IN THE MATTER OF: The Human Rights Act, R.S.N.S., 1989, as amended by 1991, c.12

The Nova Scotia, Human Rights Commission and Mary Illsley

COMPLAINANT(S)

-And -

Ultramar Services Inc. (Gould's Ultramar Service Station) and/or Douglas Kenny

RESPONDENT(S)

DECISION DATE: January 23, 2003

BEFORE BOARD OF INQUIRY CHAIR: J. Royden Trainor

COUNSEL FOR THE HUMAN RIGHTS COMMISSION: Jennifer Ross

COUNSEL FOR THE RESPONDENT: Gregory Turner

COMPLAINANT: Mary Illsley: (Not Independently Represented)

INTRODUCTION

Mary Illsley filed a formal complaint on May 3, 1999, under the *Human Rights Act*, R.S.N.S. 1989, c. 214 as amended .

Illsley, a mother of two and in her early thirties, was hired as a clerk/pump attendant at Gould's Ultramar Service Station in Kentville on or about May 29, 1998. In the fall of 1998, the Respondent Douglas Kenny ("Kenny") who was about 19 years of age at the time was also hired as a clerk/pump attendant at Gould's. Illsley alleges that on or about October 1998, Kenny began to sexually harass her while she was working at Gould's. Illsley complained to the Manager of Gould's, Pamela Gould, on or about mid-December 1998. At the time of the initial complaint to Gould, Illsley did not refer to the conduct of Kenny as sexual harassment. However, Illsley alleges that as a result of Kenny's conduct, and the way her complaint to Gould was being handled, she was unable to continue working and left Ultramar in January 1999. Illsley alleges in her formal complaint that her employment was brought to an end because of the sexual harassment she encountered while working at Gould's Ultramar. On May 3rd, 1999, Illsley filed a complaint with the Nova Scotia Human Rights Commission. It appears Illsley also complained to the local RCMP on or about August 1999 about Kenny. This (RCMP) complaint appears to have been investigated but the Board saw no evidence it was pursued or that any charges were laid as a result.

On May 3rd, 1999, Illsley filed a formal complaint with the Nova Scotia Human Rights Commission pursuant to the *Nova Scotia Human Rights Act*, R.S.N.S. 1989, c214 (as amended). The complaint reads:

> "I was employed as a Clerk at Gould's Ultramar Service Station on May 29, 1998. The first few months were uneventful. In the fall of 1998, Mr. Douglas Kenny was taken on staff as another clerk. In late October 1998, Mr. Kenny began to touch me inappropriately and speak to me about sexual matters.
>
> "For example, frequently Mr. Kenny would slap me on the behind with his open hand when he passed me in the store. He would hit my behind with a damp towel. Mr. Kenny also made vulgar comments to me about his private parts.
>
> "In early January 1999, I informed my supervisors of this harassment but was not informed as to whether any action was being taken.

> "As a result, I was unable to continue working and the employment therefore terminated for me on January 18, 1999. I suffered significant stress in this work place during this period and have required medical attention as a result.
>
> "I allege that my employment was terminated due to sexual harassment encountered in the workplace and that this is a violation of section 5(2) of the *Nova Scotia Human Rights Act*."

Ultramar Services Incorporated, (Gould's Ultramar Service Station) and/or Douglas Kenny was named as Respondent(s).

Prior to the start of the hearing, the Board was made aware by Counsel for the Commission that the Respondent, Ultramar Services Incorporated, reached a without prejudice agreement with the Nova Scotia Human Rights Commission. This without prejudice agreement as also agreed to by the Complainant. The Board cannot, and does not, draw any conclusion or inference from this resolution or agreement.

Assessing The Evidence:

A Board of Inquiry appointed under the *Human Rights Act* is not a civil proceeding subject to the Nova Scotia Civil Procedure Rules and the traditional rules of evidence. The jurisdiction of a Board of Inquiry is found at section 34(7) of the *Human Rights Act*, which is as follows:

> "A Board of Inquiry has jurisdiction and authority to determine any question of fact or law or both required to be decided in reaching a decision as to whether or not any person has contravened this Act or for the making of any order pursuant to such a decision."

Regulations made under the *Human Rights Act* with respect to evidence the Board may hear is set out at O.I.C. 91-1222 (October 15, 1991). N.S. Reg. 221/91 reads:

> "In relation to a hearing before a Board of Inquiry, a Board of Inquiry may receive and accept such evidence and other information, whether on oath or affidavit or otherwise, as the Board of Inquiry sees fit, whether or not such evidence or information is or would be admissible in a court of law; notwithstanding however, a Board of Inquiry may not receive or accept as

> evidence anything that would be inadmissible in a court by reason of any privilege under the law of evidence."

The evidence presented at the hearing is critical particularly when the Complainant and Respondent have dramatically different views of what did or did not take place. Kenny has consistently denied he has sexually harassed the Complainant, Illsley, or engaged in any conduct that is the subject matter of Illsley's complaint.

Findings:

Illsley and Kenny have dramatically different views as to what actually may have occurred during the time they worked together at Gould's Ultramar (October 1998 to Late December of 1998). The Board is mindful of the necessity of carefully assessing the evidence in its entirety as well as the credibility of each witness appearing before the Board. The Board notes later in this decision the criteria it used to carefully assess the evidence and testimony received.

The Board finds the evidence shows the work environment at Gould's was sometimes juvenile and seemed to be punctuated with a mixture of elastic "pinging" and "horseplay" between and among many of the employees. This type of activity may, have been, in part, owing to a number of young staff, some between the ages of 17-19, many of whom were part-time, and a lack of experienced professional supervision or solid management practices.

The Board heard testimony from Illsley about a series of post-it-notes containing derogatory terms about her. In testimony before the Board, Illsley gave evidence about the post-it-notes that appeared at Gould's with phrases like "Mary is a Whore", "Mary is a Bitch", and "Mary is a Rat". Kenny denies any knowledge or responsibility for the post-it-notes described by Illsley. The Board heard conflicting evidence on this matter. These are serious accusations, but do not appear evident in Illsley's complaint to Ms. Gould in January of 1999, nor is it clearly evident as an incident in the complaint filed with the Human Rights Commission in May 1999, or in the complaint made to Ms. Gould or the complaint she made to the Kentville RCMP in August 1999. Illsley testified the post-it-note incidents were witnessed by Ms. Fraser, a one time close friend of Illsley, a co-worker and later the Assistant Manager of Gould's. Ms. Fraser denies having any knowledge of any such incidents; and Illsley acknowledges that she was not a witness to Kenny writing these notes. No examples of the offensive post-it-notes were entered into evidence as an exhibit. Ms. Crouse, a co-worker

of Illsely, suggested in her testimony she had seen a single post-it-note referring to Illsley as a “slut” which she thinks may have been written by Kenny but that Illsley never saw this note and Ms. Crouse cannot say when it happened. No other witness suggested they had seen anything of this nature in a rather small working environment where post-it-notes were commonly used for recording staff IOU’s. Illsley says she never spoke to Kenny about this matter. After assessing all the evidence and testimony the Board concludes there is not a preponderance of evidence that satisfies the burden of proof necessary to establish that any such post-it-notes, with pejorative references to Illsley, existed or, that if they did exist, that Kenny had anything to do with them.

With respect to the testimony that Kenny had put a boot print on the Complainant’s backside on a number of occasions, the Board heard conflicting evidence. Ms Illsley testified that she was only able to surmise that a boot print on her backside was the result of conduct of Kenny. Illsley testified that this happened to her on a number of occasions, but cannot say she ever witnessed it being done to her or that she was aware that it was being done at the time. The Board has difficulty accepting that one could place a boot on another person’s behind on several occasions and that person was unaware until after the fact. Kenny denies any such incident or incident(s) took place. Ms. Crouse suggested in her testimony that she was witness to a single incident where Kenny put his foot on Illsley’s backside. The Board, however, was not impressed with the veracity of her testimony, and was troubled by a number of significant inconsistencies in her evidence. Crouse’s demeanour during testimony bordered on flippant and appeared disingenuous; and her suggestions that there was a conspiracy “to get Mary” combined with her apparent personal dislike for Ms. Gould and Ms. Fraser seriously damaged her credibility. The Board does not regard the testimony of Ms. Crouse as credible. The Board cannot conclude that there is a preponderance of evidence that would meet the necessary burden to satisfy the Board that the boot print incidents took place.

The Board is satisfied there was a great deal of elastic pinging and horseplay at Gould’s, and that this was an activity that predated Illsley’s and Kenny’s employment at Gould’s. Elastic pinging was an activity many employees participated in. The Board heard no evidence or suggestion that this activity had any sexual connotation or nuance. Illsley’s testimony indicated the elastic pinging targeted no specific part of the body of anyone; including elastics pinged by Kenny. The Board does not dispute that at some point this practice caused some discontent and unhappiness for Illsley whom the Board regarded as a more mature and serious person than many of her younger co-workers. Kenny on this point was a bit excessive in his denials and in all likelihood Illsley was hit on occasion by elastics pinged by Kenny , elastic Pinging is, the Board suspects, is not an exact or accurate science. There is no evidence this was in any way sex based or constituted sexual

harassment. In general, the Board is of the view that the evidence of Mr. Campbell another co-worker of Illsley, is likely more in accord with the facts on this matter than is Illsley's.

Illsley alleged Kenny subjected her to frequent and harsh name-calling. Illsley's testimony suggested this was a not an uncommon occurrence and it happened "all the time". The name-calling incidents are not clearly evident in the original complaint to Gould or in the later Human Rights Commission Complaint. There is no reliable evidence by witnesses or otherwise that Kenny referred to Illsley or any other co-worker in derogatory terms using words like "bitch", "slut", "whore" or "rat." Even Ms. Crouse, whose evidence was unreliable and inconsistent referenced only one incident where Kenny referred to Illsley as a "bitch" after an argument between himself and Illsley. Ms. Fraser seemed uncertain on this point and during her direct testimony suggested there was an incident where Kenny referred to Illsley as a "bitch" but this occurred after Illsley initiated a complaint against him. Fraser was confusing on this point during testimony, and had signed a statement with the Kentville RCMP on August 9th, 1999 that she had never witnessed Kenny either call Illsley names or slap her backside. Under direct examination, Ms. Fraser seemed to modify her position from "I am not sure", to "oh no, no, no", to "No", to "I don't recall", to "I don't think" and then to "probably". Under cross-examination, Ms. Fraser appeared to again reaffirm her original statement made in August of 1999, in which she said she had "never" witnessed such incidents.

The Board is unable to conclude there is a preponderance of evidence that meets the necessary burden of proof with respect to Illsley's serious allegations relating to name-calling.

Kenny also denies Illsley's testimony that he often slapped her on the behind. The Board is not satisfied a preponderance of evidence establishes the allegations about Kenny's persistent bum tapping or slapping with an open hand. The Board is likewise not satisfied there is a preponderance of evidence to support a conclusion that the burden of proof has been met with respect to the allegation Kenny often grabbed himself, and said things like "see how big my penis is" or words to that effect. The Board accepts Kenny's evidence with respect to this point.

The Board regarded Illsley as one who speaks her mind and takes prompt action as required. She had done so on two previous occasions during her time at Gould's Ultramar. For example there was an instance where one employee took liquor to work, and another where an employee did not pay for goods taken from the store. In both cases, Illsley did not hesitate to act immediately and in both cases Ultramar and/or Pam Gould took swift action and the two employees were fired. It is difficult therefore for the Board to square this with

the suggestion that Illsley was subjected to frequent backside slapping, verbal assaults, and often withstood sexually charged gestures, without taking any action for more than three months. Despite Illsley's claims to the contrary, there is no credible evidence that others witnessed the events, heard anything about the alleged conduct or were told by Illisley about the conduct allededed in her testimony. The Board is aware that owing to the nature of sexual harassment, it is not required to have testimony of a corroborating witness to find sexual harassment took place. Such evidence, or lack of such evidence, however, is more relevant in the context of the particular situation before the Board and considering the close work environment, Illsley's testimony that others had witnessed, and that "every one knew what was going on". In contrast with the testimony of Illsley, the Board found no credible evidence that Illsley complained to anyone about the alleged sexually harassing conduct or that others were aware of inappropriate conduct of Kenny until after formal complaint to Gould on or about December1998.

The Board is satisfied Illsley did not initially allege "sexual harassment" when specifically prompted by Ms. Gould in December 1998, nor did she complain about Kenny's conduct to other co-workers or managers prior to the December 1998 complaint.

The Board appreciates that, in the matters of sexual harassment, a delayed complaint does not necessarily weaken the veracity of the claim but the Board views this together with the entirety of all the evidence. In general, the Board finds the evidence or Mr. Kenny, Mr. Campbell, Ms. Gould and, to the extent she could recall, Ms. Alders, to be more in accord with the totality of the evidence and the facts.

Assessing Testimony:

In assessing the evidence given before the Board, the Board was aided by the reasoning in ***McNulty*** v. ***GNF Holdings Ltd.*** (1992), 16 C.H.R.R. D/418 (B.C.C.H.R.) and ***Farnya* v. *Chrony*, [1952] 2 D.L.R. 354 (B.C.C.A.) at 356-58:**

> "The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a 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. Only thus can a Court satisfactorily appraise the testimony of

> quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth…."

Therefore, the testimony of each witness in this matter has been examined for consistency with the preponderance of the probabilities surrounding the circumstances. The evidence has also been scrutinized for plausibility under the circumstances. The Board has also weighed the witnesses' motives, their attitude and demeanor under oath and the manner in which they testified (*MacDermid* v. *Rice* (1939), 45 R. de Jur. 208 at 210-11, cited in Sopinka Lederman, *The Law of Evidence in Civil Cases* (Toronto: Butterworths (1974) c. 7 at 531). The Board looks to the amalgamation of all the evidence and how it held together, as well as relevant viable circumstantial evidence before the Board. *Faryna v. Chorny*, (Supra) at p.357:

> "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 the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a 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."

Inquiry Chair David Bright aptly articulates these criteria in **McLellan v. *Mentor Investments Ltd.*** (1991), 15 C.H.R.R. D/134 , para. [20](N.S. Bd. Inq.).

> "There is no machine that an adjudicator can use to discovery if a witness is being truthful or less than candid. Therefore, any adjudicator, including myself, is left with our own personal background, and reaction to evidence given. It is a less than perfect system, but one that usually is successful as a direct consequence of the adversarial process."

Burden of Proof:

The Board has been careful to assess all the evidence in the context of the burden of proof with respect to a complaint of this nature under the *Human Rights Act* as set out in s. 39(3) of the *Act* wherein it states:

> 39 (3) In any prosecution under this Act, it is sufficient for a conviction, if a reasonable preponderance of evidence supports a charge that the accused has done anything prohibited by this Act or has refused or neglected to comply with an order made under this Act.

The Board was impressed and guided by the principles to be applied with respect to the burden of proof that must be met by the Complainant as articulated by Board Chair David Bright in ***McLellan*** v. ***Mentor Investments Ltd.*** (1991), 15 C.H.R.R. D/134 para. [15] (N.S. Bd. Inq.):

> “What is meant by the term "a reasonable preponderance of evidence supporting a charge?” The terminology is one often used in law and understood by lawyers. Human rights decisions are, however, not written solely for lawyers, but for the benefit of all because of the remedial nature of the legislation.
>
> “Let me start out by stating the obvious: There are, in essence, two types of burdens of proof; firstly, the burden of proof used in criminal cases which is "proof beyond a reasonable doubt"; secondly the proof required in a civil case, namely, proof on a "preponderance of evidence", often called the civil burden.
>
> “There is a very significant and real difference between the two. The criminal proof requires the trier of fact to ensure that he is satisfied as a matter of moral certainty the facts alleged are true, beyond a reasonable doubt. This is an extremely high standard.”
>
> The civil burden or "preponderance of evidence", or proof of a fact on a balance of probabilities has been described as follows:
>
> “<u>It must carry a reasonable degree of probability, but not so high as is required is a criminal case. If this evidence is such that the tribunal can say, "we think it more probable than not," the burden is discharged, but, if the probabilities are equal, it is not</u>.” *Miller* v. *Minister of Pensions*, (1974) 2 All. E.R. 372 (C.A.) at 374 per Lord Denning.
>
> As to the actual requirements, the Supreme Court of Canada accepted the following as appropriate:

> "[I]t is impossible to lay down in words any scale or standard by which you can measure the degree of proof which will suffice to support a particular conclusion of fact. The applicant must prove his case. This does not mean he must demonstrate his case. If the more probable conclusion is that for which he contends, and there is anything pointing to it, then there is evidence for a court to act upon. *Richard Evans & Co.* v. *Astley*, [1911] A.C. 674 (H.L.), per Earl Loreburn quoted by Duff, J. in *G.T.R.* v. *Griffith* (1911), 45 S.C.R. 380."

In short, therefore, the onus of proving allegations [is] upon those who made the allegations, namely the Human Rights Commission and the three complainants.

Previous adjudicators have found that to prove sexual harassment, the following is required:

> "The complainant must prove, on a balance of probabilities, that there was a contravention… of the *Human Rights Code*. This involves two parts: 1) proof that the alleged conduct by the respondent occurred; 2) proof that it constituted sexual harassment in the circumstances (for example, that it took place without the complainant's willing consent). If the complainant leads evidence, which could satisfy these requirements, then the respondent has an evidentiary burden to respond with some evidence that the acts did not occur or that they did not constitute sexual harassment. *Zarankin* v. *Johnstone* (1984), 5 C.H.R.R D/2274 [D/2280, para. 19221]; aff'd (1985), 6 C.H.R.R. D/2651 (B.C.S.C.)

Having said that, it is important to note that there are three complainants and each of their cases must be looked at separately. The evidence of all the witnesses, however, both for or against the complainant can be looked at in totally and, indeed, should be."

The Board has also reviewed the work of Vizkelety, in, Proving *Discrimination in Canada,* (Toronto: Carswell, 1987 on this point at pp. 142-43:

> "…it is suggested that the *Kennedy* (v. *Mohawk College*) Standard reflects a criminal as opposed to a civil standard of proof and that, as such, it is too rigid. There is indeed, virtual unanimity that the usual standard of proof in

> discrimination cases is a civil standard of preponderance. The appropriate test in matters involving circumstantial evidence, which should be consistent with this standard, may therefore be formulated in this manner. An inference of discrimination may be drawn where the evidence offered in support of it renders such an inference more probable than the other possible inferences or hypotheses.
>
> Where there is an undertaking to proceed by way of circumstantial evidence, to prove a fact in issue piece by piece, bit by bit, the probative value of each item, when taken singly, will not always be apparent … But in many instances it may well be impossible to prove the discrimination otherwise. At the very least, a decision on relevance should take into account the fact that the evidence being tendered is but part of an aggregate from which the fact finder will ultimately be asked to infer the existence of a fact in issue."

Sexual Harassment:

Ultimately the Board must turn its mind to the established facts and the application of the law and the prohibition of Sexual Harassment under the *Nova Scotia Human Rights Act* and relevant judicial comment of the application and definition of sexual harassment. The Board has carefully reviewed all the case law submitted by counsel and undertaken additional research and review of case law and judicial and academic consideration of this issue.

The Nova Scotia Human Rights *Act* reads, in part, as follows:

The *Human Rights Act*, amended in 1991, defines sexual harassment and explicitly states in subsection 5(2): "No persons shall sexually harass an individual." Sexual harassment is defined in subsection 3(o) of the *Act* to mean:

(i) vexatious sexual conduct or a course of comment that is known or ought reasonably to be known as unwelcome,

(ii) a sexual solicitation or advance made to an individual by another individual where the other individual is in a position to confer a benefit on, or deny a benefit to, the individual to whom the solicitation or advance is made, where the individual who makes the solicitation or advance knows or ought reasonably to know that it is unwelcome, or

(iii) a reprisal or threat of reprisal against an individual for rejecting a sexual solicitation or advance. 1991, c. 12, s. 1.

In order to constitute sexual harassment under the *Act*, it is not necessary that a respondent had made sexual overtures to a complainant in the form of a *quid pro quo* exchange. According to *Sexual Harassment in the Workplace* by Arjun P. Aggarwal, 3rd ed. (Toronto: Butterworths, 2000), sexual harassment can consist of both sexual coercion and sexual annoyance. At page 14, Aggarwal (Supra.) defines sexual annoyance as follows:

> "Sexual annoyance, the second type of sexual harassment, is sexually related conduct that is hostile, intimidating, or offensive to the employee, but nonetheless has no direct link to any tangible job benefit or harm. Rather, this annoying conduct creates a bothersome work environment and effectively makes the worker's willingness to endure that environment a term or condition of employment."

At pages 14-15 of his text, *Sexual Harassment in the Workplace*, Aggarwal describes verbal behaviour, which constitutes sexual harassment as follows:

> "Listed below are examples of unacceptable verbal behaviours that may constitute sexual harassment. The behaviours listed below do not necessarily have to be specifically directed at the victim to constitute sexual harassment:
>
> - continuous idle chatter of a sexual nature and graphic sexual descriptions;
> - offensive and persistent risqué jokes or jesting, and kidding about sex or gender-specific traits;
> - suggestive or insulting sounds such as whistling, wolf-calls, or kissing sounds;
> - comments of a sexual nature about weight, body shape, size or figure;
> - pseudo-medical advice such as "You might be feeling bad because you didn't get enough" or "A little tender loving care (TLC) will cure your ailments";

- staged whispers or mimicking of a sexual nature about the way a person walks, talks, sits, etc;
- derogatory or patronizing name calling;
- innuendoes or taunting;
- unwelcome remarks;
- rough and vulgar humour or language;
- jokes that cause awkwardness or embarrassment;
- gender-based insults or sexist remarks;
- comments about a person's looks, dress, appearance, or sexual habits;
- inquiries or comments about an individual's sex life and / or relationship with sex partner;
- remarks about a woman's breasts, buttocks, vagina, and her overall figure;
- speculations about a woman's virginity, her choice of sexual partner or practices;
- verbal threats or abuse;
- telephone calls with sexual overtones."

In *McNulty v. GNF Holdings Ltd.* (1992), 16 C.H.R.R. D/418 (B.C.C.H.R.), an employee of a florist shop was harassed by her supervisor and was subjected to verbal comments and unwanted physical attentions. The respondent led evidence that there was conversation and banter of a sexual nature, which occurred in the workplace, and that the complainant was involved in such conversations. The tribunal found the following at paragraph 27:

> "There was some evidence that [the harasser] was "just joking around", that he did not intend the complainant to take his behaviour personally. However, absence of intent to discriminate is not a defense to a complaint of discrimination (see *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Limited* (1985), 7 C.H.R.R. D/3102 (S.C.C.)). It is the result or effect of conduct which is important in determining whether discrimination has occurred."

The Supreme Court of Canada in, Janzen v. *Platy Enterprises Ltd.* (1989), 10 C.H.R.R. D/6205, at D/6227, para. 44444:

> "Common to all these descriptions of sexual harassment is the concept of using a position of power to import sexual requirements into the workplace thereby negatively altering the working conditions of employees who are forced to contend with sexual demands.

> “When sexual harassment occurs in the workplace, it is an abuse of both economic and sexual power. Sexual harassment is a demeaning practice, one that constitutes a profound affront to the dignity of the employees forced to endure it. By requiring an employee to contend with unwelcome sexual actions or explicit sexual demands, sexual harassment in the workplace attacks the dignity and self-respect of the victim both as an employee and as a human being. “

Re Bell and Korczak (1980), 27 L.A.C. (2d) 227 (O.B. Shime, Q.C.)), a Board of Inquiry established under the Ontario *Human Rights Code* identified the types of conduct which constituted inappropriate behaviour such as to find a violation of the anti-discrimination principles embodied in the legislation at page 229-230 of that decision:

> "The evil to be remedied is the utilization of economic power or authority so as to restrict a woman's guaranteed and equal access to the work place, and all of its benefits, free from extraneous pressures having to do with the mere fact that she is a woman. Where a woman's equal access is denied or when terms and conditions differ when compared to male employees, the woman is being discriminated against.
>
> “The forms of prohibited conduct that, in my view, are discriminatory run the gamut from overt gender based activity, such as coerced intercourse to unsolicited physical consent to persistent propositions to <u>more subtle conduct such as gender based insults and taunting, which may reasonably be perceived to create a negative psychological and emotional work environment. There is no reason why the law</u>, which reaches into the workplace so as to protect the work environment from physical or chemical pollution or extremes of temperature, <u>ought not to protect employees as well from negative, psychological and mental effects where adverse and gender directed conduct emanating from a management hierarchy may reasonably be construed to be a condition of employment</u>. …
>
> “*The Code* ought not to be seen or perceived as inhibiting free speech. If sex cannot be discussed between supervisor and employee neither can other values such as race, colour or creed, which are contained in *The Code*, be discussed. Thus, differences of opinion by an employee where sexual matters are discussed may not involve a violation of *The Code*; it is only when the language or words may be reasonably construed to form a condition of

> employment that *The Code* provides a remedy. Thus the frequent and persistent taunting by a supervisor of an employee because of his or her colour is discriminatory activity under *The Code* and similarly, the frequent and persistent taunting of an employee by a supervisor because of his or her sex is discriminatory activity under *The Code*. (Emphasis added)"

Unwelcome Conduct

The question then arises as to what is meant by "unwelcome" in paras. 3(o)(i) and 3(o)(ii) of the *Nova Scotia Human Rights Act.* Aggarwal, supra, describes this element at p.63 of his text as follows:

The primary identifying factor in sexual harassment incidents is that sexual encounters are unsolicited by the complainant and unwelcome to the complainant. In *Dupuis* v. *British Columbia (Ministry of Forests)* (1993), 20 C.H.R.R. D/87, the B.C. Council of Human Rights stated at D/93-D/94 [paras. 47-48]:

> "Evidence that the complainant explicitly put the alleged harasser on notice that the conduct was unwelcome will be very persuasive. However, indications of unwelcomeness may be implicit; an overt refusal may not be necessary.

Human rights legislation does not prohibit social or sexual contact between management and employees. In *Bell* v. *Ladas and the Flaming Steer Steakhouse* (1980), 1 C.H.R.R. D/155 (Ont. Bd.Inq.), the adjudicator stated at D/156, para. 1390:

> "The prohibition of such conduct is not without its dangers. One must be cautious that the law not inhibits normal social contact between management and employees or normal discussion between management and employees. It is not abnormal, nor should it be prohibited activity for a supervisor to become socially involved with an employee. *An invitation to dinner is not an invitation to a complaint*. [Emphasis is original]."

Chief Justice Dickson underlies in *Janzen, supra*, that all women in the workplace need not be discriminated against for a finding of discrimination (at 1288 [D/6230, para. 44457]):

> "The fallacy… is the belief that sex, discrimination only exists where gender is the sole ingredient in the discriminatory action and where, therefore, all members of the affected group are mistreated identically. While the concept of discrimination is rooted in the notion of treating an individual as a part of a group rather than on the basis of the individual's personal characteristics, discrimination does not require uniform treatment of all members of a particular group."

It would appear that proof of intention to discriminate is not necessary to establish a case of discrimination (*Fleming* v. *Simpac Systems Corp.* (1992), 18 C.H.R.R. D/234). As La Forest J. in *Robichaud*, *supra*, at 91 [D/4330, paras. 33938] states:

> "…the central purpose of a *Human Rights Act* is remedial - to eradicate anti-social conditions without regard to the motives or intentions of those who cause them. [Emphasis added]"

In *Dupuis* v. *British Columbia (Ministry of Forests)* (1993), 20 C.H.R.R. D/87, the B.C. Council of Human Rights stated at D/93-D/94 [paras. 47-48]:

> "Evidence that the complainant explicitly put the alleged harasser on notice that the conduct was unwelcome will be very persuasive. However, indications of unwelcomeness may be implicit; an overt refusal may not be necessary. In *Potapczyk* v. *MacBain* (1984), 5 C.H.R.R. D/2285 (Can.Trib.), the complainant was subjected to sexual remarks and offensive physical closeness. She did not expressly inform the harasser that his conduct was offensive. The Tribunal found that body language can suffice to demonstrate objection."

Though a protest is strong evidence, it is not a necessary element in a claim of sexual harassment. Fear of repercussions may prevent a person in a position of weakness from protesting. A victim of harassment need not confront the harasser directly so long as her conduct demonstrates explicitly or implicitly that the sexual conduct is unwelcome. For example, in *Anderson* v. *Guyett* (1990), 11 C.H.R.R. D/415 (B.C.H.R.C.), the complainant was subjected to suggestive remarks from her employer. She ignored the remarks and did not complain about them because she was afraid of losing her job. The Chairperson did not find her failure to rebuff the advances to be unusual in the circumstances.

In *Bouvier* v. *Metro Express* (1992), 17 C.H.R.R. D/313 (Can.Trib.), the Tribunal noted, "… the complainant did not always openly and energetically protest her boss's conduct". (D/237 [para. 65]). It concluded that this was not necessary, in the following passages (at p. D/327 [para. 65]):

> "The unease she felt and her attitude, which amounted to remaining cool or not responding to her boss's comments for invitations, was nonetheless consistent and was by nature, in the Tribunal's view, such as to give the respondent to understand clearly that the sexual conduct in which he was engaging was not wanted by the complainant. In any event, she also objected explicitly to his comments on several occasions. "

Individuals in a Position to Confer or Deny Benefits

With respect to the work environment, human rights legislation in Canada does not prohibit normal social interchanges, interpersonal relations, flirtation or even intimate sexual conduct between consenting adults (see *Bell, Dupuis, Broadfield, supra*). As stated in *Bell, supra,* [at D/156, para. 1390]:

> "The prohibition of such conduct is not without its dangers…It is not abnormal, nor should it be prohibited activity for a supervisor to become socially involved with an employee. An invitation to dinner is not an invitation to a complaint."

The intention is not to legislate a pristine or sterile work environment, but to curb harassing conduct, provide all employees equal opportunities and protect an employee's right to work in an environment free from unwanted sexual pressure (Aggarwal, *supra*, p. 8). Accordingly, incidents of unwelcome sexual solicitations or advances by an individual in a position to confer or deny a benefit has been defined as constituting sexual harassment under para. 3(o)(ii) of the Nova Scotia *Act*. As Adjudicator Tom Patch states in *Dupuis, supra*, at [D/92] para. 38:

> "[B]ecause of the imbalance of power that often exists between managers and their employees, managers must be very careful to ensure that they are not taking advantage of their position of authority to import sexual requirements into the job. In my view, the burden rests with the manager to be certain that any sexual conduct is welcomed by the employee and continues to be welcome.

The Alberta Board of Inquiry in *Contenti* v. *Gold Seats Inc.* (1992), 20 C.H.R.R. D/74 at D/79 and D/80 [para. 51] stated:

> “[I]n identifying discriminatory conduct, the actual knowledge and intentions of the perpetrator are not as important as the impact of the behavior on the work environment generally and on the particular victim, whose personal and economic vulnerability are often well-known to those standing in the position of an employer. It is often stated as an objective, or "reasonableness", standard, that the harasser "knew or ought to have known" that his conduct was unwelcome to the complainant. “

Sexual Conduct or a Course of Comment

The definition of harassment under para.3 (o)(i) of the Nova Scotia legislation establishes that a respondent must have engaged "in vexatious sexual conduct or a course of comment". Sexual harassment is a broad concept encompassing a wide range of comments and conduct that do not necessarily have to be specifically directed at the complainant.

Sexual harassment has been described as including verbal abuse or threats; sexually-oriented jokes, remarks, innuendoes, or taunting; derogatory or patronizing name-calling; comments of sexual nature about weight, body shape, size or figure; rough and vulgar humour or language; display of pornographic material; practical jokes which cause awkwardness or embarrassment; leering, ogling or other gestures with suggestive overtones; unnecessary and inappropriate physical contact such as patting, pinching, stroking or suggestively brushing up against someone else's body; as well as sexual touching or physical assault. (Miller vs. Sams’ Pizza House (1995), 23 C.H.R.R.)

Thus, sexual solicitation, sexually oriented comments, actual physical contact of a sexual nature or more subtle conduct such as gender-based insults and taunting may constitute sexual harassment (*Broadfield* v. *De Havilland/Boeing of Canada Ltd.* (1993), 19 C.H.R.R. D/347 (Ont.Bd.Inq.)). Inquiry Chair Philip Gerard stated in *Cameron* v. *Giorgio & Lim Restaurant* (1993), 21 C.H.R.R. D/79 at [D/84] para.34,

> "The law is clear that comments not involving sexual proposition or explicit sexual language may nonetheless constitute sexual harassment."

See also the Nova Scotia Board of Inquiry, Gregory North's decision of *Wallace* v. *Hillcrest Manor Ltd.* (May 18, 1994) in which crude, humiliating and demeaning gender-based insults and taunting (referring to female employees as bitches, retards, idiots, bitches in heat, and weasel[s]) was held to have created a poisoned work environment constituting sexual harassment. Aggarwel, refers to this as activity "sex-based harassment".

The meaning of the phrase "course of" was dealt with by the Board in *Broadfield*, v. De Havilland/Boeing of Canada (Ltd)(1993. 19 C.H.R.R. quoted with approval passage from the earlier decision of *Cuff* v. *Gypsy Restaurant* (1987), 8 C.H.R.R. D/3972 at D/3980-D/3981 (Ont.Bd.Inq.)

> "Course" suggests that harassment will require more than one event. There must be some degree of repetition of the "vexatious comment or conduct" in order to constitute harassment."

In Nova Scotia one incident may be sufficient to constitute sexual harassment for unwelcome vexatious conduct as in *Cameron* v. *Giorgio & Lim Restaurant*, (1993), 21 C.H.R.R. However, it would appear that there must be some degree of repetition of unwelcome sex-based comment or comments of a sexual nature in order to constitute sexual harassment.

The Meaning of Vexatious: The Subjective Text

What is meant by the word "vexatious" in para. 3(o)(i) of the *Act*? The Board in *Broadfield, supra*, quotes *Cuff* v. *Gypsy Restaurant,*(1987), 8 C.H.R.R.at para. 31527 defines the word vexatious and discusses the subjective element of sexual harassment. The proper test is whether or not the comment or conduct was vexatious to the complainant (D/366 [para. 132]):

> "Vexatious" is defined by the Concise Oxford dictionary as "annoying" or "distressing"… The fact that the comment or conduct must be vexatious imports a subjective element into the definition of harassment; was the comment or conduct vexatious to this complainant? In considering this condition, account should be taken of the personality and character of the complainant; a shy reserved person, or in some cases a younger, less

> experienced, or more vulnerable person, is less likely to manifest her annoyance, irritation or agitation with the respondent's behaviour than a self-confident, extroverted individual."

Known or Ought Reasonably to be known: The Objective Test

Section . 3(o)(i) of the Act addressed "vexatious sexual conduct or a course of comment is known or ought reasonably to be known as unwelcome " [emphasis added]. The Boards of Inquiry have used an objective test to determine whether or not the alleged sexual conduct or course of comment constitutes sexual harassment. That is to say, would a "reasonable person", rather than the actual respondent, have known or ought to have known that the behaviour/comment was offensive or unwelcome by the particular complainant.

Chief Justice Dickson discusses this in *Janzen*, supra, at 1283 [D/6226, para. 44449]:

> The main point in allegations of sexual harassment is that unwelcome sexual conduct has invaded the workplace, irrespective of whether the consequences of the harassment include a denial of concrete employment rewards for refusing to participate in sexual activity. [Emphasis added.

Sexual Harassment in the Act states that vexatious sexual conduct or a course of comment is known or ought reasonably to be known as unwelcome [emphasis added]. The Boards of Inquiry have used an objective test to determine whether or not the alleged sexual conduct or course of comment constitutes sexual harassment. That is to say, would a "reasonable person", rather than the actual respondent, have known or ought to have known that the behaviour/comment was offensive or unwelcome by the particular complainant.

It would appear to be that proof of intention to discriminate is not necessary to establish a case of discrimination (*Fleming* v. *Simpac Systems Corp.* (1992), 18 C.H.R.R. D/234). As La Forest J. in *Robichaud*, supra, at 91 [D/4330, paras. 33938] states:

> ... the central purpose of a human rights *Act* is remedial -- to eradicate anti-social conditions without regard to the motives or intention of those who cause them. [Emphasis added.]

For Nova Scotia authorities on this point see *Association of Black Social Workers* v. *Arts Plus* (N.S.Bd.Inq. decision dated August 26, 1994, Chair M.A. Hickey) and *Rasheed* v. *Bramhill* (decision dated December 2, 1980 [2 C.H.R.R. D/249 (N.S.Bd.Inq.)], Chair W.H.

Charles). Hickey relied on *Rasheed* for the proposition that the intention to discriminate is not a pre-requisite for a finding of discrimination.

Chief Justice Dickson went on to say that in his view, sexual harassment in the workplace could be broadly defined as unwelcome conduct of a sexual nature that detrimentally affects the work environment. The Board, however, is cognisant that one cannot simply state that any conversation with respect to sex is not allowed in the workplace, or, said another way, that any conversation with respect to sex in the workplace constitutes sexual harassment. *Bell v. Landas* (1980), 1 C.H.R.R. at D156 the caution of the over application of the definition of sexual harassment was urged by Adjudicator Shime, Q.C. where he states:

> "The prohibition of such conduct is not without its dangers. One must be cautious that the law not inhibit normal social contact between management and employees or normal discussion between management and employees. It is not abnormal, nor should it be prohibited, activity for a supervisor to become socially involved with an employee. An invitation to dinner is not an invitation to a complaint. The danger or the evil that is to be avoided is coerced or compelled social contact where the employee's refusal to participate may result in a loss of employment benefits. Such coercion or compulsion may be overt or settled, but if any feature of employment becomes reasonable dependent on reciprocating a social relationship preferred by a member of management, then the overture becomes a condition of employment and may be considered to be discriminatory."

The Supreme Court of Canada in *Janzen*, supra, quotes with approval at 1280 [D/6224, para. 44444] *Sexual Harassment in the Workplace* (Toronto: Butterworths, 1987) by Arjun P. Aggarwal .

> "Sexual harassment is any sexually-oriented practice that endangers an individual's continued employment, negatively affects his/her work performance, or undermines his/her sense of personal dignity. Harassment behaviour may manifest itself blatantly in forms such as leering, grabbing, and even sexual assault. More subtle forms of sexual harassment may include innuendoes, and propositions for dates or sexual favours."

And;

> "When sexual harassment occurs in the workplace it is an abuse of both economic and sexual power. Sexual harassment is a demeaning practice, one that constitutes a profound affront to the dignity of the employee forced

> to endure it. By requiring an employee to contend with unwelcome sexual actions or explicit sexual demands, sexual harassment in the workplace attacks the dignity and self-respect of the victim both as an employee and as a human being."

According to Chair Philip Grard in *Cameron* v. *Giorgio & Lim Restaurant*, supra, at [D/84] para.34:

> "... demeaning comments must be so pervasive as to create an offensive work environment. The cases that have considered this kind of sexual harassment have found the inappropriate comments to persist over a long period of time…".

The Board benefited greatly from the careful review, analysis, and application of relevant case law and judicial consideration to the established facts, matters and issues before the Board.

DECISION:

The Board is able to accept that Gould's may have been an uncomfortable environment for a serious-minded person such as Illsley. Indeed, it seems to have become an unhappy place for Illsley and her relationships with her co-workers including Kenny deteriorated significantly over time. While the reasons are unclear, the relationship between Kenny and Illsley appears to have dramatically soured around December 1998.

An allegation of sexual harassment is obviously a serious matter for all concerned and not to be dismissed lightly. In addition to other aspects of alleged conduct discussed elsewhere, the Board notes that the number of alleged incidents of sexual harassment occurring between October and late December 1998 would total somewhere between 50 and 80 incidents. The evidence suggests that Gould's was a small an open and gossipy work environment where everyone seemed to know the comings and goings of each other. Illsley's testimony was that she had spoken to co-workers about many of these incidents, and that "everybody knew what was going on". In stark contrast, the Board heard credible evidence from co-workers that Illsley had never spoken to them about such matters; that they had no knowledge of the alleged incidents; nor, did they witness any behaviour of a nature as alleged by Illsley, which is relevant to this hearing. The type conduct which the Board accepts is able to accept as occurring between Illsley and Kenny lacks fundamental elements that are necessary to sustain a claim of sexual harassment under the *Nova Scotia Human Rights Act*.

The complaint is against a co-worker with no supervisory responsibilities or economic power over the Complainant. There is no evidence he possess the ability to confirm or deny a benefit to the Complainant in any matter of relevance to the Board. The Board was aware of the Complainant's capacity to directly address improper conduct with respect to other staff. Matters were promptly reported to supervisors, which in two cases resulted in the dismissal of the employees in question. Taken alone, action with respect to others may bear no direct relationship with Kenny. However, in light of the alleged actions by Kenny – frequent verbal assaults, rude sexual gestures, nasty notes, behind-slapping – it is a factor which the Board cannot overlook in the context of the general environment, the totality of the evidence and the Complainant's own established pattern of addressing behaviour of an undesirable nature.

The Board is mindful of how broad the application of the provisions of the *Human Rights Act* and the law surrounding sexual harassment can and ought to be to bring full effect to the special nature of the *Human Rights Act*. The *Human Rights Act*, though noble in purpose, does not legislate pristine work environments and cannot redress every dispute and conflict between co-workers and their relationships. The Board's decision on this matter in no way suggests that the poor treatment of one co-worker to another is ever justified. The Board may wish to urge Kenny to reflect upon and improve his interpersonal skills, as well as his displays of immaturity at some level. The Board is obliged, however, to apply the relevant provisions of the *Nova Scotia Human Rights Act* and regulations to the established facts and remain cognizant of the legal and evidentiary burden the Commission must meet. The Commission has the burden of proof that certain conduct took place and constituted a breach of the *Nova Scotia Human Rights Act* and, though well argued, the Commission has failed to meet this necessary burden.

The Complaint is dismissed.

Royden Trainor Esq.
Chair
Board of Inquiry