

**CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL
CANADIEN DES DROITS DE LA PERSONNE**

SUE GOODWIN

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

DAVID BIRKETT

Respondent

REASONS FOR DECISION

MEMBER: Athanasios D. Hadjis

2004 CHRT 29
2004/08/20

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[1] The Complainant alleges that the Respondent sexually harassed her in contravention of s.14 of the *Canadian Human Rights Act*. Neither the Complainant nor the Respondent were represented by legal counsel at the hearing, and the Canadian Human Rights Commission (**Commission**) opted to not appear at all.

I. FACTS

[2] The Complainant and the Respondent were employed as bus operators by Penetang Midland Coach Lines (**PMCL**), based in Toronto. They had become friends on the job, having had occasion to work together on several one-day charters. In August 1999, PMCL sent both drivers to the Canadian Forces Base in Petawawa, Ontario. This was the first time they had worked together out of town for more than one day. The charter was scheduled to last for about a week and consisted of their shuttling Canadian Forces personnel to and from their military exercises. They worked from ten to fifteen hours per day.

[3] While in Petawawa, they stayed at a local hotel. They had separate rooms, the doors of which faced each other. The Complainant claims that about two or three days into the assignment, she came back to the hotel at about 8 p.m., after completing her shift. She changed out of her work clothes and into a sweatshirt and shorts. Around 9:00 p.m., the Respondent telephoned the Complainant from his room asking if she wanted to do anything that evening. They decided to watch television together in her room and he came over several minutes later.

[4] According to the Complainant, her room had two double beds. She sat on one and he sat on the other, while they both watched television. At some point, she nodded off to sleep. She woke up at about 3 a.m. and found the Respondent lying on her bed next to her. He was nude and was touching her with his hand below the waist in her "private area". She immediately sat up and told him to stop. He laughed at her, but she insisted that he leave. He got up, put on his clothes and left the room, the whole time still laughing.

[5] The Complainant stayed in her room the remainder of the night, unable to sleep. At about 3:30 a.m., she called a friend to tell him what had happened. He advised her to call the police, but she said that she would not do so before speaking to her dispatcher, Gord Tuttle.

[6] She called Mr. Tuttle in the morning and recounted to him what had occurred. Mr. Tuttle suggested sending up another driver to replace her but she told him not to bother, as the charter was to be ending shortly. She assured Mr. Tuttle that in the meantime, she would deal with the problem herself until her return to Toronto.

She also explained to him that she had decided to not call the police because it would result in her and the Respondent no longer being available to work, leaving the assignment short-staffed. She decided to put her duty to perform her job ahead of the other matter. The Complainant testified at the hearing that an additional reason for her unwillingness to call the authorities was that she had the misfortune of being a victim of a serious crime in her youth and she suffered emotionally during the ensuing criminal proceedings. She did not want to undergo a similar experience again.

[7] Later that morning, when she went to pick up her bus at the military base, she found the Respondent standing next to his. He approached her and asked if she was the "type of girl who would report this", presumably to her employer or to the authorities. She just told him to "stay the fuck away", and walked to her bus. She worked the remaining days of her assignment and drove her bus back to Toronto alone on the last day, Sunday, August 29, 1999.

[8] The Respondent denies the incident, as alleged by the Complainant. He acknowledges that he went over to her room that evening but he denies ever being in bed in the nude with her, nor touching her private parts. He claims that while they were watching television, he massaged her back at her request, for a matter of several minutes only. They then both returned to watching television. At some point, he noticed that the Complainant had fallen asleep. He continued watching the program for a while longer and then got up, put on his shoes and left the room while the Complainant was still asleep.

[9] On Monday, August 30th, her first day back at work in Toronto, the Complainant reported the incident to her supervisor, Greg Pockneil. He asked her to put her complaint in writing. About one week later, Mr. Pockneil convened her to a meeting at which the Respondent and the branch manager, Gord Moodie, were also present. After hearing both sides of the story, Mr. Pockneil and Mr. Moodie told the parties that they would consider the matter and get back to them.

[10] In the ensuing weeks, the employer arranged the working assignments so as to ensure that the Complainant and the Respondent never worked together. However, she could not help but run into him occasionally at the workplace, at the beginning or end of her shifts. She claims that one day in September 1999, the Respondent parked his bus at such an angle that she could not exit her car from her parking space. She asked him to make room but he refused. She complained to one of the managers who in turn instructed the Respondent to move his bus. She contends that the Respondent's conduct was in retaliation to her having complained to the employer that he had sexually harassed her while on the trip to Petawawa.

[11] According to the Complainant, the employer never disciplined the Respondent over the alleged hotel room incident. She found it uncomfortable to continue running into him in the company's yard. She deliberately avoided going into the dispatch room in order to preclude coming into any contact with him. Rumours began spreading at the workplace about the incident. She claims that the Respondent had been making accusations to others that she was a racist (the Respondent is a member of a visible minority group). She made numerous requests to her employer that the Respondent be fired. Yet, as the months passed, nothing happened and finally, on December 17, 1999, she resigned from her position. In her letter of resignation, she claimed that she was leaving in part because she had been "sexually assaulted" by another worker and "nothing was done about it".

II. LEGAL FRAMEWORK

[12] According to s. 14(1)(c) of the *Act*, it is a discriminatory practice to harass an individual on a prohibited ground of discrimination in matters related to employment. The prohibited grounds include sex (s. 3(1)). Section 14(2) specifies that sexual harassment is deemed to be harassment on a prohibited ground.

[13] Sexual harassment is broadly defined as unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of harassment. Sexual harassment in the workplace attacks the dignity and self-respect of the victim, both as an employee and as a human being. (*Janzen v. Platy Enterprises Inc.* [1989] 1 S.C.R. 1252).

III. ANALYSIS

[14] I am satisfied on the evidence that the hotel room incident took place, as alleged by the Complainant. Her evidence at the hearing was unwavering and forthright. She recalled the circumstances in detail.

[15] The Respondent's recollection of the events, on the other hand, was patchy. He initially testified that the Complainant's hotel room had only one bed and that they both watched television while lying down on it. He changed his position later in his evidence, testifying that he was not sure if it was one bed or two. He does not recall when he left, claiming that he also dozed off. His lack of specific recall is odd considering that the Complainant's formal complaint against him and the meeting with their supervisors occurred only days after their return to Toronto. It is not as if the accusation was made against him months after the event's

occurrence. The Respondent's testimony at the hearing to the effect that he gave the Complainant a back rub for a few minutes at her request appeared improvised and lacked any credibility.

[16] The Respondent called into question Complainant's decision not to report the event to the police, suggesting that her failure to do so is indication that the incident never took place. To support his contention, the Respondent sought to introduce evidence that the Complainant had no difficulty calling authorities to report other acts committed against her in the past. He cross-examined the Complainant with respect to a series of sensitive, personal matters regarding her prior relationships. The Complainant did not raise any objection to these questions and readily acknowledged that she called the police after a violent attack against her by a former boyfriend, resulting in her hospitalization. She also disclosed that she notified the police to complain that her ex-husband had been returning to her household and "harassing" her children. I accept her interpretation that these incidents were of a more serious nature than the incident alleged against the Respondent and warranted police intervention.

[17] Moreover, I am not persuaded that this evidence lends any credence to the Respondent's contention that the incident in the hotel room never took place. The Complainant was clearly committed to her work, as evidenced by the enormous efforts she made one night in Petawawa to repair the Respondent's bus, which he had abandoned by the side of the road. When she called him at his hotel room to assist her, he refused, and she was forced to call upon Canadian Forces personnel to help get the vehicle working. I have no difficulty believing the Complainant's claim that in deciding to not call in the police after the hotel room incident, she chose to place the execution of her professional duties ahead of her personal matters. In addition, I accept her evidence that she was also fearful of subjecting herself to the ordeal that victims sometimes experience in the course of criminal prosecutions.

[18] In any event, the Complainant did in fact report the incident immediately to her superiors at work, whom she expected would deal with the matter appropriately. She complied with the employer's request to submit a complaint in writing. She felt, however, that the employer never adequately addressed her concerns. She found herself with no choice but to leave a job that she claims she loved. She contacted the Commission in the days following the incident and a complaint was filed several months later. The investigation and other stages of the process ended up taking years and in the meantime the Complainant endured a serious illness.

[19] The Respondent suggested that the Complainant had fabricated her claim against him in pursuit of a financial windfall at his expense. However, this theory is not supported by the facts of the case. At the end of her evidence, the

Complainant initially told the Tribunal that she was not seeking any remedy under the *Act*, other than a letter of apology. Only after taking some time to consult the *Act* during a break in the hearing, did she inform the Tribunal that she was seeking \$2,500 in damages for pain and suffering (s. 53(2) (e)), and \$2,500 in special compensation (s. 53(3)). She did not make any claim for lost wages. Indeed, the Complainant pointed out that she did not want to claim any additional amounts from the Respondent because she was mindful of his modest means and did not want to financially ruin him. She also requested that the Tribunal order the Respondent to pay these sums to a charitable organization instead of her. I therefore fail to see how the Respondent's assertion regarding the Complainant's motives can be supported.

[20] The Respondent cited a couple of instances in the days following the incident when he claims the Complainant did not demonstrate any hostility to him. He sat down next to her at a restaurant table where she was already seated with a friend. On another occasion, he claims she accepted a sandwich from him. The Complainant denies these facts, as presented, claiming that she and her friend had finished their meal and were awaiting their bill when he Respondent sat down at the next table. They left soon thereafter. She denies outright ever having accepted the sandwich from the Respondent. More importantly, neither of these trivial incidents is indicative of the openness or friendliness that prevailed between the parties prior to the hotel room episode. The Respondent did not lead any evidence to suggest that their amicable relationship had remained unchanged after his visit to her hotel room that night. This sudden change in their friendship would be consistent with the Complainant's claim that she became cool and distant vis-à-vis the Respondent for the remainder of their assignment, pending her return to Toronto and her filing of a complaint against him with the employer.

[21] On the balance of probabilities, I am persuaded that the events as alleged by the Complainant occurred on the evening in question. I find unconvincing the Respondent's contention that nothing out of the ordinary took place.

[22] I am also satisfied that his behaviour that night constituted sexual harassment. His conduct was unwelcome, of a sexual nature and detrimentally affected her work environment. She was no longer comfortable working at the same workplace with the Respondent, which was one of the factors in her decision to resign from PMCL. While the incident occurred during a single evening, the Respondent's conduct was severe enough to create a hostile working environment by the measure of any reasonable person (See *Canada (HRC) v. Canada (Armed Forces) and Franke* (1999), 34 C.H.R.R. D/140 at paras. 29-50 (F.C.T.D.)).

[23] I therefore find that the Respondent discriminated against the Complainant by sexually harassing her. The complaint is substantiated.

IV. REMEDY

[24] As I explained earlier, the Complainant is seeking \$2,500 in damages for pain and suffering. She is also claiming that the Respondent engaged in the discriminatory practice wilfully or recklessly, for which she is seeking special compensation in the sum of \$2,500.

[25] The Complainant testified as to how the harassment affected her emotionally following the incident. Her life was disrupted, particularly at work. She modified her working habits so as to avoid contact with the Respondent. His discriminatory conduct was ultimately one of the factors that led to her departure from her job at PMCL, which she enjoyed very much. I am satisfied that the Complainant experienced significant pain and suffering as a result of the discrimination. There is also no question that the Respondent's conduct in the hotel room that evening was wilful.

[26] Taking these circumstances into account, and considering the prevailing case law with respect to non-pecuniary damages involving harassment (see *e.g.*, *Bushey v. Sharma*, 2003 CHRT 21; *Woiden v. Lynn (No.2)* (2002), 43 C.H.R.R. D/296 (C.H.R.T.)), I am satisfied that both of the Complainant's claims are more than justified. The Respondent is ordered to pay the Complainant the sum of \$2,500 in compensation for her pain and suffering (s. 53(2)e)), and the sum of \$2,500 in special compensation (s. 53(3)). Simple interest shall be payable on both of the monetary awards, to be calculated on a yearly basis, at a rate equivalent to the Bank Rate (Monthly series) set by the Bank of Canada. The interest will run from August 29, 1999.

[27] The Complainant has also requested that the Respondent be ordered to provide her with a letter of apology. In *Canada (Attorney-General) v. Stevenson*, 2003 FCT 341, the Federal Court found that the *Act* does not empower Tribunals to make such orders. The Complainant's request for a letter of apology is therefore denied.

V. RETENTION OF JURISDICTION

[28] I retain jurisdiction in the event that any dispute arises regarding the quantification or implementation of any of the remedies awarded in this decision.

Signed by

Athanasios D. Hadjis

OTTAWA, Ontario

August 20, 2004

PARTIES OF RECORD

TRIBUNAL FILE:	T825/7503
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DECISION OF THE TRIBUNAL DATED:	August 20, 2004
APPEARANCES:	
Sue Goodwin	On her own behalf
David Birkett	On his own behalf