

**PRINCE EDWARD ISLAND HUMAN RIGHTS PANEL**

**BETWEEN:**

**KIMBERLEY MILLIGAN**

**COMPLAINANT**

**AND:**

**MACZAK HOLDINGS LTD,  
carrying on business as  
SMITTY'S FAMILY RESTAURANT**

**RESPONDENT**

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**PANEL HEARING DECISION**  
**Hearing Dates: May 30, 31, and June 27, 2023**  
**Decision Date: September 29, 2023**

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Panel Member  
Chair Joanne Ings

Prince Edward Island Human Rights Panel  
9 Pownal Street  
PO Box 2000  
Charlottetown PE C1A 7N8

Counsel  
Human Rights Commission: Caroline Davison  
Complainant: self represented  
Respondent: Christopher Montigny

## **AUTHORITIES**

*PEI Human Rights Act*

*Janzen v. Platy Enterprises* [1989] 1 SCR 1252

*Manitoba v. Manitoba Human Rights Commission*, 1983 CanLII 2967 (MB CA)

*Matheson v. HRC*, 2001 PESCTD 88 (CanLII)

*Moore v. British Columbia (Education)*, [2012] 3 SCR 360, 2012 SCC 61.

*Torres v Royalty Kitchenware Ltd.*, 1982 CanLII 4886 (ON HRT)

*Ms. K v. Deep Creek Store and another*, 2021 BCHRT 158 (CanLII)

*Ayangma v FLSB & ELSB*, 2019 PECA 22 (CanLII)

## **INTRODUCTION**

1. The Complainant, Kimberley Milligan, (hereinafter referred to as “the Complainant”), currently resides in Saskatchewan, however, during the time set out in the complaint she was a resident of PEI and was an employee of the Respondent. She worked as a server.
2. The Complainant filed a complaint with the PEI Human Rights Commission (Commission) on October 26, 2018, alleging that she was discriminated against in the area of employment on the ground of sex. Her complaint includes allegations of ongoing and continuous sexual harassment at work between April 2017 and April 9, 2018. She also alleges she was fired from her job (on April 9, 2018) because of her complaints about sexual harassment in the workplace.
3. The Respondent, MacZak Holdings Ltd. carrying on business as Smitty's Family Restaurant, (hereinafter referred to corporately and collectively as “Smitty’s”), is a restaurant operating in Charlottetown. The owners of the business at the relevant time were Cindy MacDonald, now deceased, Angela Flood (hereinafter referred to as “Angela”), and Melanie Parker (hereinafter referred to as “Melanie”).
4. The Respondent denies that there was sexual harassment in the workplace, or that at least they did not know about it, and alleges that the Complainant was laid off due to a lack of work.

5. The Human Rights Commission Executive Director Delegate conducted an investigation and the matter was referred to a Panel Hearing.
6. The panel convened for 3 days - May 30, 31 and June 27, 2023.
7. The panel heard from eight witnesses and received as evidence a Joint Book of Documents, an Additional Book of Documents submitted by the Commission and additional documents from the Complainant which included a copy of the Respondent's written response to the Complaint and additional clearer versions of documents in the other exhibits. Opening and closing arguments were heard from all parties to this complaint.
8. Apart from the Complainant, all other witnesses were current or former staff or owners of Smitty's. The Panel did not hear evidence from the two individuals who were alleged to be the primary perpetrators of the sexual harassment.
9. The headings in this decision are for convenience only.

## **BACKGROUND**

10. From October 2017 to January 2018 the Complainant alleges that she was subject to sexual harassment from several male employees and one regular male customer. The primary employees who were alleged to be harassers were Dwayne Hawkes, (hereinafter referred to as "Dwayne"), a cook and assistant manager and Jody Perry, (hereinafter referred to as "Jody"), a cook and kitchen manager.
11. The Complainant stated that management was unresponsive when she reported the behavior.
12. She alleged that she witnessed incidents of sexual harassment happening to other female employees and stated that management was unresponsive when they witnessed or had knowledge of the behavior.
13. The Complainant's allegations include sexual comments, sexual joking and innuendo, use of derogatory language and sexual touching.
14. The Complainant alleged that she reported the sexual harassment she experienced and witnessed on multiple occasions to Cindy McDonald, Melanie and Angela the three owner operators and management of Smitty's at the time. The Complainant alleged that all of the three owner operators failed to act following her reports.
15. According to the Complainant she took a medical leave of absence from work January 5th, 2018, to April 9th, 2018, because of the impact the sexual harassment had on her mental and physical health. She was medically cleared to return to work on April 9, 2018.

16. Smitty's terminated her employment on April 9, 2018.
17. The Respondent denies there was sexual harassment at Smitty's. They indicate the Complainant never spoke to any of them about it. They offer a non-discriminatory explanation for the lay off based on shortage of work at the time.
18. Witnesses who did testify in addition to the Complainant were:
  - a. Sharon Banks who worked for Smitty's for close to 40 years as a server or hostess,
  - b. Dawn Marie Tompkins, a server at Smitty's for about 8 years,
  - c. Angela started working at Smitty's in 1996 and for a while including in 2017 and 201 she was part owner. She left Smitty's in 2019,
  - d. Amy Keefe ("Amy") a server at Smitty's since 1995 or 1996,
  - e. Melanie who worked at Smitty's since 1993, including as Assistant Manager, has been a co-owner since 2004, and
  - f. Jamie MacDonald, a current co-owner of Smitty's.

## **ISSUES**

19. Did the Complainant experience discrimination in employment contrary to Section 6 (1) of the Human Rights Act (*Act*):
  - a. *by being sexually harassed at work?*
  - b. *when she was terminated from her employment?*
20. If yes, can the Respondent justify or defend the discrimination?
21. If the Panel finds discrimination, what is the appropriate remedy?

## **DECISION**

22. For the reasons set out below I find that:
  - a. The Complainant did experience sexual harassment in the workplace amounting to discrimination in her employment on the ground of sex.
  - b. The Complainant did not establish a link between the sexual harassment and her termination of employment.
  - c. The Respondent can not justify or defend the discrimination.
  - d. The appropriate remedy is set out at the end of the decision.

## ANALYSIS

23. Subsection 6(1)(a) of the *Act* protects employees from discrimination in employment:

*(1) No person shall refuse to employ or continue to employ any individual  
(a) on a discriminatory basis, including discrimination in any term or  
condition of employment [.]*

24. Sex is a ground of discrimination as contained in the definition of discrimination under subsection 1(d) of the *Act*. Although not set out in the *Act*, harassment in relation to any ground in the *Act* (including sex) can amount to discrimination in relation to the conditions of employment.

25. It has been recognized that sexual harassment is a form of discrimination based on sex:

*As noted earlier, the argument that sexual harassment is sex discrimination has been recognized by a long line of Canadian, American and English (see *Porcelli v. Strathclyde Regional Council*, [1985] I.C.R. 177 (E.A.T.-Scot.), *aff'd* [1986] I.C.R. 564 (Ct. of Session)) cases which have found sexual harassment to be sex discrimination.<sup>1</sup>*

26. Sexual harassment is not specifically defined in the *Act*, however, the Supreme Court of Canada stated:

*Without seeking to provide an exhaustive definition of the term, I am of the view that 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.<sup>2</sup>*

27. In the Respondent's pre-hearing brief at paragraph 18, Counsel argued that sexual harassment is not specifically defined in the *Act* and "*the Panel is not able to "create" discrimination outside of its governing statute.*"

28. This argument was not brought forward during the panel hearing and in opening remarks counsel for the Respondent accepted that the test for sexual harassment is as set out by Commission Counsel.

29. This Panel accepts that sexual harassment in the workplace can create adverse job-related consequences in the conditions of employment amounting to discrimination and is understood to be included in the definition of sex discrimination in the *Act*.

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<sup>1</sup> *Janzen v. Platy Enterprises* [1989] 1 SCR 1252 at para 66.

<sup>2</sup> *Janzen v. Platy Enterprises* [1989] 1 SCR 1252 at para 56.

**Did the Complainant experience discrimination in employment contrary to Section 6 (1) of the Act by being sexually harassed at work?**

30. The Complainant provided testimony about ongoing sexual harassment at her place of employment. She testified that Dwayne was the main perpetrator but not the only one. She also testified that Jody frequently told sexual jokes and made sexual comments. Jody got worse after Dwayne was hired. She said Jody told her he thought it was funny and it was to make people have a good day. She testified that she told him he went over the line.
31. I do not intend to review each specific incident described by the Complainant but will review some of them below.
32. The Complainant testified that there was a daily, constant talk which included sexual comments and innuendo. She described that at least three times in 2017 Dwayne rolled a piece of bacon, put it in his mouth and let it drop and said, "I'm ready for you". She also testified that one or more occasions he put a sausage near his pants with his zipper down and said: "*here jump on*".
33. She testified that Jody participated or saw many of these things and that she did not always report it to one of the owners. She indicated since a manager saw these things, she did not believe it was necessary to report it. She indicates she did tell Melanie about some incidents and no action was taken by her or the other owners.
34. Some of the behavior the Complainant testified about happened prior to October 26, 2017. Although outside the one-year limitation period they provide context to the incidents that occurred within the limitation period and in some cases would be included as part of the allegations under the principle of continuing contravention, which would mean they could still be considered as part of the harassment within the time limit of the Act, as long as the last incident was within time.

*To be a "continuing contravention", there must be a succession or repetition of separate acts of discrimination of the same character. There must be present acts of discrimination which could be considered as separate contraventions of the Act, and not merely one act of discrimination which may have continuing effects or consequences.*<sup>3</sup>

*There is no such reference to continuing contravention in the P.E.I. Human Rights Act. However, this can be implied from the statute.*<sup>4</sup>

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<sup>3</sup> *Manitoba v. Manitoba Human Rights Commission*, 1983 CanLII 2967 (MB CA) (paragraph 18)

<sup>4</sup> *Matheson v. HRC*, 2001 PESCTD 88 (CanLII) (paragraph 25)

### Walk-in Freezer Incidences

35. The Complainant testified that there were approximately six incidents where Dwayne followed her into a walk-in fridge or freezer, say inappropriate things and physically grab her. She describes these incidents as follows:

- a. First week of October 2017 Dwayne followed her into the walk-in freezer and commented that he still remembered what she was wearing at a Christmas party, which had happened 10 months earlier, and told her he thought she was feisty and was interested in pursuing her. He grabbed her and hugged her with her arms up and he had his back to the door, she told him to get off her. There were no witnesses. She said she told Melanie and no action was taken.
- b. Approximately two weeks later he again followed her into the walk-in freezer, and he grabbed her and rubbed his body against her. He said things like he was glad they were friends again. He would do these things in the walk-in freezer where there were no witnesses or cameras.
- c. In early November 2017, Dwayne followed her into the walk-in fridge, grabbed her and started talking to her. She did not recall a lot of details about what he said but believes the comments would have been about being friends. She tried to tune him out so she could go back to do her work as a server. She told Jody and Angela.
- d. Another date in November 2017, there was a 4<sup>th</sup> incident. She was in the walk-in fridge and was bent over to get lemons from a box near the floor and he approached her and rubbed his penis against her “ass” pretending to grab something over her. She told Jody and it was obvious that she was upset. She told Angela the next day.
- e. Another incident in December 2017, again in the walk-in freezer, he grabbed her. She says it was not a hug, he was groping her, the front of his body was up against the front of hers, it was not mutual, he was holding her there and she could not move. She told Angela who said the Complainant had a bad attitude and that since it is a “he said - she said” there was nothing they could do. The Complainant suggested she check the cameras – and then they could see her demeanour (how upset she was) when she walked out of the freezer. The Complainant asked if she needed to start taking a weapon with her. She said she was not expecting him to be there and was afraid to go in and get ice.
- f. Another incident in December 2017, Dwayne followed her into the walk-in fridge with similar behaviour. She indicated she had asked Eric (a cook) to keep an eye out for Dwayne following her in but he did not. She said, “I lost my mind, I could not take it anymore”. She told Melanie and Angela.

36. These were incidences where witnesses physically could not see the harassment taking place. The Complainant testified that “he blocked the entrance of the walk-in freezer...”. The main perpetrator of the unwanted harassment, Dwayne, often chose areas of the restaurant that were not in direct view of any witnesses.
37. It is not surprising that there were often no witnesses to the sexual harassment incidents. The perpetrators of sexual harassment choose their victims and choose where the harassment takes place. Victims who are often already vulnerable persons, provide perpetrators with an easy target and they often subject the victim to sexual harassment where others cannot see the actions taking place.
38. The Complainant testified she was concerned daily about how work would go. At the same time, she was afraid of losing her job which she relied on both for her salary and tips. She was afraid for her safety. She would tell Melanie her concerns and Melanie would respond with either she was free to leave, or it is a “*he said - she said*” situation so if they did not see it, there was nothing they could do. She described an incident where Dwayne threatened to leave work and Melanie said they had no cook to cover for Dwayne, so he needed to stay at work. This made the Complainant expect they would side with him and not her.
39. Melanie denied being told about these incidents. She indicates if she was told about this she would remember.
40. The Complainant acknowledged that she had a difficult upbringing and was going through significant stress in the home environment. The toxic work environment triggered and reignited issues for her and was adding to the stress of her home life as she testified that she could not tell her husband for fear of what he might do to protect her. As a result of the stress in her life, which was at least partially a result of the toxic work environment, the Complainant had to leave her job and take a sick leave on January 5, 2018.
41. She was ready to return to work on April 9, 2018, when she was laid off from her position. She never returned.
42. The Complainant also testified there were incidents with other staff, including her stepdaughter Alecia T (hereinafter called “Alecia”). She saw Alecia come out of the walk-in freezer upset. At first the Complainant did not understand why but when things started happening to her she understood. On another occasion, she heard Dwayne call Alecia a “slut”. The owners were also aware of an allegation of a serious incident that happened off site between Dwayne and Alecia.
43. There was supporting evidence by the Respondent’s witnesses that Dwayne was inappropriate with Alecia on at least three occasions, one off site and two while at work. One occasion related to a walk-in freezer. The evidence was in a letter signed by Alecia and



entered as Exhibit 1 Tab 17. Angela testified that she helped prepare this letter which is supported by the evidence at Exhibit 1 Tab 18.

44. Even though Smitty's was aware of a serious allegation (sexual assault) by the kitchen manager on a cook working in the same kitchen (Alecia) they continued to schedule the two of them to work some of the same shifts, but "not alone". Because the assault was alleged to have happened outside of work functions, they did not seem to think there was anything they could do to protect their staff.
45. Melanie was clear in her testimony that incidences outside of work between employees was not the business of the employer. This demonstrates a lack of awareness of an employer's responsibility to their employees.
46. On cross examination by Commission Counsel, Angela said that Alecia never told her that Dwayne pushed himself into her at the grill and that made her uncomfortable. She also said Alecia did not tell her about an incident in a walk-in fridge. On being directed to Exhibit 1, Tab 17 she acknowledged she did know about these. She said there were a "*lot of things I remember and a lot of things I forget because it has been a while*".
47. In relation to Alecia and Dwayne, Angela said they both told a story and there was not much they could do with that. She said that Dwayne was told not to talk to Alecia and Alecia was told not to talk to him, and they did not work together after that. The letter (Exhibit 1 Tab 17), however, says they did not work **alone** together. This supports the conclusion that in 2017-2018 Smitty's knew there was at least some sexual harassment happening by Dwayne.
48. On cross examination by the Complainant, Angela admitted that she helped write this letter.

#### Customer Behaviour Incidences

49. In addition to sexual harassment by co-workers and managers, the Complainant also testified to sexual harassment by a regular customer of Smitty's. Most of the witnesses agreed that a particular customer (LM) would frequently ask for hugs from servers and that this was an ongoing situation in the restaurant. The Complainant testified that this was unwelcome by her and by others but that there was a pressure or expectation to comply with his requests or to spend time "socializing" with him when it was not too busy.
50. Smitty's employees testified about LM wanting hugs as follows:
  - a. Sharon Banks said she did not recall anything about it.
  - b. Dawn Marie Tompkins said she did not recall.
  - c. Angela agreed LM would ask for hugs but says if the "girls" did not like it they were free to say no. She acknowledged some "girls" were not comfortable with it.
  - d. Amy Keefe remember LM hugging at least 2 other staff.
  - e. Melanie agreed that some of the servers would sit and talk with LM and others would not. She indicated sometimes she would as well.

51. Allowing a customer to seek hugs from staff is a form of sexual harassment and it contributed to creating an unsafe workplace environment for employees. This behaviour which was happening in the workplace was allowed and not seen as an issue by Smitty's.
52. The owners handling of customer LM towards their staff showed their collective lack of experience, knowledge and ability to deal with harassing behaviour. Leaving the decision to individual staff whether to hug or not hug LM proved their inability to recognize or respond to sexual harassing behaviour.
53. All of the Smitty's employee witnesses confirmed that there was no sexual harassment policy or training at Smitty's.
54. In terms of other evidence from the witnesses, they offered little to the analysis. In very brief summary:
  - a. Sharon Banks indicated neither Dwayne nor Jody made her uncomfortable at work. Most of her answers were that she did not recall, although she did recall inappropriate text messages from Kerry M to the Complainant.
  - b. Dawn Marie Tomkins remembered Alecia telling her about something that happened at home. When asked about specific incidents that the Complainant testified to (including LM asking for hugs) she consistently answered she did "not recall". She did, however, describe Jody as flirtatious and complimentary – including saying things such as "good thing you are so cute", which, if unwelcome, could be further incidents of sexual harassment.
  - c. Jamie MacDonald had no relevant evidence relating to the allegations at this hearing.
55. For there to be a finding of discrimination, the Complainant must establish on the balance of probabilities that she experienced sexual harassment in the workplace. The Complainant's evidence was difficult to hear. She was upset and angry during her testimony. At the same time, she clearly articulated specific incidents with details about what happened to her or others. I could see her frustration in hearing from other witnesses that she believes witnessed incidents, testifying by answering "I don't know" or "I don't recall" to those questions.
56. The other witnesses either denied the allegations or said repeatedly "I don't recall". To be fair to the witnesses, the things the Complainant testified about did not "happen to them" and, therefore, may not be so memorable as to the Complainant. In addition, there has been a significant passage of time which may impact the memory of the witnesses who were not personally affected, yet the memories may remain strong in the victim. The frequency of witnesses answering "I do not recall" or similar responses leads one to question the reliability of that evidence.
57. Certain elements of the Complainant's testimony were confirmed by the testimony of the other witnesses, for example, LM asking servers for hugs. In addition, the Complainant

testified that Kerry M sent her inappropriate sexual text messages and that she did address this with management. Many of Smitty's witnesses confirmed that this happened but indicated that Kerry M had been dating another person named Kim and had mistakenly sent the messages to the wrong person. He apologised for his behaviour. While the Complainant does not believe this is why or how this happened, she has no evidence to prove that he did intend to send the messages to her. I accept this may have been a mistake, however, the evidence about the text messages supports the Complainant's ability to report on what happened to her is reliable and supported by other evidence in cases where the behaviour can be explained or excused.

58. In addition, Angela confirmed in her testimony that Aleshia reported to her a situation that occurred in the walk-in freezer with Dwayne in 2017 consistent with what the Complainant's testimony about such an incident.
59. The reliability of the other witnesses' statements measured against the clarity of descriptions during the complainant's testimony, weigh in favour of the complainant. In addition, it is apparent that the owners did not understand sexual harassment or know how to handle it as evidenced by the following examples:
  - a. not seeing the issues with LM as potential sexual harassment and leaving it to staff with no training to deal with it on their own,
  - b. saying they could not respond to an allegation of sexual harassment because it was he said-she said type situation; not investigating or dealing with it essentially means they accept what the perpetrator says, and
  - c. suggesting they could not deal inside the restaurant with anything that happened outside the restaurant even when they knew that meant leaving a potential victim of a sexual assault to work the same shifts as the perpetrator although after being told of an incident in a walk-in freezer Dwayne was apparently "*warned to leave [Alecia] alone and they made it so we never worked alone together*"<sup>5</sup>.
60. If the witnesses did not see the behaviour as significant or it did not happen to them, they might be less likely to remember it than one who did experience it and was upset by it.
61. Melanie indicated she never received any complaints about inappropriate touching, and she would remember if she did get such a complaint. She agreed rubbing up against another employee in was not allowed. However, according to Exhibit 1, Tab 17, which Angela helped Alecia prepare, Melanie was aware of this kind of incident happening with Alecia.
62. Melanie was also evasive when asked about how she would handle a situation if she was assaulted by a staff member outside of the work context. She responded with answers such as "I would do the right thing", "I assume I would file a police report".

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<sup>5</sup> Exhibit 1, Tab 17

63. The Respondents may not have seen issues or may not have known how to deal with the issues (or may not have wanted to deal with them) but they are still responsible. This combined with having no policy or training allowed sexual harassment to be normalized and become part of the work culture.

64. Applying the Moore<sup>6</sup> test to this case, I find on a balance of probabilities that:

- a. The Complainant has a characteristic protected under the PEI *Human Rights Act*, namely her sex.
- b. She suffered an adverse impact during her employment at Smitty's in that she experienced sexual harassment by other co-workers and or managers. This took the form of having to work in an environment which included unwelcome conduct of a sexual nature and included sexual touching on more than one occasion. This work environment led, at least in part, to ongoing mental health issues for which she required a medical leave, which is a job-related consequence for her.
- c. There is a link between her sex and the job-related consequences.

**Did the Complainant experience discrimination in employment contrary to Section 6 (1) of the *Act* when she was terminated from her employment?**

65. The timing of the Complainant's return to work and her being laid off is suspicious, however, there is not clear evidence that the lay off was connected to the sexual harassment in the workplace.

66. Clearly the Complainant believes that they are connected but she offered no evidence other than her belief and the timing to establish the link. The Records of Employment found in Exhibit 1 at Tabs 10-13 show the Complainant started working at Smitty's in 2002. The nature of the hospitality and restaurant industry often has long-time staff working on and off over several years with the same employer. The four ROEs show that the Complainant had many years of this type of employment with Smitty's.

67. Based on the evidence, I cannot find that the Complainant has established that she was fired from her job for a discriminatory reason. The lay off cannot be clearly connected to her experiencing or reporting sexual harassment in the workplace.

**Can the Respondent justify or defend discrimination?**

68. The Respondent did not offer any evidence of a justification or defence to the discrimination other than to say it did not happen.

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<sup>6</sup> *Moore v. British Columbia (Education)*, [2012] 3 SCR 360, 2012 SCC 61

## What is the appropriate remedy?

69. Having found discrimination in the working environment I must now determine the appropriate remedy.
70. In a workplace situation, employers can, both by accident and design, create an environment where sexual harassment can occur. Sometimes actions are not seen as those attributing to an unsafe environment for employees but the workplace becomes a “poisoned” environment which allows sexual harassment to happen without consequence. These words from the Ontario Human Rights Commission are instructive:

*“When deciding if sexual harassment has happened, human rights tribunals look at the impact the conduct had on the person, and whether this had a discriminatory effect. The intention of the harasser does not matter. A lack of intent is no defence to an allegation of sexual harassment.*

*When deciding if an organization has met its duty to respond to a human rights claim, tribunals are likely to think about: • the procedures in place at the time to deal with discrimination and harassment • how quickly the organization responded to the complaint • how seriously the complaint was treated • the resources made available to deal with the complaint • if the organization provided a healthy environment for the person who complained.”*

71. In this case, there were no procedures in place to deal with harassment. Smitty’s did not respond to the concerns raised by their employees in a timely or appropriate manner, the complaints were not taken seriously, and it was not a healthy place for the Complainant.
72. The sexual harassment consisted of sexual comments, sexual joking and innuendo, use of derogatory language and sexual touching directed at the Complainant as well as other female employees.
73. Combined with no policy or training about sexual harassment and no active responses to complaints by the owners, the working environment at Smitty’s was unsafe for staff and ripe for exploitation.
74. *Torres v Royalty Kitchenware Ltd* set out some of the considerations to determine damages in sexual harassment cases including:
- a. the nature of the harassment (verbal or physical)
  - b. the degree of aggressiveness and physical contact
  - c. the duration of the harassment
  - d. the frequency of the harassment
  - e. the age of the victim
  - f. the vulnerability of the victim

g. the psychological impact of the harassment.<sup>7</sup>

75. In this case, the behaviour included:

- a. Verbal harassment and physical touching.
- b. The degree of aggressiveness and physical contact is difficult to measure on a full spectrum but was certainly more than minimal.
- c. The physical touching continued over a period of 3 months with the verbal harassment lasting longer.
- d. The Complainant testified that some of the behaviour was daily and that she was always fearful of what would happen.
- e. The Complainant was 43 years of age, the age difference between she and Dwayne is unknown.
- f. She was a vulnerable target as the result of previous trauma she experienced, unrelated to her workplace.
- g. She was required to take a three-month medical leave and she testified that the impact of these experiences continues to this day.

76. The Respondent did not take appropriate action. In some cases, they say they did not know but the perpetrators, while not owners, were in management positions and the employer has a duty to know and either did know or should have known what was going on. Employers are responsible for what happens in their business.

77. The adverse impacts of the sexual harassment on the Complainant were profound. The medical reports contained in the Book of Additional Documents confirm the Complainant sought medical help from February 2018 to November 2019 to deal with her trauma of experiencing workplace sexual harassment. The fact that she may have had other trauma or difficulties in her past does not displace the fact that she was a vulnerable woman who suffered as a result of the actions of the perpetrators and her employer's lack of action in not maintaining a safe working environment for all of their employees.

78. Counsel for the Respondent argued that not everything that happened to the Complainant was "Smitty's fault". While that may be true in terms of what happened to her in her youth, they are responsible in relation to what happened to her at Smitty's, including how it may have triggered issues from her youth. The impact of sexual harassment can vary from person to person and when assessing damages, it is necessary to look at how it impacted this person.

79. It was also clear from her evidence that what happened at Smitty's and the employers lack of response to it continues to have an impact on her mental health.

80. The Panel has considered the cases outlined in the Commission's brief in relation to appropriate remedies.

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<sup>7</sup>*Torres v Royalty Kitchenware Ltd.*, 1982 CanLII 4886 (ON HRT) paragraph 165

81. No two cases are identical. Awards for sexual harassment are on the rise and according to *Ms. K v. Deep Creek Store and another*<sup>8</sup>, “recent cases involving discriminatory harassment and/or the termination of a person’s employment have led to injury to dignity awards in the range of \$15,000 to \$40,000”.

82. The *Act* sets out the powers of a Human Rights Panel if it finds merit in the complaint in subsection 28.4(b):

**28.4 Powers of Panel**

**(1) A Human Rights Panel**

(b) may, if it finds that a complaint has merit in whole or in part, order the person against whom the finding was made to do any or all of the following:

- (i) to cease the contravention complained of;
- (ii) to refrain in future from committing the same or any similar contravention;
- (iii) to make available to the complainant or other person dealt with contrary to this Act, the rights, opportunities or privileges that the person was denied contrary to this Act;
- (iv) to compensate the complainant or other person dealt with contrary to this Act for all or any part of wages or income lost or expenses incurred by reason of the contravention of this Act;
- (v) to take any other action the Panel considers proper to place the complainant or other person dealt with contrary to this Act in the position the person would have been in, but for the contravention.

83. These powers were interpreted by the PEI Court of Appeal which stated:

*“in my view the HRC's interpretation of s.28 to allow it to award monies for mental anguish, humiliation, affront to dignity or emotional injury, as they have been doing for the past 30 years, is sound.”*<sup>9</sup>

**ORDER**

84. Considering all of the above this Human Rights Panel Orders the Respondent Smitty’s to pay to Kimberley Milligan the sum of Fifteen Thousand Dollars (\$15,000) in general damages for mental anguish, humiliation, affront to dignity and/or emotional injury. This payment is to be made to the Complainant within 45 days of this decision. The Commission will facilitate the delivery of the payment to the Complainant.

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<sup>8</sup> 2021 BCHRT 158 (CanLII)

<sup>9</sup> *Ayangma v FLSB & ELSB*, 2019 PECA 22 (CanLII) (at paragraph 118)

85. In addition, the Human Rights Panel orders that the Respondent Smitty's forthwith provide the Human Rights Commission a copy of its Harassment Policy and accept direction, if any, from the Commission as to any recommended changes to the content of the Policy.

86. Smitty's shall provide, at their cost, sexual harassment training for all of their staff in a form which is satisfactory to the Human Rights Commission within 4 months of the date of this Order. In addition, all owners, managers and assist managers of Smitty's shall be required to take sexual harassment training on an annual basis for three consecutive years and Smitty's shall bear the costs of the training.

87. There is no order for legal costs.

Dated at Charlottetown, Prince Edward Island this 29th day of September 2023.



Joanne Ings, Panel Chair