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IN THE MATTER OF THE *HUMAN RIGHTS CODE*
R.S.B.C. 1996, c. 210 (as amended)

AND IN THE MATTER of a complaint before
the British Columbia Human Rights Tribunal

B E T W E E N:

Margaret Kwan

COMPLAINANT

A N D:

Esmail Marzara and Ara Manufacturing Company Ltd. dba Ara Sales
Company

RESPONDENTS

REASONS FOR DECISION

Tribunal Member:

Kurt Neuenfeldt

Counsel for the Complainant:

Dan Soiseth
Son Le, Articled Student

Counsel for the Respondents:

M. C. (Mark) Stacey

Hearing Dates:

July 27 and 28, 2009

I INTRODUCTION

[1] Margaret Kwan filed a complaint against Esmaeil Marzara and Ara Manufacturing Company Ltd. dba Ara Sales Company (referred to hereafter as “Ara”), alleging that she was discriminated against in her employment, on the basis of sex (sexual harassment), contrary to s. 13 of the *Human Rights Code*.

II THE COMPLAINT

[2] Mr. Marzara owns and operates Ara. Ms. Kwan alleges that when she applied for employment with Ara, and on the single day she worked for the company, Mr. Marzara sexually harassed her. Mr. Marzara denies any misconduct, and says Ms. Kwan has made false allegations against him in an attempt to get out of an employment contract with Ara.

III PREVIOUS PROCEDURAL HISTORY

[3] In *Kwan v. Marzara and another*, 2007 BCHRT 387 (“*Kwan (No. 1)*”) the Tribunal found Ms. Kwan’s complaint justified. That hearing proceeded in Mr. Marzara’s unexplained absence. In *Kwan v. Marzara and another (No. 2)*, 2008 BCHRT 382, the decision in *Kwan (No. 1)* was set aside, as Mr. Marzara provided a reasonable explanation as to why he had been absent for the initial hearing, and the Tribunal exercised its jurisdiction to reopen the complaint for reconsideration.

[4] After *Kwan (No. 2)* was decided, I was designated to rehear the case. In coming to my decision, I have not reviewed, considered, or made reference to the evidence or conclusions set out in *Kwan (No. 1)*. My decision is based solely on the oral and documentary evidence presented at the hearing over which I presided.

IV DETERMINATION

[5] On the basis of the credible evidence, I conclude that Ms. Kwan’s complaint is justified, and that Mr. Marzara sexually harassed Ms. Kwan in an employment setting. As a result, Ms. Kwan is entitled to the remedies set out at the end of this decision.

V WITNESSES AND DOCUMENTATION

[6] Ms. Kwan gave evidence on her own behalf. She also called Vivianne Wong and Rosanna Lin, former colleagues at a different job, as witnesses. Mr. Marzara was the sole witness for the respondents.

[7] There were numerous evidentiary disputes at the hearing. In assessing the credibility of the witnesses in the contentious areas, I have kept in mind the well-known considerations set out in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.). I have considered such factors as the witness' demeanour, powers of observation, opportunity for knowledge, judgment, memory, and ability to describe clearly what was seen and heard. I have also considered whether the evidence of each witness is in "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": *Faryna* (p. 357).

[8] Although I have considered all the evidence presented, in these reasons I set out only that evidence necessary to explain my decision. In making my credibility findings, I note that I am entitled to accept some, none, or all of each witness' testimony.

[9] Overall, I found Ms. Kwan and her witnesses to be credible. In particular, Ms. Kwan gave her evidence in a calm and straightforward manner, and answered the questions put to her promptly and directly. I also found Ms. Wong and Ms. Lin to be credible, but their evidence was largely limited to recounting their conversations with Ms. Kwan.

[10] I did not find Mr. Marzara to be a credible witness. He was often argumentative and repeatedly referred to Ms. Kwan's evidence in a dismissive manner. He was evasive in response to basic questions put to him. Overall, I found his version of events not in harmony with the preponderance of probabilities.

[11] Documents quoted in this decision are reproduced as in the original, with the exception of wording in square brackets.

VI THE EVIDENCE

1. Background

[12] All the events that led to the complaint occurred over five days in September 2006. However, to put the complaint in context, it is necessary to set out some of the parties' background prior to that time.

[13] I also note that I have set out some evidence that was tangential to the complaint. I have done so because Mr. Marzara's counsel challenged Ms. Kwan's overall credibility on the basis of that evidence.

A. *Ms. Kwan*

[14] Ms. Kwan is of Chinese ethnicity. In September 2006, she was 24 years old, having finished her undergraduate degree at the University of British Columbia the previous spring. Ms. Kwan had worked at a popular downtown Vancouver restaurant on a full-time basis, as an assistant manager, while going to university, and continued to do so after graduation. Ms. Kwan testified that she planned to work for a year after graduation, and then return to school.

[15] At the hearing, Ms. Kwan stated that at the time of her encounter with Mr. Marzara, she was a naïve and sheltered person. She testified that her life consisted primarily of going to work, school, and church. She testified that she had always received help from the people around her, and had had a very good relationship with her employer at the restaurant – she was treated “like a daughter”.

B. *Ara and Mr. Marzara*

[16] At the time of the hearing, Mr. Marzara was 58 years old, and had lived in Canada for approximately 23 years. His English is accented. He has three children, the youngest being a teenager.

[17] Mr. Marzara owns and operates Ara, a relatively small company with an office in downtown Vancouver. At the time of the incidents in question, Mr. Marzara's adult son worked at Ara, along with an office assistant. For the purposes of this decision, it is

necessary to note that the assistant was older than Ms. Kwan. According to Mr. Marzara, at the time of the hearing, the assistant was no longer living in Vancouver. She was not called to give evidence.

[18] According to Mr. Marzara, the Ara office has an open plan, consisting of four small rooms, including a boardroom, his office, and an open reception area. One can see into all of the rooms, and something said in one room can be heard in all the other rooms. The lines of sight were only obscured, to a limited degree, by filing cabinets.

[19] Mr. Marzara and his family were regular customers at the restaurant where Ms. Kwan worked. As a result, he and Ms. Kwan developed what I can best describe as a ‘nodding’ acquaintance.

2. Ms. Kwan’s Evidence

[20] Ms. Kwan agreed that Mr. Marzara was a regular customer at the restaurant where she worked, coming in about once a month. She testified that she thought Mr. Marzara had two children, and recalled that the restaurant owners had named two miniature serving boats after his son and daughter.

[21] In cross-examination, Ms. Kwan was challenged as to the number of children Mr. Marzara had, and how often he came into the restaurant. She acknowledged that she was mistaken in her evidence, if he in fact had three children. She did not recall Mr. Marzara coming into the restaurant on a weekly basis.

A. September 20 and 21

[22] According to Ms. Kwan, when Mr. Marzara came to the restaurant, they would sometimes engage in small talk. On September 20, Ms. Kwan mentioned to Mr. Marzara that she was going to work for a year before going back to school, and that she wanted to find an entry-level business job, as her work experience had been confined mainly to the restaurant. When she made this comment, Mr. Marzara gave her a business card and told her to send him a résumé.

[23] In cross-examination, Ms. Kwan rejected the suggestion that she was the one who first suggested to Mr. Marzara that she would like to work for Ara. She also rejected the

suggestion that he told her that he was not hiring at the time, but she could send in a résumé if she wanted to.

[24] After she finished her work late that evening, Ms. Kwan went home and reviewed Ara's website. She then sent Mr. Marzara a résumé and cover letter by email, just after midnight on September 21, as she was very interested in working for the company. She felt it might be an exceptional opportunity for her in the business world.

[25] Ms. Kwan received a call from someone at Ara the next morning. In her examination in chief, she stated that call was from Mr. Marzara, but in cross-examination she could not recall if it was Mr. Marzara or his assistant who contacted her.

[26] Ms. Kwan agreed in cross-examination that she had been wrong when she stated in examination in chief that the Ara office was on Pender Street, as it was on Hastings Street. In any event, she testified that upon her arrival at Ara's office, Mr. Marzara had her take a test in a computer room, along with another woman. In cross-examination, she disagreed that she took the test at the office reception desk.

[27] Ms. Kwan described the office as having a boardroom, an office, a reception area and some other work space. At least some of the walls in the office were made of glass.

[28] According to Ms. Kwan, after the test was over, Mr. Marzara took her into the office boardroom, and went through the test with her. She acknowledged to Mr. Marzara that she did not do well on an exercise that involved a spreadsheet program, and agreed that she needed to improve her skills in this area.

[29] Ms. Kwan testified that Mr. Marzara told her he wanted to hire a younger person who could grow with the company, and mentioned that he hoped his children would one day take it over.

[30] At the end of the interview, Mr. Marzara told Ms. Kwan that he would let her know his decision. He then gave her a hug. She thought this somewhat odd, but did not think too much more of it, as she felt it was the type of hug one might give a friend. After she left, Mr. Marzara went on to interview another person.

B. September 22 Meeting in Office

[31] According to Ms. Kwan, Mr. Marzara called her the next morning, Friday, September 22, to tell her he was going to hire her. He also told her she should come in that afternoon to sign an employment contract. Ms. Kwan's cell phone records indicate she received a call from the Ara office number on September 22.

[32] Ms. Kwan testified that when she arrived, Mr. Marzara went over the contract with her. He had her fill in her name on the form letter, and he and Ms. Kwan then discussed her probationary salary. She testified that he set her salary at \$1,600 per month, based on eight hours a day, at \$10 an hour, and asked her to fill out the salary figures in the contract.

[33] The employment contract included the following statement:

In the event that either party terminates this Employment Contract during the Probationary Period all monies due to you will be paid less statutory deductions.

[34] Ms. Kwan said she was also asked to sign a "Conflict Of Interest Agreement". None of the documents signed by Ms. Kwan suggest that there were any penalties if an employee unilaterally terminated the employment contract.

[35] Ms. Kwan testified that during her meeting with Mr. Marzara, they also discussed a written list of job duties. Mr. Marzara told Ms. Kwan that she would eventually learn all the tasks described in it.

[36] At the hearing, Ms. Kwan stated that at the end of the interview, she believed that she had the job. She testified that to her surprise, when she was about to leave, Mr. Marzara gave her another hug, and this time kissed her twice on the lips. Ms. Kwan stated that she did not know what to think, as she thought he was going to give her a friendly hug, and the next thing she knew, she was being kissed. Ms. Kwan described herself as being in a state of shock as Mr. Marzara showed her around the rest of the office.

[37] In the notes she stated she made September 23, Ms. Kwan described another incident that occurred on Friday, September 22:

After showing me the office he gave me another hug and kiss. Made me feel real uncomfortable but I thought actions were related to culture. But still did not feel right.

[38] When asked in cross-examination why she did not describe this last incident in her examination in chief, she replied that she remembered the incident, but had not been asked about it.

[39] Ms. Kwan testified that after she left the office, she discussed what had happened with Ms. Lin, whom she knew to be taking a paralegal course. Ms. Kwan thought Ms. Lin might know what to do. However, Ms. Kwan only told her about Mr. Marzara hugging her, not that he had kissed her. Ms. Lin told Ms. Kwan that people often hug in a friendly manner. In any event, Ms. Lin said she would talk to one of her instructors about the incident.

[40] In cross-examination, Ms. Kwan denied the suggestion that she picked up the employment contract and other documentation on Thursday, September 21, and returned them the next day to the assistant. She also denied the suggestion that on Friday, September 22, she had only met with Mr. Marzara's assistant to go over some documentation.

C. September 23 Telephone Call

[41] Ms. Kwan testified that she next spoke to Mr. Marzara on Saturday, September 23, when he called her. Ms. Kwan's cell phone records confirm that she received a two minute call from the Ara office number at 12:24 p.m. on September 23. Ms. Kwan was asleep when Mr. Marzara called, as she had been working late the night before.

[42] Mr. Marzara began the conversation by asking her if she had told the restaurant management that she was going to be working for him and would be leaving. She replied that she had mentioned her new job to the restaurant management, but that she planned to keep working at the restaurant at night. He then asked her if she was working that day, to which she replied that she would be working at 5:00 p.m. He next asked what she was doing the next day, Sunday, to which she replied that she would be going to church. When he asked what kind of church, she told him she attended a Mennonite Brethren church. He then asked if she went to church all day, to which she replied that she went to

a service in the morning and then Sunday school in the afternoon. Finally, he said that it looked like she would not have time to meet him for coffee, to which she replied that she would not, but that she would see him at work on Monday. The conversation then ended.

[43] Ms. Kwan's notes of the conversation, made later the same day, are somewhat different. In them she recorded the following:

Sept 23 2006 - received call at 12:24 pm. He asked if I told [the restaurant] about new job. I said told some people, he said why not tell all. I said I will later. Asked what time I will be at work. Told him 5:00 pm. ... Asked what I was doing sunday. Told him MB church. He asked for whole day I said yes because of sunday school & service. Asked me if I had time to go out for coffee on sunday. Told him no. Will see him Monday morning.

Phone call scared me even more. Made me feel really uneasy and concern.

...

[44] Ms. Kwan testified that after her conversation with Mr. Marzara, she made two calls, one to Ms. Wong (one of her witnesses), and another to a male friend. The friend suggested that she begin taking notes of what she was experiencing. As a result, her notes, as entered at the hearing, are first dated September 19, four days before she began making them.

D. September 25 Events

[45] Ms. Kwan went to Ara's office the following Monday, September 25, to start her new job. According to Ms. Kwan, she was met by the assistant who showed her around the office once again, and gave her some materials to review about the company. Ms. Kwan says she looked through the materials while sitting at the office's reception desk.

[46] According to Ms. Kwan, when Mr. Marzara came to work later in the morning, he asked her to join him in the office board room and told her to make notes of his comments on a business matter. Ms. Kwan was not familiar with the topic on which he was speaking. The session lasted about 20 minutes, after which Mr. Marzara gave her another hug and a kiss.

[47] Ms. Kwan testified that she immediately told Mr. Marzara that she did not know if hugging and kissing was part of his culture, but it was not part of her own Chinese and

Christian culture. Ms. Kwan then left the board room and returned to the reception desk. Mr. Marzara followed her, asking her if she was a Canadian. When she said she was, he stated that Canadians were more open, to which she replied that her being Canadian did not detract from her being Christian and Chinese. Mr. Marzara then said they would talk about the issue more at a later time. Ms. Kwan was surprised that there would be anything more to talk about. She decided that she would finish the day and not return.

[48] During the afternoon, Ms. Kwan spent some time putting paper products on a presentation board, and did some filing. Towards the end of the afternoon, Mr. Marzara asked Ms. Kwan to speak with him in one of rooms in the office, whereupon he asked her how her day had gone, and noted that he wanted her to work on her business writing. Ms. Kwan went along with the conversation, agreeing with Mr. Marzara, as she knew she would not be coming back.

[49] Ms. Kwan alleges that Mr. Marzara then began asking her questions about her personal life. In response to his questions, she told him that she had a boyfriend, to which he replied that he thought she would be something more special to him. Ms. Kwan told him she was happy with her relationship, and that being a Christian, she believed in monogamous relationships. In any event, she said she wanted to keep her arrangement with him strictly professional. Mr. Marzara commented to the effect that it appeared her relationship with him would be similar to that he had with his current assistant. However, he then said that people often had relationships on the side, and that she needed someone to take care of her.

[50] In her examination in chief, Ms. Kwan said that the discussion then ended and she left to go to work at the restaurant. She never returned to the Ara office. In cross-examination, it was pointed out to Ms. Kwan that in her evidence in chief, she had never referred to her comment in her notes that Mr. Marzara hinted that advancement could be a problem for her, given her reaction to what he had allegedly said. She agreed she had not mentioned it in her evidence in chief, noting that she had not been asked about the comment.

[51] Ms. Kwan testified that she never spoke to Mr. Marzara's assistant, who was in the office September 21, 22, and 25, about Mr. Marzara hugging and kissing her. When

asked in cross-examination why she had not, Ms. Kwan said she did not speak to the assistant because she did not know her.

E. September 26 and After

[52] Ms. Kwan testified that on the morning of September 26, she tried several times to call the Ara office on her cell phone to say that she would not be coming in, but she could not get through. Her telephone records indicate six calls to the Ara number on September 26, between 8:30 a.m. and 8:45 a.m. Ms. Kwan went on to say that she was eventually able to get through to Mr. Marzara's assistant on another phone. Ms. Kwan told the assistant she would not be coming into the Ara office again, saying Mr. Marzara should know why.

[53] On the same day, Ms. Kwan sent Mr. Marzara a letter of resignation. The first paragraph is as follows:

I am writing this letter in regards to providing you an official resignation of the position of office support. After the events leading to and the events that occurred on September 25, 2006 I feel that your company is not a place for me. The environment that you propose I work in is not of a professional manner and as a result I feel I do not have to fulfill the requirements of the contract that was signed on September 22, 2006 at [...]

[54] In her letter, Ms. Kwan goes on to ask Mr. Marzara to pay her for her work on September 25, but also asks that he have no further contact with her. She closes her letter by stating that she is "disappointed that the situation had to end in this type of manner." The letter does not contain any further description of the events alluded to.

[55] Ms. Kwan testified that she did not start looking for another job until October 6, nine working days after she left Ara. She stated she did not look for work sooner because she needed time off to deal with everything she had experienced, and that she continued to have concerns about her employment contract with Ara. Ms. Kwan found full-time employment at a law firm on October 16, ten working days after she began her search. She also continued to work at the restaurant. At the time of the hearing, she continued in both positions.

[56] Ms. Kwan testified that her experience at Ara has made her a different person. Prior to what happened, she had been fortunate, in that she had never had anything untoward happen to her. Since the incident, she looks at things differently. She knows she has to be more careful and less trusting of people. She also noted she sought counselling from her pastor after the incident, which, along with the support of her church group, has been helpful.

[57] She concluded by stating that she wants this episode of her life to be over, and that it has been particularly distressing that the rehearing of the complaint has meant it was dragged out over three years. Her experience with Mr. Marzara was not something she wanted published and broadcast, and she wants the matter concluded.

[58] Ms. Kwan rejected the suggestion put to her in cross-examination that she had made up her entire story as a means of getting compensation for a job she realized she did not want.

F. Viviann Wong

[59] In September 2006, Ms. Wong was working in the same restaurant as Ms. Kwan. Ms. Wong described her relationship with Ms. Kwan as that of co-worker and friend, and currently as that of acquaintances, as they no longer see each other often. Ms. Wong described Ms. Kwan as being reliable and ‘straight-laced’. She also recalled that Mr. Marzara was a regular customer at the restaurant.

[60] Ms. Wong testified that Ms. Kwan was happy and excited about her new job at Ara. However, it soon became apparent that there were problems. For example, during a shift at the restaurant on September 24, Ms. Kwan told her that Mr. Marzara had called her and asked her to go out for coffee with him.

[61] In cross-examination, Ms. Wong disagreed with the suggestion that Ms. Kwan had approached Mr. Marzara about a job. Ms. Wong agreed that all she knew about the allegations against Mr. Marzara was based on what Ms. Kwan had told her. She had not seen anything inappropriate transpire between Ms. Kwan and Mr. Marzara.

G. Rosanna Lin

[62] Ms. Lin had known Ms. Kwan since 2004, as Ms. Kwan was her manager at the restaurant. In September 2006, Ms. Lin was training to be a paralegal. Although she keeps in touch with Ms. Kwan, she no longer works in the restaurant with her.

[63] Ms. Lin described Ms. Kwan as a good role model, and someone who took her job seriously. She was a good source for advice and problem-solving. Ms. Lin also recalled that Mr. Marzara was a regular customer at the restaurant; he often came in with his wife and children.

[64] Ms. Lin recalled Ms. Kwan being happy and excited about her new job at Ara. She also recalled Ms. Kwan telling her about Ms. Marzara giving her a hug. Her recollection was that she told Ms. Kwan it might simply have been cultural, and not that important. Ms. Lin also recalled telling Ms. Kwan to speak to others about the incident.

[65] When she spoke to Ms. Lin, Ms. Kwan was concerned with the employment contract she had signed with Ara. Ms. Lin replied that she would speak to one of the teachers in her paralegal program about the situation. However, Ms. Kwan had quit before she could do so.

3. Mr. Marzara's Evidence

[66] While Mr. Marzara's recollection of his interactions with Ms. Kwan is almost completely at odds with her account, there was agreement that he and his family had been long-time customers of the restaurant where Ms. Kwan worked. He recalled that in 2006, he went to the restaurant about once a week.

A. September 20 and 21

[67] According to Mr. Marzara, when he went to the restaurant on September 20, Ms. Kwan approached him, asking if he knew anyone was hiring office staff. She said she was looking for office work as she was tired of working in the restaurant.

[68] Mr. Marzara replied by telling her to send his assistant a résumé, which Ms. Kwan did. She also sent an introductory letter. On September 21, after he reviewed it, Mr. Marzara told his assistant to schedule an interview. Mr. Marzara did not recall calling

Ms. Kwan himself that day, but remembered that his assistant had arranged a couple of interviews. Confusingly, however, he also maintained in his evidence that he was not looking for new employees at the time.

[69] In cross-examination, Mr. Marzara was referred to the Response to Complaint Form which he completed on December 8, 2006. In Section D, page 2, line 6, he states:

... I told her to come to our office for an interview and test of two assignment on words and MS Excel, test on words was ok, & Excel was not good (as per attached). ...

[70] Mr. Marzara was then reminded that in his previous evidence, he had stated that he told his assistant to call Ms. Kwan. Mr. Marzara stated that the two versions were not different as far as he could tell. He noted that English was his second language, and later added that he was better at speaking in English than writing.

[71] Mr. Marzara recalled interviewing Ms. Kwan on September 21. When Ms. Kwan arrived at the office, his assistant gave her a questionnaire and a job description. She was also given two assignments: to prepare a business letter and to prepare a computer-based spread sheet. When he reviewed the work, he thought the letter was fine, but the spread sheet work was poor.

[72] After Mr. Marzara reviewed the materials with Ms. Kwan, he told her he had another person to interview. It turned out that the second person was not at all suitable. Mr. Marzara testified that he did not tell Ms. Kwan that she had the job that day. However, he did tell her to come the next day to sign the company documentation, after which he would tell her of his hiring decision. When asked if he touched Ms. Kwan on September 21, he stated categorically that he never went close to her, and that he did not hug her. In cross-examination, he said Ms. Kwan's evidence about September 21 was fabricated, and that he never hugged anyone, not even his children.

[73] According to Mr. Marzara, on September 22, he told his assistant that Ms. Kwan would be coming into the office that day, and that the assistant should give her a copy of the Ara employment contract, as well as the conflict of interest and confidentiality documentation. Mr. Marzara stated that he asked all prospective employees to read the documents and sign them, after which he makes the decision whether to hire.

[74] In cross-examination, Mr. Marzara stated that on September 21, he told Ms. Kwan that if she was interested in the position, she could fill out the documents required by Ara, and that she decided to do so the next day. He discussed her potential salary with her on September 21, not September 22.

[75] Mr. Marzara testified that the extent of his interaction with Ms. Kwan on September 22 was to say hello to her. He had no meetings or discussions with her, nor did he have any physical contact with her. Ms. Kwan filled out the required forms, gave them to his assistant, who in turn gave them to Mr. Marzara to consider, which he did on September 23. He maintained this position in cross-examination, despite acknowledging that the document was an offer of employment dated September 22.

[76] Finally, in cross-examination, Mr. Marzara was asked if it was true that on September 22, he had hugged and kissed Ms. Kwan, showed her around the office, and then hugged and kissed her again. His reply to each question was the same. The suggestions were “lies” and “bullshit”.

B. September 23

[77] Mr. Marzara testified that when he called Ms. Kwan around lunch time on Saturday, September 23, he told her that she could work as an assistant to the current assistant, and that her starting wage would be between \$8.50 and \$10 an hour. If she could do the work, and if she improved her computer spreadsheet skills, her salary might go up after three or four months. According to Mr. Marzara, that was the extent of his conversation with her on that date. He denied having had the conversation she related in her evidence. He maintained that the entire content of the two-minute phone conversation with Ms. Kwan was that she could start work on the following Monday and her rate of pay. In cross-examination, he stated that the suggestion that he asked her out for coffee on September 23 was also a “lie” and “bullshit”.

C. September 25

[78] Mr. Marzara stated that he was in and out of the office on Monday, September 25, as was his son. Towards the end of the day, he asked Ms. Kwan how things had gone

that day, and she replied that she had learned a lot. He went on to testify that he never touched Ms. Kwan on that date. He was never alone with her in the office, never had her take notes for him, and never did anything inappropriate.

[79] In cross-examination, it was Mr. Marzara's evidence that Ms. Kwan did no work for him that day, but did work assigned to her by his assistant. He again described Ms. Kwan's evidence that he told her she needed someone to look after her as "bullshit". He denied saying anything to Ms. Kwan that was in any way inappropriate.

[80] According to Mr. Marzara's evidence, when Ms. Kwan did not come to work the next day, he asked his assistant to call her. The assistant did so, and told Mr. Marzara that Ms. Kwan sounded sleepy. When Mr. Marzara took the phone, he told Ms. Kwan that she had to be on time if she wanted to work for Ara. Ms. Kwan sounded upset as well as sleepy, and, after their brief exchange, hung up. Ms. Kwan never returned to Ara's offices.

[81] During cross-examination, Mr. Marzara was referred to Ms. Kwan's cell phone records for September 25, which indicate she called the Ara office number six times over 15 minutes, beginning at 8:30 a.m. None of the calls lasted over a minute. Mr. Marzara replied that the document was not his, that the records did not show a year, that he did not know if she called the office at those times, and did not know why she would not have gotten through if she had called. Mr. Marzara vaguely recalled receiving Ms. Kwan's letter of resignation.

[82] In summary, Mr. Marzara denied any wrongdoing in regard to Ms. Kwan. He said that after he hired her, she worked one day, and then failed to return.

VII ANALYSIS

[83] Each counsel set out their understanding of the evidence, and urged me to accept their client's version of events as being more credible. As the case turns entirely on the credibility, I find it more appropriate to set out my findings of fact and analysis rather than repeat those submissions.

[84] In order to succeed in her claim, the initial burden is on Ms. Kwan to establish a *prima facie* case of discrimination. In *O'Malley v. Simpson-Sears Ltd.*, [1985] 2 S.C.R. 536, the Supreme Court of Canada stated:

A *prima facie* case of discrimination...is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent employer". (para. 28)

[85] I will first set out my findings on the credibility of the evidence going to the *prima facie* case.

[86] I do not find that Ms. Kwan's credibility about her experiences between September 21 and 26 was diminished because she was incorrect as to: 1) how many children Mr. Marzara had, 2) how often he came to the restaurant, or 3) which street the Ara office was on. These were minor points of evidence, and, as noted earlier, tangential to the issues I must decide. Further, given the parties' limited interactions to that point, and the short period of employment, these mistakes are not surprising.

[87] It would have been helpful to have clearer evidence as to the layout and design of the Ara office space. Be that as it may, I do not accept that the design and layout were such that the events described by Ms. Kwan could not have happened because they would have been seen or heard by others in the office.

[88] I do not agree that Ms. Kwan's failure in her direct examination to recount the second alleged incident on September 22 seriously undermines her credibility. She gave her explanation as to why she made the omission frankly and without hesitation. Throughout the hearing, when a weakness in her evidence was pointed out she was not defensive. She acknowledged her mistakes and explained them.

[89] It did not assist Mr. Marzara's credibility when he stated that he was not looking for new staff, while at the same time he interviewed Ms. Kwan and another person.

[90] While Mr. Marzara spoke with accented English, he spoke at the hearing without hesitation, and had no difficulties in expressing himself or in being understood. He had a firm grasp of the English language. The narrative statement in the Response to Complaint Form that he completed is clear and concise.

[91] I do not find it credible that on September 22, Mr. Marzara would present a dated but unsigned letter of employment to Ms. Kwan, without explanation and without discussing it with her, or that he signed it on September 23 after reviewing it. It was his letter, and there was nothing for him to review. He was making the offer of employment, not Ms. Kwan.

[92] I have no persuasive basis on which to conclude that on September 23, Ms. Kwan and Mr. Marzara could not have had the telephone conversation she alleges. I do not accept Mr. Marzara's counsel's suggestion that it would have been virtually impossible to cover the topics Ms. Kwan alleges. All her responses to his inquiries were short, and she was clearly trying not to engage in the conversation with him. Further, I do not find it credible that she would have gone to the extent of crafting fictitious notes of the conversation in an attempt to bolster her complaint. I find it less credible that it would take Mr. Marzara two minutes to tell Ms. Kwan that she was hired and what she was going to be paid.

[93] I do not find it unusual that Ms. Kwan's responses to Mr. Marzara's advances were passive, not aggressive, or that she expressed concern that she might offend him. Mr. Marzara was a much older and physically larger person than Ms. Kwan. He owned the business where she had hoped to develop her career, and he was clearly in a position of power and authority over her. It was her first office job after her graduation.

[94] I also accept Ms. Kwan's evidence that until these events occurred, she had lived a sheltered life, one which revolved around her school, her work, and her church. I do not agree that her lack of assertiveness in the face of Mr. Marzara's increasingly aggressive advances indicated that she fabricated her evidence.

[95] Finally, I do not agree that if the events Ms. Kwan alleges had occurred, she would have confided in Mr. Marzara's assistant. That person was a stranger to her in an increasingly threatening environment. Ms. Kwan took the more logical step of confiding in her friends and other colleagues and making the decision not to return to Ara.

[96] I accept that rather than confront Mr. Marzara after he propositioned her on September 25, Ms. Kwan decided to finish her day's work, send in a letter of resignation,

and not return to Ara. That behaviour was consistent with her wish to avoid confrontation.

[97] Returning to Mr. Marzara's submissions, he says none of Ms. Kwan's evidence is true. He says that she concocted the entire story, possibly for financial gain, but more likely to get out of an employment contract for a job she did not like. In order for me to accept this as the correct theory of the case, I must conclude that, on the balance of probabilities:

- 1) Even though Mr. Marzara was not looking for additional staff, he decided to test and interview Ms. Kwan and another person on September 21, and hire Ms. Kwan on September 23;
- 2) After a single day's work, Ms. Kwan decided she did not like her new position, and believed she had to concoct an excuse to terminate her employment contract;
- 3) Between September 21 and 24, and prior to her first day's work, Ms. Kwan either told two co-workers at the restaurant where she worked fictitious stories about encounters with Mr. Marzara, in an attempt to corroborate her excuse for quitting on September 26, or convinced them to lie on her behalf at the hearing, about the conversations;
- 4) Between September 21 and the exchange of documents between the parties, Ms. Kwan fabricated notes containing recollections of four inappropriate physical encounters with Mr. Marzara over five days, weaving into that account her conversations with her co-workers;
- 5) On September 23, it took two minutes for Mr. Marzara to tell Ms. Kwan little more than that she was hired and her rate of pay;
- 6) Between September 23, and the exchange of documents between the parties, Ms. Kwan used her telephone records for September 23 and an innocent call from Mr. Marzara to fabricate the script of a conversation in which Mr. Marzara asked her to meet with him outside the workplace;
- 7) On September 26, Ms. Kwan composed and sent to Mr. Marzara a letter of resignation (containing no explicit allegations of misconduct) to further her malicious plan to terminate her employment contract; and,
- 8) Once Ms. Kwan terminated the employment contract, she saw further advantage in pursuing a fictitious human rights complaint over several years and through two hearings.

[98] In sum, in order to find Mr. Marzara's evidence credible, I would have to conclude that Ms. Kwan is an unprincipled and brazen opportunist, and that Mr. Marzara was the victim of her deliberate attempt to smear him. Based on what I find to be the credible evidence, I reject this proposition.

[99] On reviewing all the evidence, and after considering the manner in which that evidence was presented at the hearing, I conclude that Ms. Kwan has established that she was subjected to sexual harassment by Mr. Marzara, within the meaning of the *Code*, before and during her brief employment at Ara, and that she had to terminate that employment as a result of the harassment.

[100] As stated in *Janzen v. Platy Enterprises Ltd.* (1989), 10 C.H.R.R. D/6205 (S.C.C.):

... sexual harassment in the workplace may be broadly defined as unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment.... 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. (at para. 44451) (para. 49)

[101] In summary, I find that Ms. Kwan was sexually harassed in the workplace by Mr. Marzara. As a result, I find that Ms. Kwan's complaint, that Mr. Marzara and Ara discriminated against her in employment, contrary to s. 13 of the *Code*, on the basis of sex (sexual harassment), is justified.

VIII REMEDY

[102] I will now consider the application of the remedial sections of the *Code*, given the foregoing findings of fact and analysis. Subsection 37(2) of the *Code* sets out the various compensatory remedies available to Ms. Kwan in this case:

37 (2) If the member or panel determines that the complaint is justified, the member or panel

(a) must order the person that contravened this *Code* to cease the contravention and to refrain from committing the same or a similar contravention,

(b) may make a declaratory order that the conduct complained of, or similar conduct, is discrimination contrary to this *Code*,

...

(d) if the person discriminated against is a party to the complaint, or is an identifiable member of a group or class on behalf of which a complaint is filed, may order the person that contravened this *Code* to do one or more of the following:

...

(ii) compensate the person discriminated against for all, or a part the member or panel determines, of any wages or salary lost, or expenses incurred, by the contravention;

(iii) pay to the person discriminated against an amount that the member or panel considers appropriate to compensate that person for injury to dignity, feelings and self respect or to any of them.

...

1. Mandatory Order

[103] Pursuant to s. 37(2)(a), I order the respondents to refrain from committing the same or a similar contravention of the *Code*.

2. Discretionary Orders

A. Declaration

[104] Pursuant to s. 37(2)(b), I declare that the conduct complained of is discrimination contrary to the *Code*.

B. Wage Loss

[105] Ms. Kwan's last and only day of work for Ara was September 25. She began looking for work on October 6, nine working days later, and began a new job on October 16, 14 working days later (inclusive of the Thanksgiving statutory holiday). She stated

she did not begin to look for work immediately after leaving Ara, in part in reaction to what had happened to her. In her submissions, Ms. Kwan sought a total of 14 days in wage loss, at a rate of \$80 per day, or \$1,120.

[106] The burden is on the respondents to establish that Ms. Kwan did not take reasonable steps to mitigate her damages. Based on the evidence before me, I have no basis on which to conclude that she failed to do so.

[107] In my view, it was understandable that Ms. Kwan did not begin to look for work immediately after September 25, given the experience she had just been through. When she began to look for work she was quickly successful. In these circumstances, it is appropriate to compensate her for the entire 14 days claimed.

[108] Accordingly, pursuant to s. 37(2)(d)(ii), I order the respondents to compensate her for wage loss in the amount of \$1,120.

C. Injury to Dignity, Feelings and Self-Respect

[109] In her submissions, Ms. Kwan sought \$6,000 for injury to her dignity, feelings, and self-respect. In *Fougere v. Rallis and Kalamata Greek Taverna*, 2003 BCHRT 23 (para. 133), the Tribunal took into account the seven non-exhaustive considerations when determining compensation for injury to dignity in sexual harassment cases, first set out in *Torres v. Royalty Kitchenware Ltd.* (1982), 3 C.H.R.R. D/858 (Ont. Bd. Inq.). They are:

1. the nature of the harassment, that is, was it simply verbal or was it physical as well;
2. the degree of aggressiveness and physical contact in the harassment;
3. the ongoing nature, that is, the time period of the harassment;
4. its frequency;
5. the age of the victim;
6. the vulnerability of the victim; and,
7. the psychological impact of the harassment upon the victim.

[110] I will address each of these considerations in turn.

1. In the present complaint, the harassment was verbal, physical, and included Mr. Marzara kissing and hugging Ms. Kwan, and inviting her to meet with him outside the workplace.
2. There were no issues of threats of physical violence involved in Mr. Marzara's conduct, but there were at least four incidents of unwelcome physical contact.
3. The harassment occurred over less than a week.
4. The harassment occurred on four of five consecutive days.
5. There was a significant age disparity between Ms. Kwan and Mr. Marzara. She was 24 and he was approximately 55.
6. Ms. Kwan was in a vulnerable position, and Mr. Marzara was clearly in a position of authority over her. She was seeking her first professional employment opportunity outside a restaurant environment.
7. Ms. Kwan presented herself as a hardworking and serious individual. She believed herself to have been a naïve individual when she first encountered Mr. Marzara. She gave evidence that events in September 2006 made her more wary and untrusting. She sought counselling from her pastor as a result of what happened.

[111] In my view, taking into account these factors, the amount Ms. Kwan has requested under this heading is a reasonable one. Pursuant to s. 37(2)(d)(iii), I order the respondents to pay Ms. Kwan \$6,000 in compensation to her for injury to dignity, feelings and self-respect.

D. Interest

[112] Pursuant to the *Court Order Interest Act*, [RSBC 1996], c. 79, I order pre-judgment interest on the wage loss of \$1,120 from September 25, 2006 until the date of this decision. I order post-judgment interest, running from the date of this decision, on the wage loss of \$1,120 and on the amount of \$6,000 for injury to dignity, feelings and self-respect.

Kurt Neuenfeldt, Tribunal Member