OFFICE OF ARBITRATION

#269

IN THE MATTER OF THE ONTARIO HUMAN RIGHTS CODE, STATUTES OF ONTARIO, 1981, CHAPTER 53, AS AMENDED

AND IN THE MATTER OF a complaint by Ms. Myrtella Cuff, of Toronto, Ontario against Gypsy Restaurant, Its Servants and Agents, and Mr. Emile Abi-ad.

BOARD OF INQUIRY

A.F. Bayefsky

Appearances

Ms. Luba Kowel	Counsel for the Ontario Human Rights Commission
Mr. Ansis Semenovs	Counsel for the Respondent, Gypsy Restaurant, Its Servants and Agents, and Mr. Emile Abi-ad.

Hearings were held November 10, and 11, December 3, 1986, and January 12, 1987 in Toronto, Ontario.

This inquiry concerns a complaint by Ms. Myrtella Cuff against Gypsy Restaurant, Its Servants and Agents and Mr. Emile Abi-ad. The complaint alleges that Mr. Abi-ad, the operator of Gypsy Restaurant and Ms. Cuff's employer, denied Ms. Cuff equal treatment on the basis of sex with respect to her employment contrary to subsection 4(1) and section 8 of the Ontario Human Rights Code, 1981, c.53, as amended, and harassed Ms. Cuff while she was his employee because of sex contrary to subsection 6(2) of the Code. The complaint further alleges that Mr. Abi-ad made sexual advances toward Ms. Cuff contrary to paragraph 6(3)(a) of the Code, and carried out a reprisal by firing Ms. Cuff contrary to paragraph 6(3)(b) of the Code.

THE FACTS

At the time of the events relating to this complaint, Myrtella Cuff, was 22 to 23 years old: a single, black woman, who had moved to Canada from Jamaica 9 or 10 years earlier. She is now confined to a wheelchair as a result of a motor vehicle accident which took place six months after her complaint was made to the Human Rights Commission. Emile Abi-ad, (hereinafter "the respondent"), was a 42 to 43 year old, married man with one child.

Mr. Abi-ad operates Gypsy Restaurant, a Hungarian fast food outlet located in the Village by the Grange mall at 105 McCaul Street in Toronto. The restaurant provides only take-out or over-the-counter service, patrons eating elsewhere on tables provided within the mall. Mr. Abi-ad opened the business with

his wife in 1981 and began hiring employees in 1982. They have both worked at the restaurant since that time, although Mrs. Abi-ad has taken some periods of time off.

Mr. Abi-ad hired Ms. Cuff on October 17, 1982. Her pay was $4.00 an hour. She obtained the job through an advertisement for part-time work placed with Manpower. She worked different hours and different shifts over the course of her employment. She worked a number of evenings each week from 5 p.m. to 8:30 or 9 p.m., and sometimes she also worked Saturdays and Sundays during the day.

There is a dispute between Ms. Cuff and Mr. Abi-ad concerning the number of hours which the complainant worked. The respondent required an employee to sign a receipt before receiving any pay. The respondent passed the receipts on to his accountant, Mr. John Derry, who copied them on to a record of employment. I find that these receipts, together with the employment record, and the T-4 slip for Ms. Cuff's work in 1983, present an accurate picture of the number of hours which she worked.

I conclude that the complainant worked 1 or 2 nights per week in the months of October and November 1982, 1 to 3 nights per week in December 1982, 2 to 3 nights and/or an occasional Saturday or Sunday per week in January 1983, 2 to 3 nights and a Saturday or Sunday per week in February, 3 nights and both Saturday and Sunday per week in March, few or no hours during April, and 2 to 3 nights and an occasional Saturday or Sunday per

week in May 1983. The average number of hours which the complainant worked per week from October 1982 to May 1983 was as follows: October 1982 - 2.5 hours, November 1982 - 3.5 hours, December 1982 - 7 hours, January 1983 - 9.4 hours, February 1983 - 13.6 hours, March 1983 - 21.9 hours, May 1983 - 14.4 hours.

Her job consisted of food preparation, the service of customers over the counter and the operation of the cash register. When the complainant worked the evening shift on any evening except Friday, and when she worked on Saturdays and Sundays, she worked only with the respondent. On Fridays evenings she worked only with the respondent's wife. On any weekday in which the complainant filled in, she worked with Mr. Abi-ad and either his wife or another employee. The complainant therefore worked primarily alone with the respondent. There were no witnesses other than Ms. Cuff and Mr. Abi-ad to the events alleged to have taken place between them which form the basis of the complaint.

With respect to the issue of sexual harassment and the behaviour of the respondent toward Ms. Cuff, the complainant's testimony was as follows.

Ms. Cuff testified that from the outset Mr. Abi-ad would comment on female persons who passed by the restaurant. Sometimes he would say whether they were pretty or not; other times he would make more "unpleasant" comments such as "she is a living whore" or "oh, she makes me so horny". He would often say "I am so horny,...I am so hot". These comments would be made

frequently and in the complainant's words "there would always be something dirty coming out of his mouth".

The complainant's reaction to these comments, which she found to be "unpleasant", was not to say anything "because I don't think it was my business as long as he wasn't saying anything about me."

The precise dimensions of the restaurant were disputed but the layout consisted of a U-shaped counter backing on to a wall of the building. Food was served over the counter, which was approximately 3 feet high. In the center of the enclosure, formed by the counter and the wall, was a food preparation table around which employees circulated in preparing food and serving over the counter. The spaces between the table and the counter were referred to in the evidence as "aisles". While the width of the aisles was subject to dispute, the complainant testified that when the respondent passed her in the aisles he would make a habit of purposely rubbing up or squeezing himself against her, and sometimes squeezing her breasts.

The complainant's response would be: "sometimes I would say to him that -- you are embarrassing me, or I would ask him if he doesn't see the rest of the folks around looking at him and things like that."

After the complainant was employed for 2 or 3 months, the respondent asked her for "a blow job". The first time she ignored his request. He repeated it on another occasion and added that "he would pay money". She testified that she did not

know what a "blow job" was and asked him in response: "how much money does he pay, and...to explain what it was". When he told her she "said to him that was gross, and he said, that's how black people make their living, by doing blow jobs." The complainant testified that this incident made her furious "and from then I started taking [it] more seriously" but that she said nothing else in response to the respondent's remark.

In addition to this particular incident, the complainant testified that the respondent frequently asked her to give him a massage, which she assumed to be a shoulder massage.

She remembered responding to him by saying "massage is your wife's job, not mine".

The complainant recounted one further specific incident which occurred in February of 1983. One evening when she was preparing to go home, about 9:00 p.m., and there was no-one else in the building, the respondent turned the light off, blocked her exit from the restaurant and "grab hold of me, and he asks me to make love to him."

She responded by saying "no, I couldn't do that because you have your wife at home, and I said, also, how could you ask me to make love to you and then go home and tell your wife you love your wife? That would be a lie you would be telling your wife."

He then "said, would you kiss me". Her response was "no, I couldn't do that either...will you please let me go". The respondent then said "if you promise not to tell my wife. So, I said, you have to also promise me something too. You have to

promise me you won't do it again. So, he said, okay, I won't do it again."

The complainant recounted her emotional reaction at the time to this incident in the following way: "I didn't know what he was going to do if I -- what he was up to or anything, and he seems like a very desparate man at that time, so I was very scared." Ms. Cuff returned to work following this incident. She said she was angry but that "he said he wasn't going to do it again anyway, so I just let it pass by."

The complainant further recalls telling the respondent that "I am going to let you spend a night in jail"; she could not recall whether she told the respondent this at the time of the February incident or upon her return to work after an absence due to illness.

At the end of March she had a tooth removed and complications resulted in her being off work for approximately one month. She telephoned the respondent to advise him of her illness and he told her to call him when she was better. Near the end of April, the complainant telephoned Mr. Abi-ad to advise him she was available for work and he told her to come in that same evening. She returned to work substantially the same hours.

Upon her return, the respondent resumed rubbing against the complainant in the aisles of the restaurant and squeezing her breasts. He also continued making comments such as "I am so hot, or I am so horny". A few weeks after she returned, Ms.

Cuff "said to [the respondent] that I was a little bit tired of his jokes or whatever he was doing, and I was going to make a complaint to his wife...I told him that I was going to tell his wife about all he was doing all these days, weeks and months..." She said this to Mr. Abi-ad "because he had promised not to do it again in February, and then all of a sudden, he start all over again." The respondent subsequently told Ms. Cuff "not to come back because business was slow". The records indicate that her last pay date was Thursday, May 19, 1983. She did not thereafter work on Friday with the respondent's wife and thus had no opportunity to speak to Mrs. Abi-ad about the respondent's behaviour.

At the time, Ms. Cuff did not think that she had been fired. Business did not appear to be slow to her but "the boss...knows more than I do, so maybe, in fact, business was slow." She stated: "I think he was telling the truth then." Mr. Abi-ad never did call her and sometime in the late summer Ms. Cuff called the respondent herself, but did not reach him. She subsequently called back (testifying on one occasion that this second call was made a few days later, and on another occasion that it was made in November) and spoke to Mr. Abi-ad. He told her that he had some vacation pay for her and that she should come and pick it up. She did not ask Mr. Abi-ad about work for herself during their conversation. Ms. Cuff received a termination slip in the mail in October of 1983 and at that point knew she had been terminated. She testified that she first went

to the Human Rights Commission in September or October of 1983. She went to Gypsy Restaurant to pick up her vacation pay sometime in November.

The termination slip, Exhibit 2, indicated the reason for termination was "fired-incompetent". The slip had been completed by Mr. John Derry, the respondent's accountant, on August 4, 1983. Mr. Derry indicated that he had used the word "incompetent" to describe the respondent's statement to him that the complainant "wasn't doing a good job". Mr. Derry did not recall whether he mailed the termination slip to Ms. Cuff or whether he gave it to Mr. Abi-ad to mail.

The respondent agrees that he did not tell the complainant she was fired in May. He agrees that he manufactured an excuse for letting her go, specifically telling her that business was "really slow...I will call you if I need you." He claimed he told her this because he "didn't want to hurt her feelings". He testified that he sent her a termination notice late because he only decided not to ask her back after determining that subsequent employees were better and that his accountant had been unavailable.

The fact that shortly after Ms. Cuff was told that business was slow, the respondent hired at least three other individuals, Ms. Lily Zomparelli, Ms. Angie Nuzzo and Ms. Anna Savo-Sardaro, indicates that business was not slow and that this was not the reason for letting Ms. Cuff go.

Ms. Cuff testified that the respondent never commented to her about her work performance and never complained to her about being slow. In cross-examination, however, she said that once or twice during the course of her employment the respondent said "speed up or something like that".

Between the time she last worked for the respondent and September or October 1983, when she began a Manpower training program, Ms. Cuff did not work. Nor did she look for work. She had signed up for the Manpower course in early 1982; at this time she was told that the waiting list was very long but she was certain she would eventually be admitted. She did not want a job which required her to work during the weekdays because she she did not want to be in the position of having to resign in order to attend the course. (She had in fact decided for the same reason prior to working for the respondent not to continue her registration with two employment agencies that sent her to temporary jobs during weekday hours; she wanted to be immediately available to enter the Manpower course.) She did not look for a job in the evening hours between May and September 1983 because until sometime in August she believed that the respondent would call her back "when business picks up". She was therefore prepared to go back to the restaurant throughout the summer, although she testified that she did not intend to work there part-time when attending school.

Despite the alleged occurrence of these various incidents and the on-going sexual comments and physical touching, Ms. Cuff

was always prepared to return to her job. She testified that "there was no pressure on the job", that she "could handle it"; in contrast to her previous jobs she did not need to be "on her feet for eight hours".

The respondent's testimony was inconsistent with much of the testimony of Ms. Cuff, and that of the witnesses called by the Commission. Mr. Abi-ad denied the allegations that he had asked Ms. Cuff for "blow jobs" and massages, that he had ever grabbed her and "told her to make love", that he ever purposely rubbed or squeezed against Ms. Cuff (or any other female employee), and that Ms. Cuff ever threatened to tell his wife about his behaviour. He stated that if he brushed by Ms. Cuff in the aisles it was only because the aisles were narrow and it was necessary for him to pass by.

The respondent not only denied the allegations of sexual advances and remarks made by the complainant and other witnesses who were former employees, but attributed such behaviour to his employees. During the course of the Commission's investigation, Mr. Abi-ad wrote the Commission a letter dated July 13, 1985. In the letter he states: "If I want to fool around I can go with customers of my business, I get a lot of offers but I turn them down. I think I am a very good looking guy and not desperate for women to resort to touching and harassing my staff." During his testimony Mr. Abi-ad made the following remarks. Concerning Ms. Cuff he stated: "She said, I don't like to do anything. I said, why? Don't you have a boyfriend or something: She said...that

she work for those fantasy call agency, and the one guy called once, and she's to take the call...and the guy told her on the phone, oh, oh, I am coming, I am coming, and things like that, and she was laughing, and I said, wow, that's something, that's interesting, and I laughed. I took it as a joke, and that's the only thing we ever mentioned about sex..." Concerning Ms. Maria Caravaggio, another previous employee, he stated: "...she started making the jokes. Emile, what did you do tonight? Did you fuck your wife? I said, please, don't talk like. This is not nice, you know...oh, did you do this? Emile, you want to fuck me? Here I am. She opens her legs, and I said, look, this not the time or place." When asked by his counsel if there was room to do any such thing as "blow jobs" in his restaurant, Mr. Abi-ad stated: "No...I had a girl once came for job, and she told me she can do it if I give her a job, and I said, look, I am not interested, and I didn't even take it." When asked whether or not he commented on female passersby, the respondent said: "If a good looking guy walks by, and he is tall and handsome, and so Anna [Savo-Sardaro] or Maria [Carravagio] or any of them, she looks at them, "Oh. I said, Anna, okay, please, you know, let's go to work. She said, oh, he is so good looking."

In other words, the respondent fancied himself to be "very good-looking" and to have received offers of sex from customers and women looking for employment. It was his female employees, 15, 16, and early 20 years old, who told sexually explicit

stories, who commented on the physical attributes of male passersby, and who made sexual advances towards him.

In fact, such suggestions and the respondent's manner of relating these supposed occurences, supports the complainant's testimony that "there would always be something dirty coming out of his mouth". His testimony about Ms. Cuff relating sexually explicit stories to him is inconsistent with his own view that Ms. Cuff "is very shy".

Mr. Abi-ad made a number of references to Ms. Cuff's colour. After commenting upon her poor work performance, he stated: "With respect to being black, I am not prejudiced. I like people from all nationalities, but then there is a limit." When asked why he did not let Ms. Cuff go sooner if she was incompetent he stated: "I didn't want to have a problem. She might say, oh, well he fired me because I am black or something..." In the July 1985 letter to the Commission he stated: "I am not going to be intimidated...by the ugliest girl I ever met in my life who is nothing but a lazy black bum who found an easy way to make money by using her weakness and fancy stories she learned from her previous job answering fantasy calls..." These statements of Mr. Abi-ad tend to support the truth of the complainant's statement that Mr. Abi-ad had told her that "black people make their living by doing blow jobs".

Mr. Abi-ad made the following comments with respect to Ms. Cuff's work performance. "She is always sick, and she always used to tell me, I can't work, I don't feel like it...she is not

able to work, and I say, well, fine. Then...I give her a chance." He claimed that her frequent illnesses meant that "she is off two, three days, five days, and she is back." Mr. Abi-ad also stated that she was a "very slow" worker and that he "warned her so many times about it." He also stated that he told his accountant, Mr. Derry, while he was filling out her termination notice, that "she is not good enough for the job".

However, the respondent's claim that Ms. Cuff was very slow and not good enough for the job is inconsistent with the fact that he steadily increased her hours of work from October 1982 to March 1983. It is inconsistent with the fact that he took her back in May as soon as she was available for work following her month long illness, although he had been able to hire another employee, Ms. Maria Caravaggio, in the meantime. And he did not substantially reduce her hours upon her return to work. It is also inconsistent with Ms. Cuff's uncontradicted testimony, that when she worked on Saturdays, Mr. Abi-ad sometimes told her to open up the restaurant and start business in his absence. Furthermore, her employment records do not indicate frequent work absences (due to illness for example) but rather that aside from the one month absence due to illness, she worked a steady (and increasing) number of hours per week.

The respondent did admit that he asked Ms. Cuff whether she had a boyfriend; he commented on the physical attributes of female passersby but not in a sexually explicit fashion or by using obscene language; he told "dirty jokes" (although he

variously could not remember, and denied, making them in the presence of the complainant), but only after asking the permission of an employee to relate them. In his words, with respect to "dirty jokes" made in the presence of employees such as Ms. Zomparelli, Ms. Caravaggio, Ms. MacIsaac, and Ms. Savo-Sardaro, he stated: "I say...you like to hear a dirty jokes? So I say, fine, sure, why not, and if they [say] no, I don't want to hear it, then fine, I stop." He admitted brushing against or squeezing by his employees in the aisles of the restaurant, but states that the contact was necessary because the aisles of the restaurant were too narrow to do otherwise. Of his behaviour with his staff he stated: "I joke around with them...and I...don't have any intention to go to bed with them or anything. I just like to be friendly..."

Four former female employees of the respondent, who had all performed the same job as the complainant, testified on behalf of the complainant concerning their experiences with Mr. Abi-ad.

The first was Maria Caravaggio. Ms. Caravaggio was 15 when she began to work for the complainant. She began in March 1983 and ended in August or September 1983. She generally worked alone with the respondent, part-time, in the evening hours and on weekends.

Ms. Caravaggio exhibited some confusion about the timing and circumstances of her departure from the job. I have taken this into account in weighing the accuracy of her testimony. In addition, the demeanour of the witness suggested that she

embellished her account of the respondent's behaviour, although it appeared to be essentially truthful.

Ms. Caravaggio testified about the respondent's behaviour that: "he used to make dirty comments about women that used to walk by in the restaurant, and he would say, oh, look at her legs, oh, she must be good in bed". "There were many times where he would ask for blow jobs. There were many times where he used to tell me what he did with his wife sexually". "This went on everyday. He would start making up these dirty jokes, really filthy. He would ask me who I would go to bed with, or if I walk in with a male friend of mine, it was like I was going to bed with this guy." "He tried to sit me on his lap at times." "[H]e had a stool that was next to his refrigerator that he would sit on occasionally, and as I tried to go by, he would grab me and sit me on his lap." "He touched me on the breasts, and he tried to kiss me." Concerning the frequency of these events, she testified they occurred "[w]henever I was working. If it's not one thing, it would have been another."

Ms. Caravaggio stated that her reaction was: "I tell him to get away. I would tell him to stop bugging me, but he never would." She also told "him to fuck off." On one occasion, near the end of her employment she stated: "there was once where he was just getting really bad, touching me, getting close to me, wanting to kiss me, and then I slapped him."

When asked why she kept going to work given the respondent's alleged behaviour, Ms. Caravaggio stated: "I just put up with

it." "I managed to put up with it...I needed the money." She looked for another job but "[i]t's kind of hard, at age 15, to get another waitress job at those [early evening] hours."

The second former employee of the respondent who testified concerning her experience with Mr. Abi-ad was Ms. Lily Zomparelli. Ms. Zomparelli was a very straightforward and unconfused witness.

Ms. Zomparelli was 16 when she worked for the complainant. She worked from the end of May 1983 to August 1983 from 5 p.m. to 9 p.m., two to three evenings per week. All evenings except Friday she worked alone with the respondent.

Ms. Zomparelli stated that the respondent would make comments "like 'squeeze me' when he would pass by. Instead of saying 'excuse me', he would say 'squeeze me'...He said that -- can I massage you, but I won't let him. He said dirty jokes. I just told him to get lost." Mr. Abi-ad's response when she told him to get lost would be to laugh. The respondent also "tried to touch my shoulders". In response, she "pushed him away". His reaction to that was to "start laughing".

These incidents happened every day. "It would be different things, but things -- something was always done." "[I]f we were not busy, it's slow, he would start with the comments." His attempts to touch her shoulders happened "[o]ccasionally. I wouldn't say on a regular basis, like the dirty jokes and the vulgar sayings."

Furthermore, "he said if you ever want to learn how to kiss, I can teach you." She responded by telling him "to get lost". He stated on another occasion, "I am a very attractive looking man. I said, right, Emile, dream on, and he said, don't you think I am attractive, and I said no, and he said, you are just jealous. Too bad there is not more than one of me to go around for all the women that want me."

Her reaction to his behaviour was to tell "him to F-off...I told him that I would hit him if he didn't stop continuing on, because I was really upset, and then he stopped, and then he would start again."

On one occasion when a special event required her to work in the evening with another employee, Angie Nuzzo, as well as the respondent, Ms. Zomparelli saw Mr. Abi-ad touching Ms. Nuzzo's shoulders.

When working on a Saturday with the respondent and his wife, Ms. Zomparelli observed that Mr. Abi-ad behaved differently. "He wouldn't say any remarks. He was just serious."

In August 1983 Ms. Zomparelli decided to leave the employ of the respondent. She told him that it was because she was returning to school, although she refused his request to work only weekends. Ms. Zomparelli testified that she left because:

> I felt it was getting out of hand...Anna [Savo-Sardaro] told me that...Emile [Abi-ad] said that Angie [Nuzzo] and Emile were having an affair, so I went to Emile's wife, and I told her, and then I spoke to Emile, and I kind of told him off, and then Emile said, why did you tell my wife, and I said, well why are you going around making up stories like that,

> because I know Angie. She is a good friend of mine, and then a while after that, Emile told me that he fingered Anna.

The respondent confirmed in his testimony that Ms. Zomparelli did tell his wife that "somebody made a rumour that I am having an affair with Angie". He stated that his wife thought it was a joke and he "was laughing too".

This was Ms. Zomparelli's first job. She looked for other work during the summer but had no success and was planning on returning to school in the fall in any event. She testified: "I really didn't know how far I could take this. Like if I were to go the authorities, I didn't know how far we would go, because I was only 16."

The third former employee of the respondent who testified concerning her experience with Mr. Abi-ad was Ms. Patricia MacIsaac.

Ms. MacIsaac was 20 years old and single when she began to work for the respondent. She was employed from approximately November 1982 until November 1983. She worked on weekdays from 10 a.m. until 5 p.m. She did not regularly work alone with the respondent.

Ms. MacIsaac recalled in some detail working with the complainant for three weeks during the day in October of 1982. However, both Ms. Cuff and the respondent testified that Ms. Cuff did not work days in October of 1982 and Ms. Cuff did not recall working with Ms. MacIsaac. Although this witness appeared to be frank and sincere, it is highly unlikely that she ever worked

with Ms. Cuff, although there was some suggestion that Ms. MacIsaac could have been working in the business next door to Gypsy Restaurant (which Mr. Abi-ad eventually bought) at the same time that Ms. Cuff worked at Gypsy. In addition, some of Ms. MacIsaac's testimony was admitted by the respondent and a witness testifying on his behalf. Overall, her testimony on the following events has not been relied upon heavily.

Ms. MacIsaac stated the respondent "would tell dirty jokes all the time. He would whisper in your ear. He would tell you dirty jokes in your ear so [Mrs. Abi-ad] couldn't hear what he was saying..." "[I]f he saw a pretty girl, he would say he would like to go to bed with her, but he wouldn't say it in that way. He would say he would like to fuck her."

The comments about passersby would be made about 10 to 20 times a day. As for the frequency of the dirty jokes, Ms. MacIsaac stated: "he would do it all the time, and if [Mrs. Abi-ad's] back was turned around, he would get right in there and do it to you".

Ms. MacIsaac testified that in general her reaction to the complainant's behaviour was to ignore it. "I could handle him, but his dirty jokes and his going by you...It wasn't all right...It was annoying", although she also stated: "I would tell him to mind his own business, and that if Yvette [Mrs. Abi-ad] heard him talk like that, what would she say."

Ms. MacIsaac stated that she quit working for the respondent because she could not get along with Mrs. Abi-ad.

The fourth former employee of the respondent who testified concerning her experience with Mr. Abi-ad was Ms. Angie Nuzzo. She was a frank and candid witness.

Ms. Nuzzo was 15 years old when she began to work for the respondent. Ms. Nuzzo was employed from July 1, 1983 to April 30, 1984. She worked primarily from 5 p.m. to 9 p.m., three evenings per week. She occasionally worked Saturday and Sunday. All evenings except Friday she worked alone with the respondent.

Concerning the respondent's behaviour toward her, she testified: "I found out from the beginning that you have to put up with these stupid comments and jokes that he makes....It's just uncomfortable having to hear these comments about all these women walking by or nosey questions about your own personal life...he would ask me what I did with my boyfriend, or...I knew a lot of people that worked in the area that would come up to the counter to say hi. Oh, did you screw him yet...comments like that...from an employer." She stated that he made certain physical advances such as "little things like massaging his shoulders, and arms around the waist". The respondent would also ask her to "come sit on my lap"; he would state: "how come you don't sit on my lap? Anna [Savo-Sardaro] does." Although she believed that the respondent brushed by and touched her unnecessarily in the aisles of the restaurant, she did not find this behaviour offensive.

These acts of the respondent occurred with varying frequency. She stated that "the verbal thing...was constant

all the time. Like many times every night" "but physical [advances],...two or three times a week." She answered respondent counsel's question about how often "this massaging of the shoulders" occurred, "[a]bout two or three times a week."

Ms. Nuzzo described her working conditions as "pretty uncomfortable". She responded when he touched her by telling "him to get lost or just brush[ing] him off." In return the respondent would laugh. To his requests to sit on his lap and his statements that "Anna does" she would say, "[s]o what?...I don't want to sit on your lap." In addition she testified that "lots of times I said, can't you think of anything other to say than...these sexual comments, or -- I told him I was getting sick of it...I would go in the beginning of a shift and say, okay, Emile can we have a civilized conversation today or what?...can you agree to that, and he would say, yeah jokingly, and then he start all over again. I would tell him that I was tired of it." When he tried to massage her shoulders, she stated she "pushed him away and told him to get lost, and he just laughed". On one occasion "[h]e started massaging my shoulders and -- ...I was tired of that stuff...and I grabbed this roasting fork, and I just turned around and pointed it at his face...it was just a reflex to pick up something...it was, just "Get away, back off"."

In April 1984, Ms. Nuzzo quit after an unrelated argument with the respondent, although Mr. Abi-ad testified that Ms. Nuzzo was one of his "best workers".

Ms. Nuzzo stated that she did not quit earlier because "with not much work experience, you put up with it...because you're 15 years old, you need the experience of working at a certain place for an amount of time."

No objection was made to the admissability of the evidence of these four female employees of the respondent. The evidence meets the standards of admissability stated in Sweitzer v. The Queen[1] and Commodore Business Machines & DeFilippis v. The Minister of Labour et al.[2] The probative effect of their testimony outweighs any prejudice caused to the respondent by its admission.

The testimony of these witnesses indicates that the respondent exhibited a certain pattern of behaviour towards his young female employees. Such behaviour was more evident when his wife was not working with him and when he was alone with one employee. He would attempt to touch his employees in various ways: massaging their shoulders, sitting them in his lap, or bumping or squeezing against them unnecessarily in the aisles of the restaurant. Their evidence indicates such brushing against or squeezing by in the aisles did not occur by accident. He would regularly use obscene and sexually explicit language in the context of relating events or "stories" to employees, in the context of questioning them about their personal lives, and in the context of commenting on female passersby. All of the

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1. (1982) 68 C.C.C(2d) 193 (S.C.C.).

2. 5 C.H.R.R. D/2833 (1985) (Ont.S.C.)

witnesses (Ms. MacIsaac to a lesser extent) clearly expressed their displeasure with his behaviour and told him to stop. He did not take their rebukes seriously.

Four female employees of the respondent, who had all performed the same job as the complainant, testified on behalf of the respondent concerning their experiences with him.

All four individuals have existing connections with the respondent. Two of them are presently employed by Mr. Abi-ad. They stated that the respondent had never made any advances towards them. One of these employees, Ms. Elizabeth Silva, testified that she did not believe there was sufficient room in the aisles of the restaurant for two people to pass by each other without bumping into one another.

At the same time, Ms. Silva also stated that the respondent makes various "bad jokes...they are usually dirty jokes." She also said that she "told him I didn't want to hear them, and he just stopped."

She also testified that it did not bother her when the respondent told dirty jokes because: "I went to technical school, and it was 90 percent males, and I was just so used to it."

When asked whether or not she had heard the respondent making comments about female passersby, Ms. Silva stated: "I don't hear very well, so I don't take those into consideration....if he were to say something, I wouldn't be able to hear him." However, she later said: "I have heard him say

sometimes -- if a pretty girl would go by...isn't she pretty. She is very pretty." She did not hear him use any other kind of language to describe female passersby, but added that he might have done so without her being able to hear.

In the case of the third witness, a former employee, Ms. Janet Witelsz, her father presently has a contractual relationship with the respondent to deliver baked goods to the restaurant. In addition, Ms. Witelsz appeared extremely agitated and frightened. Ms. Witelsz began to work for the respondent when she was about 23 years of age. She worked for the respondent for varying periods of time between 1982 and July 1986. She worked alone with the respondent on a few occasions.

Ms. Witelsz testified that she did hear the respondent telling dirty jokes "[f]ew times, but he knew he couldn't joke with me." "He would try to joke with me, but I would just stop it, like I would just, you know -- not even in the middle...I wouldn't even listen..."

She also stated that: "...if a pretty girl would go by, ...he would say, oh, look how pretty she is or -- see, I can't remember the jokes, what he said, but I wouldn't even listen. Like I just walk away...and he would try to joke with me at times, and I said "Emile!", and that would be it. He says, I know, I can't joke with you, and I said, yes, you can't, and I just walk away..." With respect to the nature of his comments about passersby, Ms. Wittelsz stated that the respondent did not say "anything bad, just...she is attractive or...she is ugly".

In other words, Ms. Witelsz found his "jokes" sufficiently offensive as to have to ask him forcefully to stop and to walk away.

The fourth individual, Ms. Anna Savo-Sardaro, is alleged to be, or to have been, on sexually intimate terms with the respondent. A special relationship with this employee was admitted by Ms. Savo-Sardaro and the respondent. She described her relationship to him as "very close", "like a member of his family". Both Ms. Savo-Sardaro and the respondent testified that they had kissed (although as friends only) and that she did occasionally sit on his knee at work. The manner of this witness was evasive and her testimony, contradictory.

Ms. Savo-Sardaro began to work for the respondent when she was 15 or 16 years of age. She was employed for a couple of weeks early in June 1983, and from October 1983 until July 1986. In June 1983 and from October 1983 until the summer of 1985 she worked part-time; from the summer of 1985 until July 1986 she worked full-time from 10 a.m. to 9 p.m. She stated that over the course of her employment she worked with the respondent only, about 75% of the time. She later stated however, that Mrs. Abi-ad was present "most of the time" that she worked for the respondent.

Ms. Savo-Sardaro responded positively when asked whether the respondent said things with sexual connotations; "He would ask if you had a boyfriend, how was he like...does he love you? Are you just going out because he wants one thing out of you..." She

interpreted these questions to be a friendly interest on the part of the respondent.

She also stated that the respondent would comment on female passersby. "He would compliment girls walking by. Oh, she is very pretty, and she has a nice blouse on, or she has a nice skirt, her hair is nice, the way she transports herself." When asked whether and how often the respondent used "dirty language" about women who walked by, she first answered positively "once or twice" but later responded: "Two or three times a week, whenever a young, good looking lady would pass by." She could not remember the nature of the dirty language.

Ms. Savo-Sardaro testified that during the time in which she and Ms. Caravaggio worked together, Mr. Abi-ad would walk behind them, following them into the subway when they left the workplace around 9:15 p.m. The two girls would keep moving from one place to another, and the respondent would keep following them. Ms. Caravaggio recounted the same incidents, although she recalled that they occurred after she had stopped working for the respondent and had come by the restaurant at the end of the evening only to pick up Ms. Savo-Sardaro. The respondent admitted asking the two girls whether he could walk with them to the subway; he recalled walking behind them and that they did not want to sit with him in the subway; he said he therefore did not sit with them.

While these witnesses appeared to be more charitable in their interpretation of the respondent's behaviour, their

testimony generally does not contradict that of the witnesses called by the Commission. Their benign approach to Mr. Abi-ad's conduct should be understood in the context of their present connections with him. At the same time, the testimony of three of these four witnesses supports the testimony of the complainant and the other Commission witnesses in a number of respects. Two of them agreed that the respondent made obscene remarks of such a nature and extent to require them to ask him to stop. Three of them recall him commenting on female passersby, although not with obscene or sexually explicit language. One recalled him asking intimate questions about her personal life to which she did not take offence; the same witness willingly sat on his lap during work hours.

The versions of fact given by the complainant and the respondent are widely divergent and it is necessary to choose between their evidence in coming to factual conclusions in this case. In doing so, and indeed in reviewing the evidence of all witnesses, I have taken into account their demeanour when giving evidence, their performance under cross-examination, the clarity, consistency and apparent quality of their recollections, the reasonableness of their version of the facts in light of contradictory evidence, and their ability to be objective and resist the influence of self-interest, speculation or personal opinion, when giving evidence. I have come to the conclusion that where the testimony of the complainant and the respondent

conflicts, I prefer the version given by the complainant. I do so because:

1. Although Ms. Cuff was confused and unsure about precise dates concerning the events she recounted three and a half to four years ago, her testimony was generally straightforward and her demeanour suggested a somewhat shy or reserved and embarrassed, but honest witness.

2. In general, Mr. Abi-ad's testimony is not credible. On one occasion the witness clearly lied on the stand. He was asked the date of his birthday and he answered "July 14, 1940"; he continued "[t]hat's the right date, I can assure you". He had heard the prior testimony of Ms. Savo-Sardaro that she had kissed him on July 14 because she thought it was his birthday. However, when personal documents indicating his birthday were brought forward, he changed his testimony, and admitted that his birthday was July 13th.

3. Mr. Abi-ad admits manufacturing an excuse for letting Ms. Cuff go in May 1983. This would have been a time prior to the complainant working a shift with the respondent's wife.

4. The respondent's claim that Ms. Cuff was too slow for the job and frequently sick is inconsistent with her steady increase in work hours from October to March; a steady (and increasing) number of hours worked per week; calling her back in to work as soon as she was free after a month long illness and not substantially decreasing her hours of work upon her return; permitting her on occasion to open the business herself.

5. The respondent made the unreasonable suggestion, while using vulgar and obscene language, that it was his young employees (generally less than half his age) who told sexually explicit stories, and who made sexual advances towards him.

6. The respondent made a number of references to the complainant's colour in a manner and context which supported the truth of the complainant's testimony that he had asked her for a "blow job" and maintained that "black people make their living" that way.

7. During the hearing the respondent frequently left his seat, walked about the room and called out "she's lying" while the witnesses for the Commission testified. This conduct continued despite repeated warnings from the Board and his counsel (which are not clear from the transcript). His inability to control his behaviour is consistent with the testimony of the complainant and the other witnesses for the Commission that their repeated requests to him to cease his behaviour went unheeded.

8. The complainant's testimony is supported by similar behaviour which the respondent exhibited toward other female employees and the effect of this testimony is not significantly lessened by the witnesses who testified on his behalf.

9. The respondent's admission that he attempted to accompany some of his young employees on their way home after work while conscious of their desire to avoid his company is indicative of an inappropriate interest in young or vulnerable girls.

THE LAW

This case is the second in which a Board of Inquiry must interpret section 6 of the Ontario Human Rights Code, 1981.[3] Prior to the introduction of statutory language explicitly prohibiting sexual harassment, Ontario Boards of Inquiry interpreted paragraphs 4(1)(b) and 4(1)(g) to mean that discrimination because of sex included sexual harassment. This included both situations where there was a dismissal or refusal to employ a person because of sex, and situations where sexual harassment amounted to a discriminatory term or condition of employment. Boards extended the latter to mean that sexual harassment in the workplace was prohibited regardless of the presence or absence of tangible employment consequences.[4]

The present Code expressly makes freedom from sexual harassment a human right. The legislative articulation of a new human right ought to be viewed as an especially significant innovation in public policy. It is arrived at only through a process which includes considerable human suffering, governmental agonizing over the imposition of new legal duties, and an ultimate determination that the injustice suffered is of such magnitude that legal prohibitions are justified.

In interpreting the new provisions, it is important to note Mr. Justice Lamer's statement that laws such as the Ontario Human

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3. Bishop v. Hardy, September 19, 1986, Ontario Board of Inquiry, unreported.

4. See for instance: Cox & Cowell v. Super Great Submarine and Good Eats 3 C.H.R.R. D/609 (Ont. Board of Inquiry).

Rights Code are "fundamental law".[5] Hence, as the Supreme Court states in Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.,[6] we must

> "recognize in the construction of a human rights code the special nature and purpose of the enactment...and give to it an interpretation which will advance its broad purposes. Legislation of this type is of a special nature, not quite constitutional but certainly more than the ordinary - and it is for the courts to seek out its purpose and give it effect."

The overall purpose of the Ontario Human Rights Code, as set out in the preamble, is to recognize the dignity and worth of every person and to provide for equal rights and opportunities without discrimination. The policy of prohibiting sexual harassment in the workplace is to recognize that the dignity of an employee requires treatment and opportunity which is independent of sexuality. It is a policy of respect for the many human qualities which are relevant to employment or advancement; it is a denial that willingness to tolerate coercive sexual encounters or a sexually demeaning work environment is one of those qualities.

In embodying this public policy, the new provisions of the Code are a renovation of the existing case law; some previous trends have been explicitly adopted and some new concepts have been introduced.

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5. Insurance Corporation of British Columbia v. Heerspink and Director, Human Rights Code, [1982] 2 S.C.R. 145, per Lamer, J. concurring, at pp. 157-158.

6. [1985] 2 S.C.R. 536, at 547.

The Code codifies the understanding that sexual harassment may exist without the presence of employment consequences.

It prohibits two kinds of sexual harassment or unacceptable sexual behaviour. Sub-section 6(2) provides:

> 6.(2) Every person who is an employee has a right to freedom from harassment in the workplace because of sex by his or her employer or agent of the employer or by another employee.

Harassment is defined by sub-section 9(f) to mean:

> engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome.

Freedom from harassment in the workplace in the form of a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome is not dependent upon the presence of tangible employment consequences.

Unacceptable sexual behaviour may also take a different form. Sub-section 6(3) states:

> Every person has a right to be free from,
>
> (a) a sexual solicitation or advance made by a person in a position to confer, grant or deny a benefit or advancement to the person where the person making the solicitation or advance knows or ought reasonably to know that it is unwelcome; or
>
> (b) a reprisal or a threat of reprisal for the rejection of a sexual solicitation or advance where the reprisal is made or threatened by a person in a position to confer, grant or deny a benefit or advancement to the person.

Freedom from a sexual solicitation or advance is not dependent upon the presence of tangible employment consequences. Where consequences in the form of a reprisal or threat of reprisal do exist, an additional violation of the Code will have occurred.

Sub-section 6(2) will apply to many of the circumstances previously handled through the concept of the "poisoned work environment". The language of paragraph 4(1)(g) of the former Code, namely, "No person...shall discriminate against any employee with regard to any term or condition of employment, because of...sex", was interpreted to mean that sexual harassment could give rise to a discriminatory condition of employment by poisoning the work environment of the employee.[7] "Harassment in the workplace because of sex" is concerned with similar phenomena.

At the same time, the diversification in the new Code suggests that "harassment because of sex" in terms of s. 6(2)(a) may not take the form of a sexual solicitation or advance within the terms of s. 6(3)(a).

On the other hand, s. 6(3)(a) will apply to one or more incidents of sexual solicitation or advance which might not have been deemed sufficient under the previous jurisprudence to create a poisoned work environment or to constitute a condition of employment. In the terms of the new Code, a sexual solicitation or advance violating s. 6(3)(a) may not amount to a "course of conduct" within the meaning of s. 6(2).

While s. 6(2) codifies the spirit of the poisoned work environment or discriminatory conditions of employment jurisprudence, it introduces a number of requirements which must

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7. See for instance: Coutroubis and Kekatos v. Sklavos Printing 2 C.H.R.R. D/457 (1981) (Ont. Board of Inquiry).

be satisfied in order to find that an employee has been the subject of "harassment". These conditions are drawn from the definition of harassment in sub-section 9(f) and they are as follows:

(a) a course of

(b) vexatious

(c) comment or conduct

(d) that is known or ought reasonably to be known to be unwelcome.

"Course" suggests that harassment will require more than one event. There must be some degree of repetition of the "vexatious comment or conduct" in order to constitute harassment.

"Vexatious" is defined by The Concise Oxford Dictionary as "annoying" or "distressing"; the verb "to vex" is defined by The Standard College Dictionary as "to irritate", "annoy", "trouble" or "agitate". The fact that the comment or conduct must be vexatious imports a subjective element into the definition of harassment; was the comment or conduct vexatious to this complainant? In considering this condition, account should be taken of the personality and character of the complainant; a shy reserved person, or in some cases a younger, less experienced, or more vulnerable person, is less likely to manifest her annoyance, irritation or agitation with the respondent's behaviour than a self-confident, extroverted individual.

"Comment or conduct" means that either form of action alone can give rise to harassment. The use of certain kinds of

language can be sufficient to constitute harassment.[8] Cases decided by Boards of Inquiry under the previous Code also held that certain forms of comment could amount to sexual harassment; Bell & Korczak v. Ladas and the Flaming Steer Steak House[9] referred to "gender based insults and taunting". By analogy, verbal racial harassment through name-calling, or racial epithets and insults, on a regular basis was held to constitute a discriminatory term of condition of employment on the basis of race in Dhillon v. Woolworth Co. Ltd.[10] American case-law has similarly held that discriminatory

> "conditions of employment" include the psychological and emotional work environment...[and]...sexually stereotyped insults and demeaning propositions..."[11]
>
> ...
>
> Racial slurs...may still be just verbal insults, yet they ...may create Title VII liability. How then can sexual harassment, which injects the most demeaning sexual stereotypes into the general work environment and which ...represents an...assault on an individual's innermost privacy, not be illegal?[12]

The American cases interpreting Title VII of the Civil Rights Act of 1964 are similar to sub-section 6(2) of the Code in that they are based on the conclusion that sex discrimination with

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8. This is confirmed by the statement in Wei Fu v. The Queen, (November 17, 1986, No. 364/85, Ontario Divisional Court, unreported), that utterances of a certain nature and degree can constitute harassment within the meaning of s.9(f).

9. 1 C.H.R.R. D/155 (1980), at D/156 (Ont. Board of Inquiry).

10. 3 C.H.R.R. D/743 (1982) (Ontario Board of Inquiry).

11. Bundy v. Jackson, 641 F.2d 934 (1981) at 944.

12. 641 F.2d 934 (1981) at 945.

respect to the terms or conditions of employment can occur in the context of a hostile or abusive work environment regardless of whether employees have lost any tangible job benefits as a result of the discrimination.[13]

In addition, the definition of harassment in sub-section 9(f) makes no mention of the object of the "comment or conduct". In other words, it is conceivable for instance, that the comments may be directed toward persons other than the complainant. American jurisprudence has taken such an approach. In the case of Rogers v. Equal Employment Opportunity Commission[14] the United States Court of Appeals, Fifth Circuit held that discrimination against an Hispanic employee with respect to terms, conditions or privileges of employment (contrary to Title VII of the Civil Rights Act of 1964), could occur where the employer gave discriminatory service to its Hispanic clientele. Godbold, J. stated:

> Time was when employment discrimination tended to be viewed as a series of isolated and distinguishable events, manifesting itself, for example, in an employer's practices of hiring, firing and promoting. But today employment discrimination is a far more complex and pervasive phenomenon, as the nuances and subtleties of discriminatory employment practices are no longer confined to bread and butter issues.
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> ...
>
> [T]he phrase "terms, conditions, or privileges of employment"...is an expansive concept which sweeps within its protective ambit the practice of creating a working

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13. Meritor Savings Bank v. Vinson 54 LW 4703 (1986) (U.S.S.C.).

14. 454 F.2d 234 (1971); Certiorari denied 406 U.S. 957.

> environment heavily charged with ethnic or racial discrimination.[15]

This possibility is not ruled out by the application of s. 9(f) in the case of Wei Fu v. The Queen & Ministry of the Solicitor General et al.[16]. In that case s. 9(f) was considered in the context of an allegation of racial discrimination and a violation of s.4(2) of the Code. The Board held that the use of racial jokes and slurs did not constitute a breach of s.4(2) because they were not directed at the complainant "and were very much a peripheral aspect of the case".[17] The Board's dismissal of the complaint was upheld by the Ontario Divisional Court.[18] The Court stated:

> It was a question of fact for the Board to determine whether the conduct found by it was sufficient to constitute harassment in the workplace because of race, colour or place of origin contrary to s.4 of the Act.
> ...
> The use in the workplace of racial jokes and slurs is disgraceful...However, it is only when the utterances are of such nature and degree as to constitute harassment that the Code authorizes a court to interfere.

These conclusions appear to leave open the possibility that the injection of demeaning sexual stereotypes into the work environment by way of comments or jokes which are not directed to the complainant may be of such nature and degree as to constitute harassment within the meaning of ss.9(f) and 6(2).

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15. 454 F.2d 234 (1971) at 238.

16. 6 C.H.R.R. D/2797 (1985) (Ontario Board of Inquiry).

17. 6 C.H.R.R. D/2797 at D/2812.

18. Wei Fu v. The Queen, November 17, 1986, No. 364/85, unreported.

Comment or conduct "that is known or ought reasonably to be known to be unwelcome" imports an objective element into the definition of harassment. The fact that this particular complainant found the behaviour vexatious is not sufficient. Respondents either must have known, or they ought reasonably to have known, the behaviour to be unwelcome. Nevertheless, there are outstanding issues of interpretation raised by this phrase which are unnecessary to decide in this case. For example, from whose perspective is the reasonableness requirement to be framed? Can it be framed in terms of a reasonable victim, or in other words, a reasonable person having the perspective of the complainant? It will be particularly important to define the standard of reasonableness where the employer admits engaging in the course of conduct but denies that he could reasonably have known of the response.

A complainant who clearly indicates to the respondent that his actions were unwelcome will more likely be able to satisfy the condition that the respondent knew the behaviour was unwelcome. A complainant who did not clearly make it known to the respondent that his behaviour was unwelcome will have to show the respondent ought to have known it was unwelcome. In the latter case, attempts to let the respondent know that his behaviour was unwelcome, albeit perhaps indirect or weak, will go towards establishing whether or not the respondent ought to have known his behaviour was unwelcome. But in addition, the "ought to have known" alternative recognizes that the responsibility for

an expectation that this understanding is shared by the members of the community.

FINDINGS AND CONCLUSIONS IN RESPECT OF EVIDENCE

In this complaint Ms. Cuff alleges a violation of sub-section 6(2) of the Code. In other words, she alleges that Mr. Abi-ad engaged in a course of vexatious comment or conduct that he knew or ought reasonably to have known was unwelcome, in the workplace, because of sex. Secondly, she alleges a violation of s. 6(3)(a) of the Code, or that Mr. Abi-ad made a sexual solicitation or advance to her, having known or ought reasonably to have known, that it was unwelcome. Thirdly, she alleges that Mr. Abi-ad fired her because she rejected his sexual solicitations or advances, contrary to sub-section 6(3)(b) of the Code.

With respect to sub-section 6(2) it is necessary to consider whether Mr. Abi-ad's actions meet a number of requirements which must be satisfied in order to find that Ms. Cuff has been the subject of "harassment". Drawn from sub-section 9(f), and as stated above, these conditions are:

(a) a course of
(b) vexatious
(c) comment or conduct
(d) that is known or ought reasonably to be known to be unwelcome.

(a) I find that the respondent did, frequently and persistently, make various vexatious comments directed to women who passed by

appreciating the offensiveness of certain behaviour does not rest entirely with the complainant. Boards of Inquiry under the previous Code had a similar understanding of the nature of sexual harassment. In Bell & Korczak v. Ladas & the Flaming Steer Steak House, the Board stated: "[t]he willingness to work is of no moment because persons in need of employment may be prepared to endure certain humiliations because of their financial need."[19] Failure to terminate employment or a willingness to endure the situation similarly did not inhibit a finding of sexual harassment in Torres v. Royalty Kitchenware Ltd. & Guercio[20]. The American case of Bundy v. Jackson[21] states some of the policy considerations behind this stance:

> It may even be pointless to require the employee to prove that she "resisted" the harassment at all. So long as the employer never literally forces sexual relations on the employee, "resistance" may be a meaningless alternative for her. If the employer demands no response to his verbal or physical gestures other than good-natured tolerance, the woman has no means of communicating her rejection. She neither accepts nor rejects the advances; she simply endures them. She might be able to contrive proof of rejection by objecting to the employer's advances in some very visible and dramatic way, but she would do so only at the risk of making her life on the job even more miserable.

In general, the legislative enunciation of the right to be free from sexual harassment and advances indicates a public awareness of the unacceptable nature of this behaviour and carries with it

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19. 1 C.H.R.R. D/155 (1980) at D/157 (Ontario Board of Inquiry).

20. 3 C.H.R.R. D/858 (1982) at D/860 (Ontario Board of Inquiry).

21. 641 F.2d 934 (1981) at 946.

the restaurant counters throughout the seven months in which the complainant was employed. In addition, the respondent frequently rubbed or squeezed against the complainant when passing her in the aisles of the restaurant; this sometimes involved squeezing her breasts. As well, the respondent frequently asked the complainant to give him massages and on at least two occasions asked her for "a blow job". Furthermore, I find that the incident in which the respondent grabbed her, asked her to "make love to him", and to kiss him, did occur.

(b) The language of the respondent was "unpleasant" or vexatious to the complainant. The fact that Ms. Cuff did not describe her reaction to Mr. Abi-ad's language directed towards other people in stronger terms, in view of her evidently reserved nature, is not indicative of a failure to find his comments to be vexatious. Furthermore, she indicated she was "furious" at his remark that "black people make their living by doing blow jobs". With respect to his request for "a blow job" she said she thought it was "gross". The complainant responded to the February 1983 grabbing incident by saying no to the respondent, and by making him promise not to do it again.

(c) Some of the comments of the respondent consisted of language such as "she is a living whore", "she makes me so horny", "I am so horny...I am so hot".

These comments were frequent, unrelenting and made in the context of a small, confined workplace. They were not

directed to the complainant. This latter fact alone does not appear to remove them from outside the definition of harassment. In this case however, given the additional comments and conduct which the respondent directed to the complainant, it is not necessary for me to decide whether his frequent and persistent habit of injecting demeaning sexual stereotypes and sexual commentary about his own inclinations into the workplace would have constituted harassment, standing alone, within the meaning of sub-section 6(2).

In addition, the respondent squeezed or rubbed against the complainant when passing her in the aisles of the restaurant and sometimes squeezed her breasts; he asked her for massages and "blow jobs" and told her that "black people make their living doing blow jobs"; he grabbed her and asked her to "make love" to him and to kiss him.

(d) I find that the complainant did clearly communicate that (some of) the respondent's comments, and in particular his conduct, were unwelcome. I find also that the respondent did in fact know it was unwelcome. With respect to the respondent's squeezing against her, the complainant told him: "you are embarrassing me....[don't you] see the rest of the folks around looking at [you]". She told him his remark about "black people" and "blow jobs" was "gross". She told him: "massage is your wife's job, not mine"; "I am going to let you spend the night in jail". She told him the she was going to tell his wife "about all he was doing all these days, weeks and months..." She told

him no when he asked her to "make love" to him and to kiss him and asked him to promise not to do it again. The fact that the complainant was willing to return to work and to endure the humiliation caused by the respondent's behaviour does not vitiate the respondent's knowledge of the unwelcome nature of his acts.

I conclude therefore that the respondent did violate s. 6(2) of the Code.

With respect to s. 6(3)(a) of the Code it is necessary to determine whether:

(a) there has been a sexual solicitation or advance,

(b) by a person in a position to confer, grant or deny a benefit or advancement,

(c) where the person making the solicitation or advance knows or ought reasonably to know that it is unwelcome.

I find that respondent made a number of sexual solicitations or advances to the complainant. He asked her for massages; he asked her for a "blow job"; he squeezed against her breasts; on one occasion he grabbed her, asked her to "make love" and to kiss him.

The respondent as her employer is a person in a position to confer, grant or deny a benefit or advancement to the complainant.

The complainant did clearly communicate to the respondent that his behaviour was unwelcome and I find that the respondent knew that it was unwelcome.

I conclude therefore that the respondent did violate s. 6(3)(a) of the Code.

In addition I find that there has been a violation of s. 6(3)(b) of the Code. I find that the complainant's threat to tell the respondent's wife of his sexual harassment and advances, which shortly thereafter she would have been able to do when she next worked with his wife, or in other words, her failure to tolerate his sexual advances, was the reason that the complainant was fired. The respondent agrees that he manufactured the excuse that work was slow when he told her not to come back; work was evidently not slow in view of the fact that he hired three additional employees shortly after the complainant left. The respondent's claim that Ms. Cuff was too slow for the job and frequently sick is inconsistent with much of the evidence as stated above. I find therefore that poor job performance was not a reason for firing Ms. Cuff.

In sum I find that the respondent contravened ss.6(2), 6(3)(a), 6(3)(b) and section 8, of the Ontario Human Rights Code. In view of this conclusion it is not necessary for me to deal with sub-section 4(1) of the Code.

Damages

Once a Board of Inquiry concludes that there has been a violation of the Code, section 40 confers power on the Board to order a remedy.

S. 40(1)(b) of the Code states that the Board is empowered to direct the party having infringed the right of the complainant

to make restitution for loss arising out of the infringement. Restitution in the context of lost wages means that the complainant should be placed in the position that she would have been in had she not been fired, taking into account the duty upon the complainant to mitigate her losses. In this case, the hours of work of the complainant varied but I find that a fair estimation of her hours of work would be the average hours worked per week in May 1983, or 14.4 hours per week, according to the employment records. I find that in effect the complainant was fired May 19, 1983 but that at the time she did not reasonably know that she had been fired. By his own statements to her, the respondent led her to believe that she was simply being laid off because work was slow. While it would be reasonable for Ms. Cuff not to look for work immediately following the respondent's statements, Ms. Cuff testified that she did not look for work at any time between May 19th and the beginning of her Manpower course in September or October 1983. Although the respondent did not tell the complainant that she had been fired or let her know in some other way, for instance, by sending her a termination notice, at least until August of 1983, I find that after a certain period of time she had a responsibility to ascertain whether or not she would be called back to work and to look for alternative employment. In addition, I find that the complainant could have obtained part-time work for a similar number of hours by working as a nurse's aide with a temporary employment agency with which she had prior experience and with which she worked

subsequently beginning in November 1983. I therefore hold that it was reasonable for her not to look for work for approximately one month from the date of May 19th. Here restitution in the form of lost wages is therefore the loss associated with a 14.4 hour work week, a four week period, and a rate of pay of $4.00 per hour. This amounts to $230.40.

Previous Boards of Inquiry have held that interest is payable on damage awards. (see Cameron v. Nel-Gor Castle Nursing Home and Merlene Nelson, 5 C.H.R.R. D/2170 at paragraph 18564) Interest would appear to fall within the terms of s. 40(1)(b), specifically, "loss arising out of the infringement".

The rate of interest is the rate established by the Bank of Canada on the date of the complaint. The amount of interest due on the damages for lost wages is:

> (the date of payment - the mid-point of the lost wage period) x total wages for the lost wage period x Bank of Canada rate at the date of the complaint.

(see: Hallowell House Limited, [1980] OLRB Rep. Jan. 35; Practice Note No. 13, September 8, 1980, Ontario Labour Relations Board) In this case the rate of interest on March 2, 1984 established by the Bank of Canada was 11.5%. Assuming that damages will be paid March 1, 1987, the amount of interest due in this case is (March 1, 1987 - (mid-point of the period May 19, 1983 to June 16, 1983) x $230.40 x 11.5%, or ((March 1, 1987 - June 2, 1983) = 3.75 years) x $230.40 x 11.5% = $95.04.

S. 40(1)(b) empowers the Board also to award monetary compensation for mental anguish. In determining an appropriate award for damages for mental anguish, I find it helpful to consider the factors used by previous Boards of Inquiry in sexual harassment cases. As summarized by the Board in Torres v. Royalty Kitchenward Ltd. & Guercio[22] these factors are:

(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.

The harassment of the complainant was physical as well as verbal. His contact with her, in the case of the incident in which the respondent waited until he could not be seen or heard by passersby, turned off the lights, grabbed her and asked her to "make love" to him and to kiss him, was especially aggressive. The verbal and physical harassment, in the form of comments, squeezing against her body, asking for massages, occasionally asking for a "blow job", continued over most of the period of six to seven months the complainant was employed, with considerable

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22. 3 C.H.R.R. D/858 (1982) (Ont. Board of Inquiry).

frequency. The victim at 22 or 23, an immigrant to Canada of 9 to 10 years, and a shy person, was somewhat vulnerable. At the same time, although the victim was "very scared" as a result of the February grabbing incident, I find that she managed to inculcate in herself a certain degree of indifference to the respondent's behaviour and that it has apparently not left a lasting impression upon her.

I therefore find that compensation for damages for mental anguish should be set at $2,000. The infringement of the Code in this case has been wilful within the meaning of s. 40(1)(b).

In addition, I order the respondent to issue a letter of apology to the complainant which clearly indicates, among other things, that she was not fired due to incompetence. I further order that the respondent send a revised version of Exhibit 2, the Record of Employment, to the same authorities as it was originally sent and a copy to the complainant, which amends the reason for termination so as to be in conformity with this decision. In case the parties have any difficulty in the implementation of this portion of my order I reserve jurisdiction to assist them in carrying it out.

In consideration of future practices of the respondent, I order the respondent to post a copy of the Ontario Human Rights Code in a prominent location on the premises of Gypsy Restaurant.

The evidence was unclear as to the ownership and legal status of the restaurant. In these circumstances I make no order against the respondents other than Mr. Abi-ad.

IN THE MATTER OF THE ONTARIO HUMAN RIGHTS CODE, STATUTES OF ONTARIO, 1981, CHAPTER 53, AS AMENDED

AND IN THE MATTER OF a complaint by Ms. Myrtella Cuff, of Toronto, Ontario against Gypsy Restaurant, Its Servants and Agents, and Mr. Emile Abi-ad.

ORDER

This matter coming on for hearing on the 10th and 11th days of November 1986, the 3rd day of December 1986 and the 12th day of January 1987, before this Board of Inquiry, pursuant to the appointment by William Wrye, Minister of Labour, dated 20th day of October 1986, in the presence of Counsel for the Commission and Ms. Myrtella Cuff, the Complainant, and Counsel for the respondents, upon hearing evidence adduced by the parties and what was alleged by the parties, and upon finding that the complaint was substantiated by the evidence:

IT IS ORDERED THAT:

(1) The respondent pay to the complainant the sum of two hundred and thirty dollars and forty cents ($230.40) as damages for lost wages; and

(2) The respondent pay to the complainant the sum of ninety-five dollars and four cents ($95.04) as interest up to March 1, 1987; and

(3) The respondent pay to the complainant the sum of two thousand dollars ($2,000.00) for mental anguish caused as a result of the discriminatory act; and

(4) The respondent send a letter of apology to the complainant for the failure to abide by the Human Rights Code in his treatment of her; and

(5) The respondent send a revised version of Exhibit 2, the Record of Employment, to the same authorities as it was originally sent, and a copy to the complainant, which amends the reason for termination so as to be in conformity with this decision.

DATED at the City of Toronto in the Judicial District of York, the 6th day of February, 1987.

A.F. Bayefsky
Board of Inquiry