MANITOBA HUMAN RIGHTS BOARD OF ADJUDICATION

IN THE MATTER OF a complaint made under *The Human Rights Code*, CCSM c. H175

BETWEEN

Emily Garland,
complainant,

AND

Scott Tackaberry
operating as Grape & Grain
respondent,

AND

Manitoba Human Rights Commission,
Commission.

MHRC File No.: 12 LP 08

The complainant, in person
The respondent, in person
For the Commission: Ms Isha Khan

Heard: 7, 8, and 22 February 2013
Decided: 23 April 2013

ROBERT DAWSON, adjudicator:

[1] A former employee complains that her former employer knowingly permitted, or failed to take reasonable steps to terminate, her harassment by a customer. For the reasons that follow, the complaint is allowed.

Summary of facts

[2] The respondent, Scott Tackaberry, operates a small retail business in Winnipeg, for which he had hired the complainant, Emily Garland, as a retail clerk on 8 January 2009 while she pursued her university studies. It was part of the Ms Garland's employment duties to serve the customers of the business, some of whom came to the shop regularly, often more than once a week.

[3] This complaint focuses upon one such regular customer of Mr Tackaberry's business and an allegation about that customer's conduct towards Ms Garland, starting in early 2009. The complainant says that the customer, Raymond Berg, was repeatedly lewd and made disgusting sexual advances towards her, which she rejected and frequently reported to the respondent. For his part, Mr Tackaberry acknowledges only a single complaint about the customer, which he investigated and presumes that he dealt with, because he then heard nothing more from the complainant. Ms Garland's employment ended on 8 May 2010.

[4] The complainant filed a complaint with the Manitoba Human Rights Commission on 25 October 2010, alleging in essence that her former employer knew about the ongoing harassing conduct by the customer, but failed to do anything about it. On 24 August 2012, the Chief Adjudicator designated me as the Board of Adjudication, pursuant to s. 32(1) of *The Human Rights Code*, CCSM c. H175 (referred to below as the *Code*).

Procedural issues

[5] *Deletion of complaint under s. 20.* Although the original complaint included an allegation under s. 20 of the *Code*, the Commission advised in its letter of 14 January 2013 that it had abandoned the s. 20 component of the complaint. Given that s. 34(a) the *Code* assigns carriage of the complaint to the Commission, I accordingly dismiss the complaint against the respondent, as it relates to the s. 20 allegation.

[6] *Suppress publication of names from the public notice of hearing.* Both the complainant (through the Commission) and the respondent had requested that I suppress publication of their respective names from the public notice of hearing, pursuant to s. 36(2) of the *Code*. I denied both requests at the pre-hearing stage, indicating that my reasons would follow. I found that the grounds for both requests were insufficient to outweigh the presumed publicity that the Code and the administration of justice generally promote. For the complainant, the Commission had pointed to the following grounds: (1) the complainant was still a university student and had not yet secured permanent employment; (2) she would give "evidence of an explicit and personal nature", to which she did not want her name publicly attached; and, (3) she says that she has been receiving anonymous and threatening e-mails. However, (1) it would be a fallacy if any potential employer of the complainant were at some future time to infer

from the mere making of this complaint that the complainant is somehow undesirable as an employee; (2) the "explicit and personal" evidence was not particularized in the original request, and the evidence of that nature which eventually came out at the hearing was unnecessary and only of minimal relevance to the complaint itself; and, (3) any unwanted e-mail messages pre-dated the publicity of this hearing. Turning to the respondent, he worried that publicity would do "irreparable damage" to his reputation. However, the naming of a respondent in a public notice of hearing is not a valid ground for anyone to assume the illegal conduct of that person. At most, a public notice of hearing records the fact that an allegation has been made against a respondent but that the respondent contests and rejects the allegation. In any event, there is a strong presumption of publicity that informs the *Code*, and the respondent offers no compelling reason to suppress publication.

[7] *Deletion of information in these reasons that would disclose the identity of the complainant.* Relying upon s. 46(3) of the *Code,* the Commission asked that these reasons for decision not identify the complainant by name, citing (1) expected evidence of a personal and intimate nature, and (2) protection of the complainant from undue future prejudice in seeking and holding permanent employment. I have denied the Commission's request. Pointing to the reasons already set out above in refusing to suppress publication of the complainant's name in the public notice of hearing, I find that disclosure would not cause undue prejudice or hardship to the complainant. I am further inclined to arrive at this conclusion for these further reasons: (1) this decision does not treat in detail or at any length the "personal and intimate" evidence to which the Commission referred; and, (2) it emerged during the hearing of this complaint that the complainant no longer uses the name by which she is identified in these reasons for decision, and I had already made an order during the hearing that the new identity by which the complainant now chooses to be known would not be referenced on the public record, which includes these reasons for decision. In short, while I decline to delete identifying information about the complainant's name, I have protected her against publication of the name that she now prefers.

Issues

[8] Three principal issues arise out of this complaint:

(a) Did the respondent's customer subject the complainant to a course of abusive and unwelcome conduct or comment on the basis of her sex, or make to the complainant a series of objectionable and unwelcome sexual solicitations or advances?

(b) If so, did the respondent fail to take reasonable steps to terminate the harassment?

(c) If so, what is the appropriate remedial order?

Analysis

Harassment is a grievous indignity

[9] Section 19(2) of the *Code* defines harassment for the purpose of this complaint as a course of abusive and unwelcome conduct or comment on the basis of sex, or the making of a series of objectionable and unwelcome sexual solicitations or advances. Once made aware of such harassment within an employment context, an employer has an obligation under s. 19(1) of the *Code* to take reasonable steps to terminate the illegal behaviour, even where the actions under consideration are those of a customer, not an employee of the business. The underlying public policy of s. 19 aims to ensure a workplace, where the dignity and value of individuals are respected and where the economic reality of dependence upon continuing wages does not somehow leave employees feeling trapped and required to suffer the grievous indignity that is harassment.

The customer harassed the complainant

[10] It falls to the complainant to prove on the balance of probabilities that the customer harassed her, within the meaning of s. 19(2) of the *Code*, and I find that this evidentiary burden has been discharged.

[11] Ms Garland gave evidence about the conduct of the customer, Raymond Berg, which she stated soon began after the start of her employment in January 2009. At first, it was sexual comments about parts of her body, and the complainant said that she would continue to be subjected to such treatment almost weekly, because Mr Berg was a regular visitor to the shop. The conduct escalated at the end of March 2009 when Mr

Berg made a lewd remark that imagined him raping Ms Garland, and she testified that this prompted her to report the behaviour to Mr Tackaberry. There also was the suggestion that Mr Berg had touched Ms Garland's breast. Although she would rebuff Mr Berg in clear terms, Ms Garland indicated that the customer was nonetheless persistent, later asking questions about the complainant's sex life and making requests to see her underwear. Ms Garland particularly recalled one occasion, during which Mr Berg had rubbed his lower body against her while he passed in a narrow aisle of the shop.

[12] Mr Berg himself later testified and told a very different story. Saying that he could not recall the specifics, the customer admitted that, soon after Ms Garland's employment had begun with Mr Tackaberry, Mr Berg had "joked" with her, although not in any sexual way. He sought to reassure the hearing, stating that "I don't do crude and vulgar." He nonetheless felt that Ms Garland did not appreciate his "jokes", so Mr Berg stated that he had thereafter ignored the complainant on all future visits to the shop, even going so far as to fall silent and say nothing to her whenever he was forced to deal with her as the only cashier who could process his purchases. Mr Berg continued to visit the shop very often, sometimes more than once a week. On those occasions when Ms Garland was working, Mr Berg said he would proceed directly past her towards the shop's back office, where he could usually chat with Mr Tackaberry, with whom he was friendly. In essence, Mr Berg's evidence paints the depiction of a man who paid no attention to the complainant after she did not find humour in his single, initial "joke". Furthermore, Mr Berg explained that, being a man of larger size, he had once innocently rubbed against Ms Garland due only to the narrow aisles of the shop.

[13] In balancing such conflicting evidence, the trier of fact is required among other things both to consider the testimony of individual witnesses for internal coherence and to test its consistency with the probable matrix of facts that make up the overall case.

[14] I find Mr Berg's explanation improbable. On cross-examination, Mr Berg elaborated on his "jokes". Referring to his dealings with Paula Levesque, the complainant's female co-worker, Mr Berg agreed that his jokes were "teasing and flirty", commenting upon the person's physical attractiveness. Ms Levesque later testified, agreeing on cross-examination that Mr Berg's comments included reference to her "pixie bum." Mr Berg himself, however, denied that any of his remarks were sexual. In the face of that denial, I was left with the impression that Mr Berg has utterly failed

to appreciate that his subjective characterization of his own conduct might neither be shared by others nor received by society as appropriate public behaviour. I therefore prefer Ms Garland's version of the comments that Mr Berg had made to her soon after she started working for the respondent.

[15] I also do not accept that, over more than the full year that followed the initial incident, Mr Berg never again spoke to Ms Garland. His categorical statement seems implausible, and it is contradicted by at least two other current or former employees, Messrs Dill and Miller, both of whom stated that they had seen Mr Berg and Ms Garland in conversation. Having established that Mr Berg did in fact continue to talk with Ms Garland, I think it likely that he would have persisted with his peculiar and offensive brand of so-called hilarity, either being unable to filter himself or deliberately choosing to provoke and annoy Ms Garland. I unfortunately note that many witnesses acquainted with Mr Berg spoke about him during the hearing in similar and unflattering phrases, such as "he's a jerk", "unique in his own way", and "wasn't the easiest person to get along with".

[16] I reject Mr Tackaberry's suggestion that the complainant somehow encouraged Mr Berg, whether directly or by implication. Mr Tackaberry led evidence from several witnesses about what could be described as Ms Garland's readiness to introduce or discuss publicly aspects of her sexuality and lifestyle. I dismiss this characterization as irrelevant to the complaint. Although s. 19 of the *Code* requires the offending behaviour to be "unwelcome", the evidence here shows that the complainant had consistently repelled Mr Berg; indeed, even the customer himself described Ms Garland's reaction to his initial "joke" as a "wall of ice".

[17] I am therefore satisfied that, within the meaning of s. 19(2) of the *Code*, the complainant suffered repeated harassment through much of her employment by the respondent.

The employer did not take reasonable steps to terminate the harassment

[18] Although s. 19(1)(b) imposes an obligation upon an employer to take reasonable steps to terminate harassment, the *Code* implies that this obligation arises where the employer has become aware of the harassment. All of the parties to this complaint accept that, at some point in or about March 2009, Ms Garland reported Mr Berg's harassing conduct to the respondent. Mr Tackaberry testified that he thereafter met

with Mr Berg to put Ms Garland's allegations to him. According to the evidence of the co-worker Paula Levesque, Mr Tackaberry had also inquired of her about Mr Berg's conduct at the same time. A male co-worker testified to the same effect. With little to go on except Ms Garland's allegation, the respondent told the hearing that he had cautioned Mr Berg and urged him to keep his distance from the complainant. Although Ms Garland was not satisfied with the result of Mr Tackaberry's inquiry, having hoped to have Mr Berg banned from the shop, I find that, in the circumstances of this initial report and on the basis of the evidence then before him, the respondent had acted reasonably.

[19] However, the harassment continued, and I conclude that, although Ms Garland again and repeatedly drew Mr Berg's conduct to the attention of her employer, Mr Tackaberry took no steps at all to curb the customer's behaviour. In her direct evidence, the complainant said that she raised the matter with Mr Tackaberry "approximately once every four or five weeks". For his part, Mr Tackaberry stated that his employee said nothing more about the problem. From her demeanour as a witness, I am convinced that Ms Garland is a self-confident and assertive individual and that, as a result, she would not have likely played the role of a silent victim. It is implausible that, after having reported the indignity of Mr Berg's initial misconduct, the complainant would somehow say nothing more, especially because she continued to suffer harassment from him. In reply, the respondent suggested during cross-examination of Ms Garland that it would have been easier for her simply to have quit the job instead of enduring Mr Berg. However, this insensitive approach undermines the very protection that the *Code* affords.

[20] In arriving at this conclusion, I also recollect the evidence of Ms Garland's co-worker, Joeseph Wozny, whom the Commission called as a witness sympathetic to the complainant. He testified, and I accept, that he had repeated to Mr Tackaberry the concerns that Ms Garland had about the conduct of Mr Berg.

[21] I dismiss as mere speculation the defence that the respondent put forward; namely, the complainant's stories about ongoing harassment and her repeated reports to the employer were revenge for the way in which her employment had finally ended. The respondent's theory of his case lacks any real evidentiary basis, and it falls well short of the probability standard.

[22] Despite, as I have found, having been made aware that Mr Berg persisted in his harassment of Ms Garland, the respondent took no steps beyond his initial chat with the

customer. The respondent led no detailed evidence about the substance of that chat or the thoroughness of his investigation, so I discount the possibility that, despite Ms Garland's continuing complaints after the initial incident, Mr Tackaberry might reasonably have thought that his chat with Mr Berg had effectively resolved the problem. Instead, through the respondent's inaction, Mr Berg was able to continue in his illegal conduct, and I find that Mr Tackaberry contravened the *Code* in failing to discharge the obligation imposed upon an employer to take reasonable steps to terminate harassment.

Remedial order

[23] Where an adjudicator makes a finding that there has been a contravention of the *Code*, s. 43(2) permits the making of a remedial order.

Compensation for lost wages

[24] Pursuant to s. 43(2)(b), the Commission seeks a payment by the respondent to the complainant in an amount equal to 4 weeks' wages. In the words of the *Code*, the payment is intended to "compensate any party adversely affected by the contravention for any financial losses sustained... or benefits lost by reason of the contravention...." I find that the complainant neither sustained financial losses nor lost benefits in this case.

[25] Both the complainant and respondent testified that, upon arriving at the shop for what would be her final day of employment, a loud argument ensued. The complainant characterized the dispute to be chiefly about her employer's inaction to address the conduct of Mr Berg, while Mr Tackaberry said the argument chiefly was about what Ms Garland considered to be unilateral changes to the work schedule. Either way, the argument ended with Ms Garland's termination.

[26] It is accepted that Mr Tackaberry then paid to Ms Garland a sum equal to two weeks' wages in lieu of notice. The Commission asks that I order payment of a further four weeks' wages.

[27] The Commission's position ignores the operation of s. 61(2) of *The Employment Standards Code*, SM 1998, c. 29, which allows an employer to terminate an employment contract without cause upon, in the case of this complainant, two weeks' notice. An award of wages paid in lieu of a notice period longer than prescribed by *The*

Employment Standards Code, would effectively gift a windfall to the person adversely affected by a human rights contravention. Clause 43(2)(b) of *The Human Rights Code* therefore appropriately restricts an adjudicator's discretion to make only a compensatory award to a complainant.

Damages for injury to dignity, feelings or self-respect

[28] I have already written above about the grievous indignity that is harassment, as defined by the *Code.* Accordingly, pursuant to s. 43(2)(c) of the *Code*, the Commission seeks an award of $9,000.00, payable by the respondent to the complainant. Relying upon the criteria set out in the now-dated decision in 1982 by a Ontario Human Rights Board of Inquiry, the Commission especially underlined that the extended length of time over which the complainant had suffered harassment. The Commission also noted the complainant's age and vulnerability, as well as the significant impact that the customer's conduct and comments had upon her. In addition, the Commission pointed to evidence about the complainant's past that particularly made her suffer more acutely the effect of the harassment. The Commission candidly conceded that the amount sought as an award was much higher than past Manitoba complaints involving harassment; however, it was also noted that many years had passed since harassment cases had last gone to adjudication.

[29] In *Budge* v. *Thorvaldson Care Homes Ltd*, (19 March 2002) MHRBAD, aff'd 2006 MBCA 122, an award of $4,000 was made in favour of a complainant who had suffered workplace harassment over an extended term of employer inaction. Accounting for inflation, that 2002 award is equal to approximately $5,250 in 2013. It is just and appropriate to increase that sum further, taking into account the young age of the complainant in this case, the shocking and ongoing lewdness of the conduct and comments that she had to endure, and the special vulnerability of a young worker whose employer failed to protect her against the abhorrent inappropriateness of a middle-aged customer. Accordingly, I find that damages in the amount of $7,750.00 are to be paid by the respondent to the complainant for injury to dignity, feelings, or self-respect.

[30] In arriving at this award, I have deliberately excluded consideration of the complainant's past, which arguably caused her to feel more deeply the impact of the contravention. No expert evidence was led that would support such a contention.

Instead, I was offered anecdotes, which I do not accept as a sufficient foundation to supplement the award of damages for injury to dignity, feelings, or self-respect.

Exemplary damages

[31] No party alleged malice or recklessness to be involved in the contravention, so, pursuant to s. 43(2)(d) of the *Code*, I make no award for exemplary damages.

Public interest remedies

[32] Pursuant to s. 43(2)(a) and (e), the Commission requested that I order the respondent to attend and satisfactorily complete a workshop on harassment in the workplace within one year of the date of this decision.

[33] The Commission also sought an order that the respondent provide to every new and future employee the business' policy on harassment in the workplace. In addition, those employees should receive training to ensure that they understand the meaning and implementation of that policy.

[34] Finally, to the extent that the respondent's harassment policy designates a person independent of the business as the contact person for reporting instances of harassment, the Commission requested that I direct the respondent to provide all then-current employees with contact information for that designated person.

[35] In the circumstances of this complaint, all of these requested remedies are just and appropriate, and I make all of these requested orders.

Decision and order

[36] For the reasons set out above, the complaint is allowed, and I order as follows:

1. The respondent shall pay the complainant within 45 days of the date of this decision the sum of $7,750.00 as damages for injury to dignity, feelings, or self-respect;
2. The respondent shall attend and satisfactorily complete a workshop on harassment in the workplace within one year of the date of this decision;
3. The respondent shall provide to every new and future employee the business' policy on harassment in the workplace. In addition, the

respondent shall ensure that all employees, present and future, receive training so that they understand the meaning and implementation of the policy;

4. Whenever the respondent's harassment policy designates a person independent of the business as the contact person to whom employees are to report harassment, the respondent shall provide to all then-current employees contact information for that designated person; and,

5. Respecting Commission Exhibit I, which is the sheet of paper on which the complainant signed and printed her current name immediately before giving evidence in these proceedings, the exhibit shall be sealed and not unsealed without a further order from me.

[37] I retain jurisdiction for the purpose of resolving any issues that may arise out of the implementation or interpretation of this order.

[38] Finally, I draw to the parties' attention s. 50(2) of the *Code*, which proposes a 30-day limitation for the bringing of any application for judicial review of this decision.

[Original signed by]

23 April 2013

Robert Dawson