SUPREME COURT OF YUKON

Citation: *Hureau v. Yukon Human Rights Board of Adjudication*, 2014 YKSC 21

Date: 20140401
S.C. No. 12-AP003
Registry: Whitehorse

Between:

MARK HUREAU and 17385 YUKON INC. dba INTERSPORT

Appellants

And

THE YUKON HUMAN RIGHTS BOARD OF ADJUDICATION, DEVON HANSON and YUKON HUMAN RIGHTS COMMISSION

Respondents

Before: Mr. Justice R.S. Veale

Appearances:

James Tucker and Kelly McGill	Counsel for the Appellants
Debra Fendrick	Counsel for the Respondent Yukon Human Rights Board of Adjudication
Colleen Harrington and George Lee	Counsel for the Respondent Yukon Human Rights Commission
Richard Buchan	Counsel for the Respondent Devon Hanson

REASONS FOR JUDGMENT

INTRODUCTION

[1] Mark Hureau and 17385 Yukon Inc. dba Intersport ("Intersport") appeal the decision of the Yukon Human Rights Board of Adjudication (the "Board") finding that Mr. Hureau sexually harassed Devon Hanson between March 15 and 28, 2010.

[2] The Board also decided that Intersport was not responsible as Mr. Hureau's employer. This decision is cross-appealed by Ms. Hanson and the Yukon Human Rights Commission (the "Commission").

[3] The Board also found that Ms. Hanson should not be awarded damages for injury to her dignity, feelings or self-respect. Ms. Hanson and the Commission cross-appeal this decision. Ms. Hanson also appeals the decision of the Board denying the admission of her affidavit on damages that she suffered after the June 2012 hearing.

[4] Pursuant to s. 28 of the *Human Rights Act*, R.S.Y. 2002, c. 116 (the "*Act*"), an appeal of a board decision is only available on questions of law.

[5] It is important to note at the outset that Devon Hanson wished to resolve her complaint by settlement. It is the policy of the Commission to try to resolve things in this manner and without a hearing which is a laudable policy objective. Mr. Hureau was not interested in settlement and thus the hearing proceeded.

THE BOARD DECISION

[6] The Board ruled on the merits of the sexual harassment complaint on August 21, 2012 (the "merits decision") and on damages, remedies and costs on January 21, 2013 (the "remedy decision").

[7] In its merits decision, the Board applied the test set out in *Janzen v. Platy Enterprises Ltd.,* [1989] 1 S.C.R. 1252, which broadly defined sexual harassment as "unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment."

[8] At the time the harassment occurred, Ms. Hanson was an 18-year-old high school student who played basketball on a team coached by Mr. Hureau, a 43-year old man. In March 2009, Ms. Hanson was hired by Mr. Hureau's company, Intersport, as a part-time sales representative. The two communicated frequently by email and text. The Board heard seven days of conflicting evidence and made extensive factual findings,

but, in short, the Board found that the character of the emails and texts changed in 2010 from basketball-related to personal, and that some of these latter communications constituted sexual harassment.

[9] The Board found that the period between March 15 and March 28, 2010, was central to the complaint. Ms. Hanson terminated her employment around this time and there were numerous emails and texts exchanged.

[10] The Board found, among others things, that:

1. On March 16, 2010, Ms. Hanson said Mr. Hureau grabbed her hand. Mr. Hureau denied this but admitted that her fingers twisted around his and he said something to the effect “Devon, give me your hand, the mystery is over now, no problem. I think it is adorable.”
2. On March 17, Mr. Hureau sent a text about her underwear showing.
3. Mr. Hureau became more physical with her including punching her arm, goofing around, stroking her arm and in one instance, patting her butt with what she thought was his hand, but later realized was a shoe.
4. On March 22, Mr. Hureau texted “We’ll try and make sure that this ridiculous crush isn’t offering to talk for selfish reasons. You talk away.”
5. And in another text “It’s a little embarrassing for both of us how often I tell Devon I like her from top to bottom. Isn’t it?”
6. On Friday, March 26, he texted “zip up hoodie or I’ll tell your dad.”
7. On Friday, March 26, he texted that he snuck a picture of her back and attached a photo of the back of an obese person. This related to an earlier conversation she had with Mr. Hureau about her concern that her back

was not suitable for a backless dress. He texted “I know I said it was perfect but … well … here it is.”

8. Ms. Hanson texted on March 26 “But I don’t think I can work at Intersport anymore. You crossed the line big time.”

9. This was followed by a lengthy apology email in the evening of March 26, 2010, which included the following:

> I know I am scaring you about talks of crushes etc …
>
> …
>
> … constantly telling you how special you are has backfired on me in that I want to be around you too much, and I get jealous of all the underserving slobs who think they are good enough … there I go. That crush won’t go away easily …

10. On March 27, Mr. Hureau sent a second lengthy apology email which made references to their friendship and stated among other things:

> Writing these things is probably creepy enough. I can’t make it worse by listing all the special things I think about Devon. I think I’ve been clear on those things all along. If you feel unappreciated you must know how fond I am of you …

[11] The Board found that Mr. Hureau admitted that the email of March 26 could be easily misconstrued when taken out of context and that some contents of this and the March 27 email could be interpreted as “come ons”.

[12] The Board found there was sufficient evidence to conclude that Mr. Hureau’s behaviour was unwelcome, of a sexual nature, and persistent. The Board’s finding also

recognized factors inherent to the relationship itself, including the power imbalance, age difference and generational communication differences.

[13] As to whether Intersport was “notified” of the harassment, the Board found that Intersport was a corporate body with Mr. Hureau as the majority shareholder and concluded:

> Ms. Hanson did not notify her employer of the harassment, which means that the Respondent employer, Intersport, did not have the opportunity to address the allegations of sexual harassment in the workplace.

[14] The Board concluded that the sexual harassment of Devon Hanson by Mr. Hureau was at the “most mild end of the spectrum”. The Board accepted that Ms. Hanson was emotionally affected by the circumstances and the very public nature of the proceedings prior to and during the human rights complaint process. The Board also accepted that the complaint had a negative impact on Mr. Hureau’s business at Intersport and put stress on his relationships with customers and former friends. In this context, the Board expressed its views that the finding of discrimination itself served as a punitive consequence to Mr. Hureau and a cautionary example to other businesses and organizations.

[15] The Board was advised that the parties wished to make further submissions on remedies and set time frames for those submissions.

THE REMEDY DECISION

[16] Despite a suggestion that it had prejudged the issues of remedies, the Board heard submissions and made further decisions which included ordering Mr. Hureau to prepare and implement a sexual harassment policy for the Intersport workplace within two months of its decision.

[17] Both the Commission and the complainant took the position that the Board should order Mr. Hureau to pay $15,000 in damages for injury to the complainant's dignity, feelings or self-respect as a result of the sexual harassment. Both parties also asked for damages reflecting one month's wage loss and the complainant asked for an additional $15,000 in financial damages for a poor educational outcome at university. The Board did not permit the complainant to file further affidavit evidence about her university experience following the hearing and declined to make a financial loss order.

[18] The Board accepted affidavit evidence from the Appellants, filed in support of an application for costs, on the grounds that the complaint was frivolous or the proceeding was frivolously prolonged. The Board denied this application as well as Mr. Hureau's application for damage to his reputation.

[19] The Board explained its reasons for accepting Mr. Hureau's affidavits on costs while rejecting the affidavit of Ms. Hanson in support of her claim for financial damages as follows:

> There is a difference between affidavits in support of a claim for remedy or damages by the Complainant and Commission arising out of the findings and decision on a complaint, and a cost application that may be filed by the Respondent.
>
> The two affidavits by Mr. Hureau and Ms. MacFadgen were in support of their respective arguments for costs, which must flow from a formal finding by the Board of a breach of Section 25 and/or Section 26. Therefore, there was no inconsistency of the Board in accepting affidavits related to the cost application and affidavits related to damages and remedy.

[20] In the result, the Board ordered Mr. Hureau to pay Devon Hanson a wage loss of three months. However, the Board gave no award for Devon Hanson's claim for injury to

dignity, feelings or self-respect. I will address the details of this aspect of the Board decision below.

[21] The Board also denied Devon Hanson's claim for a poor education outcome which occurred after the merits hearing.

Appeals on Questions of Law

[22] As all the grounds of appeal in this proceeding purport to be on questions of law, I will discuss the appropriate jurisdiction of this Court.

[23] The statutory right of appeal is found in s. 28 of the *Act* as follows:

> (1) Any party to a proceeding before a board of adjudication may appeal final decisions of the board to the Supreme Court by filing a notice of appeal with the court within 30 days after the order of the board is pronounced.
>
> (2) The procedure for the appeal shall be the same as for an appeal in the Court of Appeal.
>
> (3) An appeal under this section may be made on questions of law and the court may affirm or set aside the order of the board and direct the board to conduct a new hearing.
>
> (4) The only proceeding that may be taken to set aside or vary decisions of the board is the right of appeal given by this Act.

[24] The difficulty with applying this section is in distinguishing the difference between questions of law, which are reviewable, and questions of mixed fact and law, which are not reviewable.

[25] As stated in *Housen v. Nikolaisen*, 2002 SCC 33, paras. 27 – 31, to make this distinction the court must differentiate between the legal standard applied and the lower court's weighing or interpretation of evidence.

[26] In reviewing a question of law under s. 28 of the *Act*, the court must not consider questions of mixed fact and law unless there is an "extricable legal question". See *Alberta (Workers' Compensation Board) v. Appeals Commission*, 2005 ABCA 276, at paras. 27 – 28 and *Hegel v. British Columbia (Ministry of Forests)*, 2009 BCCA 527, var'd 2010 BCCA 289, at para. 32.

[27] As pointed out in the *Alberta* case, the task is to distinguish between true errors of law and errors of fact that may be dressed in error-of-law clothing.

[28] A great deal of confusion arises out of the interpretation counsel for Mr. Hureau places on the decision of this Court in *Government of Yukon v. McBee*, 2009 YKSC 73, var'd 2010 YKCA 8. In my view, that decision does not assist the appellant in broadening the scope of his appeal here. Three of the issues Nation J. was asked to review concerned procedural fairness, and the fourth was about whether the remedy ordered by the Board exceeded its jurisdiction. The grounds argued in *McBee* differ from what is before me in this case, and I do not find that it provides guidance on the proper characterization of the issues framed by the appellant.

[29] I have concluded that the following grounds of appeal of Mr. Hureau are not questions of law but rather questions of mixed fact and law which this Court has no jurisdiction to hear on an appeal under s. 28 of the *Act*:

a) That the Board erred when it misapprehended and misapplied the standard of proof to be applied when considering whether the actions of Mr. Hureau amounted to sexual harassment.

b) That the Board failed to give consideration to contradictory evidence placed before it.

c) That the Board failed to apply the legal test for determining credibility in assessing the contradictory evidence which was placed before it.

d) That the Board erred when it failed to give reasons that provided a logical nexus between the evidence and the finding of sexual harassment.

e) That the Board erred when it failed to indicate what, if any, weight was given to the complainant's evidence.

f) That the board erred when it relied upon inaccuracies in the evidence before it.

g) That the Board erred when it failed to apply, or misapplied, the legal test for sexual harassment.

h) That the Board erred when it broadly accepted evidence, as "similar act evidence", and failed to apply any test to determine whether the accepted evidence was "similar act evidence".

i) That the Board erred when it accepted evidence as "similar act evidence" and then failed to allocate the weight and relevance to be given to that evidence.

[30] These grounds of appeal mostly relate to the evidence presented and the Board's findings of fact which are not true questions of law but rather questions of mixed fact and law. I further conclude that there are no extricable legal questions of law. To the extent that (g) alleges that the Board failed to apply the legal test for sexual harassment, I conclude that it did apply the appropriate test. The above grounds of appeal all boil down to a request that the Court reconsider the evidence heard by the Board and arrive at different conclusions.

[31] As to the allegation that the Board accepted similar act evidence, the Board simply stated that such evidence was outside the timeframe of the complaint, or in other words, not relevant.

[32] There is one question of procedural fairness raised by the appellant which is properly before the Court:

a) That the Board erred when it conducted and relied upon its own research without providing the parties an opportunity to challenge or respond to the research relied upon.

[33] This is the question that counsel for Mr. Hureau presented first in his argument.

[34] I am also of the view that the matters in the cross-appeals are questions of law and I will address them.

[35] The cross-appeal of the Commission is that the Board erred in law by failing to apply section 35 of the *Human Rights Act* in making its finding of no employer liability for the sexual harassment.

[36] The questions of law in the cross-appeal of Devon Hanson are:

1. the denial of damages for injury to her dignity, feelings and self-respect; and
2. the Board's refusal to admit the affidavit of Devon Hanson, sworn October 23, 2012, wherein she provided new evidence arising after the hearing at first instance and which was relevant to the matter of damages.

[37] There is a further issue of whether this Court can substitute its own decision where it has set aside the decision of the Board.

[38] I will deal first with the appellant's ground of review, before considering the damages award and employer liability.

ANALYSIS

[39] This is an appeal, and therefore the standard of review on a question of law is correctness. In terms of the procedural fairness issue raised by the appellant, either there was procedural fairness or there was not, and the answer depends on the content of the duty of fairness and the circumstances of the case (*Charlie v. Canada (Attorney General),* 2013 YKCA 11, at para. 33).

Issue 1: Did the Board Err in Relying on its Own Research?

[40] The Board posed the question of whether Mr. Hureau misinterpreted Ms. Hanson's "immature plays for attention" as a "display of affection". In concluding that adults must assume a greater share of responsibility in dealing with adolescents, the Board referred to research that was not in evidence, but which documented the lack of maturity in adolescent brain development. The Board then found that it was more likely than not that Mr. Hureau misinterpreted Ms. Hanson's actions and attached an inappropriate emotional link to them.

[41] There is no question that the Board should not consider social science evidence not placed before it. However, I do not find the Board made any error in taking judicial notice of the immaturity of brain development of adolescents and the need for adults to take this into account in their dealings with them, which is effectively all that the Board drew from its research.

[42] I also conclude that the Board was not making a finding of fact on this evidence, but rather giving some context to the appellant's conduct, which it found to be sexually harassing in any event. The evidence did not affect the Board's decision as a whole.

[43] In other words, there was no material consequence on the Board's decision to find sexual harassment. See *Peel Law Association v. Peters*, 2013 ONCA 396, at paras. 115 – 124. I also agree with Sarah Blake in *Administrative Law in Canada*, 5th ed. (Markham: Lexis Nexis Canada Inc., 2011) at p. 221 that "minor procedural lapses are not grounds to set aside a decision."

Issue 2: Did the Board Err in Denying Devon Hanson Damages for Injury to Dignity, Feelings or Self-Respect?

[44] I will first address the Board's decision to refuse to accept the affidavit of Devon Hanson sworn October 23, 2012, which primarily set out events relating to her educational problems after the hearing in June 2012. The affidavit also addressed the impact of the hearing itself on the complainant. The affidavit was intended to supplement the evidence that she gave at the hearing.

[45] I do not find it to be an error to refuse affidavit evidence of damages after the hearing. Ms. Hanson gave evidence at the hearing on how and what she suffered, including the impact Mr. Hureau's conduct and the hearing had on her education. I agree with the Board's decision not to extend the hearing simply to allow further evidence on damages. There was no unfairness to Ms. Hanson in refusing the affidavit.

[46] The *Act* sets out the damages that may be awarded if a complaint is established:

> 24(1) If the complaint is proven on the balance of probabilities the board of adjudication may order the party who discriminated to

(a) stop the discrimination;

(b) rectify any condition that causes the discrimination;

(c) pay damages for any financial loss suffered as a result of the discrimination;

(d) pay damages for injury to dignity, feelings, or self-respect;

(e) pay exemplary damages if the contravention was done maliciously;

(f) pay costs.

[47] The Board declined to make any order for damages for injury to dignity, feelings or self-respect. In doing so, it applied the Torres test found in *Torres v. Royalty Kitchenware Ltd.* (1982), 3 C.H.R.R. D858 (Ont. Bd. Inq.) which assessed the physicality, frequency and aggressiveness of the sexual harassment and the age, vulnerability and experience of the complainant. The Board concluded:

> … Applying those factors here, there was no finding by the Board that the harassment was sexually physical, aggressive or of a frequent, ongoing nature. The Complainant was young, vulnerable and in her first employment situation, and there was some indication that she suffered psychological impacts for which she met with a counsellor for a brief period of time in 2010. The Board also recognizes that it is more likely than not that Ms. Hanson's employment ended because of the harassment. Because of these factors, the Board confirms its finding that the sexual harassment experienced by the Complainant was at the most mild end of the spectrum of sexual harassment.

[48] The Board then applied the principle set out in *Foreman v. Via Rail Canada Inc.*, (1980), 1 C.H.R.R. D/233 (Can. Rev. Trib.), that "compensation should normally be awarded in the absence of special circumstances."

[49] The Board then set out the “special circumstances” that led to its decision that there should be no award of damages for injury to the complainant’s dignity, feelings or self-respect.

> … Because the Board only has jurisdiction over sexual harassment in the workplace, the extent of the relationship between the Complainant and Respondent, both within and outside the context of employer/employee relationship, adds a dimension to the consideration of “special circumstances”.
>
> Although sexual harassment of any kind is serious, in this case, the mild nature of the harassment, combined with the very limited timeframe during which the harassing behavior occurred constitutes the “special circumstances” that lead the Board to order no award for injury to the Complainant’s dignity, feelings or self-respect.
>
> These circumstances, combined with the limited evidence that the Complainant attempted to mitigate the psychological impact of the harassment save for one round of counselling in August 2010, and the Complainant’s failure to satisfy the Board that there was a link between her academic performance and the harassment, support the Board’s decision that there should be no award of damages for injury to her dignity, feelings or self-respect.

[50] The Board then awarded three months’ wage loss to the complainant as well as costs.

[51] At the outset, I do not agree with the principle in *Foreman* that compensation should normally be awarded in the absence of “special circumstances”. There is no basis to import the terminology of “special circumstances” into an assessment of injury to dignity, feelings or self-respect. The issue is whether the complainant has suffered such an injury and, if she has, the assessment of the quantum or dollar value of the injury. In this case, the Board found that the complainant was young, vulnerable, in her first employment situation, and that there was some indication that she suffered a

psychological impact. It also found that there was limited evidence that she had mitigated the psychological impact. In my view, these findings establish a factual basis for making an award of injury to dignity, feelings and self-respect.

[52] I find the Board not only erred in applying the “special circumstances” test, but also, having applied it, erred in its balancing of the “special circumstances” which were held to deny the complainant any award. I accept that there could be circumstances in which there are no injuries to a complainant and in which it could be appropriate to make no award of damages. For example, to use these facts, the Board could have found the hand-holding to be a fleeting incident of sexual harassment so insignificant that an award is not appropriate. However, the Board has found the cumulative incidents were sexual harassment that caused the complainant to leave her employment. That, in my view, is not so insignificant or mild as to merit no award.

[53] The factors the Board erred in considering are:

1. The fact that there was no finding that the harassment was sexually physical, aggressive or of a frequent, ongoing nature, thereby placing the sexual harassment “at the most mild end of the spectrum of sexual harassment”. There is nothing inherently wrong with this finding, but it describes the sexual harassment, not the impact or injury to Ms. Hanson.
2. The Board’s expansion on the “special circumstances” as including the limited time frame of two weeks of sexual harassment. Again, the Board erred in finding that the duration of the harassment as a factor in denying a damage award, rather than being a factor which might affect the quantum. There is no requirement that the act of sexual harassment

should be harsh and long-lasting to constitute injury to dignity, feelings or self-respect. As well, the reality is that it ended largely because the complainant quit her employment.

3. The finding that the extent of the relationship between Ms. Hanson and Mr. Hureau outside the workplace adds a dimension to the "special circumstances" denying her an award. In my view, this dimension of their relationship provides no justification for no award. The issue is what damage should be awarded for the injury that the Board found.

4. It also appears that the Board took into consideration the fact that the complaint had a negative impact on Mr. Hureau's business, customers and friends when assessing of Ms. Hanson's injuries. This can be seen in the following passage in the Remedy section of the merits decision:

> Taking this evidence into consideration, and recognizing that this case unfolded in a small, northern city where it drew significant local media attention, the Board believes the formal finding of discrimination is the necessary and sufficient act to serve not only as a punitive consequence to Mr. Hureau, but also as a censure and cautionary example to other Yukon community organizations and businesses.

[54] If the Board is considering the impact of the hearing itself and the social ostracism clearly suffered by both parties as having any impact on its assessment of damages, it is an error. The assessment of damages for injury must arise from the discrimination or sexual harassment itself and not the social consequences of the hearing and public response. Publicity clearly affects both the complainant and the subject of the complaint. The stress of the process cannot form part of the damages for

injury to dignity, feelings or self-respect. All hearings before tribunals and courts are stressful and may elicit negative reaction in the community, but that is not generally a proper basis for an award of damages.

[55] *Torres*, cited above, sets out the list of factors to consider when awarding damages for injury to dignity:

a) The nature of the harassment, i.e. whether it was physical as well as verbal;

b) The degree of aggressiveness and physical contact;

c) The ongoing nature and time period;

d) The frequency of the harassment;

e) The age of the victim;

f) The vulnerability of the victim; and

g) The psychological impact of the harassment on the victim.

[56] The Board must take care when it follows decisions that do not necessarily apply to the *Act*. The factors in sub-paragraphs a) – f) of para. 53 cannot be taken as "special circumstances" that would deny an award but rather factors that may affect the quantum of the award under s. 24(1)(d) of the *Act.*

[57] In fixing an award, the general principle to apply is not the one in the *Torres* case that directs a consideration of "special circumstances" but more appropriately the principle set out in *MacTavish v. Prince Edward Island* (2009), 288 Nfld & P.E.I.R. 108 (P.E.I.S.C.), at para. 49:

> … General damages in human rights cases are not intended to punish the wrongdoer. They reflect a recognition by society that one has been harmed by the actions of another. The harm we speak of with respect to general damages in

> these cases is not monetary harm. It is harm to the dignity and self-respect of the victim. We must attempt to restore, but not reward. We must be realistic and consider whether any award bears a reasonable relationship to other awards for similar discrimination.

[58] I also take the view that arriving at an award under s. 24(1)(d)of the *Act* should not require an exercise similar to the assessment of pain and suffering in a personal injury case. Section 24(1)(d) is a narrower ground of recovery.

[59] Counsel for the Commission and Ms. Hanson have submitted that this Court should set aside the Board's decision not to award damages for injury to dignity, feelings or self-respect, and impose its own assessment. While the jurisdiction to vary an order of the Board is not entirely clear within the *Act*, in *Yukon v. McBee*, 2010 YKCA 8, the Court of Appeal of Yukon says that s. 28(3)of the *Act* is permissive:

> [26] In other words, the wording of the statute is permissive. The employment of the word "may" does not force a choice between the options outlined in the statute: See Elmer A. Driedger, *Construction of Statutes,* 2nd ed. (Toronto: Butterworths, 1983) at 9-15.
>
> [27] The choices outlined by the statute should be read as two options but not as the only possibilities.
>
> …
>
> [30] Moreover, obliging the court to order a new hearing every time it sets aside a decision of the Board is neither practical nor economical. There may be situations in which a new hearing is required, but the court is free to make such determination in each case on its particular facts.

[60] I also note that s. 28(4) of the *Act* refers to the right of appeal as a "proceeding that may be taken to set aside or vary decisions of the board" (emphasis added).

[61] I find that this Court does have the ability under s. 28 of the *Act* to vary a decision or order of the Human Rights Board. This scope of jurisdiction is consistent with the

common law view of the remedies available on a statutory appeal and also, to use the words of the Court of Appeal, reflects a practical and economical approach to appeals under the *Act*.

[62] As I find the Board has erred in law in reaching its damages award under s. 24(1)(d) of the *Act*, I set aside this aspect of its decision.

[63] The next question is whether the court should vary the Board decision or remit it back to the Board for a new hearing. In my view, it is neither practical nor economical to send it back for a new hearing for two reasons.

[64] Firstly, there is no requirement for the Board to reconvene to hear evidence. The Board has heard all the evidence on damages and has made findings of fact about the injury to Devon Hanson as a result of the sexual harassment. The result would be a duplication of the submissions made before this Court.

[65] Secondly, the cost to the parties and the Commission would be considerable to reschedule the matter, and incur preparation and hearing costs.

[66] I am therefore going to vary the no award decision for injury to dignity, feelings or self-respect. The Board found that Devon Hanson was young, vulnerable and in her first employment situation. She also suffered psychological impacts and briefly met with a counsellor. These are not trivial or insignificant impacts.

[67] On the other hand, the Board found that the sexual harassment was not sexually physical, aggressive or of an ongoing nature. The sexual harassment was limited to a two-week period. On this basis, the Board found the sexual harassment to be at the “most mild end of the spectrum”.

[68] In a recent decision, the Board found more explicit and ongoing sexual harassment with a greater impact on the victim, to merit damages award of $5,000. See *Lacosse and Dyck v. Childhood Discoveries Preschool,* Board File No. 2012-03, June 18, 2013.

[69] There is a danger in trivializing the awards for injury to dignity, feelings and self-respect for sexual harassment. Psychological injuries are just as serious as physical injuries and are often more difficult to remedy and make the subject whole again.

[70] The court must consider the objective facts of the nature and duration of the harassment and also address the subjective impact of the conduct on the particular victim. In this case, counsel for the Commission and Devon Hanson submit that $15,000 would be an appropriate damage amount but they also included damages for the public humiliation she suffered during the hearing process. Unfortunately, the public nature of the court and tribunal system and its obvious stress and impact on the participants, cannot be compensated. The award of damages must be confined to the injury from the sexual harassment.

[71] The injury in this case was not trivial and I award $5,000 damages for her injury.

Issue 3: Did the Board Err in Not Finding the Employer Intersport Liable for the Sexual Harassment of Mr. Hureau?

[72] Section 35 of the *Act* states:

> Employers are responsible for the discriminatory conduct of their employees unless it is established that the employer did not consent to the conduct and took care to prevent the conduct or, after learning of the conduct, tried to rectify the situation.

[73] The Board did not impose liability on Intersport for the following reason:

> Because of the lack of notification of alleged harassment to the employer, and as there were limited submissions on the culpability of the corporation, the Board makes no finding against 17385 Yukon Inc. dba Intersport. Most of the actions that substantiate, in this Board's eyes, the allegations of sexual harassment, occurred outside of the work environment in the context of the broader relationship and were not specifically employer-employee related.

[74] The Board has erred in not imposing liability on the corporation. On a factual basis, Mr. Hureau is the majority owner of Intersport so there cannot be a lack-of-notification issue. When Ms. Hanson advised him that she was quitting her employment at Intersport as he had "crossed the line", Intersport had notice.

[75] In *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84, at para. 10, the Supreme Court of Canada makes it clear that the motives or intention of those who discriminate is not the central question. The remedial nature of human rights legislation requires the employer to be responsible for the acts of its employees (paras. 16 and 17). Of course, Intersport is only responsible for those acts of sexual harassment that took place between March 18 and 28, 2010, at the Intersport workplace.

[76] The wording of s. 35 of the *Act* creates liability for the employer unless the employer did not consent to the conduct and took steps to avoid it, or rectified the conduct after learning of it. The facts of this case do not logically give rise to a consideration of whether the corporation consented and took steps, as Mr. Hureau was the perpetrator employee as well as the employer.

[77] As for notice, even if the employer's notice was as late as the filing date of the complaint rather than the earlier date of Ms. Hanson's quitting, Intersport did not take any action to rectify the situation. Mr. Hureau, and thus Intersport, received the complaint on June 16, 2010. The complaint stated that it is the policy of the Commission

to resolve the complaint by settlement, if possible. The complaint stated that the complainant was interested in settlement. On August 27, 2010, Intersport denied that there was any harassment and stated that it was not interested in settlement. In light of these facts, there is no basis to establish that Intersport tried to rectify the situation.

[78] I set aside the decision of the Board in not finding Intersport liable for the acts of sexual harassment of Mr. Hureau. As there is no need for the Board to hear this issue again, I therefore vary the Board decision and find Intersport liable for the acts of sexual harassment by Mr. Hureau.

[79] The parties may bring the matter of costs in this Court to case management for decision, if necessary.

VEALE J.