File No. 00 EN 065

IN THE MATTER OF: **The adjudication of a complaint under section 19(1)(d) of *The Human Rights Code*, C.C.S.M. Cap. H175.**

BETWEEN:

JEANETTE BUDGE,

Complainant,

- and -

THORVALDSON CARE HOMES LTD.,

Respondent.

REASONS FOR DECISION

Appearances

Aaron L. Berg and Sean Boyd, counsel for the Complainant.
Herman O. Thorvaldson, representative of the Respondent.

Nature of the proceedings and the issues

This case concerns the responsibility of an employer to prevent sexual harassment in the workplace. Under the Manitoba *Human Rights Code* ('the *Code*"), harassment in any activity or undertaking to which the *Code* applies is prohibited directly by section 19(1)(a). In addition, section 19(1)(b) provides that no person shall "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."

On March 7, 2000, Ms Jeanette Budge filed a formal complaint against her former employer,

Thorvaldson Care Homes Ltd. ("the Home"), describing on ongoing course of objectionable conduct by the maintenance man at the facility. Ms Budge stated that she commenced employment as a Health Care Worker in November 1998 and began to experience unwelcome comments and contact shortly thereafter. Early on, she reported the problem to the supervisor but nothing changed. On December 15, 1999 she spoke by telephone with Mr. Herman Thorvaldson, president and director of the Home and explained the whole situation. Two days later, included in her pay envelope was a Record of Employment indicating that she had quit - but she had *not* in fact quit. Her written complaint concludes as follows:

> I believe that during the course of employment a co-worker subjected me to unwelcome sexual comments and conduct including physical touching, and that rather than take reasonable steps to deal with the reported harassment my employer encouraged me to quit and then ended my employment. (Exhibit "2")

In replying to the complaint on April 20, 2000, Mr. Thorvaldson vehemently denied that the harassment had occurred. He wrote to the Commission as follows:

> Considering I am hearing of this for the first time, that this (alleged) unacceptable behaviour went on for a year, and that no other complaints have remotely surfaced, would it not be reasonable to suspect your source of (bogus) information and/or there are some serious motives at work? (Exhibit "3")

In Mr. Thorvaldson's view, the Complainant had engaged in a plot with a disgruntled nurse at the home, Ms Pat Vandenbogerd, the purpose of which was to damage the business by quitting just before Christmas, leaving the facility with a staffing crisis. Mr. Thorvaldson continued in his reply:

> In conclusion this whole matter lacks any real credibility on the part of the complainant. She has been lead to trump-up this complaint by a very bitter and malicious ex-employee who persists on causing whatever damage possible.

> This matter is between a contract worker called in, as I would engage a plumber or painter, and Ms Budge. If she was confronted or harassed, (in the first month) of her employment why in the world (if so serious) would she settle for an assault of her sensibilities, for one moment much less a year, then only (claim to) complain to me on the second last day of her employment (unless she was put up to it). In my forty years in this care field, this complaint submitted to the commission is a most transparent "set-up" I ever hope to be involved with, ever. (Exhibit "3")

On June 29, 2001, I was designated by the Minister of Justice under section 32 of the *Code* to hear and decide the complaint. The hearing took place in Winnipeg on February 25-26, 2002 after one adjournment requested by the Respondent with the consent of the Commission. Due notice of the hearing was provided in accordance with the *Code* and both parties indicated at the outset that they were ready to proceed. No preliminary issues were raised.

I should note one other introductory point. On behalf of the Respondent, Mr. Thorvaldson made it clear throughout the hearing that he objected to the Commission's conduct of the entire matter, including the investigation and assessment stages. He requested permission to file documents relating to the pre-hearing phase (Exhibit "6", Investigation Assessment; Exhibits "12", "13" and "14", correspondence from Mr. Thorvaldson to the Commission in October and November 2000). As well, he asked the Commission to call or re-call two of its staff to be examined by him. Mr. Berg generally did not object. I indicated to Mr. Thorvaldson that while these pre-hearing matters were not strictly relevant to the issue before me, I intended to allow him a fair amount of latitude, given the fact that he was not represented by counsel. No motion of any kind was made or suggested by Mr. Thorvaldson based on the Commission's processing of the complaint or its referral of the complaint to adjudication.

In the end, as I understood him, Mr. Thorvaldson simply wanted me to be aware of the points he had raised with the Commission from the beginning. He requested that I keep in mind the

whole sequence of events when I consider the merits of the complaint itself. This might not always be the correct course of action in an adjudication under the *Code*, and I wish to note for the record that Mr. Berg's acquiescence was based on his desire to err on the side of fairness to an unrepresented party. This is as it should be. Moreover, section 39(2) of the *Code* allows an adjudicator to determine the procedures to be used at the hearing and to receive such evidence as the adjudicator considers relevant and appropriate.

I have therefore reviewed all the material put before me during the course of the hearing. However, as a result of the foregoing, I have seen witness notes from two individuals not called by the Commission or the Respondent, some of which is unfavourable to the Respondent. I have *not* taken that material into account.

Evidence on behalf of the Complainant

Ms Nancy Flintoft, a Human Rights Officer and investigator in this case, was called mainly to establish the basic documentation. However, she also testified that while a formal complaint was signed by the Complainant on March 7, 2000, the Commission's first contact with Ms Budge actually occurred on December 15, 1999. On that date, the Complainant called and spoke to Intake, recounting that she was being regularly harassed by a maintenance worker at Thorvaldson Care Homes. While Ms Budge did not identify herself on December 15, Ms Flintoft was able to correlate information she obtained from the investigation with the information on file at Intake, and thus Ms Flintoft assured herself that it was the Complainant who made the December 15 call about harassment at the Home.

In cross examination, Mr. Thorvaldson challenged Ms Flintoft's selection of witnesses to be interviewed. She responded that the Commission begins with the witnesses identified by the Complainant, but also requests relevant information and witness names from respondents. In this case, Mr. Thorvaldson failed to provide additional names for the investigation. Ms Flintoft agreed that in this case, credibility was in issue. She had been aware that all five

witnesses she interviewed were former employees but was not certain they had all been dismissed.

The Investigation Assessment (Exhibit "6") prepared by Ms Flintoft was sent to the Respondent and comments were requested. Ms Flintoft read and considered all the letters sent by the Respondent to the Commission and was aware of his strong feeling that the Complainant was conspiring with Pat Vandenbogerd, the Home's former nurse. All these submissions by Mr. Thorvaldson were forwarded to the Commissioners before the matter was referred to adjudication.

In the end, Ms Flintoft testified, she exercised her best judgement and concluded that the Complainant's case had merit. She made her recommendation accordingly.

The Complainant, Jeanette Budge, testified next and confirmed the particulars set out in her filed complaint (Exhibit "2"). She began work at the Home in November 1998 as a Health Care Aide and worked days until her employment ended on December 17, 1999. Her rate of pay was $8.50/hour for a 40-hour week.

The Home provides light care to some 60-70 elderly residents. During the day, there were 8-10 employees on duty at the Home, including a Licenced Practical Nurse (LPN), Pat Vandenbogerd, who supervised medications and attended to residents needing more intensive care. The Complainant reported to Ms Vandenbogerd who in turn reported to the owner, Mr. Thorvaldson. In addition, the staff included housekeepers, cooks, dishwashers and other aides. Much of the time there was a maintenance man named Theodore Suhia at the Home. He also bathed some of the male residents. The Complainant did not know Theodore's last name.

In the beginning, the Complainant enjoyed the job, especially working with the elderly. Things soon changed. There was no real job description and she didn't know what she'd be

doing from day to day. Then there was the harassment by Theodore. The Complainant testified that it wasn't just the sexual conduct, but also his attitude - he dominated the place. In her first talk with Theodore in the downstairs coffee room, about a month after she started, he told her that there had been allegations by employees who had been let go. They had accused him of harassment but it was all crap, he said. She shouldn't listen to the gossip.

The Complainant found there was a lot of light conversation, and realized after a while that there was a sexual content to it. Later Theodore started grabbing the Complainant and touching her skin. He did the same thing to others as well. She asked him to stop but he just laughed it off. Other staff told him this was wrong but he just ignored it. He would refer to his penis as "the Russian hammer". Once he said that "if I got a hold of you we'd have to widen the doorways because you wouldn't be able to walk into ... the rooms the next day" (Transcript, p. 12). This type of comment was standard for him. He would make reference to the Complainants breasts in front of other employees. He grabbed her buttocks and when she protested, he said, "Well, it's my butt. I can do what I want with it" (Transcript, p. 16).

The Complainant spoke to her supervisor Pat Vandenbogerd about the problem. Irene Lima, another staff member, was familiar with Theodore and told him that this behaviour was inappropriate but to no avail. In addition, the Complainant once saw Theodore swat Pat across the mouth.

During her last four months on the job, the Complainant found that there was a lot of tension at the Home. Staff were coming and going. People weren't happy. There was a scabies outbreak. One day Theodore asked the Complainant and the activity coordinator, Ronnie Volk, to help him move some furniture. Ronnie refused and Theodore got angry, threatening to get her fired. He said, "You've screwed me around before. Who do you think you are? When I ask you to come and help me, you come and help me" (Transcript, p. 15). This referred to a prior incident when Ms Volk accused Theodore of opening a female resident's shower door and reported him to management. As it turned out, Ronnie Volk was in fact

fired.

Theodore would make inappropriate comments to the residents. He would grab a resident named Richard by the arm and say, referring to a female staff member or an elderly female resident nearby, "Oh, you like what you're looking at, don't you? Look at them bending over. You like what you're looking at" (Transcript, p. 19-20).

One day Theodore sat down right beside the Complainant in the coffee room and said, "To be a real Canadian, you have to eat pussy. Is this true?" (Transcript, p. 18). The Complainant told him to get away. However, he would often return to the theme, saying he was "a real Canadian", and everyone knew what he meant. Near the end, he once tried to pry open the Complainant's legs while she sat in the office, asking "How's my pussy today?" By that point the Complainant just couldn't take it any more.

As far as the Complainant knew, the Home had no harassment policy.

Around the beginning of December 1999, Mr. Thorvaldson called the Complainant into his office and asked how she felt about her job. He requested that if she was going to quit, she should give him two weeks notice. Pat Vandenbogerd had just given the Home one months notice of her intention to quit. The Complainant told her employer that of course she would give the proper notice.

Pat left the Home around mid December 1999. On December 15, 1999 the Complainant called in sick. That day she contacted a lawyer, who referred her to the Human Rights Commission. She called the Commission to get advice about her rights. She also called the Labour Board and went to Employment Insurance for information. "I knew that as soon as I complained or said anything that I'd be let go" (Transcript, p. 21), just like anyone else who complained about Theodore. At EI they recommended she seek a doctor's letter to verify the stress she was experiencing.

Mr. Thorvaldson telephoned the Complainant at home on December 15 to ask why she did not come to work. She replied that the scabies wasn't under control and she didn't want to get it just before Christmas. She also told him about Theodore harassing her. According to the Complainant, Mr. Thorvaldson replied as follows:

> I don't put up with that type of behaviour in this place. I want to let you know. You're a valued employee, and three more times – three more incidences like this with Theodore and he's out of here." (Transcript, p. 22)

The next day, December 16, the Complainant went back to work. Around lunch time, Mr. Thorvaldson asked her if she was unhappy. He said she could quit without giving notice. She responded that as a single mother with two children, right before Christmas, she could not quit her job.

On Friday December 17 - payday - the Complainant was at work. Residential Care Licencing staff were at the Home and "it was chaotic". The Complainant told Jackie Prentice from Licencing everything that had happened. The pay cheques were late and the Complainant waited at the Home. When she got to the bank and opened her pay envelope, she was surprised to find an EI Record of Employment inside indicating that she had quit her job (Exhibit "7"). She received her holiday pay but no severance. The Complainant testified that she had said nothing to Mr. Thorvaldson about quitting, only that *if* she decided to quit, she would give the required notice.

The Complainant refused to accept this treatment by her employer. She lodged a complaint with Employment Standards which ultimately resulted in a hearing before the Manitoba Labour Board. The Board heard evidence from both parties and upheld the Complainant's position, directing the Home to pay $680 wages in lieu of notice (Exhibit "8"). Despite the supposed quit, EI accepted the Complainant's explanation and deemed her qualified to receive EI benefits. In her evidence, the Complainant expressed anger over what happened

to her. She said that she had done a good job and caused no trouble. She had family responsibilities and would never quit a job just before Christmas with nowhere else to go. Moreover, this was her first job after ten years at home with her children. It was a challenge to get back into the workforce. It was hard to look for another job without a reference. She was on EI for 6-7 months, looking for work as a Health Care Aide as well as other positions. She didn't have her certificate for aide jobs at that time.

Asked to comment on the notion that she and Pat Vandenbogerd plotted against the Home, the Complainant said it was ridiculous. She knew Pat from work and that's all. There was no plot. "What would be the point?"

The Complainant stated that she was seeking compensation for lost wages and injury to her feelings. However, first and foremost, she requested an order that the Home adopt a policy against harassment, for the protection of other employees.

In cross examination, the Complainant agreed that it was common for the staff to have coffee and cigarettes downstairs, accompanied by light talk and joking around. Pressed to explain how she knew that there would be reprisal for complaining against Theodore, she said , "No one had to tell me that. You could just see that the way he walked around the place" (Transcript, p. 37), everyone at work felt that way. If you complain, you'll get fired. The Complainant insisted that Mr. Thorvaldson knew about the sexual harassment, saying that Pat Vandenbogerd told him. She denied that she had never before mentioned the incident when Theodore touched her leg.

The Complainant confirmed that payroll at the Home was not handled internally but was sent out a few days before each pay day. She had no information about how long it took to do the payroll. Questioned about her discussions with Mr. Thorvaldson in December 1999, the Complainant maintained that she told her employer she wouldn't leave without having somewhere else to work. The telephone conversation on December 15 was the first time the

Complainant talked to Mr. Thorvaldson about the harassment, but she did complain to Pat earlier. The Complainant reiterated her evidence about the exchange in the hallway on December 16 when Mr. Thorvaldson said she could leave without having to give the usual two weeks notice. The next day was her last day.

In redirect examination, Mr. Berg tendered Exhibit "9", a letter dated February 14, 2000 from the Complainant to the Commission setting forth a detailed account of her difficulties at the Home. The exhibit was filed in order to answer the suggestion in cross examination that she had never raised this complaint before. The letter states in part: "On a couple of occasions, Pat and I would be in the office, and he'd come in. He'd sit down beside me, and he'd lean over, put his hands on my knees and try to open my legs, and say, "how's my pussy today?" I would turn away in disgust and tell him to get away from me."

Mr. Thorvaldson requested the opportunity to cross examine further based on this exhibit. He asked what Pat did when Theodore touched the Complainant in the Nursing office. The Complainant said that Pat told him to get out of the office. Mr. Thorvaldson challenged the Complainant to explain why this incident was not reported to him. She answered that she's been told you would be fired if you complained about Theodore. She needed the job. People were leaving the Home left and right. Mr. Thorvaldson queried why he would chastise the Complainant for Theodore's wrongful act. She replied that this was her concern at the time, and in fact when she did eventually complain about harassment on December 15, she *was* fired.

Mr. Thorvaldson pointed out that in her February 14, 2000 letter, the Complainant described seeing Theodore knock a cigarette out of Pat's mouth, whereas in direct examination she said Theodore had swatted Pat across the mouth. The Complainant said this was the same incident. Pat was taking a drag on the cigarette and he slapped her hand. Mr. Thorvaldson questioned the Complainant about her relationship with Pat Vandenbogerd. The Complainant testified that it was just a work relationship.

Ms Tara St. Laurent appeared next for the Commission. She worked as a cook at the Home beginning in 1996. She left for about a year and then returned, staying until April 1999. She worked days and said there were six or eight other day staff, including health care aides, Veronica (Ronnie) Volk, the Activities Director, and the LPN, as well as Julia Thorvaldson, the administrator, Thor Thorvaldson, the accountant, Theodore, John Thorvaldson, who was involved when the Home was in a construction phase, and Herman Thorvaldson, who was the manager during the 1998-99 period.

Theodore was generally at the Home every day and all day, although she understood he also did maintenance at the Inuit Centre. He got along well with Herman Thorvaldson and Julia Thorvaldson and some of the staff, but not with others. He followed most of the aides around and sat with them during breaks. Although Ms St. Laurent was in the kitchen most of the time, several staff told her about sexual harassment by Theodore - specifically the Complainant, Margaret Borkowski, and Analiese, another aide. The Complainant raised it several times and Ms St. Laurent suggested she speak to Pat or Mr. Thorvaldson. She understood that the Complainant saw Pat about the problem but not Mr. Thorvaldson because she was worried about ruffling feathers, worried about her job. On January 29, 1999, Ms St. Laurent wrote a letter to Mr. Herman Thorvaldson covering a variety of issues in the Home, including unsafe food handling by staff and inadequate activities organized by Ronnie Volk for the residents, among other topics. She was critical of a number of her fellow employees. The letter included this paragraph:

> I have noticed that Theodore spends a good portion of his time following certain staff members around. A few of these staff members have confided in me that Theodore is really bothering them, either with inappropriate and sexually explicit comments or touching. I did tell these staff members to speak to either yourself or Pat about this, they said that they didn't want to put their own jobs at risk. These are good hardworking employees. I am sure you wouldn't want to lose them over something like this.

The Respondent's reply to this disclosure was contained in a letter from Mr. Herman Thorvaldson to Ms St. Laurent dated February 5, 1999. It was handed to her at work but there was no discussion with Mr. Thorvaldson. She received the impression that her information was unwelcome and that she should mind her own business. She also testified that she sensed her own job might be at risk. Mr. Thorvaldson's letter stated as follows, in part:

> Your attitude reflected in your letter did not have the best interests of this operation or the feelings of other staff in mind. You have intentionally and openly named and criticized other employees in many areas which are of minimal concern to you, or at best might be discussed with me privately. Actually, with the exception of improvement in matters pertaining to your duties, and cleanliness related to the food service area, all else in your letter is not your responsibility, and in my opinion would foster ill-will and dis-harmony. Further, the fact that your letter addressed to me was apparently shown to, or discussed with some other staff first, is total (sic) unacceptable.

Ms St. Laurent was confused by the foregoing. She replied in writing to Mr. Thorvaldson:

> It seems you may have misunderstood my intentions when I gave you the letter dated January 29, 1999. I came to you (after trying to make suggestions to the staff members mentioned) in an attempt to minimize any ill feelings that may be caused by my observations. At no time did I intend to hurt the feelings of any staff member I mentioned. I wrote you a private letter, which I assure you was sealed in an envelope before I left my home that morning. ... I believe that everything I mentioned in my letter did affect the efficiency, quality of care and services for the residents and the harmony and goodwill between the staff. ...

According to Ms St. Laurent, Mr. Thorvaldson never asked her the identity of the staff who were being harassed, never requested any further detail and never told her that he had spoken to Theodore about the problem. His February 5, 1999 letter was the employer's only reaction to her communication. She noticed no change in Theodore's behaviour in the Home

following this exchange of letters.

In cross examination, Mr. Thorvaldson asked whether Ms St. Laurent expected that he would discuss staff concerns with *her*. She said yes. Previously he had told all the staff to come to him if they had concerns about the Home. Once before she had raised concerns and they had met about it in his office. She had suggested to the individuals complaining of harassment that they see Mr. Thorvaldson but as far as she knew, they approached Pat, not Mr. Thorvaldson.

Ms Jackie Prentice, Licencing Coordinator for the Residential Care Licencing Branch, Manitoba Department of Family Services and Housing, testified about her contact with the Home in December 1999. The Branch received several complaints that month relating to the care and supervision of residents. At the beginning of December, after conducting several interviews, the Branch learned that Theodore was harassing female staff. Initially it appeared that Theodore was not bothering the residents, so Ms Prentice was not too concerned. Later in the month she heard about fondling of buttocks and rude comments directed at staff, but this time some residents were also involved. The Branch spoke with three staff and one resident. The affected employees were upset. Ms Prentice spoke to Mr. Thorvaldson about the matter in early December and then on January 7, 2000, a lengthy letter was sent to the Respondent dealing with a number of issues. With respect to harassment, the Residential Care letter stated as follows (excerpt read into the record by the witness):

> It has also been reported that your maintenance staff (Theodore Suhia) has in the past, made comments of a sexual nature directed at staff and male residents. The recorded comments whether said "as a joke" or otherwise, are not appropriate and again constitute both verbal and sexual abuse.
>
> Our investigation supports the validity of many of the complaints concerning these staff members. We expect you will take steps to correct the conduct of staff immediately.

Ms Prentice stated that her earlier discussion with Mr. Thorvaldson was consistent with the extract she read into the record from the January 7, 2000 letter.

Under cross examination, Ms Prentice said that the first complaint the Branch received was from a Home employee on December 1, 1999 alleging that Theodore was throwing around dry ice as a joke; a resident caught it and injured his hand. As a follow up, the Branch attended on December 6, conducted resident interviews and heard that Theodore was harassing female staff. A letter was sent to the Home on December 7 stating that no inadequate care had been found but making some suggestions for improvement. There were additional visits to the home on December 14, 17 and 22. On December 16 there was a call from Ms Budge complaining of harassment by Theodore. There was also a similar verbal complaint from Pat Vandenbogerd. A written complaint from another staff member, Leah Badiou, was received as well as a complaint from a resident's family.

Mr. Thorvaldson asked the witness whether she believed the employees who claimed they were hesitant to complain because of fears for their jobs. She replied, "I don't know whether I believed it or not. I heard it. ... I heard it enough." (Transcript, p. 20)

Veronica (Ronnie) Volk was the Commission's final witness. She was employed as the Activity Coordinator at the Home from 1994 to September 1999. She worked days, along with a number of other staff such as aides, the LPN, the cook and housekeepers. Theodore was there all the time. He didn't know the boundaries for proper behaviour and came across in a sexual manner. The other staff would laugh him, then tell him off - but it only encouraged him. In her first year at the Home, Ms Volk saw Theodore hassle Analiese, one of the aides. Ms Volk also saw Theodore look in and laugh while a female resident was bathing. He was always skulking around and peeking. Ms Volk spoke to both Herman Thorvaldson and his brother Thor about these matters and told them this was not appropriate. Herman Thorvaldson's response was that they were picking on Theodore. As far as she could tell, no management action was taken. This was sometime around 1995.

With the Complainant, Theodore became totally sexual, especially at coffee time. Theodore did not recognize the word "No". Ms Volk saw Theodore touch the Complainant in the shoulder and chest area several times. The Complainant and another employee, Margaret Borkowski, both complained to Ms Volk about Theodore's conduct.

In cross examination, Ms Volk was asked if she was unhappy at the Home. She answered that her departure was amicable. There had been a verbal threat by Theodore that he would get her - beat her up. She told him she would call the police and that shut him up. She never called the police.

Evidence on behalf of the Respondent

After the close of the Commission's case, at the start of the second day of the hearing, Mr. Thorvaldson requested that Pat Vandenbogerd be subpoenaed to testify. Mr. Berg advised that in December 2001 he had informed Mr. Thorvaldson of the witnesses the Commission would be calling, and that the list did *not* include Ms Vandenbogerd. Mr. Thorvaldson denied that there was any such discussion. I advised Mr. Thorvaldson that generally speaking, it is the Respondent's obligation to be prepared on the date of hearing and to secure the attendance of any necessary witnesses. However, I was prepared to issue an immediate subpoena if the witness's whereabouts could be confirmed. Failing that, I indicated that the parties could speak to the question of how the hearing should proceed.

The hearing was adjourned and efforts were made to contact Ms Vandenbogerd. However, she could not be contacted and I therefore asked Mr. Thorvaldson how he wished to proceed. He repeated his position that the Commission's investigation process was biassed and unfair. He also expressed the hope that this adjudication would restore his faith in the system. Then he stated that he was willing to commence his personal testimony notwithstanding the unavailability of Ms Vandenbogerd. No adjournment motion or request was made on behalf of the Respondent.

In opening his evidence, Mr. Thorvaldson stated that he was fighting this case based on principle. The allegations are so blatantly false that they must be contested. Each of the Commission's witnesses were in conflict with the policies of the Home. He conceded that this group of dissenters did not originally include the Complainant. Otherwise he would not have asked her to continue employment at the Home when they spoke in early December. In the end, however, she aligned herself with a scheme to inflict harm on his business operation. The opposition group went to Residential Care and called them in for an investigation, but on December 8, 1999, the Licencing Branch stated in its letter that there was no problem. Nothing was said until later about harassment, and that was an exaggeration. By mid December, "everything broke open", and Pat Vandenbogerd led the others against the Home. Mr. Thorvaldson relied on his submissions as filed with the Commission (Exhibits "12", "13" and "14").

The Complainant painted Theodore as the villain, but at work, it was just joking around. Mr. Thorvaldson described as "ludicrous" the suggestion that he was unapproachable. No one would have lost their job. Those who were fired committed acts of misconduct. It was a "fable" to claim that Theodore was touching the Complainant while she was seated in the nurse's office - the room is too small for chairs. Moreover, Pat Vandenbogerd was not reporting anything.

Mr. Thorvaldson emphasized his long years of experience in the care home field. His motto is "Service with Integrity". He explained how the business is fragile and you are constantly being watched. But he supports licencing. He believes you must do the right thing, even when you're not under scrutiny.

In conclusion, Mr. Thorvaldson said he gives people the benefit of the doubt and treats them the way he himself would like to be treated. This case has been immeasurably hard on him. He is looking for the same standard of treatment from the government as he likes to maintain in his own operation.

In cross examination, Mr. Thorvaldson confirmed that he assumed full time management of the Home in 1998. The Complainant worked there from late 1998 to December 1999. She was a good employee and good health care aides are hard to find. He agreed that staff were told to go to Pat Vandenbogerd for operational concerns, but Pat would refer some matters to him. Ronnie Volk left in mid-September 1999 and Tara St. Laurent left May 6, 1999.

Mr. Thorvaldson said he had no idea about the Complainant's problems with Theodore until he received the Human Rights complaint in March 2000 - except for the January 7, 2000 letter from Residential Care Licencing. He knew there was joking going on, but there were no negative comments about Theodore. Mr. Thorvaldson was totally unaware of "this touching business". No one came to him. He would hope people would report to him. He conceded that Tara St. Laurent's letters made some comments, but she had an axe to grind. It is incumbent on the individual with the problem to come forward personally, or the LPN should report the complaints.

Pressed about Ms St. Laurent's letter of January 29, 1999, which disclosed an ongoing sexual harassment problem in the Home, Mr. Thorvaldson said that she tried to take on a role beyond her jurisdiction. "I wouldn't give her the credit for that by saying, oh, I'm so happy you're running my place for me. That's not her place to run the place." (Transcript, p. 21-22)

Mr. Berg referred to the statement in Ms St. Laurent's letter where she specifically mentioned sexual touching. How could Mr. Thorvaldson deny ever knowing about the touching allegation? In response, Mr. Thorvaldson said that it depends on accuracy. He wasn't there. You have to decide what's malicious and what's true. None of the employees spoke to him. As for the claim of threats to job security, "they can stick that remark ... I have never, ever taken a person and said, you know, label them." (Transcript, p. 25) Mr. Thorvaldson reiterated that these four employees - Margaret Borkowski, Ronnie Volk, Tara St. Laurent and Pat Vandenbogerd - were not let go except for performance, work habits and effect on the operation. He added that Tara St. Laurent had to go because he restructured the

cook job to part time, and Tara was not willing to work part time. But she was a reasonably good cook.

Mr. Thorvaldson denied that there was a perception among his employees that he was unreceptive to complaints. This was something in the minds of people, a group, which was bound and determined. The Complainant was part of that group but he felt that she didn't have a malicious attitude - not like Pat, who stated that she would bring the place down. Pat walked out to cripple the Home at Christmas time when it's very hard to cover the staff schedule. Residential Care was brought into the Home by the "Gang of Four", as Mr. Thorvaldson labelled the group. He also criticized the provincial Care office for acting upon a complaint by a resident with a psychiatric condition.

Mr. Thorvaldson denied Ronnie Volk's evidence that she had come to him with a complaint about Theodore's conduct. He described Ms Volk as always distraught, taking psychiatric medication, suffering from phobias and fragility, "but we kept her on". He suggested that perhaps Ms Volk had talked to his brother Thor.

He rejected as well the Complainant's version of their conversation in early December 1999. When the Complainant's "friend the LPN" gave 30 days notice, Mr. Thorvaldson said he asked the Complainant which way she was going. He denied that she said she would stay until she had a new job and would give due notice. In fact she gave him *no* answer. When she was absent from work on December 15, he did *not* call her at home, as claimed by the Complainant in her evidence. She did *not* tell him about being harassed by Theodore. He did not say that "three more times" and Theodore would be gone. Mr. Thorvaldson testified that it was "ridiculous" to think that he would allow three wrongful acts.

Mr. Thorvaldson said he heard that the Complainant was planning to leave if Pat left. He decided he couldn't play games. He needed to know. It was close to Christmas. So he said to himself, "... if you can't make up your mind and if you don't want to make up your mind,

then I'll make up your mind for you." (Transcript, p. 39) He made out a Record of Employment stating that the Complainant had quit. Although she never said it to him, that's what he understood. He knew she would be disentitled by EI, but it was not malicious on his part. He also challenged the order to pay wages in lieu of notice because he wanted to be heard. He admitted that he only paid the wages owing after being ordered by the Manitoba Labour Board.

Mr. Thorvaldson then testified that he *did* terminate the Complainant without notice on December 17, 1999 but recorded it as a quit. (Transcript, p. 43-44) He recognized that it was the week before Christmas and it might be misinterpreted but no malice was intended.

Mr. Berg led Mr. Thorvaldson through Exhibit "3" (dated April 20, 2000), the Respondent's reply to the complaint. In paragraph (b), it is stated that the Complainant "purposely terminated employment", but under questioning, Mr. Thorvaldson admitted that this written statement was untrue.

> No, only, that's what I am saying, that, yes, it's -- yeah, I, yes. At that -- okay, yeah, so take that back. That's an item that I was rolling along with I guess, and it just slipped past me. I could have gone into saying – you know, I could have gone into saying what I just said now, that it was a hit and miss and I wasn't sure if she was going to be on or not going to be on, so I couldn't take that chance and so I dismissed her. ... I should have just – on hindsight I should have just said: Here, take the two weeks. Take your vacation. Goodbye. ..." (Transcript, p. 50)

He characterized the inconsistency in his story as "splitting hairs".

In paragraph (c), the reply states that "nothing was said to me of this alleged conduct" - meaning the harassment by Theodore - and the complaint is described as "a wild story" concocted in a vindictive manner by Pat and the Complainant. Again, under questioning, Mr. Thorvaldson conceded that in truth he did have information about harassment in the Home.

Tara St. Laurent informed him by letter in January 1999. He then revised his statement to indicate that nothing was said to him *by the Complainant herself.*

Similarly, Mr. Berg challenged Mr. Thorvaldson on statements in paragraph (d) of the reply:

> ...how is it, I or any of the other 20 or more staff who have been serving the needs of the elderly ... for many years, have not heard of this or the exploits of this "Raving Russian"? The fact is there is no case for harassment, that involves this company. The contest (if any) is with the two individuals in question. Considering I am hearing of this for the first time ..., would it not be reasonable to suspect the source of (bogus) information and/or there are some serious motives at work?

Mr. Thorvaldson admitted that contrary to the above statement he made to the Commission, he had received Ms St. Laurent's letter; but he discounted her letter because of Ms St. Laurent's "vendetta" against Theodore. Moreover, he had received the Residential Care letter in January 2000 specifically naming Theodore as the perpetrator. Mr. Thorvaldson then testified that he was sure he spoke to Theodore at the time about his "European attitude". (Transcript, p. 57) Previously in cross examination, the witness said he *may* have spoken to Theodore but he just couldn't remember. (Transcript, p. 32) In any case, Mr. Thorvaldson explained that he has a problem chasing down hearsay. He noted as well that despite the supposed problem of harassment, the Complainant was still down in the coffee room regularly having a cigarette along with Theodore. "This is what I don't understand."

Mr. Thorvaldson was confronted with his letter of October 9, 2000 to the Commission (Exhibit "12"), in which he stated that the group turned to a human rights complaint because the Residential Care investigation of harassment "was going nowhere". Mr. Berg suggested that this was an untrue statement. The witness responded that "they didn't make a federal case out of it." He added that yes, it is a serious matter, and he took it up with Theodore as a result. Again he insisted that the Complainant herself should have come forward with her

complaint.

Mr. Berg pointed to a subsequent letter to the Commission dated November 8, 2000 (Exhibit "13"). He suggested that Mr. Thorvaldson tried to mislead the investigation by conveying that he got a clean bill of health from the Care office. Attached to Exhibit "13" is the December 8, 1999 letter from Residential Care finding no evidence of poor care in the Home. Mr. Thorvaldson did *not* provide the January 7, 2000 letter from Residential Care which *substantiated* sexual harassment. Why not? Mr. Thorvaldson answered that the January letter was twenty pages long, it contained a lot of stuff and he couldn't break it open. Pressed further on the point, he said that the letter didn't register the issue as needing further comment, "and so there was not a lot wrong with that". (Transcript, p. 70)

Mr. Thorvaldson testified that Theodore left the Home in May 2001 but has since resumed part time work and is presently engaged in the Home.

Questioned about the Home's policy regarding sexual harassment in the workplace, Mr. Thorvaldson stated unequivocally that there is no place for such conduct in his operation. If the employees had just come to him, he would have stopped it instantly. Mr. Berg suggested that this was not really a policy: "No, no, it's a policy -- because, I think, yeah, because what I say goes there." (Transcript, p. 71) He saw no problem with the absence of a policy in writing. He observed that even a written policy would not answer the claim in this case that people feared for their jobs.

I asked Mr. Thorvaldson *how* employees at the Home would know that he does not tolerate harassment. He answered:

> From their own moral upbringing and from what I have always been a part of ... Certainly a policy that is in a book and is put somewhere is valuable. But more than writing on a page is the instinct of people to say: I'm not settling for it. Mr. Thorvaldson, do you settle for this?

> And I would be the first to say: Where is it happening? (Transcript, p. 74)

He said that his door is always open, on anything. It would have stopped if the Complainant had just come to him and said she was fed up. This complaint, including the newspaper publicity, has affected his reputation, something he has built over thirty years.

When Mr. Thorvaldson concluded his testimony, I asked him whether he wished to adduce any other evidence. He replied no. He felt alright about the tribunal and simply wanted to be fairly heard. He acknowledged in closing that the whole thing was mishandled - both by the Complainant and himself.

Final arguments of the parties

For the Commission, Mr. Berg submitted that the evidence amply supports a finding that harassment did occur as described by the Complainant. Tara St. Laurent documented the problem early on, and Ronnie Volk saw similar conduct. The Residential Care Licencing Branch concluded that Theodore was engaging in harassment which extended to inappropriate conduct involving residents of the Home. The question is whether the Respondent knew or ought to have known that a climate of harassment existed.

Mr. Thorvaldson's approach was that the actual victim must complain to him in person. All else is hearsay. The Commission stated that this cannot be correct. Once an employer becomes aware of allegations, there is a duty to investigate and determine the substance of the problem. While it is unclear if Ms Volk complained to management, Tara St. Laurent's letter in January 1999 raised the issue and triggered the duty. Moreover, the Complainant spoke to her supervisor, Pat Vandenbogerd. Mr. Thorvaldson testified that the complaint was never passed on to him, but the Commission contends that this is not credible evidence and should be rejected.

In any event, on December 15, 1999, the Complainant disclosed directly to Mr. Thorvaldson, according to her evidence. Mr. Thorvaldson emphatically denies the conversation. Again, Mr. Berg urged that the Respondent's evidence be rejected. Right up to the hearing, Mr. Thorvaldson was maintaining that the Complainant had quit, but in cross examination, he changed his story and admitted to terminating her. Then he insisted that his motivation was merely to ensure staffing continuity during the critical Christmas holiday period. It had nothing to do with harassment. Mr. Berg cited the test in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) for assessing credibility: is the story "in harmony with the preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place, in those conditions" (see pp. 356-358). Would management fire a good employee simply because she declined to reveal her future intentions? Or is it more likely that the Respondent acted to remove an employee who was raising a complaint of harassment at the same time as the Licencing Branch was actively scrutinizing the Home? Mr. Berg noted the various misleading statements made by Mr. Thorvaldson to the Commission and to Residential Care Licencing. While Mr. Thorvaldson claimed to be a man of principle, the record was otherwise. As for his claim that "the Gang of Four" plotted to damage his business, it was simply not established on the evidence.

Based on all the foregoing, the Commission argued that the Complainant's version of events between December 15-17, 1999 must be accepted. Even *before* December 15, 1999, the Respondent was wilfully blind to Theodore's misconduct. Mr. Thorvaldson should have approached the Complainant and inquired about the reports of harassment. Was she unhappy? Was it because of Theodore? Mr. Berg submitted that Mr. Thorvaldson still does not understand the nature of an employer's duty to provide a workplace free of harassment. Holding strong personal views on the subject of harassment is not enough. The Respondent knew or ought to have known that harassment was occurring, and failed to take reasonable steps to stop the offending conduct.

Turning to the legal authorities, the Commission began with a reference to the primacy of

individual worth and dignity, as recited in the preamble to the *Code*. In the leading case on sexual harassment, *Janzen and Govereau v. Platy Enterprises Ltd. et al,* [1989] 1 S.C.R. 1252, 10 C.H.R.R. D/6205, the court accepted a broad definition going well beyond direct economic threat or reward:

> ... 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 harassment. ... 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. (at para. 44451)

In *Janzen* and the prior case of *Robichaud v. Canada (Treasury Board)* [1987] 2 S.C.R. 84, 8 C.H.R.R. D/4326, employer liability was described as statutory, not vicarious. Employer knowledge might be irrelevant so long as the misconduct occurred in the course of employment. However, the Manitoba *Code*, drafted before *Robichaud*, requires an element of knowledge under section 19(1)(b). Mr. Berg submitted that based on general interpretive principles, knowledge in this section of the *Code* includes both actual and constructive knowledge. In this case, the Respondent knew of the harassment or was wilfully blind to the facts.

The nature of an employer's obligation in responding to sexual harassment in the workplace was summarized in *Jones v. Amway of Canada Ltd. et al* (2001) 39 C.H.R.R. D/480 at para. 74:

> To determine the sufficiency of [the respondent's] response to the complaint, the Board adopts the six elements of the reasonableness test suggested in the Canadian Human Rights decisions. The reasonableness test has been applied to determine quantum of

> damages, as well as corporate liability in allegations of discrimination ... Briefly, the six elements are that an employer must demonstrate that: (a) it is aware that sexual harassment is prohibited conduct; (b) a complaint mechanism is in place; (c) it acted with alacrity in handling the complaint; (d) it dealt with the matter seriously; (e) it has met its obligation to provide a healthy work environment; (f) it met its obligation to inform the complainant of its response. If an employer fails any of the six elements it necessarily fails the test.

The Commission relied on *Jones* and the similar holding in *Wilgan et al v. Wendy's Restaurants of Canada Inc.* (1989) 11 C.H.R.R. D/119 at para. 37. Based on the foregoing, it was submitted that breach of statutory duty has been established in the present case.

The Commission requested a wide ranging remedial order. Under section 43(2)(a) of the *Code*, an adjudicator may order a party to "do or refrain from doing anything in order to secure compliance with this Code, to rectify any circumstance caused by the contravention, or to make just amends for the contravention." The Commission asked that the Respondent be required to post on the premises a copy of the *Code* or a suitable brochure on harassment, until such time as an acceptable written policy on harassment is adopted. At my request, Mr. Berg filed material after the close of the hearing setting forth the kind of brochure and policy which the Commission recommends. Mr. Berg suggested that in the particular circumstances of the present case, the Respondent should include protection of *residents* as well as employees, and warn against misconduct *by* residents and employees alike. A copy of this material was provided to the Respondent for its review and comment.

Also under section 43(2)(a), the Commission requested a monitoring order similar to the order granted by Adjudicator Goodman in *Scott v. Lou's Moving and Storage et al*, (1992) 18 C.H.R.R. D/143 (at para. 10). In *Scott*, the Respondent was required to inform the Commission for a period of two years whenever a female employee enters or leaves its employment. Mr. Berg stated that in the present case, the concern arises from Theodore's return to the Home, and not from any perceived threat caused by other employees. Therefore

the monitoring order could be made conditional on Theodore's presence in the Home as an employee or contractor.

As compensation for financial loss under section 43(2)(b) of the *Code*, the Commission requested wages in the range of 2-4 months. While the Complainant was off work and in receipt of E.I. benefits for 6-7 months, Mr. Berg said that the wage order must reflect a reasonable nexus between the contravention and the wage loss.

Section 43(2)(c) allows for general damages "in such amount as the adjudicator considers just and appropriate for injury to dignity, feelings or self-respect". The Commission cited a number of authorities, including *Torres v. Royalty Kitchenware* Ltd. (1982) 3 C.H.R.R. D/858, *Chand v. Rana Vig et al* (1995) 28 C.H.R.R. D/463, *Scott* (cited above), and *Miller v. Sam's Pizza House et al* (1992) 23 C.H.R.R. D/433. The criteria in *Torres* are frequently quoted and include nature of the harassment (verbal or physical), degree of aggressiveness, time period, frequency, age of the victim, vulnerability of the victim, and psychological impact. In the present case, Mr. Berg highlighted the Complainant's vulnerability as a woman attempting a return to the workforce after an extended period caring for children. Moreover, she did not yet have her certificate as a health care aide. The manner in which she was terminated was particularly harsh and even Mr. Thorvaldson now admits this was an error. The Commission requested an award in the range of $2,500 to $4,000. While this is above the range for reported Manitoba cases, Mr. Berg argued that the cases are dated and that current authority supports raising the level of general damages awards.

Section 43(2)(d) provides for exemplary damages as punishment for "any malice or recklessness involved in the contravention". In *Werestiuk v. Small Business Services Inc. et al* (Unreported, October 30, 1998), a case of direct harassment under section 19(1)(a) of the Manitoba *Code*, Adjudicator Suche held as follows:

> 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 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.

In *Werestiuk*, exemplary damages were set at $1,000, based on the cap of $2,000 and the fact that this was a one-time infraction. The Commission also cited a similar award in *Bourrier v. Phil-Can Services Limited et al* (Unreported, January 8, 1999) by Adjudicator Goodman. While the Commission did not allege malice in the present case, it did suggest that Mr. Thorvaldson acted recklessly, especially in his response to the Complainant's December 15, 1999 disclosure during their phone conversation. He told the Complainant that Theodore would be gone if he committed improper acts three more times. No quantum was mentioned by the Commission in final argument, except that the *Code* sets a cap equal to the maximum fine under section 51(1), which is $10,000 for a corporation.

For the Respondent, Mr. Thorvaldson emphasized the facts as he understood them. He did not dismiss the Complainant because of her alleged sexual harassment complaint. Rather, the Complainant left him hanging about her intentions on the job, so he simply had to take action. On December 13, 1999 - before the supposed phone conversation about Theodore - he instructed his outside payroll service to terminate her employment. Mr. Thorvaldson argued that the harassment and the dismissal are two distinct issues.

Addressing the harassment allegation itself, Mr. Thorvaldson described Theodore as "a new Canadian" and not a special person in the operation of the Home. After the harassment issue was raised by Residential Care, Mr. Thorvaldson spoke to Theodore immediately. In final argument, there was no mention of the letter from Ms St. Laurent, received by the Respondent in January 1999, but as I understood Mr. Thorvaldson's position, he discounted her communication because of the source - a meddlesome employee with an axe to grind against Theodore.

In any case, Mr. Thorvaldson questioned the seriousness of the harassment allegation, given that the Complainant continued associating with Theodore during coffee and cigarette breaks, right until her last day of work. He said that both the Complainant and Theodore seemed to have a good sense of humour about these things, but it all changed when Pat Vandenbogerd decided to walk out and destroy the business.

In conclusion, Mr. Thorvaldson asked that the case be dismissed. He declined to make any additional submissions relating to the Commission's material on harassment policies and brochures.

Was the Complainant subjected to sexual harassment?

The principal direct evidence relating to the allegation of harassment by Theodore came from the Complainant herself. Theodore was not called as a witness by the Respondent, although Mr. Thorvaldson indicated that at the time of the hearing, Theodore was again working for the Home in a maintenance capacity. Thus, there was no denial by the alleged offender. Mr. Thorvaldson testified that he was aware of ongoing banter, which he considered mere joking around, but his personal knowledge was limited. Generally, it was his position that the allegation of sexual harassment was trumped up or exaggerated. He connected the harassment complaint to a campaign by disgruntled employees, led by Pat Vandenbogerd.

There is some corroboration of the harassment complaint in the record. Ronnie Volk worked at the Home until September 1999 and she testified as to inappropriate conduct by Theodore, including several instances of touching the Complainant in the shoulder and chest area. Tara St. Laurent had no personal knowledge based on witnessing acts of harassment, but she passed on the Complainant's concerns in her January 1999 letter to Mr. Thorvaldson. If nothing else, this tends to refute the Respondent's argument that the harassment allegation was recently concocted as part of the plot which came to a head in December 1999. Before she was unexpectedly dismissed, the Complainant contacted the Commission's Intake office

and disclosed Theodore's misconduct. Finally, the Residential Care Licencing Branch, an independent body with expertise in evaluating care facilities, made a finding that Theodore had committed acts of verbal and sexual abuse.

I have carefully observed the Complainant's demeanor during her testimony and throughout the hearing. I have also considered her evidence in the context of the surrounding circumstances of this case. I have tried to examine her allegation in a practical way, asking myself whether or not her story has the ring of truth. Based on all the foregoing considerations, I find that the Complainant's evidence is credible. I therefore conclude that sexual harassment of the Complainant did in fact take place substantially as described in her formal complaint to the Commission (Exhibit "2") and as reiterated by the Complainant in her oral testimony.

Was the Respondent informed that the Complainant was being harassed?

I accept that the Complainant told the Home's LPN, Ms Vandenbogerd, about the harassment she was suffering. However, Mr. Thorvaldson denied in his evidence that Ms Vandenbogerd informed *him* about the problem. The Commission did not call Ms Vandenbogerd as a witness and gave no explanation for its decision. While Mr. Thorvaldson intimated at one stage that he wished to call her, he did not do so in the end. Of course, the onus of proof is on the Commission, not the Respondent. As a result, key evidence was missing in this case. The precise nature of the LPN's supervisory duties and responsibilities was never clarified. I am unable to say whether knowledge by Ms Vandenbogerd can be attached to the Respondent under section 19(1)(b) of the *Code*.

Mr. Berg argued that I should find against Mr. Thorvaldson's credibility in general and reject his evidence on this point in particular. In general terms, after careful consideration, I must agree that Mr. Thorvaldson's credibility is seriously suspect. I agree with Mr. Berg's contentions in cross examination that Mr. Thorvaldson misled the Commission during its

investigation. He has been selective and adaptable in his recollections and his testimony. Indeed he admitted to being untruthful during the hearing, initially saying that the Complainant quit, and ultimately conceding that he dismissed her. Despite my reservations, I am unwilling to make a global finding against Mr. Thorvaldson's credibility. It is preferable to consider the issues point by point, resolving any disputed evidence as required.

In Exhibit "6", the Commission's Investigation Assessment, there are notes of an interview with Ms Vandenbogerd which suggest that she had informed Mr. Thorvaldson of other complaints of harassment by Theodore. It is further suggested that Mr. Thorvaldson knew everything that went on at the Home. Under the circumstances, it would be unfair to accord any evidentiary weight to these assertions in the absence of the witness appearing to be examined.

If I were permitted to guess, I would guess that Mr. Thorvaldson *was* fully informed by his LPN about Theodore's harassment of the Complainant. But it may not be so simple. The Complainant asserted that Theodore dominated the workplace. If this was true, it was never fully explained in the evidence *why* this was the case. On one occasion, Theodore swatted Ms Vandenbogerd across the mouth, according to the Complainant. Certainly, this was a surprising action by a maintenance man against a supervisor, but there was no suggestion of disciplinary consequences. Did Theodore intimidate Ms Vandenbogerd into remaining silent about his misdeeds, on this occasion or generally? I am unable to say. If there *was* notice to Mr. Thorvaldson about harassment of the Complainant, I am left with no details as to what he learned and when he was told. Thus, despite my suspicions on the point, I am unable to make a positive finding that Mr. Thorvaldson was informed by Pat Vandenbogerd about Theodore's harassment of the Complainant specifically.

The January 1999 letter from Tara St. Laurent

Notwithstanding the foregoing, it is clear that the Respondent was put on notice of a serious

sexual harassment problem at the Home. On January 29, 1999, Ms St. Laurent gave a letter to Mr. Thorvaldson covering a number of perceived shortcomings in the operation. It is worth repeating the text of the letter quoted earlier in this decision:

> I have noticed that Theodore spends a good portion of his time following certain staff members around. A few of these staff members have confided in me that Theodore is really bothering them, either with inappropriate and sexually explicit comments or touching. I did tell these staff members to speak to either yourself or Pat about this, they said that they didn't want to put their own jobs at risk. These are good hardworking employees. I am sure you wouldn't want to lose them over something like this.

Mr. Thorvaldson's response was dismissive and intimidating. I agree with Ms St. Laurent's subsequent statement to Mr. Thorvaldson that "everything I mentioned in my letter did affect the efficiency, quality of care and services for residents and the harmony and goodwill between the staff ...". Whatever concerns Mr. Thorvaldson might legitimately have had about undue meddling by this employee, once the spectre of harassment was raised, he was duty bound to act. It was a serious error on his part to ignore the disclosure. It might have turned out to be an *unfounded* disclosure, but still, it required proper attention from management. With all due respect to Mr. Thorvaldson's view that a complainant bears the onus of coming forward personally to the manager, the absence of a personal complaint does not discharge an employer's obligations.

As early as 1983, the following characterization was given of an employer's duty:

> What responsibility does an employer have to provide employees with a workplace free from the fear of sexual harassment? First, managers and supervisors must themselves be aware that sexual harassment is prohibited conduct under the Act. When a complaint is made, it must be dealt with as a serious matter, not by a gentle tap on the fingers, but as a potential breach of a statute. Employers should advise their employees that sexual interplay that has, or may reasonably appear to have, employment consequences - either direct,

> in the nature of firing, loss of benefits, etc., or indirect, such as an adverse effect on the work environment - is improper. The distinction between flirtation and harassment should be clarified. Complaint mechanisms should be in place, so that complaints can be made confidentially and without fear of reprisals. Employers have a responsibility to advise their supervisory personnel and employees about the significance and consequences of sexual harassment. *Wilgan,* cited earlier, at para. 37, quoting with approval from *Kotyk v. Canada (Canadian Employment and Immigration Commission)* (1983) 4 C.H.R.R. D/1416.

In the present case, the Respondent's reaction to the January 1999 letter was deficient on a number of grounds. Ms St. Laurent's information was *not* dealt with as a serious matter. She was told to mind her own business and according to the evidence, there was no investigation whatsoever into the possibility that sexual harassment was indeed taking place. Employees were *not* told that sexual interplay with employment consequences is improper. The distinction between flirtation (or "joking around") and harassment was never clarified by the Respondent for its staff. It may well be that the distinction is still not appreciated by Mr. Thorvaldson to this day. *No* complaint mechanism was in place, let alone a mechanism which assured confidentiality and guarded against reprisals. Quite the contrary. Mr. Thorvaldson was told that the victims were fearful for their jobs. But he did nothing.

I accept the Complainant's evidence that there was a climate of apprehensiveness at the Home - if you complain against Theodore, you could jeopardize your job. Without a proper written policy governing sexual harassment, everything depended on Mr. Thorvaldson's personal response to the situation at hand. As he made clear in his evidence, "what I say goes ...". It is not my place to criticize the Respondent's choice of management style and it is not my intent to do so here. However, as an adjudicator, I have been asked to determine whether the Respondent failed to take reasonable steps to terminate harassment in its workplace, contrary to section 19(1)(b) of the *Code*. In *Jones v Amway*, cited earlier, six elements of the reasonableness test were listed, and it was held that where an employer fails any single element, it fails the test (at para. 74). The Respondent here has fallen short on several

elements of the *Amway* test.

The alleged phone conversation between the Complainant and Mr. Thorvaldson on December 15, 1999

The Complainant testified that by not later than December 15, 1999, the Respondent had actual knowledge of harassment by Theodore because on that date, she told Mr. Thorvaldson all about it. Having considered the conflicting testimony on this point, I prefer and accept the Complainant's version over that of Mr. Thorvaldson. He stated that there was no such phone call. She insisted that he called her at home to find out why she was not at work. Given the Respondent's strong concerns about staffing over Christmas, I find it sensible that Mr. Thorvaldson would have called the Complainant. Given her documented inquiries that same day about her human rights, it is reasonable to find that she finally worked up the courage to confront her employer on the issue of ongoing harassment.

Moreover, I accept the Complainant's evidence that when advised of the harassment, Mr. Thorvaldson responded with words to the effect of, 'Three more times and he's gone.' This is consistent with his initial response to Ms St. Laurent's letter back in January 1999, which failed to treat the issue as pressing and serious. This is also consistent with Mr. Thorvaldson's reaction when Residential Care informed him of abusive behaviour against his staff - he said he had a talk with Theodore, but took no other action, whether disciplinary or preventive.

Dismissal of the Complainant on December 17, 1999

Mr. Thorvaldson admitted, during the course of the hearing, that the Complainant did not in fact quit - she was fired. However, he insisted that the dismissal was unrelated to her harassment complaint. He maintained that the payroll documents indicating a "quit" had already been prepared when the alleged disclosure of harassment occurred on December 15,

1999. I have now made a finding that disclosure *was* indeed made to Mr. Thorvaldson on December 15.

No independent evidence was adduced by the Respondent to support the claim that the payroll was finished before December 15. I am not completely satisfied with Mr. Thorvaldson's explanation in this regard. Certainly, on December 16, 1999, he spoke to the Complainant at work and by his own account, encouraged her to leave her employment at the Home. It appears that despite the Complainant's favourable work performance, Mr. Thorvaldson decided to dispense with her services, either because she was seen as allied with Pat Vandenbogerd, or because she was complaining to Residential Care, or because she was objecting to Theodore's sexual harassment - or a combination of the above. Considering all the evidence, I find that the dismissal was related, at least in part, to the Complainant's revelation of Theodore's misconduct. This then is an aggravating factor when considering the Respondent's failure to take reasonable steps to terminate harassment. Instead of receiving support and protection, the Complainant lost her job - a week before Christmas.

Finding with respect to the Complaint

For all the reasons recited above, I find on a balance of probabilities that the Complaint (Exhibit "2") has been established by the Commission. I uphold the Complainant's summary statement of what happened to her in this case, as follows:

> I believe that during the course of employment a co-worker subjected me to unwelcome sexual comments and conduct including physical touching, and that rather than take reasonable steps to deal with the reported harassment my employer encouraged me to quit and then ended my employment.

It is therefore necessary to consider what remedies would be appropriate in the circumstances of this case.

Remedial orders under section 43(2) of the *Code*

Adoption of a written company policy on sexual harassment.

The Commission sought an order directing the Respondent to post a brochure on harassment and/or relevant provisions of the *Code*, pending the adoption of a suitable written policy on harassment. The need for such an order is amply demonstrated by the record in this case, and I so order. The Respondent will meet with the Commission and agree upon the material to be posted and the locations for posting within the Home. The Respondent is further ordered to prepare and adopt a harassment policy acceptable to the Commission, and to implement the policy in an expeditious manner. If the parties are unable to agree on the particulars, either party may approach me to settle the detailed terms of the order, and jurisdiction is reserved for that purpose, as well as to resolve any other dispute involving the effective implementation of the order.

Monitoring order.

Next, the Commission requested a monitoring order, due to the fact that Theodore remains on the premises of the Home. In *Werestiuk*, cited earlier, Adjudicator Suche considered the circumstances in which such an order is appropriate:

> 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.

On this basis, I agree that a monitoring order should be granted similar to the order by Adjudicator Goodman in *Scott*, cited earlier. The Respondent shall inform the Commission for a period of two years whenever a female employee enters or leaves its employ, providing such particulars as may be reasonably requested by the Commission for the purpose of ensuring continuing compliance with the *Code*. If Theodore ceases to be involved in the operation of the Home, and the Commission is satisfied that his departure is permanent, the Commission may terminate the monitoring order by notice in writing to the Respondent. Either party may approach me to settle any dispute arising from the foregoing at any time during the duration of the order, and jurisdiction is reserved for that purpose.

Compensation for wage loss

The Commission further requested an order compensating the Complainant for wage loss during the period she was seeking a new job. Mr. Berg suggested a range of 2-4 months, recognizing that it took the Complainant some 6-7 months to find work. I have found that the dismissal was at least partly due to the Complainant's raising of the harassment issue on December 15, 1999. Part of her wage loss was caused by the Respondent's contravention. The Complainant testified that she made serious efforts to find a replacement job and mitigation was not raised by the Respondent. On balance, I consider it just and appropriate that the Respondent pay to the Complainant 12 weeks wages and associated benefits, based on her previous rate of $8.50/hour and a 40 hour week. Again I reserve jurisdiction to settle any aspect of the financial compensation order.

General damages for injury to dignity, feelings and self-respect

Damages may be ordered under section 43(2)(c) of the *Code* for injury to a complainant's

dignity, feelings or self-respect. In this case, I have found that by January 29, 1999, at the latest, the Respondent was on notice that a harassment problem might exist in his work force. The statutory duty was triggered on or about that date, and based on my finding that the Respondent took no steps to investigate and terminate the harassment, I conclude that the Complainant suffered harassment attributable to the breach from February to December 1999 - about 10 months.

Based on the well known criteria discussed in the authorities cited earlier, I consider this to be a relatively severe case of harassment. The Complainant was vulnerable, being a single mother re-entering the workforce after an extended absence. The harassment was ongoing for a significant period of time. There was both unwelcome sexual discussion and physical touching. The incident where Theodore tried to pry open the Complainant's legs was particularly egregious. In terms of psychological impact, the Complainant was somewhat subdued in describing her feelings. No medical evidence was filed. I do not, however, interpret this as indicating that the harassment caused only a nominal effect. Rather I perceive from the evidence as a whole that the Complainant's dignity was seriously impacted, and that she reacted with anger, determination and resolve. In my view, a complainant's refusal to suffer as a helpless victim should not reduce the quantum of damages available to her under section 43(2)(c). Ultimately, as set forth in the preamble to the *Code*, this is legislation in which "Manitobans recognize the individual worth and dignity of every member of the human family."

Added to the foregoing was the effect of the pre-Christmas dismissal, which was particularly harsh given the Complainant's family status. After a year of working in a poisoned environment, the Complainant finally told her employer about the problem, only to learn that the offender would *not* be sanctioned - and then two days later, *she herself* was terminated.

The Commission requested damages in the range of $2,500 to $4,000. Mr. Berg conceded that this was higher than the existing Manitoba precedents, but relied on the trend toward a

greater level of compensation for human rights violations. I accept that the following represents the prevailing view in human rights jurisprudence:

> Although damage awards in human rights cases historically were small in size, they have become progressively more substantial in recent years. It is now a principle of human rights damage assessments that damages awards ought not to be minimal, but ought to provide true compensation other than in exceptional circumstances, for two reasons. First, it is necessary to do this to meet the objective of restitution ... Second, it is necessary to give true compensation to a complainant to meet the broader policy objectives of the *Code*. It is important that damage awards not trivialize or diminish respect for the public policy declared in the Human Rights Code. *Cameron v. Nel-Gor Castle Nursing Home* (1984) 5 C.H.R.R. D/2170, approved in *Miller*, a 1995 decision cited earlier, at para. 201.

Every case must be decided based on its unique facts, but some guidance can be drawn from the authorities. In the leading case of *Janzen*, the Supreme Court upheld a 1985 adjudication decision awarding $3,500 and $3,000 to two waitresses who suffered sexual harassment, including touching, over a two month period of employment. These were exemplary damages, but at the time, the Manitoba legislation did not provide for general damages. Section 28(2)(c) of the *Human Rights Act*, under which the awards were issued, allowed for damages "if the board is of the opinion that the person discriminated against suffered damages in respect of his feelings or self-respect", language analogous to the current section 43(2)(c). I recognize that direct comparisons are not possible due to the legislative change, but it is worth noting the court's holding that "The amounts are not inordinate in light of the seriousness of the complaints." See para. 44468.

Three Manitoba damage awards for sexual harassment were cited, but each involved a single incident or a short course of employment. The complainant in *Scott* (1992) worked for less than two weeks and endured inquiries about her sex life, hugging, grabbing, touching and unbuttoning of her clothing. General damages were $1,000 and exemplary damages were

$2,000. Similarly in *Werestiuk* (1998), the complainant had been working for about two weeks when the respondent induced her to accompany him to a hotel and tried to engage in sexual relations. It was a single incident which constituted the contravention. General damages were assessed at $2,000 and exemplary damages at $1,000. *Bourrier* (1999) involved a single incident of harassment during a job interview, and led to awards of $1,000 each for general and exemplary damages.

General damages of $5,000 were ordered in *Chand* (1995) where there was a three month period of coerced sexual relations followed by termination. In *Miller* (1995), the facts were somewhat closer to the present case. One of the complainants worked for about nine months and was subjected to unwelcome, aggressive sexual conduct and a course of vulgar and offensive comment. There were instances of touching of her breasts, chest, neck and vagina. She was threatened at the time she was terminated. Describing the harassment as flagrant and aggressive, the adjudicator awarded $5,000 in general damages and $10,000 in exemplary damages. There was evidence that the complainant required counselling to recover from a serious psychological impact.

Another case involving an extended course of unwelcome sexual inquiries and remarks was *Haynes v. Coltart* (1998) 33 C.H.R.R. D/428. For four months the complainant served as a caregiver for the quadriplegic respondent. General damages of $4,000 were awarded. Finally, in *Denison v. Badacki Holding Ltd.* (1999) 37 C.H.R.R. D/265, there was a poisoned work environment which the complainant experienced for twelve months, at which point she quit on medical advice. The complainant was a machinist and her male co-workers made sexual comments, mocked her, drew pictures, brushed up against her, and fouled the women's washroom. She was awarded general damages of $6,000 on the following basis:

> In the present case, the complainant was subjected to sexual harassment at the hands of adult males in a very public workplace. The respondent management did not address the harassing actions when brought to their attention; in fact, they participated in the

> harassment. I find that the sexual harassment in the circumstances of this case to be serious enough to warrant a substantial remedy as compensation for injury to feelings, dignity and self-respect. (at para. 54)

I conclude from the foregoing review that the Commission's suggested range is supported by the weight of authority. As the offensive conduct moves from isolated to ongoing, from verbal to physical, and from insulting to seriously oppressive, the damage awards become significantly larger. The Supreme Court of Canada characterized the impact of sexual harassment in the following terms in *Janzen*:

> Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be seen as demeaning and disconcerting as the harshest of racial epithets. (at para. 44450)

It should be noted that many of the general damage cases reviewed above involved harassment by a director or owner of the company, with both the business entity and the actual offender named as respondents. In the present case, Theodore Suhia was not named as a respondent and the Commission's case proceeded solely on the basis of employer liability under section 19(1)(b) of the *Code*. Mr. Herman Thorvaldson is not alleged to have harassed anyone, but I have found that he was derelict in his duty to maintain a healthy work environment for his employees. I do not consider that the quantum of damages should necessarily be lower in cases under section 19(1)(b) than cases under section 19(1)(a). The damages awarded pursuant to section 43(2)(c) should reflect the injury caused to the Complainant's feelings and dignity.

A relevant authority in this regard is *Wilgan*, cited earlier. A co-worker committed several acts of sexual harassment against the two complainants, all on a single day. One victim was

fondled and the other was subjected to suggestive remarks. The employer took steps to deal with the problem, terminating the harasser and adopting a company policy. However, because of the employer's failure to make the complainants aware that the matter was being taken seriously, they both resigned. Only the employer, Wendy's Restaurants, was named. The board of adjudication found liability and ordered compensation of $1,000 and $750 for hurt and humiliation.

The present case involves an extended period, a vulnerable employee, physical as well as verbal harassment, and dismissal based at least in part on the advancing of a complaint. Considering the seriousness of the affront in this case and all the authorities cited, I order the Respondent to pay $4,000 as damages for injury to the Complainant's dignity, feelings and self-respect.

Penalty or exemplary damages

Lastly, there is the Commission's request for an order of exemplary damages. Malice was not alleged against the Respondent. However, his handling of this whole affair may well, in my view, fall within the category of recklessness. Mr. Thorvaldson's February 5, 1999 letter of response to Tara St. Laurent, and his ensuing inaction in dealing with the harassment issue, might be seen as reckless disregard of his employees' rights to a healthy work environment. Mr. Thorvaldson's response to the Complainant's disclosure of harassment was especially troubling, as I have discussed earlier. His false recording of the basis for termination of employment could be seen as deceitful, and certainly the dismissal was inhumane.

In the final analysis, and with some hesitation, I have concluded that no order of exemplary damages should be made in this case. The objective of the *Code* is remedial, and in my view, the overall order herein will achieve the necessary remedial effect without the addition of a formal penalty. While a penalty might well be in order, I accept Mr. Thorvaldson's statement

(Transcript, p. 75) that his reputation has been impacted by these proceedings. He described the experience, including the media coverage, as the "biggest hit I have taken in 30 years". I sense that the severity of this public exposure will exceed any moderate award of exemplary damages which I might otherwise impose in this case. Moreover, the Commission did not press strongly for exemplary damages.

Conclusion

I would request the Commission to draft a formal order consistent with these reasons and provide a copy to Mr. Thorvaldson for his review prior to submitting it for my signature. I will retain jurisdiction to settle any issues which may arise from the implementation or interpretation of this decision.

In conclusion, this case highlights the fact that sexual harassment remains a blight on the working lives of too many women, despite years of formal condemnation. As noted by Mr. Justice La Forest in *Robichaud*, cited above, "only an employer can provide the most important remedy - a healthy work environment" (at para. 33942). The Respondent in this case simply failed to take the matter seriously. I commend Ms Budge for defending her dignity and the dignity of other women employed at Thorvaldson Care Homes.

DATED at the City of Winnipeg, in Manitoba, this 19th day of March, 2002.

ARNE PELTZ, Adjudicator

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