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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:

Anita Behm

COMPLAINANT

A N D:

6-4-1 Holdings Ltd., Edna Melgaard, and Rick Burnett

RESPONDENTS

REASONS FOR DECISION

Tribunal Member:	Barbara Humphreys
On her own behalf:	Anita Behm
Counsel for the Respondents:	Alison Taylor
Hearing dates:	May 28 and 29, 2008
Oral submissions:	June 18, 2008

1. Introduction

[1] Anita Behm filed a complaint (the “Complaint”) in which she alleged that 6-4-1 Holdings Ltd. doing business as Highway Sales and Rentals (“HSR”), Edna Melgaard, and Rick Burnett (together the “Respondents”) discriminated against her regarding employment because of sex, contrary to s. 13 of the *Human Rights Code*, which reads:

13 (1) A person must not

- (a) refuse to employ or refuse to continue to employ a person, or
- (b) discriminate against a person regarding employment or any term or condition of employment

because of the ... sex ... of that person....

[2] Ms. Behm alleges that Mr. Burnett sexually harassed her during her employment at HSR and that, as a result, she could not continue to work there. The Respondents deny the allegations.

[3] An act done by an employee of a company is deemed to be an act done by that company: *Code*, s. 44(2).

[4] I will first review the evidence of the witnesses. After addressing credibility, I will make my decision based on my findings of fact and the law. There are portions of the evidence I do not refer to as they are not necessary to my decision.

2. Witnesses

[5] In addition to testifying on her own behalf, Ms. Behm called the following witnesses: Randal Behm, her husband; Nora Heans, who was employed at HSR at the front counter from April 2005 until March 2006, when she was fired by Ms. Melgaard; and Gerald Clark, a current employee who has worked with Mr. Burnett for many years. Mr. Clark spends about 50% of his time in the parts department. He also spends time with the mechanics, and is back and forth to the front counter throughout the day.

[6] There were four witnesses on behalf of the Respondents: Ms. Melgaard, the sole officer and director of HSR; Mr. Burnett, who was employed by Ms. Melgaard or her

husband at other businesses they operated between 1977 and 1992, and who has worked at HSR since it was incorporated in 1992; Susan Chambers, who worked on Saturdays at HSR during Ms. Behm's employment; and Kimberly Bradshaw, who worked at the front counter at HSR from January until December 1999.

3. Evidence

A. Background

[7] HSR sells, rents, and repairs machinery and construction equipment, and operates a gravel mart. Ms. Melgaard is at HSR from 7:00 a.m., six days a week. Her office is behind a one-way mirror.

[8] Mr. Burnett also worked six days a week. He described his position as manager/supervisor/mechanic/purchasing agent. He reported to Ms. Melgaard.

[9] In 2006, Ms. Behm was employed at a liquor store, where she worked 35 hours/week during the summer months. In the fall, her hours were reduced significantly. She also worked part-time at a beer and wine store where Mr. Burnett was a customer. Ms. Behm mentioned to him that she was looking for additional employment, and he suggested that she bring her resumé into HSR because it needed a front counter clerk.

[10] When Ms. Behm came to HSR with her resumé, Mr. Burnett introduced her to Ms. Melgaard. They agreed that Ms. Behm would start to work at the front counter on a trial basis. Her shifts were scheduled on a day-by-day basis.

[11] Ms. Behm's responsibilities were to answer the telephone, assist customers and keep track of articles on the computer as they were rented and returned. Mr. Burnett would train her on the front counter duties. She also did cleaning and assisted Ms. Melgaard as needed.

[12] Ms. Behm's first day of work was October 5, 2006. Her last day of work was October 25. During that twenty-day period, she worked 11 shifts. She did not have a set schedule; Ms. Melgaard discussed with her at the end of the day when to next come in. Ms. Behm was working at HSR around her hours of work at the beer and wine store.

[13] Ms. Behm alleged four incidents of sexual harassment: (a) a comment made by Mr. Burnett; (b) an article about women over 40; (c) a request made by Mr. Burnett for a hug; and (c) Mr. Burnett's cupping her buttock with his hand. I will deal with each in turn.

B. Alleged incidents

a. Comment

[14] Ms. Behm testified that, as she and Mr. Burnett were walking to the computer, she stopped and said to him, "You go ahead." He responded, "No, no, no, I like the view from behind." She pulled her sweater down to indicate that the comment was unwelcome. Mr. Burnett said, "Sorry, sorry, sorry." Ms. Behm did nothing further because of the apology. She testified that she was satisfied with the apology, although she did not forget about the incident. She mentioned it to her husband.

[15] Mr. Burnett denied making this comment. He said that, on one occasion, he and Ms. Behm were walking side by side. She went to the office; he told her that he was taking the "scenic route" to the shop.

b. Article

[16] Ms. Behm said that Mr. Burnett had an article about women over 40, which stated that they had a higher sex drive. He asked her whether this applied to her. She shrugged but did not respond. She did not mention this incident to her husband.

[17] Mr. Burnett did not recall this incident or asking Ms. Behm any questions about such an article. He said, if he had had such an article on his desk, he would have covered it with a book.

c. Hug

[18] Ms. Behm said that, on October 21, she and Mr. Burnett were sitting at their computers. Mr. Burnett beckoned Ms. Behm with two fingers. When she went over to him, he asked her for a hug. She did not know what to do. She wanted to "fit in", so she went to give him a small hug. He pushed her away and said, "No, no." Ms. Behm told

her husband about this incident. He suggested that she quit. Because they needed the money, Ms. Behm said she would continue at HSR and begin to look for another job.

[19] Ms. Behm said that Mr. Clark and Ms. Chambers were standing nearby and witnessed this incident.

[20] Mr. Burnett denied that he ever motioned to Ms. Behm to come to him or asked her for a hug. He testified that it was common at HSR for an employee who was having a bad day to say, “I need a hug.” The comment was not directed at anyone in particular. Mr. Burnett estimated that he made this comment at work about 30 times a year.

[21] Both Mr. Clark and Ms. Chambers testified that they did not see this incident.

[22] Both Mr. Clark and Ms. Melgaard stated that “I need a hug” was an expression frequently used at HSR, and that it was not directed to anyone in particular.

d. Cupping buttock

[23] Ms. Behm did not work between October 22 and 24. On October 25, both she and Mr. Burnett were at the front counter. He was sitting at his computer; she was standing slightly behind him on his right side. Ms. Behm testified that Mr. Burnett pushed back his chair, swivelled to the right, and cupped her left buttock with his right hand. It was not incidental contact. She backed away from him, saying, “Nobody touches this.” Mr. Burnett raised both his hands and said, “Sorry, sorry, sorry.”

[24] She then went into Ms. Melgaard’s office (Ms. Melgaard was not at work) and telephoned her husband, who told her to get out of the workplace.

[25] Ms. Behm came out of the office and told Mr. Burnett she had to go home because her daughter was sick. Ms. Behm mentioned her daughter’s first name, which was the same as one of Ms. Behm’s co-workers. Mr. Burnett took three \$20 bills out of his wallet, telling her to take the money for the individual who was sick. Ms. Behm declined several times. When she told him that she did not know what was wrong with the individual, Mr. Burnett said that she should keep it for herself. He put the money in her bag; she threw it at him and left.

[26] Ms. Behm denied speaking to Ms. Melgaard on October 23 and asking for full time hours. Ms. Behm said that this conversation occurred before October 21.

[27] Mr. Burnett said that, on October 25, he and Ms. Behm were both sitting at their computers at the front counter. She was to his right. A call came in which she answered and then transferred to his phone. He swerved to his left to answer the telephone. Mr. Burnett's back was to Ms. Behm. He did not know that she had gotten up. As he swivelled back to his right to get up, he came out of his chair more quickly than he expected because of the spring in the chair. Ms. Behm was leaning on the counter with her left elbow. He unintentionally touched her buttock. Ms. Behm told him never to touch her again and he immediately apologized, saying, "Sorry, sorry" as he lifted his hands up.

[28] Ms. Behm went into Ms. Melgaard's office. When she came out, she provided the name of her daughter, saying she was sick, and that she had to go pick her up. Mr. Burnett thought that Ms. Behm was referring to the employee at HSR with the same name; he did not know that Ms. Behm had a daughter with that name. He knew that this employee did not carry cash. Because Ms. Behm had told him that morning that she was "broke", he offered her \$20 in case she had to pick up any medication at a drugstore for the employee. He then took another \$20 from the till and also offered it to Ms. Behm. When she said that she did not need it, he put \$20 back in the till and \$20 in his wallet.

C. Events after October 25

[29] The next day, Ms. Melgaard telephoned Ms. Behm and inquired why she was not at work. Ms. Behm asked if Mr. Burnett had told her what had happened. Ms. Melgaard said that Mr. Burnett told her that he had accidentally touched her. Ms. Behm told Ms. Melgaard, "No, he grabbed my buttock."

[30] Ms. Behm then told Ms. Melgaard about the other incidents. She had not told her about them earlier because she was a new employee. Further, Ms. Melgaard had told her at the beginning of her employment that Mr. Burnett had been her late husband's best friend, which made Ms. Behm very reluctant to complain about his behaviour.

[31] Ms. Melgaard responded that Mr. Burnett was such a nice guy, he would never do anything like that. Ms. Behm referred to an incident which Mr. Clark had told her about when Mr. Burnett had been intoxicated at work. Ms. Melgaard answered that that

incident had occurred years ago. Ms. Melgaard told Ms. Behm that she would speak with other current and former female employees to see if they had had any problems with Mr. Burnett.

[32] Ms. Melgaard asked Ms. Behm if she would be returning to work. She responded, “not unless Mr. Burnett gets help.” She stated that she would be handing in her hours. In a subsequent telephone conversation, Ms. Melgaard told her that she had spoken to other female employees and that was as far as she could go.

[33] On October 29, Ms. Behm faxed a complaint to Ms. Melgaard. She filed the Complaint on December 7, 2006.

[34] Ms. Behm testified that, after faxing her complaint to Ms. Melgaard, Mr. Burnett slowly drove by the beer and wine store while she was working and leered at her. Mr. Burnett denied this allegation. To the contrary, he said that he went out of his way to avoid Ms. Behm.

[35] Ms. Behm also said that, in November, Ms. Heans, whom she had gone to high school with but did not know well, came into the beer and wine store. She told Ms. Behm that she had worked at HSR and had heard Mr. Burnett make sexual comments.

D. Ms. Melgaard’s evidence

[36] Ms. Melgaard testified that, on October 23, Ms. Behm telephoned from one of her other places of employment. Speaking quietly, Ms. Behm told her that she had “had it with this job”. She said she liked working at HSR and asked Ms. Melgaard if she could have full time hours at HSR.

[37] On October 25, Ms. Behm worked with Ms. Melgaard in her office all morning. She asked Ms. Behm whether she had given notice at her other job. Ms. Behm responded that she had not, but she would be giving it soon.

[38] On the last Wednesday of every month, Ms. Melgaard has to leave the office at 1:30 p.m. (October 25 was a Wednesday.) She received a telephone call from Ms. Behm, who told her that she could not work at HSR anymore because “Rick had touched my bum and tried to give me money.” Ms. Behm also told her about the Comment. Ms.

Melgaard asked her if she was being oversensitive about the Comment; Ms. Behm said she was not. She did not tell Ms. Melgaard about the Hug. Ms. Behm said that she would fax her hours.

[39] Ms. Melgaard responded that it did not sound like Mr. Burnett. Her office is behind a one-way mirror and she had never seen any impropriety. She spoke to Mr. Burnett later that day; he explained to her that it had been an accidental touching. Ms. Melgaard asked him about the money. Mr. Burnett responded that he thought it was another employee who was sick, and that he did not know Ms. Behm had a daughter with the same name.

[40] Ms. Melgaard stated that she did not receive a fax from Ms. Behm. On October 26, Ms. Melgaard called Ms. Behm, who stated that she was thinking of taking the matter further.

E. Other evidence

[41] With the exception of the impact on his wife, all of Mr. Behm's evidence regarding the alleged incidents was based on what he had been told by Ms. Behm.

[42] Ms. Heans testified that she heard Mr. Burnett make sexual comments about a female employee's breasts and body, but she could not recall anything specific.

[43] Neither Ms. Bradshaw, Ms. Chambers or Mr. Clark saw Mr. Burnett act in an inappropriate manner, or heard him make any sexual or crude comments.

4. Decision

[44] For the following reasons, I find Ms. Behm's allegation of sexual harassment justified.

5. Reasons

[45] Because of contradictions in the evidence of the witnesses, determination of their credibility is necessary, as is the determination of reasonable inferences which can be drawn from the facts. In assessing credibility, I am mindful not only of such factors as the witness' demeanour, powers of observation, opportunity for knowledge, judgement

and memory, and ability to describe clearly what was seen and heard, but also of whether the evidence of the witness is in “harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions”: *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) at 357.

[46] While Ms. Behm was an emotional witness, I found her evidence persuasive. With the exception of the Article, she gave detailed evidence about the incidents in a manner which satisfied me that she was testifying from her memory. Where her evidence is at odds with the evidence of another witness, I prefer hers.

[47] In particular, I prefer Ms. Behm’s evidence to Mr. Burnett’s. Especially with respect to the October 25 incident, I found his explanation of how he inadvertently sprang out of his chair and touched Ms. Behm’s buttock unconvincing.

[48] I note that neither Ms. Behm’s October 29 complaint faxed to Ms. Melgaard nor the Complaint referred to the Article. Further, Ms. Behm did not tell her husband about it. She mentioned it in her testimony when asked if there were any incidents that she had not included in her Complaint. However, especially in contrast to her evidence about the other three incidents, her evidence about the Article was vague. For these reasons, I do not consider it in my decision.

[49] It is well-settled that sexual harassment is sex discrimination: *Janzen v. Platy Enterprises Ltd.* (1989), 10 C.H.R.R. D/6205 (S.C.C.) The Court provided a non-exhaustive definition of sexual harassment:

... sexual harassment in the workplace may be broadly defined as unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment.... When sexual harassment occurs in the workplace, it is an abuse of both economic and sexual power. Sexual harassment is a demeaning practice, one that constitutes a profound affront to the dignity of the employees forced to endure it. By requiring an employee to contend with unwelcome sexual actions or explicit sexual demands, sexual harassment in the workplace attacks the dignity and self-respect of the victim both as an employee and as a human being. (at para. 44451)

[50] I accept Ms. Behm’s evidence regarding the Comment, and find that Mr. Burnett told her, as she walked in front of him, that he “liked the view from behind.”

[51] Despite the fact that Mr. Clark and Ms. Chambers denied witnessing this incident, I find the Hug occurred as testified to by Ms. Behm on October 21. Mr. Clark gave his evidence in a rather flippant manner and I did not find it persuasive. While this was not the case with Ms. Chambers, it may simply be that the incident was not as important to her as it was to Ms. Behm. It seems that Mr. Burnett was intoxicated when this incident took place which may explain his inability to recall it.

[52] I believe Ms. Melgaard confused her dates when she testified that Ms. Behm telephoned her on October 23 and inquired about getting full time hours at HSR. I accept Ms. Behm's evidence that this conversation occurred before October 21. I also accept Mr. Behm's evidence that, after his wife told him what had occurred on that day, they agreed that she would look for another job.

[53] As stated above, I find that Mr. Burnett's attempt to characterize his touching Ms. Behm's buttock as inadvertent is not credible. I accept her evidence that he cupped her buttock and that she continued to feel the pressure of his hand after the contact ended.

[54] In reaching this finding, I also take into account Mr. Burnett's subsequent behaviour in offering Ms. Behm money. I find his explanation completely unconvincing. First, there was no evidence about any friendship between Ms. Behm and the employee to whom Mr. Burnett said he believed she was referring to explain why that employee would contact Ms. Behm at work if she were sick. Second, there was no evidence to explain why, if Mr. Burnett did believe that Ms. Behm was leaving work to pick this employee up, he did not think that she could use her bank card to purchase any medication she might require.

[55] I find that Mr. Burnett cupped Ms. Behm's buttock and that this contact was not inadvertent.

[56] I find that these three incidents constitute sexual harassment as they were unwelcome conduct of a sexual nature which detrimentally affected Ms. Behm's work environment. I conclude that Mr. Burnett discriminated against Ms. Behm on the basis of sex, contrary to s. 13 of the *Code*.

6. Remedy

[57] The Respondents submitted that the allegations against Ms. Melgaard should be dismissed under s. 27(1)(c) because she was acting in her capacity as an officer of HSR and not in her personal capacity. The Tribunal's *Rules of Practice and Procedure* contemplate that applications under s. 27(1) be pursued on a preliminary basis: *Kovacevic v. Pacific Palisades Hotel (No. 2)*, 2006 BCHRT 108, paras. 32-36.

A. Injury to dignity

[58] Ms. Behm is seeking \$15,000 as compensation for injury to her dignity.

[59] Ms. Behm testified that, even though Mr. Burnett apologized and she was prepared to continue working at HSR, she was embarrassed by the Comment. She told her husband about it that evening. He testified that she was upset.

[60] Regarding the Hug, Ms. Behm said that she felt embarrassed when Mr. Burnett beckoned her over to him and did not know what to do. When he pushed her away, she felt stupid, as though she had been the one “coming on” to him. Mr. Behm's evidence was that his wife was upset, and told him she felt stupid and humiliated. He suggested she quit, even though she has never quit a job.

[61] Ms. Behm said that, after the October 25 incident, she was in shock. She did not know what to do. She telephoned her husband. He said that she sounded like a “scared kid” and that her voice was shaking. He told her to get out of HSR. When she asked what she should say, he told her to say their daughter was sick. Mr. Behm asked his wife to call him when she had left.

[62] Ms. Behm testified that she was so upset as she drove away from HSR that she almost hit another car. She pulled over to the side of the road and telephoned her husband. She told him that Mr. Burnett had tried to give her \$60. Mr. Behm arranged for someone to take over from him and left work early. He testified that, when he arrived home, his wife was “shocked, freaked out, devastated, shaking and crying.”

[63] Mr. Behm described his wife as normally self-reliant. After October 25, she had feelings of depression and withdrew into herself. When stressed, she picks at her face,

and she began to do this. She went to see her doctor, who suggested both anti-depressants and counselling. She discussed this with her husband, and they decided that they would deal with the situation themselves.

[64] Despite Mr. Behm's description of the impact on his wife of the sexual harassment, she was able to continue her part-time employment.

[65] Section 37(2)(d)(iii) gives the Tribunal the authority to pay compensation for injury to dignity, feelings and self-respect in an amount the Tribunal considers appropriate.

[66] *Torres v. Royalty Kitchenware Ltd.* (1982), 3 C.H.R.R. D/858 (Ont. Bd. Inq.) listed some factors to take into account in assessing the appropriate compensation for injury to dignity in sexual harassment cases. Those factors were adopted by the Tribunal in *Fougere v. Rallis and Kalamata Greek Taverna*, 2003 BCHRT 23, para. 133:

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

[67] In *Clarke v. Frenchies Montreal Smoked Meats Ltd. and Blais (No. 2)*, 2007 BCHRT 153 ("*Frenchies*") the Tribunal awarded \$4,000 as compensation for injury to dignity. In that case, the complainant was 19; the individual respondent about 55. It was only her second job. The Tribunal found that the individual respondent had taken advantage of the complainant's vulnerability by subjecting her to numerous comments that created a sexualized workplace. In addition, there was some physical contact. On one occasion, the individual respondent had slapped the complainant's hand away from her face. On another occasion, he invited physical contact by asking the complainant to sit on his lap.

[68] Ms. Clarke sought \$4,000 as compensation for injury to dignity. The Tribunal noted that the cases she relied on were older sexual harassment decisions, and that the Tribunal's awards for compensation for injury to dignity had increased over the years: *Frenchies*, para. 159. The Tribunal awarded Ms. Clarke \$4,000, stating that it would have been inclined to order substantially greater compensation for injury to dignity for the sexual harassment she had suffered, but did not do so as that was the amount sought and Ms. Clarke was represented by counsel.

[69] While Mr. Burnett is older than Ms. Behm, this was not a case where she was an inexperienced, young employee. Both were mature adults. There was one comment, one touching, and one invitation for a hug.

[70] The circumstances in this case are not at all similar to those where that Tribunal has awarded amounts in the range of \$15,000. In my view, an award of \$5,000 is appropriate compensation for injury to Ms. Behm's dignity, feelings, and self-respect.

B. Lost wages

[71] Ms. Behm is seeking lost wages in the amount of \$1,200 for the period October 25 until December 1, when she obtained another job as a cleaner.

[72] Ms. Behm testified that, after the end of her employment at HSR, she looked for work by word-of-mouth, which is how she obtained both her part-time jobs and her employment at HSR. Through her husband, she learned that there might be an opportunity for a part-time job as a cleaner at his place of employment. Ms. Behm stated that she hoped to obtain this position.

[73] Ms. Behm had previously been successful finding employment through word-of-mouth, and, in my view, it was not unreasonable for her to follow the same process initially. In my view, she did not broaden her job search because she hoped to obtain the position with her husband's employer. I find that, after two weeks, it would have been reasonable for her to broaden her job search. By not diligently looking for other work, Ms. Behm failed to mitigate her damages. I do not think that the Respondents should be liable for her lost wages beyond this two-week period.

[74] During her 11 shifts between October 5 and 25, Ms. Behm worked a total of 75 hours at \$10/hour and 2½ hours overtime at \$15/hour, for total earnings of \$787.50. For another ten-day period, she would have earned approximately \$393.75.

7. Retaliation

[75] Ms. Behm did not file a complaint of retaliation. Therefore, I cannot make a finding regarding this allegation.

8. Conclusion

[76] Having found the complaint justified, I make the following orders pursuant to ss. 37(2)(a), 37(2)(d)(ii), and 37((2)(d)(iii) of the *Code*:

- I order the Respondents to cease the contravention and to refrain from committing the same or a similar contravention;
- I order the Respondents to pay Ms. Behm compensation for lost wages in the amount of \$393.75; and
- I order the Respondents to pay Ms. Behm compensation for injury to her dignity, feelings and self-respect in the amount of \$5,000.

[77] The Respondents are jointly and severally responsible for the compensation ordered.

Barbara Humphreys, Tribunal Member