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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:

Shannon Root

COMPLAINANT

A N D:

Ray Ray's Beach Club and Station Neighbourhood Pub and Eatery
and Ben Reed

RESPONDENTS

REASONS FOR DECISION

Chair:	Bernd Walter
On her own behalf:	Shannon Root
No one appearing on behalf of the Respondents	
Date of Hearing:	May 2, 2013
Location:	Cranbrook, B.C.

INTRODUCTION AND PROCEDURAL HISTORY

[1] Shannon Weaver, (now Root), filed a complaint against Ben Reed and Ray Ray's Beach Club ("Ray Ray's), and Station Neighbourhood Pub and Eatery (collectively the "Respondents"), alleging discrimination in her employment on the basis of sex (sexual harassment), contrary to s. 13 of the *Human Rights Code*.

[2] The complaint was filed on August 19, 2011, with amendments added on March 21, 2012. On April 30, 2012, the Respondents were served with the complaint and told they had until June 4, 2012 to file a response. On June 4, 2012, Mr. Reed advised the Tribunal he had no interest in participating in a settlement meeting. He said he would file a response to the complaint. He was granted an extension of time to do so. He filed no response with the Tribunal.

[3] On October 25, 2012, the Tribunal issued Notice that a hearing would be held February 6 and 7, 2013. The Notice was sent to both Mr. Reed's personal and business addresses. The letter to the business address was returned. The letter to Mr. Reed was not returned. The Tribunal's case manager made numerous, unsuccessful attempts to contact Mr. Reed by telephone using the number on file but it was no longer in service.

[4] A further Notice providing the location of the hearing was couriered on January 23, 2013. Mr. Reed was directed to contact the Tribunal by January 31, 2013, to advise of his intention to participate. The courier materials were returned, undelivered, on February 4, 2013. Mr. Reed had relocated without notifying the Tribunal.

[5] On February 4, 2013, the matter was rescheduled to be heard May 2 and 3, 2013. The Notice of Hearing and package of documents were successfully served on Mr. Reed and the Respondents, by process server, on April 15, 2013, at an address in Calgary, Alberta. (Ex. 6).

[6] On April 22, 2013, a letter confirming the location and starting time of the hearing was sent to Mr. Reed at his Calgary address. On April 23, 2013, Mr. Reed told the Tribunal's case manager that his lawyer would be in touch and his "statement" would be delivered the following day. Nothing was received.

[7] On May 1, 2013, the Tribunal received a faxed letter from a Mr. Zinner, indicating that he had, on that date been "approached" by Mr. Reed with respect to the matter and the hearing scheduled for the following day. The letter advised that Mr. Reed had sent a response to the complaint "some time ago"; he would re-fax his submission that evening; he cannot afford the travel to Cranbrook; he cannot afford to retain a lawyer; and the Notice of Hearing came to his attention 10 days ago, which does not accord with the affidavit of the process server. (Ex. 6)

[8] The letter from Mr. Zinner contained no application in the form prescribed by the Tribunal's *Rules of Practice and Procedure* ("*Rules*"). It simply requested an adjournment, "to put forward a defence and to be represented by Counsel". The letter also said that Mr. Reed anticipated retaining "us" in August.

[9] As the presiding member, I was provided with the aforementioned letter at 4:25 p.m. on May 1, 2013, while I was away from the Tribunal's offices and preparing to travel to Cranbrook for the hearing. I advised the writer by e-mail that the complaint had been filed on August 19, 2011, about twenty-two months earlier; that no response had been filed; that Mr. Reed had not complied with any of the Tribunal's orders or directions; and, that Mr. Reed had been personally served (over two weeks earlier). Mr. Zinner's letter was clear that he had not been retained by Mr. Reed to defend him. I advised that the hearing would proceed as scheduled. I indicated I would be inviting an application for costs against Mr. Reed on the basis of his misconduct in the context of this proceeding.

[10] On May 2, 2013, I convened the hearing of this complaint in Cranbrook, British Columbia. At 9:40 a.m. (B.C. time), I received an e-mail from Mr. Reed, going to the merits of the complaint and denying ownership of the respondent businesses. He also threatened civil action against me personally.

[11] The hearing proceeded as scheduled. The Respondents did not participate.

[12] Ms. Root testified on her own behalf. She was without legal representation. She was an excellent and reliable witness. She was entirely candid when her memory of dates

or events was less than firm. She withdrew the portion of her complaint based on the protected ground of marital status.

[13] Ms. Root also called two witnesses to testify on her behalf. Both witnesses testified under oath. They specifically asked not to be personally identified by name in the context of this decision. In support of their requests for anonymity, both individuals said that they had witnessed Mr. Reed react violently, including involving weapons, such as a baseball bat, toward people, even former friends, who angered him. They expressed fear for their personal safety. One witness said Mr. Reed had in the past threatened to harm that person's person or property. Under the circumstances, these witnesses will simply be referred to as X and Y.

THE EVIDENCE

[14] Ms. Root says she attended Ray Ray's, a bar and restaurant at Kinsmen Beach in Invermere, for a beer. In conversation with Mr. Reed, who, referred to himself as co-owner and manager, she said she would like to work there. Mr. Reed said if she could memorize and repeat all the brands of beer being served, she could have the job. She already had a job at a golf course but considered waitressing at Ray Ray's a fun job in a casual, relaxed atmosphere on the lake. She believes she started working there in November 2010.

[15] Ms. Root testified that on Saturday, April 15, 2011, she started her shift at 5:00 p.m. She was assigned to cover tables one and two. The bar was completely packed. A "cover band" for the group the Tragically Hip, called the "Hip Replacements", was playing. She says it was also one of the bartenders' last night at Ray Ray's.

[16] Ms. Root says around 10:00 p.m., she was busy performing a variety of chores. She found herself standing at the "hostess station", where menus, napkins, and rolled flatware, (knives, forks and spoons), were kept. She was slicing limes and lemons for drinks.

[17] Ms. Root testified that, without warning, she was struck very hard on the buttocks. She heard Ben Reed scream "Whoo, I've been waiting for months to get this F-

---d up". Ms. Root says Mr. Reed was "drunk and high". She says Mr. Reed had been drinking shots behind the bar.

[18] Ms. Root testified that the blow felt like it had been struck by Mr. Reed using his entire arm. She felt a tingling down both of her legs. She does not remember if she said anything immediately but she was completely shocked and very upset. She told a chef in the kitchen what had happened. After a while she returned to the hostess station, checked on, and attended to her tables.

[19] Witness X was at Ray Ray's that night, sitting at the end of the bar. X saw Ms. Root at the hostess station with her back to the bar, when Mr. Reed walked up behind her, raised his arm and hit her really hard on the behind. X says everyone at the bar was completely shocked. X testified that Mr. Reed said "I wanted to do that for a long time". X says Mr. Reed had been drinking, which he did regularly while working. X says Mr. Reed routinely referred to female servers in highly derogatory, sexist terms.

[20] Ms. Root says that half an hour later she sustained a second, hard smack to her buttocks. It was painful and embarrassing, if perhaps slightly less surprising than the first blow. She recalls that a lot of patrons who witnessed the incident were laughing. She told Mr. Reed not to do this. She became ever more upset and tearful and asked him, as the manager on duty, for permission to go home. She says Mr. Reed laughed as though it was a joke. He returned to the bar, poured shots, removed his shirt and let patrons take pictures of him shirtless, drinking shots.

[21] Ms. Root says that twenty minutes later, while the bar was still crowded, she was struck a third time. By then, she says, it was between midnight and one a.m. She does not remember exactly where she was when the third strike occurred. She says Mr. Reed was again laughing. She felt violated. She walked away, upset and again talked to the chef in the kitchen. She says she tried to remain busy and became even more upset, having cut her finger while slicing limes. She thought about her fiancé's reaction if she told him about what had happened. She says that at the end of her shift, Mr. Reed asked her not to tell her fiancé. The two men knew each other. She said she would certainly be telling him.

[22] Ms. Root arrived home after two a.m. She says that the next day, she told her fiancé what had happened. He was “not impressed”.

[23] X testified to hearing about, but not witnessing the second and third of Mr. Reed’s blows to Ms. Root’s buttocks.

[24] Ms. Root testified that after the events of April 15, 2011, she felt her shifts at Ray Ray’s were reduced. When she approached Mr. Reed about the possible relationship between his conduct on April 15, 2011, and her reduced shifts, he told her he needed some of her shifts to train newly hired servers. She invited him to discuss the incidents but he said there was no relationship to her hours of work.

[25] Ms. Root testified about another incident on June 25, 2011, involving a table of three women. Mr. Reed apparently went into a tirade and poured a pint of beer on one woman’s head. After the group refused to pay their large bill, he instructed Ms. Root to get his money under threat of being fired. Apparently, the next day Mr. Reed claimed no memory of the incident. Although the anecdote has no probative relevance to her complaint, Ms. Root spoke about it as an example of Mr. Reed’s volatile behaviour.

[26] Ms. Root also recounted an incident on July 16, 2011, during which Mr. Reed embarrassed her in front of a number of patrons, about the number of times she had been married, as an example of his demeaning conduct toward her.

[27] Ms. Root testified her shifts continued to be cut and she continued to ask why, because her wedding was approaching in November 2011, and she wanted the money.

[28] Ms. Root testified that on a Tuesday in July, she took time from her other job, (at which she still works), to attend a mandatory 10:00 a.m. staff meeting at Ray Ray’s. However at 9:30 a.m., she received a text message from Mr. Reed telling her not to attend. He said that he would call her later. Ms. Root says that after the staff meeting, Mr. Reed announced that she was no longer employed at Ray Ray’s. She made several attempts to speak to Mr. Reed but he did not return her calls. Ms. Root introduced into evidence the following exchange between herself and Mr. Reed a week after the meeting:

> Text messages between Ben Reed and Shannon Root regarding Shannon's dismissal.
>
> **Shannon**: Tuesday July 26, 2011, 4:50 pm my text read "heard I'm fired, would have been nice if you had called me and told me."
>
> **Ben**: Wednesday July 27, 2011, 12:04 a.m. Ben texted back, "not fired just not learning...have repeated myself so much and have tried to help you learn...I was getting to frustrated and we had some negative feedback on service a few times the last couple weeks. I didn't want to have worse time and you had I were already running into bad nights together and I hate that cause I like you and I am too busy to work on it with you...thought maybe later in the fall we could get back on track. I have too much on my plate right now to do that with you. We have to finish the summer first. I would have called but wanted to do it more in person...this conversation that is. Not anything is as it seems and I haven't gossip. I have just said you aren't with us right now. So sorry that's how you feel. I'm sure we can work something out in the future but we don't have to if your upset...There are things also to discuss to make things better between us and settle the dirt".
>
> **Ben:** The next text that I received from Ben was at 3:12 a.m. July 27th, 2011, "ok then...see you when I see you". (Ex. 8)

[29] Ms. Root testified that she filed an Employment Standards Branch complaint which was resolved on payment of one week's salary as severance, amounting to $96.98.

[30] In Mr. Reed's e-mail, addressed to me the morning of the hearing, he alleges Ms. Root's employment standards "claim" involved a release of all future claims in exchange for her severance payment. Mr. Reed appears to be under the mistaken impression that, in addition to resolving an employment-based dispute, the Employment Standards Branch has the authority to determine an allegation of discrimination under the *Human Rights Code*. Employment Standards Branch and *Code* complaints are of course entirely different in nature and substance. The Employment Standards Branch has no authority to decide or resolve human rights complaints under the *Code*: *Macarenko v. Arvai*, 2005 BCHRT 418; *Chow v. B.C. Northern Lights and another*, 2012 BCHRT 282.

[31] Witness Y testified that Mr. Reed was owner, manager of Ray Ray's, together with his wife. Y says that in his capacity, Mr. Reed hired and fired staff and signed their paycheques. Y described Mr. Reed as unpredictable, manipulative, aggressive, hard to

work for and intimidating. He routinely referred to staff using extremely derogatory terms. Y said Ray Ray's closed in June 2012. Y did not see Mr. Reed strike Ms. Root but had heard him refer to her "butt", and trying to embarrass her.

[32] Ms. Root expressed fear of retaliation from Mr. Reed.

ANALYSIS AND DECISION

[33] Ms. Root's complaint is filed under s. 13 of the *Code* which 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 sex...

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

[35] 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.), 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. 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)

[36] In *Janzen* the Court also said:

> ...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)

[37] As the Respondents failed to respond to Ms. Root's complaint, and did not appear at the hearing, there exists no evidentiary dispute or issue of credibility.

[38] Applying the foregoing definitions, I find that Ms. Root was, on April 15, 2011, subjected to sexual harassment in her employment at Ray Ray's, by Mr. Reed, her employer. The harassment was in the form of three painful, unwelcome, intimate blows, inflicted by Mr. Reed. They were sexual in nature, and he knew, or ought to have known, they were unwelcome. They negatively affected Ms. Root's work environment, eventually led to reduced work hours and ultimately her dismissal, for no stated reason.

[39] The complaint is justified against all Respondents.

REMEDY

[40] Having found the complaint to be justified against all Respondents, I now address the appropriate remedies under s. 37(2) of the *Code*.

Cease the Contravention

[41] An order under s. 37(2)(a) is mandatory when a complaint is found to be justified. Therefore, I order the Respondents to cease the contravention and refrain from committing the same or a similar contravention.

Wage Loss

[42] Ms. Root sought no compensation in the nature of lost wages and I therefore make no award in respect thereof.

Damages for Injury to Dignity, Feeling and Self-Respect

[43] Pursuant to s. 37(2)(d)(iii) of the *Code*, the Tribunal has the discretion to award damages for injury to dignity, feelings and self-respect. In *Fougere v. Rallis and Kalamata Greek Taverna*, 2003 BCHRT 23 at para. 133, the Tribunal set out the

following, non-exhaustive list of factors it will consider when assessing damages for injury to dignity, feelings and self-respect:

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 in 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 victim;

vi. The vulnerability of the victim; and

vii. The psychological impact of the harassment upon the victim.

[44] Ms. Root cited *Ratzlaff v. Marpaul Construction and another*, 2010 BCHRT 13, in support of an award of $18,000.00, for Mr. Reed's treatment of her. I do not find the conduct in this case approaches the severity or pervasiveness in *Ratzlaff*.

[45] In this case, the harassment was in the form of three blows inflicted on a single night by Mr. Reed, accompanied, on at least one occasion by demeaning language.

[46] As is implicit from Mr. Reed's text messages, the workplace relationship with Ms. Root deteriorated, to her detriment. His disrespectful, demeaning conduct toward her, though not overtly sexually harassing, intensified.

[47] Under the circumstances, I exercise my discretion to award Ms. Root, as damages for injury to dignity, feelings and self-respect, under s. 37(2)(d)(iii), the sum of $5,000.00 together with post-judgment interest, until paid in full.

Bernd Walter, Chair