HUMAN RIGHTS ADJUDICATION PANEL

IN THE MATTER OF: A complaint by T.M. against the Government of Manitoba – Manitoba Justice, alleging a breach of s.19 of *The Human Rights Code*

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

BETWEEN:

T.M.

complainant

- and –

Government of Manitoba – Manitoba Justice

respondent

Appearances: Isha Khan/Sandra Gaballa for the Manitoba Human Rights Commission
Sean Boyd/Jim Koch, for the Government of Manitoba – Manitoba Justice

Before: Sherri Walsh, Adjudicator

DECISION

I. INTRODUCTION

[1] This matter involves a complaint made by T.M. against the respondent, the Government of Manitoba – Manitoba Justice ("Manitoba Justice") in which T.M. alleges that during the course of his employment at the Manitoba Youth Centre ("MYC") he was subjected to harassment on the basis of his sexual orientation.

[2] In particular, T.M. alleges that during the course of his employment he was harassed by his co-workers at the MYC consistently and repeatedly; that he was forced to work in an environment where it was permissible to make vulgar and denigrating comments and gestures to him about sex between men; and where it was permissible to humiliate him. He alleges that when he brought these allegations forward to his employer - the respondent, it did not take reasonable steps either to terminate such conduct or to assure him that he would be able to work in a safe and respectful environment.

[3] The focus of this case, therefore, is an employer's obligation to provide a safe and respectful workplace – free from harassment and discrimination within the meaning of *The Human Rights Code* of Manitoba (the "*Code*").

[4] The main issue to be determined in these proceedings is whether Manitoba Justice breached its obligations under s.19(1)(b) of the *Code*. That section provides as follows:

> **Harassment**
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> 19(1) No person who is responsible for an activity or undertaking to which this Code applies shall
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> (a) harass any person who is participating in the activity or undertaking; or
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> **(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.** (emphasis added)

[5] In their final submission, the parties advised that this case is significant not only because it is the first time a human rights adjudicator in Manitoba has been asked to consider a complaint alleging harassment based on sexual orientation, but also because it is the first time an adjudicator in Manitoba has been asked to consider whether an employer has failed to take reasonable steps to address such an allegation of harassment, where the employer was not the perpetrator of the harassment itself.

[6] A key purpose of human rights legislation is to eliminate the barriers that deny an individual the opportunity to participate on a full and equal basis in the economic, social and cultural life of society.

[7] In keeping with this purpose, human rights tribunals have paid particular attention to eliminating discrimination in the context of the workplace because, as the British Columbia Human Rights Tribunal noted:

> The role and value of employment, from the tangible to intangible, in a person's life is perhaps immeasurable. … The vulnerability of employees is underscored by the level of importance which our society attaches to employment.[1]

[8] For the reasons set out below I have determined that once T.M. told his employer, Manitoba Justice, that he was being subjected to harassment in the workplace, Manitoba Justice failed to take reasonable steps to terminate that harassment within the meaning of the *Code*. The respondent is required, therefore, to comply with the remedial order set out at the end of these Reasons.

PUBLICATION BAN

[9] The complainant had requested that he be identified by his initials only, in the Notice of Hearing which the *Code* requires be published prior to the commencement of a hearing.

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[1] *Garneau v Buy-Rite Foods*, 2015 BCHRT 77, at para 46, citing *Wallace v United Grain Growers Ltd.*, [1997] 3 SCR 701 and *Re Public Service Employees Relations Act*, [1997] 3 SCR 701

[10] His request was made pursuant to s.36(2) of the *Code* which allows an adjudicator not to publish the name of a party to the proceeding if the adjudicator thinks it would be unduly prejudicial in the circumstances to do so.

[11] I granted T.M.'s request on August 27, 2019. My Reasons for Decision can be found at: *T.M. v Manitoba (Justice)*, 2019 MBHR 9 (CanLII).

[12] In that decision, pursuant to the jurisdiction afforded to me under s.46(3) of the *Code*, I also ordered that T.M. be identified by his initials only, in any subsequent decision, order or statement of reasons which might be issued regarding the adjudication of his complaint.

[13] His identity, therefore, remains anonymized in these Reasons.

[14] On the first day of these proceedings the parties brought the following additional motions for publication bans:

a. motion by the Commission and T.M. requesting prohibition of the publication or broadcasting of T.M.'s identity, pursuant to s.39(3) of the *Code*;

b. motion by the respondent requesting prohibition of the publication or broadcasting of the identity of witnesses and employees or former employees of Manitoba Justice, pursuant to s.39(3) of the *Code*;

c. motion by the respondent requesting the deletion of the witnesses' names or identifying information from the adjudicator's final decision in this complaint pursuant to s.46(3) of the *Code* as well as of the names or identifying information of any employees – past or present of Manitoba Justice; and

d. request by all parties to make submissions about whether to allow cameras in the hearing room.

[15] At my direction, notice of these motions was issued to the media.

[16] After hearing oral submissions from the parties, I granted all of the requests for publication bans. My Reasons for Decision dated September 11, 2019 are found at: *T.M. v Manitoba (Justice)*, 2019 MBHR 10 (CanLII).

[17] I reserved my determination of the respondent's request to delete identifying information of its witnesses and employees from the final decision, until the end of the hearing and the parties addressed this issue in their final arguments.

[18] The Commission submitted that while it did not feel there was any particular significance to disclosing the identity of the employees who played a role in the factual context of this

complaint, it would nonetheless be important to identify their position within the respondent's organization.

[19] The respondent did not take issue with that point.

[20] I agree with this position and have identified the respondent's employees, whether or not they were witnesses at the hearing, by reference to their positions and initials only.

THE EVIDENCE

[21] The hearing of this matter lasted three weeks during which time the parties called 11 witnesses to testify and introduced into evidence over 480 documents. For the purposes of these reasons, I am only going to refer to those portions of the evidence which are most relevant to my decision.

[22] T.M., began employment at MYC in 2002 where he worked as a Juvenile Counsellor 1 ("JC1") continuously, until 2009.

[23] As a JC1, he was responsible for working in a unit along with a partner, to tend to the youth who lived there. His duties included taking the youth to and from various parts of the institution such as the cafeteria and the gym.

[24] T.M. testified that approximately one year into his employment, in response to a question posed by a co-worker, he acknowledged that he was gay and that after that somehow everybody in the workplace was aware of his sexual orientation.

[25] Going back to his early days at MYC, he said co-workers made what he described as "mild jokes" about his sexuality. For example, one day when he had lost his utility belt which contained his handcuffs someone said that if they found one that had "big pink fuzzy cuffs", they would let him know.

[26] On another occasion, one of his co-workers called him a "Squaw" because he was both gay and Métis. He said he told this individual not to use that term.

[27] He described another occasion in 2004 when, while he was working with a co-worker who was lesbian, another co-worker told him that they had been asked by D.T. (also a co-worker) "what's it like working with a faggot … I couldn't work with those two faggots. I don't know how you do it."

[28] During that time, T.M. also worked on the Institutional Response Team ("IRT") which is the team that people rely upon in the event of an emergency or "code call". When he was working on the IRT, he said people would refer to him as "Code Pink".

[29] He said it infuriated him to think that when he was out there working to ensure his colleagues' safety, they were simply looking at him in a derogatory manner, as "just a fag" so he sent an email to several co-workers, including D.T., explaining how angry and hurt he felt at being referred to as a "faggot" and at being the subject of jokes. He said his supervisor chastised him for sending the email, saying he should have gone through the chain of command to complain, instead.

[30] T.M. recalled that the supervisor then brought him and D.T. together in a room to talk about T.M.'s allegations. D.T. denied calling T.M. a faggot and the supervisor said they should just give each other a hug and call it a day.

[31] T.M. said the supervisor told him he would also have to meet with the individual who was the Superintendent at the time – D.R. However, despite the fact that the complainant emailed the Superintendent himself to discuss the matter, D.R. never got back to him.

[32] T.M. also recalled speaking to the Deputy Superintendent at the time, M.R., about being called "Code Pink".

[33] He said her only response was to say to him: was "Oh that's terrible" and then walk away.

[34] For a year or two, T.M. said, things in the workplace seemed calmer but then the comments began to escalate going from mildly funny to not so funny to hurtful and humiliating.

[35] T.M. testified that he was never just "T.M." He always had a label attached to his name. For example, he would often be introduced as "This is T, the gay guy" or "This is T, he likes to smoke the wrench" and that even senior staff would introduce him that way.

[36] He said he would be referred to as a "fag" or "faggot" at least four times a week.

[37] Eventually, he said, that was all he was - the "gay guy" and while there was a core group whose harassing behavior was constant, a good 70% of the staff would from time to time make comments about his sexual orientation.

[38] He said he felt like people assumed that because he was gay, he would be willing to sleep with them, based on some sort of stereotype that all gay men are promiscuous and several times he was asked by female staff members if he would be willing to join them and their husbands for threesomes.

[39] In fact, he said, many staff verbalized a belief that they held that all gay men are promiscuous and addicted to sex.

[40] He said people would ask him how his weekend was and make a gesture to him of giving oral sex or they would say to him: "You're walking normal so obviously you didn't get fucked this weekend".

[41] T.M. also described the cafeteria as being "toxic" and said that one of the cooks, in particular, constantly badgered him about being gay.

[42] On one occasion when he came into the cafeteria with his group of youth for lunch, it was, unfortunately, hot dog day and instead of asking him how many hot dogs he wanted, the cook asked him how many would "fit" and said if they weren't big enough that there were carrots or cucumbers in the kitchen if he wanted.

[43] T.M. said he begged the cook to stop making these comments; that they were hurtful and that he was sick of them but the comments never stopped.

[44] He testified that he believed that others were certainly aware of the cook's comments including, for example, the Superintendent and Deputy Superintendent at the time, who were often in the cafeteria and were able to hear the comments, as was the kitchen supervisor. He said that no one, however, addressed the behavior; they simply got up and walked away.

[45] Other examples of harassment he gave included the assumption his co-workers had that because he was gay, he was attracted to them. He said they would often ask him whether he was attracted to them, whether he wanted to sleep with them or which youth he wanted to sleep with.

[46] He described the particularly egregious and persistent conduct of one co-worker, D., who constantly said things to him like "Don't you want me?" T.M. was particularly concerned about the fact that D. made these comments in front of the youth.

[47] When asked about his response to the harassing conduct, T.M. said that although he confronted co-workers on several occasions begging them to stop, the workplace was a "boys' club" where you did not show your weakness.

[48] He said that he knew not to voice objections because the whole group would have closed ranks and he would have been an outcast – a "rat". Once you were labelled a "rat" he said, your career was done. Accordingly, he said, he internalized everything and dealt with it as best he could.

[49] Also, he said, because he had addressed issues before and nothing had been done and since he believed the Superintendent had witnessed the behavior and done nothing about it, he felt it was futile to complain.

[50] T.M.'s evidence about the culture in the workplace at MYC was confirmed by two witnesses who also worked as JC1's, one of whom is no longer employed by the respondent.

[51] I find that both of these individuals spoke with candor and courage. They both confirmed that T.M. was the subject of many inappropriate comments based on his sexual orientation

consistent with the conduct about which T.M. testified and that these comments were made in front of the youth who were held in custody at the Centre and in front of supervisors and senior staff.

[52] They described the work environment at MYC generally, as being "crass and inappropriate".

[53] An example that was given repeatedly was that one MYC staff person identified herself as the office "cum sponge".

[54] Indeed, T.M.'s spouse recalled that this was how she introduced herself to him at a workplace social gathering.

[55] One witness remembered when T.M. was running to a Code as a member of the IRT, they heard a co-worker say "I didn't know fairies ran. I thought they flew. ..." The witness also confirmed that T.M. was referred to as "Code Pink".

[56] One witness was able to list many names of individuals who perpetrated this harassment.

[57] Both witnesses testified that D. was particularly ruthless with respect to the comments that he made to T.M. about his sexuality, on a regular basis.

[58] They also confirmed that to speak up about improper conduct in the workplace was to be considered a "rat" or a "snitch".

[59] T.M. testified that he felt helpless and embarrassed; that he got used to being humiliated and felt like maybe he deserved it. He said he also felt guilty because to an extent he participated in joking, often just to deflect the comments, or to make staff feel that what they were doing was not hurting him.

[60] Eventually, he testified, however, it reached a point where he could not do it anymore and in 2009, he had a panic attack in the parking lot when he arrived at work and was taken to the Health Sciences Centre.

[61] Following that breakdown, he was started on anti-depressants and anti-anxiety medication and was off work for five weeks. He testified that when he came back to work the harassment continued.

[62] For example, he had gained weight because of the medication and when one of his co-workers commented on that and he told them that the weight gain was because of medication, the co-worker said: "Oh I thought it was from swallowing too much cum."

[63] In the late fall of 2010, T.M. was off work again for a month on medical leave. His doctor filled out a form which identified that he was suffering from "notable depression and acute stress reaction" related to working in the unit and that he should not work with adolescents at that time.

[64] T.M. testified that his understanding was that although the youth were not the problem his doctor wanted to take away some of the stress of the workplace generally while waiting for the medication for his mental health issues to take effect.

[65] When T.M. returned from medical leave in 2010, based on his medical restrictions, he was accommodated with a position working downtown doing administrative work for the Justice Department, outside of MYC.

[66] There was no mention at this point in his doctor's notes of any stress associated with being harassed although T.M. testified that he thought he had shared that with the doctor along with discussing the general stress of the job.

[67] T.M. testified that he felt a huge relief once he was no longer working at MYC; not because he didn't like the work he was doing there, but because the harassment had stopped.

[68] During his testimony he was asked whether he thought of reporting the harassment he had experienced, once he was out of the MYC workplace.

[69] He said that although he thought about it all the time, he also thought it was pointless because when he had tried reporting it before, nothing had happened.

[70] He also said he could not be expected to name 30 people and then get put back into the same institution – that his life would have been a worse hell than it was.

[71] He stayed in the accommodation position until the end of March 2011 when he was returned to MYC.

[72] He said that, as soon as he returned to MYC, the harassment started again.

[73] For example, he recalled an incident in July 2011 when he phoned into work to say he was sick and had a sore throat.

[74] He remembered the person who took his call asked him if the reason he had a sore throat was from "sucking too much cock on the weekend".

[75] T.M.'s husband testified that he overheard this conversation and saw how much it upset T.M.

[76] In June 2012, T.M. developed a herniated disc and was required to be off work for several weeks. His doctor filled out a form which said that he could return on modified duties with a number of physical restrictions.

[77] In July 2012, therefore, T.M. was placed in another accommodation position– a probations bail program, which was in the process of shutting down and needed extra help.

[78] T.M. said the bail program was described to him as a temporary placement and that he was constantly told by the Assistant Superintendent of Operations at MYC, J.B., who was in charge of his accommodation, that his employment was at MYC and that he would ultimately have to return there.

[79] In December 2012, while T.M. was still working at the bail program, he was invited to an informal staff get together with about 10 people – JC1's from MYC.

[80] When asked why he would socialize with people who he alleged, harassed him, he testified that he always wanted to be accepted and included. The workplace environment was important to him from both a personal and social perspective.

[81] He testified that the evening started with dinner at a restaurant and then people proceeded to a local bar where, while he was sitting at a table having drinks, a co-worker came in and sexually assaulted him by grabbing his crotch and saying to him "I'm going to fuck you in the ass without lube until you bleed."

[82] T.M. said his response was to freeze. He said he did not tell anyone other than his husband about the incident although he thought that another co-worker who was sitting across the table from him, had witnessed the assault.

[83] He didn't pursue the assault, he said, until quite a bit later, mostly because of feelings of shame but approximately two months after the incident, in February 2013, he sent a text message to the person he thought had witnessed the assault asking whether he remembered seeing the co-worker assault him. The message that he received in response, led T.M. to believe that that person acknowledged having witnessed it.

[84] T.M. said that towards the end of February 2013, he decided to come forward to complain again about the harassment because he was tired of it weighing him down. He testified that the assault at the bar was probably a catalyst that shocked him into realizing he had to deal with the matter.

[85] He was also concerned because the bail program was coming to an end, that he might have to return to MYC – something he said he could not do.

February 2013 – T.M. brings his complaint forward to the respondent

[86] At the end of February 2013, T.M. sent an email to J.B. saying that he had a few things he needed to discuss with her in private as they were of a very sensitive and personal nature and he asked for a time to talk with her face-to-face. He said he trusted J.B. He had worked with her briefly before in a unit and had never had a problem with her.

[87] By this time there was a new Superintendent in place at MYC, whom T.M. did not know and he said he felt awkward talking with him. He felt that because J.B. was in upper management, however, she would take the matter forward to the Superintendent.

[88] Before meeting with J.B., T.M. typed up a three-page letter to her in which he outlined in detail the harassment that he had experienced throughout his years of employment at MYC ("the complaint letter"). He and J.B. reviewed this letter when they met at the end of February 2013.

[89] In the complaint letter, T.M. said that he rarely had a day at MYC where he did not experience constant comments about his sexuality, "slaps on my butt, my nipples being flicked or listening to all the negative gay stereotypes that persist". He also said he had been called a "Squaw".

[90] The complaint letter set out the following specific examples of harassment and which T.M. had described in his testimony:

> "... After returning to work from time off due to depression I entered the cafeteria and an SUO commented that I had gained weight (due to meds) in front of several other people. As if that comment wasn't rude enough he added that my weight gain was probably due to swallowing large amounts of cum every day. Every one present laughed at the joke. Another time I had called in sick and mentioned that I could hardly talk with a sore throat. "Sucking too much cock on the weekend?" was the response from the I.C. While serving on the IRT I was constantly referred to as the Code Pink. Yet another time I was taken aside and a staff member shared with me the fact that he used to sleep with men but discovered a Christian group that cured him. He suggested I look into attending the group so my sickness could be cured and I could then lead a normal life. ... Several times I have been asked by female staff if I would be willing to join them and their husbands for threesomes since all gay men are promiscuous and addicted to sex. Just a few months ago I went out with at least 10 MYC staff to a lounge to reconnect and touch base with fellow co-workers. A staff member reached over and grabbed my genitals twice and loudly announced that he was going to "fuck me in the ass without lube until I bled."
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> ...
>
> Many times I have been introduced to new staff as ... he's gay or he likes to smoke the wrench. I have also had issues with staff telling kids about my sexuality. ..."

[91] The complaint letter went on to say that T.M. had brought his concerns forward to management in the past with little resolution and that ironically many of the comments were made by staff who now made up the new management team.

[92] The complaint letter said that while he had listed some of the more extreme examples "it is the daily jokes and insults that beat me down and I believe help to push me into a state where I was throwing up in the parking lot before my shifts. This most likely contributed to my final breakdown at work."

[93] T.M. made it clear in the complaint letter that he could not go back to working in "such a toxic and dysfunctional environment" and asked to be advised what employment options would be available to him once his medical issues were resolved.

[94] He recalled that J.B. was sympathetic and expressed concern at the matters he was raising but advised him that unless he was prepared to identify names of individuals, the employer could not investigate his complaint. He said he left the meeting feeling crushed.

[95] J.B. testified she was taken aback by the information T.M. gave her and was worried about him. She acknowledged that she could not ignore his concerns; they were serious and had to be followed up but that she told him that for the allegations to be investigated he needed to name names and that nothing could go forward unless he was able to share who had done the actions. Immediately after T.M. left her office, however, she went down the hallway and spoke with the new Superintendent, J.W.

[96] J.W. testified that he also recognized these allegations were serious and he immediately reported them to his boss - the Executive Director of the youth side of probation for Manitoba Justice. Then he waited to receive direction on how to proceed.

March 2013

[97] T.M. also waited to receive a response. On March 12, 2013, he sent an email to his Human Resource consultant - S.E. in which he forwarded a copy of the complaint letter.

[98] He asked that S.E. not share it with anyone other than her Human Resource Manager, L.F.

[99] The next day, March 13, 2013, S.E. and L.F. met with T.M. and the Superintendent to discuss and follow up on T.M.'s concerns.

[100] T.M. again went over the allegations set out in the complaint letter but he was told by L.F. that if he did not name names, Human Resources ("HR") could not do anything. He said he explained to them he had not named names for fear of retribution. T.M. also recalled that L.F. kept telling him that his placement was at MYC.

[101] Following the meeting, the HR consultant and her Manager met separately with the Superintendent to ask him if he was aware of any allegations or aware of any LGBT2SQ+ employees having difficulty in the workplace. He told them he was not aware of anyone having such difficulties.

[102] On cross-examination, J.W. testified that when he discussed the issue with Unit Managers, he did not raise the specific allegations that had been identified by T.M. He simply talked about the environment generally and asked whether anyone had witnessed anything out of the ordinary.

[103] Following these meetings, S.E. and L.F. met with the Director of HR at the time and it was decided that since T.M. was not willing to come forward with the names of the individuals who allegedly harassed him, the file should be closed.

[104] No one, however, advised T.M. that his file was closed.

[105] Instead, T.M. waited to hear what steps the respondent would take to address his allegations, not knowing the respondent was not intending to take any steps.

[106] Over the summer of 2013, T.M. had some communication with J.B. but he said that she only wanted to discuss his physical medical condition and nothing else.

October & November 2013

[107] At the end of October 2013, T.M. wrote to J.B. asking to meet to discuss possible plans for his future. There was still talk that the bail program was going to be closed and he had the impression that he was going to be returned to MYC. J.B. was out of the office and busy so in November 2013, he reached out to S.M. who worked with Supportive Employment Services which is the staff unit responsible for assisting Human Resources with employees who are out of the workplace for medical reasons. S.M. was responsible for assisting him to return fully to the workplace.

[108] He asked S.M. to meet with him to discuss possible options regarding employment, saying that there were several things he wanted to discuss with her in person which were of a very personal and private nature.

[109] It took some time but eventually they met and T.M. again went over the allegations set out in the complaint letter.

[110] T.M. testified that although S.M. was sympathetic, her response was to focus on the medical issues he was having with his back.

December 2013

[111] Coincidentally, a month later, in December 2013, T.M. received an email that the Civil Service Commissioner sent out to all Corrections employees reminding them about the need to conduct themselves in accordance with respectful workplace obligations. This prompted him to write to the Commissioner, telling her about his allegations of harassment and inquiring as to what steps were being taken to address them.

[112] As a result, the Civil Service Commissioner contacted the new Director of Human Resources, R.B., and asked her to become involved and address T.M.'s complaint.

January 2014

[113] On January 24, 2014, R.B. and her colleague K.I., who was the Director of Supportive Employment Services, met with T.M., his father and his Union representative.

[114] During the meeting T.M. again reviewed the allegations set out in the complaint letter, and discussed how the harassment was affecting his mental health. He again asked what solutions there could be for him to have a different work placement.

[115] At this meeting, T.M. provided the names of three individuals, including the previous Superintendent, D.R., and the Deputy Superintendent, M.R. and said he had told the Deputy Superintendent about having been referred to as "Code Pink".

[116] He testified that he made it clear at the meeting that he feared retribution if he said anything more about who had made the harassing comments and that he felt he was unable to return to work at MYC.

[117] R.B. testified that she remembered T.M. being very upset during the meeting but that she told him he would need to provide more names in order for them to be able to investigate the complaint.

[118] She testified that she and K.I. decided not to speak either to the past Superintendent or the Deputy Superintendent because they did not feel they had enough information to go forward with the matter.

[119] Following the meeting, R.B. did meet with the current Superintendent. She said she asked him general questions about the environment at MYC but did not ask him about the specific allegations which were set out in the complaint letter.

[120] R.B. recalled asking the Superintendent whether there were other individuals within MYC who were gay, and that he said there were, but that no one else had come forward with any harassment complaints.

[121] She and K.I. also spoke with the Deputy Superintendent to find out if she was aware of any harassment towards T.M., or generally. They were told that nothing had been brought to the attention of either the Superintendent or the Deputy.

[122] R.B. said she and the Superintendent talked about having a representative from the Rainbow Resource Centre come to MYC to do a presentation to the unit managers about gay and

lesbian people and that the Superintendent was amenable to having that training take place. The training did take place a few months later.

[123] She said she also checked the minutes of Provincial Management Committee Meetings to see if union representatives had brought up any concerns and looked at sick leave averages at MYC because, she said, that might substantiate that there was a problem in the workplace.

[124] She testified that the reason she and K.I. decided not to do an investigation, however, was because without names and dates, given the size of the institution and the fact that its staff worked on a 24/7 basis they would not know where to start.

[125] Absent more specific information she said, they were very limited in what they could do.

[126] No other steps were taken either by Human Resources or staff at MYC, to respond to the harassment allegations T.M. had brought forward, one year before.

February 2014

[127] On February 3, 2014, not having received any indication that the respondent was going to take steps to respond to T.M.'s allegations, T.M.'s father wrote to his MLA - the Honourable Minister Jennifer Howard asking to meet to discuss T.M.'s concerns.

March 2014

[128] The meeting took place on March 27, 2014 and was attended by T.M. and his father, the Honourable Minister Howard and the Deputy Civil Service Commissioner. T.M. again reviewed the allegations set out in the complaint letter and said that no one was helping him.

[129] He testified that the Minister apologized to him and committed that two things would take place: 1) LGBT2SQ+ training for the top management at MYC; and 2) the same training for staff in every unit at MYC, together with a meeting with all the staff to discuss the harassment.

May 2014

[130] On May 8, 2014, the Deputy Civil Service Commissioner wrote to T.M. and his father to report on these commitments, advising that on April 9, 2014, an LGBTTQ awareness workshop was conducted with Senior Unit Officers, Unit Managers, the Medical Unit Manager, Preventative Security Office and Educational team members of MYC.

[131] She also said that MYC management was arranging to have a facilitator from the Rainbow Resource Centre provide that same information to front-line staff.

[132] There was no evidence as to which MYC staff members actually attended the workshop on April 9, 2014 nor was there any evidence as to what was discussed beyond staff being made aware that their colleagues could be members of the LGBTTQ community.

[133] Nor was there any evidence that even to date, front-line staff at MYC have received the training that the Deputy Civil Service Commissioner said was to be provided or that any training about harassment on the basis of sexual orientation has ever been provided to front-line staff at MYC.

[134] The respondent took no other steps to address T.M.'s allegations.

June and July 2014

[135] Still having received no positive response to his allegations from the respondent, T.M. sent an email to his Union representative and to the Deputy Civil Service Commissioner, on June 19, 2014 in which he identified both the names of the individual who, he alleged, had sexually assaulted him in December 2012, and the individual who he believed, had witnessed the assault. He also provided a series of text messages exchanged between himself and the person he thought had seen the assault in which he had asked him whether he recalled having seen the assault and understood the person's response to be affirmative.

[136] A week later, on June 26, 2014, T.M.'s father sent another email to Minister Howard, the Justice Minister, the Assistant Deputy Minister of Justice, and R.B., inquiring as to whether, now that they had further names and information regarding the allegations, they would finally be taking action. He repeated that request a month later.

August 2014

[137] Finally, on August 6, 2014, T.M.'s father received a letter from the new Civil Service Commissioner, L.R., advising that his letter of June 26, 2014 to Minister Howard and the Justice Minister, had been sent to her for review and response.

[138] Her letter went on to say that having reviewed the workplace actions taken to date by management and Human Resources, to ensure a safe and respectful workplace, she was suggesting that T.M. and his father meet with the Director of Negotiation Services for the Labour Relations Division of Manitoba Justice, T.V., saying this would allow for a thorough review of T.M.'s concerns with a representative who was outside of Human Resources.

September 2014

[139] The meeting with T.V. took place in September 2014. T.M. again reviewed the allegations in the complaint letter, talked about the culture of harassment at MYC and how difficult it was to come forward - how fearful he was of naming names. He then gave the names of a few more

individuals who, he said, either witnessed harassing conduct or, in one case, was a perpetrator of such conduct.

[140] He testified that he was prepared to start giving some names because he felt that since he had not been given any options of where else he could go, his career was finished.

[141] He also brought up the name of the person, he alleged, had sexually assaulted him and was surprised to hear that that name was not in the investigation file despite his having mentioned it in the emails he sent before. T.V. explained that he had discussed the allegations surrounding that incident with R.B. who told him that because the incident did not occur in the physical workplace, it was not considered a workplace incident.

[142] In her testimony, however, R.B. confirmed that MYC's respectful workplace policy would still have applied to the social occasion in question.

[143] T.V. recommended that an investigation be carried out. Originally, he recommended that an external investigator be retained to conduct the investigation, however, ultimately it was determined that it would be appropriate for it to be conducted by R.B. and K.I.

An Investigation is commenced - October 2014 – February 2015

[144] The interviews for the investigation were conducted between October 2014 and February 2015, beginning with interviews of the management team at MYC and witnesses of the alleged assault.

[145] The investigation was expanded to include several JC1's whose names came up during the course of the investigation as potentially having information about the workplace environment.

[146] Although the investigation appeared to focus on the sexual assault allegation, questions of a more general nature were asked, but most of the specific allegations which were set out in the complaint letter were never put to witnesses.

[147] R.B. admitted that she did not ask questions about or reference most of the specific terms and allegations that were referred to in the complaint letter, other than the term "Code Pink". Instead, she said she and K.I. asked witnesses whether there was any "joking" or "teasing" in the workplace.

[148] She testified that witnesses acknowledged that T.M. was "teased" about being gay but that they said that none of it was done with malice.

[149] R.B. testified that the investigation she and her colleague conducted was mostly informed by an email that T.M. sent to T.V. in September 2014 which only referenced the sexual assault,

rather than by the rest of the detailed allegations T.M. had provided to the respondent in the complaint letter, back in 2013.

[150] She also confirmed that the word "harassment" does not appear in the mandate section of the report that was prepared, following the investigation.

[151] The investigation report concluded by stating that the investigators could not substantiate the allegations described by T.M. This was so notwithstanding the fact that R.B. acknowledged that during the course of her investigation she heard witnesses say that T.M. was "teased" about being gay; that "jokes" were made about his being gay; that he was referred to as "Code Pink" and a "fag"; and that these comments were made in front of youth inmates.

[152] The report specifically said that "Not one employee who was interviewed heard that [T.M.] was called 'Code Pink'."

[153] On cross-examination, however, R.B. confirmed that that was not an accurate statement because witnesses had confirmed hearing T.M. referred to that way.

[154] The report made three recommendations. One recommendation related to employment matters generally at MYC and had nothing to do with any of T.M.'s allegations.

[155] The remaining two recommendations were:

> 1. That the management team continue to hold educational workshop(s) on the topic of LGBTQ2; and
>
> 2. That the management team hold a "respectful workplace" session to address the bantering and teasing as some employees may see this as disrespectful.

[156] R.B. did not send a copy of the investigation report to the Superintendent who confirmed that although he was made aware of the report's conclusions and recommendations he never received a copy of it. He also said that the training for front line staff that the report recommended, has never taken place.

February 2015

[157] T.V. sent the investigation report to T.M. in February 2015. He also provided the explanation that was given to the investigators about the meaning of the text messages from the person T.M. thought had confirmed witnessing the sexual assault in December 2012. The explanation was that the text message should be interpreted based on inserting punctuation that the person had not originally included, to mean that he was simply inquiring as to whether the complainant was assaulted, not that he had actually seen the assault.

[158] Following receipt of this email, T.M. immediately wrote back to T.V. and identified the names of more individuals who, he alleged, had harassed him.

[159] He said that at that point he felt he had nothing further to lose.

[160] T.V. testified that he gave these names to the investigators but they took no further action.

[161] Shortly after the investigation report was prepared, T.V. sent an email to HR indicating that although the investigation could not substantiate any of T.M.'s claims, he recommended that once T.M. was able to return to work he not be returned to Corrections.

[162] There was no evidence, however, that the respondent ever told the complainant that once he was medically able to return to work, he would not have to return to MYC. Nor was there any evidence that such a determination was ever made.

T.M.'s medical status February 2014-2017

[163] On February 7, 2014, T.M. gave J.B. a medical note stating that he would be off work from that day until May 7, 2014 and in response to J.B.'s request for more medical information, T.M.'s doctor advised that T.M. had a permanent back issue and also suffered from depression - post-traumatic stress disorder and suicidal thoughts, noting that both these conditions prevented T.M. from returning to work, indefinitely.

[164] The doctor also gave J.B. a report from a psychiatrist who had assessed T.M. The report identified that T.M. was experiencing a number of mental health challenges in addition to "the recent harassment at work which contributes to his stress". The psychiatrist advised that T.M. could not return to MYC as a result of his reaction to the harassment he said he experienced.

[165] This information was made known to the various departments which were responsible for dealing with T.M.'s workplace personnel file, including staff in Human Resources and Supportive Employment Services.

[166] There is no evidence, however, that the respondent ever considered the impact of the harassment allegations on T.M.'s mental health or that those allegations informed its response to his complaint.

[167] At the end of April 2014, T.M. submitted an application to Great West Life for long-term disability benefits in which his doctor indicated that while he was not able to return to his current position he could work in other positions.

[168] The LTD application was approved in June and applied retroactively to May 25, 2014.

[169] Unfortunately, in early 2015 the complainant started to experience significant worsening of his neck and back pain such that he could not return to work. In May 2016, he had back surgery with the prospect of a year-long recovery before being able to return to work.

[170] In October 2017 he had an occupational therapy assessment done which suggested that he could gradually return to work with possible restrictions.

[171] By that time, T.M.'s husband had accepted employment in Ontario and T.M. was moving back and forth between Ontario and Manitoba.

[172] In November 2017, T.M. resigned from his employment with the respondent.

[173] His evidence was that by that time, because the respondent had never properly addressed his concerns about the workplace, he felt a return to employment with Manitoba Justice was hopeless because no one had given him any options about returning to an environment where he would be protected and he had lost all trust in his employer.

[174] After moving out of Manitoba, he worked in a number of jobs for short periods of time but said he was essentially unable to continue in any of them, due to mental health issues which remain unresolved to this day.

[175] The respondent's evidence was that if T.M. had returned to work at a different place than MYC, he would have been eligible for two years of what was called "overrange" payments such that if he had been placed in a position with a lower salary he would still have received his pre-disability JC1 salary for up to two years. Had he returned to work in November 2017, therefore, these payments would have taken him to November 2019.

ANALYSIS

Issue

[176] As I indicated at the outset of these Reasons, the main issue to be determined in this matter is whether the respondent breached its obligations under s.19(1)(b) of the *Code*:

> **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.** (emphasis added)

Parties' Positions

[177] The Commission submitted that while there was sufficient evidence for me to find that the respondent knowingly permitted T.M. to be harassed because managers were aware of ongoing harassment in the workplace, the main thrust of its argument was that the respondent failed to take

reasonable steps to terminate that harassment once T.M. brought his complaint forward in February 2013.

[178] The respondent's submission was that T.M. was not harassed in the course of his employment at MYC but that even if he had been, the employer had no obligation to do anything under s.19(1)(b) of the *Code* at the time he brought his complaint forward.

[179] In making this argument, the respondent submitted that s.19(1)(b) only obliges an employer to take reasonable steps to "terminate " harassment and because the complainant was not physically working at MYC when he brought his complaint forward he was not being subjected to harassment, therefore, there was nothing for it to "terminate" and it had no obligation to take any action under the legislation.

[180] Both the Commission and the respondent submitted that the first issue for me to determine was whether the complainant was subjected to harassment in the first place.

[181] On this point I find that it is not necessary for an adjudicator to determine that a person has been harassed in fact, in order to determine whether their employer has met its obligations under s.19(1)(b) of the *Code*.

[182] As I discuss in more detail later in these Reasons, that cannot be what the section means. It makes no sense for a complainant to be required to prove that they have actually been harassed before their employer's obligation to address their concerns, is triggered.

[183] That said, given the facts of this case, I feel it is important to make a determination as to whether T.M. was harassed and to articulate my reasons for that finding in order hopefully, to prevent such discrimination from occurring in the future.

Determination that T.M. was subjected to harassment in the workplace

[184] As Justice LaForest stated in the Supreme Court of Canada's decision in *Robichaud v Canada (Treasury Board)*, the aim of human rights legislation "is to identify and eliminate discrimination".[2]

[185] For this reason, in my view, it is important to identify, name and define what constitutes harassment on the basis of sexual orientation in the workplace.

[186] Section 19(2) of the *Code* defines harassment as follows:

> **"Harassment" defined**
>
> 19(2) In this section, "harassment" means

[2] *Robichaud v Canada (Treasury Board),* [1987] 2 SCR 84 at para 13 (CanLII)

> (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.

[187] In *Janzen v Platy Enterprises Ltd.*, the Supreme Court of Canada established that sexual harassment is a form of discrimination. I find that the analysis the Court conducted to arrive at that conclusion that such conduct creates a poisoned work environment, is of guidance in the case before me. In *Janzen*, the Court said:

> "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."[3]

[188] In my view, the concept of an abuse of power arises not only in a situation where the employer is the actual perpetrator of the harassment but also where the employer fails to take reasonable steps to address harassment which is occurring in the workplace because the employer, as the person responsible for the workplace, has the authority to take reasonable steps to make sure that harassment does not take place.

[189] The only power an employee has in this regard is to bring the allegations to their employer's attention. Beyond that, they are at the mercy of the employer to make sure that harassment does not become a condition or term of their work environment.

[190] Unfortunately, I find that that describes the environment to which T.M. was subjected at the MYC – being harassed on the basis of his sexual orientation was so pervasive at MYC that it became a term or condition of T.M.'s employment.

[191] Not only was the language which was used in the workplace toward T.M. shocking, vulgar and offensive, it signalled to him and others around him that he was "other" – in the sense of being less deserving of being treated with respect and dignity.

[192] The evidence led by the respondent to suggest that there were other lesbian or gay employees at MYC who did not bring forward complaints or who thought that things were fine, is irrelevant to my analysis as to whether T.M. was harassed.

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[3] *Janzen v Platy Enterprises Ltd.*, [1989] 1 SCR 1252 at p.33

[193] While the concept of discrimination is rooted in the notion of treating an individual as part of a group rather than on the basis of their personal characteristics, discrimination does not require uniform treatment of all members of a particular group. It is sufficient that ascribing to an individual a group characteristic is one factor in the treatment of that individual.

[194] I find that the standard that ought to be applied in assessing whether T.M. was harassed is the standard of a reasonable gay man rather than simply of a reasonable person. The case law supports this.

[195] In *Stadnyk v Canada,* for example, the Court held that the female plaintiff's complaint in that case ought to be assessed based on the standard of the reasonable woman in order to determine whether or not the conduct to which she was subjected was sufficiently pervasive or severe so as to constitute harassment. It said that it adopted the perspective of a reasonable woman:

> primarily because we believe that sex by a reasonable person's standard tends to be male biased and tends to systematically ignore the experiences of women.[4]

[196] Whether assessed on the standard of the reasonable gay man or the reasonable person, however, there can be no doubt that that conduct to which T.M. was subjected on the basis of his sexual orientation was offensive, demeaning, objectionable, abusive, and unwelcome.

[197] I find that T.M.'s evidence about the conduct to which he was subjected over the course of his employment was credible because of its specific and consistent nature and the fact that it was corroborated by other witnesses who testified at the hearing.

[198] I find, therefore, that T.M. was subjected to harassment on the basis of his sexual orientation while he was employed by the respondent.

[199] In making this finding, I have decided that given the evidence regarding the other allegations, it is not necessary for me to make a finding about the allegation relating to sexual assault and I have not made any determination as to whether or not the assault occurred.

[200] In determining that T.M. was harassed, I also note that T.M's doctor's records, starting in March 2013, discuss the harassment he said he endured in the workplace and are consistent with his testimony at these proceedings. T.M. testified that he was afraid to open up about the harassment even to his doctor until he reported it to the respondent in early 2013.

[201] Further, I do not find that the evidence that T.M. participated in the social atmosphere of the work environment precludes a finding of harassment, as was argued by the respondent.

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[4] *Stadnyk v. Canada (Employment and Immigration Commission)* [2000] FCJ No. 1225 at para 25

[202] Many tribunals have found that the complainant's participation in the social atmosphere of the work environment does not preclude a finding of harassment.[5]

[203] Nor does the timing of T.M.'s reporting of the complaint, in my view, detract from the credibility of his allegations.

[204] A person who is being harassed does not need to object to the conduct at the time it occurs for it to be found harassing.[6]

[205] In assessing the credibility of the complainant's allegations, in this regard, I am guided by the law from criminal sexual abuse cases.

[206] A failure to make a timely complaint must not be the subject of an adverse inference which is based upon rejected stereotypical assumptions of how persons react to sexual abuse.[7]

[207] The Supreme Court of Canada has recognized that there is no

> ... inviolable rule on how people who are the victims of trauma like a sexual assault will behave. Some will make an immediate complaint, some will delay in disclosing the abuse, while some will never disclose the abuse. Reasons for delay are many and at least include embarrassment, fear, guilt or lack of understanding and knowledge. In assessing the credibility of a complainant, the timing of the complaint is simply one circumstance to consider in the factual mosaic of a particular case. A delay in disclosure, standing alone, will never give rise to an adverse inference against the credibility of the complainant.[8]

[208] There are many reasons why an individual who is already being singled out on the basis of a personal characteristic, would not want to be further isolated by eventually standing up for themselves, as was the case here.

[209] T.M. testified repeatedly about his fear of coming forward with his harassment complaint because he was afraid of being seen as a "rat" and he feared reprisal, which was also the reason he did not want to identify any individuals when he first brought his complaint forward. This evidence was consistent with the evidence of other witnesses' as to how such reporting would be viewed.

[210] For all of these reasons, therefore, I find that T.M. was subjected to harassment on the basis of his sexual orientation when he was employed by the respondent.

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[5] *Smith v Menzies Chrsyler*, 2009 HRTO 1936; *Francis v BC Ministry of Justice (No. 3)*, 2019 BCHRT 136 at paras 310-312

[6] *Emslie v Doholoco Holdings Ltd.*, 2014 CanLII 71723 (MBHRC), at para 63

[7] *R. v D.D.* 2000 SCC 43 (CanLII) at para 65

[8] *D.D., supra,* at para 65

[211] I now return to discuss what the *Code* required the respondent to do once it became aware of T.M.'s complaint.

The respondent's obligations under s.19(1)(b)

No need to establish harassment has occurred

[212] As I stated earlier, whether a person who is responsible for an activity or undertaking to which the *Code* applies, such as in this case, an employer, has breached their obligations under s.19(1)(b) of the *Code* is not contingent upon an adjudicator first determining that harassment has occurred.

[213] An employer's obligation to address allegations of harassment on a ground which is prohibited in the *Code*, is triggered when the employer is made aware of the allegations, usually as the result of a complaint. That duty is triggered whether or not harassment is ultimately determined to have taken place.

[214] I am supported in interpreting the legislation in this way by the approach taken by the Human Rights Tribunal of Ontario in a recent decision where it discussed an employer's obligation to address allegations of the existence of a poisoned workplace.[9]

[215] The complainant in that case alleged that she was subjected to sexual harassment in the workplace. The issues to be determined included whether the respondent employer had met its duty to respond to the complaint appropriately.

[216] The Ontario *Human Rights Code* does not contain an equivalent section to s.19(1)(b) of the Manitoba *Code*. It simply provides that employees have the right to be free from harassment in the workplace because of sex, by the employer or by another employee.

[217] The Tribunal noted in its analysis that the applicant, although she alleged she was subjected to sexual harassment and advances in the workplace, did not name any of the individuals alleged to have engaged in discriminatory conduct, as respondents to the application.

[218] Instead, she relied on previous decisions of the Tribunal which found that employers have a duty to ensure that workplaces are free of discrimination and harassment contrary to the *Code* and that pursuant to this duty, they are obliged to take reasonable steps to address complaints of workplace human rights violations, including sexual harassment and solicitation.

[219] The Ontario Tribunal found that a failure to meet this obligation may amount to a code breach even in cases where a violation of the code had not been made out. An employer's

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[9] *Crete v Aqua-Drain Sewer Services Inc.* 2017 HRTO 354 (CanLII)

obligation to address allegations of workplace sexual harassment and solicitation, it held, is triggered when the employer is made aware of the allegations, usually as the result of a complaint.[10]

[220] As the tribunal in *Laskowska v Marineland of Canada Inc.*, said, it would make the protection to a discrimination free work environment a hollow one:

> if an employer could sit idlely when a complaint of discrimination was made and not have to investigate it. If that were so, how could it determine if a discriminatory act occurred or a poisoned work environment existed? The duty to investigate is a "means" by which the employer ensures that is achieving the *Code* mandated "ends" of operating in a discrimination free environment and providing its employees with a safe work environment.[11]

[221] The same reasoning must apply when interpreting an employer's obligations under s.19(1)(b) of the *Code*.

Interpreting the wording of the section – principles of statutory interpretation

[222] The respondent submitted that based on the principles of statutory interpretation, the word "terminated" in s.19(1)(b) must be interpreted to mean that a contravention will only exist where harassment is ongoing and because at the time he brought his complaint forward T.M. was not physically working at MYC, the harassment had ceased, therefore, there was nothing for the respondent to "terminate" within the meaning of the *Code*.

[223] In response to this argument, the Commission submitted that the obligation under s.19(1)(b) extends to the activity or undertaking. In their view, therefore, the fact that the person who made the complaint had been removed from the workplace did not in any way reduce the employer's obligation to take reasonable steps to address the allegations.

[224] The Supreme Court of Canada recently conducted the following exercise in statutory interpretation in the context of human rights legislation:

> [30] In *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27, at para. 21, quoting E. A. Driedger, Construction of Statutes (2nd ed. 1983), at p. 87, this Court endorsed the modern principle of statutory interpretation, which must guide our interpretation of the Code in this appeal:
>
> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> [31] Added to the modern principle are the particular rules that apply to the interpretation of human rights legislation. The protections afforded by human rights legislation are fundamental to our society. For this reason, human rights laws are given broad and liberal interpretations so as better to achieve their goals (*Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, 1985 CanLII 18 (SCC), [1985] 2 S.C.R. 536, at

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[10] *Crete, supra,* para 43

[11] *Laskowska v Marineland of Canada Inc.* 2005 HRTO 30 at para 53

> pp. 546-47; *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, 1987 CanLII 109 (SCC), [1987] 1 S.C.R. 1114, at pp. 1133-36; *Robichaud v. Canada (Treasury Board),* 1987 CanLII 73 (SCC), [1987] 2 S.C.R. 84, at pp. 89-90). As this Court has affirmed, "[t]he Code is quasi-constitutional legislation that attracts a generous interpretation to permit the achievement of its broad public purposes" (McCormick, at para. 17). In light of this, courts must favour interpretations that align with the purposes of human rights laws like the Code rather than adopt narrow or technical constructions that would frustrate those purposes (R. Sullivan, Sullivan on the Construction of Statutes (6th ed. 2014), at §§19.3-19.7).
>
> [32] That said, "[t]his interpretive approach does not give a board or court license to ignore the words of the Act in order to prevent discrimination wherever it is found" (*University of British Columbia v. Berg*, 1993 CanLII 89 (SCC), [1993] 2 S.C.R. 353, at p. 371).[12]

[225] The court went on to state that:

> [50] The modern principle of interpretation requires that courts approach statutory language in the manner that best reflects the underlying aims of the statute. This follows from the obligation to interpret the words of an Act harmoniously with the object of the Act and the intention of Parliament. As Professor Sullivan notes, "[i]n so far as the language of the text permits, interpretations that are consistent with or promote legislative purpose should be adopted, while interpretations that defeat or undermine legislative purpose should be avoided" (§9.3).[13]

[226] Applying this approach, I find that the respondent's proposed interpretation of s.19(1)(b) is too narrow. The clear statement of purpose set out in the *Code* which must guide an interpretation of s.19(1)(b) is found in the Preamble to the *Code* which starts by saying that:

> Manitobans recognize the individual worth and dignity of every member of the human family, …
>
> (b) to protect this right it is necessary to restrict unreasonable discrimination against individuals, including discrimination based on stereotypes or generalizations about groups with whom they are or are thought to be associated …

[227] This purpose, to quote the Supreme Court, sets out an "ambitious aim" that supports an expansive and not a restrictive approach to interpreting the legislation.[14]

[228] I acknowledge that the black letter wording of s.19(1)(b) obliges a person who is responsible for an activity or an undertaking to which the Code applies "… to take reasonable steps to **terminate**, harassment …" (emphasis added). However, the only way that this section makes sense, consistent with the purpose of the *Code,* is to interpret it as requiring an employer, once they become aware of a complaint of harassment to take reasonable steps to **respond** to that complaint in the sense of addressing the complaint.

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[12] *British Columbia Human Rights Tribunal v Schrenk*, 2017 SCC 62, paras 30-32
[13] *Schrenk, supra*, para 50
[14] *Schrenk, supra,* at para 52

[229] Under s.19(1)(b) of the *Code*, therefore, once an employer receives a complaint that an employee is being harassed in the workplace, it has a duty to take reasonable steps to respond to that allegation.

[230] The nature of the allegations will inform the nature of the steps that will be considered to be reasonable.

[231] Further, aside from finding the respondent's proposed interpretation of s.19(1)(b) too narrow, I disagree with its submission that the harassment had ceased at the time T.M. brought his allegations forward.

[232] He was still an employee of the respondent at that time. He was still being advised by the respondent that his home position was at MYC and no one in authority had told him that he was not going to be returned to MYC. Nor had the respondent taken any steps to address his specific allegations.

[233] It cannot be said, therefore, that the harassment had ceased. Clearly, the respondent still had an obligation to take reasonable steps to ensure that once T.M. was put back in the workplace, he would not be subjected to harassment.

Knowledge requirement of s.19(1)(b)

[234] The respondent submitted that s.19(1)(b) has a knowledge requirement and that since Manitoba Justice has several thousand employees, with over 200 employees at MYC alone, it is not clear whose knowledge of harassment could reasonably be attributed to it, under s.19(1)(b).

[235] In making this argument, the respondent submitted that I should be guided by the principles of how knowledge is attributed to corporate entities for intentional torts.

[236] It cited the Supreme Court of Canada's decision in *Rohne (The) v Peter A.B. Widener (The)* which set out the directing mind test as follows:

> … the focus of inquiry must be whether the impugned individual has been delegated the "governing executive authority" of the company within the scope of his or her authority. I interpret this to mean that one must determine whether the discretion conferred on an employee amounts to an express or implied delegation of executive authority to design and supervise the implementation of corporate policy rather than simply to carry out such policy. In other words, the courts must consider who has been left with the decision-making power in a relevant sphere of corporate activity. (emphasis added)[15]

[15] *Rohne (The) v Peter A.B. Widener (The)* [1993] SCJ No. 19 at para 32

[237] Relying on this approach, the respondent submitted that it was only the Superintendent and Deputy Superintendent of MYC who had the requisite authority to constitute being a part of the "directing mind" of the operation.

[238] I agree that s.19(1)(b) has a knowledge requirement, however, the evidence was clear that immediately after T.M. brought his allegations forward in February 2013, the Superintendent was made aware of those allegations.

[239] There can be no question, therefore, that by the end of February 2013, the person who had the requisite authority over the workplace had knowledge of the complaint and, therefore, the respondent's obligation to take reasonable steps to address that complaint, was triggered.

[240] Having found that the respondent's obligation under s.19(1)(b) was triggered – that it had a duty to respond to T.M.'s complaint, I now turn to discuss whether it discharged that duty by taking reasonable steps to address the complaint.

Were the steps taken by the respondent reasonable

[241] The respondent submitted that s.19(1)(b) should not be interpreted as necessarily mandating the investigation of any and all complaints of harassment to the same degree in every case. Instead, it submitted, whether a given allegation requires an investigation and how rigorous that investigation ought to be will depend on the circumstances.

[242] I agree. The nature of the allegations will inform what will be considered a reasonable response within the meaning of s.19(1)(b).

[243] In this case, whether or not the allegations T.M. brought forward were true, they were of such a serious and explicit nature that they demanded the respondent take steps to address them. Instead, however, the respondent's response in March 2013, shortly after receiving the complaint was simply to close the file.

[244] It was only after T.M. and his father elevated their concerns first to the Civil Service Commissioner and then to Ministers in the Government, that the respondent finally took steps to address his concerns.

[245] By that time, 19 months had passed since T.M. had made his complaint known to the respondent.

[246] This was not reasonable.

[247] The respondent submitted that there were a number of factors that justified why the formal investigative process was slow to start including the fact that the complainant refused to provide names and times to support his allegations.

[248] The Commission submitted, however, that T.M. gave enough information, even without naming names, about identifiable positions in the workplace, such as positions on the IRT Team, for example, that either the Superintendent or Assistant Superintendent could have, if they had made an inquiry, determined which individuals had worked with T.M. in order to make inquires of them.

[249] I agree. Both J.W. and J.B. testified that shift schedules and log books identifying staff schedules were certainly available.

[250] The Commission also pointed to the fact that early on in January 2014, when T.M. met with the Director of Human Resources he did provide the names of two retired MYC staff members, but the Director never contacted those individuals.

[251] The Commission also submitted that, in any event, as early as February 2013 there was enough information for the respondent, even without a formal investigation, to take steps to respond to the complainant's allegations, other than conducting an investigation.

[252] I agree.

[253] I acknowledge that T.M.'s reluctance to name names would have posed a challenge to conducting a conventional workplace investigation, but given how specific and egregious the allegations were, the respondent's response to simply close the file was not reasonable.

[254] Where allegations are specific, detailed and amount as they did in this case to alleging a culture of a toxic work environment, what amounts to "reasonable steps" will likely be different than where the allegations point to the actions of one or two individuals.

[255] In a situation where an employer does not feel that it is able to carry out an investigation, its obligations may not end. It may still have to consider other ways to address a complaint. In this case, for example, even if the respondent felt it could not carry out an investigation because T.M. had not identified the names of individuals, it could still have taken proactive steps to ensure that harassment based on sexual orientation was not taking place in the work environment.

[256] It could have taken such steps as posting signs, sending out information, holding workshops, having discussions with staff in groups or on an individual basis, to remind or confirm about the nature of appropriate conduct in the workplace.

[257] The respondent could also have monitored the workplace to see what type of interactions were taking place in the work environment.

[258] None of those steps were undertaken with the exception of the presentation held in April 2014.

[259] With respect to that presentation, the Commission submitted that there was no evidence to support that that workshop constituted an adequate response to the plaintiff's allegations.

[260] I agree.

[261] The evidence was unclear as to what was covered in the presentation. There are no copies of the presentation, no log of who attended or of what was discussed.

[262] I also find that once it decided to carry out an investigation the respondent still failed to conduct itself in a reasonable manner.

[263] I agree with the respondent's submission that some deference is owed when considering an investigation which has been undertaken by qualified individuals. The focus should be on the process that was undertaken rather than on the results. In this case, however, I find that the investigation process was not reasonable.

[264] I agree with the Commission's submission that given the very specific nature of T.M.'s allegations, those allegations should have been put to witnesses using the very language used by the complainant. Instead, however, the questions which were posed asked about "joking" or "bantering".

[265] I find that these words chosen by the investigators suggested an attempt to minimize the type of misconduct and showed a failure to understand the significance of the complainant's allegations. The conduct to which T.M. was subjected was not "teasing". It was harassment.

[266] I also find that the conclusions that were drawn from the report were not reasonable.

[267] The investigators acknowledged that witnesses confirmed the complainant was referred to as "Code Pink" and a "fag" and that remarks were made on an ongoing basis about his sexual orientation. Despite receiving this information, the report did not conclude that the complainant was subjected to harassment on the basis of his sexual orientation.

[268] This was not reasonable.

[269] Finally, with respect to the recommendations made in the report, although there were two recommendations aimed at providing awareness to staff about LGBTQ2 issues there is no evidence that those recommendations were ever carried out.

[270] I also find it unreasonable that no one from the respondent ever considered linking T.M.'s harassment allegations with his mental health restrictions.

[271] Certainly, by February 2014, T.M.'s physician had made it clear that T.M. had both physical and mental health restrictions and that some of those mental health issues were exacerbated by the alleged harassment.

[272] I am supported in finding that the respondent failed to take reasonable steps to address T.M.'s complaint, by the decisions from other human rights tribunals which have considered similar issues.

[273] The Ontario Human Rights Tribunal in *Jones v Amway,* for example, set out some of the factors to consider in deciding whether an employer has taken reasonable steps to respond to a complaint of harassment:

a. Is the respondent aware that sexual harassment is prohibited conduct?

b. Is there a complainant mechanism in place?

c. Did the respondent act with alacrity in handling the complaint?

d. Did it deal with the matter seriously?

e. Has it met its obligations to provide a healthy work environment? and

f. Has it met its obligation to inform the complainant of its response?[16]

[274] Looking at these factors, the respondent cannot be viewed as having taken reasonable steps to respond to T.M.'s complaint.

[275] Focusing on the period when T.M. brought his complaint forward, in February 2013, I find that the respondent did not address T.M.'s complaint seriously. It did not have a clear complaint mechanism in place for reporting harassment allegations. It certainly did not act with "alacrity", did not meet is obligations to provide a healthy work environment and did not meet its obligation to inform the complainant of its response.

[276] It was not until September 2014, 19 months after T.M. made his complaint and only because of the intervention of the Civil Service Commissioner and Government Ministers that steps were taken to address T.M.'s concerns. But as I set out above, those steps were neither adequate nor reasonable and demonstrated both the respondent's lack of understanding of what constitutes harassment on the basis of sexual orientation and how to properly address such harassment in the workplace.

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[16] *Jones v Amway*, 2001 CanLII 26217 (ONHRT); appeal dismissed, [2002] OJ NO. 1504 (ONSC)

[277] Based on the totality of the evidence, therefore, I find that although T.M. brought his very specific complaint of harassment forward to the respondent in February 2013, the respondent did not take reasonable steps to address the complaint and, therefore, failed to satisfy its obligations under s.19(1)(b) of the *Code*.

Remedy

[278] Section 43(1) of the *Code* provides:

> **Determination re contravention**
>
> 43(1) After completion of the hearing, the adjudicator shall decide whether or not, on a balance of probabilities, any party to the adjudication has directly or indirectly contravened this Code in the manner alleged in the complaint.

[279] For the reasons set out above, I have decided that the respondent contravened its obligation under s.19(1)(b) of the *Code*. In making this determination, I do not find that fault lies with any one individual – rather I find that it was a matter of collective responsibility within the Government respondent. To prevent harassment from recurring at MYC, remedial steps must take place, therefore, at a broad, institutional level and address the workplace culture as a whole.

[280] The *Code* provides that I may order the respondent to do one or more of the following:

> **Remedial order**
>
> 43(2) Where, under subsection (1), the adjudicator decides that a party to the adjudication has contravened this Code, the adjudicator may order the party to do one or more of the following:
>
> (a) do or refrain from doing anything in order to secure compliance with 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.

Section 43(2)(a) – Order to Secure Compliance with the *Code*

[281] Based on the evidence I heard at these proceedings I find that the respondent must take steps to increase its capacity to identify and address harassment in the workplace in particular with respect to harassment on the basis of sexual orientation.

[282] I acknowledge the evidence that in 2016 and 2017 staff at MYC received training on the respondent's respectful workplace policy, that a new policy was implemented in 2019 which covers both respectful workplace and sexual harassment and that online training on that policy is being provided.

[283] There was no evidence, however, that the new training includes anything on how to identify and address harassment which is based on sexual orientation.

[284] I therefore order that within six months of the date of this decision, all staff employed by the respondent at MYC and all staff who provide human resources services to the respondent receive:

a. training on what constitutes harassment on the basis of sexual orientation, which must include a discussion of the Reasons for Decision in this matter;

b. training on how to respond to allegations of harassment on the basis of sexual orientation, taking into consideration that a response may include any or all of the following:

    i. monitoring the workplace;

    ii. providing pro-active education and information to a workplace; and/or

    iii. conducting an investigation; and

c. training on the use of a trauma informed approach when conducting a harassment investigation and when dealing with a person who has brought forward a harassment complaint.

[285] I further order that the respondent designate a Respectful Workplace Advisor for MYC whether by creating a new position or attaching this responsibility to an existing position.

Section 43(2)(b) – Financial Loss Compensation

[286] The Commission sought an order for lost wages calculated from May 2014 which was the date T.M. was approved for LTD benefits, to the date of the hearing, with appropriate pension

adjustments and adjustments for any increments in salary due to changes in the collective bargaining process.

[287] T.M. sought full compensation for lost wages commencing November 17, 2017, the date he resigned, until his calculated retirement date of January 14, 2026 together with pension benefits.

[288] The respondent submitted, citing case law, that there must be a causal link between the discriminatory practice and the loss claimed and that such a link has not been established on the evidence in this case, regarding T.M.'s claim for loss of income.[17]

[289] I agree.

[290] The evidence disclosed that there were a number of other factors that were causally related to any impairment to the complainant's earning capacity including the significant physical medical issues he had with his neck and back and his spouse's acceptance of a favourable employment opportunity outside of Manitoba.

[291] Counsel for the Commission submitted that if I felt I was not able to make an award for loss of income because of a lack of specific evidence in that regard, I could still acknowledge the impact of the respondent's contravention on the complainant's income earning ability in any award I made under the general damages heading under s.43(2)(c).

[292] Accordingly, I have taken that impact into consideration in making an award under s.43(2)(c).

Section 43(2)(c) – Injury to Dignity

[293] The Commission submitted that the factors which should be considered in awarding damages to compensate T.M. for the injury to his feelings, dignity or self-respect are those set out by the Ontario Human Rights Tribunal in *Sanford v Coop*: humiliation and hurt feelings experienced by the complainant; loss of self-respect, dignity, self-esteem and confidence; experience of victimization; and the seriousness, frequency and duration of the offensive treatment and the vulnerability of the complainant.[18]

[294] Tribunals in Manitoba have considered the same factors on many occasions.[19]

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[17] *Chopra v Canada (Attorney General)*, 2007 FCA 268; *Gichuru v Law Society of British Columbia (No. 9)*, 2011 BCHRT 185; *Walsh v Mobil Oil Canada*, 2013 ABCA 238

[18] *Sanford v Coop*, 2005 HRTO 53 (CanLII) at para 35

[19] *Jedrzejewska v A+ Financial Services Ltd.*, 2016 MBHR 1 (CanLII); *Nachuk v City of Brandon*, 2014 CanLII 20644 (MHRBAD) at para 37

[295] The Ontario Human Rights Tribunal has primarily applied two criteria in making a global evaluation of 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. This approach was articulated in *Arunachalam v Best Buy Canada*, 2010 HRTO 1880, where the Tribunal stated at paras 52-54:

> ... the first criteria recognizes that injury to dignity, feels and self-respect is generally more serious depending, objectively upon what occurred. ... The more prolonged, hurtful and serious harassing comments are, the greater the injury to dignity, feelings and self-respect.
>
> The second criteria recognizes the applicant's particular experience and 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 ...[20]

[296] Applying these criteria, I find that while the respondent did not actually perpetrate the harassment, its failure to take reasonable steps to address T.M.'s allegations once it was aware of those concerns, had no less of a negative impact on T.M.'s dignity, self-esteem and wellbeing. This failure was a serious breach of its obligations under the *Code*.

[297] For example, this failure meant that T.M. was obliged to repeat the allegations over and over in an effort to be heard. This re-telling further traumatized him as did the clear indication from the respondent that it did not believe him or that it did not believe that the things that he was alleging constituted wrongful conduct.

[298] The injury to T.M. was also made worse by the respondent's failure to assure him that he would not have to return to a workplace where he would be subjected to harassment on the basis of his sexual orientation despite his consistent and repeated attempts to obtain such assurance - an assurance to which he was entitled at law.

[299] Based on the evidence, I have no doubt that if the respondent had assured T.M. that he would not have to return to a toxic workplace environment, he would not have sustained the same extent of damage to his dignity and wellbeing.

[300] Every person needs to be heard – to feel that they have been understood and believed, that their feelings are valid.

[301] In this case, however, the respondent's lack of response to T.M.'s complaint conveyed to him that it did not believe him or did not believe that the things he was alleging had happened, constituted wrongful conduct. This attitude added to the injury to his dignity.

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[20] as cited in *G.M. v X Tattoo Parlou*, 2018 HRTO 201 at para 50

[302] The Commission submitted that damages under this heading should be made in the range of $50,000 - $75,000.

[303] It provided me with a number of cases to offer guidance in determining the award in which the amount of damages ranged from $20,000 (*Jedrzejewska)*[21] to $200,000 (*A.B. v Joe Singer Shoes Limited)*[22].

[304] The respondent submitted that the appropriate quantum under this head of damages should be minimal recognizing that the contravention is not the asserted harassment itself but rather the employer's failure to properly terminate the harassment.

[305] While I agree with the respondent's submission as to what constitutes the contravention, I do not agree that the contravention in this case warrants a minimal award.

[306] As the Tribunal in *Crete* stated, a tribunal must ensure that the quantum of damages for the injury to dignity, feelings and self-respect is not set too low since doing so would trivialize the social importance of the *Code* by effectively creating a "licence fee to discriminate".[23]

[307] Following this reasoning, I find that the award in this case must send a message to employers to confirm the importance of their obligation as the entity which is responsible for the workplace, to take reasonable steps to address an allegation of harassment once it comes to their attention.

[308] Courts and tribunals have often commented on the importance of the workplace to an individual, starting with this description from former Chief Justice Dickson:

> Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being. Accordingly, the conditions in which a person works are highly significant in shaping the whole compendium of psychological, emotional and physical elements of a person's dignity and self respect. ...[24]

[309] Keeping these comments in mind and based on the evidence, the parties' submissions and the law as set out above, I order that the respondent pay the complainant $75,000 to compensate him for injury to his dignity, feelings and self-respect.

Dated: December 19, 2019

Sherri Walsh, Adjudicator

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[21] *Jedrzejewska, supra*, at para 95
[22] *A.B. v Joe Singer Shoes Limited* 2018 HRTO 107 at para 181
[23] *Crete, supra,* at para.63
[24] *Reference Re: Public Service Employees Act (Alta.)* [1987] 1 SCR 313 at p.368