

MANITOBA HUMAN RIGHTS BOARD OF ADJUDICATION

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

BETWEEN

**Margaret Jedrzejewska,
Naseer Chaudhry, and
Huma Chaudhry**
complainants,

AND

**A+ Financial Services Ltd,
and Wayne McConnell**
respondents,

AND

Manitoba Human Rights Commission,
Commission.

*MHRC File Numbers: 12 LP 13, 12 LP
14, and 12 LP 15*

Ms Margaret Jedrzejewska, in person

Mr Naseer Chaudhry, in person

Mr Huma Chaudhry, in person

A+ Financial Services Ltd, in person

through Mr Sid Chorney

Mr Wayne McConnell, in person

For the Commission: Ms Isha Khan

*Complaint heard: 12, 13, 14, 15, 16, 29,
30 May, and 2 June 2014*

Complaint decided: 25 April 2016¹

ROBERT DAWSON, adjudicator:

[1] Three former independent contractors complain that both the company and the owner of the company to which they had previously provided services harassed them in various ways. For the reasons that follow, the complaint is allowed.

¹ I am obliged to the patience of the parties and the Chief Adjudicator, who, by reason of my personal and family circumstances, suffered the delay of my publication of these reasons for decision.

Facts

[2] At all material times, the respondent Wayne McConnell was the president and sole director and owner of the respondent A+ Financial Services Ltd.

[3] In June 2009, A+ Financial entered into a “personal services agreement” with the complainant Naseer Chaudhry. In essence, the agreement provided that Mr Chaudhry would work as a mortgage broker and that A+ Financial would pay him a commission for the mortgages and loans that he arranged. In addition, Mr Chaudhry executed a “non-competition confidentiality agreement”, which aimed to prevent him, if he were to leave the company, from immediately exploiting the insider information and customer contacts that he had acquired during his time with the company.

[4] Soon after he began work at A+ Financial, his wife, the complainant Huma Chaudhry, also entered into a “personal services agreement” and non-competition contract with the company. Although the first document suggests that she would also work as a mortgage broker, Ms Chaudhry in fact functioned as her husband’s assistant, providing secretarial and clerical assistance. In addition, she performed similar support work for Mr McConnell. However, because she did not work as a mortgage broker, Ms Chaudhry received no compensation from A+ Financial. Instead, Mr Chaudhry shared his commissions with his wife.

[5] By December 2009, the complainant Margaret Jedrzejewska had also entered into a “personal services agreement” and non-competition agreement with A+ Financial. It was her initial idea to work as a mortgage broker from her home on flexible hours. Although she did not mention it to Mr McConnell, Ms Jedrzejewska thought working from home would help her deal with her chronic back pain. However, Ms Jedrzejewska was soon working from the office. Early in her time at A+ Financial, she came under Mr Chaudhry, whom the company had designated as her trainer. That early encounter led to Ms Jedrzejewska’s becoming friends with the Chaudhrys.

[6] By any measure of the evidence, the workplace at A+ Financial Services Ltd was volatile and intimidating. The company was very much Mr McConnell’s petty kingdom. He was a demanding boss. Whether in e-mail messages or in person, Mr McConnell was not at all reluctant to hide his displeasure when events frustrated him for whatever reason or the company’s brokers disappointed him in some way. The smell of freshly-terminated staff hung in the office air, and the threat of more firings always seemed to loom.

[7] By her own acknowledgment, Ms Jedrzejewska was not especially successful as a mortgage broker at A+ Financial. Fearing that she was about to be terminated, Ms Jedrzejewska resigned in December 2010.

[8] In early January 2011, Mr McConnell terminated the Chaudhrys. Initially he had what he described ethical concerns about their conduct as mortgage brokers. Later, a USB memory key was found to be attached to the work computer that Mr Chaudhry regularly used. Upon examining the key's contents, electronic documents were discovered that suggested that, along with Ms Jedrzejewska and his wife, Mr Chaudhry was planning to open his own competing mortgage brokerage company. One of the electronic documents included the A+ Financial customer database.

[9] On 1 June 2011, all three complainants filed complaints with the Manitoba Human Rights Commission. After an amendment and the later addition of Mr McConnell as the individual respondent, the complaints alleged that A+ Financial and Mr McConnell had, contrary to s. 19(1) of the *Code*, harassed the complainants in various ways while they worked at A+ Financial. More specifically,

- (a) Mr Chaudhry alleged that, within the meaning of s. 19(2)(a) of the *Code*, he had suffered a course of abusive and unwelcome conduct or comment undertaken or made on the basis of his ancestry or sex;
- (b) Ms Chaudhry alleged that, within the meaning of s. 19(2)(a) of the *Code*, she had suffered a course of abusive and unwelcome conduct or comment undertaken or made on the basis of her sex; moreover, within the meaning of s. 19(2)(b), she

alleged that she had suffered a series of objectionable and unwelcome sexual solicitations or advances; and,

- (c) Ms Jedrzejewska alleged that, within the meaning of s. 19(2)(a) of the *Code*, she had suffered a course of abusive and unwelcome conduct or comment undertaken or made on the basis of her physical and mental disabilities or sex; moreover, within the meaning of s. 19(2)(b), she alleged that she had suffered a series of objectionable and unwelcome sexual solicitations or advances.

[10] After the resignation of Adjudicator Smordin, the Chief Adjudicator designated me on 24 January 2014 to hear these three complaints together. Pursuant to the requirements of the *Code*, I provided notice of the hearing to the parties and the public. During a pre-hearing conference on 6 March 2014 and again at the opening of the hearing, I reminded the parties that they were entitled to be represented by a lawyer. While the Commission was so represented, the respondents expressly advised that they would proceed without a lawyer.

Submissions of the parties

The complainants

[11] The complainants entirely relied upon the Commission to put in their case, and they made no submissions.

The Commission

[12] The Commission submitted that the respondents were responsible and controlled the workplace in which the complainants had worked. The Commission alleged that Mr McConnell had harassed the complainants on various grounds, including race, sex, and disabilities.

[13] By way of a very broad summary, the Commission portrayed the A+ Financial workplace as poisoned by the conduct of Mr McConnell, which had sexualized the work environment and intimidated the staff. It was the Commission's position that the complainants could not reasonably be expected to confront Mr McConnell, but at the same time they could not simply walk away from their work without the risk of losing significant commissions owed to them. In short, the complainants needed the money, and they were trapped. They had to endure Mr McConnell, because he effectively *was* the company, and there was no one else to whom they might have complained.

[14] The Commission cautioned me against distraction by unrelated issues, such as allegations of wrongdoing by some or all of the complainants.

The respondent Wayne McConnell

[15] Mr McConnell characterized the human rights complaints as a diversion from the purported misconduct of the complainants, which in broad terms he characterized first as allegations of mortgage fraud and, secondly, as breach of the non-competition agreement that the complainants had accepted.

[16] To the extent that he addressed the complainants' allegations, Mr McConnell was not specific in his defence, seeking generally to deny or minimize his conduct.

The respondent A+ Financial Services Ltd

[17] Through Mr Chorney, the corporate respondent argued that the complainants were abusing the human rights complaint process, concocting their complaints as a way of undermining Mr McConnell and his company and as a means of recovering money.

[18] Turning to the allegations against Mr McConnell and his company, the corporate respondent sought to minimize the conduct or deny that some of it had even occurred. Mr Chorney asked me to consider the improbability that any individual would have actually lasted so long in the A+ Financial workplace if the alleged events had occurred as the complainants had here testified.

Analysis

Applicable law and governing principles

[19] Sub-section 19(1) of The Human Rights Code prohibits harassment in the workplace:

[n]o 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....

“Harassment” itself is defined in s. 19(2) to mean

- (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.

Among the characteristics set out in s. 9(2) and referenced above by s. 19(2) are

“ancestry, including colour and perceived race”; “sex, including sex-determined

characteristics...”; and, “physical or mental disabilities or related characteristics...”

[20] It falls to the complainants to prove on the balance of probabilities that they have suffered the harassment that they allege.

[21] Although there are two respondent parties, they are in effect the same person. At the material time, the individual respondent, Wayne McConnell, was the president and sole director and shareholder of the corporate respondent. A+ Financial was very much his company. In the circumstances, the artifice of the corporate veil serves no purpose. Therefore, while considering the evidence, I have readily attributed the actions of one respondent to the other, and vice versa.

[22] Another issue that arose during my consideration of the evidence is credibility.

When faced with competing versions of the facts, I considered the whole of the evidence, as explained by the British Columbia Court of Appeal in *Faryna v. Chorny*,

[1952] 2 DLR 354:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried the conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[23] I have also applied similar fact evidence at times. Each complainant was employed at more or less the same time, each made strikingly similar allegations in his or her testimony, and each told about witnessing strikingly similar behaviour.

Naseer Chaudhry's allegations

[24] Mr Chaudhry says that, during his time at A+ Financial, he was the victim of sexual and racial harassment by Mr McConnell.

[25] During his direct examination, Mr Chaudhry referenced numerous e-mail messages that were admitted into evidence. Sent by Mr McConnell over a period of months, the messages were puerile attempts at humour. Some of these messages were overtly racist, while the majority involved sexual innuendo and even included erotic, if not pornographic, photographs. I prefer not to catalogue this evidence in detail, but, by way of example, I point to Exhibit Commission-33, an e-mail that had apparently been forwarded to Mr McConnell by "gerry.ryz@rbc.com" on 19 November 2010. Entitled "Fw: Canoe Trip? I'VE BOOKED US TO GO!!!", the e-mail message includes the naked photo of a woman and, managing to be both racist and sexual, an inappropriate comment about her displayed breasts. Leaving aside how such a message seems to have emerged from the e-mail server of the Royal Bank of Canada, this e-mail is typical of the messages entered into evidence.

[26] Mr Chaudhry also claimed that Mr McConnell had regularly referred to persons of Pakistani origin as “brown people” or “your people”. I again choose not to repeat the testimony here in detail. It is sufficient to recall that Mr Chaudhry testified about Mr McConnell’s ready blanket attribution of laziness and dishonesty to persons of the same race as Mr Chaudhry.

[27] For his part, Mr McConnell denied or diminished the evidence of Mr Chaudhry. Although admitting that he had sent the e-mail messages to which Mr Chaudhry had referred, Mr McConnell underlined that Mr Chaudhry had asked that his e-mail address should be added to Mr McConnell’s “jokes” distribution list. Both respondents claimed that Mr Chaudhry was a willing recipient of such messages. In their cross-examination of Mr Chaudhry, the respondents strove to dilute the disgust that Mr Chaudhry claimed he had in connection with these e-mails. As for the racial comments, Mr McConnell outright denied that he had made such remarks.

[28] I have nonetheless preferred to accept Mr Chaudhry’s version of events.

[29] First, Ms Jedrzejewska corroborated Mr Chaudhry’s report of racist remarks, testifying that she had heard an angry Mr McConnell tell Mr Chaudhry to “go back to your own fucking country.”

[30] Secondly, by the documentary evidence admitted during the hearing, it was obviously established that Mr McConnell had sent many offensive e-mail messages to

Mr Chaudhry, among others. These messages were mostly sexual “jokes” – and I use the word “jokes” very reluctantly – and some were racist in nature.

[31] While Mr Chaudhry may have asked to join that e-mail distribution list, he explained that he felt compelled to do so in order to retain or attract Mr McConnell’s favour. That compulsion deserves explanation. Like the other complainants, Mr Chaudhry described a volatile workplace in which Mr McConnell intimidated the staff and always seemed ready to explode with yelling, throwing things, and threats of physical violence. Mr Chaudhry claimed that he had decided that it was easier for him to “play along” than risk a confrontation. Moreover, he described how Mr McConnell had denied compensation to other A+ Financial staff after they had been fired. It was Mr Chaudhry’s estimation that he had too much money coming to him; he could not risk walking away or getting fired. While some individuals might have differently responded to Mr McConnell and the situation at A+ Financial, I accept Mr Chaudhry’s explanation as reasonable in his circumstances.

[32] Accordingly, I find that, contrary to s. 19(1)(a) of the *Code*, the respondents had engaged in a course of abusive and unwelcome conduct or comment with respect to the complainant, Naseer Chaudhry, and had undertaken such conduct or made such comments on the basis of Mr Chaudhry’s ancestry or sex.

Huma Chaudhry's allegations

[33] Like her husband, Ms Chaudhry complains that she suffered sexual harassment by Mr McConnell. She also alleges that he made unwelcome and unsolicited sexual advances upon her.

[34] Supported by further documentary evidence, Ms Chaudhry testified about receiving several e-mail messages from Mr McConnell over a period of months. Their content was similarly inappropriate to those about which her husband would testify. Mr McConnell had not sent the e-mail messages only to Ms Chaudhry; all of them had gone out to a list of A+ Financial staff.

[35] In addition to the e-mail messages, Ms Chaudhry also received a wall calendar from Mr McConnell, which was entered into evidence. Ms Chaudhry recalled that she had received the calendar from Mr McConnell while she rode with her husband, Mr Chorney, and Mr McConnell in a Montreal taxi on a trip for a trade show. The calendar displays a different photograph for each month of the year, depicting different women in bikinis and similar clothing..

[36] Ms Chaudhry also described other incidents in which Mr McConnell made a comment about her hair or her clothes.

[37] There was further testimony about physical contact between Mr McConnell and Ms Chaudhry. She recalled him asking for, and receiving, a hug from her on more than

one occasion. However, in every case, Mr Chaudhry was present. In one instance, Mr McConnell had given Ms Chaudhry a Christmas gift. She also mentioned a hug after a long day that had seen Mr McConnell in strong disagreement with her husband.

[38] In addition, Ms Chaudhry described occasions when Mr McConnell would come into the office where she worked at A+ Financial. While asking her to check something on the computer, Mr McConnell would apparently stand next to her so close that she could feel his breath, and she said that he would place his hand on her lower back while she sat at the computer.

[39] In reply, Mr McConnell acknowledged that he had sent the inappropriate e-mail messages, but he blamed it on the clumsy operation of his smartphone. He said that he had a distribution list of men in the office who wanted to receive such “joke messages”, but he also had an e-mail distribution list that included everyone who worked at A+ Financial. He would use the latter list when communicating with the staff. Mr McConnell explained that the e-mail messages which so offended Ms Chaudhry had been intended for the smaller list, but that he had accidentally sent it to everyone.

[40] First, I am astonished that the owner of a company would have a select e-mail list comprised of persons who work for his company and who want to receive his “joke” messages. This fact, to which the individual respondent readily admits, proves in itself

the Commission's contention that the A+ Financial workplace was a poisoned work environment.

[41] As for Mr McConnell's defence that he had inadvertently sent the e-mail messages to Ms Chaudhry, I entirely reject that explanation. Multiple e-mail messages were admitted into evidence that range over many months. Perhaps a single e-mail message could be misdirected, possibly two. However, it is wholly unreasonable to think that anyone could make the same mistake over and over again. More to the point, it seems far more likely in the totality of the evidence that Mr McConnell saw nothing wrong with sending out such "jokes" to everyone who worked at A+ Financial. It is even arguable that he derived an odd pleasure from the discomfort that some of his recipients exhibited.

[42] That notion brings me to the calendar that Ms Chaudhry received from Mr McConnell in the Montreal taxi. I prefer to include the calendar under the heading of these so-called "jokes". Because Mr McConnell gave the calendar to Ms Chaudhry in the presence of Mr Chorney and her husband, I discount the possibility that it was intended as a sexual advance. Instead, I prefer to categorize it as yet another "joke" that aimed to inflict cruel embarrassment upon Ms Chaudhry by exposing her to the sexual content of the calendar in the presence of her husband and co-workers.

[43] In respect of his comments about Ms Chaudhry's appearance and the hugs, Mr McConnell described them as innocent. They were compliments, he said. They were friendly gestures. On these points, I am inclined to prefer Mr McConnell's version of events. Without the backdrop of the inappropriate e-mail messages and the intimidating behaviour, Mr McConnell's comments about Ms Chaudhry's hair and clothing could reasonably have been seen as innocent, if awkward, behaviour that should nonetheless be discouraged in the workplace. Similarly, the hugs came on occasions when it is arguable that friends might share a hug. I am mindful that Ms Chaudhry did not include Mr McConnell among her circle of friends, but I wonder if Mr McConnell had the insight to notice this factor. The hugs also happened in the presence of Ms Chaudhry's husband. An objective and reasonable onlooker would therefore not necessarily have categorized the hugs as sexual harassment.

[44] I am left with the incidents in the office while Ms Chaudhry would check the computer for Mr McConnell. For his part, Mr McConnell denies that he touched Ms Chaudhry's lower back. He does however concede that he would have necessarily had to stand very close to Ms Chaudhry in order to see the computer screen. According to the testimony of Ms Jedrzejewska, which I consider below, Mr McConnell had also adopted the same posture when he had come to her office and bent to look at her computer screen. I therefore accept that Mr McConnell did put his hand on the lower

back of Ms Chaudhry. I am also convinced that the gesture amounts to an objectionable and unwelcome sexual advance. A prudent man would have found a better place for his hand than the lower back of Ms Chaudhry. I say this, even recalling the testimony of several witnesses about the physical layout of the A+ Financial office space. To be sure, Ms Chaudhry's desk was in a tight and cramped spot. I further appreciate the testimony of witnesses that Mr McConnell was a large and heavy man, even a full 100 lbs heavier than he appeared at the hearing of these complaints. I also take in account that the touching was never described as rubbing or fondling. Nonetheless, such conduct is inappropriate, especially in a workplace. I therefore consider Mr McConnell's gesture to be in the form of a sexual advance.

[45] Accordingly, I find that, contrary to s. 19(1)(a) of the *Code*, the respondents had engaged in a course of abusive and unwelcome conduct or comment with respect to the complainant, Huma Chaudhry, and had undertaken such conduct or made such comments on the basis of Ms Chaudhry's sex; moreover, within the meaning of s. 19(2)(b), she had suffered a series of objectionable and unwelcome sexual solicitations or advances.

Margaret Jedrzejewska's allegations

[46] Like Ms Chaudhry, Ms Jedrzejewska complained that she suffered sexual harassment by Mr McConnell and that he made unwelcome and unsolicited sexual advances upon her. She added that the harassment extended to her physical and mental disabilities.

[47] Ms Jedrzejewska received the many sexualized e-mail messages that Mr McConnell sent out. I have previously described these messages above, and I have found that their sending constitutes sexual harassment. I arrive at the same conclusion in respect of Ms Jedrzejewska.

[48] Like Ms Chaudhry, Ms Jedrzejewska testified that Mr McConnell would come into her office and hover over her, placing his hand on her lower back. For the reasons set out above, I find that this act constitutes an objectionable and unwelcome sexual advance. In his closing argument, Mr Chorney denied that the incident had ever happened. While there was no independent evidence that Mr McConnell had behaved in the manner alleged, the similarity of Ms Jedrzejewska's incident to that reported in the testimony of Ms Chaudhry is striking. Moreover, given the configuration of the offices, I think it likely that Mr McConnell would have had to be in close proximity to the women on those occasions when he viewed their computer screens. I therefore prefer the version of events that Ms Jedrzejewska set out, which in turn coincides with the testimony of Ms Chaudhry.

[49] I digress here to explain that conduct may be found to be unwelcome, even if a complainant does not actually express objection. Where an objective and reasonable onlooker would conclude that conduct is unwelcome, it is unnecessary for the complainant to protest. The wrongdoer should simply know better.

[50] Ms Jedrzejewska also complains that she suffered harassment from Mr McConnell by reason of her back pain and depression. No medical or psychological evidence was called in support of her physical and mental conditions, but none is always needed: *CR v Canadian Mental Health Association, Westman Region Inc*, 2013 CanLII 125 (MB HRC). So long as the person contravening the *Code* perceives the complainant as possessing a protected characteristic and then treats the complainant differently because of that perceived characteristic, it arguably is sufficient to show discrimination. I would nonetheless encourage future parties to lead, where appropriate, supporting evidence of physical or mental disabilities. The additional information often helps an adjudicator to understand such topics as the nature of the disability, how it impacts the complainant, and how it can be accommodated.

[51] The respondents denied knowledge of Ms Jedrzejewska's disabilities. While she herself readily conceded that she never explained her condition to Mr McConnell, Ms Jedrzejewska did talk with Mr Chaudhry, who in turn had encouraged Mr McConnell to have some understanding for her. More than one witness recalled Mr McConnell

loudly referring to Ms Jedrzejewska as “a fucking retard” when he discussed her poor performance with Mr Chaudhry.

[52] I find that Mr McConnell did not know that Ms Jedrzejewska suffered from any physical or mental disability. Ms Jedrzejewska did not tell him. There is no clear evidence before me that Mr Chaudhry actually told Mr McConnell anything substantive about a disability. At most, Mr Chaudhry told Mr McConnell that he was doing the best that she could, but there was no mention of a physical or mental disability. I have also searched the evidence for a convincing suggestion that, despite not having been told about Ms Jedrzejewska’s disabilities, Mr McConnell might have reasonably arrived at that conclusion by inference. Instead, I conclude that an objective and reasonable onlooker would not have been lead to the conclusion that Ms Jedrzejewska suffered from a physical or mental disability.

[53] Accordingly, I find that, contrary to s. 19(1)(a) of the *Code*, the respondents had engaged in a course of abusive and unwelcome conduct or comment with respect to the complainant, Margaret Jedrzejewska, and had undertaken such conduct or made such comments on the basis of Ms Jedrzejewska’s sex; moreover, within the meaning of s. 19(2)(b), she had suffered a series of objectionable and unwelcome sexual solicitations or advances. However, I find that she did not suffer harassment by reason of her physical and mental disabilities.

Remedies

[54] Having found that the respondents have contravened the *Code*, s. 43(2) affords me with a discretion to order the respondents to do one or more of the following:

- a) 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;
- (b) compensate any party adversely affected by the contravention for any financial losses sustained, expenses incurred or benefits lost by reason of the contravention, or for such portion of those losses, expenses or benefits as the adjudicator considers just and appropriate;
- (c) pay any party adversely affected by the contravention damages in such amount as the adjudicator considers just and appropriate for injury to dignity, feelings or self-respect;
- (d) pay any party adversely affected by the contravention a penalty or exemplary damages in such amount, subject to subsection (3), as the adjudicator considers just and appropriate as punishment for any malice or recklessness involved in the contravention;
- (e) adopt and implement an affirmative action program or other special program of the type referred to in clause 11(b), if the evidence at the hearing has disclosed that the party engaged in a pattern or practice of contravening this Code.

Damages for injury to dignity, feelings, or self-respect

[55] The Commission submits that an appropriate award under s. 43(2)(c) is \$15,000.00 for each complainant, pointing to the impact of the contraventions upon the complainants.

[56] The complainants each felt themselves to be the victim of ongoing misconduct by Mr McConnell, from which they also felt that they could not immediately escape. They could not easily walk away from their work at A+ Financial without risking the loss of pending compensation. They could not ignore e-mail messages that Mr McConnell had sent, because the message contents might actually be important and work-related. At the same time, they were always concerned that a new message might in fact be yet another inappropriate e-mail. Ms Chaudhry's testimony captured the dread that all of the complainants must have felt. The workplace tensions affected the quality of Mr Chaudhry's home life, while Ms Jedrzejewska testified about the continuing distress that she felt even after she had left the company. Compounding their situation, Ms Jedrzejewska was battling depression and back pain, and her physician had ordered her to avoid stress. Ms Chaudhry had also to deal with news of the death of a parent. In her testimony, Ms Jedrzejewska claimed that Mr McConnell "ruined my life."

[57] I am especially distressed that Mr McConnell still does not appreciate the inappropriateness – and illegality – of his conduct. In his closing submission, he repeated the characterization of his e-mail messages, which he had described in his

direct evidence as “off-colour”. I have found the e-mails and his calendar to be much more. It is simply vile and disgusting that anyone in a workplace environment should send such materials to anyone else. Mr McConnell’s evidence and closing submission demonstrate an ignorant insensitivity to the reaction of those who would receive such e-mails. No one would expect such a puerile obsession with sexual content, even if the sender had the addled brain of a newly-pubescent teenager. It is all the more shocking that the conduct comes from the owner of a business.

[58] While much of the distress that the complainants report does clearly tie to contraventions of the *Code*, some of the impacts does stem from the volatile conduct of Mr McConnell. The complainants variously gave evidence about occurrence that are beyond the protections of *The Human Rights Code*, such as Mr McConnell’s physical confrontations, his yelling and screaming, and his outrageous work compliance tactics. In calculating the award of damages, I have excluded from consideration the effects upon the complainants by the conduct of Mr McConnell that falls outside the *Code*.

[59] I am also aware that each complainant was a victim of a different set of contraventions of the *Code*. I have nonetheless considered that, in the end, they were suffered indignity to the same extent. Accordingly, my award of damages is the same for each complainant.

[60] In my calculations, I have taken into account the upward trend in awarding damages for injury to dignity, feelings, or self-respect. It is important that, where a contravention of the *Code* has been found, the consequences should not be trivialized. The contraventions in the instant complaints were grievous and ongoing, and the complainants suffered egregious indignity in their workplace. In addition, economic circumstances left them feeling trapped and without alternative but to endure the conduct of Mr McConnell.

[61] In the circumstances, I order the respondents jointly and severally to pay each of the complainants \$20,000.00 as damages under s. 43(2)(c).

Damages for financial losses sustained

[62] The Commission submits that the complainants Naseer Chaudhry and Huma Chaudhry sustained financial losses by reason of the respondents' contravention of the *Code*. For her part, Ms Jedrzejewska advanced no claim for financial losses sustained.

[63] Pointing to a spreadsheet that Mr Chaudhry prepared, which I admitted as Exhibit Commission-37, the Commission calculates those losses at \$76,021.00. By way of explanation, Mr Chaudhry's spreadsheet reflected his best attempt at listing the commissions to which he was entitled at the time that his work ended at A+ Financial. According to that spreadsheet, the total owing was \$79,521.00; however, on cross-

examination, Mr Chaudhry acknowledged that the commission of \$3,500.00 set out on the first line of that spreadsheet was not owing to him. Accordingly, the revised total owing would be \$76,021.00.

[64] In general, I am satisfied that, at the time that Mr and Ms Chaudhry left A+ Financial, the company owed, or would owe, Mr Chaudhry commissions in respect of mortgages and loans that he had brokered. I note that, despite the Commission's submission, it is only Mr Chaudhry to whom any such commissions would have been payable. As Ms Chaudhry explained in her direct evidence, she worked under her husband, so all commissions were payable to him. I therefore find that, regardless of what follows below, no damages for financial losses would have been payable to Ms Chaudhry pursuant to s. 43(2)(b).

[65] Despite my satisfaction that a general indebtedness has been established, I am unable to overcome two concerns. First, the spreadsheet is demonstrably unreliable. Until cross-examination, it was Mr Chaudhry's evidence that I could rely upon the spreadsheet as a statement of the commissions owing to him. Although there are other financial documents that were entered into evidence through Mr Chaudhry, I have been unable to reconcile all of these documents – and I assure you that I have spent many weekends trying to make sense of the materials that were simply entered into evidence without any detailed explanation of their basis. It would have been immensely helpful

if Mr Chaudhry had gone through his spreadsheet, line by line and column by column.

As tedious as it might have been, I could then have determined the basis upon which each claimed commission had been calculated. Instead, I am left to wonder whether or not the claimed commissions are actually owing at all or in the amounts claimed. In the end, the complainant Mr Chaudhry has failed to prove his entitlement to damages.

[66] Of course, I am mindful that the spreadsheet is nothing more than a “best effort”, because the respondents failed to produce documents that my production order required. If the respondents had complied with that production order, the supporting documents that relate to the spreadsheet would presumably have become available.

[67] In the circumstances, the Commission has urged me to draw an adverse inference from the failure of the respondents to produce the documents. I suppose that inference would take the form of an assumption that the spreadsheet is accurate, but I am unwilling to do that.

[68] While it is a serious matter that the respondents have ignored my production order, it is not appropriate that I should simply rely upon “best efforts” and guess at the damages owing. If I accept this spreadsheet’s calculations, the amount of commissions payable would be significant. However, I worry that, if it later emerged that the ordered damages were significantly out of line with the actual commissions owing, the discrepancy would bring the reputation of human rights adjudications into disrepute.

Mr Chaudhry helpfully offered during cross-examination to amend his entitlement, if it later appeared that he was not owed as much as I might order; however, that is not how an order to pay damages works.

[69] It is easier for me to dismiss the claim for damages, noting that there were other alternatives open to Mr Chaudhry and the Commission than simply asking me to accept the spreadsheet as a “best effort” solution. After all, the *Code* sets out significant investigative powers and enforcement methods. These documents could have been retrieved one way or the other during the investigation of these complaints. As another alternative, the Commission itself could have been less hasty in moving to refer these complaints to adjudication until the Commissioners had satisfied themselves that the cases were ready to proceed.

[70] In addition to these considerations, I especially arrive at the conclusion that it would not be just and appropriate to order these damages, because it is arguable that the corporate respondent has a counterclaim against Mr Chaudhry for breach of the non-competition agreement. It is not my place to find facts relating to a claim that belongs in the Court of Queen’s Bench, but it was occasionally mentioned during these proceedings that such a claim exists in the Queen’s Bench. I am exceedingly unsettled by the testimony that Mr Chaudhry had attached a USB key to his work computer, containing the A+ Financial customer list and documents that related to his new

mortgage brokerage company. Even if I were satisfied as to the reliability of the calculation of damages, I would have worried that my award of damages should possibly be reduced by a counterclaim.

[71] I therefore conclude that it is not just and appropriate that Mr Chaudhry should be awarded damages for financial losses sustained, and I make no order in the circumstances.

Implementing a special program

[72] The Commission sought several orders pursuant to s. 43(2)(e), which in turn references s. 11(b) of the *Code*; namely, a special program that

- (i) has as its object the amelioration of conditions of disadvantaged individuals or groups, including those who are disadvantaged because of any characteristic referred to in subsection 9(2), and
- (ii) achieves or is reasonably likely to achieve that object.

The Commission asks that the corporate respondent be required within a period of month to (a) develop and distribute an anti-harassment policy; (b) post the policy so that employees and others working at the company would see it; (c) distribute the policy to all new employees; (d) refer in the policy to the Manitoba Human Rights Commission or its complaint process. The obligation to post and distribute the policy would extend three years into the future.

[73] I am satisfied that the respondents have engaged in a pattern or practice of contravening the Code. Therefore, I will make a remedial order.

Costs

[74] The Commission submitted that, in the circumstances, it would be appropriate that costs should be ordered against the respondents on the ground that they had connived to extend unnecessarily the length of the hearing.

[75] Section 45(2) of the *Code* permits an adjudicator to award costs:

Where the adjudicator regards a complaint or reply as frivolous or vexatious, or is satisfied that the investigation or adjudication has been frivolously or vexatiously prolonged by the conduct of any party, the adjudicator may order the party responsible for the complaint or reply or for the conduct to pay some or all of the costs of any other party affected thereby.

[76] The Commission correctly noted that, at the last minute, the corporate respondent was represented by an officer of the corporation, Mr Sid Chorney. As a result, all respondent cross-examinations, respondent direct examinations, and respondent submissions doubled in length. The hearing went from its original plan of 3 days in length to 8.

[77] I am unwilling to order costs against the respondents for the reason that the Commission cites. I do not attribute to the respondents any motive that sought to

protract the hearing. In fact, I found Mr Chorney's contribution very helpful. His questions on cross-examination were apt. For example, it was his questioning that revealed problems with Mr Chaudhry's spreadsheet relating to the compensation that he claimed. Moreover, Mr Chorney was respectful and cooperative throughout these hearings.

[78] However, I am prepared to order costs for an entirely different reason.

[79] During the pre-hearing conference that I had convened on 6 March 2014, I made an order against the respondents for the production of certain documents relating to payments made to the complainants and information about the files on with the complainants had worked during their time at A+ Financial Services Ltd. In the pre-hearing conference written memo that followed on 17 March 2014, I specifically set out those required documents and information that was to be produced and fixed a production deadline of 3 April 2014. As confirmed in the written memo, I also cautioned the respondents against failing to comply with that production order.

[80] My production order repeated a similar order that Adjudicator Smordin had made when he had been acting as the designated adjudicator and with which the respondents had failed to comply.

[81] The documents and information that my order had listed could have streamlined parts of the direct examination of some complainants and the cross-examination of the

respondents. I am told that the documents relate to mortgage or financing deals on which Mr and Ms Chaudhry worked and for which they claim compensation that was never paid to them. As a result, those documents and information would likely have also helped me in assessing an award of damages, as discussed above.

[82] It is my view that, in failing to comply with the production order, the adjudication of these complaints has been prolonged by at least one day, and I can add that it has cost me many hours after the hearing in attempting to reconcile the evidence before me.

[83] During the hearing, the respondents offered varying explanations for their failure to have produced the documents and information. In his closing submission, Mr McConnell claimed that he has none of the documents that I had ordered produced, but this was the first time that he had advanced this defence; I had not heard it at the pre-hearing conference when I pronounced the production order, and Mr McConnell made no mention of this supposed fact at the opening of the hearing when the production order was discussed.

[84] Instead, Mr Chorney advanced the most plausible explanation, which was the concern that, in producing the ordered documents and information, the respondents would have aided the parallel action that is pending against them in the Court of

Queen's Bench. However, refusing to comply with an order is an unfortunate way in which to address such a concern.

[85] I therefore find that the adjudication has been frivolously or vexatiously prolonged by the conduct of the respondents, and pursuant to s. 45(2) of the *Code*, I order costs against the respondents in the amount of \$1,000.00, payable jointly and severally to the Manitoba Human Rights Commission. Because the complainants entirely relied upon the Commission to put in their case, I make no award of costs in their favour.

[86] I have calculated the quantum of costs keeping in mind Tariff A of the Queen's Bench Rules. Although not at all binding to these proceedings, s. 5(2)(r) of Tariff A helpfully suggests that a lawyer's fee for a half-day of trial is \$500 for a Class 2 proceeding. Given the relief sought in connection with this adjudication, I find that this hearing most closely resembles a Class 2 proceeding, which would include expedited actions under Queen's Bench Rule 20A.

[87] In the end, my calculation and award of costs reflect my own sense of the disruption to these proceedings that has resulted from the respondent's failure to comply with the production order that I had made.

Procedural and miscellaneous issues

Publication of a complainant's name by initials

[88] At the opening of the hearing, the Commission asked that the complainant Margaret Jedrzejewska should be referred to in my published reasons only by her initials. Because her complaint refers to physical and mental disabilities, the Commission was concerned that the publication of her name might cause undue prejudice to her when she might apply for work in future.

[89] I have denied this motion. The names of all of the parties have already been published. For example, the Notice of Public Hearing published in the *Winnipeg Free Press* on 3 May 2014 sets out all of the parties. Before that Notice was published, every party was invited to make submissions about the suppression of names. None did.

[90] As a matter of general principle, adjudications are open to the public. They are the occasional subjects of media attention. The resulting written decisions are published. It apparently is the practice of the Manitoba Human Rights Commission to issue press releases about adjudication outcomes, and the Commission even collects the reasons for decision on its web site and makes them available to anyone in the world. I am sensitive to the fact that many complaints involve personal details that most individuals would not choose to publicize. At the same time, these are public proceedings. In the instant complaint, the general concern of the complainant about publicity does not outweigh the inherent public nature of the adjudication process.

Refusal to hear two Commission witnesses

[91] During the hearing, I declined to hear the testimony of two witnesses that the Commission had proposed to call.

[92] Pointing to my direction during the pre-hearing conference, the respondent Mr McConnell complained that the Commission had not included the proposed witnesses on the list that I required the complainants and the Commission to file by 21 March 2014. In the succinct submission of Mr McConnell, “these were the rules”. In reply, the Commission argued that it was open to me to receive the witness testimony on the ground that, although not listed before the deadline, the names of the witnesses had been provided to the respondents at least two weeks before the hearing. Accordingly, they would not be surprised by the calling of these witnesses. I was nonetheless not satisfied that the respondents had received a sufficient summary of the intended evidence, and I declined to hear those witnesses.

[93] In the context of these proceedings, the strict enforcement of rules became necessary, even if it ensnared the Commission when it missed a deadline. At one point, Mr McConnell proposed to call more than 100 witnesses in reply to the complaints. I therefore had to impose a rigid and unforgiving regime in order to control the proceedings.

Decision and order

[94] For the reasons set out above, the complaint is allowed.

[95] I order as follows:

1. The respondents A+ Financial Services Ltd and Wayne McConnell shall pay damages for injury to dignity, feelings, or self-respect in the amount of \$20,000.00 payable to each of the complainants within 45 days of the date of this decision, and the respondents shall be jointly and severally liable to pay these damages;
2. The respondent A+ Financial Services Ltd shall draft within 45 days of the date of this decision an anti-harassment policy for its workplace in a form and with content satisfactory to the Manitoba Human Rights Commission, and, within 7 days of the Commission's indicating its satisfaction, shall (a) distribute a copy of the policy to every individual who, within the meaning of s. 19 of the *Code*, participates in the activity or undertaking of the corporate respondent, and (b) post a copy of the policy in a prominent place in the corporate respondent's work place. The corporate respondent shall also provide from time to time a copy of the policy to every individual with whom, at any time in the next three years running from

the date of this decision, the corporate respondent may enter into an employment contract or other agreement by which the individual would, within the meaning of s. 19 of the *Code*, participate in the activity or undertaking of the corporate respondent;

3. Where the respondent Wayne McConnell is at least the majority owner of controlling shares in any corporation that carries on business in or about the Province of Manitoba, the respondent Wayne McConnell shall cause every such corporation to draft within 45 days of the date of this decision an anti-harassment policy for its workplace in a form and with content satisfactory to the Manitoba Human Rights Commission, and, within 7 days of the Commission's indicating its satisfaction, shall cause every such corporation to (a) distribute a copy of the policy to every individual who, within the meaning of s. 19 of the *Code*, participates in the activity or undertaking of the corporation, and (b) post a copy of the policy in a prominent place in the corporation's work place. The respondent Wayne McConnell shall also cause every such corporation to provide from time to time a copy of the policy to every individual with whom, at any time in the next three years running from the date of this decision, such a corporation may enter into an employment contract or other agreement by

which the individual would, within the meaning of s. 19 of the *Code*, participate in the activity or undertaking of such a corporation; and,

4. The respondents A+ Financial Services Ltd and Wayne McConnell shall pay costs to the Manitoba Human Rights Commission in the amount of \$1,000.00 within 45 days of the date of this decision, and the respondents shall be jointly and severally liable to pay these costs.

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

[97] I draw to the parties' attention s. 50(2) of the *Code*, which requires that any application for judicial review of this decision must be made the Court of Queen's Bench within 30 days of the making of this decision or within such further time as the court may allow.

25 April 2016

[Original signed by]

Robert Dawson