

IN THE MATTER OF: THE NOVA SCOTIA *HUMAN RIGHTS ACT* (the “*Act*”)
and

IN THE MATTER OF: Board File No. 51000-30-H19-0172

BETWEEN:

Timothy Parsons

Complainant

- and –

Bedford Investments Ltd. o/a Sunnyside Restaurant and True North Diner

Respondent

- and –

Nova Scotia Human Rights Commission

DECISION ON REMEDY

Chair: Dennis James, K.C.

Hearing Date: July 17th and 18th, 2023

**Location: Human Rights Commission Office located at 5657 Spring Garden
Road, Suite 305, Halifax Nova Scotia**

Counsel: Timothy Parsons, Complainant

Steve McMullin, on behalf of the Respondent

**Kendrick Douglas, Counsel for the Nova Scotia Human Rights
Commission**

By a decision dated September 11, 2023, this Board found that the Complainant's human rights were violated in two ways:

- i. Through the operation of the restaurant True North, the Complainant was the subject of sexual harassment, including retaliation; and
- ii. Through the operation of the restaurant, Sunnyside, the Complainant was the subject of discrimination based on his race and/or colour leading to his loss of employment.

While the Respondent was the common employer, the circumstances were not related, and each act of discrimination should be reviewed separately to understand the impact on the Complainant and to properly apply the principles as directed in *Disability Rights Coalition v. Nova Scotia (Attorney General)* 2021 NSCA 70 ("DRC").

The Board's authority to direct remedy is set out in Section 34 (8) of the *Human Rights Act* 1989 RSNS c. 214, as amended ("Act") as follows:

(8) A board of inquiry may order any party who has contravened this Act to do any act or thing that constitutes full compliance with the Act and to rectify any injury caused to any person or class of persons or to make compensation therefor and, where authorized by and to the extent permitted by the regulations, may make any order against that party, unless that party is the complainant, as to costs as it considers appropriate in the circumstances

In *DRC* the Court adopted the following approach to understand the scope of the Board's remedial authority:

230 Russel W. Zinn explains the purpose of discrimination awards in *The Law of Human Rights in Canada* (looseleaf) at §16:10:

The purpose of awarding damages in discrimination cases has been said to prevent further discrimination rather than to punish the wrongdoer. However, tribunals will also seek to put the complainant into the position he would otherwise have been but for the discriminatory conduct.

In *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, Chief Justice Dickson, for the majority, stated:

The purposes of the [*Canadian Human Rights Act*] would appear to be patently obvious, in light of the powerful language of s. 2. In order to promote the goal of equal opportunity for each individual to achieve "the life that he or she is able and wishes to have", the Act seeks to prevent all "discriminatory practices" based, *inter alia*, on sex. It is the practice itself which is sought to be precluded.

The purpose of the Act is not to punish wrongdoing but to prevent discrimination.

In *Cashin v. Canadian Broadcasting Corp.*, **the Tribunal stated that the remedial powers of adjudicators should be interpreted broadly. The remedy for discrimination should make the victim whole by putting the complainant into the position he or she would have been but for the discrimination.** The tort test of reasonable foreseeability does not apply in human rights law.

(Emphasis in original)

Training

In this case the Commission has requested, and the Respondent has accepted a direction that it shall receive training on human rights supplied by the Commission at the Respondent's expense. This should include the wages of employees who are attending for training. As there is agreement on this point, the requirement for the Respondent's training will form part of the Board's order.

Compensation

The Commission filed a brief advocating for \$27,000 in a compensatory award in favour of the Complainant. The Complainant did not file a separate brief but did endorse the Commission's position. The Respondent advocates for a compensatory award of \$6,000.

The Court of Appeal in *DRC* summarized the factors to be taken in account when assessing appropriate compensation:

231 The Board in *Y.Z. v. Halifax Regional Municipality*, (2019 NS HRC Decision on Remedy) ("Y.Z.") concisely sets out the following general principles relating to damage awards for discrimination:

1. Boards of Inquiry may award damages for the harm and injury to a Complainant's dignity and self-respect and to recognize the humiliation suffered as a result of discrimination or harassment.
2. Some of the considerations in assessing general damages in the human rights context are addressed at paragraph 67 of *Marchand v. 3010497 Nova Scotia Ltd.* (2006), 56 CHRR D/178 (NSBOI):

In considering an appropriate range of general damages I am guided by a number of factors, which are, I believe relevant. [...] The relevant factors include the following:

- 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 [Respondents] and others that human rights must be respected; and
- c) the need to ensure 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.

3. Further relevant considerations are set out in *MacTavish v. Prince Edward Island*, 2009 PESC 18:

49 The court must take a common sense, fair and equitable approach to any award of general damages. It must take into account the principles outlined above. General damages in human rights cases are not intended to punish the wrongdoer. They reflect a recognition by society that one has been harmed by the actions of another. The harm we speak of with dignity and self-respect of the victim. **We must attempt to restore, but not reward.** We must be realistic and consider whether any award bears a reasonable relationship to other awards for similar discrimination.

(Emphasis in original)

232 With respect to general damages, the Alberta Court of Appeal in *Walsh v. Mobil Oil Canada*, 2013 ABCA 238 adopted the reasoning in *Arunachalam v. Best Buy Canada Ltd* 2010 HRT0 1880 (“*Arunachalam*”), which set out the following two-factor approach to assessing damages:

[60] The Ontario Human Rights Commission recently outlined the criteria for awards of general damages: see *Arunachalam v Best Buy Canada Ltd*, 2010 HRT0 1880 (Ont Human Rights Trib). **The first aspect is to characterize the injury based on the nature of the discriminatory conduct, depending for example, on how serious or prolonged the conduct was. The second is to recognize the complainant's particular experience in response to the discrimination.** To the extent that a complainant has experienced particular emotional difficulties as a result, this will likely increase the amount of the award.

(Emphasis in original)

[46] Monetary compensation for injury to dignity, feelings and self-respect recognizes that the injury to a person who experiences discrimination is more than just quantifiable financial losses, such as lost wages. **The harm, for example, of being discriminatorily denied a service, an employment opportunity, or housing is not just the lost service, job or home but the harm of being treated with less dignity, as less worthy of concern and respect because of personal characteristics, and the consequent psychological effects. [...]**

[...] Often the harm to intangible interests [affected] by a breach of rights will merge with psychological harm. But a resilient claimant whose intangible interests are harmed should not be precluded from recovering damages simply because she cannot prove a substantial psychological injury.

[47] The principle that intangible losses are compensated with monetary awards is not unique to statutory human rights law. [...]

[48] While principles from other areas of law may be useful analogies, the Tribunal's approach to the exercise of its remedial discretion must be centered in the values of and statutory language in the *Code*. *Code* damages are meant to compensate, not punish, and *Code* violations, unlike some other areas of law, arise in a variety of very different social and legal contexts.

[49] Damages for *Code* violations, as in other areas of law, must be fair to both the applicant and respondent(s), given the violations of the *Code* found: see *Ward, supra*, at para. 53. Damages under the *Code* must not be so low as to trivialize the social importance of the *Code* by effectively creating a license fee to discriminate (see *Lane, supra* at para. 152). At the same time, *Code* damages for intangible losses should not be "unduly high": see *Ward, supra* at para. 54, referring to the approach of courts in other jurisdictions to damages for violations of constitutional rights. [...]

[50] In a system in which many decisions on the merits are made each year, there is a particular importance that damage awards for intangible losses be consistent and principled. [...]

(Emphasis in original)

In addition, the Board considered previous decisions of Board of Inquiry, adjusting awards to reflect current day equivalency, including:

- *Cromwells v. Leons Furniture Limited*, 2014 CarswellNS 331;
- *Davison v. Nova Scotia Construction Safety Association*, 2006 NSCA 63;
- *Gough v. C.R. Falkenham Backhoe Services Ltd.*, 2008 NSCA 38
- *Miller v. Sam's Pizza House*, 1995 CarswellNS 713;
- *Symonds v. Halifax Regional Municipality (Halifax Regional Police Department) (Re)*, 2021 CanLii 37128 (NS HRC);

To assess the impact of the discriminatory conduct on the Complainant, the Board will follow the two-step process adopted and applied by the Court of Appeal in *DRC*:

- Characterize the injury based on the nature of the discriminatory conduct including how serious or prolonged the conduct was; and,
- Recognize the Complainant's particular experience in response to the discrimination.

Compensation for Sexual Harassment

Mr. Parsons worked for the Respondent for four-weeks, dividing his time between the True North restaurant and the Sunnyside restaurant. He was hired to work at the True North and was asked to accept some shifts at the Sunnyside. The sexual harassment occurred through his work at the True North as he was victimized by a co-worker identified as B.S. The incidents complained of occurred during the November 23 shift, which was the first that he worked at True North and are described on pages 14 and 15 of the September 11 decision. The evidence is that the initial instance of harassment was limited to a few comments and suggestive signing with no suggestion of physical conduct. Later during the first shift and in subsequent shifts working with B.S., Mr. Parsons experienced retaliatory conduct from B.S. in the form of derogatory comments such as ridiculing his sexuality by openly discussing his sexual orientation, subjecting him to ridicule by calling him a faggot, and referring to him as "boy" which is vile when directed at a black male, given the term's malevolent deployment in the time of slavery and segregation.

The Complainant gave evidence that Mr. Olver, the Chef Manager of True North, did respond in a supportive way, both by assuring him that they valued his contribution but also by attempting to separate Mr. Parsons and B.S. in future shifts. While the tactic was somewhat effective, it lacked the rigor and thoroughness that one should expect when there is an incident of sexual harassment.

The Respondent did not carry out a formal investigation nor was there evidence of what discipline or training was undertaken with B.S. to ensure that the expectations of a respectful and safe work environment were understood, including the expectation that she

would not engage in retaliatory conduct. In fact, the Respondent's sole witness was lacking any information or insight into the complaint even though it was set out in the original complaint form, and the hearing was conducted 4 years hence.

Mr. Parsons described his reaction to the treatment by his co-worker which included his humiliation and the impact on his confidence. During his testimony Mr. Parsons spoke of many and regular experiences of discrimination throughout his working career that he related to his race and/or colour. He said in relation to the sexual harassment that this was the first occasion that he experienced discrimination due to his sexual orientation. He said that he had to stand up for himself. It was clear in his evidence that the conduct of B.S., and the fact that she could continue to retaliate was very impactful on Mr. Parsons and left him with a feeling that he was not protected by his employer, despite the initial response by Mr. Olver.

While Mr. Parsons had a short term of employment at the True North restaurant, it started with acts of sexual harassment, and continued during his four weeks through acts of retaliation up to and including his final shift. The limited efforts by Mr. Olver were appropriate and served to mitigate some of the effects of B.S.' conduct but were lacking in the rigor that is needed to ensure a safe workplace. The Board is concerned that the Respondent lacked the policies and procedures to address the situation. The Respondent's lack of evidence suggested that it did not take the situation seriously enough, and it is important that any award sends a message that an employer cannot be a passive observer in the workplace.

Given the nature of the initial sexual harassment, the prolonged retaliatory conduct, which was allowed to continue, the impact of the conduct on Mr. Parsons, as well as the limited response by the Respondent to address the complaint, and the need to emphasize the importance of ensuring a safe and respectful work environment that meets the objectives of the *Act*, the Board finds an award of \$7,500 in damages to be appropriate.

Compensation for discrimination due to race and/or colour

The findings of discrimination related to Mr. Parsons' race and/or colour were those related to his shift on December 15, and the resulting termination of his employment. Mr. Parsons testified that he found new employment within two months, approximately of his employment being terminated. He said it took a while because January is a quiet month in the restaurant industry. In its submission, the Respondent estimates that Mr. Parsons' lost \$4,000 for eight weeks' salary. The implication of the submission is that because there was a minimal period of employment that the impact of the conduct was not significant. This is not an acceptable proposition as it does not address the impact of humiliation and indignity endured when one's human rights have been violated.

The circumstances are that Mr. Parsons' lost his job with the Respondent with conduct that started with allegations by two co-workers. The Board found that it was reasonable to draw an inference that race and/or his colour was a factor in the circumstances that led to his dismissal including the complaints made against him and the manner in which he was challenged by his supervisor for his attitude. The evidence is that the Respondent lacked the policies and procedures to ensure that complaint process protected against abuse such as it was with Mr. Parsons.

Mr. Parsons spoke of being excluded from the workplace at Sunnyside, and from being "picked on" by being falsely accused of having attitude towards other employees. It is clear that he was frustrated of having false allegations used as a reason to end his employment, and he continued to feel the insecurity of such circumstances.

Given the fact that Mr. Parsons's race and/or colour was a factor in the allegations against him, and that those allegations caused the loss of his employment, as well as the impact of the conduct on Mr. Parsons, and the need to emphasize the importance of ensuring a safe and respectful work environment that meets the objectives of the *Act*, the Board finds that \$10,000 in damages to be appropriate.

Lost Wages

The Complainant estimated that he was off work for eight weeks but did not provide any documentation to support that claim. The Board declines to make a separate award for eight weeks based on the lack of clear evidence. The Board does award \$3,000, less statutory deductions for the Complainant's loss of income.

Summary

Based on the foregoing, the following is directed:

1. The Respondent pay to the Complainant \$7,500 in damages for the sexual harassment he endured;
2. The Respondent pay to the Complainant \$10,000 in damages for the discrimination that he experienced due to his race and/or colour leading to the loss of his job;
3. The Respondent pay to the Complainant \$3,000, less statutory deductions, for lost wages.
4. The Respondent is directed to undergo human rights training from the Human Rights Commission at the Respondent's expense, including the payment of wages of employees who attend; and,
5. The Board will remain seized with jurisdiction to ensure the remedies are enforced.

DATED at Truro, Nova Scotia this day of November, 2023.

Dennis James, K.C.
Board