

**IN THE MATTER OF:** The *Human Rights Code* R.S.M. Cap H 175 and amendments thereto;

- and -

**IN THE MATTER OF:** A Complaint by Linda Bourrier against Phil-Can Services Limited and Alain Caron, alleging a breach of Section 19 of the *Human Rights Code*;

**Appearances:** Aaron Berg and Ivan Wiebe for the Human Rights Commission and the complainant Linda Bourrier

As a result of a request by the Human Rights Commission ("the Commission") pursuant to Section 29(3) of the *Human Rights Code* ("the Code"), I was designated to adjudicate a complaint by Linda Bourrier ("Bourrier") against Phil-Can Services Limited ("Phil-Can") and Alain Caron ("Caron") alleging a breach of Section 19 of the Code. Section 29(3) of the Code reads as follows:

**"Adjudication or prosecution.**

**29(3)** Where a complaint is not disposed of in accordance with subsection (1) or (2) and the Commission is satisfied that additional proceedings in respect of the complaint would further the objectives of this Code or assist the Commission in discharging its responsibilities under this Code, the Commission shall

- (a) request the minister to designate a member of the adjudication panel to adjudicate the complaint; or
- (b) recommend that the minister commence a prosecution for an alleged contravention of the Code."

The hearing of the complaint proceeded on September 21, 1998 in the City of Winnipeg, in Manitoba. The respondents did not attend despite having been properly served and were unrepresented.

The principal witness at the hearing was Bourrier who gave evidence which was essentially the same as her complaint which read as follows:

1. On February 19, 1996, I was interviewed by Alain Caron for a position of Assistant Office Manager at Phil-Can Services Limited. At the end of the interview, he stated that he wanted a second interview and that he was to call me on February 22, 1996 to set a time.
2. Receiving no call, I contacted Alain Caron on February 22, 1996. He stated that the woman who was to fly in from Toronto to set the interview up had a baby on the previous day. He indicated that someone would call me on February 26 or 17, 1996.
3. Since no one called, I telephoned Alain Caron on February 27, 1996. This resulted in a two and a half hour telephone interview where he mentioned that I was one of three candidates in consideration for the job. Later in the conversation, he commented that it was now down to two candidates (me being one). He then added that the other person made him a better offer (the meaning of this was not clear to me).
4. On February 28, 1996, he called me and said that before he made his final choice, he wished to meet me for coffee. We met at Perkins Family Restaurant at 6:30 PM. He showed

me what was called a "Preliminary Employment Contract" between myself and Phil-Can Services Limited which described the duties of the Business Manager. I accepted his job offer. We both signed the document.

5. At the end of our meeting ( about 5 hours later), he said that he had one more question and that I would not be happy to hear it but he needed to ask me and then he'd justify his reasons. He said, "This will make or break it for me". Then he asked if I would sleep with him for the job. I immediately told him "Not on your life". He attempted to justify his question/proposition by saying that he needed to know if I could be bought by clients in exchange for confidential information. I believed the proposition was real. We terminated our meeting on this and he said that he'd call me on February 29, 1996 with his decision.
6. On March 7, 1996, I called Alain Caron to tell him that I disapproved of his hiring method. He got rude with me and hung up. He never contacted me with his final decision.
7. I believe that I was subjected to sexual harassment in the course of an employment interview, ie. I was subjected to sexual solicitation made by a person who was in a position to provide me with employment, contrary to Section 19 of The Human Rights Code.

Two witnesses were called to corroborate the evidence of Bourrier. Victor Schwartzman ("Schwartzman"), an investigator employed by the Commission, testified that he followed up on the complaint by Bourrier and gave hearsay evidence that he interviewed sixteen other applicants in addition to Bourrier. Allegedly, two of the applicants had said that Caron had solicited them

during the course of the job application process and other applicants commented on inappropriate questions.

The other witness called to corroborate the evidence of Bourrier was William Craig Brown ("Brown") who is a long-time employee of Human Resources Development Canada ("HRDC"). HRDC had contracted with Caron to recruit people for Phil-Can. It was supposedly a high-tech company with various types of job vacancies. In total, approximately fifty people were interviewed although none were offered jobs. Brown testified that he received complaints that Caron's recruitment methods were disturbing in that some of his questions were inappropriate and of a sexual nature. More particularly, Caron asked some applicants whether they would sleep with him to gain a position. On other occasions he commented that other applicants had offered to sleep with him to gain employment. Not surprisingly, HRDC stopped the recruitment process.

Counsel for the Commission also tendered an affidavit sworn by Deborah Harris ("Harris") who attested that she had also applied for a job with Phil-Can in February of 1996 and had a similar tale of numerous meetings at various restaurants with Caron and related that he had advised her that some women interviewed by him had offered to sleep with him in order to get a job. Counsel also tendered documentary evidence indicating that Caron is an undischarged bankrupt and that Phil-Can is a lapsed corporation apparently without assets.

**Issues**

**Should the hearsay evidence of Schwartzman and Brown and the affidavit of Harris with regard to complaints by third parties be admitted?**

Under the terms of the Code I am given a broad discretion with respect to what evidence will be admitted. Section 39(2) of the Code reads as follows:

**"General procedures at hearing.**

**"39(2)** Subject to this Code and the regulations, the adjudicator may determine the procedures to be used at the hearing and may receive at the hearing such evidence or other information as the adjudicator considers relevant and appropriate, whether or not the evidence is given under oath or affirmation and whether or not it would be admissible in a court of law."

I viewed the evidence in question to be relevant and appropriate and therefore received it into evidence. The only issue is what weight it is to be given. I find all of this evidence to be reliable and, given that it is all consistent with the evidence of Bourrier, I give it significant weight as corroborative of the evidence of Bourrier.

**Test to be Met**

The concept of sexual harassment and the prohibition against sexual harassment are both set out in Sections 19(1) and 19(2) of the Code which read respectively as follows:

**"Harassment.**

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

- (a) harass any person who is participating in the activity or undertaking; or
- (b) knowingly permit, or fail to take reasonable steps to terminate, harassment of one person who is participating in the activity or undertaking by another person who is participating in the activity or undertaking."

**"'Harassment' defined.**

**19(2)** In this section, 'harassment' means

- (a) a course of abusive and unwelcome conduct or comment undertaken or made on the basis of any characteristic referred to in subsection 9(2); or
- (b) a series of objectionable and unwelcome sexual solicitations or advances; or
- (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; or
- (d) a reprisal or threat of reprisal for rejecting a sexual solicitation or advance."

The concept of sexual harassment has received considerable consideration by the courts. The leading case is the Supreme Court of Canada decision in *Janzen v. Platy Enterprises Ltd.* (1989), 10 C.H.R.R. D/6205 where at page D/6225, paragraph 4444 late Chief Justice Dickson wrote:

"Common to all of these descriptions of sexual harassment is the concept of using a position of power to import sexual requirements into the workplace thereby negatively altering the working conditions of employees who are forced to contend with sexual demands."

The essence of sexual harassment is abuse of power. In that regard, Chief Justice Dickson wrote as follows in paragraph 45521 of page D/6227 of *Janzen, supra*:

"Without seeking to provide an exhaustive definition of the term, I am of the view that sexual harassment in the workplace may be broadly defined 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. It is, as Adjudicator Shime observed in *Bell v. Ladas, supra*, and as has been widely accepted by other adjudicators and academic commentators, an abuse of power. When sexual harassment occurs in the workplace, it is an abuse of both economic and sexual power. Sexual harassment is a demeaning practice, one that constitutes a profound affront to the dignity of the employees forced to endure it. By requiring an employee to contend with unwelcome sexual actions or explicit sexual demands, sexual harassment in the workplace attacks the dignity and self-respect of the victim both as an employee and as a human being."

There is a question of whether sexual harassment in the workplace extends to the job interview process but the courts have clearly indicated that such is the case. (See *Ross v. Gendall* (1989), 10 C.H.R.R. D/5836.)

Based on the evidence before me, I find on a balance of probabilities that Bourrier was sexually harassed by Caron and his alter ego, Phil-Can. More particularly, she was subjected to a sexual solicitation from a person in a position to confer a benefit as contemplated in Section 19(2)(c) of the Code and, given that the solicitation was made as a prerequisite to a job offer, Caron and Phil-Can knew or ought reasonably to have known that it was unwelcome.

### **Remedies**

My jurisdiction to grant redress for a breach of the Code is detailed in Section 43(2) thereof which reads as follows:

**"Remedial order.**

**43(2)** Where, under subsection (1), the adjudicator decides that a party to the adjudication has contravened this Code, the adjudicator may order the party to do one or more of the following:

- (a) do or refrain from doing anything in order to secure compliance with the Code, to rectify any circumstance caused by the contravention, or to make just amends for the contravention;
- (b) compensate any party adversely affected by the contravention for any financial losses sustained, expenses incurred or benefits lost



by reason of the contravention, or for such portion of those losses, expenses or benefits as the adjudicator considers just and appropriate;

(c) pay any party adversely affected by the contravention damages in such amount as the adjudicator considers just and appropriate for injury to dignity, feelings or self-respect;

(d) pay any party adversely affected by the contravention a penalty or exemplary damages in such amount, subject to subsection (3), as the adjudicator considers just and appropriate as punishment for any malice or recklessness involved in the contravention;

(e) adopt and implement an affirmative action program or other special program of the type referred to in clause 11(b), if the evidence at the hearing has disclosed that the party engaged in a pattern or practice of contravening this Code."

I have been asked to order damages pursuant to Section 43(2)(c) of the Code. Bourrier testified that as a result of this incident that gave rise to the complaint, she became less trusting of people, a little tougher and now screens people properly. She testified that the incident gave her a wake-up call. She is not as naive as she used to be and for a while she lived in fear of what might happen after the complaint was filed. With this testimony in mind, I award damages of \$1,000.00 to compensate her for injury to her dignity, feeling and self-respect. This damage award is against Caron and Phil-Can jointly and severally.

I have also been asked to consider an award of exemplary damages. In ordering exemplary damages I am compelled to keep in mind the following sections of the Code:

**"Maximum exemplary damages.**

**43(3)** The amount of a penalty or exemplary damages ordered by an adjudicator under clause 2(d) shall not exceed the maximum fine to which the contravening party would have been liable under subsection 51(1) as a result of a prosecution for the contravention.

**"Prosecution.**

**51(1)** Every person who

- (a) contravenes a provision of this Code; or
- (b) deprives, abridges or restricts, or attempts to deprive, abridge or restrict, any other person in the enjoyment of a right under this Code; or
- (c) hinders, obstructs, molests or interferes with, or attempts to hinder, obstruct, molest or interfere with, the Commission or any of its members, officers or employees, an adjudicator, or any other person acting under the authority of this Code, in the exercise of their respective powers, duties and functions under this Code; or
- (d) fails to comply with a decision or order of an adjudicator, other than an order for the payment of money;

is guilty of an offence and is liable on summary conviction

- (e) in the case of an individual, to a fine of not more than \$2,000.00.; or
- (f) in any other case, to a fine of not more than \$10,000."

In *Janzen, supra*, the Supreme Court of Canada approved an adjudicator's award of exemplary damages of \$3,500.00 and \$3,000.00 respectively to the two complainants. While any incident of sexual harassment is a serious matter, the sexual harassment in that case was more overt,

included repeated sexual touching and was sustained over a period of time. In the circumstances of this case, I find that the respondents acted with malice as contemplated in Section 43(2)(d) and therefore order exemplary damages against them jointly and severally in the amount of \$1,000.00. Given that the particular complaint before me relates to one incident only and did not involve physical contact as in *Janzen, supra*, I believe this amount to be appropriate relative to the standard established by the Supreme Court.

Counsel for the Commission has asked me to make a preventative or protective order pursuant to Section 43(2)(a). In particular, I was asked to order that Caron, Phil-Can and any business or corporation of which Caron is an officer or director be compelled to notify the Commission for a period of five years of any hiring activity, including names, addresses and phone number of all persons interviewed for positions, identity of successful applicants, date of departure from employment of any employees and the ostensible reason for departure, coupled with an entitlement for the Commission to audit the books of any such business or company with respect to its employment practices during the time of that Order. I do so order.

In conclusion, I find that the conduct of Caron was disgraceful. Apparently as a result of some real or perceived sense of personal inadequacy, Caron used the hiring process as a means to secure the company of women and ultimately to try to coerce Bourrier to have sexual relations with him. I have concerns, however, about the order that has been asked of me. The respondents appear to be judgment proof and as for the preventative or protective order, there is no central registry for such an order. In any event it would be a simple matter for Caron to leave the province and thereby avoid its effect. Accordingly, the disposition of this complaint may do little

to deter Caron's conduct. The question then is: could the Commission have taken steps that would be more effective than this adjudication? It might have recommended commencement of a prosecution pursuant to Section 29(3)(b) of the Code but that route has drawbacks of its own. In the end, therefore, this case teaches us -- or, at least, reminds us -- there are limits to what the Commission can do to protect us from the kinds of discrimination prohibited in the Human Rights Code.

January 8th, 1999



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Thomas A. Goodman, Q.C., Adjudicator