than Mr. Hureau and Ms. Hanson were involved in the exchange of e-mails regarding costuming.

x) On November 5, 2009, Mr. Hureau sent a poem to Ms. Hanson in French by e-mail (Exhibit 9). Ms. Hanson testified that she did not know what precipitated the poem, that she does not read French and that she didn't translate it, as it "didn't matter".

xi) On or about January 26, 2010, at the end of the workday, Mr. Hureau spoke to Ms. Hanson about a rumour regarding a "sex contest" involving her and Ms. Mooney. Ms. Hanson testified she didn't see how it would affect Intersport, and thought it inappropriate of Mr. Hureau to discuss it. Ms. Hanson testified that she had told Ms. Gottschall that it was just Ms. Mooney involved and denied that she said she was involved. Further, Ms. Hanson testified that she was not involved in the sex contest.

xii) Testimony was offered by Ms. Hanson, Mr. Hureau, Ms. Gottschall and Ms. Mooney regarding the viewing of a YouTube video clip viewed at work with Mr. Hureau, Ms. Gottschall, Ms. Hanson and Mr. LaRose. Mr. Hureau later sent an e-mail with a link to an additional YouTube clip on January 28, 2010 to Ms. Hanson (Exhibit 11). There was some testimonial confusion in regard to which clip was shown at work and which was sent later.

C) Communication Interactions

i) Ms. Hanson and Mr. Hureau testified that e-mail and texting was one of the primary communication tools used between Mr. Hureau, as coach and team members. Mr. Hureau preferred e-mail as he had little experience with texting.

ii) Ms. Hanson took pictures of a number of texts sent to her from Mr. Hureau and printed them. There is no certainty of the dates for some of them and contextual continuity could not be clearly established in testimony.

iii) Ms. Hanson testified that she saved a number of the texts because her father suggested they print them out about a week after she quit her employment.

iv) Ms. Hanson also testified that her phone only saves 50 texts, so they would be lost if they weren't saved. Ms. Hanson further testified that she normally sent about 150 texts per day.

v) Ms. Hanson did not save any of her texts or e-mail correspondence to Mr. Hureau.

vi) In testimony, when Ms. Hanson was questioned about the e-mails or texts that she had saved; generally, she could not recall whether she responded or not, or what precipitated the exchanges of any of the texts or e-mails.

D) Arctic Winter Games

i) Mr. Hureau was the coach of the Yukon girls basketball team. Its co-captains were Ms. Hanson and Ms. Mooney; for the Arctic Winter Games, the team travelled to Grande Prairie, Alberta, chaperoned by Cheryl Keleher.

ii) While Ms. Hanson denied any personal attentiveness to Mr. Hureau, testimony given by Ms. Mooney and Ms. Keleher was that she was very attentive to Mr. Hureau, including:

- Asking if he wanted dessert when Mr. Hureau was sitting with a group of adults;
- Leaning back against Mr. Hureau's legs while sitting watching a basketball game;
- During a debrief of a game, Ms. Hanson removed her shirt and sat among her teammates wearing only a sports bra while Mr. Hureau was in the room; and
- Ms. Hanson insisting that when Mr. Hureau sent co-captain texts to her and Ms. Mooney, that only she, Ms. Hanson, be the person to respond.

E) Changes after Arctic Winter Games

i) Content of communication from Mr. Hureau changed in 2010 from basketball to personal e-mails or texts at night as evidenced by the e-mails provided to the Board by Ms. Hanson from Mr. Hureau.

ii) Ms. Hanson alleged that Mr. Hureau sent uninvited texts and she responded to some of them because she didn't want to offend Mr. Hureau or jeopardize her job and/or possible future basketball opportunities.

iii) Ms. Hanson alleged that on March 16, Mr. Hureau grabbed her hand while taping up boxes of stock. Mr. Hureau offered another account of this episode. He noted that he did not grab her hand, but rather, her fingers twisted around his. He then testified remarking to Ms. Hanson something to the effect: "Devon, give me your hand, the mystery is over now, no problem. I think it is adorable."

iv) Ms. Hanson showed a scab on her back to Mr. Hureau on Thursday, March 18 pertaining to an injury incurred at the Games.

v) Mr. Hureau sent a text to Ms. Hanson about her underwear showing on Thursday, March 17.

vi) Ms. Hanson alleged that she felt it was "weird" that Mr. Hureau became more physical with her, including punching her arm, goofing around, stroking her arm, and in one instance, patting her butt with what she thought it was his hand, but later realized was a shoe.

F) Birthday Party

i) Saturday, March 20 was Mr. Hureau's birthday. Ms. Hanson testified that the day before (March 19) she, Ms. Gottschall and Ms. Mooney agreed to decorate the store and have a party. The testimony of Ms. Mooney and Ms. Gottschall was that the party was planned by Ms. Hanson and Ms. Gottschall as Ms. Mooney was not working the day prior. Ms. Hanson brought a birthday cake and Ms. Gottschall brought a bottle of rum and some coolers.

ii) Both Ms. Hanson and Ms. Gottschall arrived early on Saturday morning and decorated the store with streamers. The decorating was in progress when Ms. Mooney arrived for her scheduled shift.

iii) Later in the afternoon, approximately one hour before store closing, Ms. Hanson and Ms. Gottschall began drinking alcohol.

iv) The party attendees after the store closing were Mr. Hureau, Ms. Gottschall, Ms. Hanson and Ms. Mooney. The witnesses described a number of incidents at the party, without consistency, including:

- Suggestions of modelling bikinis: Ms. Hanson testified it was Mr. Hureau's idea; Mr. Hureau said he was in the office when the event occurred; Ms. Mooney and Ms. Gottschall said it was Ms. Hanson's idea and they stopped her before Mr. Hureau came out of the office,
- Ms. Hanson putting a bikini top put on Mr. Hureau over his shirt,
- Ms. Hanson's mother coming to pick her up at closing time, and being urged to return later,

v) Mr. Hureau had a family party to attend. Everyone left around 8:00 p.m.

G) Events between Birthday Party (March 20) and March 27, 2010

i) There was an incident on Monday, March 22 with Ms. Gottschall, Ms. Hanson and Mr. Hureau where Mr. Hureau "put Ms. Hanson down" in front of Ms. Gottschall.

ii) Mr. Hureau later attempted to apologize in a tweet sequence which begins with the "ridiculous crush" message on Monday evening, March 22 (Exhibit 2). This is referred to as well in a March 26, 2010 e-mail (Exhibit 3) when Mr. Hureau writes *"I put you down in front of Candace on purpose, because that you hold a special place for me and I don't want her to feel left out. She knows that when given a chance, I just want to be with you when we're here. Sorry if that makes you feel under-appreciated or picked on. Didn't little boys hit you when they liked you?"*

iii) An Arctic Winter Games "feedback" e-mail regarding her basketball performance was sent from Mr. Hureau to Ms. Hanson on March 23, 2010 (Exhibit 18). This follow-up feedback was a regular practice by the coach, Mr. Hureau, to players.

iv) Ms. Hanson offered to bring Mr. Hureau her mother's chicken dinner on Wednesday evening, March 24, during a correspondence exchange with Mr. Hureau, who was working late at the store after hours. Mr. Hureau declined. Ms. Hanson denied that this event occurred.

v) Mr. Hureau sent a text to Ms. Hanson during work on Friday, March 26 saying: *"zip up hoodie or I'll tell your dad."*

vi) Ms. Hanson stated that she knew as soon as she left work on Friday she wasn't going back to work.

vii) Mr. Hureau texted a message about sneaking a photo of her back with a photo attachment showing an obese person's back (Exhibit 2). This related to an earlier conversation in the store with Ms. Gottschall, Ms. Hanson and Mr. Hureau about backless prom dresses and Ms. Hanson's concern that her back was not suitable for a backless dress. Ms. Hanson testified that she initially believed Mr. Hureau had taken secret photos of her.

viii) Ms. Hanson received the "inconsistency" apology e-mail (Exhibit 3) later in the evening of March 26, 2010 from Mr. Hureau while at Mr. Hine's home. She testified that at some point she talked to Mr. Hine and showed him the e-mail and he stated he thought it was "weird".

ix) Ms. Hanson spoke to her boyfriend's mom, Pamela Hine, because of her prior experience with a sexual assault, and Ms. Hanson showed her the text of March 26 from Mr. Hureau.

x) On Saturday evening, March 27, Mr. Hureau sent the "rumours" e-mail (Exhibit 4) and tweeted Ms. Hanson that he did so (Exhibit 2).

xi) Ms. Hanson showed Ms. Pamela Hine the "rumours" e-mail the following day.

xii) Ms. Hanson sent Mr. Hureau a text saying, "You crossed the line big time." (Exhibit 2).

H) Events after March 27, 2010

i) Ms. Hanson spoke to her boyfriend's mother's fiancé, who is a lawyer, about the e-mails.

ii) Ms. Hanson testified that she told her parents within a week of receiving the e-mails of March 26 and 27, 2010.

iii) Sometime in April, the Complainant's father, Michael Hanson, went to Sport Yukon to report the inappropriate behaviour of Mr. Hureau. He was referred to Basketball Yukon. Testimony was that his intent was to have Mr. Hureau removed as a basketball coach.

iv) Ms. Hanson, accompanied by her father, met with the Commission Intake Officer, Lynn Pigage, on May 3, 2010 with files relating to the complaint Ms. Hanson was considering filing (Exhibit 1.1)

v) A meeting was held with Mr. Mooney (representing Basketball Yukon), Ms. Hanson's parents, and Mr. Hureau on May 5, 2010 after a preliminary meeting on April 23, 2010, which Mr. Hureau did not attend.

vi) Ms. Hanson testified that the complaint to Basketball Yukon "didn't go far" so her father suggested that the route to go was through the Human Rights Commission.

vii) Another texting sequence went on between Mr. Hureau and Ms. Hanson between June 5, 2010 and June 12, 2010 (Exhibit 8).

viii) In one text Ms. Hanson wrote *"I miss you too"*, later testifying that "Mark was big part" of her life, a great coach and noting that she wished it hadn't happened because she lost a relationship she valued.

ix) The human rights complaint was signed by Ms. Hanson on June 11, 2010 at the Commission office.

x) The texting correspondence ended when Ms. Hanson texted Mr. Hureau on June 12, 2010 saying *"Stop contacting me."* Mr. Hureau's later, final reply was *"Stop lying."*

xi) Ms. Hanson saved this text sequence and took them to the Yukon Human Rights Commission on August 13, 2010. Staff photographed them and Ms. Hanson had prints made at Walmart. Exhibit 8 provides a written transcript of the photos copied in Exhibit 7.

IV. What are the issues in this complaint?

The text of the complaint reads: *"The Complainant alleges that the Respondent contravened the Act by discriminating against her on the prohibited ground of sex and sexual harassment in connection with employment."*

Sexual harassment, as a form of sexual discrimination, is at the core of this complaint. As noted earlier "harass" is further defined in the Yukon *Human Rights Act* as: *"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 know is unwelcome."*** *[emphasis added]*

A leading case with respect to sexual harassment in Canada is Janzen v. Platy Enterprises Ltd [19891 S.C.R. 125 ["Janzen"]. It is a decision of the Supreme Court of Canada. The Court in Janzen stated that sexual harassment is a form of sexual discrimination which *"[w]ithout seeking to provide an exhaustive definition of the term", was content to broadly define 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."*

Various types of conduct may constitute sexual harassment. The Court has cited Professor Aggarwal's text, Sexual Harassment in the Workplace, on this. In it, Professor Aggarwal states that sexual harassment *"is any sexually-oriented practice that endangers an individual's continued employment, negatively affects his/her work performance, or undermines his/her sense of personal dignity. Harassment behaviour may manifest itself blatantly in forms such as leering, grabbing, and even sexual assault. More subtle forms of sexual harassment may include sexual innuendos, and propositions for dates or sexual favours."*

As well, the Court has noted in Janzen that *"sexual harassment also encompasses situations in which sexual demands are foisted upon unwilling employees or in which employees must endure sexual groping, propositions, and inappropriate comments, but where no tangible economic rewards are attached to involvement in the behaviour."*

The complaint filed by Ms. Hanson with the Commission on June 11, 2010 (Exhibit 16) sets out a number of alleged incidents that purport to establish her case for sexual harassment. These include: inappropriate verbal comments, inappropriate physical touching, inappropriate texting and e-mailing. Later at the hearing before the Board, Ms. Hanson further expanded on the number of incidents included under these categories.

V. *Prima Facie* Discrimination

The evidence presented by the Commission and the Complainant, prior to the case presentation by the Respondents, sought to demonstrate that there was a *prima facie* case made for sexual harassment on a balance of probabilities.

The Supreme Court of Canada held in Ontario Human Rights Commission vs. Simpsons-Sears Ltd. (1985, 2 S.C.R. 536 a t 558) that *"...The complainant in proceedings before a [human rights tribunal] must show a prima facie case of discrimination. A prima facie case in this context is one which covers the allegations made and which, if they are believed is, complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer."* The legal framework for a *prima facie* case in assessing claims of discrimination, thus, is well established.

Once a *prima facie* case is established, however, the onus then shifts to the Respondent to provide a satisfactory explanation that demonstrates either that the conduct did not occur as

alleged or was non-discriminatory. If a reasonable explanation is provided by the Respondent, it is up to the Complainant to demonstrate that the explanation is merely a pretext for rationalizing away the alleged discrimination.

In civil cases the burden of persuasion requires proof on the balance of probabilities, which means that the evidence in favour of the Complainant must be more probable than the evidence against him or her.

The Parties in Hanson vs. Hureau presented differing analyses of the issues and the required elements of a *prima facie* case. Ms. Hanson, in her closing submission, clearly states that *"Mark Hureau's increasingly inappropriate communication with me had begun to make me feel very uncomfortable and created a great deal of confusion related to how to be an employee at Intersport."*

These actions, she contends, lead her to feel that she *"could no longer live with this discomfort and confusion"* and hence her decision *"to quit my job at Intersport."* Ms. Hanson stated in her testimony that she chose not to report for work on Saturday, March 27, 2010. This decision ended her employment at Intersport, leaving without notice or letter of termination, but rather by abandonment.

In a text message sequence with Mr. Hureau between March 22 to March 27, 2010 offered as Exhibit 2, Ms. Hanson provided a sense of the evolution of her allegation of sexual harassment in her last e-mail in the sequence: *"(O)ver the last couple of weeks you've been saying things and doing things that have been creepying me out. It is Very unfair of you to put me in this situation where I do not have a clue what to do. I've talked to my parents and I have some things to think about. You're Email came at the exact time I was going to tell you to stop. So sorry But I dont thing I can work at Intersport anymore.* ***You crossed the line big time****." [emphasis added]*

The Commission submitted that the evidence in this hearing substantiates a *prima facie* case of sexual harassment. They offered that there is evidence that the conduct of Mr. Hureau was both subjectively and objectively unwelcome to the Complainant, Ms. Hanson, as it would have been, they contend, to any reasonable person in her circumstances.

Furthermore, they believe there is substantial evidence that the employer knew or ought to have known that this conduct was unwelcome. As the Commission notes *"(I)n this case, the employer and the harasser are one and the same and he has admitted that he knew that he offended the Complainant (but says he did not know why) and he was apologizing to her for it."*

Counsel for the Respondent endeavored to demonstrate that *"(A)ll of the conduct and all of the communications which is referred to in the complaints occurred in the real context of a friendship between Hanson and Hureau."* Furthermore, they offered that *"(A) close examination of each and every communication and circumstance on which the Board has received evidence reveals that none of them were sexual in nature."*

After hearing all the evidence presented, the Board reviewed the e-mails contained in Exhibits 3 and 4. Statements in them such *as "(I) know that I am scaring you about talks of crushes etc."* or *"(C)onstantly telling you how special you are has backfired on me in that I want to be around you too much, and get jealous of all the undeserving slobs who think they are good enough....there I go"* or *"You can do your part by trying not to be so alluring, or funny, or nice, or ..... JK." affirms* for the Board allegations that these communications included, in part, comments of a sexual nature when viewed objectively.

At hearing, Mr. Hureau presented an extensive explanation of the Exhibit 3 and 4 e-mails. He sought to interpret what certain phrases meant to him and to put the e-mails into the context of his shared experiences with Ms. Hanson. At the hearing, Mr. Hureau indicated that when he reread the e-mail of March 26, it could easily be misconstrued when taken out of context. This, he affirms, in the second e-mail on March 27 when he himself says about a number of the passages of the March 26 e-mail that *"(S)ome of them can be interpreted as come ons."*

The evidence and testimony of Ms. Hanson, taken together with her allegation that Mr. Hureau's conduct was unwelcome and her evidence pointing out that she had to endure sexually inappropriate comments for a *"couple of weeks"* leads the Board its conclusion that a *prima facie* case of sexual harassment can be made in the Complainant's favour in the absence of a formal answer from the Respondent-employer.

A full hearing of the Respondent's case followed the closing of the Commission's case. The Board's analysis and final decision rested on a full hearing of the entire case.

VI. The Arguments – Written Submissions and Replies

Counsel for the Commission and for the Respondent both pointed out any allegation of sexual harassment in this case could only be viewed as being at the *"most mild end of the spectrum of sexual conduct."* The Board agrees with this assertion and views the following arguments in this light.

The Respondent challenged the scope of evidence that the Commission sought to present. There were arguments as to whether this Board should hear this case as a trial *de novo* or limit its consideration to the specific scope of the original complaint. Counsel for the Commission pointed out the following under *Human Rights Act* regulation 11(1): *"In addition to receiving evidence in accordance with the Evidence Act, the board of adjudication may receive or view any relevant evidence whether under oath or otherwise and in respective [sic] of whether that evidence would be admissible in proceedings in court, and the board may act according to its view of the reliability and import of the evidence. (2) The board may receive evidence of similar acts for the purpose of providing a pattern of conduct or a practice."* This allows the Board to accept evidence beyond the framework of the original complaint.

While Counsel for the Respondent writes in the response to the Commission's closing submission that *"Hureau takes no issue with the sections of the Yukon* Human Rights Act *cited and referred to by the Commission",* they do express in their own closing submission their concern about *"large volumes"* of *"similar act evidence"* which they see *as "having no bearing on the complaints."*

The Board chose to broadly accept evidence outside the narrow scope of the original Complaint on the basis that it was the task of the Board to use its expertise and discretion in according appropriate weight and relevance to what it heard.

The framework the Board has considered for its examination of the evidence presented in this case can be found in the case of the Federal Court of Canada in Canada (Human Rights Commission) v. Canada (Armed Forces) (T.D, [1999] 3F.C. 653.

This case was cited by both Parties. In it, the legal test for sexual harassment drawn from the Janzen case already noted, addresses unwelcome conduct of a sexual nature that is detrimental to the work environment and pointed out that the stated test had been elaborated on by various human rights tribunals throughout Canada up to that point.

As cited from this case by the Commission *"the Court set out the elements of the test as 1) was the conduct "welcome", 2) was the conduct sexual in nature, 3) was the persistence or gravity of the conduct enough to constitute harassment, and 4) notification to the employer. With respect to this fourth element, the Court states that, "although this was not an element considered by the Supreme Court in Janzen, I believe that fairness requires the employee, whenever possible, to notify the employer of the alleged offensive conduct" that is detrimental to the work environment."*

Was the conduct welcome?

In Canadian jurisprudence, the general adopted definition of "unwelcome" presented to this Board notes that the challenged conduct must be unwelcome *"(I)n the sense that the employee did not solicit or incite it, and in the sense that the employee regarded the conduct as undesirable."*

All Parties recognized Mr. Hureau's relationship to Ms. Hanson as a coach, mentor, and employer. Although Ms. Hanson disputes the characterization of their relationship as one of friendship, Mr. Hureau and his Counsel sought to put all interactions in the context of an existing friendship. The birthday party preparations for Mr. Hureau by Ms. Hanson and frequent texting outside the workplace and basketball environments with 69 exchanges between them on March 25 alone, led Counsel for Mr. Hureau to argue that this evidence supports the notion of a more significant relationship than just employer-employee or athlete-coach.

It is Ms. Hanson's testimony regarding her perception of the relationship, though, that is central as is her interpretation and feelings toward Mr. Hureau's actions. The Board focused its attention on the discrepancy between the Complainant's and Respondent's perspectives on what was welcome versus unwelcome in making its determination.

The Commission's closing submission noted Re Canada Post Corp. and Canadian Union of Postal Workers (Gibson) (1987), 27 L.A.C. (3d) 27. In it Arbitrator Swan, while holding that the conduct of the alleged harasser was unwelcome, stated that: *"…merely because an employee is prepared to engage in banter, flirtation, or even sexual activity with one or more fellow employees does not mean that employee is required to accept the same conduct from everyone. As this area of law develops, it must recognize that some comments or activity may be welcome from one person, while entirely unwelcome from another, and will recognize an employee's right to choose those with whom he or she is prepared to let down some of the defences to which he or she is entitled."*

Of the questions, not only “who” but also of “when” and “how” an employee, in this case Ms. Hanson, chooses to engage others is key. Ms. Hanson clearly testified that Mr. Hureau’s behaviour during the time period between March 15 and March 27, 2010, was unwelcome. While there is no evidence that she communicated that the behaviour was unwelcome, her testimony was that she left her employment as a result of the behaviour. Further, Mr. Hureau’s text and e-mail apologies of March 26 and 27 may be interpreted as amplifying the correctness of her perception.

Was the conduct sexual in nature?

The standard for this Board in making a determination that Mr. Hureau’s conduct was sexual in nature, as has been pointed out by both Counsel, is the “reasonable person” standard.

Counsel for the Respondents went to considerable length with Mr. Hureau to contextualize the evidence in text messages and e-mails found in Exhibits 2, 3, and 4, arguing that there was no sexual content found in them. Yet, as previously noted, Mr. Hureau, at the hearing, indicated that when he reread the e-mail of March 26, passages could easily be misconstrued if taken out of context. This, he stated, prompted the second e-mail on March 27. In reference to a number of the passages of the March 26 e-mail he writes: *“(S)ome of them can be interpreted as come ons.”*

Counsel for the Commission offered Aggarwal and Gupta’s description of electronic harassment: *“With electronic harassment, there is no direct visual, verbal, or physical contact between the harasser and the victim. The harasser first obtains, on one pretext or the other, the e-mail address of the victim, and then communicates or transmits inappropriate sexual or racial comments.”*

The Commission’s Counsel further offered that e-mail harassment can include *“sending personal and inappropriate messages”* or *“unwelcome remarks.”* The Commission argues that a reasonable person in the circumstances before the Board would find the nature of Mr. Hureau’s conduct to be sexual in nature in a variety of instances, including the evidence received in Exhibits 2, 3, and 4.

The Board finds that there is sufficient evidence to conclude that the conduct of Mr. Hureau was, at times, especially within his communication to Ms. Hanson, of a sexual nature.

Was the persistence or gravity of the conduct enough to constitute harassment?

The Commission’s Counsel pointed out that Section 14(2) of the *Human Rights Act* does not require more than one demand or sexual solicitation or advance “*that one knows or ought reasonably to know is unwelcome”* in order to constitute harassment.

The Respondent’s Counsel sees this line of argument as an inappropriate attempt to reverse the onus, seeking to make the Respondent disprove the allegation of harassing conduct rather than have the Complainant prove it.

The Board determines that within a very limited timeframe, the conduct of Mr. Hureau, with his intensive communications with Ms. Hanson, established that the persistence of this conduct was sufficient to find for harassment.

Was there notification to the employer?

Recognizing that one of the primary goals of human rights legislation is to stop discrimination and harassment, rather than have it be a solely a punitive process, it becomes necessary to consider whether the Complainant notified the employer in an effort to end the harassment, or at the very least, to allow the employer to take action against harassment in the workplace.

There is only indirect evidence that Ms. Hanson gave Mr. Hureau indications prior to her departure from employment that his actions or comments were unwelcome. This evidence can be inferred from Mr. Hureau's text and e-mail apologies beginning on March 22.

There is no indication that Ms. Hanson made any attempt to discuss any concerns relating to Mr. Hureau's behaviour with her direct supervisor, Mr. LaRose.

Unfortunately, Ms. Hanson's employer was a corporate body doing business as Intersport and Mr. Hureau was the majority shareholder in the corporation. Ms. Hanson would have had to notify Mr. Hureau, her harasser, or at the very least, Ms. LaRose, her direct supervisor and store manager, however difficult it may have been for her to do so.

Ms. Hanson did not notify her employer of the harassment, which means that the Respondent-employer, Intersport, did not have the opportunity to address the allegations of sexual harassment in the workplace.

Power imbalance

With respect to the issue of power imbalance, the Commission's Counsel cited BC Human Rights Tribunal in Mahmoodi v. Dutton (No.4) (1999) 36 C.H.R.R. D/8, which stated that*, "Behaviour may be tolerated and yet unwelcome at the same time. The reasons for submitting to conduct may be closely related to the power differential between the parties and the implied understanding that lack of co-operation could result in some form of disadvantage."* (para.141)

Counsel for the Respondent accepted that "(F)undamentally, sexual harassment is an exercise of power." However, citing the B.C. Human Rights Tribunal case of Kang v. Hill and another (No.2) called this Board's attention to the determination that the Respondent's conduct "*rather than being simply an assertion of his power, it was also an acknowledgement of his weakness,"* and that the Respondent *"did not proposition [the Complainant]; he expressed feelings for her."*

The power imbalance between Mr. Hureau acting as employer and coach and Ms. Hanson as employee and athlete has obvious employment and sports implications in this case. The overlapping roles present a decision-making challenge to the Board.

Age differential

There is a 25-year gap between Mr. Hureau, a 43-year-old employer/basketball coach and Ms. Hanson, an 18- year-old high school student employee/basketball player.

Immaturity

As noted in the labour arbitration case, Canadian Union of Public Employees, Local 1146 v. Woodstock (City) [2010] O.L.A.A. No.224 (QL) offered by the Commission as a reflection on Ms. Hanson's situation, the young student worker affected in it *"may have lacked the maturity*

and wherewithal to be able to discern the appropriate reaction to the grievor's inappropriate comments and overtures," particularly when factoring in the power imbalance given the grievor's supervisory authority."

Counsel for the Respondent challenged the relevance of Canadian Union of Public Employees, Local 1146 v. Woodstock (City) [2010] to our deliberations in this Complaint.

Dress

The workplace dress of Ms. Hanson provoked three reported interventions by Mr. Hureau.

Counsel for the Commission submitted that Professors Aggarwal and Gupta point out that testimony about a Complainant's manner of dress should be ruled inadmissible*. "It is irrelevant unless there is a dress code, and it is prejudicial because by advancing worn-out stereotypes, the defendant creates the inference that the Complainant may have encouraged the behaviour. While this may be relevant in a tort suit, it has no bearing on a complaint under the Human Rights Acts. If sex discrimination is proved, it is irrelevant whether the Complainant's behaviour in any way antagonized the employer or co-workers."*

Counsel for the Respondent pointed out that, after Mr. Hureau mentioned directly or texted his concern to Ms. Hanson over a dress issue, she responded appropriately to each concern.

Both Parties, possibly for differing reasons, have pointed the Board away from this as a concern, though the "coloured underwear" incident was mentioned in the original complaint.

Physical contact

Mr. Hureau testified that while working in the storage area of the Intersport store sometime in December of 2009, he slapped Ms. Hanson on her bum with a shoe. This was after she levelled a put-down crack at him. Later the same day, he reported that he told the whole staff working that day of the incident and repeated Ms. Hanson's joke. He noted that although Ms. Hanson was initially shocked at the thought that he had slapped her with his hand, with the knowledge he had hit her with a shoe, she said that she didn't mind. In testimony, Ms. Hanson testified that it had made her feel awkward.

Ms. Hanson mentioned that Mr. Hureau on unspecified occasions punched her arm and stroked it at work. Mr. Hureau denied this.

Testimony was given by both Parties and by witnesses that Ms. Hanson leaned back against Mr. Hureau's legs while sitting watching a basketball game during the Arctic Winter Games in early March of 2010.

Ms. Hanson stated in her complaint that on or about March 16, 2010, while trying to help her tape boxes in the storeroom at Intersport, Mr. Hureau grabbed her hand and said, "I like it when you touch my hand." Mr. Hureau offered a different account and venue in the store for this episode. He noted that he did not grab her hand but rather her fingers twisted around his. He then testified remarking to her something to the effect "Devon, give me your hand, the mystery is over now, no problem. I think it is adorable."

Ms. Hanson, in her complaint, speaks of Mr. Hureau harassing her about giving him a birthday hug at the March 20 birthday party that Ms. Hanson planned with Ms. Gottschall. Examination by Counsel for Mr. Hureau brought out testimony that all three of the attendees hugged Mr. Hureau at the end of the party.

VII. Yukon Human Rights Board of Adjudication findings of fact and analysis

This Human Rights Board of Adjudication (Board) understands it role and responsibility in according the necessary weight and consideration to evidence tendered before it. This is true whether or not the evidence is within the timeframe of the original complaint or is "similar act evidence" outside of those time strictures.

While it heard evidence over a broad time period, this Board chooses to focus on the salient events between the 2010 Arctic Winter Games, March 6 to 13, and on until March 28, 2010, because, as Ms. Hanson herself noted in her testimony, her relationship started "feeling weird" at or shortly before Arctic Winter Games in March of 2010 when the tenor of the e-communication from Mr. Hureau became more personal.

At the Arctic Winter Games held in Grande Prairie, Alberta, Mr. Hureau was the coach of the Yukon basketball team. The team's co-captains were Ms. Hanson and Ms. Mooney. At these games, while Ms. Hanson denied any personal attentiveness to Mr. Hureau, credible testimony by Ms. Keleher, the girls basketball team chaperon, noted that Ms. Hanson seemed to be very attentive to Mr. Hureau. Ms. Keleher gave testimony about a number of events describing this behavior on the part of Ms. Hanson:

- **Ms. Hanson leaned back against Mr. Hureau's legs while sitting watching a basketball game**. Ms. Keleher noted that Mr. Hureau did not lean forward. While Ms. Hanson in her testimony didn't remember specifically the event, she stated that it was possible that this occurred. Mr. Hureau's testimony is explicit: from Ms. Hanson's posture the impression could be had that *"she looked like my girlfriend."* Mr. Hureau continued; *"she was my best friend on the team, maybe she was putting a stamp of ownership on me."* He affirmed that he *"never had any girl do that to me."*

- **During a debriefing session after a game, Ms. Hanson removed her team jersey and sat among her teammates wearing only a sports bra.** Ms. Keleher noted that while Mr. Hureau said nothing when the incident occurred, his body language showed that this was an awkward moment for him. Ms. Hanson indicated that she did this *"likely out of habit".* Mr. Hureau clearly indicated that while girls sometimes switch jerseys and tops during a debriefing session, they do not just remove their jerseys and sit there in their sport bras, and that he had never seen Ms. Hanson do this in the past.

- **While at a dinner, the adults were sitting together and the team players were sitting apart from them. Ms. Hanson came to the table and specifically asked Mr. Hureau if he would like her to bring him some dessert.** There was testimony from Stephen Mooney and Ms. Keleher regarding their observations during this event. Ms. Keleher testified that she felt it was the kind of comment that a girlfriend might make as it was not a general request if *anyone* wanted dessert, but very specific to Mr. Hureau. Mr. Mooney testified that Ms. Hanson seemed to be "doting on" Mr. Hureau, referencing that dessert episode.

The tenor of Mr. Hureau's attested friendship toward Ms. Hanson appears, from Ms. Hanson's perspective, to change at this time. Evidence was that a number of the female workers at Intersport were designated as a "Rob's girl", which the Board accepts as being part of the normal interaction within the workplace environment. In an e-mail to Mr. Hureau, Ms. Hanson indicated that she chose to be a "Mark's girl". Yet in testimony, Ms. Hanson stated that she would never characterize their relationship as a friendship.

The volume of communications and their more personal nature between Mr. Hureau and Ms. Hanson after the Arctic Winter Games reflected a change. The evidence of the time period between Monday, March 15 and Sunday, March 28, 2010 is central to the complaint as it encompasses the timeframe in which the nature of the communications changed, Ms. Hanson's terminated her employment, and there were e-mails/texts that related to the employment termination and Mr. Hureau's reaction thereto.

The physical, verbal and electronic communication incidents during this period demand the application of the "reasonable person" tests:

Were possible immature plays for attention by Ms. Hanson misinterpreted as displays of affection by Mr. Hureau as alluded to in his Arctic Winter Games' testimony?

As noted previously in Canadian Union of Public Employees, Local 1146 v. Woodstock (City) [2010], an adolescent's immaturity must be considered in judging how they react to alleged incidents of sexual harassment. That same immaturity must also be factored into how any adult judges an adolescent's actions, as in Ms. Hanson's actions toward Mr. Hureau at the Arctic Winter Games.

This lack of maturity in adolescence has documented support from scientists working in the field of brain development. In the case of Terrance Jamar Graham, v. State of Florida, and Joe Harris Sullivan, v. State of Florida, before Supreme Court of the United States Nos. 08-7412, 08-7621 an amici curiae brief was filed for the American Psychological Association together with the American Psychiatric Association, the National Association of Social Workers and Mental Health America in July of 2009.

The brief pointed to research that "has shown that adolescents' decision-making differs from that of adults in several respects: adolescents are less able to control their impulses; they weigh the risks and rewards of their conduct differently; and they are less able to envision the future and apprehend the consequences of their actions. Even late adolescents who have developed general cognitive capacities similar to those of adults show deficits in these aspects of social and emotional maturity."(page 8-9) This is attributable to the fact that "the part of the brain that is critical for control of impulses and emotions and mature, considered decision-making is still developing during adolescence, consistent with the demonstrated behavioral and psychosocial immaturity of juveniles." (page 27)

If the findings of this research are to be believed, it reinforces the need for adults to assume a greater share of the responsibility both legally and morally in their dealings with adolescents. Further, a duty to accommodate this physiological reality of brain development and factor it into one's actions requires a higher standard of discernment by employers in their dealings with their adolescent employees.

Mr. Hureau's texts and e-mails document a failure to recognize that Ms. Hanson was an adolescent with an inherent immaturity in dealing with decisions related to relationships, especially between genders. The Board believes that it is more likely than not that Mr. Hureau misinterpreted the actions of Ms. Hanson and attached an inappropriate emotional link to those actions.

Should Mr. Hureau have recognized the personal text and e-mail messages and interactions at Intersport over the period in question were unwelcome to Ms. Hanson, however contradictory the outward signs may have appeared to him and/or were not appropriate interactions between an employer and employee?

The Board takes note of Professors Constance Backhouse and Leah Cohen's book The Secret Oppression: Sexual Harassment of Working Women (1978) that: *"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."* (page 38)

Additionally, the Board accepts Counsel for the Commission's reference to Gregory v. Parkbridge Lifestyle Communities Inc., 2011 HRTO 1535 (CanLiII), the Ontario Human Rights Tribunal, as a guide which, in applying a human right's code with a similar provision to section 14(2) of the Yukon *Human Rights Act*, states: "[86] *Whether a harasser ought to have known that their behaviour was unwelcome depends upon whether a reasonable person in the applicant's position would find such conduct to be unwelcome and, if so, whether reasonable people in the respondents' position would know that to be the case."*

The Board most notably accepts the notion as expressed by Patricia Janzen, a lawyer writing for the Law Society of British Columbia's publication Bencher's Bulletin 2008: No. 4 October, ***"(T)he standard applied to powerful harassers is not whether they knew their conduct was unwelcome but whether or not they should have known better."*** *[emphasis added]* This standard must be maintained regardless of role: coach, mentor, or employer. This complaint is within the context of an employer/employee relationship and a determination in regard to the appropriateness within the facts of the situation: a teenage, female employee and a mature, male employer.

Mr. Hureau's obviously affectionate e-mails and tweets stand out to an objective reader as indicators, though mild in form, of sexual harassment in an employer-employee relationship. Whether they would have been appropriate within a coach/player longstanding relationship is outside of the jurisdiction of this Board to determine.

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.

Social media played key part in determining credibility in this complaint

There is an obvious generational gap on the evolving use of electronic means of social communication. It exists between the Adjudicators, the Respondent and the Complainant

here. The electronic media tools and styles of communication are rife with possibilities for misunderstandings to arise, particularly when generational differences are factored in.

Exhibit 2 presents a series of tweets and Exhibits 3 and 4 present two lengthy e-mails that have had a strong influence on the decision in this complaint. However, the Board must recognize that the sequence and the context of the tweets have been challenged. Ms. Hanson testified that she could not remember if she started particular conversations or if she responded to given e-mails or texts. Subpoenaed phone records showed that Ms. Hanson could send and receive over 300 text messages a day. Ms. Hanson saved only specific text messages from Mr. Hureau during the period from March 22 to March 28, save her one lengthy response to Mr. Hureau believed to be on March 27, 2010 where she clearly told him *"(Y)ou crossed the line big time."*

While the June 5 to 13 text sequence did, in fact, include a fuller back-and-forth thread to the conversation, the Board must consider that these correspondences occurred after the complaint has been instigated and continued up until the day after the Complainant signed the actual complaint. It is reasonable to conclude that there was a clear intent on the part of the Complainant to retain evidence that related to her impending complaint.

Mr. Hureau attempted to cast the texts and e-mails in a non-sexual frame. The Adjudicator in Dupuis v. Her Majesty in Right of the Province of British Columbia as Represented by the Ministry of Forests, Forest Sciences Division (December 23, 1993) understood that the ability to pick up on the social cues of others differs from person to person but also noted that a person could be *"blinded by his purpose."*

It was exceedingly difficult for the Board to make a determination on the evidence without accepting inference testimony that the Parties communicated back and forth with each other, and knowing there were substantial gaps in the continuity, volume and substance of the e-mail/text evidence before the Board. The Board accepted a telephone log of all calls, as subpoenaed, by the Complainant and Respondent over a brief period of time. The logs were difficult to decipher, but it was evident that there was a lot of interactivity between the Parties.

Due to the lack of complete record of the texts and e-mails between the Complainant and Respondent, the Board had some difficulty in determining accurately the type of relationship between Ms. Hanson and Mr. Hureau over the period of time she was employed at Intersport. Relying on the evidence regarding the relaxed workplace atmosphere, the interplay of relationships between Mr. Hureau and Mr. LaRose with their employees, the testimony related to observed behaviours by Ms. Hanson toward Mr. Hureau from Ms. Keleher, in particular, the Board concludes a strong relationship for most of the timeframe was in place. Further, the Board believes there was evidence that Ms. Hanson was acting in a somewhat "flirtatious" manner toward Mr. Hureau, However, the Board in its final determination focused on the nature of the e-mails from Mr. Hureau on March 26 and 27. It was primarily these two documents which solidified the determination of the Board that Mr. Hureau did not properly act or react to Ms. Hanson in an appropriate manner for an employer toward an employee.

VIII. Yukon Human Rights Board of Adjudication conclusion on the complaint

The Board believes that a finding of sexual harassment has been established. The Board determines that there were sufficient indicators of unwelcome, sexual in nature and persistent conduct in Mr. Hureau's interactions with Ms. Hanson during the period from March 15 to March 28, 2010 to warrant this finding of sexual harassment as defined in the Yukon *Human Rights Act*. This finding is further underscored by the power imbalance, age difference and generational communication issues already touched on.

In its finding that Mr. Hureau sexually harassed Ms. Hanson, this Board further finds the harassment to be at the "*most mild end of the spectrum"* of sexual harassment.

Because of the lack of notification of alleged harassment to the employer, and as there were limited submissions on the culpability of the corporation, the Board makes no finding against 17385 Yukon Inc. dba Intersport. Most of the actions that substantiate, in this Board's eyes, the allegations of sexual harassment, occurred outside of the work environment in the context of the broader relationship and were not specifically employer-employee related.

IX. Remedy

This Board concurs with Robichaud v. Canada (Treasury Board), [1987] 2 S.C.R. 84 ["Robichaud'], a case in which the Supreme Court of Canada points out that **human rights legislation is essentially concerned with the removal of discrimination as opposed to punishing anti-social behaviour.** *[emphasis added]*

It was made clear to the Board that the Complainant believed she had suffered ostracism because of the human rights complaint she filed against Mr Hureau, her employer and coach. While the Respondent attempted to show that such reaction was of Ms. Hanson's own actions, the Board cannot accept that Ms. Hanson has not been emotionally affected by these circumstances and the very public nature of the proceedings prior to and during the human rights complaint process.

By the same measure, the Board was clearly informed of the impacts of the complaint on the Respondent prior to any finding of culpability. Testimony indicated that Mr. Hureau's personal life, his behaviour regarding his employees and the impact on his coaching career and activity have all been affected in a negative manner. The Board also accepts the testimony in regard to the negative impact of the complaint on the Respondent's business at Intersport and the resulting stress on his relationships with customers and former friends.

Taking this evidence into consideration, and recognizing that this case unfolded in a small, northern city where it drew significant local media attention, the Board believes the formal finding of discrimination is the necessary and 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.

At hearing, the Board was advised by the Parties that they may wish to make further submissions on remedy, depending on the outcome of the matter. Clearly, the Board holds jurisdiction over remedy, and requires that should either party wish to make submissions on remedy, the Board will accept those submissions within 30 days of the date of this decision and allow for further replies from the other Parties within a subsequent 10 days.

Dated this 21st day of August 2012 at the City of Whitehorse, Yukon.

Michael Dougherty
Chair, Yukon Human Rights Board of Adjudication