

PROVINCE OF NEW BRUNSWICK



Labour and Employment Board

HR-005-07

IN THE MATTER OF THE *HUMAN RIGHTS ACT*

AND IN THE MATTER OF A BOARD OF INQUIRY

BETWEEN:

Jennifer Steeves
Riverview, New Brunswick

Complainant

- and -

Woody's Place, O'Brien's Pub/RPK Inc.
and Jeff Johnson
Moncton, New Brunswick

Respondents

BEFORE: George P. L. Filliter, Chairperson

APPEARANCES:

For the Human Rights Commission:

Chantal L. Gauthier, Esq

For the Complainant:

Jennifer Steeves

For the Respondents:

Jeff Johnson, on his own behalf

Brian Dalling, on behalf of Employer, RPK Inc.

DATE OF HEARING:

September 26, 2007

DATE OF DECISION:

October 16, 2007

DECISION OF THE BOARD

I. INTRODUCTION

1. Jennifer Steeves started working for RPK Inc. (hereinafter referred to as “RPK”) in 2002. After a two week training session, she was assigned to look after a bar known as Woody’s Place. Her immediate supervisor was Jeff Johnson. RPK operated a number of bars in the area around Moncton, New Brunswick and is owned and operated by Brian Dalling.

2. On May 30, 2005, Ms. Steeves filed a complaint with the Human Rights Commission (hereinafter referred to as the “Commission”), in which she claimed to have been the subject of sexual harassment. In the complaint she names both Jeff Johnson and her employer RPK. On June 14, 2005, Ms. Steeves wrote a four (4) page document outlining the specifics of her complaint. The basis of the complaint of Ms. Steeves was that Mr. Johnson on various occasions made inappropriate comments and on May 6, 2005 he allegedly grabbed her left buttock. RPK did not respond in writing to the complaint, but on September 8, 2006, Mr. Johnson filed a five (5) page rebuttal.

3. After an investigation, the Minister of Post-Secondary Education, Training and Labour, at the request of the Commission, appointed the Board to act as a Board of Inquiry by virtue of section 20(1)(b) of the *Human Rights Act*. The Board convened on September 26, 2007 to conduct an inquiry into this matter.

II. FACTS

4. The Complainant Jennifer Steeves, the named respondent Jeff Johnson, and Brian Dalling all gave evidence before the Board. Additionally, nine exhibits were marked with the consent of all parties. Ms. Steeves worked for RPK from November 2002 to May 2005 and in 2005 she was paid \$8.50 an hour. It would appear from the records that on average she worked 32 hours a week.

5. After assessing the testimony of all the witnesses, it is quite clear that the only factual issue that is in contention surrounds an incident that may or may not have occurred on May 6, 2005 involving Mr. Johnson and Ms. Steeves. The remainder of the relevant facts were not in dispute as Mr. Johnson acknowledged that some of his comments were inappropriate.

6. During the employment of Ms. Steeves, she would often be in contact with Mr. Johnson. On some of these occasions, Mr. Johnson made comments about Ms. Steeves. These comments included observations that Ms. Steeves' breasts were shrinking since she had started an exercise regime; asking Ms. Steeves if she had any tattoos or piercing that could not be seen; commenting on the colour of her underwear and suggesting that he could arrange for another male friend which he referred to as a "strange piece" if she ever broke up with her boyfriend. As indicated, Mr. Johnson acknowledged that these comments were inappropriate regardless of the context in which they were made. Furthermore, the Board concludes that Ms. Steeves did not express her concerns to Mr. Johnson or her employer prior to May 2005.

7. On May 6, 2005, Ms. Steeves was at work and having completed her shift she was in the process of interviewing a potential new employee. At about 6:00 p.m. that evening, Mr. Johnson arrived at the bar to empty the VLT machines and provide a float to the bar. During his visit all witnesses agreed that there were about 6 to 8 people present.

8. Ms. Steeves provided the Board with a hand drawn diagram of the layout in the bar which was marked as an exhibit. Both Mr. Johnson and Mr. Dalling agreed that it was quite representative of the floor plan. Furthermore, both Ms. Steeves and Mr. Johnson were in general agreement as to where Ms. Steeves was seated at the relevant time.

9. Mr. Johnson's evidence was that when he arrived, he touched Ms. Steeves on the "hip/small of the back" so as to tell her he had arrived. Ms. Steeves testified that when he left he grabbed her in the buttocks area. Although there is a discrepancy in the evidence, both as to when the touching occurred and what part of the body was touched, what is clear is that Mr. Johnson did touch Ms. Steeves either on or close to the buttocks and this was not invited by Ms. Steeves.

10. After this incident Ms. Steeves decided that she had had enough and informed Mr. Dalling of her decision to leave. This notice was put in writing by Ms. Steeves on May 10, 2005 and Mr. Dalling immediately suspended Mr. Johnson, with pay, pending an investigation. Shortly thereafter on May 12, 2005, Mr. Dalling spoke with Ms. Steeves and indicated that he wanted her to remain in his employ. Towards this end he agreed to make every effort to ensure that contact between Mr. Johnson and Ms. Steeves was avoided or limited. Ms. Steeves wrote to Mr. Dalling on May 13, 2005 and indicated that she was not satisfied with his proposal. This is a part of what she wrote:

“With the understanding any shifts that I would be working that there would be no contact with Jeff Johnson, or at least minimal contact, and that I would only deal with him if something came up in which you could not attend.

After much thought and consideration I will have to decline your offer of a solution and will not be coming back to work for O’Brien’s Pub/Woody’s”

11. After her departure from RPK, Ms. Steeves applied for and eventually was placed on Employment Insurance. In August of 2005, she commenced a program where she became a Dental Assistant in September of 2006. Since that time Ms. Steeves has been employed in a variety of positions, the most recent of which is at the Cosco retail outlet in Moncton, New Brunswick.

12. Mr. Dalling informed the Board, and there was no evidence to the contrary, that after being advised by Ms. Steeves of the alleged actions of Mr. Johnson, he suspended him and started his own investigation. In fact, Mr. Johnson at no time ever returned to work for RPK as he was terminated in June or July of 2005. Furthermore, Mr. Dalling contacted the Commission’s office in Moncton and arranged for his staff to undergo a training session on Sexual Harassment issues.

III. ISSUES

13. The issues in this matter are as follows:

- a) Were the actions of Mr. Johnson discriminatory on the basis of the prohibited ground of “sex” and therefore continuing to the protective provisions of the *Human Rights Act*?

- b) If the answer to the first issue is in the affirmative, then what is the appropriate remedy under the circumstances?

IV. RELEVANT STATUTORY PROVISIONS

14. The relevant provisions of the *Human Rights Act* are set forth as follows:

3(1) No employer, employers' organization or other person acting on behalf of an employer shall

- (a) refuse to employ or continue to employ any person, or
- (b) discriminate against any person in respect of employment or any term or condition of employment, because of race, colour, religion, national origin, ancestry, place of origin, age, physical disability, mental disability, marital status, sexual orientation, sex, social condition, political belief or activity.

7.1(1) In this section

“association” means an employers’ organization, a trade union, a professional association or a business or trade association;

“representative” means a person who acts on behalf of an association or another person;

“sexually harass” means engage in vexatious comment or conduct of a sexual nature that is known or ought reasonably to be known to be unwelcome.

7.1(2) No employer, representative of the employer or person employed by the employer shall sexually harass a person employed by the employer or a person seeking employment with the employer.

20(6.2) Where, at the conclusion of an inquiry, the Board finds, on a balance of probabilities, that a violation of this Act has occurred, it may order any party found to have violated the Act

- (a) to do, or refrain from doing, any act or acts so as to effect compliance with the Act,
- (b) to rectify any harm caused by the violation,
- (c) to restore any party adversely affected by the violation to the position he would have been in but for the violation,

- (d) to reinstate any party who has been removed from a position of employment in violation of the Act,
- (e) to compensate any party adversely affected by the violation for any consequent expenditure, financial loss or deprivation of benefit, in such amount as the Board considers just and appropriate, and
- (f) to compensate any party adversely affected by the violation for any consequent emotional suffering, including that resulting from injury to dignity, feelings or self-respect, in such amount as the Board considers just and appropriate.

V. DEFINITION OF SEXUAL HARASSMENT

15. The definition of sexual harassment was set forth in the Supreme Court of Canada decision *Janzen v. Platy Enterprises Ltd.* [1989] 1 S.C.R. 1252, where the court concluded that conduct of the perpetrator may be blatant or subtle. The court stated:

“Harassment behaviour may manifest itself blatantly in forms such as leering, grabbing, and even sexual assault. More subtle forms of sexual harassment may include sexual innuendos, and propositions for dates or sexual favours.”

In 1995, a Nova Scotia Board of Inquiry, in the case of *Miller v. Sam’s Pizza House* (1995), 23 C.H.R.R. D/433 at page 446, concluded that there was a wide range of comments and conduct that may constitute sexual harassment, and that these comments do not necessarily have to be directed at the complainant.

16. In considering this claim, the Board must conclude on a balance of probabilities (see *Ontario Human Rights Commission et al v. The Borough of Etobicoke*, [1982] 1 S.C.R. 202) that the behaviour is unwelcome, of a sexual nature, and has a detrimental effect on the work environment (see generally *Janzen v. Platy Enterprises Inc.*, *supra*).

17. The complainant need only establish that the conduct or comment “is known or ought reasonably to be known” to be unwelcome (see section 7.1 of the *Act*). There is no requirement that the complainant explicitly reject the conduct or comment of the perpetrator (see *MacBain v.*

Canada (Human Rights Commission) (No 2) (1984), 5 C.H.R.R. D/2285 and *Penner v. Gabriele* (1987), 8 C.H.R.R. D/4126).

18. The Board is required to assess the allegations of sexual harassment taking into consideration various factors which include the nature of the allegations, the intensity of the conduct or comment, and the recurrence of the unwelcome acts or gestures. (see *Mopega v. Université de Moncton* [2001] N.B.J. No 246 (N.B.C.A.))

19. The cases noted above have been considered by this Board in the cases of *Paula Hooper and Dante's Dance Club & Dante Foriere* [2006] N.B.L.E.B.D. No. 36 and *Ewart and Kilburn* [2007] N.B.L.E.B.D. No 27. In these cases the Board accepted and followed the approach set forth in the jurisprudence.

VI. DID THE ACTIONS OF THE RESPONDENT AMOUNT TO DISCRIMINATION?

20. Based upon the findings of fact, the Board concludes that on a balance of probabilities, Ms. Steeves was the subject of sexual harassment and therefore discrimination as a result of the actions of her supervisor Mr. Johnson. The harassment consisted of the several inappropriate and uninvited remarks made by Mr. Johnson to Ms. Steeves often in the presence of others. In addition there was the incident of May 6, 2005, where Mr. Johnson touched Ms. Steeves inappropriately, whether or not it was on the buttocks.

21. The Board therefore concludes that Mr. Johnson is in violation of sections 3(1) and 7.1(2) of the *Act*. Furthermore, the employer RPK has violated these same sections of the *Act*. In coming to this conclusion the Board accepts the elements of the offence as enunciated in *Re the Borough of Etobicoke, supra*. The Commission has established to the satisfaction of the Board that the behaviour of Mr. Johnson was unwelcome to Ms. Steeves and also of a sexual nature.

VII. REMEDIES

22. The Commission, given the proactive intervention by the Employer in this case, is not requesting training of staff employed by RPK. Rather the request is for special damages for loss wages, general damages and costs incurred by Ms. Steeves.

a) Costs

23. The Commission presented an invoice for \$45.00 that Ms. Steeves paid to obtain copies of tapes of the criminal trial where Mr. Johnson was originally charged and convicted. Mr. Johnson later appealed this conviction and was successful in having it overturned. No documentation was produced before the Board as to this process.

24. With respect to the invoice of \$45.00, while this may have been a legitimate request if the tapes had been entered into evidence or otherwise used in the presentation of this case, under the circumstances the Board is not prepared to make this order.

b) General damages

25. In *Re Dante's, supra* and *Re Kilburn, supra* counsel referred the Board to a large number of cases dealing with the issue of general damages. The Board in both cases ordered general damages for loss of self dignity and self respect.

26. In 1987, a Board of Inquiry in Ontario adopted general principles to be considered in the awarding of general damages (see *Willis and David Anthony Phillips Properties* (1987), 8 C.H.R.R. D/3847). These principles have found favour amongst Human Rights Tribunals across the country (see *Miller and Sam's Pizza House* (1995), 23 C.H.R.R. D/433 (N.S. Board of Inquiry) – paragraphs 200 to 202). In *Willis, supra* the following statement was made, which this Board adopts:

“Awards of general damages under the Human Rights Codes, 1981 should be high enough to provide real redress for the harm suffered, insofar as money can provide such redress, and

high enough to encourage respect for the legislative decision that certain kinds of discrimination are unacceptable in our society ... No award should be so low as to amount to a mere "licence fee" for continued discrimination. At the same time, fairness requires that an award bear a reasonable relationship to awards made by earlier boards of inquiry."

27. In addition, the Board accepts the factors to be considered in assessing a remedy for sexual harassment as set forth in the case of *Torres and Royalty Kitchenware Ltd.* (1982), 3 C.H.R.R. D/858. These factors can be summarized as follows;

1. the nature of the sexual harassment (verbal or physical)
2. the degree of aggressiveness and physical contact
3. the ongoing nature (duration) of the harassment
4. the frequency of the harassment
5. the age of the victim
6. the vulnerability of the victim
7. the psychological impact of the harassment on the victim.

28. Ms. Steeves was and still is a young lady and at the relevant time was working in an industry where it was acknowledged that inappropriate behaviour exists. That said, she should not have to put up with the behaviour she experienced from her immediate supervisor. Ms. Steeves testified that she enjoyed her work immensely and this evidence was despite the conduct of Mr. Johnson. The Board concludes that she was not vulnerable under the circumstances, and she struck the Board as quite a capable person. Furthermore, the evidence of Mr. Dalling was compelling. He testified that it was in May 2005 that he first heard of these issues and his actions were commendable. He immediately suspended Mr. Johnson and offered to do everything in his power to keep Mr. Johnson away from Ms. Steeves. This offer was not acceptable to Ms. Steeves. When the Board examines all of these factors it is not convinced that a large general damage award is appropriate. Having consideration to previous cases before this Board, in particular, *Re Kilburn, supra* and *Re Dante's, supra*, the Board is of the view that a general damage award in the amount of \$2,000.00 is appropriate in all of the circumstances of this case.

c) **Special Damages – Lost Wages**

29. The Commission submits that Ms. Steeves should be paid the equivalent of “adequate notice”, which counsel defined as 12 weeks in this case. This might be a remedy that under appropriate circumstances the Board would order. However, Mr. Dalling on behalf of the employer in this case was proactive. He immediately suspended Mr. Johnson, pending the results of an investigation that he was to conduct. He further told Ms. Steeves of this action. Mr. Dalling advised Ms. Steeves that he wanted her to stay and that he would do everything to ensure there was no contact between her and Mr. Johnston.

30. Ms. Steeves was not fully satisfied with this proposal and decided to leave her employment. In the view of the Board, although the decision of Ms. Steeves may have been right for her, there is very little else the employer could be expected to do to address this matter. Accordingly, the Board is of the view that this is not an appropriate case to order the remedy requested.

VIII. CONCLUSION

31. Having considered all of the evidence and submissions and given the above, the Board concludes that RPK and Jeff Johnston discriminated against Jennifer Steeves in violation of the provisions of the *Human Rights Act*. Accordingly, the Board orders that Ms. Steeves receive \$2,000.00 for general damages to be paid by RPK, the employer herein.

Issued at Fredericton, New Brunswick, this _____ day of October 2007.

GEORGE P. L. FILLITER
CHAIRPERSON
LABOUR AND EMPLOYMENT BOARD