

PROVINCE OF NEW BRUNSWICK



Labour and Employment Board

HR-005-06

IN THE MATTER OF THE *HUMAN RIGHTS ACT*, R.S.N.B., 1973, c. H-1 1

AND IN THE MATTER OF A BOARD OF INQUIRY

BETWEEN:

Steven William Ewart
Saint John, New Brunswick

Complainant

- and -

Bruce Kilburn
Halifax, Nova Scotia

Respondents

BEFORE: George P. L. Filliter, Chairperson

APPEARANCES:

For the Human Rights Commission:	<i>Chantal L. Gauthier, Esq</i>
For Steven William Ewart:	<i>per se</i>
For Bruce Kilburn:	<i>no one appeared</i>

DATE OF HEARING: August 13 and 14, 2007

DATE OF DECISION: August 23, 2007

DECISION OF THE BOARD

I. INTRODUCTION

1. On December 14, 2004, Steven William Ewart filed a complaint with the Human Rights Commission (hereinafter referred to as the “HRC”) in which he claimed to have been sexually harassed by Bruce Kilburn. The original complaint named his employer, the University of New Brunswick and Mr. Kilburn as respondents. Mr. Ewart amended his complaint on March 8, 2005 by removing his employer as a named respondent, but the essence of the issues remained the same. Mr. Kilburn, through counsel, responded to the complaint on April 6, 2005 and Mr. Ewart filed a reply to the response dated May 5, 2005.

2. On May 9, 2006, the Minister of Post-Secondary Education, Training and Labour referred this matter to the Board to act as a Board of Inquiry pursuant to section 20(1)(b) of the *Human Rights Act*.

II. SCHEDULING OF HEARING

3. Initial attempts by the Board to set this matter down for hearing were unsuccessful, as all parties agreed that the matter should be postponed pending the outcome of a criminal trial involving Mr. Kilburn which directly related to the complaint of Mr. Ewart. On January 30, 2007, the Honourable Justice Louise Villemure of the Quebec Court (Criminal Division) rendered a decision in which Mr. Kilburn was found guilty of sexually assaulting Mr. Ewart. Once the Board was informed of this decision, as is its practice, a preliminary teleconference was conducted on April 10, 2007 where Mr. Ewart and counsel for both the HRC and Mr. Kilburn participated. Although a number of matters were discussed, it was agreed by all parties that the matter would be set down for hearing before the Board for five days starting on August 13, 2007. This agreement was confirmed by the Board by a letter to all parties dated April 11, 2007 which was mailed to Mr. Ewart and faxed to counsel.

4. By letter dated May 25, 2007, the board was informed that Mr. Kilburn was no longer represented by counsel. This letter provided the new address for Mr. Kilburn in Halifax, Nova Scotia. All further correspondence from the Board was sent to this address.

III. RESPONDENT FAILS TO ATTEND

5. At the beginning of the hearing on August 13, 2007 Mr. Kilburn had not arrived. The Board waited for 15 minutes after the scheduled starting time before commencing the hearing. As a preliminary matter the Board asked Mr. Ewart and the HRC if they wished to proceed and when they responded in the affirmative, the Board asked for submissions on the issue of whether or not there was authority to continue in the absence of the Respondent.

6. After considering the submissions of the HRC, the Board determined that it did have the jurisdiction to proceed for the following reasons. In the case of *Woiden, Falk, Yeary & Curle and Lynn* (2002) 43 C.H.R.R. D/296 (C.H.R.T.) the Canadian Human Rights Tribunal was faced with a similar situation. In that case the Tribunal determined to proceed in the absence of the Respondent as it was satisfied that the individual was fully aware of the proceedings and simply chose not to attend.

7. This Board is likewise satisfied that Mr. Kilburn was fully aware of the proceedings and simply chose not to attend. It is important to note that when the matter was originally set down for hearing (April 10, 2007), Mr. Kilburn was represented by counsel who in fact consented to the dates. Confirmation of these dates was sent by the Board by letter dated April 11, 2007 sent by facsimile. It was on May 25, 2007 that the Board was informed that counsel was no longer representing the interests of Mr. Kilburn.

8. Furthermore, in July 2007 Mr. Kilburn contacted that Board offices and questioned whether he could attend due to a supposed order of the Quebec Court (Criminal Division) that allegedly prohibited him to be in contact with or in close proximity to Mr. Ewart. This of course confirms that Mr. Kilburn was aware of the scheduled hearing, but raises another issue. In response to this call, Board staff informed Mr. Kilburn to contact the crown prosecutor in Quebec to determine what

needed to be done so as to allow him to attend the hearing. As Mr. Kilburn did not advise the Board of the outcome of this suggested process, the Board sent correspondence on August 7, 2007 to Mr. Kilburn by courier. The purpose of the letter was to advise Mr. Kilburn that the hearing would proceed unless he was able to provide proof that the Quebec court would not allow his attendance. The address used by the Board was the same as provided by Mr. Kilburn's former counsel and at the hearing the HRC provided proof that a package that they had sent to Mr. Kilburn at the same address had been received.

9. For all of these reasons the Board is satisfied that Mr. Kilburn was aware of the dates of the hearing and the purposes thereof and that he chose not to attend. Consequently the Board decided to proceed in his absence.

IV. FACTS

10. Evidence was provided to the Board in the form of documents admitted as exhibits and through the testimony of five witnesses: Mr. Ewart, Natalie Davidson, Matthew Foot, Chris Richardson and Eric Grant. Although none of the witnesses were tested by cross examination, the Board found each of them to be credible and thus the finding of facts in this matter is relatively simple.

11. In August of 2003 Mr. Ewart, who was then in his middle twenties, commenced employment with the University of New Brunswick at the campus located in Saint John, New Brunswick. He was employed as a "Residence Life Coordinator" and was required to reside in a room located at one of the university residences simply called "New Residence". Bruce Kilburn had been employed by the same employer for some 10 to 12 years both as the ITS Help Desk Supervisor and as the Residence Academic Leader. In his latter position, Mr. Kilburn was also required to reside in a room located in another of the university residences. It was in the capacity of Residence Academic Leader that Mr. Ewart was required to work with Mr. Kilburn.

12. During the first few months of the employment of Mr. Ewart, nothing untoward occurred between he and Mr. Kilburn. However, starting in the month of October 2003, the relationship

between these two individuals changed. At about this time, Mr. Kilburn began to make remarks that made Mr. Ewart uncomfortable. These comments included compliments on the attire of Mr. Ewart; suggestions that they go to dinner and or the movies together; questions as to whether or not Mr. Ewart needed company; offers to cook meals for Mr. Ewart; requests that Mr. Ewart stay the night with Mr. Kilburn at his apartment; offers to go shopping together; invitations to go to Florida and meet the parents of Mr. Kilburn and generally suggestions that they “hang out” together. On many occasions, when making these comments Mr. Kilburn would place his hand on the shoulder of Mr. Ewart. Because Mr. Ewart was a relatively new employee, and Mr. Kilburn was a long term employee, the former said nothing to anyone about this, excepting of course his girlfriend Ms. Davidson.

13. In the middle part of December, 2003, matters grew progressively worse. At this time Mr. Ewart was under some stress due to a “personal situation” and on December 10, 2003, he received a note from Mr. Kilburn that had been left under his apartment door. The note said “Steve, I know this has been hard for you the last few weeks, but I want you to know that I care for you dam it and I will not go away, so let’s do some Christmas shopping and catch a movie.”

14. The next day Mr. Ewart attended a workshop offered by the university the topic of which was sexual harassment. Having participated in the conference, Mr. Ewart decided that he should make his concerns known. He met with Daphne Waye, the Sexual Harassment Officer for the university. After the meeting he went back to his apartment and Mr. Kilburn knocked at the door on three occasions which Mr. Ewart ignored. Shortly thereafter Mr. Kilburn called Mr. Ewart from his office three times and on the final occasion, Mr. Ewart answered the phone and told Mr. Kilburn that he did not want to be disturbed. Shortly thereafter Mr. Ewart decided to approach Mr. Kilburn at his office. During this meeting Mr. Ewart indicated that he was not comfortable with the actions of Mr. Kilburn.

15. A few nights later, on December 13, 2003, Mr. Kilburn was playing hockey and Mr. Kilburn was present as a spectator. At one point during the game, Mr. Ewart had an argument with the referee and was ejected from the game. Mr. Ewart described how uncomfortable he was being in the shower alone, knowing that Mr. Kilburn was present in the building.

16. Later that week Mr. Kilburn apparently did not take heed to the admonitions of Mr. Ewart as he continued to suggest that the two of them go Christmas shopping and in fact Mr. Kilburn asked Mr. Ewart what he might want for Christmas. Furthermore, Mr. Kilburn asked once again if Mr. Ewart might want to go to Florida for the Christmas break.

17. In May of 2004, Mr. Ewart was planning a vacation to Mexico. Leading up to the time of his departure, Mr. Kilburn attempted to give Mr. Ewart \$200.00 to purchase a gift. Mr. Ewart did not take this money or purchase a gift for Mr. Kilburn.

18. Upon return from his trip to Mexico, Mr. Ewart and Mr. Kilburn were required to attend a conference in Wolville, Nova Scotia. In order to save their employer money on travel expenses they decided to travel together by car. Prior to departure and in fact on the trip from Saint John to Wolville, Mr. Kilburn made several suggestions that rather than staying in the campus residence in Wolville that they should stay together in a Bed and Breakfast. These suggestions were rejected by Mr. Ewart.

19. In June, 2004 Mr. Kilburn and Mr. Ewart once again had to travel to attend a conference, this time to Montreal. Upon arrival at the hotel in Montreal in the afternoon of June 18, 2004, Mr. Ewart was surprised to learn that Mr. Kilburn had booked only one room for them to stay in together. Mr. Ewart, although surprised, decided not to ask for another room in order to “save the university money”. In any event the room had two double beds and the two of them retired for a short nap before meeting with Mathew Foot, another employee of the university at the campus in Fredericton. In the early evening all three met and travelled to the baseball stadium in order to watch the Montreal Expos play. During the game each person consumed three beers. When the game concluded, the group went to the souvenir shop before catching the subway train back to their respective hotels. Mr. Foot was the first to get off the train, as his hotel was located before the hotel in which Mr. Ewart and Mr. Kilburn were staying. Upon arrival at the hotel, Mr Ewart and Mr. Kilburn had another beer in the hotel bar before retiring to the room to go to sleep.

20. Mr. Ewart was expecting a telephone call from Ms. Davidson so he placed his cellular phone on the table between the beds. At about 3:00 a.m. the call came through and Mr. Ewart answered it. When he did so, he observed that Mr. Kilburn was not sleeping on his bed, but rather was lying on the floor between the two beds. Perhaps because he was awakened from a deep sleep or for some other reason, Mr. Ewart thought nothing of this peculiar situation and went back to sleep. Shortly thereafter Mr. Ewart was again woken suddenly. At this point in time the right hand of Mr. Kilburn was caressing the left nipple of Mr. Ewart and Mr. Kilburn was performing oral sex on Mr. Ewart. Needless to say Mr. Ewart was extremely upset and jumped out of bed. He was both angry and upset to the point of crying at this juncture.

21. Immediately Mr. Ewart called his girlfriend and cried on the phone, which according to Ms. Davidson was unusual for him to do. In any event it was agreed that Ms. Davidson would call the airline to attempt to book a flight back home (Saint John) that very day. Once the call was completed, Mr. Ewart left the room and went to the lobby of the hotel, despite the suggestion of Mr. Kilburn that he stay and talk about the matter. When Mr. Ewart was in the lobby, his girlfriend called back to confirm that arrangements had been made for him to return to Saint John that morning. During this call Mr. Kilburn came into the lobby. As Mr. Ewart concluded that the room was vacant, he then went to the elevator to pack. Mr. Kilburn attempted to join him, however, Mr. Ewart clearly told Mr. Kilburn to stay in the lobby.

22. When Mr. Ewart arrived in Saint John, Ms. Davidson picked him up at the airport and took him to the local police station where Mr. Ewart gave a statement. Afterwards, Ms. Davidson took Mr. Ewart to the hospital where he received a general examination which included an unpleasant penal swab.

23. Two days later Mr. Kilburn sent an email to Mr. Ewart which said;

“Steve,

I realize you probably want nothing to do or say to me right now, or if you will see this, but I wanted to express my sincere apologies over this whole incident, which was the last thing I would have ever wished to happen. I wish you would have stayed but I respect that decision.

I need to say some things in person but I know it won't be possible for a while.

I have indicated to Matt that you had a personal emergency and had to leave. I am not sure what you have said to anyone so please let me know so i can say the same thing.

I picked up your materials and I will put them in the office when I can.

I am so sorry about all this – I need some help.

Bruce”

24. As indicated, Mr. Kilburn was eventually convicted of an offence under the *Criminal Code of Canada*, and the findings of fact of the criminal court, as introduced into evidence are not materially different that those of this Board.

25. Both Mr. Ewart and Ms. Davidson described the significant impact this incident had both upon Mr. Ewart himself and also to them as a couple. First of all, Mr. Ewart attended at the hospital for very intrusive tests and subsequently he went to his own doctor because he was not able to sleep. His family physician prescribed sleeping pills. For some time Mr. Ewart, who was both a baseball player and a hockey player, had difficulty participating in these sports as he felt uncomfortable sitting with other males. In fact, a couple of days after the incident Mr. Ewart thought that it would be good for him to play in a baseball game, but he felt so uncomfortable that he was unable to sit in the dugout with his team mates. He at that time decided to, as he put it best, “go into hiding for a couple of weeks”, as he put it, and thus avoid any contact with people.

26. With the assistance of his employer, he attended counselling sessions with psychologist Barbara Gibson. The Board accepted the report of Ms. Gibson who has been qualified as an expert witness in various courts within Canada (New Brunswick, Ontario and Newfoundland) as well as within the United States (Maine), not to mention before various arbitration panels. The report of Ms. Gibson, dated December 19, 2006, states in part:

“Mr Ewart indicated that he has been experiencing a number of psychological symptoms since the date of this event, symptoms, which have interfered with his daily life activities, his capacity for concentration, and his relationship with his girlfriend. He gave classic description of thought intrusion, and flashbacks, which were at times triggered by tactile sensations. He expressed a feeling of dislike himself since the indicated event, and a constant feeling of discomfort, which at times, he felt so helpless to make change in that, he had been experiencing suicidal thoughts.

Approximately one month prior to his first consultation, he was placed on an anti-depressant by his family doctor. His measured level of depression on the Beck Depression Inventory – II (BDI-II) had subsided to a mild to moderate level when he was seen in November 2004. Suicidal thoughts were no longer occurring. He was however experiencing sleep disturbance, agitation, diminished pleasure, intermittent sadness and a loss of self confidence. Measurement of Mr. Ewart's reactions using the Davidson Trauma Scale showed a distribution of intrusive thoughts, emotional numbing, and hyperarousal symptoms (which include irritability, concentration difficulties, edginess, rapid reactivity, and a rapid startle response). The total pattern showed post-traumatic event anxiety and would not be specifically classified as Post Traumatic Stress Disorder.

Mr. Ewart gave no history of having experienced psychological problems prior to this event. Symptoms were subsiding somewhat when he was last seen in January 2005 but he was continuing to show rumination and occasional nightmares. He improved by that time in his capacity for concentration. *Overall, it would be concluded that Mr. Ewart was very seriously impacted by the experienced event, and that many aspects of his life were thrown on to disarray as a result of this. It would also be expected that he would carry at least a few continuing symptoms perhaps into the distant future.*" (my emphasis added)

27. The opinion of Ms. Gibson coincides with the observations of this Board. Mr. Ewart presented himself to the Board as still upset, embarrassed and ashamed. Both he and Ms. Davidson described the difficulties with intimacy that they as a couple were continuing to experience. Mr. Ewart still has flashbacks of the incident and on occasion still has nightmares. In the view of the Board, the last two sentences of the report of Ms. Gibson bear repeating – "Overall, it would be concluded that Mr. Ewart was very seriously impacted by the experienced event, and that many aspects of his life were thrown on to disarray as a result of this. It would also be expected that he would carry at least a few continuing symptoms perhaps into the distant future."

V. ISSUES

28. The issues in this matter are as follows:

- a) Were the actions of Mr. Kilburn discriminatory on the basis of the prohibited ground of "sex" and therefore contrary 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?

VI. RELEVANT STATUTORY PROVISIONS

29. 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. (my emphasis added)

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.

VII. DEFINITION OF SEXUAL HARASSMENT

30. 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.

31. 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*).

32. 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).

33. 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.))

34. The cases noted above were recently considered by this Board in the case of *Paula Hooper and Dante's Dance Club & Dante Foriere* [2006] N.B.L.E.B.D. No. 36. In that case the Board accepted and followed the approach set forth in the jurisprudence.

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

35. Based upon the findings of fact, the Board has no difficulty in concluding that on a balance of probabilities, Mr Ewart was the subject of sexual harassment and therefore discrimination. This discrimination was as a result of the behaviour of Mr. Kilburn, a fellow employee of Mr. Ewart's. The harassment included the many inappropriate comments and actions of Mr. Kilburn over the 9 months between October 2003 and June 2004 as more specifically described in paragraphs 12 to 18 of this decision and of course the sexual assault that occurred in Montreal as described in paragraphs 20 and 21 of the this decision. It is further the conclusion of this board that Mr. Kilburn was employed by the university at the material times of these offences. Accordingly, in the view of the Board, sections 3(1) and 7.1(2) of the *Act* have been violated by Mr. Kilburn.

36. In drawing this conclusion, the Board is cognizant of the elements of the offence as enunciated in *Re The Borough of Etobicoke, supra*. In this case, the Commission has established to the satisfaction of the Board that the behaviour of Mr. Kilburn was unwelcome to Mr. Ewart and certainly of a sexual nature. It is hard to imagine that the continued inappropriate comments and touching by Mr. Kilburn, despite being told to discontinue, were anything but sexual in nature. And, of course, the event of June 19, 2004 as found by this Board to have unfolded, is also very much of a sexual nature. The effect of this behaviour was most certainly detrimental to the employment relationship of Mr. Ewart, who was unable to concentrate for a long period of time and who in fact was even unable to come to work for a period of time.

37. For all of these reasons, the Board reiterates its conclusion that Mr. Ewart was the subject of discrimination on the basis of sex or sexual harassment by Mr. Kilburn. Thus, sections 3(1) and 7.1(2) of the *Act* have been violated.

IX. REMEDIES

38. Counsel for Mr. Ewart and the Commission requested that the Board order general damages, and costs associated with the attendance of the 5 witnesses called by the Commission.

(i) General Damages for Mental Anguish and Loss of Dignity and Self Respect

39. In *Re Dante's, supra*, counsel referred the Board to a large number of cases dealing with the issue of general damages and one of these cases dealt with an allegation of sexual harassment. The Board there ordered general damages for loss of self dignity and self respect in the amount of \$5,000.00. In paragraph 35 of *Re Dante's, supra*, the Board stated as follows:

35. However, the complainant also submitted that the Board should award general damages for loss of dignity and self-respect. In making this claim, counsel reminded the Board of the significance attached to employment in our society, a submission which this Board accepts. It is the view of this Board that the law is unclear as to whether or not such a claim requires proof of wilful or reckless conduct.

40. Counsel submitted that the Board should review the conclusion it drew in *Re Dante's, supra* concerning the awarding of general damages for mental anguish. In that case the Board concluded that there was a requirement that there be a wilful or reckless act in order for general damages to be awarded under this head of damages, and in drawing this conclusion the Board relied upon the case of *York Condominium No 216 Corp v. Dadnik* (1991) 79 D.L.R. (4th) 161. However, as pointed out by counsel, the case of *York Condominium, supra* was decided based upon a provision of the relevant legislation that specifically used the words “reckless or wilful”, whereas there are no similar words in section 20(6.2) (f) of the *Act*. The Board accepts this submission and concludes that legislative provision in question provides the Board with the power to award, in the words of the *Act*, compensation “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”.

41. 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.”

42. 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.

43. In analyzing the aforementioned criteria, the Board concludes that Mr. Ewart, a young (mid twenties) man just starting his employment with the University of New Brunswick, was very vulnerable, especially given the fact that Mr. Kilburn was a long term employee. This conclusion was confirmed when Mr. Ewart testified that he was very reluctant to say anything until after the conference on sexual harassment. Even then Mr. Kilburn did not stop his inappropriate actions. The harassing behaviour lasted for a full 9 months from October, 2003 on to June, 2004 and was frequent in nature. In fact, Mr. Ewart testified that the inappropriate comments and unwanted touches to the shoulder occurred daily and often times many times a day. Although the degree of

aggressiveness and physical touching in the nine month period was not on the high side of the scale, what occurred on June 19, 2004 was a most egregious and flagrant act. It is not surprising that Mr. Ewart was and still is psychologically damaged and required counselling.

44. Of the cases that counsel referred the Board to, two were most helpful. In the case of *Gill and Grammy's Place Restaurant and Bakery Ltd.* (2003), 48 C.H.R.R. D/174 a British Columbia Human Rights Tribunal awarded the complainant \$10,000.00 in general damages for sexual harassment. In this case the complainant was the subject of various harassing comments, unwanted touching and eventually being terminated.

45. The other case of some interest to the Board was *Gibbons & Ladouceur and Sports Medic Inc.* (2003), 48 C.H.R.R. D/98 where a Human rights Tribunal in Ontario awarded a total of \$25,000.00 in general damages consisting of \$10,000.00 for mental anguish and another \$15,000.00 for infringement of her rights. In this case the complainant Ladouceur was the subject of repeated sexual molestations.

46. Although it is impossible to have an identical fact situation to assist the Board in drawing a conclusion on the issue of general damages the cases of *Gibbons and Ladouceur, supra* and *Gill, supra* provide this Board with some assistance in assessing awards of other tribunals in somewhat similar situations. Mr. Ewart, in the view of the Board was the subject of several unwanted and inappropriate comments over a nine month period during which Mr. Kilburn also invited him to shop, have dinner, stay overnight, stay in a Bed and Breakfast and go to movies. The seriousness of the sexual harassment seemed to escalate and of course culminated with the sexual assault that occurred on June 19, 2004. The result of the sexual assault was significant and Mr. Ewart attended psychological counselling and he and Ms. Davidson will probably have to attend further counselling sessions to get beyond their "intimacy issues". For all of these reasons this Board has decided to compensate Mr. Ewart in accordance with the provisions of section 20(6.2)(f) of the *Act*, by ordering damages in the amount of \$15,000.00 for "consequent emotional suffering, injury to dignity, feelings or self respect" to be paid by Mr. Kilburn.

(ii) Attendance Money

47. Counsel submitted that the Board should make an award for the costs of requiring the five witnesses called to attend. The Board did issue summons to all five witnesses, but there was no evidence provided to show how much money had been paid to any of the witnesses either for conduct money or mileage. Although section 20(6.2)(e) of the *Act* grants the Board authority to order such amounts under the appropriate circumstances, in this case the Board concludes that the HRC has failed to lay a factual basis to make the claim. Accordingly, the Board dismisses this aspect of the claim.

X. CONCLUSION

48. The Board concludes that Mr. Kilburn has violated sections 3(1) and 7.1(2) of the *Human Rights Act*. As a result, Mr. Kilburn is ordered to pay \$15,000.00 in general damages to Mr. Ewart for “emotional suffering, injury to dignity, feelings or self respect”.

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

GEORGE P. L. FILLITER
CHAIRPERSON
LABOUR AND EMPLOYMENT BOARD