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Smith v New Age Automation, 2024 MBHR 2

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HUMAN RIGHTS ADJUDICATION PANEL

Citation: 2024 MBHR 2

IN THE MATTER OF: A complaint by Britney Smith v. New Age Automation Group Inc. alleging a breach of s. 19 of *The Human Rights Code*

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

BETWEEN:

BRITNEY SMITH,

Complainant,

AND

NEW AGE AUTOMATION GROUP INC.,

Respondent.

PANEL: Tracey L. Epp, K.C., Adjudicator

APPEARANCES:

The Complainant, in person

For the Commission: Melanie Wire and Sherri Walsh

For the Respondent: Robert Levesque

DECISION

[1] This is a complaint of discrimination based on harassment as defined by Section 19(2) of *The Human Rights Code*, C.C.S.M., C. H175 (the "***Code***"). The Complainant (pronouns she/her) was an employee of the Respondent New Age Automation Group Inc. ("**New Age**"). At all material times Robert Levesque ("**Levesque**") (pronouns he/him) was the sole director and officer of New Age as well as the President. The Complainant alleges that during the course of her employment, she was subjected to a course of abusive and unwelcome conduct or comment in her employment on the basis of her sex, and/or a series of objectionable and unwelcome sexual solicitations or advances, and/or a sexual solicitation or advance made by a person in a position to confer or deny a benefit, contrary to Section 19 of the *Code,* and further, that New Age is vicariously liable for such actions.

[2] New Age did not file a response to the Complaint.

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PRELIMINARY MATTERS

[3] The Complaint was referred to adjudication in September 2021. Initially, New Age and Levesque were named are respondents. There were no objections to my designation as adjudicator. A pre-hearing conference was conducted virtually on October 4, 2021, at which time Levesque advised that both he and New Age were bankrupt. Hearing dates were set for January 2022. In December 2021 the January 2022 dates were adjourned by consent.

[4] A second pre-hearing conference was conducted virtually on December 17, 2021. In January 2022 counsel for the Commission advised that conduct of the matter would be assumed by external counsel. Ultimately, Ms. Wire and Walsh were appointed as counsel and a third pre-hearing conference was conducted virtually on May 11, 2022. Hearing dates were set for December 13-16, 2022, inclusive, as were dates for pre-hearing disclosure. It was at that time that counsel for the Commission advised that the Commission would be proceeding against New Age only.

[5] In the weeks leading up to the December hearing dates several issues were raised. Levesque alleged that he was not comfortable attending a hearing with the Complainant.

[6] Further, counsel for the Commission alleged that New Age had failed to provide disclosure as agreed upon. New Age then provided partial disclosure, limited to its witness list. In response to the witness list, the Complainant alleged that one of the witnesses was her former partner who was convicted of assaulting her, was incarcerated during all times relevant to the Complaint, and was being called to intimidate her.

[7] Counsel for the Commission brought forward a motion seeking, amongst other things, an order for disclosure of all documents and production of can-say statements from New Age, which motion was heard virtually on December 13, 2022. A preliminary award was issued the same day, a copy of which is attached to this Award.

[8] The within matter then proceeded to hearing in person on December 14, 2022.

EVIDENCE

The Complainant

[9] The Complainant testified at the hearing. I have considered her testimony in its entirety for the purposes of this Award. Her testimony is summarized below.

[10] In November 2015 the Complainant commenced employment with New Age as an executive assistant. Shortly thereafter, Levesque began making sexualized comments to her. When Levesque saw a photo of the Complainant's sister, he said "I like the original version [the Complainant] better". When the Complainant was making coffee, Levesque would look at her rear end and comment "wow, that ass", that he loved when the Complainant wore certain pants, and "how can I concentrate with you in the office". The Complaint testified that Levesque would look down her shirt, make comments about her breasts and ask if he could touch them.

[11] The Complainant testified that Levesque's behaviour made her uncomfortable and she did not know how to respond. She testified that they told Levesque "You're my boss" but that she tried to ignore his behavior. She said she felt violated but needed the job. Her father had recently passed away, and she wanted to be financially independent.

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[12] The Complainant testified that on the evening of December 3, 2015, she was at her second job and Levesque repeatedly called her cell phone. When she finally answered, Levesque said that he was just checking to make sure that she was “okay”. Levesque also texted the Complainant that evening. Those text messages were produced. Levesque’s final text to the Complainant was “I’m shit faced and naked help me please.” This confused the Complainant and thought it was sent to her in error. She thought it was not appropriate for Levesque to speak to her that way. She refused to pick him up but offered to call Levesque a taxi.

[13] On December 8, 2015, Levesque again texted the Complainant while she was at her second job. These text messages were produced. Levesque told the Complainant “I’m drunk and naked you need to pick me up”. When the Complainant said she was at work and suggested Levesque call a cab, Levesque texted “No. You need to pick me up. I’m naked and drunk and afraid.” The Complainant replied, “you are my boss you shouldn’t be calling me over and over.” When the Complainant ignored Levesque’s calls, he texted “wow”. The Complainant said she felt very uncomfortable by these exchanges. The next day, she told Levesque to stop calling her.

[14] Prior to Christmas 2015, the Complainant told Levesque about her father’s death and her aunt’s illness and the financial burden she was under. She said in hindsight, this confession made her vulnerable to Levesque.

[15] In mid-January 2016, the Complainant’s aunt was diagnosed with cancer. It was also around the one-year anniversary of her father’s death. The Complainant felt trapped as she needed her income from New Age to help support her family and aunt. The Complainant says that Levesque held this over her. He made comments to the effect that she should be with him because he had money and could take care of her.

[16] The Complainant testified that on January 15, 2016, she was working at her desk when Levesque stood beside her, put his foot on the desk and angled his hips so that his crotch was near her face, and made a humping motion. She told him to stop. Later in the day, the Complainant yawned, and Levesque made sexualized comments about her mouth being open. When the Complainant objected, Levesque pretended not to hear her.

[17] The Complainant testified that this incident made her feel sick, ashamed, disgusted, and scared.

[18] The Complainant also testified about in incident that occurred on or about January 29, 2016. The day was casual Friday, and she was wearing jeans, a t-shirt, and a blazer. She stated that Levesque came upon her and put his hand on the small of her back where her jeans and t-shirt met. She told Levesque that he could not touch her, and that he just laughed. She said that he often told her how good she looked while she was working, or that she was sexy. He frequently commented on how she looked. She said this incident made her feel violated and sick, she was anxious all the time, she worried about what she was wearing and worried that Levesque would touch her.

[19] On the same day, the Complainant said that Levesque touched her face, neck, and hair when she was on the phone on a business call. She motioned for Levesque to leave her alone, to which he said “what”? At this point, the Complainant no longer wanted to attend at work.

[20] The next incident that the Complainant spoke of occurred on February 11, 2016, when Levesque told the Complainant he had a Valentine’s Day gift for her. The Complainant said that she told Levesque she did not want anything from him. The next day, Levesque asked for the

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Complainant's car keys. She thought he wanted to move her car. When the Complainant went to her car, there was a jewelry box with a diamond necklace in the shape of a heart sitting on the seat. The Complainant told Levesque to take it back. He refused. She told him she would not wear the necklace. The Complainant also produced screen shots of text messages between she and Levesque during which she refused the gift.

[21] The Complainant kept the necklace at her mother's home. It was produced as an exhibit.

[22] The next incident the Complainant testified to occurred on or about February 26, 2016. She, Levesque and others from New Age attended Whiskey Fest. According to the Complainant, Levesque made numerous comments about how good she looked, that she was sexy, that he wanted to jump her bones. Another employee, who did not testify, told her that Levesque was in love with her. During the event, Levesque grabbed and slapped her rear end. This made her feel shocked, embarrassed and humiliated.

[23] The Complainant testified to another incident in February 2016 when she was driving to a store with Levesque for office supplies. She did not want to go with him but felt she could not say no. The Complainant said Levesque made inappropriate comments to her of a sexual nature, professed his love for her, touched her face and hair and the inside of her thigh. She said that Levesque played romantic music and persisted, even when she objected and said she was in a relationship. She said that Levesque told her she should not be with her boyfriend, and he kept singing to her. After she jumped out of the vehicle, Levesque caught her, pulled her into him and grabbed her rear end. He continued to profess his love to the Complainant, and she continued to reject his advances, even while shopping. He repeatedly stated that he had money and could take care of her.

[24] While the Complainant testified to this incident, I noted that Levesque was smirking in a disrespectful manner. To the contrary, the Complainant was shaking and avoided eye contact with Levesque. The Complainant said that his incident made her feel frightened.

[25] The Complainant also testified to an incident that occurred on or about March 7, 2016, when Levesque asked her to get under his desk – the implication related to oral sex. The Complainant said that Levesque often made these types of comments and thought perhaps up to fifteen times. She said these comments made her feel gross, disgusting, violated, anxious, depressed and physically ill.

[26] On or about March 16, 2016, the Complainant says that Levesque put his hand on her back and undid her bra, and then proceeded to brag about it. This made her feel violated.

[27] The Complainant also testified that on or about April 5, 2016, she submitted two reports to Levesque, and that one had an error. Levesque yelled, swore and screamed at her, calling her names. The Complainant apologized but Leveque could not calm down. He told the Complainant to leave and take the rest of the week and she left. When she was in her car, Levesque approached her. She did not engage and drove away. She stopped shortly after that to try and calm down. Later, the Complainant emailed Levesque and resigned, giving two weeks' notice. When the Complainant returned to work, she learned that Levesque told staff she was fired for giving him the finger while in her car. Later, Leveque threatened the Complainant with legal action if she did not respect a non-disclosure agreement she allegedly signed. That agreement was never produced by New Age.

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[28] The Complainant testified that her experience with Levesque damaged her dignity, that she had lost her dignity and that this caused her to not trust herself. She said that the experience changed her, the essence of her, and prolonged her previous trauma. The experience with Levesque made her physically ill. The Complainant did seek treatment, and as of the date of hearing was on a list for a new counsellor.

[29] On cross examination, the Complainant denied making up her evidence, and denied "doctoring" timestamps on the screenshots provided. The Complainant denied that she and Levesque had a sexual relationship or that the Complainant pursued a sexual relationship with Levesque. Levesque put to the Complainant that she held the company's website "hostage" in exchange for a monetary payment, which the Complainant denied. Levesque attempted to cross examine the Complainant on facts not raised in the Complaint or in evidence. Levesque was asked if he would be calling evidence on his behalf and after a brief adjournment, indicated that he would not be calling any evidence in support of his allegations. Before concluding his cross examination, Levesque was warned that if he did not challenge the Complainant's evidence, I could accept it. Levesque chose not to ask any additional questions.

[30] The Commission did not call any additional witnesses. New Age did not call any witnesses or produce any other evidence.

SUBMISSIONS OF THE PARTIES

[31] The Commission made submissions and produced authorities on its own behalf and on behalf of the Complainant. New Age did not make any submissions nor respond to those of the Commission.

[32] The Commission argued that the prohibition against harassment and its definition is found in Section 19 of the *Code.*

[33] The Commission reiterated that this section codifies principles which were set out in the Supreme Court of Canada decision in *Janzen v. Platy Enterprises Ltd.* 1989 CanLII 97 (SCC), [1989] 1 S.C.R. 1252 and have been reaffirmed in many cases since then. In any human rights complaint, the standard of proof is the civil standard of proof on a balance of probabilities and the standard of conduct the respondent is expected to meet is the civil standard of a reasonable person.

[34] The Commission addressed the issue of how New Age may be held liable pursuant to section 19(1) of the *Code*. The Commission argued that section 19(1) provides that "no person who is responsible for an activity or undertaking to which the *Code* applies" may harass or knowingly permit harassment. *The Interpretation Act* provides that the word "person" includes a corporation and therefore, New Age can be liable if it is responsible for an activity or undertaking to which the *Code* applies.

[35] The Commission also argued that the Complainant's evidence was unchallenged on other key points:

1) that the Complainant was employed by New Age as evidenced by a T4 from New Age and emails evidencing the Complainant as an executive assistant with New Age;

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2) that Levesque was the sole officer and director of New Age as evidenced by the 2015 Annual Return for New Age and the Companies Office File Summary for New Age as of March 24, 2022;

3) that the sole shareholder of New Age was 5729841 Manitoba Ltd. (the "Numbered Company") as evidenced by the same documents;

4) that Levesque was the sole officer, director and shareholder of the Numbered Company as evidenced by the Companies Office File Summary as of December 5, 2022.

[36] Taken together, the Commission argued, that Levesque was at all material times hereto the sole director and officer of New Age, the Numbered Company was the sole shareholder of New Age, the Levesque was the sole officer, director and shareholder of the Numbered Company, and therefore, there was no distinction between New Age and Levesque.

[37] In support of this contention, the Commission referred to the Alberta Court of Appeal's decision in *698828 Alberta Ltd. v. Elite Homes (1998) Ltd*., 2020 ABCA 154 where at paragraph 116, the Court stated that "corporations can only act through their human agents, and any distinction between a corporation and its officers is prima facie artificial. The knowledge and intention of one are the knowledge and intention of the other".

[38] The Commission also referred to VanDuzer, *"The Law of Partnerships and Corporations*", where at page 207 the writer wrote that "the corporation may be directly liable for a tort if the person committing the tort is not merely an employee but can be considered the directing mind and will of the corporation in such a way that the acts done are the acts of the corporation itself".

[39] The Commission therefore argued that Levesque was the directing mind of New Age and further, that his actions were in essence the actions of New Age. Accordingly, New Age knowingly permitted, or failed to take steps to terminate the harassment of the Complainant by Levesque, in breach of section 19(1) of the *Code*. In other words, it cannot be said that New Age did not know of Levesque's harassment of the Complainant because, in effect, it was New Age's conduct too.

[40] To put it another way – Levesque was the directing mind of New Age. It was both Levesque's and New Age's legal obligation to terminate the harassment. It seems trite to say that given that Levesque was the perpetrator, New Age did not know of the harassment.

[41] The Commission also addressed the issue of whether Leveque's actions constituted harassment as defined by the *Code*. Section 19(2) of the *Code* defines harassment, but the Commission focused on 19(2)(c) – a sexual solicitation or advance made by a person who is in a position to confer upon or deny any benefit on 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.

[42] The Commission argued that courts have recognized that sexual harassment is not limited to actions but includes comments with sexual innuendo. It argued that Levesque as the sole officer and director of New Age was in a position to confer upon or deny a benefit to the Complainant. In determining whether the Complainant was harassed, the Commission encouraged me to find that because the Complainant is a woman, the standard that ought to be applied was that of a reasonable *woman* and relied upon the Federal Court of Appeal's decision in *Stadnyk v. Canada*

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(Employment & Immigration Commission), 2000 CarswellNat 1593, paragraph 25, in support of its submission.

[43] Further, the Commission acknowledged that while there is still an obligation on a complainant to prove that a respondent's conduct was unwelcome, it argued that as it was determined by the British Columbia Human Rights Tribunal in *Ms. K v. Deep Creek Store and another*, 2021 BCHRT 158, paragraph 89, a complainant can prove the conduct was unwanted by establishing that the conduct had an adverse impact upon them. The Commission argued that the evidence was clear that Levesque's conduct was unwelcome to the Complainant, and although the Complainant did not necessarily have to rely upon adverse impact for that reason, the evidence nonetheless established that Levesque's conduct had an adverse impact upon her.

[44] Further, the Commission argued that a power imbalance is a fundamental factor to consider in determining whether particular conduct is unwelcome. In *AM v. Kellock*, 2019 HRTO 414 at paragraph 112, the Ontario Human Rights Tribunal found that a power imbalance is a fundamental factor in considering whether particular conduct amounts to unwelcome conduct. Further, the greater the power imbalance, the greater the onus.

[45] In that regard, the Commission argued that the only evidence I had before me was the Complainant's own evidence. Neither New Age nor Levesque filed a reply, and New Age did not call or file any evidence. New Age did not deny the Complainant's evidence nor put forward a different version of events or any evidence that would put the Complainant's credibility into question.

[46] In that regard, the Commission acknowledged that while the Complainant's evidence was unchallenged, an assessment of her credibility was necessary to determine whether I should accept it.

[47] The Commission referred to Ontario Court of Justice's decision in *R. v. Taylor*, (2010) ONCJ 396 which explains credibility as having two dimensions – honesty and reliability. Honesty relates to a witness' sincerity, candour and truthfulness. The second refers to several different factors which impact on the accuracy of a witness' perception, memory, and testimonial recitation.

[48] The Commission argued that the Complainant was credible – sincere, and occasionally emotional. She spoke of matters that occurred several years ago but had independent recollection of events, often adding additional detail. She was able to recall specifics, how she felt and what she thought. Further, the Complainant's testimony was supported by objective evidence that was contemporaneous to the events in question including screenshots of text messages, emails and the necklace. The Commission argued that by keeping the necklace and not selling it, the Complainant showed that she was not motivated by financial gain and was therefore credible.

[49] As a result, the Commission submitted that the Complainant's testimony ought to be accepted in its entirety.

[50] In that regard, the Commission reviewed the evidence of the Complainant in detail. It argued that Levesque knew the Complainant was vulnerable, and then attempted to use a non-disclosure agreement allegedly signed by her to control her. While the Complainant initially thought the New Age workplace to be fun and laidback, she was subjected to approximately thirteen unwelcome sexual solicitations or advanced by Levesque, and when the Complainant ignored or rejected his advanced, he would threaten her by words to the effect of "okay, fired".

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[51] In applying the law to the evidence, the Commission argued that the events as described by the Complainant consisted of comments, gestures, propositions and physical touching that constituted sexual solicitations or advances by Leveque for which New Age is liable. It argued that Levesque was in a position to confer a benefit upon the Complainant, and that he knew or ought to have known that his conduct towards the Complainant was unwelcome. Further, the power imbalance between Levesque and the Complainant placed a greater on Levesque to ensure that his actions were not unwelcome. Levesque frequently reminded the Complainant of the power he had over her and knew that she was vulnerable and financially desperate.

[52] In the alternative, beyond the Complainant communicating to Levesque that his conduct was unwelcome, the impact of the conduct on the Complainant established that it was unwelcome. The Commission concluded that the Complainant was subjected to harassment as defined by the *Code*, and that New Age through Levesque knew of the harassment and failed to terminate it, in breach of its obligations pursuant to section 19(1)(b) of the *Code*.

[53] In terms of remedy, the Commission sought a remedial order pursuant to section 43(2) of the *Code*. In doing so, the Commission acknowledged that while the *Code* is remedial not punitive legislation, the purpose of ordering compensation under the *Code* is to put a complainant back in the position they would have been had the discrimination not occurred.

[54] Specifically, the Commission sought:

1) An Order that New Age provide the Complainant with a written apology pursuant to section 43(2)(a) of the *Code*;

2) An Order that if New Age is “reconstituted”, it submit to training with respect to harassment on the basis of sex as determined by the Commission, and further, that Levesque personally submit to such training;

3) An Order that New Age compensate the Complainant for financial losses sustained as a result of the harassment and that she be compensated for the loss of income from her last date of employment (April 5, 2016) until the Respondent was dissolved (September 20, 2019), which the Commission calculated as $92,178.68, less deductions and amounts earned from other sources; and

4) An order that New Age pay to the Complainant $25,000.00 in damages for injury to dignity, feelings and self-respect pursuant to section 43(2)(c) of the *Code*.

[55] Regarding the quantum of damages, the Commission argued that the maximum damage award was warranted in this case. The Commission acknowledged that $25,000 is the maximum amount under this remedial heading and that an award of damages under this heading “must be proportionate to the seriousness of the contravention and its effects on the party” and submitted that “if there was ever a case to make the maximum award of $25,000 in general damages, this is it.”

[56] In support of its position, the Commission relied upon the Manitoba Human Rights Adjudication Panel decision in *T.M. v. Government of Manitoba*, 2019 CarswellMan 1002 where at paragraph 293, the Adjudicator cited the factors set out by the Ontario Human Rights Tribunal in *Sanford v. Koop* that should be considered in awarding general damages:

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- 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.

[57] Further, at paragraph 295, the Adjudicator went on to discuss the Ontario Human rights Tribunal's approach to general damages from *Arunachalam v. Best Buy*, which set out two criteria:

- The first criteria recognizes that injury to dignity, feelings 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; and
- The second criteria recognizes the applicant's particular experience and response to discrimination. Damages will be generally at the high end of the relevant range when the applicant has experienced particular emotional difficulties because of the event and when his or her particular circumstances make the effects particularly serious.

[58] The Commission submitted that New Age's conduct was egregious, that the Complainant was subjected to unwelcome sexual solicitations and advances by Levesque almost every day of her employment, and the only reason that the conduct stopped was because she left her position. The Commission argued that Levesque's conduct was invasive, he looked down the Complainant's shirt, he put his hand down the back of her pants, he undid her bra, and he slapped her rear end. The Commission characterized this as very serious conduct.

[59] Further, the Commission submitted that some of Levesque's conduct was particularly frightening. He effectively imprisoned the Complainant in his vehicle. He played loud music, sang at her and touched her while they were in a moving vehicle. He took her car keys to leave her an unknown gift in her car which turned out to be a diamond necklace.

[60] The Commission also spoke to the Complainant's vulnerabilities, of which Levesque was aware, and exploited. Further, Levesque constantly reminded the Complainant of the power imbalance between them and tried to get her to "be with him" because it would have made her dad proud. He had her sign a non-disclosure agreement to prevent her from talking about his conduct at work.

[61] In addition, the Commission spoke about the impact that Levesque's conduct had on the Complainant and submitted that it was struck by the "loss of self-respect, dignity, self-esteem and confidence" factor from *Sanford v. Koop* because that was precisely what the Complainant described in her evidence, unprompted, and that the Complainant was quite simply a different person because of Levesque's conduct.

[62] The Commission also raised New Age's pre-hearing conduct including its refusal to provide documents, authorities, can-says and the threat to call the Complainant's former, abusive partner as a witness as evidence of its on-going harassment of the Complainant.

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[63] The Commission also raised the Manitoba Human Rights Adjudication Panel decision in *Re: Jedrzejewska and A+ Financial Services Ltd*., 2016 CarswellMan 462 wherein the respondents were ordered to pay $20,000 in general damages to each complainant for conduct that the Commission characterized as less egregious than in the present case, including fewer incidents of physical contact and less invasive touching. In making his award of general damages, the Adjudicator said at paragraph 60 that:

> …It is important that, where a contravention of the *Code* has been found, the consequences should not be trivialized. The contraventions in the instant complaints were grievous and ongoing, and the complainants suffered egregious indignity in their workplace. In addition, economic circumstances left them feeling trapped and without alternative but to endure the conduct of [the respondent].

[64] In conclusion, the Commission submitted that all of New Age's conduct took place in the context of employment. At paragraph 308 of *T.M*. *supra*, the Adjudicator wrote of 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..."

DECISION

[65] The prohibition against harassment and its definition is found in Section 19 of the *Code* which reads:

> **Harassment**
>
> 19(1) No person who is responsible for an activity or undertaking to which this *Code* applies shall:
>
> (a) harass any person who is participating in the activity or undertaking; or
>
> (b) knowingly permit, or fail to take reasonable steps to terminate, harassment of one person who is participating in the activity or undertaking by another person who is participating in the activity or undertaking.
>
> **"Harassment" defined**
>
> 19(2) In this section, "harassment" means:
>
> (a) a course of abusive and unwelcome conduct or comment undertaken or made on the basis of any characteristic referred to in subsection 9(2); or
>
> (b) a series of objectionable and unwelcome sexual solicitations or advances; or

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> (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.

[66] This section codifies principles which were set out by the Supreme Court of Canada decision in *Janzen, supra.* In any human rights complaint, the standard of proof is the civil standard of proof on a balance of probabilities and the standard of conduct the respondent is expected to meet, subject to my comments below, is the civil standard of a reasonable person.

Liability of New Age for the actions of Levesque

[67] The Commission's submissions related to this issue are previously set out in this award. I accept the submissions of the Commission and find that New Age can be and is liable for the actions of Levesque. The evidence showed that the Complainant was employed by New Age, and that at material times hereto Levesque was the directing mind of New Age and that in essence, there was no distinction between New Age and Levesque.

[68] As in *Elite, supra,* the knowledge and intention of one was the intention of the other. To do otherwise would be prima facie artificial. Further, at paragraph 116 of *Elite, supra,* the Court wrote that corporate variation has always been viewed with caution by the courts.

[69] In *A+ Financial*, *supra,* three independent contractors filed complaints of harassment against the corporate respondent. Wayne McConnell was the president and sole director and owner of the corporate respondent and was found to be the perpetrator of the conduct complained of. At para 21 the Adjudicator found that although there were two respondent parties, they were in effect the same person. He said that at all material times, the individual respondent was the president and sole director and shareholder of the corporate respondent and was therefore "very much" McConnell's company. He therefore found that the "artifice of the corporate veil served no purpose" and while examining the evidence, he "readily attributed the actions of one respondent to the other, and vice versa".

Credibility of the Complainant

[70] The Commission acknowledged that while the Complainant's evidence was unchallenged, an assessment of her credibility was necessary to determine whether I should accept it. For the reasons set out below, I find that the Complainant was a credible witness, and I accept her testimony in its entirety.

[71] The Commission referred to the decision in *Taylor*, *supra*, regarding the two dimensions of credibility, those being honesty and reliability. However, the Commission also provided to me *McCharles v. Jaco Line Contractors Ltd*. 2022 AHRC 115 in which the Adjudicator cited with approval the seminal case of *Faryna v. Chorny*, 1951 CanLII 252 (BCCA) in which O'Halloran, speaking for the court, said:

> "The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with

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> the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness is such case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions."

[72] In *McCharles,* the Adjudicator also listed the factors used by courts, arbitrators and adjudicators in assessing credibility, including internal consistency, ability to apprehend and recollect, the witnesses opportunity and/or inclination to tailor evidence, the existence of corroborative and/or confirmatory evidence, the motives of witnesses and/or their relationship with the parties, and the failure to call or produce material evidence.

[73] Assessing credibility is a complex exercise, and a witness can be credible on one point and not on another.

[74] I find that the Complainant was credible. She spoke of matters that occurred several years ago, referring to the Complaint itself from time to time, but at other times had independent recollection of events. She added additional details, including the song that Levesque sang to her in the vehicle. She was able to recall specifics, how she felt and what she thought. The Complainant was consistent throughout.

[75] Further, the Complainant's testimony was supported by objective evidence that was contemporaneous to the events in question including screenshots of text messages, emails and the necklace.

[76] For instance, the Complainant produced screenshots of a text message between Levesque (on the left) and the Complainant (on the right):

> -Call me please
>
> -I'm just at my other job
>
> -Ok call me when your done please just to make sure your ok
>
> -I'm shit faced and naked help me please

[77] And a screenshot from another text message between Levesque and the Complainant:

> -Help!
> -I'm calling you
> -Help me
>
> -Hey sorry I'm at chapters what do you need
>
> -I'm drunk and naked
> -You need to pick me up
>
> -Bobby I'm at Chapters polo park
> -Can you not call a cab?
>
> -No
> -You need to pick me up
> -I'm naked and drunk and afraid

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-You are my boss you shouldn't be calling me over and over
-Lmao

-Wow your ignoring my calls.
-Wow

-Well I'm sorry I don't know what to say other than call a cab or I can call one for you?

-Wow

-I thought you were probably just trying to be funny. Sorry? I can call you a cab if you want otherwise I'll see you at the office tomorrow morning

[78] The Complainant also provided a screenshot of text messages between she and Levesque regarding the necklace:

-I can't accept this. That's crazy
-Its so beautiful
-But I can't accept it

-Yes

-I so can't
-I'm sorry can't answer I'm in icu

-K well you can the diamond moves everytime your heartbeats it's not as beautiful as you but closest thing I could find and yes its yours no way I can take it back

-I can't wear that bobby then I have to keep it a secret about where it came from and I don't want to lie. Its so beautiful. It is. But I can't lie about it and keep it a secret and that's just a lot.

[79] For the reasons set out above, I accept the evidence as put forward by the Complainant and the Commission.

Did the Actions of Levesque constitute prohibited conduct?

[80] The Commission asked that I assess the evidence on the standard of the reasonable woman, given that the Complainant is a woman. In *Stadnyk*, *supra*, the Court held that the female plaintiff's complaint ought to be assessed based on the standard of the reasonable woman in order to determine whether or not the conduct complained of constituted harassment. In adopting the perspective of the reasonable woman, the Court said that "we believe that sex by a reasonable person's standard tends to be male biased and tends to systemically ignore the experiences of women".

[81] Whether assessed on the standard of the reasonable man, woman or person, I find that the conduct to which the Complainant was subjected to was offensive, demeaning, objectionable, abusive and unwelcome. In *McCharles, supra,* paragraph 58, the Adjudicator wrote:

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> "The demeaning and cavalier way that the Owner treated this complainant is worthy of strong sanction. Women should not be forced to make a choice between career advancement and a safe workplace. Company owners especially owe a duty to their staff to create and maintain a safe work environment. The poisoned work environment where the complainant was exposed to demeaning names, the Owner's gossip about wanting to sleep with her, and then finally being attacked physically is appalling. No person should have to work in these conditions."

[82] Further, at paragraph 78 the Adjudicator wrote that "…objectively, unwanted touching of a woman's breasts by her boss is far along the seriousness scale of possible sexual harassment…sexually touching of another individual without clear consent…is offensive in the workplace".

[83] Section 19(2)(b) defines harassment as a series of objectionable and unwelcome sexual solicitations or advances. The events described by the Complainant constituted sexual solicitations and advances, including but not limited to Levesque's comments to the Complainant, touching of the Complainant, and propositions related to a possible relationship between the two. The Complainant testified that they were objectionable to her and unwelcome by her, and subject to my comments below, I find that on the reasonable man, woman or person standard, they were objectionable and unwelcome. As a result, I find that Levesque's actions were in breach of section 19(2)(b) of the *Code*.

[84] Section 19(2)(c) defines harassment as a sexual solicitation or advance made by a person who is in a position to confer upon or deny a 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.

[85] I have already found that Levesque's actions constituted sexual solicitations, and further, that as the directing mind of New Age, was in a position to confer upon or deny a benefit to the Complainant. That then takes us to the question of whether Levesque knew or ought reasonably to know that his advances were unwelcome.

[86] In *Kellock, supra*, paragraph 112 the Tribunal dealt with a newly hired, probationary employee working as a housekeeper in a hotel. The Tribunal found that she was subjected to sexual harassment, unwanted touching, sexual assault, unwelcome sexual solicitation and advances which the respondent knew or ought to have known were unwelcome. Like the Complainant, the victim was vulnerable and afraid to lose her job. The Tribunal also found that power imbalance is a fundamental factor to consider in determining whether conduct amounts to unwelcome harassment, solicitation or advances. The greater the power imbalance, the greater the onus. In this case the power imbalance was patent, the respondent at the highest person in the hierarchy and the complainant the lowest.

[87] Further, at paragraph 113 the Tribunal wrote that "the obligation on the respondent to establish that his interest in the applicant was not welcome could not be clearer. He ought to have known that his actions were unwelcome." At paragraph 127 the Tribunal cited the decision in *Strudwick* which listed the factors to consider in determining whether certain behaviour was unwelcome, including, the immediate impact of the discrimination or harassment, ongoing impact of the discrimination or harassment, the complainant's vulnerability, objections to the offensive conduct, the respondent's knowledge that the conduct was not only unwelcome but viewed as

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harassment or discrimination, the degree of anxiety the conduct caused and the frequency and intensity of the conduct.

[88] In *Ms. K., supra,* page 88, the Tribunal confirmed that a complaint must prove that conduct was unwelcome but warned against reliance on gender-based myths and stereotypes about complainants in sexual harassment cases.

[89] I agree with the Commission that the only evidence I have before me is the Complainant's own evidence. Neither New Age nor Levesque filed a reply, and New Age did not call or file any evidence. New Age did not deny the Complainant's evidence nor put forward a different version of events or any evidence that would put the Complainant's credibility into question. I have already found the Complainant to be credible and have accepted her evidence in its entirety.

[90] The Complainant testified that she repeatedly told Levesque that she was not interested in a relationship with him, that she objected to his comments, touching and propositions, that she was in a relationship with another person, and that she did not want his gifts. Given that I have accepted the Complainant's evidence, I also find that Levesque knew or ought to have known that his conduct was unwelcome.

[91] In the alternative, beyond the Complainant communicating to Levesque that his conduct was unwelcome, the impact of the conduct on the Complainant established that it was unwelcome. As in *Kellock, supra,* the power imbalance between the Complainant and Levesque was patent. As set out in *Strudwick, supra*, the Complainant experienced and immediate and on-going impact from the conduct. As in *T.M., supra*, the Complainant was subjected to harassment by her employer, New Age, via its directing mind, Levesque, and in doing so, New Age as her employer failed to protect her. As in *Ms. K, supra*, Levesque's conduct had a lasting impact on the Complainant.

[92] The Commission did not rely upon section 19(2)(d) of the *Code* that defines harassment to include a reprisal or threat of reprisal for rejecting a sexual solicitation or advance. However, according to the Complainant, she resigned from her position with New Age after Levesque blew up at her for making an error. Within days, Adam Lessard, on behalf of New Age, advised the Complainant of the termination of her employment. Based upon the evidence, it seems that Levesque may have retaliated against the Complainant, for rejecting his advances.

Conclusion

[93] For the reasons set out above, I find that the Complainant was subjected to harassment as defined by the *Code*, and that New Age through knew of the harassment and failed to terminate it, in breach of its obligations pursuant to section 19(1)(b) of the *Code*.

REMEDY

[94] Having found that New Age contravened the *Code*, section 43(2) affords me with discretion to order New Age to:

> (a) do or refrain from doing anything in order to secure compliance with this *Code*, to rectify any circumstances caused by the contravention, or to make just amends for the contravention;

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(b) compensate any party adversely affected by the contravention for any financial losses sustained, expenses incurred or benefits lost;

(c) pay any party adversely affected by the contravention damages in such amount as I deem just;

(d) pay any party adversely affected by the contravention a penalty or exemplary damages in such amount, subject to subsection 3, as I consider just and appropriate; and

(e) adopt and implement an affirmative action program or other special program of the type referred to in 11(b), if the evidence at the hearing discloses that a party engaged in a pattern or practice contravening the *Code*.

[95] I am mindful of the warning found in *Kellock, supra*, paragraph 125 that compensation for a breach of the *Code* is compensatory, not punitive. However, the purpose of ordering compensation under the *Code* is to put a complainant back in the position they would have been had the discrimination not occurred.

[96] The Commission sought an Order that New Age provide the Complainant with a written apology pursuant to section 43(2)(a) of the *Code*. Setting aside the question of whether I have jurisdiction to make such an order, it is my observation that New Age is not sorry, and an ordered apology would be hollow and false. Accordingly, I decline to make such an order.

[97] The Commission also sought an Order that if New Age is "reconstituted" in any way, it submit to training with respect to harassment on the basis of sex as determined by the Commission, and further, that Levesque personally submit to such training. I find that such an order is not only reasonable, but necessary in these circumstances, and I so order.

[98] The Commission sought an Order that New Age compensate the Complainant for financial losses sustained as a result of the harassment and that she be compensated for the loss of income from her last date of employment (April 5, 2016) until the Respondent was dissolved (September 20, 2019), which the Commission calculated as $92,178.68, less deductions and amounts earned from other sources. I find that pursuant to section 43(2)(b) of the *Code* I have the jurisdiction to make such an order. However, I do not agree with the Commission's calculation of lost wages.

[99] According to the Complainant, she earned $8,379.88 during the first four months of 2016. This equates to $2,094.97 per month. There were eight months in 2016 during which she lost wages, twelve months in 2017, twelve months in 2018 and just under nine months in 2019, for a total of 41 months during which the Complainant lost wages. 41 months multiplied by $2,094.97 equals $85,893.77. Accordingly, I order New Age to pay to the Complainant the lost wages in the amount of $85,893.11 less deductions, and less amounts earned from other sources during that period of time.

[100] The Commission also sought an Order that New Age pay to the Complainant $25,000.00 in damages for injury to dignity, feelings and self-respect pursuant to section 43(2)(c) of the *Code*.

[101] The Commission acknowledged that $25,000 is the maximum amount under this remedial heading and that an award of damages under this heading "must be proportionate to the

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seriousness of the contravention and its effects on the party" and submitted that "if there was ever a case to make the maximum award of $25,000 in general damages, this is it."

[102] The Adjudicator in *T.M. supra,* citing the decisions in *Sanford and Arunachalam,* set out the criteria to be considered in awarding general damages.

[103] I agree that New Age's conduct was egregious, that the Complainant was subjected to unwelcome sexual solicitations and advances by Levesque almost every day of her employment, and the only reason that the conduct stopped was because she left her position. I concur that the conduct that the Complainant was subjected to was invasive and constituted sexual assault. I also find that the Complainant was frightened by the conduct, particularly the vehicle incident. I also find that the Complainant was vulnerable, and that Levesque knew of her vulnerability and exploited it. Further, I find that Levesque constantly reminded the Complainant of the power imbalance between them and tried to get her to "be with him".

[104] In *Kellock, supra,* paragraph 128 the Tribunal said that the highest human rights awards involve sexual harassment, solicitation and advances involving sexual conduct by a person in a position of power over a vulnerable employee. The Tribunal considered awards in the range of $40,000.00 to $200,000.00 and ordered that the complainant in that case be awarded $75,000.00.

[105] In *T.M. supra*, the Adjudicator awarded the complainant damages in the amount of $75,000.00 in order to send a message to the employer.

[106] In *Render v. ThyssenKrupp Elevator (Canada) Limited*, 2022 ONCA 310 and *Hucsko v. A.O. Smith Enterprises Limited*, 2021 ONCA 728, the Ontario Court of Appeal emphasized that the onus is on employers to ensure a harassment free workplace, and that such harassment creates a poisoned atmosphere from which employees are entitled to be free.

[107] In *British Columbia Human Rights Tribunal v. Schrenk*, 2017 SCC 62, paragraph 48, the Supreme Court of Canada ruled that the structure of the British Columbia Code supports an approach that views employment as a context requiring remedy against the exploitation of vulnerability rather than a relationship needing unidirectional protection. While that Code protects relationships like employer and employee, but also takes into account the vulnerability in which discrimination may arise.

[108] In *A+ Financial Services, supra, the* respondents were ordered to pay $20,000 in general damages to each complainant for conduct that the Commission characterized as less egregious than in the present case, including fewer incidents of physical contact and less invasive touching.

[109] In making his award of general damages, the Adjudicator said at paragraph 60 that:

> …It is important that, where a contravention of the *Code* has been found, the consequences should not be trivialized. The contraventions in the instant complaints were grievous and ongoing, and the complainants suffered egregious indignity in their workplace. In addition, economic circumstances left them feeling trapped and without alternative but to endure the conduct of [the respondent].

[110] Finally, in *McCharles, supra*, the Adjudicator, referring to the respondent's conduct as "cavalier and worthy of strong sanction" including gossip, rumour mongering, touching, and assault, and awarded the complainant $50,000.00 in general damages.

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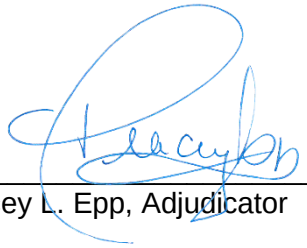
[111] As stated by former Chief Justice Dickson, work is one of the most fundamental aspects in a person's life. In the words of the Adjudicator in *McCharles, supra*, paragraph 78, "unwanted touching without clear consent is offensive in the workplace".

[112] The conduct of Levesque and therefore New Age was egregious, invasive and in some instances constituted assault. The conduct frightened the Complainant and left her feeling worthless. The Complainant was vulnerable, both internally to the employment structure but also personally. New Age and Levesque preyed upon that vulnerability. I agree that sexual harassment cases garner the highest damages awards, and this case is no exception. A message must be sent to other predatory employers and remind them of their obligation to provide a safe and harassment-free workplace.

[113] For those reasons, I Order that New Age pay to the Complainant damages in the amount of $25,000.00.

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

Dated: October 30, 2024



Tracey L. Epp, Adjudicator

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