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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:

Mirical MacDonald

COMPLAINANT

A N D:

Hesam Najafi and 791156 Ltd. dba Sign-A-Rama Vancouver

RESPONDENTS

REASONS FOR DECISION

| | |
|-------------------------------|-------------------------------|
| Tribunal Member: | Murray Geiger-Adams |
| Counsel for the Complainant: | Dan Soiseth |
| On behalf of the Respondents: | Adam Taylor Soha Najafi |
| Dates of Hearing: | June 18-19, 2012 |
| Written Submissions: | June 27, July 3, July 6, 2012 |

Introduction

[1] Mirical MacDonald filed a complaint alleging that Hesam Najafi and his company, Sign-A-Rama Vancouver, discriminated against her during her employment, as a graphic designer and receptionist, on the basis of sex and marital status, contrary to s. 13 of the *Human Rights Code*.

[2] The respondents say that some of Mr. Najafi's admitted comments to Ms. MacDonald were intended and understood as jokes, that others were not discriminatory, and that he did not make other alleged comments and gestures at all.

[3] I conducted a hearing, at which I heard oral evidence from Ms. MacDonald, Mr. Najafi, and Mr. Najafi's son, Feras Najafi (to whom I will refer as Feras to avoid confusion), and received documentary evidence from all parties. I did not admit in evidence written statements tendered by the respondents, said to have been provided by other employees, as these were not made under oath or a solemn promise to tell the truth, and the declarants were not available for cross-examination.

[4] This is my decision on whether Ms. MacDonald's complaint is justified, and, if so, the remedies to which she is entitled.

Facts

Credibility of witnesses

[5] Many of the facts about Ms. MacDonald's employment, and her interactions with Mr. Najafi, are not in dispute. In resolving conflicts in the evidence, and determining whether to accept the evidence of any witness, in whole or in part, I have adopted and applied the test set out in *Bradshaw v. Stenner*, 2010 BCSC 1398, at para. 186:

Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his [or her] memory, the ability to resist the influence of interest to modify his [or her] recollection, whether the witness' evidence harmonizes with independent evidence that

has been accepted, whether the witness changes his [or her] testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont. H.C.); *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) [*Faryna*]; *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 at para. 128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).

[6] In general, where the evidence of Ms. MacDonald and Mr. Najafi conflicts, I prefer her evidence to his. She testified candidly about her initial friendly relationship with Mr. Najafi, did not appear to exaggerate the nature or frequency of his alleged objectionable behaviour, or of its effects on her; and provided details, to the best of her ability, of the time, place, and other circumstances of his comments.

[7] By contrast, Mr. Najafi sometimes said he did not remember the behaviour Ms. Macdonald alleged he engaged in, or said he did not remember it happening, without actually denying it. Mr. Najafi claimed to treat women and men absolutely without distinction, but testified, with respect to three of the male employees: "Sometimes, they are men, they use a bad word, like with the 'f'. I always told them, 'Please don't say this in front of any female'." He acknowledged referring to Ms. MacDonald as "girl", and commenting on her marital status, and agreed that he never addressed male employees in a similar fashion.

[8] Feras had little first-hand knowledge of the events detailed in the complaint, and, with one exception, I have not found most of his evidence helpful in determining whether they occurred or not.

[9] As detailed below, a central aspect of Ms. Macdonald's complaint is that, on several occasions, Mr. Najafi whistled at her, alone among the employees, to get her to come speak to him, as if she were a dog. Mr. Najafi denied ever doing so, and even denied being able to whistle at all. Yet, when Feras, who was excluded from the hearing room while Ms. MacDonald and Mr. Najafi gave their evidence, testified, he said that he had observed that, when Mr. Najafi was younger, he was able to whistle to call his friends "a couple of streets away". This discrepancy between Mr. Najafi's evidence, and that

given on his behalf by his son, touching on a central disputed factual issue, affected my view of Mr. Najafi's overall credibility.

Factual narrative

[10] Ms. MacDonald graduated, with distinction, from the University of Calgary in 2008 with a Bachelor of Fine Arts degree in visual studies.

[11] From 2007, while she was still a student, until October 2009, when she moved to Vancouver, she worked in Calgary as a graphic designer in various printing businesses, and in the marketing department of a real estate agency. All of those businesses experienced financial hardship and laid off staff, and she decided to relocate.

[12] Once in Vancouver, she took a part-time position in a bakery, and then, also in October 2009, she answered an advertisement for a position as a graphic designer at Sign-A-Rama. She was in her mid-twenties. Mr. Najafi, who interviewed and hired her, was considerably older – in his early 60s, with adult children. He started the business in 2007, after living for about 40 years in Iraq and Iran, and then moving to Canada in 1995.

[13] After a short trial period, Mr. Najafi offered her a permanent position. Although her hours sometimes varied, she generally worked eight hours per day, five days a week. She did graphic design work, but also a variety of other tasks, including printing, and working with vinyl signs. By the end of her employment, her pay rate was \$14 per hour. With the exception of Mrs. Najafi, all of the other employees at the time were male.

[14] Within a few weeks, Mr. Najafi and Feras, who also sometimes worked in the shop, expressed some dissatisfaction with the speed and quality of Ms. MacDonald's design work. She felt she was working as fast as she could, while maintaining accuracy. It is not necessary for me to come to any conclusion as to whether or not their criticisms were justified, as the complaint does not relate to any alleged treatment because of her performance, and the respondents do not suggest that she would not have remained employed, but for the events giving rise to the complaint. Mr. Najafi fired her male replacement, who he said worked very fast but made many mistakes, four or five months after Feras hired him.

[15] After Mr. Najafi and Feras raised their concerns about her work, Ms. MacDonald agreed to move to a receptionist, sales, and office position, at the same rate of pay. It was more appealing to her to stay in the print community, as that was better than her former job in a bakery.

[16] Ms. MacDonald and Mr. Najafi were often the first people in the shop in the morning. They had conversations that she characterized as very friendly chats, in which she shared some information about her personal life. For example, she recalled an incident in which he came over and asked her what her ex-boyfriend was like, and why they had broken up. She did not object, and said they had an “honest conversation” about that.

Needing a man

[17] However, Ms. MacDonald also described a number of incidents in which she said Mr. Najafi made “random sniper comments”, not part of any other conversation. In one such incident, during the winter or early spring, Ms. MacDonald came in one morning, and was at the graphic design desk, shivering, when Mr. Najafi said, “You are cold; maybe you need a man to keep you warm.” She didn’t respond. Mr. Najafi did not address this allegation in his direct evidence. In cross-examination, he agreed that he would never tell a male employee that he needed a woman to keep him warm at night.

[18] I find that his comment was made, as described by Ms. Macdonald.

Marriage

[19] On another occasion, Mr. Najafi asked Ms. MacDonald when she would get married, “chastising” her, in her understanding, for not being married. He said, “Maybe I will have to marry you.” She told him that was ridiculous, that he was too old for her, and already married. She did not think he was serious about marrying her, but that he was asking to make her uncomfortable. She said, in an attempt to make the situation less uncomfortable, that she and Feras were getting along well; maybe they would get married. Mr. Najafi became upset, and asked what Feras had, when he had so many things.

[20] Mr. Najafi testified, with reference to saying that he might marry Ms. MacDonald, that, “Maybe I told her this one”, but that he was joking. He said that he sometimes said similar things to his daughter, saying, “Maybe you will not marry anyone; [then] I am your husband.” He said this showed how close he was to her, and that he didn’t know if anyone had something against this. In cross-examination, he said he agreed that he did ask Ms. MacDonald when she would get married, but that it was a joke, and that she “knew it was”.

[21] I find that this exchange took place, as described by Ms. MacDonald, though I also accept that Mr. Najafi did not intend his comments, and Ms. MacDonald did not understand it, as a serious suggestion that he wanted to marry her.

Calling Ms. Macdonald to Mr. Najafi’s desk

[22] Ms. MacDonald testified that, on many occasions, Mr. Najafi asked her to come to his desk to talk to her about work matters. She said that sometimes he was very friendly, and would say, “Come over here and have a seat, please”. But on other occasions, she said, he would be frustrated and just say, “Hey”, and point to the seat next to him. Or he would look at her and just pat the seat beside him, or point at her and say, “Come here”.

[23] In his direct examination, Mr. Najafi said that he never told Ms. MacDonald to “come here and sit”, and that he had two chairs in front of his desk, and none beside him, so “how can I tap? I don’t think it happened.” However, he immediately added that, “If I bring a chair and put it beside me to show her something on the screen, I put my hand on the back of the chair.” In his response to the complaint, he wrote: “[Y]es when I asked anyone to have meeting with [me] or discuss the job I point to the chair beside me to s[i]t.” And, in cross-examination, he testified that, “Sometimes, if I have something on the computer to show an employee, I grab the chair and put it beside me.”

[24] Mr. Najafi also acknowledged that he was under pressure, and sometimes not in a good mood, and that on those occasions his behaviour would “sometimes be different”. Given the clarity and credibility of Ms. MacDonald’s evidence, the general problems with the credibility of Mr. Najafi’s evidence, and his equivocation and contradiction on

this point in particular, I find that, on occasion, he behaved as described by Ms. MacDonald.

Whistling for Ms. MacDonald

[25] Ms. MacDonald said that these latter actions of saying “Hey”, pointing, and patting, made her feel awkward, though she couldn’t recall responding overtly, but the ones which most disturbed her were when Mr. Najafi whistled for her. She described an incident, first thing one morning, in which she was standing beside a whiteboard on which jobs were written. She did not recall anyone else being present. It was quiet, with no radio playing. She heard a whistle, like a call. Mr. Najafi whistled again, so she looked up, and asked him not to call her over like that, but just to say, “Mirical, come over here please.” He did not address her request, but just shrugged it off and smiled.

[26] Mr. Najafi testified in direct examination that he “didn’t remember any time [he] whistled.” However, he also said he thought one time Ms. MacDonald told him she was not a dog, but he did not explain what he did, if not whistling, that would have prompted her to make this comment. In cross-examination, he said he didn’t whistle for her, but that, sometimes when someone speaks, they make whistling sounds, which he simulated, and that, “Maybe this is whistling.” I did not find Mr. Najafi’s evidence on this point convincing. He testified at some length on two different days, and at no time was he lisping or whistling in the way he demonstrated.

[27] I find that, on this occasion, Mr. Najafi did whistle for Ms MacDonald, as she described, and that he did not treat male employees in a similar fashion.

Comments about a woman winning the Oscar

[28] Ms. Macdonald testified to another incident one morning in which she and Mr. Najafi were engaged in small talk while getting coffee from a small area where tools were kept behind his desk. She did not recall anyone else being present. He was frustrated that James Cameron had not won an Oscar for “Avatar”; instead, his former spouse had won. He commented to her, “Women steal everything from men in this country. But I shouldn’t talk about it here. Maybe some other time we will have that conversation.” She did not respond, because she did not want to cause a confrontation.

[29] In his evidence, Mr. Najafi explained that he took a considerable interest in movies, including watching the Oscar awards every year. He acknowledged thinking that James Cameron should have won the award, and being upset that Mr. Cameron's former spouse, Kathryn Bigelow, won instead. However, he denied saying that "women are stealing, or something like this." He also commented, with reference to Ms. MacDonald, that she "didn't tell me; she didn't say anything", and that he "didn't know she would take a note on me."

[30] In cross-examination, when asked about Ms. Macdonald's evidence, Mr. Najafi first said that he didn't remember. Then he said that his English was not good enough to tell her women are stealing everything. To my observation during his lengthy evidence, this was clearly not true. Mr. Najafi's English, though accented and imperfect, was fairly fluent. He did not demonstrate any difficulty understanding what he was asked, in either direct or cross-examination, and appeared able to express himself effectively.

[31] When asked in cross-examination about Ms. MacDonald's evidence that he said he shouldn't talk about the matter there, and that maybe some other time they would have that conversation, Mr. Najafi responded: "If I told her, I don't know why I told her this. ... I forgot a lot of things. Always I ask them to remind me, because [I have] a lot of things in my head."

[32] I prefer Ms. Macdonald's evidence to Mr. Najafi's on this point. In this and other matters, she was specific about what he said, the context in which he said it, and his recognition that his comment might be considered inappropriate. His evidence vacillated between denying the comment outright, saying he didn't remember it, and explaining it away. From his evidence, I infer that he noticed her lack of response to a comment he now denies making at all, and that he was surprised, not by her false "note" of the comment, but by her bringing it up as part of her complaint when she had not objected at the time.

[33] I find that this conversation took place as described by Ms. MacDonald, and that, while it was not necessarily directed at Ms. MacDonald because of her sex, it was indicative, to some extent, of his general attitude toward women.

Breakfast in bed

[34] One of the allegations in Ms. MacDonald's complaint was not against Mr. Najafi, but against a fellow employee identified only as "Vlad". In the course of a chat at the front desk, Vlad offered to make her breakfast in bed, which she understood to be a sexual invitation. She yelled at him, and told him his comment was inappropriate. She reported it to Mr. Najafi, who promptly took Vlad aside, said such comments were unacceptable, and threatened to fire Vlad if there was a repeated incident. There was not. Mr. Najafi did not tell Ms. MacDonald how he had handled the situation, and left her to wonder what, if anything, he had done about her complaint.

[35] I accept that this incident took place as described by Ms. MacDonald. I also find that, when it was drawn to his attention, Mr. Najafi took prompt, effective steps to ameliorate the situation. This incident was isolated, brief, and not part of the larger pattern of alleged conduct by Mr. Najafi which was the focus of Ms. MacDonald's complaint.

Comment about Ms. MacDonald's appearance

[36] Ms. MacDonald testified that, at one point, she and Mr. Najafi had a private conversation, at her request, in his car, after he made critical remarks about people from India, including a male friend with whom she had gone on a date. She said she brought up with Mr. Najafi other things that were bothering her, including that he had "chastised" her, implying that she was fat or obese. She said he was inappropriate to call her fat. He responded that she was not fat; she was "hot and sexy". She said that he just needed to treat her like an employee, and not make remarks about her physical appearance. She did not recall his exact response, but said that the matter was resolved.

[37] Mr. Najafi testified that he didn't remember referring to Ms. Macdonald as fat or obese. However, he then said that, "If I said this I apologize. I don't know if I told her."

[38] I find that this conversation occurred as described by Ms. MacDonald, and that Mr. Najafi did not address similar comments to male employees.

Barbeque

[39] Ms. MacDonald gave evidence about attending a barbeque hosted by a supplier in Burnaby in the late spring, perhaps as late as June. She, Mr. Najafi, and an employee named Miguel, rode together in Mr. Najafi's car; another employee named Eugene rode his motorcycle. She said she "felt" like Vlad was there, but said she couldn't say for sure. (This was an example of the occasions on which Ms. MacDonald, in giving her evidence, was clearly searching her memory, and was careful about its extent and accuracy, which enhanced the credibility of her other evidence.) Mr. Najafi confirmed in his evidence that Vlad was present in the car.

[40] Ms. MacDonald became separated from the other Sign-A-Rama employees at the barbeque. While she was looking for them, they drove up to her in the parking lot in Mr. Najafi's car. He said, "Hey, girl, get in the car." He was evidently joking, and Miguel was laughing, but she was upset, and said, "You shouldn't call me a girl like that. You're lucky your wife isn't here." Mr. Najafi acknowledged that his wife wasn't there, but continued to smile, and seemed to Ms. MacDonald to think it was funny that she was upset. When asked in direct examination what upset her about the "joke", Ms. MacDonald responded that it was, "like catcalling a girl on the street ... rolling up to some girl and picking her up".

[41] Mr. Najafi testified that the group had agreed to stay only an hour, because Mrs. Najafi had been left alone to take care of the shop. He and the others were waiting in the car for Ms. MacDonald. When he saw her coming slowly, he said he used his hand to beckon her, and said, "Come on girl; let's go." He said he didn't know whether calling her a "girl" was "a very bad word or something", in Vancouver, but that in Iran it would be "a compliment". He was aware that she was angry.

[42] In cross-examination, Mr. Najafi said that beckoning to Ms. MacDonald and saying, "Come on girl; let's go", was "like a joke", and "didn't mean anything". When asked what the joke was, or what was funny about it, Mr. Najafi paused at length, and looked to his daughter, Soha, who was present in the hearing room, as if seeking her assistance. He then said that there was "nothing funny in it".

[43] I find that this incident occurred as described by Ms. MacDonald.

Final day of work

[44] What turned out to be Ms. MacDonald's last day of work was June 24, 2010. During the day, she testified that Mr. Najafi again tried to call her over to talk to him by whistling for her and saying, "Come here". She objected and said, "Are you trying to ask me something?" She said, "Did we get a dog?" She imitated his whistle, and patted her leg, as if calling a dog. Several others present laughed; Ms. MacDonald described Mr. Najafi as "angry but smiling".

[45] Mr. Najafi testified that he "usually" would say "Mirical, can you come here?", and that she responded, "You are whistling. I'm not a dog." He did not offer any explanation of why she would respond to a polite request by referring to whistling and dogs.

[46] In cross-examination, Mr. Najafi testified that he didn't whistle for Ms. MacDonald, and that he could "say that 100%, I didn't whistle for her". He denied that he was able to whistle, and said that if he tried, it would be a sound, which he demonstrated, which was a cross between a hiss and a whistle.

[47] Ms. MacDonald and Mr. Najafi agreed in their evidence that, immediately after this, Ms. MacDonald looked toward him and made a noise with her mouth that Mr. Najafi, in his response to the complaint and in his evidence, called a "raspberry" – a sound of disapproval or derision. He said this was very loud, that it hurt him very much, and that he didn't expect it from her, because she was a "very quiet girl".

[48] Mr. Najafi testified that Ms. Macdonald humiliated him in front of all the employees, and that he told her, "If you are in my country, Iran, it is a very bad thing. You will be hanged." In his evidence, he then commented that, "That's in Iran. Something in my age. If my daughter told me this, it's unbelievable." He testified that Ms. MacDonald then laughed and went back to work until the end of the day, and then left without saying anything.

[49] According to Ms. Macdonald, Mr. Najafi's comment about being hung did not come until the end of that day, Mr. and Mrs. Najafi were sitting together at his desk at the back of the shop, and Ms. MacDonald was by the installation table, heading out the door.

He said to Ms. MacDonald, “You abused me when you said this thing about a dog. In my country you would be hung.” Ms. Najafi gave Mr. Najafi “a little slap”. Ms. MacDonald was upset, and left through the front door. In his cross-examination, Mr. Najafi said he didn’t feel Mrs. Najafi’s “backhand slap”, but said, “I don’t know, you can ask her if she did this or not.” Mrs. Najafi, though apparently present throughout this incident or incidents, was not called as a witness.

[50] I find that this incident occurred as described by Ms. MacDonald, although I think it is likely, given the vehemence of Mr. Najafi’s reaction to the “raspberry”, that he made the comment about being hung immediately, rather than, or perhaps as well as, at the end of the work day. I also find that, while part of Mr. Najafi’s reaction was attributable to what he perceived as a challenge to his dignity and authority as an employer, part of it was also attributable to his perception that it was particularly inappropriate for a “girl” or a “daughter” to behave in this way toward a man.

[51] Ms. MacDonald testified that she thought Mr. Najafi’s behaviour, as detailed in her complaint, was in part because she was a woman. She was the only female present. She was the only one he whistled at. The comment about getting in the car was specific to her being female. She took the comment about being hung as specific to her being female.

Police involvement

[52] The next morning, June 25, 2010, Ms. MacDonald called the non-emergency number of the Vancouver Police Department to see whether it would consider Mr. Najafi’s conduct as harassment. She identified a female officer to whom she spoke, who told her a detective would open a harassment file. The officer said the conduct Ms. MacDonald was reporting sounded like harassment, and advised Ms. MacDonald to quit her job, so that harassment would stop. The officer told Ms. MacDonald not to contact Mr. Najafi; she said she would call him, and let him know that a friend of Ms. MacDonald’s would come in to pick up her last paycheque and return her keys to the shop.

[53] After talking with the officer, and notwithstanding her advice not to contact Mr. Najafi, Ms. MacDonald sent him an e-mail that same day, in which she expressed her discomfort at some of his behaviour as detailed above, including whistling at her to come to his desk, saying “come here”, pointing at chairs, commenting about marrying her, and saying, “Hey girl, get in the car” at the barbeque. She said she “drew the line” at his statement the day before that, “In my country you would be hung”, as “incredibly inappropriate to say to your female employee and could be taken as a threat.”

[54] Mr. Najafi confirmed that the police called him and told him not to contact Ms. MacDonald.

Impact on Ms. MacDonald

[55] Ms. MacDonald testified that leaving her job with Sign-A-Rama was difficult for her, both financially and emotionally. She had never been on social assistance, or needed to use a food bank. She said that was hard on her self-esteem. Her search for other work was complicated by the fact that she had no reference from Sign-A-Rama, her most recent employer.

[56] Ms. MacDonald said that Mr. Najafi’s treatment of her made her feel uncomfortable and demeaned. She wanted to leave to get away from his comments, and felt badly about herself for not doing so, but felt trapped, as she couldn’t afford to leave her job. In cross-examination, she acknowledged that she did not see a doctor, counsellor or therapist after she left her job at Sign-A-Rama, and did not discuss her feelings with any medical professional.

[57] Cumulatively, I find that the treatment to which Ms. MacDonald was subjected, culminating in Mr. Najafi’s angry reference to being hung, and the advice she received when she reported that incident to the police, made it reasonable for her decide that it was no longer tenable for her to remain in her employment.

Mitigation of financial losses

[58] After Ms. MacDonald left her employment at Sign-A-Rama in late June 2010, in the circumstances described above, Human Resources and Skills Development Canada denied her employment insurance benefits, because they said she had not worked

sufficient hours to qualify. She required short-term social assistance (supplemented by pawning her laptop) to pay her rent, and eventually received a total of about \$2,100 in such benefits. She received assistance from the Greater Vancouver Food Bank in early July and early September 2010.

[59] Ms. MacDonald immediately began looking for other work. From the beginning, she did not restrict her search to the graphic design work for which she was qualified. In mid-July 2010, she obtained part-time work for a month, making dog treats at a bakery, earning a little over \$400. Beginning August 1, 2010 a friend offered her a part-time position at the front desk of a tea shop and art gallery. There she earned a little over \$1,200, before being laid off due to a shortage of work. From September 2010 to January 2011, she was employed as a graphic designer and print operator at another sign design shop, earning approximately \$8,600, until she quit, in circumstances not explained in the evidence. Beginning in late September, 2010, she accepted a casual, part-time position as a bartender for a theatre at \$10 per hour. She earned approximately \$1,150 from this work in 2010.

[60] The respondents did not seriously challenge the adequacy of Ms. MacDonald's efforts to mitigate any financial losses she suffered as a result of the end of her employment at Sign-A-Rama. In cross-examination, she was asked why she didn't consider moving back to Calgary, where her family was. She responded that, to do so, she would have had to abandon everything she owned, because she couldn't afford to move her belongings, and that she did not even have money for a bus ticket. I am satisfied on the evidence before me that the respondents have not met their burden of showing any failure on Ms. MacDonald's part to mitigate her damages.

Analysis

[61] Section 13(1) of the *Code* prohibits sex discrimination regarding employment. It provides:

- (1) A person must not
 - (a) refuse to employ or refuse to continue to employ a person, or

- (b) discriminate against a person regarding employment or any term or condition of employment because of the ... sex ... of that person
... .

[62] Although Ms. MacDonald also made her discrimination complaint on the ground of her marital status, I do not think it is necessary to consider that ground separately from that of sex.

[63] *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252, the Supreme Court of Canada established that sexual harassment is sex discrimination, and provided the following non-exhaustive definition:

[S]exual 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.
(para. 56)

[64] In order to succeed in her complaint, Ms. MacDonald has the burden of proving, on a balance of probabilities, that the words and actions of which she complains occurred, and that they were unwelcome: *Mahmoodi v. UBC and Dutton*, [1999] B.C.H.R.T.D. No. 52, paras. 140-51.

[65] She must also prove that they were related, at least in part, to her sex. This does not mean, however, that she must prove that Mr. Najafi's conduct was overtly, or even covertly, sexual. She need only establish that he treated her adversely in connection with her employment, and differently from other employees, at least in part because she was a woman. See, generally, for a case in which the Tribunal found discrimination on the basis of sex, when much of the conduct was not "sexual": *J.J. v. School District No. 43* (No. 5), 2008 BCHRT 360.

[66] I have found, as facts, that the incidents complained of occurred, essentially as testified to by Ms. MacDonald, and that each was related, at least in part, to the fact that she was a woman. I also find that, when she was particularly disturbed by Mr. Najafi's

conduct, as with the whistling, the comments about her weight, and the reference to her as “girl” at the barbeque, she objected. On other occasions, I find that, in spite of her silence, or her attempt to deflect the behaviour with humour, a reasonable person in Mr. Najafi’s position should have known that his conduct was unwelcome.

[67] I accept that Mr. Najafi did not set out deliberately to insult or injure Ms. MacDonald because of her sex, although he does seem to have largely ignored her efforts to communicate to him that she found his actions and comments offensive or demeaning. Section 2 of the *Code* specifies that discrimination need not be intentional; it is sufficient if the effect of a person’s conduct is to create adverse consequences for another person because of their membership in a protected group, or their having a protected characteristic.

[68] I determine that Mr. Najafi and (because, under s. 44(2) of the *Code*, his acts and Vlad’s are deemed to be those of the company) Sign-A-Rama discriminated against Ms. MacDonald regarding her employment because of her sex.

Remedies

Cease and refrain

[69] As I have found Ms. MacDonald’s complaint justified, s. 37(2)(a) of the *Code* requires me to order that the respondents “cease the contravention and to refrain from committing the same or a similar contravention”, and I so order.

Wage loss

[70] Section 37(2)(d)(ii) of the *Code* permits the Tribunal to order a person who contravenes it to “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”.

[71] Ms. MacDonald asks the Tribunal to compensate her for lost wages for the 62 8-hour working days, at \$14 per hour, she says it took her to find other employment, less the amounts she actually earned at other jobs during the period, for a total of \$5,291.50. In their argument, the respondents do not take issue with the hours or dollars which are

the basis for her calculations; they simply say that the treatment Ms. MacDonald experienced was not sufficiently serious to have required her to resign from her employment. I have already found, as a fact, that it was reasonable for her to do so.

[72] Neither party addresses any potential deduction from Ms. MacDonald's wage loss claim to reflect the social assistance payments she received. In the absence of any argument on this point, I decline to make any deduction under this head.

[73] I order the respondents to pay Ms. MacDonald \$5,291.50 for wage loss because of the contravention.

Expenses

[74] Ms. MacDonald's only claim for expenses is the cost of her return airfare between Calgary, where she now lives, and Vancouver, in order to attend the hearing.

[75] I accept that it was necessary for her to incur this expense, and that it was an expense incurred because of the respondents' contravention. Accordingly, I order the respondents to pay her the \$306.79 which the documentary evidence establishes was the cost of her airfare.

Injury to dignity, feelings, or self respect

[76] Section 37(2)(d)(iii) of the *Code* permits the Tribunal to order a person who contravenes it to "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". Ms. MacDonald asks the Tribunal to award her "at least \$5,000" under this heading. She does not refer to any cases previously decided by the Tribunal in support of that amount.

[77] In *Behm v. 6-4-1 Holdings and others*, 2008 BCHRT 286, the Tribunal adopted, at para. 66, the following factors from *Torres v. Royalty Kitchenware Ltd.*, (1982), 3 C.H.R.R. D/858 (Ont. Bd. Inq.) as potentially relevant to an assessment of damages for injury to dignity in a sexual harassment case:

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. the frequency of the harassment;
5. the age of the victim;
6. the vulnerability of the victim; and
7. the psychological impact of the harassment upon the victim.

[78] In that case, in *Behm and Tyler v. Robnik and Mobility World (No. 2)*, 2010 BCHRT 192, in more egregious circumstances, the Tribunal awarded damages of \$5,000 and \$6,500, respectively.

[79] I accept that the circumstances in this case were somewhat different from those in *Behm and Tyler*, and that a consideration of the “*Torres factors*” supports an award towards the lower end of the scale. Mr. Najafi’s conduct was insensitive, demeaning, and persistent. There was a considerable disparity in age and position between Mr. Najafi and Ms. MacDonald, and she was in vulnerable financial circumstances that made it difficult to object or leave. However, all the conduct was verbal; there was no physical contact at all, it was relatively infrequent, and, on the evidence, the psychological impact on Ms. MacDonald was relatively modest.

[80] In all the circumstances, I order the respondents to pay Ms. MacDonald \$4,000 for injury to her dignity, feelings and self respect, pursuant to s. 37(2)(d)(iii) of the *Code*.

[81] In accordance with the *Court Order Interest Act*, R.S.B.C. 1996, c. 79, as amended I order the respondents to pay Ms. MacDonald pre-judgment interest, for wage loss, from September 21, 2010, the day she was re-employed, and post-judgment interest on compensation for expenses, and for injury to dignity, feelings and self respect.

Decision

[82] I determine that Ms. MacDonald’s complaint is justified.

[83] I make the remedial orders set out in paragraphs 69, 73, 75, 80, and 81, above.

[84] Both respondents are jointly and severally liable to pay Ms. MacDonald the compensation for her lost wages, expenses, and for injury to her dignity, feelings and self respect.

Murray Geiger-Adams, Tribunal Member