

HUMAN RIGHTS ADJUDICATION PANEL

IN THE MATTER OF: A complaint by Traci Emslie v. Doholoco Holdings Ltd. o/a The UPS Store #425, alleging a breach of s. 19 of *The Human Rights Code*;

AND IN THE MATTER OF: *The Human Rights Code*, C.C.S.M., Chapter H175, as amended.

Between:

TRACI EMSLIE,

complainant,

and

DOHOLOCO HOLDINGS LTD. O/A THE UPS STORE #425,

respondent.

Panel: Peter Sim, adjudicator

Appearances:

The complainant in person

For the Commission: Ms. Isha Khan

No one for the respondent

Decision

[1] This is a complaint of discrimination based on harassment as defined in paragraph 19(2)(c) of *The Human Rights Code*, C.C.S.M., C. H175 (the “Code”). The complainant was formerly employed by the respondent as a sales clerk at a store in Winkler, Manitoba. The complainant alleges that the owner of the respondent, Douglas Homick, harassed her by making crude and suggestive remarks in her presence and ultimately touching her, in a sexual way, without her consent, on several occasions.

[2] The Respondent did not file a formal response to the complaint or appear at the hearing. The president of the Respondent, Douglas Homick, received notice of the hearing and advised me by e-mail that he did not intend to appear.

Preliminary Matters

Request to Remove Complainant's Name from Reasons

[3] The first preliminary issue was a request that the complainant not be identified by name in these reasons. Ms. Khan submitted that the complainant lives in a small community and that her employment prospects might be damaged if she were identified by name.

[4] I have concluded that it is not appropriate to grant this request. The name of the complainant has already appeared in the public notices which were given for the hearing. No request to remove her name was made prior to publication.

[5] The complainant has married since the filing of the complaint and now uses her husband's surname. In these reasons, I will not refer to the complainant by her married name or give the full name of her husband. This should provide sufficient protection for her privacy.

Motion to add Douglas Homick as a Respondent

[6] The second preliminary issue is a request by the Commission to amend the complaint to add Douglas Homick, the president, director and principal shareholder of the Respondent, as a Respondent in his personal capacity.

[7] The Commission argues that it is appropriate to add Mr. Homick as a party because he was the directing mind of the corporate respondent and also the person directly responsible for the acts of harassment.

[8] My main concern about this application is the timing. The complaint was filed in April, 2012 and was in the hands of the Commission for over two years before I was designated as an Adjudicator to hear the complaint in August, 2014. I issued the Notice

of Hearing on October 30, 2014 after consultation with counsel for the Commission and prior notice to the complainant and the respondent. The Commission did not request to amend the complaint to add Mr. Homick as a respondent until November 20, 2014, less than a week before the hearing was to commence.

[9] I asked counsel for the Commission the reason for the delay in seeking to add Mr. Homick as a respondent. She explained that it was the practice of the Commission to avoid adding a personal respondent if the complaint could be remedied by a corporation. She said that the Commission did not consider this matter during its investigation and it was only when she took conduct of the file that it became evident that Mr. Homick was not taking the matter seriously.

[10] Section 40 of the *Code* gives an adjudicator broad power to amend a complaint and add parties, subject only to the restriction that there must not be undue prejudice to any party or proposed new party. However, I have concluded that when the Section is considered in the context of the *Code* as a whole it is an exceptional power which should be exercised only in exceptional circumstances.

[11] An appropriate test for adding parties under Section 40 of the Manitoba Code is found in a decision of the Canada Human Rights Tribunal in *Syndicat des employés d'exécution de Québec-téléphone section locale 5044 du SCFP v. Telus communications (Québec) inc.*, 2003 CHRT 31 (CanLII) and followed by the federal tribunal in subsequent cases. In that case the tribunal stated:

[30] The Panel is of the opinion that the forced addition of a new respondent once the Tribunal has been charged with inquiring into a complaint is appropriate, in the absence of formal rules to this effect, if it is established that the presence of this new party is necessary to dispose of the complaint of which the Tribunal is seized and that it was not reasonably foreseeable, once the complaint was filed with the Commission, that the addition of a new respondent would be necessary to dispose of the complaint.

[12] The panel in the *Telus* case based its decision on the procedures under the *Canada Human Rights Code* which require the Commission to review and screen cases before they are referred to the tribunal for adjudication.

[13] The Manitoba *Code* uses a similar structure. Once a complaint is filed, Section 27 of the *Code* requires that the Commission investigate the complaint. Section 24 of the *Code* gives the Executive Director, or other employees of the Commission, the power to add parties at any time until the Commission disposes of the complaint under Section 29.

[14] Section 28 of the *Code* requires that the Commission notify the complainant and the respondent of the findings of the investigation and give them an opportunity to respond before the complaint is considered by the Commission under Section 29.

[15] Under 29, the Commission considers the complaint and may either dismiss the complaint, request the appointment of an adjudicator or recommend a prosecution for a contravention of the *Code*. The Commission is required to consider whether the complaint is frivolous or vexatious, whether the acts or omissions described in the complaint contravene the *Code* and whether there is sufficient evidence to support the complaint. The Commission functions as a gatekeeper to the adjudication process. The Commission is required to receive representations from the respondent and screen out those complaints which do not merit a full hearing before an adjudicator.

[16] An amendment by the adjudicator to add a new respondent after the complaint has been considered by the Commission deprives the proposed respondent of the right to make representations under Section 28 and of the benefit of the screening process under Section 29. It should therefore be regarded as an exceptional order which should be granted only where the facts which are relied on to justify it were not known, and could not have been discovered by reasonable diligence, before the Commission disposed of the complaint under Section 29.

[17] There are no such facts here. The complaint discloses that Mr. Homick was the owner of the store in question. A simple search of the Companies Office would disclose his connection with the corporate respondent. The fact that the respondent was not being cooperative with the Commission became evident early in the investigation process. The question of whether to add individual respondents to a complaint is matter of substance which ought to be considered by the Commission as part of the

investigation and review of the complaint. The possibility that the corporate respondent might be stripped of assets is a known risk that could have been considered earlier. Even if Mr. Homick were added as a personal respondent, there are ways in which he could make himself judgment proof.

[18] There was ample opportunity to add Mr. Homick as a respondent under Section 24 of the *Code*. A last minute application under Section 40 is not justified. I therefore deny the motion to amend the complaint to add Douglas Homick as a respondent.

Evidence

[19] The complainant is 35 years old. In 2009, when she started work with the respondent, she was single and had a four year old daughter from a previous relationship. She was in a relationship with the man (who I will not name) who subsequently became her husband. She had completed high school and a business course of some kind. She did not describe her work history in detail but it appears that most of her jobs had been in retail stores or restaurants.

[20] The respondent Doholoco Holdings Ltd. operated a retail store in Winkler, Manitoba which combined a franchise of The UPS Store with a Sears catalogue outlet. The two businesses occupied the same space and employees worked on both sides of the store. The respondent operated a second store in Steinbach, Manitoba.

[21] Douglas Homick was the President and sole director of the respondent. He worked mainly in the Steinbach store but would visit the Winkler store once or twice a week.

[22] The complainant began work at the respondent's Winkler location in March, 2009. She initially had another part time job, but in July she left that job and began working for the respondent full time. When the complainant began work there was a store manager named Deb and another employee named John. Deb left the store in 2010 and the complainant began taking over more of her functions. Various other part time employees were hired from time to time but it appears that, after Deb left, the complainant and Mr. Homick were often the only people working in the store.

[23] During the time that Deb was at the store, the complainant had no difficulties with Mr. Homick. When he was working at the store she would sometime ask him questions and he would answer them and that was all. However, once Deb left and the complainant was working alone with Mr. Homick, his attitude changed. He began a stream of sexually tinged comments.

[24] The complainant gave a few examples. Mr. Homick would suggest that one of the UPS drivers wanted to sleep with the complainant. He might ask, "Do you need help going to the bathroom?" He would point to the underwear section of a catalogue and say, "These are going to be your new uniform." When the wooden casing had to be removed from a fridge that was delivered to the Sears outlet he might say, "It's time to get down on your hands and knees and screw."

[25] In other contexts, Mr. Homick's remarks would simply be vulgar. Taken by themselves, most of his remarks might only be mildly offensive. What raises them to the level of harassment is their constant repetition and the relationship of power in which they took place. Mr. Homick was described as over 6 feet tall and over 250 pounds and very imposing. The complainant is around five feet tall. Mr. Homick and the complainant worked alone most of the time. Mr. Homick was 20 or 25 years older than the complainant. Mr. Homick was the complainant's boss and the power to set her hours or work, give or deny raises and fire her. The complainant was a single mother with limited skills living in a small town.

[26] The complainant seldom objected to Mr. Homick's constant stream of sexual references. She said that she was uncomfortable with speaking to him in person but she would sometimes send him text messages objecting to something he had said or done. However, the remarks she described were of a type that no reasonable person would believe a woman would welcome. Mr. Homick must have realized that the complainant did not like his so-called jokes. Nevertheless he kept up with them, no doubt because he enjoyed reminding her that he was the boss and if she wanted to keep her job she had to listen to his jokes whether she liked them or not.

[27] Things soon escalated beyond simple joking. The complainant explained that she had injured her shoulder in a previous job. One day in late 2010 her shoulder started acting up while she was at work. Mr. Homick noticed that she was in pain and offered to massage her shoulder. She let him rub her shoulder through her clothing and she did feel somewhat better.

[28] After this incident, Mr. Homick was constantly saying, "Do you need a backrub? Do you want a backrub? I think you need a backrub?" The Sears part of the store also had a display of mattresses and Mr. Homick kept suggesting that he pull a mattress down.

[29] On Friday, February 11, 2011 the complainant and Mr. Homick were working alone in the store. The complainant started closing down the store at 5:30 pm because she needed to pick her daughter up from day care at 6:00 pm. The complainant was on the phone talking to her boyfriend when Mr. Homick pulled down a mattress and moved it to a storage area, out of public view. He told the complainant, "See you on the bed."

[30] The complainant walked over to the bed and sat down. She said that she did not want to sit on the bed but her first reaction was to do what her boss asked her to do. After she got off the phone she told Mr. Homick that she needed to pick up her daughter but he did not seem to catch on that she did not want to be there. The complainant's recollection became blurred. She recalls lying on the bed and Mr. Homick rubbing her back. He also rubbed her feet and the inside of her thighs. He did not try to kiss her. The complainant could not say how long the incident lasted. She kept telling Mr. Homick that she had to go and he eventually let her go.

[31] The complainant picked up her daughter and went home. She says that she felt violated, ashamed and scared. She did not tell anyone else about the incident.

[32] That night the complainant sent an e-mail to Mr. Homick at the store e-mail address which read, "Hey, I don't mind you getting knots out of my back, but it needs to be a professional relationship."

[33] When the complainant next saw Mr. Homick the following Tuesday, she described the situation as awkward. Mr. Homick made some vague remarks about being out of his mind. He also asked the complainant not to send e-mails to the store e-mail address because those e-mails went through a hub and he did not want other people to see them.

[34] The complainant's e-mail protest was very mildly worded, but its intent should have been clear to any reasonable person. However, it was not clear to Mr. Homick. Another incident soon followed.

[35] The complainant had a photography business on the side and she asked Mr. Homick to print some business cards for her. The cards had to be printed at the Steinbach store. When Mr. Homick brought the cards to Winkler, he told the complainant to close her eyes, grabbed her shirt and stuffed the cards into her bra. Mr. Homick laughed. The complainant was stunned and shocked. She said thanks for the cards and turned away.

[36] There was another incident around Easter of 2011 when Mr. Homick put an Easter egg inside the complainant's shirt after she had specifically asked him not to.

[37] Around this time, there was one other incident where the complainant gave Mr. Homick permission to touch her. The complainant had injured her back working around her home. She had gone to a massage therapist who gave her a lotion to put on her back. The next day the complainant was in extreme pain at work. Mr. Homick was the only other person around. When the complainant could no longer stand the pain, she asked Mr. Homick to rub some lotion on her back. This involved lifting her shirt about two inches and rubbing the lotion to her lower back around her hips. The process took less than a minute.

[38] The complainant described an incident in the spring of 2011 where Mr. Homick sat down beside her in the back area of the store and removed her shirt so that he could massage her back. Her memory of this incident was somewhat blurred and she could not say whether it happened before or after the incident with the lotion.

[39] During the spring and summer of 2011, Mr. Homick came to the complainant's house on a couple of occasions. She did not let him in the house and there were neighbours around outside so he left after a short time.

[40] By the fall of 2011, the complainant was suffering from serious stress as a result of Mr. Homick's behaviour. She does not recall any further instances of actual touching but there was a constant stream of sexual innuendo whenever she dealt with Mr. Homick. She recalled a telephone conversation with him where he asked for "phone nookie" as the incident that led her to take action. Mr. Homick had done this many times before but this time she had had enough.

[41] On October 21, the complainant went to see a doctor. She was not able to see her family doctor that day but was able to see another doctor in the urgent care clinic who gave her a sick note. The complainant decided to wait until she could see her family doctor on October 26. Her family doctor gave her a note approving her for stress leave until January 20, 2012. On October 26, 2011 she went to the store and left the note on a desk. She did not return to work after that.

[42] After she left her job the complainant contacted the area supervisor of The UPS Store franchise and complained about Mr. Homick's behaviour. A private investigator interviewed the complainant, Ms. Bell and some other employees. The complainant does not know if the franchisor took any further action.

[43] The complainant also reported Mr. Homick to the police. She said that she believes there were some court proceedings against him but she did not attend court and could not give further details.

[44] The Commission also called Amy Bell as a witness. Ms. Bell worked for The UPS Store in Steinbach which was also owned by the respondent. Ms. Bell started work in 2011 and she would often call the complainant in Winkler to ask for advice about the store. As time went on, she and the complainant got to know each other and talked about more personal things.

[45] Ms. Bell recalls one incident where she was talking to the complainant by telephone. Mr. Homick was in the office and said in a voice loud enough for the complainant to hear over the telephone, "Ask her what bra she is wearing, what color are her underwear?"

[46] Ms. Bell said that the complainant seemed more and more stressed because of Mr. Homick's behaviour. She asked for Ms. Bell's advice and Ms. Bell suggested that she call someone higher up in the organization. The complainant followed this advice after she left her position.

[47] Ms. Bell also gave some evidence as to Mr. Homick's conduct on occasions when the complainant was not present. I will not refer to this evidence as I do not consider it to be relevant.

[48] The Commission also called the complainant's husband. He testified that he had married the complainant in 2013 and they had been in a relationship for about 10 years. In 2009 he had been working part time delivering furniture and taking a course for his Class I license. In March 2011 he got his license and found work with a trucking company. His work was a mix of long haul and local hauling. As a result, he was sometimes away for 5 or 6 nights at a time.

[49] When he had time off work, he would sometimes visit the complainant at her work. When the complainant was busy, he would talk to Mr. Homick.

[50] The complainant's husband noticed Mr. Homick's fondness for making degrading remarks about women. He described an incident where the complainant was working in the back room. Mr. Homick went in for a minute and came out zipping up his fly and saying, "That was great."

[51] The complainant did not tell her husband that she was being harassed by Mr. Homick until after she had gone on stress leave and made a complaint to the police. Before that, he noticed that she was becoming increasingly stressed. She was often short with her daughter, did not eat much and not comfortable going out. When he asked what was wrong, she simply said that it had been a rough day at work.

[52] Her husband said that after the plaintiff left work, she had drawn back from society. She continued to suffer from panic attacks. Large males intimidated her. She did not like to go out by herself.

[53] The Commission called the complainant's family physician, Dr. Reyneke, and tendered medical reports from a number of medical professionals who had seen the complainant.

[54] Dr. Reyneke testified that when she examined the complainant on October 27, 2011 she concluded that she was suffering from severe stress and wrote a note confirm that she was entitled to stress leave on medical grounds until January 2012. In January, Dr. Reyneke saw the complainant again and sent a report to the Workers Compensation Board confirming that the complainant was still entitled to stress leave. She also referred the complainant to a Dr. Schellenberg.

[55] There were two reports from Dr. Schellenberg. His letterhead describes him as "Special Interest in Psychiatry." Dr. Reyneke explained that he is a family physician whose practice is limited to psychiatric patients. There were two reports from Dr. Schellenberg to the Worker's Compensation Board which stated that the complainant was suffering from flashbacks and panic attacks. The report also noted that the complainant had declined medication.

[56] Dr. Reyneke said that the complainant had refused medication for her psychiatric problems because she had suffered side effects from medication in the past and wanted to deal with her problems through cognitive therapy. She said that medication might have reduced the severity of the complainants symptoms in the early stages but that the complainant would still have to learn to live with what had happened to her through cognitive therapy.

[57] The Commission also produced a report dated April 23, 2013 from Dr. Enns, a psychologist who saw the complainant at the request of the Workers Compensation Board. The report concluded that the complainant was suffering from anxiety and depression which were likely related to the harassment in the workplace. In addition, the

complainant suffered from a Panic Disorder with Agoraphobia (fear of open spaces) which had been in remission but which had started to bother her again after the incidents in the workplace.

[58] The most recent medical report filed was from Dr. Miller, a psychiatrist, to Dr. Reyneke and was dated December 23, 2013. The report noted that the complainant had lifelong difficulties with depression and anxiety which had been exacerbated by a number of factors including issues with parenting, her current pregnancy and the ongoing human rights complaint relating to workplace harassment and possible sexual assault.

[59] I note that while Dr. Miller identifies the ongoing legal proceedings relating to the harassment complaint as an ongoing source of stress, as a matter of law, the cause of this stress is the harassment itself. If there had been no harassment, there would have been no legal proceedings or resulting stress.

Applicable Law and Conclusions

[60] The statutory definition of sexual harassment is found in Section 19 of the *Code* which reads:

Harassment

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

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

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(d) a reprisal or threat of reprisal for rejecting a sexual solicitation or advance.

[61] This section codifies principles which were set out in the Supreme Court of Canada decision in *Janzen v. Platy Enterprises Ltd.* [1989] 1 S.C.R. 1252 and have been reaffirmed in many cases since then. The application of these principles to the facts of this case are clear. In any human rights complaint the standard of proof is the civil standard of proof on a balance of probabilities and the standard of conduct the respondent is expected to meet is the civil standard of a reasonable person.

[62] The evidence clearly established that Mr. Homick, who was the directing mind of the respondent and in a position of authority over the complainant, made repeated sexual solicitations or advances to the complainant. Indeed, he went beyond simple advances and actually touched the complainant, several times, without her consent.

[63] A complainant in a sexual harassment case does not have to object to the acts of harassment at the time they occur. The test is whether a reasonable person would realize the conduct was unwelcome. In this case, the complainant said that she did tell the respondent that she found his conduct objectionable on a number of occasions but it did no good. She did not protest more forcefully because she was afraid she would lose her job and she needed the income.

[64] The complainant did admit to two incidents in which she permitted Mr. Homick to touch her. Neither of these events would lead any reasonable person to believe that the complainant welcomed the kinds of sexual advances that Mr. Homick had made and was continuing to make.

[65] Mr. Homick was in a position of power over the complainant and he repeatedly abused his power to degrade and humiliate the complainant.

[66] I therefore find that the respondent has contravened Section 19 of the *Code* and the complainant is entitled to damages and other remedies.

Remedies

Loss of Income

[67] The first head of damages the Commission seeks is under paragraph 43(2)(b) of the *Code* for compensation for financial losses sustained and benefits lost as a result of the contravention of the *Code*.

[68] The complainant has not worked, except for one or two days, since she left her employment with the respondent on October 27, 2011. She received Workers Compensation benefits until March 1, 2013. She took a course to qualify as an Educational Assistant and did get one or two days of work in a school. However, she became pregnant in August of 2013 and had her second child in May, 2014. She is now pregnant again and not seeking employment. The Commission suggested that that she be awarded loss of income damages from October 27, 2011 to April 30, 2014.

[69] In the decisions of in *Garland v. Tackaberry (c.o.b. Grape & Grain)*, [2013] MHRBAD 5, 2013 CanLII 21646 (MB HRC), and *Metaser v Jewish Community Campus of Winnipeg Inc*, 2013 CanLII 61017 (MB HRC), Adjudicator Dawson stated that the damages in respect of loss of employment under the *Human Rights Code* should not exceed the amount that the complainant would have been entitled to under Section 61 of *The Employment Standards Code*, C.C.S.M. c. E110 for dismissal without cause and without notice.

[70] In this case the complainant had been working for the respondent for two and a half years so she would have been entitled to two weeks' pay in lieu of notice.

[71] However, in the case of *K.K. v Hair Passion*, 2013 CanLII 3982 (MB HRC) stated the law as follows:

The position advanced by the Commission equates the remedy under clause 43(2)(b) of the *Code* with the remedy of wages in lieu of notice at common law. There are significant differences, however, between the nature and purpose of these two types of remedies.

An award on account of wages in lieu of notice is the measure of damages in a claim for wrongful dismissal at common law, and is based on a contractual obligation to give an employee reasonable notice of an intention to terminate his or her employment. (*Bardal*, at paras. 12 to 14) The purpose of an award of damages in a wrongful dismissal case is to place the former employee in the position the employee would have been in if reasonable notice had been given, as contemplated under the contract.

A remedy under clause 43(2)(b), on the other hand, is aimed at compensating the affected party for financial losses sustained by reason of the contravention of the *Code*. The purpose of such compensation is to restore the affected party so far as is reasonably possible or appropriate to the position he or she would have been in if the discrimination had not occurred.

[72] Human rights tribunals in other provinces have not limited damage awards for lost income to the amounts that would be available in a wrongful dismissal action. In *Piazza v. Airport Taxicab (Malton) Assn.* (Ont.C.A.), 1989 CanLII 4071, 69 OR (2d) 281; 60 DLR (4th) 759; [1989] OJ No 994 (QL); 10 CHRR 6347; 26 CCEL 191; 34 OAC 349 (ON CA), Zuber, J.A. wrote:

The purpose of the compensation is to restore a complainant as far as is reasonably possible to the position that the complainant would have been in had the discriminatory act not occurred. I find nothing in the language of the foregoing section which would import into it the limit on compensation which is imposed by the common law with respect to claims for wrongful dismissal.

[73] Other tribunals have reached similar conclusions. See for example: *Schulz v. Lethbridge Industries Limited*, 2012 AHRC 3 (CanLII) and *Vanton v. British Columbia Council of Human Rights*, 1994 CanLII 911 (BC SC).

[74] The amount of pay in lieu of notice that the complainant could have received under the *Employment Standards Code* or at common law is one reference point an adjudicator may use in assessing damages under clause 43(2)(b), but it is not the only one. The tribunal must consider all of the consequences of the contravention of the *Code* and the financial losses that flow from them.

[75] In this case, the extreme harassment suffered by the complainant not only caused her to lose her employment, but caused severe anxiety and depression which left her incapable of seeking alternative employment for an extended period of time. The complainant is entitled to compensation for lost income during which she was unable to work because of the effects of the harassment which she suffered.

[76] I am not satisfied that that the evidence supports an award based on the entire period from October 27, 2011 to April 30, 2014. The medical evidence confirms that the complainant suffered severe mental distress as a result of the harassment she experienced.. However, the complainant also had a prior history of psychiatric problems and there were other factors besides the harassment which contributed to her stress.

[77] By September, 2012 the complainant was able to take a course to qualify as an Educational Assistant. She completed this course in January, 2013 and submitted applications to the local school divisions. She had one interview in June, 2013 but was not hired. She did get her name on the substitute list and got one day of work at an elementary school. She became pregnant with her second child in August, 2013 and took her name off the substitute list because she was feeling unwell.

[78] There is no precise way of determining when other issues in the complainant's life became more significant than the stress caused by the harassment she had suffered in preventing the complainant from finding work. My assessment of the evidence as a whole is that the end of August 2013, when the complainant became pregnant, is a reasonable end date. I will therefore award the complainant damages for loss of income from October 25, 2011 to September 1, 2013.

[79] The complainant testified that her starting rate of pay was \$12.00 per hour and shortly before she left her employment it had increased to \$14.00 per hour. She worked between 30 and 40 hours per week. She also produced calculations of her gross weekly earnings that were used by the Workers Compensation Board in calculating her benefits. According to these calculations, her gross weekly wage was \$425.77 as of October 27, 2011 and in February, 2012 it increased to \$433.96 per week. She received Workers Compensation Benefits from October 27, 2011 to March 1, 2013 and the amount of these payments has been deducted from the calculation of lost earnings.

[80] The following table is an estimate of the lost earnings of the complainant based on the information taken from the Worker's Compensation Board summaries:

| Start Date | End Date | Weeks | Gross weekly earnings | WCB Benefits Received | Loss per week | Net loss |
|----------------------------|-----------------|--------------|------------------------------|------------------------------|----------------------|--------------------|
| 27-Oct-11 | 16-Feb-12 | 16 | \$425.77 | \$357.12 | \$68.65 | \$1,098.40 |
| 16-Feb-12 | 1-Mar-13 | 54 | \$433.96 | \$363.55 | \$70.41 | \$3,812.20 |
| 1-Mar-13 | 1-Sep-13 | 26 | \$433.96 | \$0.00 | \$433.96 | \$11,406.95 |
| TOTAL LOST EARNINGS | | | | | | \$16,317.55 |

Damages for Injury to Dignity, Feelings and Self-Respect

[81] The Commission also seeks an award of damages under clause 43(2)(c) of the Code to compensate the complainant for injury to dignity, feelings and self-respect. A number of recent Manitoba decisions have considered this head of damages in a sexual harassment complaint.

[82] The highest award of damages for injury to dignity, feelings and self-respect made in a Manitoba case is \$7,750.00 by Adjudicator Dawson in *Garland v. Tackaberry (c.o.b. Grape & Grain)*, [2013] MHRBAD 5. That case involved lewd comments and actions directed at a young female employee by a customer of the business. The employer was liable for failing to take reasonable steps to prevent the harassment.

[83] In *Metaser v Jewish Community Campus of Winnipeg Inc*, 2013 CanLII 61017 (MB HRC) the same adjudicator concluded that \$5,250.00 was a reasonable settlement

offer under this head of damages for harassment consisted of unwelcome sexual jokes and verbal solicitations.

[84] In *Walmsley v Brousseau Bros Ltd (Super Lube)*, 2014 CanLII 31472 (MB HRC) the adjudicator awarded \$3,500 damages, an award which he described as being at the low end of the scale.

[85] Awards in other provinces have been higher. In *Vipond v. Ben Wicks Pub and Bistro* [2013] HRTO 695, the tribunal reviewed recent damage awards in Ontario sexual harassment claims which ranged from \$12,000 to \$50,000.

[86] In *Arunachalam v. Best Buy Canada*, 2010 HRTO 1880 (CanLII) an adjudicator of the Ontario Human Rights Tribunal set out a two part test for assessing damages which has been adopted by other tribunals:

[52] I turn now to the relevant factors in determining the damages in a particular case. The Tribunal's jurisprudence over the two years since the new damages provision took effect has primarily applied two criteria in making the global evaluation of the appropriate damages for injury to dignity, feelings and self-respect: the objective seriousness of the conduct and the effect on the particular applicant who experienced discrimination: see, in particular, *Seguin v. Great Blue Heron Charity Casino*, 2009 HRTO 940 at para. 16 (CanLII).

[53] The first criterion recognizes that injury to dignity, feelings, and self respect is generally more serious depending, objectively, upon what occurred. For example, dismissal from employment for discriminatory reasons usually affects dignity more than a comment made on one occasion. Losing long-term employment because of discrimination is typically more harmful than losing a new job. The more prolonged, hurtful, and serious harassing comments are, the greater the injury to dignity, feelings and self-respect.

[54] The second criterion recognizes the applicant's particular experience in response to the discrimination. Damages will be generally at the high end of the relevant range when the applicant has experienced particular emotional difficulties as a result of the event, and when his or her particular circumstances make the effects particularly serious. Some of the relevant considerations in relation to this factor are discussed in *Sanford v. Koop*, 2005 HRTO 53 (CanLII) at paras. 34-38.

[87] Applying these tests in the present case supports a very high award of damages. The conduct of the respondent was objectively far more serious than any of the other cases I have referred to. Aggravating factors that were not present in other cases

include the facts that the acts harassment were committed by the owner of the business, the complainant and the owner were working along most of the time and the acts included physical contact.

[88] The subjective impact of the harassment on the complainant has also been severe. The harm she suffered went beyond simple injured feelings and included anxiety, depression, flashbacks and panic attacks which continued for several years.

[89] The Commission requested \$15,000.00 for this head of damages. I agree that this amount is appropriate. It is consistent with the level of damages awarded in other recent Manitoba cases but reflects the much greater seriousness of both the conduct of the respondent and the impact on the complainant in this case.

Exemplary Damages

[90] The Commission also seeks an award of exemplary damages in the amount of exemplary damages in the amount of \$5,000.00. Paragraph 43(2)(d) of the *Code* states that the adjudicator may award exemplary damages “as punishment for any malice or recklessness involved in the contravention.” Subsection 43(3) limits the amount of exemplary damages to the maximum fine which may be imposed in a prosecution for a contravention of the *Code* pursuant to subsection 51(1). This maximum is \$5,000.00 for an individual and \$25,000.00 in any other case.

[91] There is ample evidence of malice and recklessness on the part of the directing mind of the respondent. The amount of \$5,000.00 exemplary damages is appropriate.

Public Interest Orders

[92] The Commission also requested public interest orders consisting of directing the respondent to attend a course on sexual harassment and the implementation of a sexual harassment policy.

[93] I have included a direction to the respondent to develop its own sexual harassment policy, but because this policy may take some time to create, I have also

directed that the respondent deliver a copy of the Commission's policy to each employee immediately.

[94] The Commission did not request a monitoring order of the kind that was granted in *Werestiuk v. Small Business Services Inc.* [1998] M.H.R.B.A.D. No. 1 because of the difficulties in enforcing such an order. Had such an order been requested, I would have granted it.

[95] I therefore make the following orders:

- a. That the Respondent pay to the Complainant the following amounts:
 - i. \$16,317.55 as compensation for lost income as a result of the contravention of the *Code*;
 - ii. \$15,000.00 for injury to dignity, feelings and self-respect;
 - iii. \$5,000.00 as exemplary damages.
- b. That the president of the Respondent, Mr. Douglas Homick, attend a workshop on sexual harassment in the workplace offered by the Commission or some other party satisfactory to the Commission, and provide the Commission with evidence of its completion no later than July 14, 2015.
- c. That the Respondent deliver to each employee of the Respondent a copy of the Manitoba Human Rights Commission policy on sexual harassment to each of its employees and provide the Commission with a signed acknowledgment from each employee that he or she has received the policy, within thirty days of the date of this decision.
- d. That the Respondent develop and implement a sexual harassment policy, satisfactory to the Commission in form and content, post a copy of the policy at each workplace the Respondent operates and deliver a copy of

the policy to each employee of the Respondent. no later than February 1, 2014.

[96] I will retain jurisdiction to deal with any matters arising out of the enforcement of this Order.

Dated: December 3, 2014

Peter Sim, Adjudicator