

*The Human Rights Code, C.C.S.M. Cap.H175 and amendments thereto.*

BETWEEN:

**CHRISTINA WERESTIUK and  
THE HUMAN RIGHTS COMMISSION,**

Complainants,

- and -

**SMALL BUSINESS SERVICES INC.,  
CEPHAS KEITH REYES, TCC SMALL BUSINESS SERVICES INC.,  
AZ SMALL BUSINESS SERVICES CORP., and  
TROPICAL CUISINE CONSULTANTS INC.**

Respondents.

Adjudicator:

P. Colleen Suche, Q.C.

Appearances:

for The Human Rights Commission:

A. Berg and J. Hawkins

## DECISION

These proceedings arise out of a complaint filed by Christina Werestiuk, (herein "the Complainant") on June 11, 1996, alleging that Cephaz Keith Reyes, (herein "Reyes") and Small Business Services Inc., violated section 19(1)(a) of *The Human Rights Code*. Following completion of the investigation in early 1997, the Complaint was amended by the Executive Director of the Human Rights Commission, as it was learned that Reyes owned and operated TCC Small Business Services Inc. and AZ Small Business Corp. In addition, the Reply to the Complaint revealed that the Complainant was employed by Tropical Cuisine Consultants Inc. As a result, all three parties were added as Respondents to the Complaint.

On September 4, 1997, I was designated as the Adjudicator to hear and determine the Complaint. The hearing was first convened on April 27, 1998. No one attended on behalf of the Respondents, although they were served with notice of the time and place of hearing. Subsequent to the commencement of the hearing, a fax was delivered to me indicating that Reyes would not be present because he had to see his physician on an emergency basis. As a result, the matter was adjourned until June 8, 1998. The Respondents were served with notice of the new hearing date, time and place.

The hearing reconvened on June 8, 1998. Reyes attended, but after making some preliminary remarks, left the hearing and indicated that he would not return. His remarks might best be described as an expression of his belief that the proceedings would not be fair, and in fact, were biased against him because of his race; and further, that none of the investigation, the hearing process, or my integrity were credible. The hearing then proceeded in Reyes' absence, as the notice of time and date of hearing indicated would happen should the Respondents not appear.

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The Complainant was twenty years old at the time the situation in question occurred. She has a Grade 12 education and had just completed a course at South Winnipeg Technical Centre. At the beginning of May 1996, she responded to a notice for an account manager position which had been posted at the Job Bank. She was interviewed and hired by Reyes. Her job duties required her to contact people who had started a business, to solicit interest in attending a seminar on business management which was offered by Reyes. She had a number of other miscellaneous duties as well. The Complainant testified that she understood her employment to be with the Respondent Small Business Services Inc. Exhibit 7 is a photocopy of her business card which represents that she is the accounts manager for that company. A copy of a contract of employment between the Complainant and Tropical Cuisine Consultants Inc., which was submitted with the Reply, was put to the Complainant. While she recalled that she signed such a document, she was not aware that Tropical Cuisine Consultants Inc., was named as the employer.

The Complainant commenced her employment either May 9<sup>th</sup> or 11<sup>th</sup>, 1996. She testified she was very excited about her new position and was anxious to learn as much as she could about the business. She apparently had several conversations with Reyes regarding the business, wherein he made it clear that there would be opportunity for her to "grow with the company". The Complainant told Reyes that she was eager to learn and at any time she would be prepared to work late or otherwise make herself available if there was an opportunity to discuss matters related to the business.

The Complainant had only been in her position for a few weeks when the incident in question occurred. On May 28, 1997, the Complainant, who is a cheerleader for the Winnipeg Blue Bombers, told Reyes some time during the work day that she had a cheerleading practice after work. While on the face of it this fact is of no particular

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significance, it seems that it may have been to Reyes. At approximately 10:30 p.m. the Complainant received a telephone call from Reyes at home. He wanted her to meet with him to discuss business. She thought it was unusual for him to call at that time, and initially indicated that she felt it was too late to meet and suggested that another time might be better. When he persevered, she suggested that they meet at a restaurant located in her neighbourhood. He agreed to this and then called back shortly thereafter suggesting that they meet at the Westin Hotel. He told the Complainant that he would pick her up and that she should wait for him downstairs in the parking lot of her building.

The Complainant testified that her boyfriend, who was present during the phone call, expressed some concern when she told him that she was going to meet with Reyes. The Complainant said she thought that Reyes was sincere in his stated purpose for the meeting. She reasoned that since she had not experienced any difficulties with Reyes during the time she worked with him, she thought it was probably unfair of her to think there was any other motive behind the invitation. She also testified that she thought that Reyes was too old to have any "other ideas". Interestingly, however she did call her co-worker, Christina Dicastri and tell her about the meeting. In addition she called her mother. Mrs. Werestiuk testified that the Complainant called her and told her what she was going to do. Mrs. Werestiuk told the Complainant not to go to the meeting. Apparently the Complainant responded that there was no reason to be concerned and that things would be fine. Her mother told her she was too trusting. Although she dismissed her mother's concerns, the Complainant did agree to call her when she returned from the meeting.

Reyes arrived at the Complainant's apartment approximately an hour after his call. He suggested that she bring a toothbrush and whatever she wanted to wear to work the following day, as they would be meeting for a long time, so she should stay

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overnight at the Westin Hotel. The suggestion clearly made the Complainant nervous. She testified that she did not want to do this. Her response to Reyes, however, was she could not do so as she had to pick her father up at the airport at 2:15 a.m. This was not true, but was merely an excuse. They then agreed that the Complainant would take her own car and Reyes would follow her.

After arriving at the Westin Hotel, they took the elevator from the parking lot to the Hotel. In the elevator Reyes put his arm around the Complainant's shoulders. She extracted herself by pulling out from under his arm. When they got to the main lobby, he told her to wait while he went to the desk. He returned a few minutes later to say that there were no suites available, and suggested that there was somewhere else they could meet. They then went to Motel 75 on Pembina Highway. The Complainant testified that she was feeling uneasy and this was made more so on their arrival at Motel 75 when she observed that Reyes was carrying an overnight bag. They went into the hotel room. The Complainant sat in a chair at a table and began talking about the business. Reyes lay down on the bed, took his shirt and tie off, and told the Complainant to turn on the television. The Complainant complied. Reyes poured himself a glass of what appeared to be sherry and gave some to the Complainant. She pretended to taste it and told him that she did not like it. Reyes suggested that the Complainant sit beside him at the edge of the bed. She reluctantly did so, although she said that at this point she was very scared. Reyes then told her that he was aware that she wanted to get ahead in business and that he would give her two to three thousand dollars if she would have sex with him. He began rubbing her thigh. She pulled away from him and jumped up. Reyes said that she should not tell anyone about their meeting.

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Terrified, the Complainant ran out of the hotel room and drove to her parents' home. She was crying and was very upset. Her parents were in bed asleep when she burst in on them and told them what had happened. Mrs. Werestiuk testified that the Complainant was hysterical. After calming her down, she called the Complainant's boyfriend to come over. They also called Christina Dicastri. Mr. Werestiuk called the police. The police came and took a statement. The Complainant told the police that she did not want to go back to work with Reyes. They apparently advised her that she could attend the office and retrieve her personal belongings. They suggested that as long the building security personnel were in agreement, she could enter the office to do this.

The Complainant and her boyfriend did go to retrieve her belongings from the office, but were told by the security officer on duty that they would not be permitted to enter the office. A day or so later, Mrs. Werestiuk called the office and spoke to a new employee who put the Complainant's belongings in a box and left it outside the office. The Complainant retrieved the box several days later.

The Complainant filed the Complaint with the Human Rights Commission on June 1, 1996. It sets out the description of the events essentially as described above.

The Reply, (Exhibit 6), raises a very different version of events. It states:

2. Ms. Werestiuk was employed by the company from May 11, 1996 to May 28, 1996. Ms Werestiuk made no secret about her lifestyle and adventures including being a cheer leader for the Bombers and the recent purchase of her car by a friend for favours. Ms. Werestiuk made consistent sexual advances towards me including, "... that she would keep me young (I am 60 yrs old) ... she wants me to buy her a jeep ... she wanted a trip to the Caribbean etc."

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3. On Monday May 27, we decided to go out on Tuesday May 28, 1996. On Tuesday she told me that she had an appointment at the Bombers office just after work and that I could call her at her home after 8:00 pm and we could then go out. I told her that we should go to the Westin Hotel which is near our office. It was agreed that we would spend the night there. I called her at around 10:00 pm and she said that she would wait for me in the parking lot of her apartment building. I met her there as planned. I told her that she should use her car since she would need it to get home on Wednesday after work. She agreed. She told me to follow her since she knew the parking area at the Westin very well. I had never been to the Westin Hotel before. I followed her and she drove into the underground parking at the Westin Hotel. I parked next to her. She led the way to the reception area of the Hotel and had a seat while I went to the desk to book a suite. There were no suites available. I told her that if she wants we can go to a motel nearer to her home. I suggested one on Pembina Highway. I think the name is Motel 57. We went there. She sat in her car while I went to pay for the room. We went into the room. She went to the washroom. When she came out she had a glass of sherry. She then looked at her watch; it was about 2:15 am. She said "... hell I did not realise [sic] it was this late, I have an appointment for 2:30 and I must go now, we could do this tomorrow. I said OK and we left in our respective vehicles. Ms Werestiuk was never asked to, and never sat on the bed as alleged. There was no rubbing of thigh or any physical contact as alleged. No offer of money for sex was made to Ms Werestiuk as alleged.

At the hearing, the Reply was put to the Complainant. She denied the version of events contained therein. She indicated that a car was given to her by her boyfriend of some three years, to drive to work. It was not of great value. She maintained that at no time had she made sexual advances to Reyes or discussed her "lifestyle". She acknowledged that she would have mentioned that she was a cheerleader, however, aside from that fact she couldn't think of what "lifestyle" or adventures she could have spoken about.

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I did not have the benefit of hearing Reyes himself, nor was the Complainant cross-examined on her description of what occurred. However, I found her believable and consistent in her recounting of the incident. Exhibit 13, a letter from the City of Winnipeg Police Department, sets forth the report made by the Complainant to the police on May 29, 1995, at 1:21 a.m. It is in all material respects identical to both the Complaint and the Complainant's evidence before me. Mrs. Werestiuk's evidence supported the Complainant's description of the Complainant's reaction to the incident, as well as several other details. Ms Dicastri did not testify, but Counsel for the Commission presented evidence which demonstrated that she could not be located despite some effort.

Considering the whole of the evidence before me, I am satisfied that the events occurred as the Complainant said they did.

Section 19(1) of the *Code* prohibits harassment.

#### Harassment

19(1) No person who is responsible for an activity or undertaking to which this Code applies shall

- (a) harass any person who is participating in the activity or undertaking; or

Section 19(2) of the *Code* defines sexual harassment and includes:

- (c) a sexual solicitation or advance made by a person who is in a position to confer any benefit on, or deny any benefit to, the recipient of the solicitation or advance, if the person making the solicitation or advance knows or ought reasonably to know that it is unwelcome; ...



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Reyes, being the manager of the Complainant's employer, falls within the definition of a person who is responsible for an undertaking to which *The Human Rights Code* applies (that is, employment), and was also a person in a position to confer benefit or deny benefit to the Complainant. Further, his actions clearly amount to a sexual advance towards the Complainant. Was the sexual advance unwelcome and ought he to reasonably have known this?

Unwelcome is, of course, a totally subjective assessment. What may be welcome to one person is offensive to another. It is long established that a complainant is not required to make it known that the offending behaviour is unwelcome. However, in deciding whether the behaviour was in fact unwelcome, typically adjudicators, arbitrators and Boards of Inquiry examine a complainant's reaction to, or participation in, a situation as corroboration of the claim that the behaviour was unwelcome.

Unwelcome or unwanted is also different than invited or accepted. Passiveness must not be confused with acceptance. It may, and often is the case that unwelcome behaviour is ignored, tolerated, or "put up with" for a variety of complex social and economic reasons. Thus, it is accepted that sometimes only the most subtle of indications may be given and may be implicit rather than overt. A failure to rebuff or otherwise respond, evasive measures and body language are all subtle but clear ways that women, in particular, convey unwelcomeness. This is especially so, of course, where the perpetrator is in a position of authority or power over the complainant.

It is also now accepted that where the Respondent is in a position of authority vis-a-vis the Complainant, the burden rests with the Respondent to demonstrate that the conduct is welcome. (See for example, *Dupuis v. Her Majesty in Right of the Province of British Columbia* (1993), 20 C.H.R.R. D/87).

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In the case before me, the Complainant's conduct was consistent with her claim that Reyes' advances were unwelcome. Her relationship with Reyes was that of employee/employer. Her only discussions with him regarding after hours contact was in relation to business. On the night in question, when Reyes telephoned her at home, her initial reluctance to meet with him at such a late hour, the lie about meeting her father at the airport, the manner in which she dealt with him placing his arm around her in the elevator at the Westin, and her reaction to his actions in the hotel room demonstrate that from the outset, the Complainant was agreeing to a business meeting and nothing more. I am satisfied that Reyes' advances were unwelcome.

Did Reyes know, or ought he reasonably to have known his advances were unwelcome? The Complainant did not say this to this Respondent. It is understandable that she did not, given the circumstances. As to whether Reyes ought to have known, as noted in Miller v. Sam's Pizza House (1995), 23 C.H.R.R. D/433, the test to be applied is that of a reasonable person. The question then is not ought Reyes to have known that the behaviour was unwelcome, but rather would a reasonable person in the same circumstances know that the behaviour was unwelcome?

To begin with, of course, it must be remembered that Reyes asked the Complainant to meet with him to discuss business. Their relationship was that of employer and employee, and nothing more. While the cautionary phrase from Bell v. Ladas Steak House - namely that an invitation to dinner is not an invitation to a complaint - is true, it is equally true that an employee who agrees to go to a business meeting is not agreeing to sex.

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As the onus is on Reyes to demonstrate that the behaviour was welcome, the issue can be dealt with rather quickly. Nothing in the evidence supports this. In addition, however, with one exception, the very same indications of unwelcomeness referred to above were there for Reyes to observe. (He did not, of course, know that the Complainant was not going to meet her father at the airport). I am of the view that a reasonable person in these circumstances would have recognized that the behaviour was unwelcome.

The question arises as to which of the Respondents is liable. The Respondents maintain that Tropical Cuisine Consultants Inc., was the Complainant's employer. The contract of employment confirms this. However, the evidence also shows that the Complainant was providing services to Small Business Services Inc.

A certified copy of the Articles of Incorporation of Tropical Cuisine Consultants Inc., was filed as Exhibit 9, as was a certified copy of a notice from the Corporations Branch that the Corporation was dissolved on February 21, 1997, for failing to file corporate returns.

A certified copy of the Articles of Incorporation for AZ Small Business Services Corp. was filed as Exhibit 11, and shows that this company was incorporated on July 10, 1996, and carries on business at the same location where the Complainant was employed at the time of incorporation. A copy of the 1996 Annual Return was also filed, which shows the Respondent Reyes was the sole shareholder and director of the corporation as of August 1997.

Other than the documents mentioned, no evidence was presented to connect AZ Small Business Services Corp. to the Complaint. As a result, I do not find any liability on its part.

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In terms of remedy, counsel for the Complainant and the Human Rights Commission seeks general damages, unpaid and outstanding wages, exemplary damages and a monitoring order. I will deal with each of these separately.

The Complainant was earning \$6.50 per hour. She worked seven hours per day, five days per week, plus alternate Saturdays for a half day. At the time of the incident she had been working for approximately three weeks. She had received one pay cheque, but had not been paid for the five and a half working days immediately prior to the incident. In addition, in keeping with her contract of employment, \$50.00 was deducted from her first pay cheque on account of a "refundable security bond". Contrary to the agreement, however, this was not returned to her within 14 days of the end of her employment and remains outstanding. In total the sum of \$ \$329.50 was owing to her. In addition, the Complainant was unemployed until July 7, 1996. Lost wages for that period, calculated on the basis of 41.5 hours at the same hourly rate amounts to \$1,348.75.

Clearly the Complainant is entitled to recover damages to compensate her for lost wages for the period from the date of the incident until she found alternate employment. The question is whether she is also entitled to recover wages owing for the period prior to that.

Section 43(2)(b) of the *Code* allows an Adjudicator to compensate any party adversely affected by a breach of the *Code* for any financial losses, sustained, expenses incurred or benefits lost as a result of the breach. Wages due and owing should properly be considered a "benefit".

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Based on the evidence there appears to be no justification for the Complainant's wages to have been withheld. A reasonable inference is that it was her reaction to Reyes' sexual advance, either in the sense of her actions at the time of the incident, or in leaving her job and/or filing a complaint with the Commission, that caused the Respondent not to pay her. Absent any explanation from the Respondents that it was for some other reason, I am prepared to draw that inference, and thereby conclude that the loss of the wages due and owing to the Complainant falls within section 43(2)(b) as a benefit lost as a result of the contravention.

In terms of general damages, or to use the language of section 43(2)(c), damages for injury to dignity, feelings or self respect, I accept the suggestion of Counsel for the Commission that \$2,000.00 is an appropriate amount given the circumstances of this case.

Section 43(2)(d) also provides for payment of a penalty or exemplary damages for any malice or recklessness involved in a contravention. Under this heading, counsel for the Commission seeks an order of \$2,000.00 as against Reyes and \$10,000.00 as against the corporate respondents. This is the maximum allowed by the *Code* in both instances.

I am of the view that exemplary damages are appropriate. This was not a contravention of the *Code* that occurred through inadvertence or mistake. Rather it was a deliberate and planned abuse of Reyes' position of authority. His actions were made possible because he was the Complainant's employer. It was a very significant breach of Reyes' fiduciary obligations to his employee. Having said this, given that it was a one time incident, I do not consider it to be deserving of the maximum penalty. Further, as the respondents Small Business Services Ltd. and Tropical Cuisine Consultants Inc, are really

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the alter ego of Reyes, I do not think they should be assessed damages separately from Reyes.

Lastly, Counsel for the Human Rights Commission requests a monitoring order pursuant to Section 43(2)(a) of the *Code* to ensure that there is no continuation of the breach of the *Code*.

A monitoring order is a very invasive measure, of course, and should not be granted in every case. However, given the remedial rather than punitive purpose of the legislation, I agree with the commentary in *Lampan v Photoflair Ltd.* (1992), 18 C.H.R.R. D/196 that the primary purpose of an order of this nature is to achieve compliance with Human Rights legislation both in respect of past and future practices. Monitoring potentially provides an opportunity for a party to be made aware of the obligations imposed by the *Code*. It is, in my view, justified where there is reason to believe that a Respondent will not comply with the *Code* in the future. Such evidence may be in the form of a pattern of repeated violation of the *Code*, or a single incident where a Respondent demonstrates a lack of understanding of the obligations imposed by the *Code*, or alternatively, an absence of intention to meet those obligations. Here, both in the Reply and his comments at the outset of the hearing, Reyes demonstrated that he has no regard for the *Code*, the Commission or the process. The inference to be drawn from this is that he will not comply with the *Code* in the future. As a result, I am satisfied that such an order is appropriate.


Having found the Respondents Reyes, Small Business Services Inc. and Tropical Cuisine Consultants Inc., liable, the following is ordered:

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1. The Respondents Reyes, Small Business Services Inc. and Tropical Cuisine Consultants Inc., are jointly and severally liable to pay to the Complainant forthwith as follows:
  - (a) damages for wages owing or lost in the amount of \$1,678.25;
  - (b) general damages of \$2,000.00; and
  - (c) exemplary damages of \$1,000.00.
  
2. The Respondents Reyes, Small Business Services Inc., Tropical Cuisine Consultants Inc., shall each allow the Manitoba Human Rights Commission to monitor their employment practices in any operation they maintain, (and in the case of Reyes, also any operation he manages, supervises, or otherwise directs) for a period of two years from the date of this decision.

I will retain jurisdiction for the purpose of resolving any issues which may arise out of the implementation or interpretation of this decision.

Dated at the City of Winnipeg, in Manitoba this 30<sup>th</sup> day of October, 1998.

  
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P.C. Suche, Q.C.  
Adjudicator