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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:

Q

COMPLAINANT

A N D:

Leonard Walker and Wild Log Homes Inc.

RESPONDENTS

REASONS FOR DECISION

Tribunal Member:	Enid Marion
Counsel for the Complainant:	Lindsay Waddell
On his own behalf:	Leonard Walker
Dates of Hearing:	December 5-7, 2011

INTRODUCTION

[1] Q filed a complaint against Wild Log Homes Ltd. (“Log”) and Leonard Walker (collectively the “Respondents”), alleging discrimination in employment on the basis of sex (sexual harassment), contrary to s. 13 of the *Human Rights Code*, and that they retaliated against her, contrary to s. 43, for filing a complaint with the Tribunal.

[2] The Respondents deny the allegations. Mr. Walker appeared on behalf of both himself and Log at the hearing, though he only attended the hearing until the conclusion of Q’s cross-examination. He called no evidence on behalf of the Respondents and did not attend to present any final argument or respond to Q’s argument.

[3] Q has also filed an application for costs against Mr. Walker on the basis that he engaged in improper conduct during the course of these proceedings. Mr. Walker was provided the opportunity to respond to that application, and did so.

[4] In order to address that application, it is necessary to review the procedural history of this complaint. I will first set out that history, then review the evidence presented during the course of the hearing and my findings of fact. I will then set out my analysis and decisions.

[5] All references to documentary excerpts are as written.

Procedural History

[6] Q filed her complaint on June 17, 2009.

[7] On January 6, 2010, the Tribunal, amongst other things, set deadlines for disclosure of documents and hearing dates.

[8] On March 19, 2010, the Respondents filed a response to the complaint, together with applications to defer (or alternatively adjourn the hearing dates), extend the time for disclosure of certain documents and dismiss the complaint on March 19, 2010. The response and applications to dismiss were late-filed, but the Tribunal extended the time for filing.

[9] The basis of the application to adjourn was to await the conclusion of a criminal proceeding pending against Mr. Walker involving alleged sexual assault against Q.

[10] The Tribunal adjourned the hearing dates and granted the Respondents' application to extend the time to disclose certain documents. Specifically, in regard to documents in the Respondents' possession or control, which Mr. Walker intended to rely on for the purpose of his criminal defence, the Tribunal ordered that those documents be disclosed at the conclusion of the criminal trial, which was scheduled to be completed by August 13, 2010.

[11] In regard to documents disclosed to the Crown in the criminal proceedings and which the Respondents were seeking from the Canada Border Services Agency in relation to the human rights complaint, the Tribunal ordered that the documents be disclosed as soon as possible, but in any event, no later than August 13, 2010.

[12] Sometime later, the Tribunal set new hearing dates.

[13] By August 13, 2010, the Respondents had not provided Q with any of the documents that were the subject of the Tribunal's earlier order.

[14] The hearing dates were subsequently adjourned.

[15] Q then wrote to the Tribunal requesting that the Respondents provide document disclosure by no later than November 15, 2010. The Respondents did not do so.

[16] The Tribunal subsequently set new hearing dates for December 5-9, 2011.

[17] On October 17, 2011, Q applied to the Tribunal for certain orders, including an order that the Respondents not be entitled to rely on any documents that they have refused to produce to Q. She also applied to add an allegation of retaliation to her complaint.

[18] The Tribunal scheduled a pre-hearing telephone conference call for November 23, 2011 to consider Q's applications. On the morning of the scheduled conference call, the Respondents applied to dismiss the complaint pursuant to ss. 27(1)(c) and (e) of the *Code*.

[19] During the pre-hearing telephone conference call, the Respondents advised the Tribunal that they intended to call one witness in addition to Mr. Walker. Mr. Walker also stated that he was in possession of three bags of documents and a laptop computer which stored relevant information. He estimated that the bags of documents contained approximately 5,000 documents. He confirmed that neither the documents nor the information stored on the laptop computer had been produced to Q, though he indicated over 3,000 documents had been filed in a Supreme Court proceeding. He noted, in a written response, that he thought Q was on a “fishing expedition” for the documents, that if she wanted them, they were “for sale” at \$.35 a page and that he believed the Respondents had supplied all their relevant documents to her. However, he also indicated, during the pre-hearing telephone conference call, that certain of the documents would exonerate him.

[20] The Tribunal Member conducting the pre-hearing telephone call declined to make any order at that time respecting the documents, deferring the issue for determination at the outset of the hearing into the complaint. The Tribunal did, however, remind Mr. Walker of his ongoing obligation to provide arguably-relevant documents to Q.

[21] In addition, the Tribunal added the ground of retaliation to the complaint and declined to consider the late-filed applications to dismiss.

[22] On November 28, 2011, Q wrote to the Respondents requesting production of all arguably-relevant documents in their possession or control.

[23] Also on that date, the Respondents filed an amendment to their application to dismiss and attached the Reasons for Judgment of the Honourable Judge Walker in the criminal proceedings.

[24] The Respondents did not produce any additional documents prior to the commencement of the hearing.

[25] At the outset of the hearing, I heard submissions from the parties on an issue that had arisen in respect of the allegation of retaliation, and confirmed that the allegation of retaliation was added to the complaint and should be addressed in evidence and argument by the parties.

[26] I also heard submissions on whether the Respondents would be entitled to rely on any of the now 5,000 or more documents they alleged were in their possession, or stored on the laptop computer, but which had not been provided to Q. Mr. Walker indicated that he had brought the documents and the computer to the hearing, and that most of the documents related to the criminal proceedings.

[27] Q noted that she had not seen the documents Mr. Walker was referring to, and that she had repeatedly asked him to produce his relevant documentation. She submitted that the Respondents failed to comply with the Tribunal's prior directions and order respecting the production of documents and that it would be a disservice to its process to allow a respondent to ignore the Tribunal's directions and orders and then rely on documents at hearing that the complainant had not previously had the opportunity to review.

[28] After hearing from the parties, I made the following ruling. Mr. Walker had indicated to the Tribunal that he had previously disclosed to Q some documents that he considered relevant and that he intended to rely on at the hearing. He also stated that he had transcripts and an additional 5,000 or more documents that he might also rely on, but which he had refused to disclose to Q prior to the hearing.

[29] On March 29, 2010, Mr. Walker was ordered to produce certain documents by a specific date. He failed to do so in compliance with that order. He was advised of his ongoing obligation to disclose those documents, and the fact that the Tribunal might preclude him from relying on those documents at hearing if he failed to disclose them. Despite this, and despite being provided a further opportunity to disclose the documents to Q prior to the hearing in order to allow her a fair opportunity to respond to those documents, he did not disclose them. He also insisted that he would only provide certain documents if she paid a \$.35 per page copying fee.

[30] In those circumstances, I considered that it would be unfair to Q to allow Mr. Walker to introduce evidence documents which, by his own decision, he withheld from her contrary to the Tribunal's order and his ongoing obligation to disclose such documents. I also considered that the hearing had been adjourned on more than one occasion, and that the disclosure of such a massive amount of documents would

necessarily result in a further delay in the proceeding. Mr. Walker was therefore precluded from relying on documents which he had refused to disclose prior to the hearing. He was, however, entitled to rely on the documents that he had disclosed in the course of the proceeding.

[31] After issuing my ruling, Mr. Walker stated that he did not have the money to copy the documents, and that, without them, there was not much he could do. However, he also stated that he had submitted all the documents in a B.C. Supreme Court civil claim that he had commenced. Presumably, therefore, he was able to make copies in the context of that claim.

[32] The fact is that Mr. Walker did not indicate, until shortly before the hearing, that he intended to rely on such a massive amount of documentation, and did not take any steps to alert Q to the existence of these documents and provide her an opportunity to at least review them in a reasonable time frame prior to hearing. I did not consider Mr. Walker's continued protestations to be persuasive.

[33] I also declined the Respondents' amended application to dismiss the complaint. It had been filed well outside the time-limits for filing such an application and, in my view, there was no reasonable basis asserted for extending the time limit to file such an application.

[34] In their application, the Respondents relied on the decision in the criminal proceeding. I note that the issues, legal framework, parties and standard of proof in this complaint differ from those in the criminal proceeding. For example, in this complaint, I must assess whether Q has proven, on a balance of probabilities, her complaint of discrimination. In order to do so, unlike the criminal proceeding, intent is not a necessary element that need be proven by Q. I also note that, in the criminal proceeding, the Court did not conclude that the alleged incidents, which includes two kisses, breast poking and buttocks grabbing, did not occur. Rather, the Court concluded that, even though those acts may have occurred, the Crown had not proven the alleged offence beyond a reasonable doubt.

[35] I did allow the Respondents to pursue an application that the complaint had been filed for an improper motive at the conclusion of the hearing, and to explore that issue in

evidence at the hearing. At the end of the day, the Respondents did not avail themselves of this opportunity.

[36] I also addressed two matters raised by Q at the outset of the hearing. The first was an application to anonymize this decision in the same manner as the criminal decision. That is, to refer to the complainant only by initials. The Respondents did not object to this application and I granted it. I will refer to the complainant throughout as Q.

[37] Q also applied to have the evidence of Ms. Gloria Frimpong heard by teleconference. It was necessary for Ms. Frimpong to make childcare arrangements, and to travel for a lengthy period to attend the hearing. She also had an exam to write on the afternoon of the day she was scheduled to give evidence. The Respondents objected to the application on the basis that Ms. Frimpong was an important witness and it was necessary to cross-examine her on certain documents (that Mr. Walker indicated he had previously disclosed to Q). Q indicated that the disclosed documents could be provided to Ms. Frimpong by email so they would be available to her during her evidence.

[38] I denied the application to hear Ms. Frimpong's evidence by telephone. In the circumstances, I considered that Mr. Walker should have the opportunity to cross-examine her in person and that, if an assessment of credibility was necessary, it may benefit the Tribunal to have the witness present while giving her evidence.

[39] An issue also arose in regard to the attendance of another witness. Mr. Walker had only identified one witness in addition to himself on the witness list he provided to Q. He had served an Order to Attend on that witness, who was a police officer. The police officer attended on the first day of hearing since Mr. Walker had not informed her of when her evidence might be required. The police officer was excused and was scheduled to give evidence at 1 p.m. the next day.

[40] The hearing commenced and, after the morning break, Mr. Walker requested that the hearing be adjourned so he could file a document in Supreme Court. He also indicated he wished to apply for judicial review of the ruling that he was precluded from relying on the documents that he had failed to disclose prior to the hearing.

[41] I declined the application to adjourn as I did not consider it to be reasonable in the circumstances. Mr. Walker was free to make arrangements to file any documents he wished in Supreme Court either over the breaks, including lunch breaks, or through the use of an agent, lawyer or other person. I advised Mr. Walker that he was free to attend or not attend the hearing, but that if he chose not to attend, it would proceed in his absence.

[42] Mr. Walker continued to attend the hearing. At the end of the first day, Mr. Walker requested that the hearing resume at 1 p.m. the next day rather than 9:30 a.m. on the basis that he had an appointment before a B.C. Supreme Court Justice the next morning. After hearing from the parties, I declined to adjourn the hearing until 1 p.m. the next day as I considered it unreasonable in the circumstances. The hearing dates had been set for a long time. Mr. Walker had not brought the application to adjourn in a timely manner, and had not provided any information as to why it had been necessary to schedule the appointment on the morning of a scheduled Tribunal hearing date. As well, I noted that witnesses had been scheduled to attend the hearing and had organized their time accordingly.

[43] The hearing commenced the next morning with Mr. Walker in attendance. At the commencement of this day of hearing, the Respondents applied to call nine additional witnesses in support of their case, as well as the lawyer who represented Mr. Walker in the criminal proceeding. Mr. Walker advised that four of the witnesses could provide evidence about his whereabouts on some of the dates on which Q alleges he sexually harassed her. Other witnesses could provide evidence about documents that the Tribunal had ruled were inadmissible, or issues that were irrelevant to the matters addressed in the complaint or the response to the complaint filed by the Respondents.

[44] I allowed Mr. Walker to call the witnesses who he said would provide evidence about his whereabouts at times when Q alleged he sexually harassed her. I denied the application to call the other witnesses on the basis that the evidence Mr. Walker had described they would provide was irrelevant to the issues in this complaint. As well, none of the witnesses were being called to respond to any new or unexpected information elicited in the direct examination of Q.

[45] Later in the day, and after this ruling, Mr. Walker advised that one witness who had been excluded by the earlier ruling (and who he also described as his wife) would now give evidence about his whereabouts at times when Q alleged he sexually harassed her. After hearing from the parties, I allowed Mr. Walker to call this witness for the limited purpose of addressing the identified evidence.

[46] After the completion of Q's direct examination, Mr. Walker cross-examined her on behalf of the Respondents. At points during the cross-examination, I directed Mr. Walker to cease yelling at Q and to focus on asking relevant questions. I also reminded him that he could not give evidence during Q's cross-examination, and that any comments he had about Q's evidence should properly be given in sworn testimony during the Respondents' case.

[47] Prior to the end of the hearing day, Q applied for an adjournment of the hearing for the purpose of preparing cross-examination of the Respondents' additional witnesses and to prepare a detailed costs application regarding Mr. Walker's conduct during the course of the proceeding. I denied the application to adjourn the hearing and advised the parties that I would set a schedule for written submissions on the costs application.

[48] At the end of the hearing day, Mr. Walker applied for an adjournment to allow him to serve Orders to Attend on his new witnesses. I denied this application and advised Mr. Walker that he should make appropriate arrangements to serve the Orders to Attend to ensure that witnesses were available after both he and the police officer had given their evidence. Mr. Walker then indicated he would not be available at 9:30 a.m. the next day. I advised Mr. Walker that if he was not present at the 9:30 a.m. scheduled commencement time the next day, the hearing would proceed in his absence.

[49] At 9:30 a.m. the next day, Mr. Walker was not in attendance. I stood the hearing down for 15 minutes to provide Mr. Walker with time to appear. I also directed the Case Manager to determine whether Mr. Walker or anyone on his behalf had contacted the Tribunal to provide an explanation for his delay or absence. No one had contacted the Tribunal on his behalf. I was satisfied that the Respondents had notice of the date, time and location of the hearing and it proceeded.

[50] Ms. Frimpong was present to give her evidence. In addition to her other evidence, which I will review later in this decision, she testified that it had taken her approximately two hours to travel to the Tribunal and that she was concerned as she had to prepare for a test that she was scheduled to take later that day.

[51] Her evidence was not lengthy. Mr. Walker did not attend to cross-examine her. Q closed her case and I adjourned the hearing until 1 p.m. and advised that I would hear final argument at that time. The Case Manager contacted Mr. Walker to advise that final argument was scheduled for 1 p.m. Mr. Walker advised the Case Manager that he was scheduled to appear in Supreme Court at that time, and that he would not be in attendance. Mr. Walker did not apply for an adjournment, and did not submit or provide any record confirming any matter set down for hearing in the Supreme Court that required his attendance.

[52] Mr. Walker was not present for the hearing when it resumed at 1 p.m. I was satisfied that the Respondents had notice of the date, time and location of hearing and had elected not to attend. The hearing proceeded.

[53] Q made her final argument. A schedule of submissions was subsequently set on the costs application. I will address that application later in this decision.

Other Proceedings

[54] There were two other legal proceedings involving these parties that had either concluded or were ongoing at the date of hearing. The first was a criminal proceeding in which a decision was rendered on November 23, 2011.

[55] The second proceeding was a civil claim filed by Mr. Walker against Q in which he seeks, amongst other things, damages against her for filing a human rights complaint with the Tribunal. A copy of the claim, as amended, was provided to the Tribunal.

Witnesses and Credibility

[56] In assessing credibility, I have had particular regard to the test set out by the B.C. Court of Appeal in *Faryna v. Chorny*, [1952] 2 D.L.R. 354:

In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a

practical and informed person would readily recognize as reasonable in that place and in those conditions. (page 357)

[57] I have also considered that I can accept some, all or none of the evidence of a witness.

[58] Q testified on her own behalf. As noted earlier, during cross-examination, Mr. Walker, from time to time, yelled at her and addressed her disrespectfully. He was directed from time to time to lower his voice, and to focus his questions on issues relevant to the complaint and his response to it. Despite the sometimes forceful style of cross-examination, I found Q to remain respectful and responsive to the questions put to her. There were times when her evidence was imprecise on matters not germane to this complaint. I do not find that this made her relevant evidence unreliable. In my view, Q was attempting to recall events as accurately as possible, but there were times when certain contextual details had faded from memory.

[59] I also note that while the evidence demonstrated a difference of perspective about events that occurred in Washington State, the focus of the complaint before the Tribunal is on whether Mr. Walker sexually harassed Q, and whether he retaliated against her by seeking civil damages for filing a human rights complaint. In that regard, the evidence was precise and unshaken on cross-examination. It was generally supported by the documentary evidence, and I accept Q's evidence in this regard as reliable. I make no findings on whether Q was properly performing her duties on behalf of Log while in Washington State.

[60] Ms. Gloria Frimpong also testified about certain incidents that she witnessed in the workplace. Her evidence was not subject to cross-examination, despite the Respondents having had the opportunity to do so. Q testified that she only knew Ms. Frimpong for about five days and did not describe her as a friend. I have accepted all of Ms. Frimpong's evidence, and found her to be a credible witness.

[61] Mr. Walker did not testify, or call any witnesses on behalf of the Respondents, despite being provided the opportunity to do so.

Evidence

[62] Q described herself as a bookkeeper. Towards the end of April, 2009, she responded to a Craigslist advertisement for a Business Administrator/Trainee with Log, dated April 13, 2009.

[63] Mr. Walker subsequently interviewed her for the position. Q testified that during the interview, he asked how she would feel about travelling to other countries, such as Finland and Africa, because he had contracts to build log homes for the needy in Africa and also owned part of three mills in Finland. He further advised her that he built log homes in Canada and in Washington State.

[64] Q testified that they also spoke about hours of work. She advised him that she was seeking full-time work and testified that they agreed she would work 40 hours per week at \$20 per hour Monday to Friday.

[65] She also testified that, during the interview, Mr. Walker asked her whether she was married or had a boyfriend. These questions made her feel uncomfortable and she shifted the conversation to bookkeeping responsibilities. Mr. Walker indicated that he needed someone to bring the business books up-to-date. He showed her where her office would be and she tried to access the accounting software. She was unable to do so and advised him that it appeared the accounting program has been improperly installed on the computer. Q was not challenged on any of this evidence during cross-examination.

[66] After the interview, Mr. Walker sent Q the following email:

I wanted to thank you personally for today's interview as it was very pleasant for me. I do not have any close friends but would consider it a honor if I can call you my friend. My business has expanded so much that I find myself wanting to consider a partner as I have been alone for some time now. You could be that partner if your heart is in it.

I look forward to your response to our meeting and welcome you aboard to Wild Log Homes.

[67] Q testified that she thought the email was "bizarre" but then thought maybe Mr. Walker was lonely. She responded by thanking him for the opportunity to work for him.

[68] Mr. Walker subsequently emailed her at 11:39 p.m. Sunday night and asked her to touch base with him on Monday morning. He provided his cell phone number in the email and asked her to “do lunch” if she “was allowed.”

[69] Q testified that she wondered why Mr. Walker wanted to talk to her on Monday, since they had agreed she would not be starting until Tuesday. She also was uncomfortable with the reference to “if she was allowed” and wondered what he meant by that reference. She subsequently started work on Tuesday.

[70] At that time, she met Ms. Frimpong, who performed telemarketing and reception duties. Q testified that she got along well with Ms. Frimpong. She was also informed that another woman, who was out of the country, worked in the office.

[71] Q set up the SIMPLY accounting system on the computer. She saw Mr. Walker a few times during that day. She described it as uneventful until the afternoon when he asked her to help Ms. Frimpong with a brochure mailing. She described Mr. Walker sharing personal life stories with her, and stating he was going to tell her secrets about his life in the military that she should not tell anyone else. He also told her he was from Australia, that he was rich and that he would consider letting her partner with him. She thanked him, but said she was not interested in partnering with him. She interpreted this comment to refer to a business partnership.

[72] On approximately her third day of work, she recalled that she was coming out of her office and proceeding down the hallway to Ms. Frimpong’s desk. Mr. Walker was walking towards his office in the opposite direction and, as he passed her, grabbed her buttocks and squeezed. She testified that she was caught “totally offguard.” She was stunned and thought she must have looked stupid. She could not believe Mr. Walker had done that and testified that it took her a few minutes to digest that he had actually grabbed her in that manner. She recalls thinking “did he just do what I think he did?”

[73] Q recalls that Ms. Frimpong then came up to her and was “furious” that Q had not reacted to being grabbed in that manner. She recalls feeling stunned and not knowing what to do. Inside, she felt that she wanted to tell him off, but she had just started her job and didn’t know what to do. She recalled feeling embarrassed.

[74] Q also testified that, during the week, Mr. Walker directed her to make telemarketing calls. She had not been aware that this would be part of her job and was not familiar with cold calling. She suggested they print out a list of companies, and mail flyers to those companies about Log's business. They agreed to do this. She recalls that as they were preparing the mailing, Mr. Walker said her "you know that I have not had sex for twelve weeks." She recalls Ms. Frimpong chastising him for this comment. She considered the comment to be inappropriate in the workplace and it made her feel uncomfortable. Mr. Walker also stated that he was going to hire a Mexican woman who would then fire Q.

[75] After the first week, Q had concluded that the job was making her feel uncomfortable and she started looking for other work.

[76] The next Monday, on May 4, Q advised Mr. Walker that she would call him later that morning, and would not be in for work. Ms. Frimpong had advised her that Mr. Walker wanted her to persuade Q to have a relationship with him. As a result, she was feeling depressed. She agreed in cross-examination that she was tracking down a person who had written an NSF cheque that day. She also agreed in cross-examination that there were times she advised the office that she would not be in to work until after lunch. She also stated, however, that there were times she stayed late at work and so would come in later in the day.

[77] Later that day, Q received an email from Mr. Walker advising her that the bookkeeping position required that she come to work on Monday and Friday, that he could not afford for her to work anymore than that, and that he knew she would understand. She interpreted this email as meaning that her hours were being reduced to two days a week.

[78] Q sent the following email in response:

It's been a very stressful day today and honestly after receiving your email, I'm only more depressed and not going to bother phoning. I just don't see the point now. I can't accept the position. I can not afford to live on 1280.00 a month even if I didn't have any payments, this would not be enough to survive.

thank you.

[79] Mr. Walker expressed disappointment towards this email and advised Q that he was available to talk until midnight.

[80] On May 6, 2009, Mr. Walker emailed Q advising her that the position was still open for her. He asked her to “come back, we miss you” and stated that he would “make it up to you. I need you.”

[81] Q sent the following response:

Gloria just emailed me.

several emails today, and she informed me you have been sitting there for every one.

I don't need her telling me off, and saying you got nothing for your money, and I didn't work for her. I worked for you she has no business saying what she did.

She also informed me you have a new girl, so why you emailed me I have no idea. it's just games. I said I would mail the keys and I will. I told her the simply was loaded on your laptop, the same as I had a copy only of..there does not need to be all this hard feelings. I am tired of it.

[82] Q testified that the reference to “new girl” was to a replacement for her position, as Gloria had advised her that Mr. Walker had hired a new bookkeeper. I accept that this was the intended reference. There is no reference to “girlfriend”, though this is how Mr. Walker interpreted the reference in the email.

[83] Mr. Walker responded at 2:23 a.m. the next day with the following email to Q:

Your hearing this from my **heart**. I DO NOT HAVE A NEW GIRLFRIEND. Those are **Gloria's words**.

Gloria informs me that you were never interested in me at all. She tells me that you had no intentions of dating me at all.

If that's true, I will look elsewhere. I do not play games. Maybe you have a boyfriend as you spend no time with me.

This is me now talking to you as I want you to meet me for coffee on your turf. You pick the time and place.

I do not need to inform Gloria, OK. Make it so and we will go from there. I told you once that I would not hurt you and I meant that. Don't believe everything you hear from Gloria. If I had a new girlfriend, that's the first I heard of it.

Gloria is something else. Ever since you left, she has taken over the office. I will explain later.

I can cancel my 10:00 if you want to get together. Call me on the mobile before I go to the office and I will meet you.

Do not respond to this, just call me on the mobile.

[84] In response to questions in cross-examination, Q testified that the highlighted words were in red.

[85] The next morning, May 7, Q sent the following reply:

Where to start?

When I applied to position, it was for the position only. I had no idea you were looking for a mate. I needed employment, and that was my intention to hopefully get a job where I really liked what I was doing for work.

Somewhere along the way, you have wanted to have a relationship, and I am not interested in having a relationship. I have expressed that several times.

[86] She went on in the email to provide an explanation as to why she needed employment commensurate with her qualifications and at an income she could afford to live on. She clearly stated that she needed to earn more, and could not work only two days a week.

[87] Mr. Walker sent the following email to Q shortly thereafter:

When you first came aboard, I was not so much interested in you. You grew on me fast and I was thinking of a business partner as this company is getting bigger. i also thought how nice it would be to have a relationship with you. Your right, I may have put the horse before the cart. Your single, good looking and have extra talents in many ways but I really do not to push the relationship just to make you happy. I know you got the experience and are worth \$20 a hour plus when you're doing your book keeping but I do not think I can afford that when you do other work. If a sale of a log home would go through, then I would be able to keep you for 40 hours a week but up until that comes, I do need to watch the budget. You got to ask yourself where would be in 6 months if a sale did not go. Your bills would be paid and I will be sinking and looking for a job. I need to make a sale to pull this company ahead and then I can help you. Gloria is now paid \$13.00 per hour but she is very domineering since you left. That's what I meant when I said you threw me to the wolves. She was the wolf, not you.

I do not always explain myself in the manner of what I want to say. Maybe I was expecting more from you but I was hoping for that special friend that one can talk to when needed. I have no one that comes close to a friend. Gloria is not a friend, just a employee. She is running out of ideas in sales and I feel may be worried about her job. You're a threat to her now as your paid the big money and she feel the struggle. I do not want to tread on your toes or cause you any grief because I do care for you even if you do not respond in the same manner. We have a saying in Australia that your welcome at my camp fire any time.

I know where our relation is now going but business decisions and how I felt about you were two different issues. I'm very sorry all this came about but in time you might have changed your mind. I needed you in the business aspect but Gloria did not want you back. Do I run the business or Gloria. She is a wolf in disguise. I better not say any more. If there is anything I can do for you, just let me know and I will see what I can do. I do have feelings even its one way. Your special in my heart.

I will have coffee with you any day and I will buy and chalk it up to a business expense with a receipt. If you're not coming back, I will need to get somebody in here to do the 2008 and 2009 simple accounting. I do want to hear more from you.

[88] Q subsequently spoke to Mr. Walker, met him at a Starbucks and advised him that she did not like his advances, that she was not interested in a relationship with him and that she just wanted a job. He agreed to stop behaving that like, stated that he had been alone for many years, that he valued her as an employee and wanted her back. She testified that she believed what he said and agreed to come back to work.

[89] Q subsequently returned to work for Mr. Walker. She was introduced to the other office employee, Ms. Sandra Klynsoon, who had returned from her holiday. The morning of her first day back, Ms. Frimpong was fired.

[90] Q testified that she brainstormed with Mr. Walker that day about how they might increase sales. She advised Mr. Walker about a family she knew in Washington State who logged and made loans to contractors at high interest rates, and indicated she could speak to them. Mr. Walker advised her that he owned part of a mill in Portland and they agreed that she should visit the family and make inquiries about potential business ventures. Mr. Walker appeared excited about this.

[91] Q went to Washington State, looked at possible building lots and met with the family. The family requested such things as a business plan, market research and costing,

prior to deciding whether to invest with Mr. Walker. Q was optimistic, however, that a lot could be obtained and a log home built and sold by the company with a substantial loan from the family.

[92] On Sunday, May 10, 2009 at 1:40 a.m., Mr. Walker sent Q the following email:

I know it's your weekend but I need to speak to you. Please call me. Thank you.

[93] Q subsequently returned to the office and met with Mr. Walker. She advised him what had occurred during the tip. She testified that Mr. Walker appeared excited about the potential business prospect. She then went outside to have a cigarette and Mr. Walker went outside with her. When they were outside, and after he expressed excitement about the potential business, he kissed her. She reacted by saying "what the hell do you think you are doing". Q further testified that she said to him that he had promised her he would not do this, that he apologized profusely, begged her not to quit and said he was "just so excited about getting the potential loan."

[94] Q testified that she subsequently returned to Washington. She continued to receive emails from Mr. Walker at all hours of the day and night, some of which referenced personal matters. She testified that Mr. Walker began to express anxiety about the project and she began to receive incomplete or inaccurate information from him. For example, on Tuesday, May 12, 2009, Mr. Walker sent Q the following email:

I enclose the Greek plans and pictures to remind of what they go too. Do not do a thing about the pricing. I had a wrong page and could not work it out. I do not miss you just my book keeper. The figures are correct. The sign will be installed by us if the homes are being sold at our cost. If the client is making a terrific profit on it, then he can pay.

I do not have any words for you but do take care.

[95] On Wednesday, May 13, 2009 at 12:14 a.m., Mr. Walker sent Q the following email:

I waited until midnight for a reply from you but I guess it was not in the cards. I will expect a report tomorrow. Good nite.

[96] Q testified that she subsequently found a lot, which an offer was put on with a 30-day feasibility clause to determine if the lot was buildable. When she was in the office

with Mr. Walker discussing the offer and showing him some information on the computer, she testified that he leaned over her and poked her breasts asking if they were real. She testified that she swung her arm back and swore at him.

[97] Later that day, as they were looking at drawings, he referred to renting one hotel room with two beds, rather than two rooms, if they travelled to Finland together for business. Q told Mr. Walker that if he expected her to go on a business trip, she would need a separate room or she would not go.

[98] After a further trip to the States and return the office, another incident occurred with Mr. Walker. Q testified that, on that occasion, as she left the office to walk to her car, Mr. Walker followed her. She spoke to him about the trip and then got into her car, which was a convertible. As she prepared to leave, Mr. Walker leaned over and kissed her again. She described it as a “pop” on her lips. She says she got angry and drove away. She described driving rapidly, with her leg trembling. She ultimately stopped the car and took time to calm down. She described being very upset about her work situation and the potential business deal in Washington.

[99] On Tuesday, May 26, 2009 at 10:44 p.m., Mr. Walker sent Q an email which, after commenting on a business matter, contained the following:

FOR YOUR EYES ONLY PERSONAL NOTE

I’m not an easy person to express myself in words like you, as your still excited. I have feeling for you that I must remain hidden from you so the business stays on track. I know you know that, or you would not have let me get away with kissing you. I’m sorry for taking liberties but you excite me, not the sale. I must tell you this, you have blown me away. Nobody has ever done anything like this for me before. I look at this as we both needed bailing out of a situation. I helped you and you helped me, but your is much deeper and I will never forget. I said my say, whether it goes in your heart or mind, you know how I feel. You don’t know what it means for me to have you as my best friend as you have many. You are my true blue friend and that will never change in our lives.

Thank you for being there for me

[100] Q responded to the business aspects of that email at 11:48 pm, and then commented:

I am glad you are happy. we have a good opportunity here. I think we will work great together. I will let you know more as I know more and the day ends.

off to sleep now

[101] She testified that she decided not to respond to the personal comments in Mr. Walker's email but focused on the business aspect of it.

[102] By the end of May, an offer had been put on the property. Q briefly described difficulties in her relationship with Mr. Walker obtaining accurate costing and pricing, and various problems bringing the project to fruition.

[103] On Wednesday, June 3, 2009 at 1:22 pm, Mr. Walker sent the following email to Q:

I'm back to chat with you and we need to work this out together. YES! i want you to continue in your project and find another property. I think you are doing a great job but due to the previous experiences, i had had in the past on the sales of the log homes.

I find it difficult to share my business with anybody that is close to me but I will try very hard to improve it. I do not need to put excess pressure on you as I know your under a lot of pressure. I will make it up to you some way an do hope you forgive me for straying out of bounds with you. If there is anything that we can do to make your job easier, I will do what I can immediately. Sanders says Business relationships takes time to grow and I hope we all are on the right road and take the journey together. I do hope see you in the future. Go with Phil and see what he is interested in. I do trust you in your job or I would not have believed in you. Do you have Orphan Annie outfit on. Ha, HA.

[104] Q explained that Mr. Walker would make fun of the way she dressed and that she was offended by his reference to looking like Orphan Annie. She also testified that, on occasion, Mr. Walker would end a telephone conversation with "love you" and that she would hang up.

[105] Two days later, on Friday, June 5 at 8:38 a.m., Mr. Walker sent Q the following email:

You have terminated your position so I will ask for the return of the keys to my office. I will also ask for the return of any outstanding monies that you did not pay out. The return of the drawings must be returned along with all receipts. The return of all documents that is related to Wild Log

Homes and any other property that you have in your possession. You have until Monday, 8th June 2009 at 9:00 a.m. I will except no excuses as its your dead line.

[106] At 12:26 pm that same day, he sent a further email which read:

I did really appreciate what you did as I told you many many time before that I had no words for you as you just blew me away. I cannot say things in the proper words that you want to hear. I merely express myself in my way. I told you I'm not suited for this job as I'm better in the field constructing the homes and doing your job with the contractors. When I tell you how I truly feel about, you claim I get muss so I say nothing and you still complain. I do not know what you want from me as I feel I walked in your shoes. You were the back bone to this company but I had no control. You did have it all, stressed out and all. You did know it was effecting us as you were never here.

You acquired me of wiping out words on the quote but that is their English broken. I changed nothing. You got it as it came to me. You talked about me being secretive and blocking your moves. I ever got my answers so who was being secretive to who. You were doing a top job but I had no control with you. We gave you everything you asked for and a lot more.

I know you are stressed out as this job is not suited for you at all. Sandra and I will get support elsewhere in Whistler some how. You take your rest and maybe your next job will be easier for you.

Your job here was above and beyond the call of duty and I was proud of you. more than you think. You inspired me beyond the words that you're looking for. You were the role model for the company and the best in the field. I would be glad to give you a letter of recommendation towards your next position. I regret having to lose you but such is life. I did my best to work with you and you know it. You know how I feel towards you so why do I need to express myself to you Your embarrassing me by putting words for you that I cannot get out to you.

I have not had a relationship for 12 years and your asking for words of appreciation that I have forgotten. I told you how I feel, that should be enough. Don't you understand that. It's not easy for me to express myself. You are my idol. I worship the ground that you walk on and admire your inner strength but we walk together and not alone in different directions.

[107] At 12:29 pm that day, Mr. Walker sent Q an email with an advertisement attached to it. She responded to him at 12:54 pm by asking why he was sending it to her as she did not work there anymore.

[108] At 1:08 pm that day, Q sent Mr. Walker an email as follows:

bottom line this is devastating. I worked myself to the ground for you, and you just dismissed it because your ego won't let you admit you are wrong..you just keep blaming me.

Since you don't want me, I'm going to look into doing this myself..good luck to you.

I'm off your clock now remember. I will go where I am appreciated.

maybe do not hire someone who is so motivated as I am, because that threatens you and you will only fire yet another person.

[109] At 4:43 pm, Mr. Walker responded to Q's email about the advertisement by stating that he thought she might to look at it as she was "still a team player...one for all and all for one..where is your spirit."

[110] Q then sent an email to Ms. Klynsoon at 5:05 pm that day:

Sandra are you there in the office now...do you know why is he sending me this kind of email...he is just taunting me now. I lose my job and he says I'm still a team member...I feel like I am losing my mind, like I am all alone in this twisted saga. I don't know how much more I can take. I'm really stressed out. I'm maxed, and he just keeps up with all these emails and wanting a relationship etc. now this tonight.

[111] The result of the foregoing interactions was that Q ceased employment with Log.

[112] In cross-examination, Q gave the following additional evidence about her employment experience with Log and Mr. Walker:

- a) Mr. Walker was in the office on the occasions she said that he was in the office.
- b) When Mr. Walker told her in an email that she was special in his heart, she understood him to be saying that he had emotional feelings for her.
- c) Mr. Walker refused to provide her access to all the paperwork necessary to complete the accounting and assigned her to assist Gloria.
- d) Mr. Walker advised her he was uncomfortable sharing paperwork with her.
- e) Mr. Walker's emails to her in the middle of the night made her uncomfortable.
- f) Mr. Walker instructed her to put an offer on the Washington property. He called the realtor to close the deal. He then decided he did not want the property.
- g) The four incidents described by her (the buttock grabbing, two kisses and breast poking) all occurred as she testified.

Criminal Proceeding

[113] Q stated that shortly after these events, she was advised that Mr. Walker had made a report to the RCMP that she had stolen money from him and was trying to have her arrested. She subsequently spoke with a police officer and explained what had been going on at work. She felt that Mr. Walker had made up the allegations out of revenge toward her and that he had been harassing her.

[114] Q testified that she was terrified and hired a lawyer. She had never been involved in something like that before. She testified that she returned all company property to the lawyer, who made arrangements for Mr. Walker to pick it up. He refused to do so. She was never charged with any criminal offence and testified that she was informed there was no theft. She says she was also advised by the police officer that what she had described constituted a sexual assault and she should look into filing charges. She did so, and Mr. Walker was subsequently charged with four counts of sexual assault.

[115] A hearing into the criminal charges was scheduled for November 2010. Mr. Walker was acquitted of the charges.

Civil Proceeding

[116] In July 2009, Mr. Walker filed a civil claim against Q. The action commenced in small claims court, but was subsequently moved to the B.C. Supreme Court.

[117] Since at least December 2010, Mr. Walker has sought civil damages against Q for amounts he says he expended in defending against this complaint.

[118] On June 22, 2011, Mr. Walker filed an Amended Notice of Civil Claim in the Supreme Court of British Columbia in which he sought, amongst other things, the following remedy as against Q:

The recovery of the amount of \$13,000.00 that the Plaintiff expended in defending a Human Rights Tribunal action that the Defendant Q brought against the Plaintiff, which action proved to be groundless.

[119] On October 5, 2011, Mr. Walker filed a Notice of Application to Amend his Civil Claim in which, amongst other things, he increased the recovery sought against Q to \$15,000.00.

[120] I was provided a further Notice of Application to Amend the Civil Claim, date stamped November 4, 2011, in which, amongst other things, Mr. Walker increased the recovery sought against Q to \$16,868.93. The status of that application was not clarified in the evidence.

Evidence of Ms. Gloria Frimpong

[121] Ms. Frimpong worked for Log for approximately two months. She worked for a brief period of time with Q, possibly two or three weeks.

[122] Ms. Frimpong testified that her job description changed every day. One day she would be an office manager, the next a receptionist. She said that these changes were reflected in her pay and were dependent on Mr. Walker's mood. If he was angry, Ms. Frimpong was a receptionist.

[123] Ms. Frimpong described witnessing Mr. Walker grab Q's buttocks as she was walking down the office hallway. She was shocked at what she saw and asked Q if he really grabbed her buttocks. Q replied that he had.

[124] Ms. Frimpong also testified that Mr. Walker would often make comments of a sexual and inappropriate nature in front of her and others in the office. She recalled that he told her that he liked Q and wanted to know if she liked him. She testified that he asked her to feel Q out to see if Q liked him and whether his feelings were being returned. She said that this inquiry had nothing to do with business, but was personal.

[125] Ms. Frimpong also testified that Mr. Walker maintained that he did not have a wife, when in fact he did. She further testified that Mr. Walker would not provide certain documents to Q in order to allow her to do her accounting duties.

[126] Ms. Frimpong kept a diary. After she saw Mr. Walker grab Q's buttocks, she spoke to her pastor, who was also a lawyer and friend, and asked for advice as she felt what she had witnessed was wrong. She was advised to keep a record of any inappropriate comments or conduct she witnessed. She did so. However, after she was fired, she threw it away.

[127] Ms. Frimpong testified that it took her two hours to get to the Tribunal's offices. She had to wake up her baby at 5 am to get the baby to childcare, take public transportation and then prepare to write an exam later in the day.

Impact

[128] Q was emotional during the hearing and often cried. At one point she became physically ill and had to leave the hearing room. It was evident that her interactions with Mr. Walker were having an ongoing emotional and physical impact on her.

[129] Q described her life as like being a roller coaster. She testified that every day she is depressed. All she wanted was to get a good job and since meeting Mr. Walker, she describes her life as a living hell. She said she worked for approximately one month for him and now has no peace in her life. She testified that he has filed a civil claim against her and there is always something new arriving in the mail that she must respond to. She estimates there have been over 50 applications filed in the B.C. Supreme Court by him that she has dealt with and that it is overwhelming for her. She feels stalked by him through the legal system.

[130] She lives alone, is her sole support, is terrified of Mr. Walker and is exhausted. She wants her life back, and says that she now she lives in a constant state of anxiety. She testified that she has panic attacks, feels like she can't breathe and is going to vomit.

LEGAL ANALYSIS AND DECISION

Sexual Harassment Complaint

[131] Q filed a complaint of discrimination based on sex (sexual harassment), contrary to s. 13 of the *Code*, which provides, in part:

- (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 ... sex...
- ...
- (4) Subsections (1) and (2) do not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.

[132] The onus is on Q to establish, on a balance of probabilities, that the Respondents, or any of them, discriminated against her on the basis of sex (sexual harassment).

[133] Sexual harassment is a form of sex discrimination: *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252, [1989] S.C.J. No. 41 (Q.L.). The Supreme Court of Canada defines sexual harassment broadly as:

... unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of harassment. It is...an abuse of power. 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.... (para. 56)

[134] The Court went on to quote with approval the following descriptions of sexual harassment:

...Sexual harassment is any sexually-oriented practice that endangers an individual's continued employment, negatively affects his/her work performance, or undermines his/her sense of personal dignity...

...Harassment behaviour may manifest itself blatantly in forms such as leering, grabbing, and even sexual assault. More subtle forms of sexual harassment may include innuendos, and propositions for dates or sexual favours.... (para. 49)

[135] The Supreme Court of Canada also commented on the scope of circumstances that might constitute sexual harassment:

...Sexual harassment is not limited to demands for sexual favours made under threats of adverse job consequences should the employee fail to comply with the demands. Victims of harassment need not demonstrate that they were not hired, were denied a promotion or were dismissed from their employment as a result of their refusal to participate in sexual activity. This form of harassment, in which the victim suffers concrete economic loss for failing to submit to sexual demands, is simply one manifestation of sexual harassment, albeit a particularly blatant and ugly one. Sexual harassment also encompasses situations in which sexual demands are foisted upon unwilling employees or in which employees must endure sexual groping, propositions, and inappropriate comments, but where no tangible economic rewards are attached to involvement in the behaviour (para. 52).

[136] The test for determining whether conduct is unwelcome is an objective one: would a reasonable person, taking into account all the circumstances, know that the comments or conduct were unwelcome.

[137] In *Mahmoodi v. University of British Columbia* (1999), 36 C.H.R.R. D/8 (B.C.H.R.T.); petition for judicial review dismissed 2001 BCSC 1256, the Tribunal set out the following considerations when assessing whether conduct is unwelcome:

- i) A complainant is not required to expressly object unless the respondent would reasonably have no reason to suspect it was unwelcome;
- ii) Behaviour may be both tolerated and unwelcome;
- iii) Not only overt, but also subtle indications of unwelcomeness may be sufficient to communicate that conduct is unwelcome; and
- iv) The reasons for submitting to conduct may be closely related to the power differential between the parties and the implied understanding that lack of co-operation could result in some form of disadvantage. (paras. 140-141).

[138] Q says that the following conduct constitutes sexual harassment:

- a) asking whether she had a boyfriend during the interview process;
- b) grabbing her buttocks;
- c) kissing her on two occasions;
- d) poking her breasts;
- e) professing feelings for her in emails and in conversation.

[139] She notes that, in an email to her, Mr. Walker apologized for “taking liberties” with her, and that this supports a conclusion that she was subjected to sexual harassment. She says that while she initially did not speak out about these inappropriate comments and conduct, she then began to protest and asked him to stop. Mr. Walker agreed to do so, but did not.

[140] Q says that any reasonable person would know, or ought to have known, that the identified behaviour was unwelcome, and that Mr. Walker was expressly advised that it was unwelcome and still did not stop.

[141] Q says that Ms. Frimpong noted in her evidence that Mr. Walker had expressly asked her to inquire whether Q liked him, and that Mr. Frimpong confirmed the buttocks incident.

[142] I accept that Mr. Walker made inappropriate inquiries and comments about Q in pursuit of an intimate relationship with her. In reaching this conclusion, I note that Mr. Walker should not have inquired about whether or not Q had a boyfriend or husband during the interview. Such an inquiry was entirely irrelevant to assessing her suitability for the advertised position. However, on its own, such a comment may not be sufficient to sustain a complaint of discrimination. Further details of the context of the comment would be necessary to reach such a conclusion.

[143] However, this comment was not an isolated one. Rather, it was the beginning of Mr. Walker's pursuit of Q, and her continued rejection of his advances.

[144] I find that Mr. Walker physically touched Q in an inappropriate manner. I accept Q's evidence that she was shocked and wondered if the incident had actually occurred. She didn't know how to react initially. Such a reaction is consistent with the unexpected nature of the contact and its marked incongruence with appropriate workplace conduct. I do not consider her lack of comment at the time of the incident to change the nature of this interaction. Any reasonable person would have known that such conduct was unwelcome, and there was no evidence that Q indicated that such conduct was welcome.

[145] After this encounter, and its confirmation by Ms. Frimpong, Q began to express her discomfort to Mr. Walker and asked him to stop his behaviour. He did not. He kissed her on two occasions. I find he also poked her breasts and asked if they were real. Again, any reasonable person would have known that such conduct in the work environment, absent explicit consent, would be unwelcome.

[146] In this case, however, Q expressed her discontent to the kisses and touching. I have considered that Mr. Walker was excited about a potential sale and that at least one of the kisses may have been made within this context. However, I also note that Mr. Walker stated in an email to Q that it was she who excited him and not the project. In any event, such an emotional reaction to a business matter does not justify Mr. Walker taking

inappropriate physical liberties with an employee, such as by kissing Q, particularly when she had indicated to him that she did not want an intimate relationship.

[147] In my view, the impugned conduct is demonstrative of the very type of situation that the *Code*'s prohibition on sexual harassment is designed to prevent. Mr. Walker was in a position of authority over Q. He used his business, and her economic vulnerability within the employment relationship, to further his personal, romantic interests towards her and to "take liberties" with her. This had a detrimental effect on her work environment. I accept that Q found it difficult to come into work, and became anxious and upset.

[148] I find that she ultimately left her employment because of this situation. This is supported by the Respondents' statement in their response to complaint that Q quit her employment and an email sent by Mr. Walker to Q in which he stated that she terminated her employment.

[149] Considering the comments and conduct as a whole, I find that Mr. Walker engaged in persistent and ongoing sexual harassment of Q, which he knew or ought to have known was unwelcome, and that such conduct had a detrimental effect on her work environment.

[150] Q has proven, on a balance of probabilities, that Mr. Walker sexually harassed her in her employment and that it made her workplace intolerable for her. By virtue of s. 44(2) the *Code*, Log is also liable for the conduct of Mr Walker.

[151] Q's complaint of discrimination in her employment, based on sex, contrary to s. 13 of the *Code*, is justified.

Retaliation Complaint

[152] Q has also filed a complaint pursuant to section 43 of the *Code*, which states:

A person must not evict, discharge, suspend, expel, intimidate, coerce, impose any pecuniary or other penalty on, deny a right or benefit to or otherwise discriminate against a person because that person complains or is named in a complaint, gives evidence or otherwise assists in a complaint or other proceeding under this Code.

[153] Complaints filed under s. 43 of the *Code* are commonly referred to as retaliation complaints. In *Bissonnette v. School District No. 62 and Frizzell*, 2006 BCHRT 447, the Tribunal summarized the elements necessary to prove retaliation as follows:

In order to establish a complaint under s. 43 of the *Code*, a complainant must establish:

- That a previous complaint has been made under the *Code* and that the respondent was aware of the complaint: *Cariboo Chevrolet Pontiac Buick GMC Ltd. v. Becker*, 2006 BCSC 43, at paras. 47-55;
- That the respondent engaged in or threatened to engage in retaliatory conduct; and
- That the respondent intended to engage in that conduct or can reasonably have been perceived to have engaged in that conduct in retaliation, with the element of reasonable perception being assessed from the point of view of a reasonable complainant: *Talkkari v. City of Burnaby and others*, 2005 BCHRT 68, at paras. 42-49; *Mathison v. Musqueam Indian Band and Easton (No. 3)*, 2006 BCHRT 429, at para. 22. (para. 19)

[154] Q says that Mr. Walker's attempts to recover legal costs against her in a civil claim constitutes retaliation under the *Code*. She says that her complaint had been filed, and Mr. Walker had notice of it, and that he amended his civil claim to seek recovery of these costs. She says that any reasonable complainant would perceive such conduct to constitute retaliation for filing a human rights complaint.

[155] I agree with Q. In my view, the filing of a civil claim seeking damages for filing a human rights complaint is a clear, substantive and particularly chilling type of retaliatory conduct against a complainant.

[156] The *Code* does not contain an express provision for either a complainant or a respondent to recover legal fees in the event of a successful or unsuccessful complaint. It does, however, contain a mechanism for a respondent to apply to dismiss a complaint if it considers the complaint was filed for an improper motive or made in bad faith. Mr. Walker did not file such an application until shortly before the hearing of this complaint. He was invited to pursue the application in evidence and argument, but did not do so. It was also open to him to file an application for costs for improper conduct during the course of the complaint if he considered that Q had engaged in such conduct. He did not

do so. In short, Mr. Walker did not avail himself of these processes that were available to him under the *Code*, despite having the opportunity to do so.

[157] Instead, he chose to seek damages in a B.C. Supreme Court proceeding which, I note, has been filed not only against Q, but also against her witness in this proceeding, Ms. Frimpong. He has subjected Q to numerous court applications in respect of that claim. I also note that he demonstrated clear hostility towards her while he was in attendance at the hearing, and repeatedly referred to the Supreme Court claim.

[158] In my view, any reasonable person, and particularly any reasonable complainant, would consider the filing of such a claim, in these circumstances, to be retaliation for filing the complaint. It could also reasonably be seen as an attempt to curtail pursuit of it. Such conduct may properly be characterized as intimidation or, if successful, as the imposition of a penalty for filing a complaint. Under either characterization, it is retaliatory.

[159] I find that Q has proven retaliation, contrary to s. 43 of the *Code*, on a balance of probabilities. The retaliation complaint is justified against Mr. Walker.

Remedy

[160] Having found the s. 13 complaint to be justified against both Respondents, and the retaliation complaint justified against Mr. Walker, I will now address the appropriate remedies pursuant to s. 37(2) of the *Code*.

Cease the Contravention

[161] An order under s. 37(2)(a) is mandatory when a finding is made that a complaint is justified. Therefore, I order Log and Mr. Walker to cease the contravention and refrain from committing the same or similar contraventions.

[162] Since I have ordered Mr. Walker to cease and desist his retaliatory conduct against Q, she is free to bring this order to the attention of the B.C. Supreme Court in respect of that part of the civil claim against her.

Declaration

[163] Q requests a declaration pursuant to s. 37(2)(b) that the Respondents' conduct is discrimination contrary to the *Code* and it is so declared. In this regard, I note that retaliation is defined as discrimination under the *Code* and therefore no separate declaration is necessary in that regard.

Damages for Injury, Dignity, Feelings and Self-Respect

[164] Pursuant to s. 37(2)(d)(iii) of the *Code*, the Tribunal has the discretion to award Q damages for injury to her dignity, feelings and self-respect.

[165] In *Fougere v. Rallis and Kalamata Greek Taverna (No. 1)*, at para. 133, the Tribunal set out the following non-exhaustive factors for consideration when assessing damages for injury to dignity, feelings and self-respect in a sexual harassment case:

- i) The nature of the harassment, that is, was it simply verbal or was it physical as well?
- ii) The degree of aggressiveness and physical contact of the harassment;
- iii) The ongoing nature, that is, the time period of the harassment;
- iv) The frequency of the harassment;
- v) The age of the complainant;
- vi) The vulnerability of the complainant; and
- vii) The psychological impact of the harassment on the complainant.

[166] In this case, the sexual harassment was both verbal and physical. It was somewhat aggressive, and it was ongoing and relatively frequent. Q is an older woman, and able to speak up for herself in the workplace. She was not timid in that regard. However, she was in a position of economic vulnerability and Mr. Walker took advantage of that vulnerability. Ultimately, Q was left in the position of seeking alternate employment.

[167] I am persuaded that there was a significant psychological impact on Q, both as a result of the sexual harassment and the retaliatory conduct. Q perceives Mr. Walker's conduct to constitute the stalking of her within the legal system. She is continually reminded of the distress of that workplace environment, and cannot put it behind her. She described experiencing anxiety, depression and panic attacks. She was distraught at times throughout the proceedings. While there was no medical evidence submitted on her

behalf, I accept that the emotional impact of this situation on her has been real, substantive and ongoing.

[168] I consider the ongoing impact on Q to be particularly egregious. Taking into consideration all of the circumstances, and recognizing that Q has proven both a complaint of discrimination and retaliation, I make the following orders for damages for injury to dignity, feelings and self-respect.

[169] Pursuant to s. 37(2)(d)(iii) of the *Code*, I order Log and Mr. Walker, jointly and severally, to pay to Q the amount of \$7,500.00 as damages for injury to dignity, feelings and self-respect in respect of the s. 13 complaint of discrimination. In this regard, I note that in *McIntosh v. Metro Aluminum Products and another*, 2011 BCHRT 34, the Tribunal awarded damages \$12,500.00 to the complainant for damages for injury to dignity, feelings and self-respect. In that case, the complainant had been subjected to repeated sexually harassing texts. She experienced stress, anxiety and had a pre-existing medical condition that was affected by stress. The evidence of impact in this case, flowing from the sexual harassment, is not as egregious as in that case, and is unsupported by medical evidence. These considerations are reflected in my award.

[170] In addition, pursuant to s. 37(2)(d)(iii) of the *Code*, I order Mr. Walker to pay Q the amount of \$8,000.00 as damages for injury to dignity, feelings and self-respect in respect of the s. 43 complaint of retaliation. In this regard, I have considered that in *Clarke v. Frenchies Montreal Smoked Meats and Blais (No. 2)*, 2007 BCHRT 153, the Tribunal awarded \$7,500.00 as damages for injury to dignity, feelings and self-respect arising out of the respondent's retaliatory conduct. The Tribunal also noted that, had it been requested, it would have been inclined to order a substantially higher award.

[171] In that case, the respondent had sought to intimidate the complainant in an effort to make her fearful to pursue her complaint. His conduct was also disruptive and disrespectful during the hearing process. Similar factors are operative in this case. In addition, the significant detrimental effect on Q, including the ongoing emotional impact, is reflected in my award.

COSTS APPLICATION

[172] Q has filed an application for costs to be awarded against Mr. Walker on the basis that he engaged in improper conduct during the course of this complaint.

[173] Pursuant to s. 37(4) of the *Code*, the Tribunal has the discretion to award costs as follows:

The member or panel may award costs

- (a) against a party to a complaint who has engaged in improper conduct during the course of the complaint, and
- (b) without limiting paragraph (a), against a party who contravenes a rule under section 27.3(2) or an order under section 27.3(3).

[174] Q says that the following conduct was improper:

- a) Failing to produce relevant documents in accordance with the Tribunal's March 29, 2010 order;
- b) Failing to produce a list of witnesses in accordance with the schedule set by the Tribunal;
- c) Falsely asserting that he had not received any documents from Q when, in fact, documents had been delivered to him by Q's former counsel;
- d) Making offensive and unsubstantiated statements about Q and her witnesses in correspondence to the Tribunal and during the hearing;
- e) Waiting until the eve of hearing to bring an application to dismiss the complaint;
- f) Unnecessarily prolonging the hearing with irrelevant arguments and bringing repeated applications, at least one of which was unnecessary since he failed to call any evidence;
- g) Failing to attend to cross-examine Ms. Frimpong after opposing the application for her to give evidence by telephone;
- h) Failing to heed the Tribunal's warnings to use respectful language, refrain from giving evidence or yelling at Q;
- i) Applying to call witnesses on matters irrelevant to the complaint;
- j) Failing to call any of those witnesses after bringing a successful application to be allowed to call despite not having identified them on his witness list; and
- k) Repeatedly bringing applications to adjourn the hearing so he could attend the B.C. Supreme Court civil claim he filed against Q.

[175] In response, Mr. Walker objects to any order for costs and says he intends to apply to the Supreme Court for judicial review of any decision awarding costs against him. He threatened to lay charges against “the guilty parties” for “lying to the RCMP, Crown, Criminal Court and Human Rights”. He also indicated that he has filed a civil claim against both Q and Ms. Frimpong (who was a witness in the hearing before the Tribunal), as well as other persons.

[176] In support of his submission, Mr. Walker submitted an affidavit dated January 23, 2012 that was filed in the New Westminster Civil Registry in the context of the civil claim. In that affidavit, he asserts that Q and Ms. Frimpong both lied to the Tribunal. On the evidence before me, I have found otherwise.

[177] Mr. Walker also asserted in his affidavit that he has evidence that he was not on the work premises on certain dates when the sexual harassment was alleged. I note, however, that he declined to call the witnesses he said would confirm his whereabouts elsewhere, and that he declined to give any evidence himself. He also attached to the affidavit documents which he had refused to provide to Q prior to the hearing, in contravention of the Tribunal’s order, and that, as a result, he had been precluded from introducing into evidence at the hearing. The documents produced by him in support of this submission could easily have been provided to Q well before the commencement of the hearing, and in compliance with the Tribunal’s directions and order.

[178] In response, Q asserts that Mr. Walker’s submissions about false testimony are serious, inflammatory, baseless and without any factual or evidentiary foundation. She says this submission is another example of improper conduct. As well, she says that Mr. Walker’s threat of legal action against both herself and the witness is improper.

[179] As noted earlier in this decision, I found Q to be a credible witness. Her evidence was supported by emails written by Mr. Walker. Mr. Walker was not present during the evidence of Ms. Frimpong, and has no direct knowledge of any of the evidence given by her. He also declined to avail himself of the opportunity to subject her evidence to cross-examination. I found Ms. Frimpong to be a credible witness. The statements made by Mr. Walker in his submission and affidavit in regard to either of these witnesses lying or giving “false evidence” before the Tribunal are contrary to my findings in this complaint.

[180] The Tribunal has found in numerous other cases that a failure to abide by Tribunal's rules, directions and orders constitutes improper conduct: *Rusiecki v. B.C. Rubber Supply*, 2007 BCHRT 429; *Bedard v. Continental Steel*, 2008 BCHRT 351; *Samuda v. Olympic Industries*, 2009 BCHRT 65.

[181] In this case, Mr. Walker repeatedly refused to produce documents in accordance with the Tribunal's orders. He also failed to produce a list of witnesses in accordance with the Tribunal's direction (*Lungo v. BC*, 2011 BCHRT 341); waited until the eve of hearing to bring an application to dismiss (*Chaudhary v. Smoother Movers*, 2009 BCHRT 176); and made serious, inflammatory, derogatory and unsubstantiated statements about Q during and after the hearing (*MacGarvie v. Friedmann*, 2009 BCHRT 176 (remitted back to the Tribunal on judicial review, though not on that issue)).

[182] Mr. Walker also represented to the Tribunal that he required a witness to attend in person, at substantial inconvenience to that witness, in order to cross-examine the witness on information he considered important to the Respondents' defence. He then failed to appear, without explanation, to conduct that cross-examination. Similarly, he served an Order to Attend on a police officer, who attended the first day of hearing when her evidence was not required, and then failed to advise that witness that her evidence would not be required since Mr. Walker had decided not to present any evidence.

[183] I also find that Mr. Walker unnecessarily prolonged the hearing by bringing applications to call numerous witnesses, which required a response from Q and preparation for cross-examination by her legal counsel, and then failing, without explanation, to call these witnesses. This made his applications superfluous. I acknowledge, however, that he then shortened the hearing by not calling any evidence.

[184] As well, I consider Mr. Walker's threat of legal action against Q and the witness to constitute improper conduct. I also consider that it could constitute a breach of s. 43 of the *Code* which precludes retaliatory action against a person who participates in Tribunal proceedings. There is, however, no such application on this issue before me and I make no finding or further comment on it.

[185] In my view, in light of the conduct described above, Mr. Walker has demonstrated repeated disrespect for the Tribunal and its processes, which has had a significant and

negative impact on the integrity of the Tribunal's processes. In reaching this conclusion, I have not found Mr. Walker's lack of focus during his cross-examination of Q, as argued by Q, to constitute improper conduct. It is often the case that self-represented parties, who may be unfamiliar with the art of cross-examination, require reasonable latitude in the cross-examination process to ensure they have had a fair opportunity to present their case.

[186] Having concluded that Mr. Walker engaged in improper conduct, I must now determine the quantum of any costs award.

[187] The primary purpose of a costs award under s. 37(4) is punitive, and not compensatory: *Fougere v. Rallis and Kalamata Greek Taverns (No. 2)*, 2003 BCHRT 43, para. 14. Such an award is intended to have a deterrent effect and to sanction conduct that has a significant and detrimental impact on the integrity of the Tribunal's processes: *McLean v. B.C. (Min. of Public Safety and Sol. Gen.) (No. 3)*, 2006 BCHRT 103, para. 8.

[188] In *Kelly v. ICBC*, 2007 BCHRT 382, the Tribunal set out a non-exhaustive list of factors to be considered when assessing the quantum of a costs award:

Unlike other monetary awards by the Tribunal, the primary purpose of an award of costs is punitive, not compensatory. In addition, such an award is meant to act as a deterrent to prevent future participants from committing similar acts. In *Bains v. Metro College Inc. and others (No. 2)*, 2004 BCHRT 7, the Tribunal stated that an award of costs "should be sufficient to signal the Tribunal's condemnation of the complainant's conduct and to serve the punitive purpose of such an award." (at para. 18)

Flowing from this [*Bains* at para 18], the primary factor taken into account by the Tribunal in determining the quantum of a cost award has been the nature and severity of the behaviour which is being sanctioned, and the impact of that behaviour on the integrity of the Tribunal's processes. In addition, and in appropriate circumstances, the Tribunal has taken into account other factors, including the following:

- The ability of the party against whom costs are awarded to pay any award: *Mahal v. Hartley*, 2004 BCHRT 63;
- The relative culpability of the party with respect to the behaviour in question: *Neuls v. Ann Davis Transition Society and Jacob (No. 2)*, 2007 BCHRT 5;
- Any factors, such as a disability, which may have contributed to the behaviour in question: *Stopps, Bakhtiyari*; and

- Any other consequences to the party which have arisen as a result of the sanctioned behaviour: *Bakhtiyari; Glumac v. Fusco and others* (No. 4), 2006 BCHRT 578 (para. 91).

[189] I have considered these factors in assessing what, if any, award of costs to make in this case.

[190] Mr. Walker provided no information about his ability to pay an award of costs. The improper conduct was all within his control and direction. He had possession and control of documents that he asserted were arguably relevant to the complaint and response to the complaint, but refused to disclose those documents prior to the hearing of the complaint and then only if Ms. Walker paid a photocopying charge of \$.35 per page. I have considered, however, that one consequence of this improper conduct was that he was precluded from relying on the documentation at hearing.

[191] I have also considered that the timing of the various applications filed by the Respondents, and the decision not to attend the balance of hearing to pursue his successful applications, were all matters within Mr. Walker's direction and control.

[192] Mr. Walker provided no information to suggest that he has any disability or that there is any other relevant factor that contributed to the improper conduct.

[193] Finally, I have considered the impact on Q and her counsel in having to prepare a response to the various applications that were then not pursued by Mr. Walker, including preparing for cross-examination of witnesses that Mr. Walker then failed to call after seeking an order to do so the day prior.

[194] In all these circumstances, I am persuaded that a significant award of costs is warranted. The range of awards in the cases provided by Q is from \$3,500.00 to \$7,500.00. In my view, given the cumulative improper conduct of Mr. Walker, the circumstances warrant an award at the higher end of this range.

[195] Pursuant to s. 37(4) of *Code*, I order Mr. Walker to pay to Q the sum of \$6,500.00 as costs for improper conduct in the course of the complaint.

Interest

[196] I order the Respondents to pay to Q post-judgment interest on the applicable awards for injury to dignity, feelings and self-respect and Mr. Walker to pay post-

judgment interest on the costs award until the respective awards are paid in full, based on the rates set out in the *Court Order Interest Act*. R.S.B.C. 1996, c. 79, as amended (the “Act”).

Summary

[197] The s. 13 complaint of discrimination in employment based on sex is justified.

[198] The s. 43 complaint of retaliation is justified.

[199] Log and Mr. Walker are ordered to cease and desist the same or similar contraventions.

[200] Log and Mr. Walker are ordered to pay to Q, jointly and severally, the amount of \$7,500 for damages for injury to dignity, feelings and self-respect in respect of the s. 13 complaint of discrimination.

[201] Mr. Walker is ordered to pay to Q the amount of \$8,000 for damages for injury to dignity, feelings and self-respect in respect of the s. 43 complaint of retaliation.

[202] Mr. Walker is ordered to pay to Q the amount of \$6,500 as costs for improper conduct during the course of the complaint.

[203] Log and Mr. Walker are ordered to pay post-judgment interest on these amounts in accordance with the *Court Order Interest Act*.

Enid Marion, Tribunal Member