



IN THE MATTER OF THE HUMAN RIGHTS ACT 1981

IN THE MATTER OF THE BERMUDA HUMAN RIGHTS TRIBUNAL

BETWEEN:

B

Complainant

-v-

First Respondent

F

AND

SPS

Second Respondent

JUDGMENT

Mr. Arion Mapp, of Christopher's, for the Complainant

Ms. Sara Tucker, of Trott and Duncan, for the First and Second Respondents

Background

1. This is a complaint brought before the Human Rights Commission in October 2012, by B, the Complainant against F, the First Respondent and SPS, the Second Respondent. It was alleged by the Complainant that on the evening of August 18, 2012, that while working as a Security Officer employed by SPS, the First Respondent, who was her employer and a part owner of SPS, put her into a headlock, and while she was in the headlock led her to a vacant guest cottage, on the grounds of the Horizon Guest Cottages.

2. It was the Complainant's evidence that once in the cottage, the Complainant was led to a seat and the First Respondent, pinned down the Complainant's arms and pulled her shirt out of her pants and grabbed her bra, exposing her left breast. The Complainant who had been protesting throughout the entire incident, was eventually released by the First Respondent. The Complainant's evidence indicates that she completed her rounds, cried and went home after completing her shift. The complainant indicated that she was crying on the phone when she called another employee to inform him of what occurred and also mentioned in that conversation that she was scared to travel home alone. The Complainant stated that SPS, the Second Respondent, did not provide any training on how to report sexual harassment in the workplace or training on preventing sexual harassment in the workplace. The SPS employee that the Complainant spoke with after the incident contacted the First Respondent who attempted to call the Complainant, apologize and enquire as to whether the Complainant would continue working at SPS. The Complainant did not continue working with SPS.
3. The Complainant alleged that the First Respondent discriminated against her by breaching section 9 (1) of the Human Rights Act 1981, which states:
No person shall abuse any position of authority which he occupies in relation to any other person employed by him or by any concern which employs both of such persons, for the purpose of harassing that other person sexually.” Section 9(1) should be read in conjunction with Section (4) which states “ *For the Purposes of this section, a person harasses another sexually if he engages in in sexual comment or sexual conduct towards that other which is vexatious and which he knows, or ought reasonably to know is unwelcome.*”
4. The Complainant alleged that the Second Respondent discriminated against her by breaching Section 9 (3) which states “*A person who is an employee has a right to freedom in his workplace from sexual harassment by his employer, or by an agent of his employer, or by a fellow employee, and an employer shall take such action as is*

reasonably necessary to ensure that sexual harassment does not occur in the workplace.”

5. The hearing before the Human Rights Commission on the above breaches of Section 9 of the Human Rights Act 1981 (“HRA 1981”) was put on hold while criminal proceedings into the matter were ongoing. On November 25th 2015, the First Respondent was found guilty in the Magistrates’ Court in relation to the criminal case brought by the Complainant. After a Directions Hearing on October 31st 2016, the hearing before the Human Rights Commission commenced on January 12, 2017, at which time an admission of liability for the breaches of Sections 9 (1) (3) and (4) of the HRA 1981 were accepted by the First and Second Respondents.
6. On January 12, 2017 and continuing on February 28 2017, with liability being accepted by both Respondents a hearing on the quantum of damages (“the Hearing”) was held and legal submission were heard with both parties seeking a decision from the Tribunal on the quantum of damages to be awarded to the Complainant by the First and Second Respondents.

Jurisdiction of the Tribunal

7. Once a matter is referred to a Tribunal by the Executive Office and heard by the Tribunal, under Section 20 of the HRA the Tribunal has the jurisdiction to:
 - (a) *“Order any party who has contravened this Act to do any act or thing in the opinion of the tribunal, constitutes a full compliance with such provision and to rectify any injury caused to the complainant by the contravention and to make financial restitution therefor; Provided that financial restitution shall not be ordered for any loss which might have been avoided if the complainant had taken reasonable steps to avoid it;”*

Section 20 (4) states:

“For the avoidance of doubt is hereby declared that restitution in relation to a contravention of any provision of this Act includes financial restitution for injury to feelings.”

The Respective Submissions

8. Mr. Mapp submitted that the Tribunal should be guided by the decisions in *Harris v Thorne and Rice* [2006] Bda LR 61; *Lightbourne v Fourways Limited and Kovacs* [2015] Human Rights Tribunal; *Bell v NSPCC* [2010] IRLR 19 and *Royal Brompton & Harfield NHS Foundation Trust & ors v Shaikh* [2014] EWHC 2857. Further, that if the above authorities are applied to the facts of the Complainant’s case against the Respondents, that the matter falls towards the higher end of the middle range as set out by the Vento Guidelines as assessed in *Lightbourne v Fourways and Kovacs*, for compensation to injury for feelings. Counsel for the Complainant also submitted:
- (i) That the Complainant resigned from her position with SPS as a result of being sexually assaulted by a part owner of the Company;
 - (ii) That the Complainant filed a complaint with the Bermuda Police Service and that the First Respondent was charged with the offence of sexual assault of which he was convicted.
 - (iii) That consideration is given to the witness statement of the Complainant’s mother regarding the Complainant’s demeanour in the days following the incident.
 - (iv) That the Respondents have accepted responsibility by admission of liability, but that the Complainant was made to go through highly emotive criminal proceedings.
 - (v) That the Second Respondents did not have a policy in place to report sexual harassment nor did they take any steps to prevent it from occurring, and that when complaining of the incident that had taken place the Complainant was

told that she should speak with the First Respondent, despite her protestations that she did not desire to do so.

9. Mr. Mapp, submitted therefore, that considering the above factors, the appropriate range of an award, following the formula set out in *Kelland v Lamer* [1988] Bda LR 69, as followed by *Lightbourne v Fourways and Kovacs* would be an award of damages within the range of \$14,000 to \$42,000 dollars.
10. Ms. Tucker submitted that the leading authority on sexual harassment claims in Bermuda is *Harris v Thorne and Rice* [2006] Bda LR 61, and highlighted the principles in *Harris v Thorne* upon which damages should be assessed, and noted that the valuation of damages was considered by the Supreme Court using Canadian case law, and that the use of Canadian case law is appropriate for doing so in this matter as the HRA 1981 was adapted from Canadian Human Rights legislation.
11. Ms. Tucker further submitted that there was no evidence before the Tribunal to support an award of special damages and that any award given should be limited to injury to feelings and that the level of conduct although inappropriate, did not merit an award on the scale of that suggested by the complainant. Further it was submitted that the Tribunal should consider the following when assessing damages:
 - (i) The incident was isolated, there was no ongoing assault;
 - (ii) That the Complainant worked the remainder of her shift;
 - (iii) That the Complainant accepted a call of apology from the Respondent the day after the incident occurred;
 - (iv) That the Complainant, when speaking with the Respondent indicated that she wasn't sure if she would stay with the company;
 - (v) That the Respondent removed the Complainant's bra but did not touch her left breast once exposed.

- (vi) That the purpose of an award for injury to feelings should not be to punish the Respondents but to provide restitution to the Complainant.

12. Ms. Tucker submitted therefore, that the Tribunal should not award the Complainant more than \$15, 000, and that in light of the Canadian authorities of *Deborah Smith v The Rover's Rest and Bruce Dorman* 2013 HRT0 700; *Sarah Sanford v Gerry Koop* 2005 HRT0 53; *Julie Chard v Stewart Newton* 2007 HRT0 36; *Teri Reneiya v Daniel Krumeh* 2009 HRT0 1824 and *Dionne Newton v City of Toronto*, that the appropriate award range of an award of damages would be between \$5,000 and \$15,000 dollars, and that the Complainant has failed to show that she has sufficient injury to warrant an award of between \$12,000-\$42,000 dollars.

Damages

13. The Tribunal accepts the First Respondent's admission of liability under Section 9 (1) (3) and (4) and Second Respondent's admission of liability for breaches of Section 9 (3) of the HRA 1981.
14. The Tribunal has heard the submissions and reviewed the case law submitted by Mr. Mapp and Ms. Tucker.
15. The Tribunal accepts that as submitted by Mr. Mapp and Ms. Tucker, damages awarded in this matter should be limited only to injury to feelings.
16. The Tribunal accepts as submitted by Mr. Mapp that the injury to the Complainant's feelings were as a result of the harassment suffered and were compounded by the aggravating features of the sexual harassment which the Complainant suffered; namely, that the Complainant was alone at work in the evening when she was put into a headlock and dragged into an empty cottage, that she was forced down on a seat, had her shirt pulled up and her breast exposed by the First Respondent, a part-owner of the company in which she was employed. Further that the distress that the Complainant felt was supported by her demeanour after the sexual harassment took place and her resignation from SPS. (The Tribunal does not accept the submission made by Ms. Tucker that the action of putting the Complainant in a

headlock was part of the Self-Defence training outlined in the SPS Employment Handbook, which clearly states that self-defence courses are offered to employees under the direction of a licensed instructor.)

17. The Tribunal also accepts that the lack of protocol in place by the Second Respondents for reporting, investigating and addressing complaints of Sexual Harassment further compounded the injury to the Complainant's feelings. The Tribunal finds that it is particular egregious that the lack of a protocol for handling matters of sexual harassment led to the untenable situation in which the Complainant was advised to discuss the Sexual Harassment with the First Respondent who was acting in his capacity as employer and part owner of the Second Respondent, when he was in fact the individual responsible for the Sexual Harassment. Additionally the Tribunal notes that SPS carried out no internal investigations into the incident reported by the Complainant.

18. It is accepted by the Tribunal that the nature of the sexual harassment suffered by the Complainant in this instance can be distinguished from the features of both, the sexual harassment suffered by the Complainants in *Harris v Thorne and Rice*, in which the award for General Damages to each complainant was \$10,000, and of that in *Lightbourne v Fourways Limited and Kovacs*, in which the Award for injury to feelings was \$4000. Although both of the above cases of Sexual Harassment were contraventions of Section 9 of the HRA 1981, the offences committed did not rise to the level of aggressiveness and physical contact as was experienced by the Complainant in this matter.

19. The Tribunal has noted that in *Harris v Thorne and Rice*, the Supreme Court considered Canadian authorities when assessing the level of damages for injury to feelings and in *Lightbourne v Fourways Limited and Kovacs*, the Human Rights Tribunal, considered the Vento Guidelines, as updated in *Bell v NSPCC* (using the formula established in *Kelland v Lemar* when assessing an award for injury to feelings.

20. The Canadian authorities submitted by Ms. Tucker as outlined above in paragraph 7, cover a spectrum of sexual harassment conducted in an employment context, and the award range for injury to feelings awarded in the cases submitted ranged from \$10,000 Canadian dollars in *Chard v Newton 2007*, in which the Complainant's employer made sexually inappropriate remarks and touched the Complainant's buttock on one occasion and her breast on another; to the high end of \$35,000 Canadian dollars in the matter of *Smith v The Rover's Rest, 2013* in which the Complainant was subjected to repeated sexual harassment of a verbal and physical nature over a period of months by her employer, which continued even after her employment was terminated.
21. The Tribunal notes the position outlined by Justice Wade Miller in *Harris v Thorne v Rice* in paragraph 19, regarding the use of Canadian Authorities in assessing damages in cases of Sexual Harassment. *"This court finds it far more helpful to look at the Canadian case law definition of sexual harassment and for an approach to the assessment of damages which have arisen from legislation which is substantially similar to the Bermuda Human Rights Act 1981."* Justice Wade Miller also notes the lack of benchmark for awards of injury to feelings in Bermuda and indicates that the award should bear a broad general similarity to the range of awards in personal injury cases (none of which were put by either counsel before the Tribunal).
22. The Tribunal notes that Justice Wade Miller continues at paragraph 77 *"To arrive at an equitable compensation for injury to feelings, the injury to feelings must have resulted from the harassment. The complainant must prove that he or she has suffered injury to feelings but the award should not be so low as would diminish respect for the law nor should it be too high."* This was echoed by the Canadian Human Rights Tribunal of Ontario in *Smith v The Rover's Rest, 2013* who stated at paragraph 117 *"An award of monetary compensation for injury to dignity, feelings and self-respect includes recognition of the inherent value of the right to be free from discrimination and the experience of victimisation. The Divisional Court has recognized that the Tribunal must ensure that the quantum of damages for this loss is not set too low, since doing so would trivialize the social importance of the Code [The Ontario Human Rights Code] by effectively creating a "licence fee" to discriminate."*

23. Continuing at paragraph 124, the Tribunal in *Smith v The Rover's Rest* states "*Recent Tribunal decisions that have considered sexual harassment and related issues in the context of employment have generally made awards ranging from \$12,000 to \$50,000...*"
24. During his submissions, Mr. Mapp highlighted paragraph 125 of *Smith v The Rover's Rest* which states: "*In the cases on the low end of the spectrum, The Tribunal generally found that there were few incidents, the incidents were of a less serious nature, and/or the incidents did not include physical touching. In cases on the high end of the spectrum, the Tribunal generally found that there were multiple incidents, the incidents were of a serious nature, there was serious physical assault, and/or there was a reprisal or a loss of employment related to the incidents.*"
25. The Tribunal accepts as submitted by Mr. Mapp that none of the Canadian cases put before the Tribunal by Ms. Tucker involved physical contact to the level of that experienced by the Complainant, although some of the cases did involve protracted periods of sustained sexual harassment continuing post-employment which can be, as Ms. Tucker submitted contrasted with the isolated incident in the current case.
26. The Tribunal notes that as outlined in *Retneiya v Krumeh and Krumeh 2009*, at paragraph 103, there are other factors to be considered when determining damages, "*...The Tribunal has found the criteria developed in previous cases helpful in determining the appropriate damages for injury to dignity, feelings and self-respect....The Ontario Divisional Court, in ADGA Group Consultants Inc. v. Lane, (2008) 295 D./L.R. (4th) 425, held that the following are among the factors that Tribunals should consider when awarding damages; humiliation; hurt feelings; the loss of self-respect, dignity and confidence; the experience of victimization; the vulnerability of the complainant; and the seriousness of the offensive treatment.*"
27. The Tribunal finds that the facts of this case; the vulnerability of the victim, who was alone patrolling grounds and led into an empty cottage, pinned down on a seat unable to free herself from the grip of her employer, while her breast has been exposed must be considered when evaluating the seriousness of the offensive treatment that the

Complainant experienced. Her experience of victimization and hurt feelings are supported by the evidence given that the victim was shaken and emotional after the experience, telling a co-worker and family members about the incident, and the fact that the Complainant ceased working at SPS after the incident occurred. This victimization was further compounded by the lack of an appropriate protocol, policy or guideline established by SPS for addressing allegations of sexual harassment and by the fact that the most senior employee that the Complainant spoke with regarding her sexual harassment was the person who perpetrated the act.

28. The Tribunal accepts, as submitted by Mr. Mapp that if the Vento Guidelines were applied to *Harris V Thorne V Rice* in 2006, under the original Vento Guidelines the award of \$10,000 would put that award in the higher end of the lowest bracket, and that the current matter can be distinguished from *Harris v Thorne v Rice* due to the physical nature of the sexual harassment suffered by the Complainant; and also as pointed out by Ms. Tucker that the period over which the Complainants in *Harris v Thorne v Rice* suffered from sexual harassment was over the period of almost a year.
29. Taking into account all of the aggravating factors of this case, in particular the aggressiveness of the physical contact and the vulnerability of the victim the Tribunal accepts that this case falls within the middle end of the spectrum supported by Canadian case law (in addition to also falling within the middle range bracket of the Vento Guidelines as updated in *Bell v NSPCC*, using the formula followed by *Lightbourne v Fourways and Kovacs*) makes an award of \$19,000 dollars for injury to feelings to the Complainant, \$12,000 of this award is payable by the First Respondent and the remaining \$7,000 is payable by the Second Respondent.
30. The Tribunal has apportioned the award in the above manner as it finds that while the sexual harassment suffered by the Complainant at the hands of the First Respondent was aggravated by the factors listed in paragraph 26, this was compounded by the lack of an appropriate response and handling of the sexual harassment allegation by the Second Respondent, in addition to the absence of any company policy or training for

employees with regard to Sexual Harassment prevention, reporting and the handling of such allegations.

31. The Tribunal has considered its powers under Section 20 (1) (a) of the HRA 1981 which states that the Tribunal may order any party who has contravened the HRA to do any act or thing that, which in the opinion of the tribunal, constitutes full compliance with such provision and recommends that as per Section 9 (3) SPS takes steps to create a work place safe from Sexual Harassment by;

(1) Drafting and implementing a company policy, to be included in the SPS Employee Handbook which:

(a) Provides a definition of sexual harassment;

(b) Outlines a protocol for reporting and investigating sexual harassment complaints; and

(c) Outlines any disciplinary action that may follow with respect to incidences of sexual harassment.

DATED this 12th day of July, 2017



TAWANA TANNOCK, CHAIRPERSON



DONNA DANIELS, PANEL MEMBER



JENS JUUL, PANEL MEMBER

This judgment has been modified
(anonymised) to ensure our compliance
with the Human Rights Act, 1981. -
Human Rights Commission (295.5859)
(humanrights@gov.bm)

SUPREME COURT BERMUDA

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