| | |
|---|---|
| **IN THE MATTER OF:** | The Human Rights Act, R.S.N.S., 1989, Amended 2012, c.51 |
| | and |
| **IN THE MATTER OF:** | A Complaint under the **Human Rights Act** ("the Act")<br><br>By Stephanie Graham, Complainant<br><br>against Shear Logic Hairstyling and/or Shawn Cormier, Respondent |
| **BEFORE:** | Kenneth D. Crawford, Q.C., Chair |
| **DATE OF DECISION:** | December 15, 2014 |
| **PLACE:** | Halifax, Nova Scotia |
| **APPEARANCES BY:** | Ann E. Smith, Q.C., and Kymberly Franklin, Counsel for the Nova Scotia Human Rights Commission<br><br>Stephanie Graham, Complainant, on her own behalf<br><br>Kevin A. MacDonald, counsel for the Respondent, Shear Logic Hairstyling and/or Shawn Cormier, Respondent |

**NOVA SCOTIA HUMAN RIGHTS COMMISSION** ("the Commission")

Complaint under the Human Rights Act, R.S.N.S.,1989, as Amended 2012, c.51

| Complainant | Respondent |
|---|---|
| Stephanie Graham | Shear Logic Hairstyling and/or Shawn Cormier |

---

Section and Nature of Complaint: 5(1)(d)(m) and (n); Employment/sex (gender); sexual orientation; 5(2) – sexual harassment

File Number: 51000-30-H07-1273

## DECISION OF THE BOARD OF INQUIRY

## 1. INTRODUCTION

1. On May 23, 2012, Provincial Chief Judge Patrick Curran, pursuant to the Nova Scotia Human Rights Act, R.S.N.S., 1989 amended 2012, c.51 ('the Act') appointed me as a one member Board of Inquiry to inquire into the complaint of Stephanie Graham alleging discrimination against her contrary to section 5(1)(d)(m) and (n) (employment, sex, sexual orientation) and subsection 5 (2) sexual harassment of the Act.

This matter came on for hearing on June 9, 2014, at Halifax, Nova Scotia

## 2. PRELIMINARY MATTERS

2. Prior to the Board of Inquiry, Kevin A. MacDonald, counsel for Shear Logic Hairstyling and/or Shawn Cormier, made a submission to dismiss the complaint on

the ground of delay in that some seven years had lapsed from the time the complaint was laid in November, 2007 to the Board of Inquiry date of June, 2014. His second submission for dismissal of the complaint was based on the doctrine of *res judicata*. He argued that since the Complainant, Stephanie Graham received an award from the Nova Scotia Labour Standards Board in 2007 for termination of employment without pay in lieu of notice in the amount of $201.00, the matter should be stayed on the basis that she could not file a parallel complaint with the Human Rights Commission based on termination of her employment.

3. At the Board of Inquiry on June 9, 2014, counsel for the Human Rights Commission and counsel for the Respondent agreed that since the Complainant and Respondent would be the only witnesses to be called, I could proceed with the Board of Inquiry and subsequently hear Mr. MacDonald's submissions on delay and alternatively *res judicata*. Obviously, if I found merit in either of his arguments, I would dismiss the complaint. If the arguments were without merit, I would make a decision based on the evidence.

## 3. BACKGROUND AND EVIDENCE

4. The Complainant, Stephanie Graham, attended Mount Saint Vincent University in Halifax on a full-time basis from 2003-2005 while taking courses leading to a Bachelor of Arts Degree. Because she found it so difficult to pay for her education and work part-time, she decided she would obtain a trade and subsequently completed a Cosmetology course in 2007.

5. Ms. Graham then decided to pursue a career as a general hairstylist in 2007. She began training at the Respondent's business, Shear Logic Hairstyling, owned and operated by Sean Cormier. Shear Logic was not an incorporated company. It was a business name and the Respondent had been carrying on business in his own right as Shear Logic Hairstyling. It was necessary for Ms. Graham to apprentice under Mr. Cormier to fulfill the necessary requirements leading to a general hairstylist. She was employed for three months.

6. As Ms. Graham's evidence disclosed, she began to feel uncomfortable soon after her employment. Mr. Cormier began to make comments concerning her appearance and her sexuality. One day he noticed a tattoo on her wrist and asked her what it was. She stated it was two intertwining female symbols. She told him she was gay. To quote her interpretation of his reaction, "he was shocked". He went on to say she could not be gay because "you're pretty".

7. One month after discovering Ms. Graham was gay, Mr. Cormier's comments quickly escalated. Initially, she would ignore him or laugh. She really wanted the job to work and to become a capable hairstylist.

8. Mr. Cormier asked Ms. Graham questions concerning her partner; namely, "is she hot or sexy? Did you get lucky last night?".

9. Generally, Mr. Cormier would ask Ms. Graham inappropriate questions about being a "lesbian". For example, "how do lesbians have sex" .When the questions increased she would say "it's none of your business" and would advise she did not approve of his questions. Ms. Graham would then laugh and concurrently feel embarrassed.

10. One day, Ms. Graham told the Respondent she intended to go to the beach and Mr. Cormier asked, "do you wear a one piece or two piece bathing suit" and requested her to describe same. He proceeded to inform her that she would "look good in a high-cut black bathing suit".

11. On another occasion at the salon, Mr. Cormier told the Complainant he knew she was a lesbian but that he "could still dream". Ms. Graham alleged he would make the foregoing comments when he was alone with her and at times, in the presence of clients.

12. On occasion, Ms. Graham testified Mr. Cormier would introduce her to clients and say she was a lesbian. This would cause her great discomfort.

13. From time to time, the Respondent would refer to the Complainant as "a crazy bipolar lesbian" or as a "bitch". Ms. Graham denied at the hearing that she was bipolar and never told the Respondent same.

14. At times when the Complainant was in a sad mood at the salon or as a result of the Respondent's insults, she heard him explaining to clients that, as a result of her being a "bipolar lesbian", her mental health was being affected because she was gay.

15. One day at the salon, Ms. Graham decided to use the tanning bed. The Respondent had encouraged her to use same as clients would probably be attracted to tanning sessions thus increasing Mr. Cormier's revenue. Mr. Cormier was the only person on the premises when she decided to have a tanning session (nude). While in the tanning bed, she testified she "could feel somebody watching me".

She removed her goggles and could see a shadow moving away from the opening. She immediately dressed and passed Mr. Cormier in the salon area. No one was present but Mr. Cormier. There was a bell on the door of the salon which would ring when someone entered. The bell did not ring while she was in the tanning bed. She was certain the shadow was Mr. Cormier.

16. Ms. Graham went outside to have a cigarette and to attempt to determine what had just transpired. She testified that she felt violated and disgusted. By violated, she meant Mr. Cormier had viewed her naked without her consent.

17. Ms. Graham ignored the above incident because she emphasised she "wanted the job to work". As a result she suppressed the tanning experience.

18. The Complainant noted the Respondent, on occasion would drive past her residence on occasion. One evening she and her former fiancée saw him parked on the street in front of her home. When he noticed he had been seen, he left.

19. Mr. Cormier called her at home one evening at approximately 9:30 p.m. and appeared to be in an intoxicated state in that he was slurring his words. He said he was calling to hear her voice and to say good evening. She advised him not to call in the evenings. Two evenings later, he called a second time. She did not recall the contents of this call. However, she did recall being surprised and angry. She felt the call was inappropriate and unprofessional. She reiterated she did not wish to receive any further telephone calls.

20. On Friday, June 7, 2007, which was three months after Ms. Graham was hired, Mr. Cormier approached her and suggested they go to dinner the following Sunday to celebrate their three month anniversary. She did not feel confortable going to dinner with him and gave excuses for not being able to attend. In the event she did not attend, he told her she would no longer have a position at Shear Logic. He continued to persist and she began to fear for her safety. Rather than flatly refusing to accede to his wish, she told him that she had to look for a new apartment that evening. Further, she advised she was uncertain of whether she would be at work the next day. He told her to call in the event she was unable to make it.

21. Friday evening at 6:00 p.m., Ms. Graham called the salon and left a message with an employee advising she would not be at work the next day. Her reason for doing so was that she was afraid of Mr. Cormier's anger and ridicule and that he would probably exhibit same the next day.

22. On Friday evening at 9:00 p.m., Ms. Graham heard a "banging" on her apartment door. Her former partner and a female friend were present. Mr. Cormier entered the flat, proceeded down a long hallway and stopped at the kitchen where he began to scream at the Complainant. His facial expression was quite threatening. She testified, "it was like I was breaking up with him, like he was an angered boyfriend and I was ending the relationship". While she requested he leave, he continued to scream and finally she told him he was trespassing and that she would call the police. He began to shout obscenities such as "crazy bipolar lesbian", "crazy bitch", and "stupid bitch". Her feelings were those of fright, embarrassment, and belittlement. He then fired her and told her to stay away from the salon.

23. The following Tuesday, the Complainant, with a friend went to the salon to obtain her belongings and pay. On arrival the Respondent immediately began to berate her and his demeanour became aggressive. Again, he referred to her as a "bipolar lesbian" and "stupid bitch".

24. While at the salon, Ms. Graham intended to take her large floor plant. Mr. Cormier told her it was the salon's and that he had paid for the pot. He then proceeded to tear the plant from its roots and threw same in her direction causing some of the earth to strike her. She took the remnants of the plant and left the salon.

25. On June 25, 2007 Ms. Graham filed a complaint with the Human Rights Commission, which is the subject matter of this hearing.

26. Sometime in late June or July 2007, Ms. Graham filed a complaint with the Nova Scotia Labour Standards Tribunal against the Respondent alleging she was fired and seeking a week's pay in lieu of notice. The Tribunal found she was fired without cause and awarded her one week's pay in the amount of $201.00. At the Human Rights Board of Inquiry, there was discussion between counsel as to the amount of the award the Complainant ultimately received from Mr. Cormier. Counsel for the Human Rights Commission decided not to claim this outstanding amount as a portion of a Human Rights award in the event I decided in favour of the Complainant.

27. Shawn Cormier testified he and the Complainant never argued throughout her employment, nor did he make any sexual advances. He indicated his conversations with her at work were normal workplace conversations. When he went to her apartment on June 7, 2007, he denied barging into her apartment, stated she was hysterical and finally he said he did not yell.

28. With respect to asking her to dinner, the Respondent testified she could bring along her partner.

29. In summary Mr. Cormier denied all of her allegations. Moreover, his evidence was particularly punctuated in cross- examination with an inability to remember and that he simply "did not know". To some extent, one can empathize with his inability to recollect given the unduly long period of time the Commission required to bring this matter to a Board of Inquiry. If one were to accept the calculations of Counsel for the Commission, the time period would be five years (date complaint laid, 2007 to my appointment under the Act, 2012). If I accept the calculations of Mr. Cormier's counsel, the time period would be 7 years (date complaint laid, 2007 to hearing date, 2014). In either case, the period was ridiculously long. I hasten to add the Complainant and Respondent were the only witnesses to give evidence.

## 4. **ISSUES**

30. i) Did the Respondent violate the Complainant's rights in employment by discriminating against her pursuant to s. 5(1)(d)(m)(n) (sex, sexual orientation) and 5(2) sexual harassment of the Act;

ii) Should the complaint be stayed because of the delay of seven years (I accept the time calculations of counsel for the Respondent) due to the Commission's dilatoriness in bringing this to a Board of Inquiry or;

iii) Should the complaint before the Commission be stayed based on the doctrine of *res judicata*;

iv) Should an adverse inference be drawn against the Complainant for her failure to call her former partner, Christine Doucette as a witness.

## 5. **LEGISLATION**

31. Section 3 (ha) of the Act defines "harass" as:

…. to engage in a course of vexatious conduct or comment that is known or ought reasonably to be known to be unwelcome;

"Sexual harassment" in 3 (o) is defined as:

(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

**Meaning of Discrimination**

32. Section 4 - For the purpose of this Act, a person discriminates where the person makes a distinction, whether intentional or not, based on a characteristic, or perceived characteristic, referred to in clauses (h) to (v) of subsection (1) of Section 5 that has the effect of imposing burdens, obligations or disadvantages on an individual or a class of individuals not imposed upon others or which withholds or limits access to opportunities, benefits and advantages available to other individuals or classes of individuals in society.

**Prohibition of discrimination**

33. Section 5(1)-No person shall in respect of (d) employment… discriminate against an individual or class of individuals on account of (m) sex or (n) sexual orientation

Section 5(2)-No person shall sexually harass an individual.

34. The interpretation of human rights legislation is best set out in *Re Ontario Human Rights Commission and O'Malley v. Simpson – Sears Ltd. (1985), 7 C.H.R.R.D/3102 (S.C.C) where C.J.C. Dickson at D3105*, para. 24766 said:

> It is not, in my view, a sound approach to say that according to established rules of construction no broader meaning can be given to the Code than the narrowest interpretation of the words employed. The accepted rules of construction are flexible enough to enable the Court to recognize in the construction of a human rights code the special nature and purpose of the enactment… and give to it an interpretation which will advance its broad purposes. Legislation of this type is of a special nature, not quite constitutional but certainly

> more than the ordinary –(sic) and it is for the courts to seek out its purpose and give it effect. The Code aims at the removal of discrimination.
>
> Again, in Action *travail des femmes, supra*, at p.D/4424, the Chief Justice spoke of interpretation.
>
> Human rights legislation is intended to give rise, amongst other things, to individual rights of vital importance, rights capable of enforcement, in the final analysis, in a court of law. I recognize that in the construction of such legislation, the words of the Act must be given their own meaning, but it is equally important that the rights enunciated be given their full recognition and effect. We should not search for ways and means to minimize these rights and to enfeeble their proper impact. Although it may seem commonplace, it may be wise to remind ourselves of the statutory guidance given by the federal Interpretation Act, which asserts that statutes are deemed to be remedial and are thus to be given such fair, large and liberal interpretation as will best ensure that their objects are attained.

## 6. **CASE LAW AND ANALYSIS**

Adverse Inference

35. Counsel for the Respondent argued I should draw an adverse inference relating to the Complainant's failure to call as a witness, her former partner who was present on an occasion the Respondent was alleged to have referred to the Complainant as a "crazy bipolar lesbian" and a "bitch". Her former partner, Christine Doucette was residing in the Halifax area at the commencement of this hearing. The implication of course, is since the Complainant failed to call the former partner to corroborate her evidence, I should find her credibility (Complainant) suspect.

36. In respect of Mr. MacDonald's argument, he relied on *Baggs v. Baggs, 1997 Carswell NS 62, 161 N.S.R. (2d) 81*.The parties separated after 11 years of marriage. In matrimonial proceedings, the issue to be determined was the division of matrimonial assets. The husband had collapsed RRSPs prior to the separation. The result was that they could not be considered a matrimonial asset because they did not exist at the date of separation, and moreover, the proceeds had been put into the husband's business. Hood J. drew an adverse inference from the

husband's failure to call the firm's accountant to testify about the firm's alleged financial difficulties and the collapse of the RRSPs. An adverse inference was also drawn from the husband's actions in collapsing the RRSPs just prior to the separation when the marriage was in difficulty. Had the proceeds not been cashed prior to separation, they would have formed part of the matrimonial assets of the parties and be subject to a division.

37. It is important to note the decision to draw an adverse inference and the weight a judge attaches to it is discretionary. It is permissive and not mandatory (*C.R. Falkenham Backhoe Services Ltd. v. Nova Scotia (Human Rights Board Of Inquiry), 2008 NSCA 38*).

38. Ann E. Smith, counsel for the Commission, forcefully argued against drawing an adverse inference. A Nova Scotia Board of Inquiry recently confirmed this legal principal in *Cromwell, v. Leon's Furniture Ltd., 2014 CanLII 16399*. The Respondent's employer had requested the Board draw an adverse inference against the complainant because the Human Rights Commission failed to call two witnesses; namely, the complainant's direct supervisor and the employee who conducted a workplace investigation into the complaint. Board Chair Raymond made the following comments before declining to draw an adverse inference at para. 62:

> Commission counsel clearly indicated during the hearing that the Commission did not intend to call Mr. Hopkins as a witness. <u>There is no property in a witness</u>. The Respondent had notice of the Commission's position and had an opportunity to call Mr. Hopkins itself had it chosen to do so. There was no evidence to suggest that Mr. Hopkins would have resisted a subpoena issued by this Board, had one been requested, nor was this suggested to be a problem. [emphasis added]

39. The Respondent's counsel was aware as of the first day of the hearing that Ms. Doucette would not be called as a witness by the Complainant or by the Commission. As was the situation in the <u>Cromwell</u> case *supra*, there was no evidence before me that Ms. Doucette would not have responded to a subpoena.

40. Moreover, if the Respondent was of the view Ms. Doucette's evidence would have been detrimental to the Complainant, a subpoena could have been issued compelling her attendance.

41. The Complainant did not have exclusive control over the witness. The Complainant indicated at this Inquiry that they had not been partners for some time.

42. In *Davison v. Nova Scotia Government Employees Union 2005 NSCA. 51*, Cromwell J.A. discussed the basic principal governing adverse inference in civil cases at paras 73-74:

> 73] In civil cases, " ... an adverse inference may be drawn against a party who does not call a material witness over whom he or she has exclusive control and does not explain it away": see J. Sopinka, S. Lederman and A. Bryant, **The Law of Evidence in Canada**, 2d ed.(Toronto and Vancouver: Butterworths, 1999) at para. 6.321. The rationale of this rule is that the failure to call the evidence in these circumstances is an implied admission by the party "... that the evidence of the absent witness would be contrary to the party's case, or at least would not support it": *Ibid*. But, as with all implied admissions, one must remember that conduct may be equivocal. It follows that the failure to call evidence may reasonably be open to different interpretations. An adverse inference should only be drawn when it is warranted in all of the surrounding circumstances: see, e.g. Sopinka, Lederman and Bryant at para 6.315 - 6.320; ***Kaytor v. Lion's Driving Range Ltd.*** *(1962), 40 W.W.R. 173 (B.C.S.C.)* at 176.
>
> [74] The appellants submit, relying on **Levesque v. Comeau**, 1970 CanLII 4 (SCC), [1970] S.C.R. 1010 and **Johnston v. Murchison** (1995), 1995 CanLII 8966 (PE SCAD), 127 Nfld. & P.E.I.R. 1; P.E.I.J. No. 23 (Q.L.)(P.E.I.S.C.,A.D.) that it is an error of law not to draw an inference from the unexplained failure of a party to call material witnesses over which the party has control. However, I do not agree that the principle is that broad. I respectfully agree with E. Macdonald, J. in **MacMaster (Litigation guardian of) v. York (Regional Municipality)**, [1997] O.J. No 3928 (Q.L.)(Gen. Div.) at paras. 25 - 26 that the inference is permissive, not mandatory. As she said at para. 28:

> 28 An adverse inference with varying weight attached to it may occur in circumstances where a party fails to call a material witness, and it is apparent from all of the other evidence in the case that the witness, who was particularly and uniquely available to that party, would have been able to help the court by giving evidence on a material issue.

43. After a careful reading of the two post-hearing briefs submitted by counsel, transcript of the proceedings, and an analysis of the facts, and cases herein, the Board declines to draw an adverse inference against the Complainant in not having called Ms. Doucette as a witness. I would add that in ***Baggs*** *supra*, Hood J. found there was an evidentiary void to be filled; viz, the failure of Mr. Baggs to call the accountant to testify about matters involving the Dartmouth business and to answer such questions as to why and when did the company run into financial difficulty and needed cash so urgently that Mr. Baggs had to cash his RRSPs. Thus she drew an unfavourable or adverse inference from the failure to call the accountant.

44. At this hearing, I heard from the Complainant that the Respondent had referred to her on various occasions, in the presence of Ms. Doucette, as a "crazy bipolar lesbian" or a "bitch". Assuming the Board drew an adverse inference in the Complainant's failure to call Ms. Doucette, this would not constitute an " evidentiary void" to be filled as there were numerous allegations of sexual harassment the Complainant alluded to in her evidence that could possibly be persuasive notwithstanding the existence of the previously discussed hypothetical adverse inference.

Delay

45. Counsel for the Respondent asked I dismiss the complaint due to the inordinately long period of time (approximately 7 years) the Commission delayed in bringing this matter to a Board of Inquiry. The Commission received the signed complaint on November 22, 2007 and the matter came on for hearing on June 9, 2014. He stressed that because of the delay, the memory of the parties and witnesses would be "significantly impaired".

46. In support of Mr. MacDonald's position, he relied on and attached to his pre-hearing brief numerous articles and three cases, but did not argue same.

47. Counsel for the Commission argued that the matter should not be dismissed on the grounds of delay. In support of her argument, she relied on the Supreme Court of Canada case of *Blencoe v. British Columbia (Human Rights Commission, 2000 Carswell BC 1860,190 D.L.R. (4th) 513, 28 C.H.R.R.153.* Mr. Blencoe was an N.D.P Cabinet Minister in British Columbia and was removed from his legislative position and cabinet position following a complaint of sexual harassment. There was initially one complaint and soon after, a second complaint. His assistant went public with allegations that she had been sexually harassed by Mr. Blencoe. At the time of the allegations, he had been an M.L.A. for some 12 years. There was a Legislative Inquiry. Premier Harcourt subsequently removed Mr. Blencoe from Cabinet and dismissed him from the N.D.P.

48. The allegations concerned conduct dating back from 1993 to 1995. The complaint proceeded to a Board of Inquiry approximately 30 months later, and it was at that point Mr. Blencoe sought a Stay of Proceedings on the basis of a state-caused delay.

49. After Basterache J. writing for the majority determined the Charter issue, he turned to the question of whether Mr. Blencoe was entitled to a remedy pursuant to administrative law principles.

50. Mr. Blencoe argued that the death of two potential witnesses and the fading memories of other witnesses prejudiced his ability to make a full defence to the allegations and finally, prevented him from receiving a fair hearing. Thus he argued it would be an unfair process which would amount to an abuse of process in the in event the hearing continued.

51. In addition, Mr. Blencoe argued the psychological allegations of harassment had had a negative psychological impact on him, and there was evidence he led that he had suffered and continued to suffer stigma to his reputation over the delayed proceeding.

52. Mr. Blencoe also testified that his political career was at an end and that he couldn’t find work. He and his wife sought treatment for depression and also, he had been removed as a coach from his son’s soccer team.

53. The court rejected the proposition that delay in bringing forward an administrative proceeding could not, on its own, just by virtue of the delay constitute an abuse of process. I happen to agree with Bastarache J. when he said at para. 101:

> Delay without more will not warrant a stay of proceedings as abuse of process at common law. Staying proceedings for the mere passage of time would be tantamount to imposing a judicially – created limitation period.

Rather, Bastarache held:

> In the administrative context, there must be proof of significant prejudice which results from an unacceptable delay. Prejudice can take two different forms. The first form is that the passage of time may taint the quality of the evidence presented, such that a stay is required.

At para. 102, he stated:

> Where delay impairs a party's ability to answer the complaint against him or her, because for example, memories have faded, essential witnesses have died, or unavailable, or evidence has been lost, the proceedings may be rendered unfair and a stay of proceedings will be appropriate.

54. Although Mr. Blencoe claimed prejudice had impacted the fairness of the hearing, in that two witnesses had died and the memories of witnesses had faded, the Motions Judge declined these arguments as vague assertions that fell short of establishing an inability to prove facts necessary to respond to the complaints. Justice Bastarache adopted the reasoning of the Motions Judge.

55. At para. 115, Bastarache J. discussed the second aspect of prejudice which is the psychological harm or stigma which could result in being involved in the human rights process. He said at para. 115:

> …where inordinate delay has caused significant psychological harm to a person, or attached a stigma to the person's reputation such as the human rights system would be brought into disrepute, such prejudice may be sufficient to constitute an abuse of process.

56. The well-respected author, Walter Tarnopolsky, in Discrimination and the Law, Vol. 3 referred to some human rights boards of inquiry where delay did not amount to an abuse of process. He discussed the role of the complainant in the context of dismissal of a matter due to delay. He said at p. 15-107:

> These decisions indicate that delay in processing complaints is a consideration in the evaluation of the oral testimony of witnesses, in view of the natural fading of memory with the passage of time, and further that the delay must be considered in the determination of the appropriate remedy. However, Boards have been reluctant to dismiss complaints on the basis of delay in the absence of specific proof of prejudice to the respondent, because that would have the effect of penalizing the complainant who was powerless to speed up the Commission's handling of the complaint and whose actions may not have substantially contributed to the delay. Since the complainant cannot resort to a civil cause of action to vindicate his or her rights, the effect of dismissing the complaint would be to deny the alleged victim of discrimination any meaningful remedy. These considerations have led Boards of Inquiry to dismiss complaints, even in situations where the delay was lengthy. (underlining mine)

57. See the following cases where Boards of Inquiry held that the delay did not amount to an abuse of process:

> *Bhaduria v. Toronto (city) Board of Education (1987), 9C.H.R.R D/4501; Quereshi v. Central High School of Commerce (1987), 9 C.H.R.R.D/4257; Shepherd v. Bama (1988), 9C.H.R.R.D/5049; Morin v. Moranda Inc. (1988), 9C.H.R.R.D/5245; Gohm v. Domtar Inc. (1988), 10C.H.R.R.D/5968; Meisner v. Swiss Chalet (506756 Ontario Ltd.) (1989), 11 C.H.R.R.D/99; College of Physicians and Surgeons of Ontario v. Sazant (2012), Carswell Ont 13478, 113 O.R.(3d) 420; Camara v. Canada 2014, Carswell Nat1612, 2014 FC446.*

58. The party alleging delay constituting an abuse of process has the onus of establishing actual prejudice and the burden remains with the party alleging unfairness caused by the delay *(Sazant, supra).* I find the Respondent, Shawn Cormier, failed to discharge this onus and I subsequently refuse the Respondent's request to stay this Board of Inquiry because of delay. He did not raise the issue of delay until sometime after I was appointed as a Board of Inquiry, the appointment being in May of 2012.

59. Moreover, at no time did the Respondent press for an earlier hearing date. He did not question the fixed date that had been previously determined. At one stage,

he cancelled a pre-hearing conference, which amongst other things would have given him an opportunity to argue for a hearing date as soon as possible.

60. The Respondent did not present any evidence to show that the delay had caused him any psychological harm, or as discussed in *Blencoe supra*, stigma to his reputation. Counsel, in his pre-hearing brief referred to the Respondent having had this stigma of being a discriminator hanging over his head for the last 7 years…" However, there was not an ounce of evidence brought forward to substantiate this claim.

61. During the long process, Mr. Cormier provided two written responses to the Commission and at no time did he mention the delay or inquire as to when the matter would be heard.

62. Certainly, there was no evidence presented that would indicate the Complainant delayed the process of the investigation or the referral of the matter to a Board of Inquiry.

Res Judicata

63. A leading case on whether a determination of an issue by an administrative tribunal will bind another decision-maker is the Supreme Court of Canada case of *Danyluk v. Ainsworth Technologies Inc.,2001 SCC44, 2 S.C.R.460.* Binnie J. referred to the definition of *res judicata* or issue estoppel by Meddleton J.A. of the Ontario Court of Appeal in *McIntosh v. Parent [1924] 4 D.L.R. 420* at 422:

> When a question is litigated, the judgment of the Court is a final determination… between the parties… Any right, question, or fact… put in issue and determined by a Court… cannot be re-tried in a subsequent suit between the same parties…

64. Mr. MacDonald, counsel for the Respondent, relied on a Halifax Small Claims Court case of 2014 *Perry Costa v. Electric Engineering Incorporated (2014), SCCH 424595* (a case in which Mr. MacDonald represented the Defendant) in asserting the doctrine of *res judicata* or issue estoppel should apply in staying the matter before this Board of Inquiry.

65. The Claimant, Costa sued the Defendant, in Small Claims Court for wrongful dismissal following his termination. His claim alleged amongst other things, inadequate notice and unpaid vacation pay.

66. Mr. Costa revealed that he had filed an application pursuant to the *Labour Standards Code* which was being investigated and had not been finally determined. Mr. MacDonald then made an immediate motion for a stay of proceedings. The request was granted.

67. It is important to note at the outset, the Small Claims Court Adjudicator, Gregg Knudsen stated that a stay of proceedings was not a dismissal of the action, but a temporary suspension of the claim pending its determination under the *Labour Standards Code*.

68. The adjudicator relied on the decision in *Fredricks v.2753014 Canada Inc. 2008 NSSC 377, 272 N.S.R. (2d) 186* where Justice Duncan held that the doctrine of *res judicata* did not bar the Court from hearing a wrongful dismissal claim. In *Fredricks,* the plaintiff was dismissed from his employment. He filed a Labour Standards complaint alleging violations of various sections of the *Labour Standards Act.* The Director of *Labour Standards* found no violations of *the Act.* The complainant subsequently filed a wrongful dismissal action in the *Nova Scotia Supreme Court* against his former employer.

69. Justice Duncan found the *Labour Standards* Director had not considered the issue of wrongful dismissal at common law and as a result, issue estoppel or *res judicata* did not apply to bar the complainant's wrongful dismissal action. The complainant had been provided with two weeks pay in lieu of notice by his employer. The Supreme Court awarded five months pay in lieu of notice.

70. In *Fredricks supra,* Duncan J. also relied on a previous decision of the Nova Scotia Court of Appeal in *Deagle v. Shean Co-operative Ltd [1966], N.S.J.No.504 (N.S.C.A), 156 N.S.R (2d) 219,* where an employer had argued that an existing order of the *Labour Standards Tribunal* estopped its former employee from advancing a claim for damages arising from wrongful dismissal. At para. 47 of his decision, Justice Duncan referred to the decision of Flynn J.A. in *Deagle*:

> 17. In dealing with a complaint under s.72 of the Act, the Labour Standards Tribunal makes no inquiry, as would a court in a wrongful dismissal action, as to what notice requirements would be reasonable given the circumstances of both the respondent and the appellant. It makes no inquiry concerning other benefits which the employee has lost as a result of being dismissed, and it makes no inquiry as to other damages such as punitive damages, damages from mental distress etc.

71. Flynn J.A in *Deagle* noted a decision by the *Labour Standards Tribunal* did not bar a subsequent action for wrongful dismissal. He stated that the purpose of s. 72 of the *Code* was to require an employee to meet certain minimum standards when dismissing an employee who had not been, amongst other things, guilty of neglect of duty.

72. On the other hand, the Supreme Court of Nova Scotia has inherent jurisdiction to rule on all issues of law and equity including discrimination.

73. The *Labour Standards Tribunal* is a statutory tribunal; it is not a court. It can only grant remedies in accordance with the *Labour Standards Code*. It has no inherent jurisdiction to inquire into complaints of discrimination. Because the Act is quasi-constitutional legislation, it has superiority over other legislation in the event of a conflict.

74. The Human Rights Act is quasi-constitutional legislation (see *Insurance Corp of British Columbia v. Heerspink [1982] 2 S.C.R.145*). A Board of Inquiry pursuant to s. 34 of the *Act* has a wide latitude to inquire into a complaint of discrimination. Section 34 (8) states that a Board may order any party... to do any act or thing that constitutes full compliance with the Act and to rectify any injury caused to any person.

75. When the Complainant appeared before the *Labour Standards Tribunal*, she was seeking one week's pay in lieu of notice due to the Respondent having terminated her without cause. The *Tribunal* found she had been fired and awarded what she requested. She was only entitled to one week's wages because of the short duration of employment at Shear Logic Hairstyling (3 months).

76. During proceedings at the *Labour Standards Tribunal*, there was no inquiry into the Complainant's Human Rights complaint. Nor was there an award for her common law right for wrongful dismissal. Ms. Graham could have pursued her common law right in the Supreme Court of Nova Scotia for damages for wrongful dismissal. She choose not to do so. It is trite to state if she had the right to pursue a wrongful dismissal claim in the Supreme Court, surely she would have the right to pursue a claim under the *Nova Scotia Human Rights Act* notwithstanding her prior award from the *Labour Standards Tribunal*.

77. After carefully analyzing the cases Justice Duncan referred to in the *Fredricks* and the *Danyluk* cases it is abundantly clear *res judicata* does not apply to prohibit the Complainant, Stephanie Graham from seeking a remedy under the *Human Rights*

*Act* after having received an award for wages from the *Labour Standards Tribunal* for termination of employment without cause.

Sexual Harassment

78. Sexual harassment is defined in the *Act at page 7, supra*.

Burden of Proof

79. The general burden of proof is on a complainant to establish on a civil balance of probabilities that:

1. the complainant has a protected characteristic under the Act and;

2. the stated characteristic was a factor in suffering a burden.

80. In essence the burden of proof is on Ms. Graham to establish it was more likely than not that the Respondent, Mr. Cormier, discriminated against her on the basis of her sex (gender) and sexual orientation by sexually harassing the Complainant.

81. Ms. Graham must establish a *prima facie* case of discrimination. The Supreme Court of Canada in *O'Malley v. Simpson- Sears Ltd (1985), 7C.H.R.R D/3102 at D/3108* said*:*

> …The onus then shifts to the employer to show he has taken such reasonable steps to accommodate the employee as are open to him without undue hardship.

82. In the case involving sex discrimination the onus is on the complainant to establish three factors. The leading case in Nova Scotia dealing with same is the Nova Scotia Court of Appeal decision of *Construction Safety Association v. Nova Scotia Human Rights Commission, 2006 NSCA 63 (CanLII) NS.Bd.Inq*:

1. Did sexual behaviour occur. If the response is yes;

2. Was the behaviour vexatious? The test is subjective and questions whether the employee was annoyed. If the behaviour was not vexatious, no damages will be awarded;

3. If there was sexualized behaviour, was the behaviour unwelcomed? This factor consists of an objective and subjective test. Objectively, the test questions whether the employer should have known better and asks whether a "reasonable person" in the same situation would consider the conduct unwelcomed (the reasonable person

test was considered in *Wigg v. Harrison [1999], NSHRBD, No. 2(NSBOI); Miller v. Sam's Pizza supra note 16, at 29; Robichaud v. Canada (Treasury Board) [1987], 2 S.C.R.84).*

83. Subjectively, the test asks whether the employer knew better. A complainant has to prove the first two prongs of the test.

Workplace Environment

84. An employer is responsible for establishing and maintaining a workplace free of discrimination (*School District No. 44 (North Vancouver) v. Jubran, 2005 BCCAC201) and Willow v. Halifax Regional School Board (2006), 56 C.H.R.R.D/1571.* If I find the Respondent did in fact make certain comments to the Complainant concerning her sexuality and if he made sexual advances towards her, he will have created a "poisoned work environment".

Justification

85. Counsel for the Human Rights Commission characterized the concept of justification quite aptly in her pre- hearing brief in stating that if a *prima facie* case is established on a balance of probabilities, the Respondent must justify his conduct. To do so, he would have to demonstrate that his actions and words were not vexatious or that the Complainant consented to same. If he could establish consent, it would refute the Complainant's proof of unwanted or vexatious behaviour. If there was no consent but the Respondent had exhibited vexatious behaviour in the Complainant's view, she will have made out a case of discrimination.

86. It is important to point out that the intention of Mr. Cormier is not relevant, but what is important is the perception of Ms. Graham. "Lack of objection and even participation in the activity do not imply consent or cloak otherwise objectionable behaviour with propriety" (*Swan v. Canadian Armed Forces [1994], C.H.R.D. No. 15 (C.H.R.T.); (1995), 25 C.H.R.R.D/333 at 7 (F.C.T.D.)).*

87. When a manager, supervisor or owner of a business engages in sexualized comments, or permits another employee to engage in such conduct, he/she cannot rely on a complainant's silence or indeed, participation to prove consent. The reason being the power imbalance and the potential fear of reprisal can be compelling reasons to remain silent or try to 'fit in' by participating in the conduct. To be successful, Mr. Cormier would have to demonstrate this power was not operative. As the owner of the hair salon in 2007, he carried a high burden as he had power over all of the employees.

Credibility

88. Credibility is usually an issue in matters involving sexual harassment. In *Leach v. Canadian Blood Services, 200 ABQB54, Coutu J., at para. 70* adopted the test for assessing credibility set out by *Foster J. in Sylvan Lake Golf and Tennis Club Ltd. v. Performance Industries Ltd. And O'Connor (1996) 190A.R.321 (Q.B.) at para. 27* as follows:

> 1. The witness's evidence shall first be considered on a "stand-alone" basis. In this regard, factors such as firmness, memory, accuracy, evasiveness, and whether the witness's story is inherently believable;
> 2. If the witness's evidence survives the first test above, the assessment moves on to a comparison of that witness's evidence with the evidence of others and documentary evidence;
> 3. Finally, the court must determine which version of events, if conflicting versions exist, is most consistent with "the preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place in those conditions."

89. Applying the tests well- expressed enunciated in *Leach supra,* and closely observing the demeanor of the Respondent and the Complainant when they presented their evidence during the two day hearing (they were the only witnesses), I found the Respondent's evidence to be replete with contradictions, evasiveness, constantly forgetful (to some extent, this was understandable considering the length of time (some seven years) it took this matter to reach the hearing stage), untruthful, nonchalant, uncaring and detached. He seemed to have had a plodding acquaintance with the truth. In Ms. Smith's thorough cross-examination of Mr. Cormier, he said words to the effect that he did not know why he was here (at the hearing) and why the hearing was taking place. I interpreted his responses to mean that the complaint etc. was trivial.

90. I found Ms. Graham presented her evidence in a straight forthright manner in spite of her becoming emotional at times. She was honest, extremely thorough and quite compelling.

91. The Respondent denied every allegation the Complainant set out in her complaint. I did not believe him at all. Where there is conflicting evidence between Ms. Graham and Mr. Cormier, I accept the evidence of Ms. Graham.

Effect of Mr. Cormier's Actions

92. It greatly dismays me to think how the Respondent could have treated a young lady, who was 22 years of age at the time with such anger, total disrespect and humiliation and also did so in the presence of clients. His abhorrent actions which occurred with great regularity took place one month after she advised she was gay.

93. It was patently obvious Mr. Cormier wished to commence an intimate relationship with Ms. Graham shortly after her employment. One does not have to be perspicacious to discern that his infatuation soon became an obsession. Some examples are, telephone calls to the Complainant's home late in the evening, driving by her residence on more than one occasion, parking in front of her residence, barging into her apartment (angry) the evening she refused to go to dinner, and arriving at her apartment unannounced on two other occasions.

94. Ms. Graham's evidence was that Mr. Cormier's negative treatment caused her to feel:

a) feel uncomfortable

b) humiliated

c) disgusted with herself that she remained in his employee for three months

d) she said, "he was suppose to be my boss and mentor and he made me feel my being a lesbian gave him the right to treat me the way he did, that it was okay for him to make those comments because I was gay

e) she said she didn't deserve to be treated or spoken to in such a negative manner

f) she said his attitude negatively affected her for a long time

g) she indicated that on one level, she was afraid of him because of his sexual comments, that he would one day, transfer his verbal comments into physical actions. She was afraid to go to dinner because of the fear of being alone with him could possibly result in her physical harm or that he would attempt to make his dreams become a reality

h) Ms. Graham indicated that she continues to have a difficult time telling people she is gay as she is afraid of how they may react.

95. In summary, the alleged discrimination she suffered caused her emotional and psychological harm. The discrimination occurred on a frequent basis in excess of two months.

Conclusion

96. I find the Respondent, Shawn Cormier discriminated against the Complainant, Stephanie Graham on account of her sex, sexual orientation, and sexually harassed her while she was in his employ, contrary to section 5(1) (d) (m) (n) and section 5 (2) of the *Act*.

97. I would ordinarily order the Respondent to apologize to the Complainant. However, I decline to do so for two reasons:

1. He failed to apologize over a seven-year period (as his evidence disclosed, he did not see the reason for the hearing). I interpreted his remarks to mean he was not of the view that his actions were extremely inappropriate;

2. A forced apology would not advance the cause of human rights, which is the hoped for elimination of racism.

Award

98. As concerns a monetary award, I have taken into consideration the factors Bd. Chair Cusack set out in assessing general damages for humiliation, loss of dignity, self-respect, psychological and emotional harm in *Marchand v. 3010497 Nova Scotia Ltd., 2006 NSHRC1, at 67* as follows:

(a) The redress for the harm suffered by the discriminatory conduct, which in this case I consider to be economic, sociological (impacting an entire family) and emotional;
(b) The need to ensure that a message is delivered to the Complainants and others that human rights must be respected; and
(c) The need to insure that the award does not appear to be so small as to constitute a minor cost of doing business, such as to encourage risk taking.

99. On hearing this matter and on reviewing all of the evidence and written submissions filed on behalf of the Commission and Respondent, I order the Respondent, Shawn Cormier, to pay the Complainant, the sum of $11,400.00 representing general damages for denigration of the Complainant's dignity, self-respect and psychological and emotional harm he inflicted.

100. The Respondent is to pay pre-judgment interest at the rate of 2.5% for 7 years.

101. In *Gilpin v. Halifax Alehouse Limited and* NSHRC 2013 CanLII 43798 (NS HRC), a May 29, 2014 decision of Bd. Chair, J Walter Thompson, Q.C., general damages were set at $6,250.00 plus interest. Mr. Gilpin, a black man who immigrated to Canada from Sierra Leone in 2003, was refused service at the Alehouse on the basis that he did not have identification proving he as 19 years of age or older. Mr. Gilpin was 32 years old at the time. The police were called. Mr. Gilpin was drinking water when they arrived. He was arrested for being intoxicated in a public place and spent the night in the lockup. The charges were dismissed within a month. His complaint of discrimination on the basis of colour was upheld.

In *Cromwell v. Leon's Furniture Limited and NSHRC, 2014 CanLII 16399 (NSHRC,)* BD. Chair, Kathryn Raymond awarded Ms. Cromwell $8,000.00 in general damages plus prejudgment interest at 2.5%. The Board of Inquiry noted at paragraph 401 of her decision that general damages need to reflect the serious nature of discrimination and be truly compensatory. The Board of Inquiry referred to the *Cottreau v. R. Ellis Chevrolet Oldsmobile Ltd.* decision *([2007] N.S.H.R.B.I.D. No. 3)* at para. 402 of her decision. BD. Chair Raymond in noted at para. 402 that in Cottreau "The Human Rights Board of Inquiry award Mr. Cottreau $10,000.00 in general damages even though there was no evidence from Mr. Cottreau, that he suffered any long-term psychological damage or inquiry to his self-worth. There was evidence before Board of Inquiry Raymond that Ms. Cromwell suffered long term injury to her self-worth.

102. The Complainant, Ms. Graham was psychologically and emotionally affected. She was fired from a job she required for training purposes. Although she quickly found new work through her own efforts, her undisputed evidence was that the discrimination caused her emotional harm.

103. I retain jurisdiction to determine any issues related to remedy and any other issue arising out of this award.

Comment

104. There is a new leader at the helm of the Nova Scotia Human Rights Commission; viz., Tracey Williams. Under her tutelage of approximately two years, the Commission has significantly reduced the time it takes to deal with a complaint.

105. The foregoing is of extreme importance as aggrieved parties under the *Act* will now be greatly encouraged to file complaints knowing their claim will be dealt with in a timely manner.

106. I make the foregoing comments in light of this case in which I acted as Chair. This matter took some seven years to reach the Board of Inquiry stage. There is no justifiable excuse for this inordinately long delay. The facts in this case were straightforward. A multitude of witnesses was unnecessary. There were only two witnesses, the Complainant and the Respondent. It was a two-day hearing. It would have been a one-day hearing, but for some preliminary motions counsel raised.

107. It is refreshing to know the ridiculously long delays at the Commission are now in the past. The delays clearly did not place the Commission in a "favorable light". Moreover, it discouraged in many cases, potential complainants, from filing a complaint. Incidentally, the delays were and are endemic to Commissions across Canada.

Dated at Hammonds Plains, Nova Scotia this day 15 of December, 2014

_____

Kenneth D. Crawford, Q.C., Chair
Board of Inquiry