THE CONTINUING LEGAL EDUCATION SOCIETY OF BRITISH COLUMBIA CLE BC

EMPLOYMENT LAW CONFERENCE 2021
PAPER 2.1

The Intersection of Human Rights and Employment Law

These materials were prepared by Steven Barker of Tevlin Gleadle Curtis Employment Law Strategies, Vancouver, BC, Fiona H. McFarlane of Kent Employment Law Corporation, Vancouver, BC, and Laura Track of Community Legal Assistance Society, Vancouver, BC for the Continuing Legal Education Society of British Columbia, May 2021.

THE INTERSECTION OF HUMAN RIGHTS AND EMPLOYMENT LAW

I. Jurisdictional Limits on Employee Claims

A. Introduction

The purpose of our Provincial and Federal human rights legislation is to safeguard people from discrimination in various settings. These protections extend to help prevent, or at least provide redress for, discrimination in the course of employment.[1] Those who have been discriminated against can file and advance complaints with Provincial or Federal administrative bodies and if successful access expansive remedies. The protections afforded by our human rights legislation

[1] *Human Rights Code*, RSBC 1996, c 210 at section 13 and the *Canadian Human Rights Act*, RSC 1985, c H-6 at sections 7 and 8. Also, refer to the Supreme Court of Canada decision *British Columbia Human Rights Tribunal v Schrenk*, 2017 SCC 62 for a recent and expansive approach to what constitutes discrimination "regarding employment" and, consequently, who may avail themselves of the statutory protections.

serve to protect those who are often most vulnerable. Nevertheless, there remain ongoing challenges with regard to access to justice. This is by no means a new problem; despite the strides that have been made and continue to be made to address the problem, it is likely not going away any time soon.

One challenge for victims of potential discrimination in the course of employment is that they are limited with regard to choice of forum. The issue has been navigating its way through the courts in this Province over the last several years, culminating in the 2019 BC Court of Appeal decision *Lewis v. WestJet Airlines Ltd.*, 2019 BCCA 63.

This section of the paper will canvass the jurisdictional limits that victims of potential discrimination in the course of employment face, the potential impact of the *Lewis v. WestJet Airlines Ltd.* decisions on the available fora for advancing claims, and how employer's craft their employment policies.

B. The Legal Landscape

Potential victims of discrimination in the course of employment have generally been stuck with advancing their complaints through administrative bodies; either the British Columbia Human Rights Tribunal or the Canadian Human Rights Commission. Long is the list of plaintiffs who have attempted to bring civil claims against their employers in our Court system only to have their pleadings struck on jurisdictional grounds. The common argument advanced by defendant employers being that the claim(s) should have been pursued through the Human Rights Tribunal. See, for example, *Schulz v. Beacon Roofing Supply Canada Company*, 2016 BCSC 1475. In that case the plaintiff advanced a claim that included allegations of sexual harassment and discrimination in the workplace. It was pleaded that liability flowed from breaches of an implied term of her employment contract that incorporated the British Columbia *Human Rights Code*, RSBC 1996, c 210.

At paragraph 22 of the decision Jenkins J. held that:

> [22] If I understand the plaintiff's position correctly, she is claiming an express or implied term in her contract of employment that the defendant would abide by the provisions of the *Human Rights Code*. With respect, if an employer were to act contrary to the protections offered the public in the *Human Rights Code*, any damages must come under the provision of that Act.

The finding of Jenkins J. excerpted above reflects the reasons in *Macaraeg v. E Care Contact Centers Ltd.*, 2008 BCCA 182 in which the Court held that a civil action for relief based on a breach of a statutory obligation could not be maintained because doing so would frustrate legislative intention.[2] This decision reflects the oft-encountered issue of being limited to the statutory processes set out in human rights legislation. Despite affording access to certain remedies that may not be available in a civil action, statutory complaint processes can lead to bifurcation of claims, longer timelines before final resolution and, in some cases, increased costs.

---

[2] See also *Seneca College v. Bhadauria*, [1981] 2 S.C.R. 181, 1981 CanLII 29 (SCC). In this case the plaintiff's claim was struck because the claim was based on the breach of statutory rights set out in *The Ontario Human Rights Code*.

C. Lewis v. WestJet Airlines Ltd., 2017 BCSC 2327 and 2019 BCCA 63

The *Lewis* decisions open the door for victims of potential discrimination in the course of employment to advance civil claims.

Lewis v. WestJet Airlines Ltd., 2017 BCSC 2327

The plaintiff, Mandalena Lewis, alleged that she was sexually assaulted in 2010 by a pilot working for the defendant. She reported the incident to the defendant and to the RCMP who in turn referred the complaint to the Maui police.

Managers of the defendant met with the plaintiff and advised her that it had looked into her complaint and suspended the pilot's privileges, barred him from flying to Hawaii and would ensure that she would not be scheduled to work with that pilot in the future. The plaintiff was also told that she should not speak of the sexual assault with other parties. The plaintiff asserted that the defendant's steps did not address her complaint and, in fact, resulted in her shifts being affected, a loss of income and a loss of opportunity for career advancement.

In 2015 the plaintiff encountered a flight attendant who had made a similar complaint in 2008 against the same pilot. The plaintiff then went on short term disability leave due to stress and anxiety and made numerous attempts to obtain her employment file. In 2016 the plaintiff was terminated for cause due to insubordination based on an email and a phone call that she had made. The plaintiff then commenced a class proceeding against the defendant alleging systemic breaches of the defendant's Anti-Harassment Promise. The plaintiff alleged, and the defendant did not contest, that its Anti-Harassment Promise formed part of the plaintiff's contract of employment.

Of particular note, and what ultimately distinguished *Lewis* from cases like *Macaraeg* and *Seneca* is that the foundation of the claim was breach of contract and not that the alleged breach was itself discriminatory. The defendant brought an application to strike out the plaintiff's notice of civil claim on the basis that "courts have recognized that the *Canadian Human Rights Act*, R.C.S. 1985, c H-6 ["*Human Rights Act*"] is a comprehensive administrative scheme for the granting and enforcement of employee rights relating to discrimination."[3]

The court ultimately denied the defendant's application and held that:

> [53] If WestJet were able to show that this claim was based in an employment statute, or was a claim for discrimination or harassment, this motion would have a greater chance of success, based on *Seneca* and *Macaraeg*. The plaintiffs there were attempting to enforce a statutory right through a civil action. The plaintiff in this case is not. Her claim is for breach of contract. [Emphasis added]

Lewis v. WestJet Airlines Ltd. 2019 BCCA 63

The defendant appealed the 2017 decision. At issue on appeal was whether it is plain and obvious that the courts' jurisdiction to hear a breach of contract claim against an employer is ousted by operation of statute. The defendant argued that courts lack jurisdiction to hear the dispute because the essential character of the claim is one that engages alleged breaches of statutory rights enforced by the Canadian Human Rights Tribunal.[4]

---

[3] *Lewis v. WestJet Airlines Ltd. 2017 BCSC 2327* at paragraph 25. The defendant cited *Macaraeg, Seneca* and *Moore v. British Columbia* (1988), 23 B.C.L.R. (2d) 105 in support of this position.

The Court of Appeal considered the wording of the defendant's Anti-Harassment Promise, provisions of the Canadian Human Rights Act and Canada Labour Code, R.S.C. 1985, c. L-24, and authorities such as Macaraeg in confirming that "a civil action for breach of a statutory obligation could not be maintained because doing so would frustrate legislative intention."[5]

However, the Court of Appeal also distinguished the plaintiff's claim on the grounds that it was not based on an alleged breach of statutory rights. Harris JA, writing for the Court, found at paragraph 30:

> [30] I agree with this reasoning. The plaintiff's civil action, in this case, is not based directly on the breach of statutory rights like *Seneca* or *Macaraeg*; the plaintiff does not argue that WestJet's failure to fulfil the Anti-Harassment promise is, in and of itself, a discriminatory act.

Having affirmed that the plaintiff's claim was not based on an allegation that there had been a breach of statutory rights, the Court of Appeal considered whether the court's jurisdiction had been ousted by the enactment of the *Canadian Human Rights Act.*[6] The Court answered that question in the negative, finding at paragraphs 44 and 49:

> [44] While I am sympathetic to the argument that WestJet finds itself subject to the court's jurisdiction because it has incorporated its statutory human rights obligations into its employment contracts, that does not avoid the fact that these obligations are now terms of the contracts and can be relied on as such by both WestJet and its employees. Nor can I see that recognizing the general principle that a plaintiff can choose his or her forum frustrates the statutory objectives of the statutory human rights scheme.
>
> …
>
> [49] In the result, I am not persuaded that the judge fell into error in concluding that it was not plain and obvious that the court did not have jurisdiction to hear the plaintiff's claim.

D. Impact of the Lewis Decisions

In the result, the *Lewis* decisions confirm that standard contract law tenets apply to all employment contracts, including those that incorporate human rights-like protections. The statutory framework does not automatically immunize employers from contractual liability.

On its face the *Lewis* decisions appear to be "wins" for employees and those victims of potential discrimination in the course of employment. While the *Schulz* decision reinforced the established principles from *Seneca* and *Macaraeg*, the *Lewis* decisions have opened the door to a potential new avenue for redress; the obvious caveat being that the presence of an express contractual protection and focused pleadings are requirements for plaintiffs to walk through that now-

---

4 WestJet argued that the plaintiff's pleading was simply a disguise for an allegation that WestJet failed to provide a workplace compliant with its obligations under the *Canadian Human Rights Act* and the *Canada Labour Code*; see *Lewis v. Westjet Airlines Ltd.*, 2019 BCCA 63 at para 15.

5 *Lewis, ibid* at para 22.

6 At para 40 the Court noted that the purpose of essential character test "is not to oust jurisdiction but to assign jurisdiction to one of the mutually exclusive fora. The existence of a jurisdictional contest must be demonstrated before the test is applicable. It is not a means to create a contest."

opened door. The *Lewis* decisions are not a blanket answer to the problem of jurisdictional limits on potential claimants, but they do confirm that in the right circumstances more options are available than what have historically been considered.[7]

For employee-side employment lawyers these decisions should, if not redirect focus, at least expand the scope of strategic considerations canvassed in the early stages of a file. Facts that suggest the presence of potential discrimination in the course of employment need not be automatically relegated to the appropriate Provincial or Federal administrative process.

The *Lewis* decisions also give rise to considerations for employer-side counsel. Many employers make good faith efforts to ensure that their workplaces are free of harassment and discrimination. These efforts often take the form of robust employment contracts and employee policy manuals that clearly define what isn't acceptable in the workplace and what steps the employer will take when allegations of harassment and/or discrimination are brought to its attention.

An unintended consequence of the *Lewis* decisions might be a curtailing of employer willingness to provide certainty and clear guidance for internal resolution of harassment and/or discrimination complaints in the course of employment. In the result, while the *Lewis* decisions may have eased jurisdictional limits facing victims of potential discrimination in the workplace, the decisions may also lead to disengagement from clear mechanisms for internal resolution of claims.

II. Common Law Remedies

A. Just Cause termination – Employer Remedies

Before turning to the options employees have to seek remedies when subjected to sexual harassment in the workplace, a brief review of several decisions applying the legal test for just cause from *McKinley v. BC (British Columbia) Tel,* 2001 SCC 38 is helpful to understand why employees may not be satisfied with their harasser being fired and are pursuing remedies in contract as in *Lewis*.

In 2013, the Federal Court of Appeal considered whether sexual misconduct in the workplace justified a with cause dismissal. Bank of Montreal branch manager, Mark Payne, was fired in November 2008 for cause following allegations that he was stalking the female assistant branch manager following an affair. The revelations came on the heels of an investigation into complaints made by other female employees about alleged inappropriate conduct including shouting, demeaning behaviour, improper questions and comments. The first investigation resulted in a suspension with pay and serious corrective action, which was still in force when the affair was revealed. The stalking allegations resulted in a second suspension with pay and another investigation.

---

[7] *Lewis* has been relied on since its release for the principle that the BC Human Rights Tribunal does not have exclusive jurisdiction over conduct that *might* be discriminatory. See *Deol v. Dreyer Davison LLP*, 2020 BCSC 771 discussed later in this paper.

Following his dismissal for cause, Mr. Payne appealed to an adjudicator appointed pursuant to the *Canada Labour Code*, who reviewed the two investigations and concluded that the affair, and Mr. Payne's initial denials, were the main events that precipitated the dismissal. The adjudicator found that Mr. Payne's misconduct was foolish and dangerous but was not serious enough to warrant dismissal based on the doctrine of progressive discipline. The adjudicator gave Mr. Payne the benefit of the doubt, and ordered that Mr. Payne be reinstated after a four-month suspension.

When the matter reached the Federal Court in 2012 (*Bank of Montreal v. Payne*, 2012 FC 431), it concluded that the adjudicator made several errors, including a failure to properly consider *McKinley*, and held that the dismissal was just and, in the event that it was unjust, the reinstatement remedy was unreasonable because Mr. Payne's conduct destroyed the bank's trust and confidence in him to responsibly manage staff. The Federal Court of Appeal in 2013 (*Payne v. Bank of Montreal*, 2013 FCA 33), affirmed the Federal Court's decision and remitted the remedy question back to an adjudicator for review. In doing so the Federal Court of Appeal confirmed that *McKinley* requires that misconduct be considered as a whole, including any supervisory role played by the dismissed employee, and that a category of misconduct, such as sexual harassment, is not determinative of the issues.

A court in Nova Scotia reached a different conclusion in 2014. Mr. Jeffrey Garnhum was employed with the Nova Scotia Department of Environment and was dismissed in 2010 for a number of reasons including inappropriate comments to, and touching of, women, misuse of alcohol and driving while impaired. After an investigation into his conduct, the Department wrote a lengthy letter outlining the reasons for Mr. Garnhum's dismissal. The letter referred to violations of the *Human Rights Act* and sexual harassment that violated the Respectful Workplace Policy and breaches of the Code of Conduct and collective agreement, including incidents that were offences under the *Liquor Control Act* while in a government vehicle. The letter was appealed to an administrative panel, which confirmed, after nearly two years of procedural matters and a hearing on the merits, that the dismissal was for cause. In its decision, the administrative panel commented that Mr. Garnhum's oral testimony was aimed at rationalizing his behaviour, and was not accepted where it conflicted with that of other witnesses.

The Nova Scotia Supreme Court in *Garnhum v. Nova Scotia Public Service Commission et al*, 2014 NSSC 268, held that the administrative panel's findings were within a reasonable range of outcomes and that the *McKinley* test was properly applied because the nature and extent of the misconduct was considered in the circumstances. In this case, the sexual harassment and misconduct were considered together with other serious allegations and the dismissal was justified.

Several recent cases further highlight the variable nature of the decisions applying *McKinley*. In *Dale Kent (Re)* 2019 BCEST 119, the Employment Standards Tribunal considered whether or not a sexually inappropriate text message sent on a work phone, that the female recipient called creepy, justified a with cause termination. The termination occurred in January 2018, one day after the inappropriate text message was sent, and was followed by at least one email from Mr. Kent that made the female recipient "extremely uncomfortable about this entire situation." The Tribunal, considering whether *McKinley* was properly applied by the Delegate, upheld the just cause termination on the basis that the conduct was admitted, and

> [68] … The Record established that the Employer's employees had a fundamental obligation to not send unwanted sexually explicit communication to another employee and that the Appellant did not understand this fact even after he engaged in this conduct…

In Ontario, a termination with cause dating back to July 2019 was not upheld in *Hucsko v. A.O. Smith Enterprises*, 2020 ONSC 1346. In that case, a female colleague complained that John Hucsko made sexually inappropriate comments shortly before Mr. Hucsko was terminated for both the comments and for his actions afterwards, including his refusal to accept and comply with the corrective action that the employer required. The judge, in not finding that there had not be an irreparable breakdown in the employment relation as required in *McKinley*, concluded at paragraph 45 that:

> [45] In my view, the defendant was faced with a situation in which two employees were in a difficult working relationship. Samar Niazi had made it clear that she would not accept a token apology. She did not want the plaintiff to be given "a slap on the wrist". The defendant was entitled to make a decision about which of two employees it wished to continue to employ. The defendant was entitled to terminate the plaintiff's employment on the basis of an incompatible working relationship with Samar Niazi. What the defendant was not entitled to do was create a situation in which it could rely on just cause to terminate the plaintiff's employment.

However, the Ontario courts reached a different result in *Render v. ThyssenKrupp Elevator (Canada) Limited*, 2019 ONSC 7460. The conduct at issue in that case was a slap on the buttocks by Mark Render, which occurred in February 2014. While Mr. Render did not deny the slap occurred he said it was not sexual. The court conducted a detailed review of the facts, including:

- Mr. Render's employment;
- the office environment;
- the anti-harassment policy in place at the time;
- the slapping incident, which was proceeded by actions that witnesses described as shocking, and were upsetting to the recipient, and subsequent conduct that same day; and
- the workplace investigation into the incident; and
- aggravating and mitigating factors relevant to the *McKinley* contextual analysis such as the nature and seriousness of the conduct, Mr. Render's role as a supervisor, the fact that the anti-harassment policy has been communicated to all e employees eight days before the incident, a lack of remorse from Mr. Render, and Mr. Render's employment record prior to the incident.

Well aware that the onus is on the employer to prove that the just cause termination was a proportionate response to the slapping incident, the Court concluded that

> [111] The conduct was clearly of a serious nature. A slap on a female co-worker's buttocks is not acceptable conduct in the modern workplace. The act involved non-consensual physical contact on a sexual part of Ms. Vieira's body. Mr. Render was not her direct supervisor but was a senior person in the office, with whom Ms. Vieira had to work. Mr. Render ought to have been aware that this

> conduct was unacceptable, especially when the Anti-Harassment Policy had been presented to the employees eight days before the incident.
>
> [112] Mr. Render's conduct following the incident is particularly troublesome. Although he apologized to Ms. Vieira, he did not demonstrate an understanding that his conduct was unacceptable, or the effect it had on Ms. Vieira. Immediately after the incident, when Ms. Vieira was clearly upset, he asked why she was upset when she had punched him in the shoulder in the past. He maintained his position that the slap on a female co-worker's buttocks is equivalent to a punch in the shoulder. He denied that his action was a form of sexual harassment or assault and has maintained that position at trial. He made a formal complaint of misconduct against Ms. Vieira when it became clear that his employment may be terminated.

In obiter, and of interest as we consider employee remedies, is the Court's expressions of concern about the Complainant's conduct, including speaking to the press between her examination-in-chief and her cross-examination and exchanging texts with potential witnesses, and the decision by the employer to launch a public relations campaign, which included statements that were not proven in court.

While *McKinley* is applicable in situations where sexual misconduct affects an employer's ability to trust an employee, especially when the health and safety of other employees is being affected, the courts don't have a great track record on finding that sexual misconduct irretrievably affects the employment relationship, having consideration for other contextual factors like the employee's role and responsibilities with the organization, and other misconduct.

B. Constructive Dismissal – Employee Remedies

In the event that a harasser is not terminated, or the employer does not otherwise take a complaint of sexual harassment or misconduct seriously, it is open to the harassed employee to argue that they have been constructively dismissed, specifically under the second branch of the test in *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10. In such cases, the Court is asked to consider whether, in light of all the circumstances, the failure on the part of the employer to properly deal with harassment, makes continued employment intolerable.

A review of the case law leads to the conclusion that few employees are choosing to argue that they have been constructively dismissed when they have complained about sexual harassment and misconduct. Examples of the limited number of cases include:

Chiang v. Kejo Holdings et al., 2005 BCSC 414

Ms. Chiang was asked out by her employer, who called her at home and was very persistent. A complaint was made to a manager, however no action was taken. The Court found that Ms. Chian was constructively dismissed and, in addition to damages for a reasonable notice period, awarded $10,000 for general damages; and $5,000 for punitive damages.

Deol v. Dreyer Davison LLP, 2020 BCSC 771

Ms. Deol, a lawyer, sought damages from her former employer on the basis that the sexual harassment she experienced in the workplace amounted to a repudiation of the employment contract. In a decision further to an application to strike Ms. Deol's pleadings the Court found, at paragraph 36, that:

> [36] …Pared down to its essentials, Ms. Deol claims that her employer's treatment of her made her continued employment intolerable. Many of the particulars are described as instances of sexual harassment and a failure to address it. Whether those particularized incidents constitute harassment, sexual harassment, or something else altogether, I consider that they are relevant to the consideration of whether Ms. Deol's employer is responsible for creating or perpetuating an intolerable working environment that amounted to a repudiation of Ms. Deol's employment contract.

Colistro v. Tbaytel, 2019 ONCA 197, leave to appeal to SCC dismissed.

Ms. Colistro was found to be constructively dismissed when her employer re-hired an executive who had been dismissed 10 years earlier because of sexual harassment claims Ms. Colistro and others made. At trial, Ms. Colistro was awarded 12 months of reasonable notice, from which disability payments received were deducted, and an award of $100,000 for moral damages. Ms. Colistro appealed the decision, on the basis that the employer had committed the tort of "intentional infliction of mental suffering" by re-hiring the harasser, and the employer cross-appealed arguing the workplace had not been objectively made intolerable. The Ontario Court of Appeal upheld the trial judge's conclusion on both issues and stated that

> [55] It is clear that the trial judge directed his mind to the correct legal standard. He adverted to the governing legal principles and the objective nature of the test before conducting his analysis: see paras. 241-246. He then applied those principles to the facts. As indicated above, at para. 317, the trial judge specifically concluded that "an objective reasonable bystander, aware of all the facts, would find that [the appellant's] continued employment with Tbaytel in these circumstances was intolerable" (emphasis added). The trial judge's references to the reactions of the appellant and other Tbaytel employees formed an important part of the narrative and the context in which Tbaytel's actions were objectively assessed.

As a consequence of the limited case law that employees can rely on, it is not surprising that employee-side counsel are beginning to rely on *Lewis* types arguments and deciding to pursue remedies in the BC Human Rights Tribunal.

III. "The Trend is Upwards": Injury to Dignity Awards in Sexual Harassment Cases before the BCHRT

A. Introduction

Human Rights Tribunal awards are typically small. In the ten years from 2009 to 2019, forty-four per cent of the injury to dignity awards ordered by the BC Human Rights Tribunal ("BCHRT" or the "Tribunal") amounted to $5,000 or less.[8] Thirty-two per cent were between $5,001 and $10,000. The low awards typical in human rights cases have led some legal professionals to suggest that corporations and institutions can simply treat them as a cost of doing business,

---

[8] BC Human Rights Tribunal, "Compensation for injury to dignity, feelings and self-respect", online: <http://www.bchrt.bc.ca/human-rights-duties/remedies/compensation/index.htm>.

creating disincentives for victims of sexual harassment and other forms of discrimination to make human rights complaints, and for employers to make change.[9]

Here in BC, there appears to be change afoot. In its 2018 decision in *Biggings obo Walsh v. Pink and others*,[10] the Tribunal declared: "[t]he trend in damages for injury to dignity is upwards".[11] In the three years since its decision in *Walsh*, the BCHRT has quoted this statement in a number of decisions justifying significantly higher awards than in previous precedent-setting cases. The Tribunal's long-standing high water mark, an injury to dignity award of $75,000 in *Kelly v. University of British Columbia (No. 4)*,[12] was recently significantly surpassed by the award ordered in *Francis v. BC Ministry of Justice (No. 5)*,[13] in which the complainant, a Black man subjected to years of racist abuse in his employment as a correctional officer, was awarded injury to dignity of $176,000 in recognition of the devastating impact the discrimination had had on him.[14]

Francis may end up being an outlier, in much the same way *Kelly* was an outlier for many years after the Tribunal made the award in 2013.[15] The decision is too new to have generated any treatment by the BCHRT or other tribunals as of yet. Nevertheless, it is a powerful signal that the Tribunal is prepared to recognize the immense harm caused by discrimination in the workplace and perhaps in other protected areas as well,[16] and to order awards that are commensurate with and more adequately reflect and denounce that harm. These higher awards may have the effect of making the Tribunal the more attractive forum for pursuit of redress in sexual harassment complaints, notwithstanding the door to other avenues opened by the courts in *Lewis*.

---

9 Robyn Doolittle, "To stop gender discrimination at work, Canada has all the laws it needs – but the system enforcing them is broken" (29 January, 2021) *The Globe and Mail*, online: <https://www.theglobeandmail.com/canada/article-power-gap-broken-pipeline/>.

10 2018 BCHRT 174. [*Walsh*]

11 At para. 163.

12 2013 BCHRT 302, aff'd 2016 BCCA 271 [*Kelly*, cited to BCCA].

13 2021 BCHRT 16. [*Francis*]

14 In fact, the Tribunal awarded Mr. Francis $220,000 in compensation for injury to dignity, which was the amount he had requested, but applied a 20% contingency to all of the heads of damage on the basis that intervening events accounted for some of the harm he experienced, and only 80% of the losses he experienced flowed from the discrimination for which the respondent should be held liable (para. 103).

15 Until the recent decision in *Francis*, no BCHRT award had even come close to the high water mark set by the Tribunal in *Kelly*. Until *Francis*, the highest post-*Kelly* award was the Tribunal's award of $50,000 in *PN v. FR,* 2015 BCHRT 60 [*PN*]. The facts in *PN* were significantly more egregious than those in *Kelly*, and the impact on PN's dignity no doubt much more severe. *PN* was decided after the Tribunal's decision in *Kelly*, but before it had been judicially reviewed and upheld on appeal. The Tribunal's award of $50,000 to PN, an award substantially lower than the $75,000 awarded to Mr. Kelly, and its apparent lack of reliance on its decision in *Kelly*, suggests it may have been apparent to the Tribunal that the *Kelly* award was an aberration rather than a reliable benchmark. See Susanna Quail, "What are our rights worth? Quantifying damages for human rights violations" *CLE-BC Human Rights Conference Paper 2.2,* November 2015.

16 In *Walsh*, the Tribunal held there was no principled reason to suggest that awards should be higher or lower depending on the area of discrimination, and awarded $35,000 to the Ms. Walsh, the highest award ever made in a complaint of discrimination in tenancy.

B. General Principles in Assessing Injury to Dignity

The Tribunal has discretion under s. 37(2)(d)(iii) of BC's *Human Rights Code* to award a complainant an amount to compensate them for injury to their dignity, feelings, and self-respect resulting from discrimination. There is no cap on injury to dignity awards under the *Code*. The purpose of these awards is compensatory, not punitive. Their aim is to place the complainant in the position they would have been in absent the discrimination.[17] The quantum is "highly contextual and fact-specific," and the Tribunal has considerable discretion to award an amount it deems necessary to compensate a person who has been discriminated against.[18]

The ranges established by previous cases are not determinative.[19] The Tribunal has observed that "while precedent is of some value in determining damage awards, the Tribunal should not be so bound by past damage awards that it cannot adequately compensate a complainant for the actual injury to his or her dignity".[20]

In determining quantum, the Tribunal considers three broad factors: the nature of the discrimination, the complainant's vulnerability, and the effect of the conduct on the complainant.[21] These broad factors can be expanded upon in sexual harassment cases as follows, and are often referred to as the *Torres* factors:[22]

- The nature of the harassment, that is, was it simply verbal or was it physical as well?
- The degree of aggressiveness and physical contact in the harassment;
- The ongoing nature, that is, the time period of the harassment;
- The frequency of the harassment;
- The age of the victim;
- The vulnerability of the victim; and
- The psychological impact of the harassment upon the victim.

Also relevant is the "totality of the relationship between the parties,"[23] which is considered in the assessment of the vulnerability of the complainant.

---

17 *Gichuru v. Law Society of British Columbia (No. 2)*, 2011 BCHRT 185 at para. 256, aff'd 2014 BCCA 396. [*Gichuru*, cited to BCHRT]

18 *Ibid*.

19 *Kelly* at para. 60.

20 *Nixon v. Vancouver Rape Relief Society*, 2002 BCHRT 1 at para. 245.

21 *Basic v. Esquimalt Denture Clinic and another*, 2020 BCHRT 138 at para. 193.

22 *Torres v. Royalty Kitchenware Ltd.* (1982), 3 CHRR D/858 (Ont. Bd. Inq) [*Torres*], as quoted in *Gichuru* at para. 257.

23 Vasil v. Mongovious (No. 4), 2009 BCHRT 117; Gichuru at para. 260.

C. Injury to Dignity Awards in Sexual Harassment Cases, 2006-2015

With the exception of its decision in the *PN* case,[24] which involved egregious and ongoing sexual assaults by the respondent, the Tribunal's injury to dignity awards in sexual harassment complaints have remained stubbornly low over the past 15 years. Most were in the $3000-$6000 range, despite findings of egregious conduct including unwanted touching, kissing, pinching and slapping of buttocks, blatantly sexual comments, and significant power imbalances between complainant and respondent.[25] Other than *PN*, and prior to the complaints described below, only three BC sexual harassment complaints have generated awards over $10,000:

- *McIntosh v. Metro Aluminum Products and another*[26] ($12,500): R sent C repeated inappropriate and unwanted text messages.
- *Harrison v. Nixon Safety Consulting and others (No. 3)*[27] ($15,000): R touched C inappropriately, propositioned her for sex, and asked her to look at pornography with him. The company did not properly deal with her complaints.
- *Ratzlaff v. Marpaul Construction and another*[28] ($25,000): R forced his way into the C's hotel room, grabbed her throat, kissed her, grabbed her breasts and tried to rape her.

Ontario has been much more likely to recognize the seriousness and severity of the harm caused by workplace sexual harassment and abuse through significant damages awards. In recent years, it has awarded considerable sums to sexual harassment complainants, including $200,000 in *AB v. Joe Singer Shoes Ltd. (No. 6)*;[29] $170,000 in *NK v. Botuik*;[30] $150,000 and $50,000 for two workers in *OPT v. Presteve*;[31] $75,000 in *GM v. X Tattoo Parlour (No. 2)*.;[32] and $50,000 in *Escobar v. WCL Capital Group Inc.*[33] This discrepancy between Ontario and BC awards has been

---

24 PN v. FR, 2015 BCHRT 60.

25 For example, see Paananen v. Scheller (No. 2), 2013 BCHRT 257 ($3,000); Root v. Ray Ray's Beach Club and others, 2013 BCHRT 143 ($5,000); Q Wild Log Homes and another, 2012 BCHRT 135 ($7,500); Soroka v. Dave's Custom Metal Works and others, 2010 BCHRT 239 ($5,000); Tyler v. Robnik and Mobility World (No. 2), 2010 BCHRT 192 ($6,500); Kwan v. Marzara and another (No. 3), 2009 BCHRT 418 ($6,000); J.J. v. School District No. 43 (No. 5), 2008 BCHRT 360 ($4,000); Behm v. 6-4-1 Holdings and others, 2008 BCHRT 286 ($5,000); Kwan v. Marzara and another, 2007 BCHRT 387 ($5,000); Clarke v. Frenchies Montreal Smoked Meats and Blais (No. 2), 2007 BCHRT 153 ($4,000); Koblensky v. Westwood and Schwab (No. 2), 2006 BCHRT 281 ($4,000); Algor v. Alcan Inc. and others, 2006 BCHRT 200 ($5,000).

26 2011 BCHRT 34, aff'd 2012 BCSC 345.

27 2008 BCHRT 462.

28 2010 BCHRT 13.

29 2018 HRTO 107, aff'd 2019 ONSC 5628.

30 2020 HRTO 345.

31 2015 HRTO 675.

32 2018 HRTO 201.

33 2020 HRTO 388.

highlighted by counsel[34] and acknowledged by the Tribunal,[35] but with little substantive engagement.

As awards rise to reflect the real harms of workplace sexual harassment and abuse, victims are increasingly turning to human rights tribunals as a forum in which to seek accountability.[36] Human rights tribunals offer complainants a number of advantages over criminal and civil proceedings, including a less formal process, relaxed rules of evidence, greater autonomy for complainants and a lower burden of proof than in criminal cases, and, ideally at least, a faster resolution.[37] While the BCHRT does not presently publish the number of sexual harassment complaints filed each year, a review of recent decisions shows that three of the Tribunal's nine final decisions in 2020 in which the complaint was found to be justified were complaints about workplace sexual harassment, compared to just one in each of the previous two years. There were no successful sexual harassment complaints in 2016 or 2017.[38]

D. Recent Sexual Harassment Cases at the BCHRT

1. Araniva v. RSY Contracting and another (No. 3), 2019 BCHRT 97 (Member Cousineau)

Ms. Araniva was employed by Robert Yule as an administrative assistant for his company, RSY Contracting. She worked out of his home.

On two occasions, Mr. Yule made sexual advances towards Ms. Araniva in the workplace. He asked her to have sex with him, and called her "beautiful" and "hot." On one of those occasions, he forced a hug on her, followed her to the bathroom, and made her feel unsafe. On a third occasion, Ms. Araniva found a bra, wig, and a pair of his underwear near her workspace, which made her feel very uncomfortable. Mr. Yule also repeatedly invited Ms. Araniva to a join him at a hockey game. When she rejected his advances, he cut her hours of work. She eventually left her job because of the harassment.

---

34 *LL,* discussed *infra* at para. 215.

35 *Basic*, discussed *infra* at para. 206.

36 Sean Fine, "Ontario Human Rights Tribunal gains steam as an alternative route for sexual assault cases" *The Globe and Mail* (3 April 2018), online: <https://www.theglobeandmail.com/canada/article-workplace-sexual-assault-survivors-claim-victory-at-human-rights/>.

37 Both the BC and Ontario human rights tribunal have seen significant slowdowns in their processing times in recent years. The BCHRT reports average wait times of six months for screening decisions (personal communication with author). Waits of up to a year, or even more, for decisions on dismissal applications are not uncommon. See also BCHRT Annual Report, 2019/2020, online: <http://www.bchrt.bc.ca/shareddocs/annual_reports/2019-2020.pdf> and Raj Anand, Kathy Laird and Ron Ellis, "Justice delayed: The decline of the Ontario Human Rights Tribunal under the Ford government" (29 January 2021), *The Globe and Mail*, online: <https://www.theglobeandmail.com/opinion/article-justice-delayed-the-decline-of-the-ontario-human-rights-tribunal-under/>.

38 For a table summarizing all of the complaints found to be justified by BCHRT over the past 20 years, including the damages awarded, see the Awards Chart published by CLAS's BC Human Rights Clinic, available on their website and updated quarterly: <https://bchrc.net/legal-information/remedies/>.

The Tribunal found that Mr. Yule sexually harassed Ms. Araniva, applying the well-known test from *Janzen v. Platy Enterprises Ltd*.[39] His comments and behaviour negatively affected her employment and undermined her dignity. While the incident with the underwear and wig was found to be inadvertent, the Tribunal said that this incident, as well as the repeated invitations to the hockey games, "had the effect of importing unwanted sexual dynamics into Ms. Araniva's work". While either of those incidents on their own might not have been enough to establish a violation of the *Code*, together with the other behaviours and comments they formed part of larger pattern in which Ms. Araniva was forced to contend with Mr. Yule's sexual desires as a condition of her employment. The Tribunal also found that Ms. Araniva's sex, and her rejection of his sexual advances, were a factor in Mr. Yule's decision to reduce her hours.

In determining an appropriate amount for injury to dignity, the Tribunal considered the three broad factors set out in *Torres*: the nature of the discrimination, the complainant's vulnerability, and the effect of the behaviour on the complainant.

With respect to the nature of the discrimination, the Tribunal noted that sexual harassment took place over the course of just over one month and was, with one exception (the forced hug), almost entirely verbal. The harassment was also "direct and explicit", and Ms. Araniva endured work-related consequences including having her hours cut and, ultimately, losing her job and the opportunities she had hoped would follow.

Ms. Araniva's vulnerability was high. The harassment took place in Mr. Yule's home, while the two of them were alone together. Mr. Yule was physically much larger than she was. She was vulnerable as Mr. Yule's employee, and relied on her income to support herself and her daughter. The Tribunal also took into account Ms. Araniva's particular vulnerability to this type of harassment because of a history of trauma during her childhood and early 20s. An expert in clinical psychology testified that Ms. Araniva's previous experiences, where she had been harmed by significant men in her life, made her more susceptible to an extreme emotional reaction to similar behaviour. The expert diagnosed Ms. Araniva with "other specified trauma and stressor-related disorder," the symptoms of which developed after she left Mr. Yule's employment. This vulnerability was found to help explain the severity of Ms. Araniva's reaction to circumstances which may not have caused another person to suffer as greatly.

The most significant factor in the Tribunal's damages analysis was the effect of the discrimination on Ms. Araniva, which it found to be extreme. After leaving the job, Ms. Araniva experienced high levels of anxiety. She was fearful that Mr. Yule would find her and was hyper-vigilant about her surroundings. She testified that she felt scared for her life, and for her daughter's safety. The psychologist testified that one impact of the discrimination was to cause Ms. Araniva's old fears, related to past trauma, to re-emerge. Ms. Araniva developed physical symptoms that her doctor ultimately diagnosed to be caused by stress. The events changed her from an outgoing and trusting person into someone who was constantly fearful and did not socialize often.

The Tribunal found that the extreme impact of the behaviour on Ms. Araniva justified an injury to dignity award of $40,000, as well as lost wages and expenses that included the cost of counselling sessions.

---

[39] [1989] 1 SCR 1252 [*Janzen*].

In determining injury to dignity, the Tribunal compared Ms. Araniva's experiences to those of complainants in other cases, including *Ratzlaff v. Marpaul Construction Ltd.*[40] and *PN*. In *Ratzlaff,* the respondent forced his way into the complainant's hotel room, grabbed her throat, kissed her, grabbed her breasts and tried to rape her. The Tribunal awarded $25,000 for injury to dignity. In *PN*, the respondent repeatedly sexually assaulted the complainant and treated her like an indentured servant. The Tribunal awarded $50,000 for injury to dignity. In each of these cases, in the Tribunal's view, the discrimination was of a more serious nature than what happened to Ms. Araniva.

The Tribunal noted that the purpose of the award was to compensate Ms. Araniva for the significant harm she had suffered. Notwithstanding that her experience was less severe than the discrimination in *Ratzlaff*, a case attracting an award of $25,000, the Tribunal ordered the respondents to pay Ms. Araniva $40,000 in compensation for injury to her dignity. The Tribunal noted that all of the cases cited by the parties were now several years old, and that "the trend for these damages is upwards".[41]

2. MP v. JS, 2020 BCHRT 131 (Member Ohler)

MP worked as a housecleaner for JS and a number of other clients. The complaint centered on one event of sexual assault, in which JS pushed MP onto his bed while she was cleaning his home and sexually assaulted her. However, the Tribunal accepted that JS had begun touching MP in a sexual way that was unwelcome more than two years earlier. JS argued that MP had consented to the touching and that she had demanded money from him in exchange. The Tribunal did not agree with this characterization of their relationship, preferring MP's evidence that the touching was not consensual and she only tolerated it because JS threatened to "break up her family" if she did not comply. The assault constituted an adverse impact in MP's employment, and the respondent was found to have violated s. 13 of the *Code*.

The Tribunal awarded MP wage loss in the amount of $4,300, which was the amount she would have earned from cleaning JS's home from the last day of her employment there to the date of the hearing. MP argued that she was unable to work at all due to the discrimination, and sought compensation for the wages she was unable to earn from other clients, in addition to JS. She was diagnosed with PTSD and depression associated with the sexual assault, but the Tribunal found that the medical evidence did not support that she was unable to work at all and declined to award additional wage loss. Also relevant was that she had not disclosed her cash earnings to the CRA, nor tendered bank statements or other accounting establishing her income.

In determining an award of injury to dignity, the Tribunal declined to consider the ongoing nature of the sexual assaults in its assessment. It assessed the injury to MP's dignity, feelings and self-respect based on the events of October 27, 2017 and their aftermath, within the context of the usual three broad considerations: the nature of the discrimination, the complainant's vulnerability, and the effect on the complainant.

---

40 2010 BCHRT 13.

41 At para. 145.

The Tribunal found the nature of the discrimination – a sexual assault – to be at the extreme end of the spectrum. It found she was vulnerable as a woman working alone in the privacy and isolation of JS's home, though she was not as vulnerable as the complainant in *PN*, who was not only isolated but had precarious immigration status and no community or social support.

The impacts of the assault were severe: MP isolated herself, withdrew from her family and religious community, and contemplated suicide. Her fear of being shamed in her community weighed on her greatly. She was diagnosed with depression and post-traumatic stress disorder. Her entire family was affected. While the medical evidence regarding the impact of the discrimination was "somewhat sparse relative to that summarized in *Araniva*",[42] the Tribunal accepted that the discrimination had had a "devastating effect" on MP.[43] Her ability to work was impeded, her ability to participate in community and social life was hindered, and her ability to interact with her husband and children was impaired. The Tribunal awarded her $40,000 in compensation for injury to her dignity, feelings, and self-respect.

3. Basic v. Esquimalt Denture Clinic and another, 2020 BCHRT 138 (Member Juricevic)

Ms. Basic was employed by Mr. Lee as a receptionist for his denture clinic. She alleged that he sexually harassed her by slapping her buttocks, grabbing her breasts, commenting on her appearance and the size of her breasts, and trying to kiss her, then terminating her when his wife discovered what was happening. Mr. Lee defended his conduct by arguing that he and Ms. Basic had had a consensual personal relationship that ended badly, and that he had no reason to know his behaviour was unwelcome because Ms. Basic sexualized the workplace herself by engaging in discussions of sexual topics, dressing provocatively, and inviting compliments about her appearance. The Tribunal rejected these explanations as implausible and inappropriately rooted in discriminatory myths and stereotypes about women's behaviour.

In assessing damages, the Tribunal considered the nature of the discrimination as serious: Mr. Lee's harassment of Ms. Basic was persistent and escalated over a period of months, and as a result of the sexual harassment, she was terminated from her job. Citing *Senyk v. WFG Agency Network (No. 2)*,[44] the Tribunal noted that because of the significance of employment to a person's dignity, cases which involve the termination of employment will often attract significant remedies. Ms. Basic was vulnerable as a young woman working alone in the office for an older male supervisor. She had limited job experience and education, and this was her first job in a professional setting.

The impact of the discrimination on her was significant. While noting that the impact of discrimination on a person will always be subjective, the Tribunal accepted her evidence that she suffered panic attacks and feelings of anxiety, depression and stress. She experienced conflict with her fiancé and economic difficulties. Her "stoicism" did not diminish her evidence of adverse

---

42 At para. 206.

43 At para. 208.

44 2008 BCHRT 376.

impact.[45] In the Tribunal's view, the significant adverse impact was the most significant factor justifying a substantial award in this case.

However, the Tribunal found that impact on Ms. Basic was not as extreme and her vulnerability not as significant as that described in *Araniva*. It considered previous sexual harassment cases including *McIntosh v. Metro Aluminum Products and another*,[46] in which the award was $12,500; *Harrison v. Nixon Safety Consulting and others (No. 3)*,[47] in which the award was $15,000; and *Ratzlaff v. Marpaul Construction Ltd.*,[48] in which the award was $25,000. The Tribunal noted that the discrimination in *Ratzlaff* was more severe, and the impact on Ms. Basic was more analogous to that found in *Harrison* and *McIntosh*. Nevertheless, accounting for inflation and the need to provide adequate compensation to those subjected to sexual harassment, the Tribunal awarded Ms. Basic $25,000 in injury to dignity.

4. LL v. DM and The Company, 2020 BCHRT 129 (Member Ohler)

LL worked as a roofer for DM's company for approximately eight years. The working relationship was informal; DM paid her and other crew members in cash, often at the end of the day, and did not pay overtime or statutory holidays. If a crew member did not show up to work, they did not get paid. A number of facts about LL's employment were unclear on the evidence, including how often LL worked for the Company and for how many hours, the number of days the respondents had jobs available for her, the kind of work she would do, or how much she was paid.

During the employment, LL and DM formed an intimate sexual relationship. The Tribunal found that LL and DM were in a long-term, consensual, personal relationship, which stood apart from the employment relationship, though the two relationships often became muddled.

LL testified that she only had sex with DM in order to "keep him happy" and ensure she would keep getting work. She said she "had a feeling", "understood" or "just knew" that he would only give her work if she had sex with him, but the Tribunal found that there was no reasonable basis for this belief as she "was unable to point to any specific conduct on the part of DM that could on a balance of probabilities establish that he was demanding sex in exchange for work".[49] The Tribunal said: "[w]hile upheaval in the relationship at times resulted in her losing work, I am unable to find that she lost work for refusing to have sex with DM or that DM made sex a condition of his giving her work. On a balance of probabilities, I do not find that sex with DM was a prerequisite for LL's working with the Respondents".[50] Therefore, applying the *Janzen* test, there was no sexual harassment.

The Tribunal did find, however, that there were occasions where DM withheld work from LL when he became jealous, or his feelings were hurt. On four days, the Tribunal found that DM either did

---

45 At para. 196.

46 2011 BCHRT 34.

47 2008 BCHRT 462.

48 2010 BCHRT 13.

49 At para. 130.

50 At para. 133.

not pick LL up for a job, or did not tell her about where to go for work, and that he did this specifically in response to his feelings of jealousy about other men in LL's life. In effect, DM imposed employment-related consequences on LL for issues arising out of their personal relationship. This constituted an adverse impact in LL's employment with a connection to her sex, satisfying the test for *prima facie* discrimination set out in *Moore v. British Columbia (Education)*.[51]

The Tribunal noted that in *Araniva*, the Tribunal had found that an employer's decision to reduce an employee's hours of work because the employee declined an invitation to socialize with him constituted a breach of s. 13 on the basis of sex. It said:

> Here, DM's jealousy over LL's sexual relationships with other men cannot be extricated from her sex. DM imposed employment-related consequences because that was one place where he had power over LL when his feelings were hurt in their personal relationship.
>
> …
>
> If DM had concerns about LL's relationship-related behaviour, such as her hurting his feelings by seeing other men, it was incumbent on him to deal with that outside of the employment context.
>
> …
>
> …the moment DM imposed adverse employment-related consequences on LL for behaviour arising not in the employment context but in the personal context, DM breached the *Code*. Those consequences were to punish her for the behaviour he did not like in the context of their personal relationship by excluding her from the employment sphere. This is precisely the kind of conduct prohibited by the *Code*.[52]

The Tribunal also found that DM retaliated against LL when he sent a link to a pornographic video that LL had appeared in many years before to her cousin and, in all likelihood, other members of his crew.

In assessing injury to dignity and applying the three broad *Torres* factors, the Tribunal noted how courts and tribunals have recognized the importance of work in a person's life, and the general vulnerability of employees. DM imposed employment-related consequences on LL when he was jealous or his feelings got hurt, leveraging the power he had over her as her boss and making her feel like a "big joke" at work who was only good for sex, thereby adversely impacting her self-worth.[53]

The Tribunal found that while LL had some unique vulnerabilities relating to her life experience and addiction issues, she was a hard worker and had a strong network of family supports. The respondents were not her only source of employment income, and there was no evidence that she was left more vulnerable by the conduct complained of. In all of the circumstances, the Tribunal determined that an award of $15,000 was appropriate to compensate her for the injury

---

51 2012 SCC 61.

52 At paras. 175 and 180.

53 At para. 222.

she sustained to her dignity and self-respect. The Tribunal also ordered $7,500 in compensation for the retaliation.

The complainant's counsel argued for a higher injury to dignity award as a matter of access to justice for vulnerable and low-income complainants. He asserted that the Tribunal is not seeing vulnerable people before it asserting their rights because it does not issue high enough damages awards to "get people's attention."[54] He argued that injury to dignity awards of $5,000 or $10,000 are "keeping people who don't earn a lot of money silent" because their wage losses will be low, and they will be unable to afford a lawyer. He pointed to the higher awards in Ontario as making it more appealing for lawyers to get involved in those cases, thereby increasing access to justice. While the Tribunal acknowledged that there are real concerns about accessibility to justice, it did not accept the submission that "higher awards for injury to dignity, feelings and self-respect will somehow provide vulnerable people with greater access to the Tribunal by making it 'worth it' for them to pay a lawyer."[55] This is not, the Tribunal concluded, "an appropriate consideration given that the purpose of the award is to compensate for injury to dignity, feelings and self-respect."[56]

5. The Sales Associate v. Aurora Biomed Inc. and others (No. 3), 2021 BCHRT 5 (Member Cousineau)

The Sales Associate worked for Aurora Biomed Inc., a company founded and run by the respondent, Dr. Dong Liang. Her supervisor was the second respondent, Sophia Liang.

The Sales Associate alleged that, during her job interview, Dr. Liang asked her inappropriate questions about her marital status and intention to have children. She also alleged that throughout her employment, he made comments about her appearance that made her feel uncomfortable and degraded. When she complained to Ms. Liang about Dr. Liang's conduct, Ms. Liang arranged a meeting between the Sales Associate and Dr. Liang in which Dr. Liang accused the Sales Associate of defaming him and asked her to sign a statement affirming that he had not physically assaulted her. The morning after this meeting, the Sales Associate was fired.

She alleged that the interview questions, the comments, and the termination constituted discrimination in employment on the basis of sex, contrary to s. 13 of the *Code*, and that the termination also constituted retaliation for the prospect that she might file a human rights complaint, contrary to s. 43 of the *Code*.

The Tribunal did not accept the allegations of discrimination during the job interview. The Tribunal did accept that Dr. Liang made comments to the Sales Associate concerning her appearance, including calling her "beautiful girl" or "beautiful lady" on several occasions, and telling her to "smile more."

The Tribunal did not assess this conduct through the lens of "sexual harassment" and the *Janzen* test of "unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences":

---

54 At para. 214

55 At para. 217.

56 *Ibid*.

> Without intending to limit the type of conduct that may be sexual harassment, none of Dr. Liang's comments were inherently sexual. He never made any sexual advances towards the Sales Associate and there is no suggestion that he was trying to flirt with the Sales Associate or pursue a sexual relationship with her. She never felt that he was. There is no issue about whether the comments were "unwelcome". Rather, Dr. Liang's comments were misguided, non-sexual, attempts to be friendly and warm. The issue that this case presents is whether the comments adversely impacted the Sales Associate in her employment because of her sex.

Instead, the Tribunal applied the test from *Moore*, asking whether the Sales Associate had experienced adverse treatment or impact in her employment that was connected to her sex. Per s. 4 of the *Code*, Dr. Liang's intentions were not relevant to this analysis; rather, the focus was on the effect of his conduct on the Sales Associate. The Tribunal situated the comments within the larger context of subtle forces that reinforce, perpetuate, and exacerbate the disadvantage faced by many women in the workplace:

> Women have long fought for the right to be evaluated on their merits. One persistent barrier to that goal is the conflation of a woman's worth with her appearance. Society continues to impose expectations on women to be pleasing to the people around them, particularly men. Their appearance and outward manner are important components of that. While telling a woman to smile may feel like harmless banter, it imposes a burden on her to please people in a way that is disconnected from the tasks of the job, and the skills she brings to it. Calling her "beautiful" or commenting on her appearance reinforces the message that her value is in how she is seen by others and not in the strength of her ideas, her skills, and her contributions to the work. And finally, calling a grown woman a "girl" in the context of her employment infantilizes and patronizes her. It signals that she is not an adult worthy of being taken seriously in their profession. Most often, these are not burdens or messages shared with men. The impact of this type of behaviour is to subtly reinforce gendered power hierarchies in a workplace and, in doing so, to deny women equal access to that space.[57]

The effect of Dr. Liang's comments was to make the Sales Associate feel degraded and devalued in connection with her work. It left her with the impression that her value to the company came not from her skills and qualifications, but her appearance. This effect was exacerbated by the power imbalance between her and Dr. Liang, who was the founder and CEO of the company; other difficulties in their interactions and his management of her performance; and the respondents' response to her raising concerns about the comments with Ms. Liang, in which they reacted angrily and defensively and ultimately terminated her employment.

The Tribunal found that the Sales Associate's complaint of sexual harassment – and therefore her sex – was a factor in the termination, and that both the comments and the termination amounted to a violation of s. 13 of the *Code*. The Tribunal also found that the termination was retaliation for the possibility that the Sales Associate might make a complaint to the Human Rights Tribunal – notwithstanding that the respondents were not aware of the existence of the Tribunal or the protections of the *Code.* It was sufficient that they were aware that she might pursue *some legal recourse* for the discrimination.

---

[57] At para. 116.

The Tribunal awarded the Sales Associate lost wages and commissions. With respect to injury to dignity, the Sales Associate did not specify the amount she was seeking, other than to say it should not be less than $15,000.

In applying the three broad factors from *Torres*, the Tribunal determined that the seriousness of the discriminatory comments was at the milder end of the spectrum. However, the termination of her employment was serious, and violated both s. 13 and s. 43 of the *Code*.

The Sales Associate was vulnerable in a number of respects: she was relatively young, and this was her first sales position. She was under significant financial strain. She has previously been the victim of a sexual assault which the Tribunal found, citing *Araniva*, made her more vulnerable and sensitive to the types of comments Dr. Liang made to her. The power imbalance was significant; the entire management structure of the company was staffed by Dr. Liang's immediate family.

While the Sales Associate did not testify at length about the impact of the discrimination on her, and it was difficult to extricate the impact of the discrimination from the impact of other difficult events in her life, the Tribunal accepted that the discrimination had a serious impact on the Sales Associate. She was hurt, humiliated, and she lost her job. However, there was no evidence that she experienced negative mental health impacts like anxiety, depression, or post-traumatic stress disorder – factors justifying a higher award in cases like *Araniva* and *MP*. The Tribunal concluded that while the circumstances of the case were not as severe as those in the cases the Sales Associate relied on, "damage awards have increased in the period since many of those cases were decided and the trend for damages is upwards".[58] Taking all these factors into account, the Tribunal ordered the respondents to pay $20,000 in compensation for injury to dignity.

---

[58] At para. 196.